No. 25-1158

IN THE

Supreme Court of the United States

AMY HADLEY,

Petitioner,

v.

CITY OF SOUTH BEND, INDIANA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE AND OWNERS COUNSEL OF AMERICA SUPPORTING PETITIONER

MICHAEL M. BERGER
Counsel of Record
MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park East,
Suite 1700
Los Angeles, CA 90067
(310) 312-4185
mmberger@manatt.com

Counsel for Amici Curiae Small Property Owners of San Francisco Institute and Owners Counsel of America

121081

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INTERESTS OF AMICI CURIAE

The Small Property Owners of San Francisco Institute ("SPOSFI") is a California nonprofit corporation (Internal Revenue Code § 501(c)(3)) and organization of small property owners that advocates for the rights of property owners in San Francisco. SPOSFI's members range from young families to the elderly on fixed incomes, and its membership cuts across all racial, ethnic, and socio-economic strata.[1]

SPOSFI is also involved in education, outreach and research. Through education, it helps owners better understand their rights and learn how to deal with local government; through outreach to community groups and to the public, it demonstrates how restrictive regulations harm both tenants and landlords, and through research projects, it aims to separate hyperbole from fact on the effect of rent control on housing stock. Through legal advocacy, SPOSFI seeks to protect the rights of small property owners against unfair and burdensome regulations.

SPOSFI has appeared as amicus curiae in this Court in support of petitions seeking to protect the rights of property owners.[2]

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1. No counsel for any party has authored this brief in whole or in part and no person other than the amici has made any monetary contribution to this brief's preparation or submission. The parties were timely notified of intent to file.

2. Simultaneously with the filing of this brief, these amici have filed a brief in *Pena v. City of Los Angeles*, no. 25-1163. The two cases raise related issues, and the two briefs apply to both cases.

Owners' Counsel of America (OCA) is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998). As the lawyers on the front lines of property law and property rights, OCA brings unique perspective to this case. OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. OCA seeks to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or *amicus* in many of the property cases this Court has considered in the past forty years, including most recently *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024); *Tyler v. Hennepin County*, 598 U.S. 631 (2023); *Sackett v. EPA*, 598 U.S. 651 (2023); *Wilkins v. United States*, 598 U.S. 152 (2023); *Pakdel v. San Francisco*, 594 U.S. 474 (2021); and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021).[3] OCA members have also

3. For additional cases handled by OCA members, see *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Horne v. U.S. Dept. of Agriculture*, 576 U.S. 350 (2015); *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envt'l Protection*, 130 S. Ct. 2592 (2010); *Winter v. Natural Resources Def. Council*, 555 U.S.

authored and edited treatises, books, and law review articles on property law and property rights.[4]

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7 (2008); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Preseault v. ICC*, 494 U.S. 1 (1990); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

4. *See, e.g.*, Michael M. Berger, *Theft, Extortion, and the Constitution: Land Use Practice Needs an Ethical Infusion*, 38 Touro L. Rev. 755 (2023); Michael M. Berger, *Whither Regulatory Takings*, 51 The Urban Lawyer 171 (2021); Michael M. Berger & Gideon Kanner, *The Nasty, Brutish And Short Life Of* Agins v. City Of Tiburon, 50 The Urban Lawyer 9 (2019); William G. Blake, The Law of Eminent Domain—A Fifty State Survey (Am. Bar Ass'n 2012) (editor); Leslie A. Fields, Colorado Eminent Domain Practice (2008); John Hamilton, Kansas Real Estate Practice And Procedure Handbook (2009) (chapter on *Eminent Domain Practice and Procedure*); John Hamilton & David M. Rapp, Law and Procedure of Eminent Domain in the 50 States (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill of Rts. J. 679 (2005); Dwight H. Merriam, Eminent Domain Use and Abuse: *Kelo* in Context (Am. Bar Ass'n 2006) (coeditor); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?", 4 Alb. Gov't L. Rev. 154 (2011);* Randall A. Smith, *Eminent Domain After Kelo and Katrina*, 53 La. Bar J. 363 (2006); (chapters on Prelitigation Process and Flooding and Erosion).

INTRODUCTION

Members of South Bend's police department were intent on serving an arrest warrant. They approached the home noted on the warrant and announced their presence through a bull horn, directing anyone inside to come out. The 15-year-old son of the owner emerged and told the officers there was no one else at home. Notwithstanding that he left the door open, the officers did not enter the home to enforce their warrant. Instead, they fired numerous tear gas grenades into the home, causing severe damage and making it unfit for habitation.

It turned out that there was no one else in the home (as the boy had told them). It also turned out that it was not the right house. The miscreant was apprehended days later at a different location. When the owner sought compensation for the damage, the City declared it was not the City's problem.

Thus, this litigation.

The lower courts made short work of it. The Seventh Circuit already had a rule declaring a "police power" exception to the Fifth Amendment, holding that damage caused by exercise of any power other than eminent domain was exempt from the just compensation mandate. *Johnson v. Manitowoc County*, 635 F.3d 331, 336 (7th Cir. 2011). Applying that circuit precedent, the lower courts made short work of Mrs. Hadley's claim.

SUMMARY OF ARGUMENT

There is no "police power" exception to the Fifth Amendment. The Fifth Amendment's compensation

guaranty is absolute. When there is a taking, the owner is entitled to be paid. And the payment must be contemporaneous with the taking.

ARGUMENT

I. THE STATE'S POLICE POWER IS NOT THE POWER OF A POLICE STATE.

In all facets of modern life, the Constitution protects the individual against the majority's collective will. Otherwise, as this Court wisely noted a century and a half ago, the result is "despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism." *Loan Assn. v. Topeka*, 87 U.S. 655, 662 (1875). That has been a consistent theme of the Court's jurisprudence.

As it plainly said more recently, the Fifth Amendment's just compensation guarantee was *intended* to restrict the "freedom and flexibility" of government, just like other provisions of the Bill of Rights, in order to protect the rights of individuals. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

Under our system of law, we have institutionalized and constitutionalized the protection of private property. That is why, more than a century ago, the Court expressly recognized that if government acts to protect the public health, safety, and welfare and the effect of its action goes "too far" the command to pay just compensation is triggered. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Nor was that the first time the Court commented on the issue. In *Barron v. Baltimore*, 32 U.S.

243 (1833), for example, the Court accepted the argument that city diversion of water to damage a wharf raised a Fifth Amendment compensation issue. The only reason the owner did not recover was that the Court held the Fifth Amendment guarantee applied only to actions of the federal government, not state entities.

More to the point, in *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177-78 (1871) the Court strongly demonstrated why the compensation guarantee is essential to our system:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, *always understood to have been adopted for protection and security to the rights of the individual as against the government*, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would *pervert the constitutional provision* into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for

> invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." (Emphasis added.)

The Court summarized its thinking recently in *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149, (2021), explaining that "[t]he essential question is not . . . whether the government action at issue comes garbed as a regulation . . . [but] whether the government has physically taken property for itself or someone else—by whatever means".

A. No Bright Line Separates The Police Power From Eminent Domain.

As Justice Stewart succinctly put it, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring).

This Court's takings doctrine is built around the idea that in addition to eminent domain, other exercises of government power have such a dramatic effect on private property that they are considered to be the functional equivalent of an affirmative exercise of the condemnation power, giving rise to a self-executing obligation to compensate the owner. As the Court put it in *First English*:

> "While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is

> predicated on the proposition that a taking may occur without such formal proceedings." 482 U.S. at 316.

Nonetheless, otherwise respectable authorities (including the courts below) play the label game, asserting that if "only" the "police power" is being utilized, then compensation is not required; whereas if the "eminent domain" power is used, compensation must be paid.

But that distinction has been heavily criticized by scholars in the field. Professor Waite called the distinction "illusory."[5] Professor Michelman called it "wordplay."[6] Professor Van Alstyne characterized these decisions as consisting of "conclusionary terminology, circular reasoning, and empty rhetoric."[7] Professor Sax called them "a welter of confusing and apparently incompatible results.[8] Professor Dunham, examining only decisions of this Court, found a "crazy-quilt pattern."[9] Professor Beuscher sagely counseled:

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5. G. Graham Waite, *Governmental Power and Private Property*, 16 Cath. U.L. Rev. 283, 291 (1967).

6. Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1186 (1967).

7. Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. Cal. L. Rev. 1, 2 (1970).

8. Joseph Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 37 (1964).

9. Allison Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 Sup. Ct. Rev. 63, 80-81.

> "The inverse condemnation cases should remind us that those writers who emphasize the separate air tight, non-overlapping character of the two basic powers-police power and eminent domain-have been too glib."[10]

Professor Beuscher was a master of understatement. The conceptual difficulties which have arisen in this area are the result of a simple refusal to face reality. Problems are not solved by attempting to define them out of existence. Problems are only solved, as W.C. Fields once expressed it, by "taking the bull by the tail and facing the situation."

Those who have forthrightly confronted the issue have recognized the unitary nature of the governmental power with which we deal. For example, as the New York Court of Appeals put it: "Government interference with an owner's use of private property *under the police power* runs a *gamut* from *outright condemnation* for which compensation is expressly provided to the *regulation of the general us*e of land remaining in private ownership so that the use might harmonize with other uses in the vicinity."[11]

This Court's most explicit recognition of the concurrent nature of the "two powers" is in its 1954 decision of *Berman v. Parker*, 348 U.S. 26 (1954). *Berman*, of course,

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10. Jacob Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation*, in J. Beuscher & R. Wright, LAND USE 724 (1969).

11. *Lutheran Church in America v. City of New York*, 316 N.E.2d 305, 310 (N.Y. 1974) (emphasis added).

is best remembered (particularly by governmental entities) for its expansive interpretation of "public use." The coextensiveness of the "two powers" is best expressed in the Court's own words:

> "We deal, in other words, with what traditionally has been known as the *police power*. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. . . . The rights of these property owners are satisfied when they receive that *just compensation* which the Fifth Amendment exacts as the *price of the taking*." 348 U.S. at 32, 33, 36; emphasis added.

More recently, this Court summarized the rule:

> "The [eminent domain] 'public use' requirement is thus *coterminous* with the scope of a sovereign's police powers." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (emphasis added).

Any effort to separate police power and eminent domain is specious.

B. Even Legitimate Government Actions Can Require Compensation When They Impress Private Property Into Public Service.

The government defended itself below by claiming that its focus on protecting the public was legitimate. The Seventh Circuit adopted that rationale. The question, however, is whether legitimacy should count for anything in this constitutional analysis? In a word, no.

The decision proceeds as though recognition of a legitimate governmental *goal* validates whatever *solution* is chosen. Not relevant. Determination of a legitimate governmental objective is the first, not the last, step. The law distinguishes between means and ends, and the means chosen to achieve the objective must survive Constitutional scrutiny the same as the ends.

Legitimate goals are constitutionally irrelevant. For the proper exercise of *any* governmental power, the underpinning of such a beneficent purpose must exist. That much was settled no later than 1922, when the Court examined a statute designed to stop land subsidence caused by underground coal mining and concluded that the prerequisites for exercise of *both* police power *and* eminent domain were present:

> "We assume, *of course*, that the statute was passed upon the conviction that an exigency existed that would warrant it, *and* we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall."[12]

After determining that government action was done to achieve a legitimate goal, the means chosen must be constitutionally examined to ensure that private rights

12. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (emphasis added). *See also Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994): "It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest. . . ."

have not been violated. Governmental power is not permitted to run roughshod over the constitutionally protected rights of individuals. That is what the Court meant when it concluded in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 321 (1987) that:

> "many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them."

Pennsylvania Coal was merely one in a long line of decisions in which the Court explained to government agencies that the general legal propriety of their actions and the need to pay compensation under the Fifth Amendment present different questions, and the need for the latter is not obviated by the legitimacy of the former.

The Seventh Circuit, however, seems not to have gotten the message. Evidently believing that the government was pursuing the public good, it ended its analysis at that point. Demonstrating the error of that theory, the *dissenting* opinion in *Pennsylvania Coal* had argued *precisely the same*, saying that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking."[13] Eight Justices rejected that proposition more than a century ago.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, New York's highest court upheld a statute as a valid

13. 260 U.S. at 417 (Brandeis, J. dissenting).

police power exercise and dismissed an action seeking compensation. This Court reversed:

> "The Court of Appeals determined that § 828 serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.*"[14]

Similarly, in *Kaiser Aetna v. United States*, the Corps of Engineers decreed that a private marina be opened to public use without compensation. The Court reversed, explaining:

> "In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question."[15]

Or, as the Court put it in *Nollan:*

> "That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be

14. 458 U.S. 419, 425 (1982) (Marshall, J.) (emphasis added).

15. 444 U.S. 164, 174 (1979) (Rehnquist, J.) (emphasis added).

> right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose.'"[16]

That is why the Court concluded in *First English* that the Fifth Amendment was designed "to secure *compensation* in the event of *otherwise proper* interference amounting to a taking."[17]

In cases like these, the Court has directed the property owners to the Court of Federal Claims to determine whether these exercises of government power, *though substantively legitimate*, nonetheless required compensation.

> "In such cases the characteristic feature is the defendant's use of *rightful* . . . regulatory rights to control and prevent exercise of [private] ownership rights the defendant is unwilling to purchase and pay for."[18]

In sum, for a taking to occur, it matters not whether government officials acted in good or bad faith, or for good

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16. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987) (Scalia, J.).

17. 482 U.S. at 315 (Rehnquist, C.J.) (first emphasis, the Court's; second emphasis added).

18. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 899 (Fed. Cir. 1986) (quoting with approval; emphasis the Court's).

or bad reasons. What matters is the impact of their acts, not the purity *vel non* of their motives. The Court put it succinctly when it concluded that the Takings Clause "focuses directly upon the severity of the burden that government imposes upon private property rights"—not the importance of the governmental interest advanced by the taking. *Lingle*, 544 U.S. at 539.[19]

Indeed, if government motives are benign—or done for the best of reasons—that only fortifies the need for compensation required by the Just Compensation guaranty.

II. THE FIFTH AMENDMENT'S PROTECTION OF PRIVATE PROPERTY IS FOUNDATIONAL, CATEGORICAL, AND SELF-EXECUTING.

Owners' rights to be secure in their property is one of the primary objects for which the national government was formed. In *United States v. Jones*, 565 U.S. 400, 405 (2012), the Court recalled Lord Camden's holding in *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765): "The great end for which men entered into society was to secure their property." This Court explained, "In any society the fullness and sufficiency of the securities which surround the individual in use and enjoyment of his property constitute one of the most certain tests of the character and value of government." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 324 (1893) (followed by *Olson v. United States*, 292 U.S. 246, 254 (1934)).

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19. *See Hughes v. State of Washington*, 389 U.S. 290, 298 (1967): "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (Stewart, J., concurring) (emphasis added).

This Court held the Fifth Amendment guarantee of compensation does not "depend on the good graces of Congress," explaining:

> "[A] landowner is entitled to bring an action in inverse condemnation as a result of the 'self-executing character of the constitutional provision with respect to compensation'. . . . As noted in Justice Brennan's dissent in *San Diego Gas* [], it has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in the Constitution itself[.]" *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 315-16 (1987).

The Court reiterated recently that the Just Compensation Clause is "self-executing." *Knick v. Township of Scott*, 588 U.S. 180, 192 (2019).

In *First English*, the Solicitor General (as amicus curiae) urged that the Fifth Amendment was merely "a limitation on the power of the Government to act, not a remedial provision." *See* 482 U.S. at 316, n.9. The Court rejected that argument, concluding that it was the Constitution itself that both established the right and dictated the remedy. *Id.*

Indeed, even before *San Diego Gas* and *First English*, this Court found:

> "whether the theory . . . be that there was a taking under the Fifth Amendment, and that

> therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment. . . ." *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

The Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela*, 148 U.S. at 325.

When the government takes an owner's property, the government has a "categorical duty" to comply with the Fifth Amendment. *See Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012); *Horne v. Dept. of Agriculture*, 576 U.S. 350, 362 (2015). In other words, cash may not heal all wounds, but it is a constitutionally acceptable remedy for unconstitutional government action.

CONCLUSION

Certiorari should be granted. There is confusion among the lower courts with some, like the Seventh Circuit here, purporting to find that the Constitution has some exceptions to the Fifth Amendment's just compensation guaranty. There is no such exception and this Court needs to make that clear.

Respectfully submitted,

MICHAEL M. BERGER
Counsel of Record
MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park East,
Suite 1700
Los Angeles, CA 90067
(310) 312-4185
mmberger@manatt.com

Counsel for Amici Curiae
Small Property Owners of
San Francisco Institute and
Owners Counsel of America