No. 17-1198

In The
Supreme Court of the United States

MARTINS BEACH 1, LLC
AND MARTINS BEACH 2, LLC,

Petitioners,

v.

SURFRIDER FOUNDATION,

Respondent.

On Petition For A Writ Of Certiorari To The First Appellate District Court Of Appeal Of The State Of California

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and restoring constitutional limits on the power of government. A central pillar of the Institute's mission is protecting the right to own and enjoy property, both because property rights are a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. The Institute litigates cases to defend property rights and has defended the right to exclude others from private property in challenges to unconstitutional rental-inspection regimes across the country. *See, e.g.*, *Rivera v. Borough of Pottstown*, No. 2017-04992, Order Den. Dem. (Dec. 15, 2017 Pa. Ct. Com. Pl. 2000); *City of Golden Valley v. Wiebesick*, 899 N.W.2d 152 (Minn. 2017); *McCaughtry v. City of Red Wing*, 831 N.W.2d 518 (Minn. 2013). Additionally, the Institute is currently defending Chicago food-truck owners' Fourth Amendment rights against government intrusion with mandatory GPS-tracking devices. *LMP Servs., Inc. v. City of Chicago*, 2017 IL App (1st) 163390.

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[1] In accordance with Rule 37.2(a), all parties were given ten days' notice and have consented to the filing of this brief. In accordance with Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

The decision below erodes the very foundation of property rights. The Institute files this brief to urge the Court to grant certiorari in order to safeguard one of the most important aspects of property ownership, without which property cannot exist: the right to exclude.

SUMMARY OF ARGUMENT

The right to exclude is the "sine qua non"[2] of property ownership, without which there can be no property. Simply put,

> that is property to which the following label can be attached:
>
> To the world:
>
> Keep off X unless you have my permission, which I may grant or withhold.
>
> Signed: Private citizen
> Endorsed: The state.[3]

This case keenly illustrates how the right to exclude is the foundation of property rights and why destroying that foundation is so dangerous. The decision below upheld a statute requiring petitioners to obtain a permit in order to exclude the public from their beachfront property and allowed the government to violate petitioners' right to exclude without

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[2] Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998) (hereinafter, Merrill I).

[3] Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954).

compensation. These results cannot be reconciled with Americans' right to own property, and this Court should grant certiorari to safeguard the right to exclude from assault on all fronts, not just the nation's coasts.

The right to exclude is the foundation of property rights for three reasons.

First, the right to exclude is definitional: Private property *means* that it is mine, not yours. Other aspects of property ownership – such as the rights to use, transfigure, and transfer – flow directly from the right to exclude. The right to exclude is the "gatekeeper right"[4] that leads to all others, and the decision below made the government the gatekeeper of petitioners' private property.

Second, the right to exclude is historical: Private property has *always* meant that it is mine, not yours. The right to exclude is deeply rooted in history, from the usufruct to possessory common-law estates, from Hugo Grotius and Samuel Pufendorf to William Blackstone and John Locke, and onward to James Madison. The right to exclude undergirded the Fifth Amendment because our Constitution came to be in a world in which that right was assumed.

Third, the right to exclude is universal: *Everyone* knows that private property is mine, not yours. The right to exclude is central to ordinary Americans' understanding of property ownership because of the role

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[4] Merrill I, *supra*, at 731.

it plays in our daily lives. Even scholars who disagree about many other aspects of what it means to own property agree that the right to exclude is foundational. Accordingly, and unsurprisingly, "no other [property] right has been singled out for such extravagant endorsement by th[is] Court."[5]

The decision below undermines the concept of private property ownership. If a statute can require property owners to ask the government's permission to exclude, and no compensation is required when the right to exclude is violated, then private property rights are in serious jeopardy.

Moreover, the decision below is also inconsistent with this Court's Fourth Amendment jurisprudence. The right to exclude is more than a property right: It is a privacy right, and its disavowal in the context of the Fifth Amendment will inevitably lead to the loss of Fourth Amendment freedoms.

Despite this Court's elevation and protection of the right to exclude, the California Court of Appeal held that the right to exclude is not inherent in ownership, government can require a difficult-to-obtain permit in order to exclude, and no compensation needs to be given for depriving someone of the right to exclude. This Court should accept review to safeguard private property rights from this dangerous precedent.

[5] *Id.* at 735.

ARGUMENT

This brief proceeds in four parts. First, it explains how the right to exclude is definitional and cannot be separated from the concept of property ownership. Second, it examines the history of the right to exclude, which has been a central tenet of American property ownership since its beginnings. Third, the brief shows how the right to exclude is a universal part of the public's, scholars', and this Court's understandings of property rights. Finally, it demonstrates why this case is a perfect opportunity for this Court to protect the right to exclude.

I. The right to exclude is definitional: Private property means that it is mine, not yours.

The most important reason that the right to exclude is foundational is obvious: It is part of the definition of property.[6] The right to exclude is a necessary condition of property, and all other aspects of property ownership – such as the rights to use, transform, and transfer – come from the right to exclude.

The right to exclude is the right to control who may enter onto or touch property.[7] It is the "gatekeeper

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[6] The right to exclude can be traced back to Roman law, which did not define "property" but assumed the existence of the right to exclude as an implicit "substructure." *See* John G. Sprankling, *The International Law of Property* 307 (2014); *see also* Section II, *infra*.

[7] *See, e.g.*, Thomas W. Merrill, *Property and the Right to Exclude II*, 3 Brigham-Kanner Prop. Rts. Conf. J. 1, 3 (2014)

right"[8] that differentiates the three types of property: private, public, and communal.[9] An individual is the gatekeeper of his private property; a government or agency is the gatekeeper of public property; and members of a community are the gatekeepers of communal property. (In this case, petitioners' private property was transformed into public property because the government expropriated the right to exclude.)

Thomas W. Merrill calls the right to exclude the "sine qua non" of property ownership because "without [the right to exclude] it could not be."[10] This is especially evident with personal property, when losing the right to exclude can mean that the property is actually consumed or destroyed by the intruder. If you lose the right to exclude others from your piece of candy, someone else will eat it and you will have lost your property. This is also true for real property, even though it cannot be "consumed" in exactly the same way as personal property. If a real property owner cannot act as gatekeeper, she cannot determine how her property is used or what happens to the property.

Other aspects of property ownership – such as the rights to use, transform, and transfer – flow directly

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(hereinafter, Merrill II); *see also* Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. Toronto L. J. 275, 289 (2008).

[8] Merrill I, *supra*, at 740–41; Merrill II, *supra*, at 3; *see also* Katz, *supra*, at 281.

[9] *See, e.g.*, Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 Harv. J.L. & Pub. Pol'y 593, 596 (2008); Merrill I, *supra*, at 749.

[10] Merrill II, *supra*, at 1; *see also* Merrill I, *supra*, at 730.

from the right to exclude.[11] Simply by virtue of excluding others, an owner is free to determine what happens to property. When an owner has the right to exclude – and only then – no one else can interfere with her use or transformation of property.[12] Regarding transfer, there must be borders and exclusion to help determine what belongs to whom before property can be transferred or inherited.[13]

Losing the right to exclude means losing your property because the two are inextricably linked.

II. The right to exclude is historical: Private property has always meant that it is mine, not yours.

The concept of property is incoherent without the right to exclude. That is why, unsurprisingly, the right to exclude has been regarded as foundational for a very long time.

The earliest form of property ownership, which arose when humans first began farming in Mesopotamia, was an exclusive right to possess property while it was in active use.[14] The right, called a usufruct, was

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[11] *See* Merrill I, *supra*, at 740–45; Merrill II, *supra*, at 3–4. Of course, a property owner may voluntarily assign the right to exclude – and perhaps therefore the rights to use, transform, or transfer – to someone else.

[12] *See* Merrill I, *supra*, at 741.

[13] *See* Merrill II, *supra*, at 5.

[14] *See* Robert C. Ellickson, *Property in Land*, 102 Yale L. J. 1315, 1365 (1993).

nontransferable and terminated when the owner died or ceased the use.[15] What defined the usufruct was the right to exclude others.[16]

Likewise, the Romans regarded the right to exclude as foundational.[17] Although the Romans did not define property formally, the right to exclude was "an implicit assumption, part of the substructure of Roman property law."[18]

European Enlightenment jurists Hugo Grotius and Samuel Pufendorf, who developed the first modern theories of property, wrote extensively about the right to exclude. Grotius is regarded as the first modern "rights" theorist.[19] His idea of "suum" connected a person's self

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[15] *Id.* at 1364–65.

[16] Merrill I, *supra*, at 746 ("What distinguishes usufructuary rights from unowned resources is not the right to use the resource, but rather the right to exclude others from engaging in particular uses of the resource.").

[17] According to the Digest of Justinian, a Roman "[could] be prevented from entering upon land belonging to another." Sprankling, *supra*, at 307 (internal quotation marks omitted). *See also* Juan Javier Del Granado, *The Genius of Roman Law from a Law and Economics Perspective*, 13 San Diego Int'l L. J. 301, 316 (2011) ("Roman property law typically gives a single property holder a bundle of rights with respect to everything in his domain, to the exclusion of the rest of the world.").

[18] Sprankling, *supra*, at 307.

[19] *See* Knud Haakonssen, *Hugo Grotius and the History of Political Thought*, reprinted in *Grotius, Pufendorf and Modern Natural Law* 36 (Knud Haakonssen ed., 1999) ("Grotius's most important contribution to modern thought was his theory of rights, for, although he had precursors, it was in his formulation that it gained currency. . . ."); Richard Tuck, *Natural Rights Theories:*

with his resources.[20] Grotius wrote that "'ownership' connotes possession of something peculiarly one's own, that is to say, something belonging to a given party in such a way that it cannot be similarly possessed by any other party."[21] Similarly, Pufendorf believed that acquiring something produces a "moral effect," that is, "an obligation on the part of others to refrain from a thing,"[22] and that property included the power "to dispose of things, which belong to us as our own, at our pleasure, and to keep all others from using them."[23]

Having been influenced by Grotius and Pufendorf, English philosopher John Locke's theory of property also placed the right to exclude at its foundation.[24] In his *Two Treatises of Government*, Locke defined property as a combination of acquisition and labor.[25] According to Locke, people in the state of nature do not possess property rights; but once one mixes one's labor

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Their Origin and Development 71 (1979) ("Grotius was . . . the first radical rights theorist.").

[20] *See* Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* 29 (1991) (explaining Grotius's idea of suum and its use in the context of property).

[21] Hugo Grotius, *De Jure Praedae Commentarius: Commentary on the Law of Prize and Booty* 227 (Gwladys L. Williams & Walter H. Zeydel trans., 1950) (1604).

[22] 2 Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* 547 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688).

[23] *Id.* at 533.

[24] *See generally* Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 Ariz. L. Rev. 371, 385–89 (2003).

[25] John Locke, *Two Treatises of Government* (London: G. Routledge 1884) (1690).

with an object in the state of nature, it becomes one's property to the exclusion of all others.[26]

Grotius, Pufendorf, and Locke influenced English jurist William Blackstone,[27] who made the right to exclude famous with his statement defining property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[28]

English common law developed accordingly. Present possessory estates – such as a fee simple absolute, a fee tail, a fee simple determinable, a life estate, a tenancy for years, a periodic tenancy, or a tenancy at will – all include a right to exclude so long as the estate

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[26] *See, e.g.*, *id.* at ch. V, § 27 ("Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this 'labour' being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.").

[27] 1 William Blackstone, *Commentaries on the Laws of England* 38–61 (Univ. of Chicago Press 1979) (1766) (citing Grotius, Pufendorf, and Locke repeatedly regarding how natural rights, including property, come about and how society is formed to protect these rights).

[28] 2 William Blackstone, *Commentaries on the Laws of England* 2 (Univ. of Chicago Press 1979) (1766).

remains possessory.[29] The law of trespass protected these estates and allowed the holder to call upon the state to enforce his right to exclude.[30]

Blackstone and Locke heavily shaped the beliefs of the American founders.[31] In an essay written shortly after ratification of the Bill of Rights, James Madison echoed Blackstone when he defined property as "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."[32] Madison also expressed "pride[] . . . in maintaining the inviolability of property" by providing just compensation for takings through the Fifth

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[29] *See* Merrill I, *supra*, at 747.

[30] *Id.*; *see also* J.W. Harris, *Property and Justice* 13 (1996) (arguing that property should be conceived of as comprising items that are the "subject of direct trespassory protection").

[31] *See, e.g.*, James W. Ely, Jr., *The Constitution and Economic Liberty*, 35 Harv. J.L. & Pub. Pol'y 27, 29–30 (2012) ("John Locke and the Whig emphasis on the rights of property owners profoundly influenced the founding generation."); Adam Mossoff, *The Use and Abuse of IP at the Birth of the Administrative State*, 157 U. Pa. L. Rev. 2001, 2031, n. 146 (2009) (stating that "[t]he study of Locke and other natural law philosophers was fundamental to a legal education in the early American Republic" and collecting texts and lectures studied by early American lawyers that referenced Locke, Grotius, and Pufendorf); Richard A. Epstein, *No New Property*, 56 Brook. L. Rev. 747, 750 (1990) (observing that American property lawyers are the "inheritors of the Lockean tradition"); Lawrence M. Friedman, *A History of American Law* 112 (2d ed. 1985) ("Ordinary lawyers referred to Blackstone constantly; they used his book as a shortcut to the law. . . .").

[32] James Madison, *Property* (Mar. 29, 1792), in *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987), http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html.

Amendment.[33] Furthermore, Madison wrote, "Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[34]

Given his pivotal role as the author of much of the Constitution and the Bill of Rights – including the Fifth Amendment – it is safe to say that Madison's definition of property, and thus the right to exclude, is foundational to American property rights.[35]

III. The right to exclude is universal: Everyone knows that private property is mine, not yours.

The right to exclude's prominence continues today. Exclusion is crucial to an ordinary understanding of property rights. Even scholars whose conceptions of property rights differ wildly agree that the right to exclude is foundational. Accordingly, this Court agrees.

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[33] *Id.*

[34] *Id.* (emphasis in original).

[35] *See* Hon. Loren A. Smith, *Introduction*, 46 S.C. L. Rev. 525, 526 (1995) ("Madison's venerable role in our republic – author of much in the Constitution and a large share of The Federalist; member of the First Congress, where he was the driving force behind the Bill of Rights; and, of course, our fourth President – should give much weight to his definition [of property].").

Ordinary people easily and intuitively recognize the right to exclude as the essence of property.[36] Humans of all cultures respect the inviolability of others' persons and, by extension, their property.[37] As a result, people instinctively stay away from things unless they have a legitimate claim over them.[38] This idea plays out practically in the way people universally respect others' possession of (and right to exclude others from) property. Thomas W. Merrill paints a vivid picture of a busy airport terminal to explain how thousands of people from different places and cultures can coexist without the situation devolving into a free-for-all in which everyone tries "to seize control of the choicest-looking suitcases or satchels."[39] The answer is respect for possession and the right to exclude.

People use possession to determine who owns property because it is easy to do so.[40] It is "hardwired into human psychology" to observe relationships between people and tangible things "automatically and unconsciously."[41] As illustrated by Merrill's airport terminal, the right to exclude allows society to operate

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[36] *See* J.E. Penner, *The Idea of Property in Law* 2 (1997) ("[P]roperty is what the average citizen, free of the entanglements of legal philosophy, thinks it is: the right to a thing. . . .").

[37] *See* Balganesh, *supra*, at 620; Lawrence K. Frank, *The Concept of Inviolability in Culture*, 36 Am. J. Soc. 607, 607 (1931).

[38] *See* Balganesh, *supra*, at 621.

[39] Merrill II, *supra*, at 16.

[40] *Id.* at 18.

[41] *Id.* at 17 (citing James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 Cornell L. Rev. 139 (2009)).

harmoniously. It incentivizes property owners to use resources efficiently[42] and enables them to make contracts involving their property.[43] As a result, the right to exclude is part of everyone's daily life.

Some scholars have rejected people's ordinary understanding and characterized property ownership as a "bundle" of "strands" or "sticks."[44] Although the bundle metaphor has been increasingly criticized while the right to exclude has risen to prominence among scholars,[45] the bundle metaphor is not incompatible with the

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[42] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 356 (1967) (describing how "an owner, by virtue of his power to exclude others," has "incentives to utilize resources more efficiently").

[43] *See* Donald J. Kochan, *The Property Platform in Anglo-American Law and the Primacy of the Property Concept*, 29 Ga. St. U. L. Rev. 453, 472 (2013) ("By first identifying what each individual owns and has the right to control and to exclude, we can then understand what individuals have the authority to trade or contract for or against.").

[44] *See generally* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. Rev. 711, 712 (1996).

[45] *See, e.g.*, Jeremy Waldron, *Property and Ownership* (" 'Private property' refers to a kind of system that allocates particular objects like pieces of land to particular individuals to use and manage as they please, to the exclusion of others (even others who have a greater need for the resources) and to the exclusion also of any detailed control by society."), in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2016), https://plato.stanford.edu/entries/property/; Hanoch Dagan, *Reconstructing American Legal Realism and Rethinking Private Law Theory* 164–65 (2013) (noting that "[a]fter decades in which the bundle-of-sticks picture . . . had been regarded as the conventional wisdom, several leading property scholars are again considering the right to exclude as the most defining feature of property"); Joseph William Singer, *Property Law: Rules, Policies, and Practices* xxxix (5th ed. 2010)

fact that the right to exclude is foundational. In fact, many of the Legal Realist scholars who developed and espoused the bundle theory of property believed that the right to exclude was foremost among all aspects of property ownership. For example, A.M. Honoré privileged the right to exclude among eleven parts of the

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("[M]ost scholars agree that the right to exclude is either the most important, or one of the most important, rights associated with ownership."); Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 Mich. L. Rev. 1835, 1836 (2006) ("American courts and commentators have deemed the 'right to exclude' foremost among the property rights, with the Supreme Court characterizing it as the 'hallmark of a protected property interest' and leading property scholars describing the right as the core, or the essential element, of ownership.") (footnotes omitted); David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39, 58 (2000) ("The right of a landowner to exclude others is a fundamental part of the equally fundamental Constitutional Right to the enjoyment of private property."); J.E. Penner, *The "Bundle of Rights" Picture of Property*, *supra*, at 754 (opining that property is not "some bundled together aggregate or complex of norms, but a single, coherent right": the right to exclusive use); J.E. Penner, *The Idea of Property in Law*, *supra*, at 68 (asserting that "property rights can be fully explained using the concepts of exclusion and use"); J.W. Harris, *supra*, at 13 (arguing that property should be conceived of as comprising items that are the "subject of direct trespassory protection").

bundle.[46] Morris Cohen[47] and Felix Cohen[48] believed that the right to exclude was indispensable to private property. Additionally, Oliver Wendell Holmes wrote:

> But what are the rights of ownership? They are substantially the same as those incident to possession. Within the limits prescribed by policy, the owner is allowed to exercise his natural powers over the subject-matter uninterfered with, and is more or less protected in excluding other people from such interference. The owner is allowed to exclude all, and is accountable to no one.[49]

This Court's conception of the right to exclude comports with the public's and scholars' understanding. In fact, the Court could not be more clear that the right to exclude is "[t]he hallmark of a protected

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[46] *See* A.M. Honoré, *Ownership*, in *Oxford Essays in Jurisprudence* 107, 113 (A.G. Guest ed., 1961) ("[The right] to have exclusive physical control of a thing . . . is the foundation on which the whole superstructure of ownership rests."); *id.* at 114 (suggesting that humans are hardwired to want to exclude others from their property).

[47] Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L.Q. 8, 12 (1927) ("The law does not guarantee me the physical or social ability of actually using what it calls mine. . . . [I]t may indirectly aid me by removing certain general hindrances to the enjoyment of property. But the law of property helps me directly only to exclude others from using the things which it assigns to me.").

[48] Felix S. Cohen, *supra*, at 371 ("Private property . . . must at least involve a right to exclude others from doing something.").

[49] Oliver Wendell Holmes, *The Common Law* 193 (Mark DeWolfe Howe ed., 1963) (1881).

property interest"[50] and "universally held to be a fundamental element of the property right."[51] Even when this Court uses the bundle metaphor to describe property, the right to exclude is "one of the most essential sticks"[52] or "treasured strands"[53] of that bundle.[54]

The right to exclude is so universal that the public, scholars, and this Court agree that it is fundamental to property rights. The California Court of Appeal's decision to the contrary cannot stand.

IV. This Court should grant certiorari to safeguard the foundation of property rights: the right to exclude.

The decision below is an egregious affront to property rights with implications beyond whether coastal property owners may exclude the public. This Court should grant certiorari to overturn it.

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[50] *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999).

[51] *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

[52] *Id.* at 176; *see also Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987).

[53] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

[54] *See id.* at 435 (a "permanent physical occupation of another's property is a taking . . . [because] the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand").

A. The decision below destroys the very concept of private property ownership.

The right to exclude is at the center of this case. The California Court of Appeal allowed the government to become the gatekeeper of petitioners' property, and now, the government literally controls *everything* about petitioners' property. At a minimum, abrogation of the right to exclude logically affects other aspects of property ownership, and in this case, the California Court of Appeal took even further steps to assure that petitioners may no longer enjoy their own property. The California Court of Appeal commanded petitioners to allow the public to use their private road, to run an unprofitable business, and to advertise that business.

Whether property is owned privately, publicly, or communally turns on who is exercising the right to exclude. In this case, the California Court of Appeal transformed private property into public property by transferring the right to exclude from petitioners to the government. Since exclusion is the foundation of all other aspects of property ownership, as demonstrated in Section I above, losing the right to exclude has downstream implications for petitioners' other rights. Now, petitioners cannot use the road on their property as they see fit. Neither can they use the beach without others' presence. Petitioners certainly cannot transform their land by destroying (or even improving) the road or building something that might interfere with the public's use of the property. And if petitioners wish to sell their land, their property value will

certainly be affected.[55] Reassigning the right to exclude is the equivalent of handing over title to the property.

B. The decision below is also inconsistent with this Court's Fourth Amendment jurisprudence.

The right to exclude is crucial to protecting more than just physical property. Undermining the right to exclude in the context of the Fifth Amendment will inevitably lead to loss of Fourth Amendment freedoms because, as shown by this Court's decision in *United States v. Jones*,[56] exclusion underlies the "secur[ity]" in our "persons, houses, papers, and effects" protected by the Fourth Amendment.[57]

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[55] Indeed, a recent study of property values after the passage of the Countryside and Rights of Way Act of England and Wales (which formalized a public "right to roam" on private property) reflects the value of the right to exclude. "[T]he Act's passage led to statistically significant and substantively large declines in property values in areas of England and Wales that were more intensively affected by the Act relative to areas where less land was designated for increased access." Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. Pa. L. Rev. 917, 918 (2017).

[56] 565 U.S. 400 (2012).

[57] U.S. Const. amend. IV; *see generally* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 Wake Forest L. Rev. 307, 307 (1998) (arguing that "the Fourth Amendment right to be 'secure' is equivalent to the right to exclude").

When the Fourth Amendment was adopted, the primary concern was the home.[58] Therefore, early Fourth Amendment cases focused on physical intrusion or trespass by the government on private property.[59] Then, in *Katz v. United States*, the Court articulated the "reasonable expectation of privacy" test when it held that attaching an eavesdropping device to a public telephone booth violated the Fourth Amendment.[60] Even though the Court rejected a test based purely on "the presence or absence of a physical intrusion into any given enclosure,"[61] the Court's decision was based on society's expectation that, when one enters a closed telephone booth, he seeks to "exclude" others.[62]

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[58] *See* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 Sup. Ct. Rev. 67, 72 ("Famous search and seizure cases leading up to the Fourth Amendment involved physical entries into homes, violent rummaging for incriminating items once inside, and then arrests and the taking away of evidence found. These examples, and some contemporaneous statements during the ratification debates, suggest that home entries and rummaging around inside were understood as the paradigmatic examples of 'searches.' ").

[59] *See id.* at 92; Jace C. Gatewood, *Warrantless GPS Surveillance: Search and Seizure – Using the Right to Exclude to Address the Constitutionality of GPS Tracking Systems Under the Fourth Amendment*, 42 U. Mem. L. Rev. 303, 333 (2011) ("As early as 1928, the Supreme Court recognized trespass as the driving force for Fourth Amendment protection.").

[60] 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

[61] *Id.* at 353.

[62] *Id.* at 352 ("[W]hat he sought to exclude when he entered the booth was not the intruding eye – it was the uninvited ear. . . . One who occupies [a public telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is

In *United States v. Jones*, this Court held that the use and installation of a GPS tracking device on a car to track the movement of a suspect constituted a "search."[63] In his majority opinion, Justice Scalia quoted the following passage to emphasize the "significance of property rights in search-and-seizure analysis":

> [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.[64]

The "sacred" right to exclude gives us privacy. It allows us to have a space into which others, including the government, cannot intrude. A case about beachfront property may at first blush appear not to have anything to do with issues such as protecting cell phone data,[65] but the role of the right to exclude brings the decision below into conflict with this Court's Fourth Amendment jurisprudence.

Because the right to exclude is at the center of this case, it is a perfect opportunity for this Court to

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surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.").

[63] 565 U.S. at 404.

[64] *Id.* at 405 (quoting *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765) (alteration in original)).

[65] *See Riley v. California*, 134 S. Ct. 2473, 2485 (2014) (holding that officers must generally secure a warrant before searching cell phone data).

confirm that the right – deeply rooted in history and of continued importance today – is the foundation of property ownership.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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