No. 12-1162

In The
Supreme Court of the United States

RALPHS GROCERY COMPANY,

Petitioner,

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 8,

Respondent.

On Petition For a Writ of Certiorari to the Supreme Court of California

Brief of Amici Curiae Supporting Petitioner, by California Retailers Association, California Business Properties Association, and International Council of Shopping Centers

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INTEREST OF *AMICI CURIAE*

The undersigned *amici curiae* file this brief in support of the Petitioner.[1]

Description of Amici. The California Retailers Association (CRA) is the only statewide trade association representing all segments of the retail industry, including general merchandise, department stores, mass merchandisers, fast food restaurants, convenience stores, supermarkets and grocery stores, chain drug and specialty retail such as auto, vision, jewelry, hardware and home stores. CRA works on behalf of California's retail industry, which currently operates over 164,200 stores with sales in excess of $571 billion annually and employing 2,776,000 people — nearly one fifth of California's total employment.

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[1] Counsel for the *amici curiae* authored this brief in whole and no other person or entity other than the *amici curiae* on whose behalf this brief is filed, their members, or counsel, have made a monetary contribution to the preparation or submission of this brief. The parties have given their consent to the filing of this *amicus curiae* brief and their letters of consent have been filed with the Court. Counsel for the *amici curiae* timely notified counsel for the parties that we intended to file this brief.

The California Business Properties Association (CBPA) represents over 10,000 member companies and has served as the voice on legislative and regulatory issues for all aspects of the retail, commercial and industrial property owners in California for almost 40 years. CBPA members include numerous shopping center owners and property managers, as well as large retailers. Additionally CBPA is the designated legislative advocate for the International Council of Shopping Centers (ICSC), the California chapters of the Institute of Real Estate Management (IREM), the Building Owners and Managers Association (BOMA) of California, the Retail Industry Leaders Association (RILA) and the California Downtown Association (CDA).

The International Council of Shopping Centers is a not-for-profit corporation organized under the Not-For-Profit Corporation Law of the State of Illinois. It is the global trade association of the shopping center industry with over 59,700 members worldwide, 49,640 in the United States and over 7,500 in the State of California. Its members include developers, owners, retailers, lenders and others that have a professional interest in the shopping center industry. ICSC's members own and manage essentially all of the 14,993 shopping centers in the State of California. In 2012, these shopping

centers accounted for $302.6 billion in retail sales with 1.3 million in shopping center employment or 9.1% of the share of total employment. Shopping centers contributed $22.7 billion in sales tax revenue and almost $2.7 billion in property tax revenue.

Interest of Amici. CRA, CBPA and ICSC represent members who either own properties devoted to business purposes or operate businesses on those properties. They are vitally interested in the rules applicable to the ability of private groups in general, and labor organizations in particular, to use CRA, CBPA, and ICSC members' private property to pursue the goals and interests of other parties.

The Petition places ample focus on the First Amendment issue; the focus of this brief is to amplify the Petition's Fifth Amendment discussion.

SUMMARY OF ARGUMENT

1. This Court has repeatedly held that one of the most important aspects of private property is the right to exclude third parties, a right that is vouchsafed by the Fifth Amendment and protected by the courts. (E.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 [1978].)

California has upended that proposition for the sake of one group: organized labor. In all other cases, California recognizes the right of private property owners to establish rules by which third parties may be allowed to access private property, if at all. But not in the case of organized labor. In that case alone, California has enacted statutes that prohibit property owners from protecting themselves, and also prohibit the courts from coming to the defense of this basic constitutional right.

This is not the first time that California has established rules that denigrate the rights of private property owners. In overturning a California rule that would have allowed repeated trespass by the public, this Court concluded that the state courts broke into two jurisprudential groups. One consisted of California, the other of "every other court that has considered the question . . . ." (*Nollan v. California Coastal Comm'n*, 483 U.S. 825, 839

[1987].) California must again be brought back into the federal constitutional fold. Its specialized statutes that discriminate in favor of one discrete type of speech and against the rights of private property owners are invalid.

2. The Supremacy Clause (U.S. Const., art. VI, cl. 2) establishes the U.S. Constitution as "the supreme law of the land; . . . anything in the . . . laws of any State to the contrary notwithstanding."

The California Supreme Court set the Fifth Amendment on one pan of its scale and two state statutes on the other — and concluded that the latter outweighed the former.

If the Supremacy Clause means anything, that California holding cannot stand.

ARGUMENT

I.

THE RIGHT OF A PRIVATE PROPERTY OWNER TO EXCLUDE PEOPLE IS A VITAL ELEMENT OF PROPERTY

"Property" consists of many things. Indeed, the concept is so complex that this Court has repeatedly used the law professors' "bundle of

sticks" analogy to illustrate it, concluding that either the taking of an entire "stick" from the "bundle" or the taking of a part of all the "sticks" violates the Taking Clause of the Fifth Amendment.[2]

A.

This Court Has Long Protected A Property Owner's Right To Exclude

One "stick" which has received special protection from this Court has been the right of property owners to exclude others from their property. This Court has repeatedly referred to the right to exclude others as ". . . one of the most essential . . ."[3] and ". . . most treasured

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[2] *E.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *United States v. Security Indus. Bank*, 459 U.S. 70, 76 (1982); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984); *Hodel v. Irving*, 481 U.S. 704, 716 (1987); *Nollan*, 483 U.S. at 831.

[3] *Kaiser Aetna*, 444 U.S. at 176; *Loretto*, 458 U.S. at 433; *Ruckelshaus*, 467 U.S. at 1011; *Irving*, 481 U.S. at 716; *Nollan*, 483 U.S. at 831.

stands in an owner's bundle of property rights."[4]

Moreover, the Court has been particularly protective against governmental actions which permit strangers to invade the property of others:

> "This is *not* a case in which the Government is exercising its regulatory power in a manner that will cause an *insubstantial devaluation* of petitioners' private property; rather, the imposition of the navigable servitude in this context will result in *an actual physical invasion* of the privately owned marina." (*Kaiser Aetna*, 458 U.S. at 180; emphasis added.)

Like *Kaiser Aetna*, this case does not involve "insubstantial devaluation" of property. The State's adoption and enforcement of statutes allowing actual physical intrusion onto Ralphs' private property — coupled with a prohibition on aid from the judiciary — has taken a possessory interest in the property from Ralphs. Colorfully, Professor Tribe once referred to interlopers on private property as "government-invited gatecrashers." (Laurence

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[4] *Loretto*, 458 U.S. at 435.

H. Tribe, *American Constitutional Law*, § 9-5 at 602 [2d ed. 1988].) Indeed, they are.

But the Fifth Amendment provides a shield against "gatecrashers." This Court has routinely noted that government actions resulting in actual physical invasion are relatively simple to analyze from the vantage point of the Fifth Amendment: physical invasion is a taking that cannot be accomplished without compensation.

This Court's cases make no distinction between actual physical invasion by the government (*e.g.*, *Pumpelly v. Green Bay Co.*, 13 Wall. [80 U.S.] 166, 181 [1871] [artillery shells]; *United States v. Causby*, 328 U.S. 256, 261 [1946] [military aircraft]) and legislation or regulation authorizing trespass by others. Some of the Court's prime physical invasion cases simply involved enabling third party trespass. In *Nollan*, 483 U.S. 825, a California agency sought to authorize random beach goers to trespass on private property. In *Loretto*, 458 U.S. 419, the New York legislature authorized cable TV companies to install equipment in apartment buildings without consent from the building owners. In *Kaiser Aetna*, 444 U.S. 164, the United States sought to open a private marina to use by the general public.

The point is simply this: Neither by itself, nor through authorizing others, may a public agency invade the right of private property owners to exclude third parties from their land — not without compensation.

Legally, this case is an analytical twin to the cases cited earlier (*Kaiser Aetna*, *Nollan*, et al.). In each, government regulation sought to compel a private property owner to open property to physical intrusion and use by strangers. Such random and unwanted intrusions by union representatives — at times and in manners of their own choosing, while ignoring Ralphs' commercially reasonable and non-discriminatory regulations — is so significant that, as this Court held in *Kaiser Aetna*:

> ". . . the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." (444 U.S. at 180.)

The idea that compensation is a necessary adjunct of government action that takes private property was augmented eight years after *Kaiser Aetna*: ". . . government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay

just compensation." (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987); emphasis added.) Compensation is thus an automatic requirement when property interests are taken.

This is not contrary to the Court's holding in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), as even the California Supreme Court acknowledged below. *PruneYard* was *sui generis*. It involved neither a single store nor a modest shopping center. Instead, *PruneYard* arose at a shopping center so massive (21 acres) that it drew daily crowds of 25,000 people. In that context, the court had decided that shopping center had become, in effect, the equivalent of a town square, where members of the public were invited to congregate for myriad purposes. Even there, this Court concluded that the property owner was entitled to establish time, place, and manner regulations for use of its facilities. No such protection is available under the California statutes. Nor, despite its recognition that Ralphs had done nothing to convert its entry to a "public" space (Pet. App. at 2a), did the California Supreme Court do anything to protect the rights of this property owner.

This Court's cases are in direct conflict.

B.

Good Intentions Cannot Save The Statutes

The California Supreme Court suggests that the Legislature recognized a problem, accepted the duty to solve it, and devised a solution. But its opinion proceeds as though recognition of a legitimate governmental *goal* (accepting *arguendo* that the goal is legitimate) validates whatever *solution* is chosen.

That is not the law in the United States. Determination of a legitimate governmental objective is the first, not the last, step. The means chosen to achieve the objective must then survive Constitutional scrutiny.

Good intentions are 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 this 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 the power of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416.)

More recent authority echoes that conclusion: "the Takings Clause presupposes that the government has acted pursuant to a valid public purpose." (*Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 [2005].)[5]

Once it is determined that the government action is done to achieve a legitimate goal, then the means chosen must be examined against the constitutional matrix to ensure that private property rights have not been violated.

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[5] 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 . . . ." More than that, it assumes that the Government is acting pursuant to lawful authority. If not, the action is *ultra vires* and void. (Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952] [unlawful wartime seizure voided] with *United States v. Peewee Coal Co.*, 341 U.S. 114 [1951] [compensation mandatory after lawful wartime seizure].)

Pennsylvania Coal was merely one in a long line of decisions in which this Court — speaking through various voices along its ideological spectrum (*Pennsylvania Coal* having been authored for the Court by Justice Holmes) — patiently, and consistently, explained to regulatory 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 virtue of the former. Emphasizing the point, the dissenting opinion in *Pennsylvania Coal* had argued the absolute position that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking." (260 U.S. at 417.) Eight Justices rejected that proposition.

In *Loretto*, 458 U.S. 419, New York's highest court upheld a statute as a valid exercise of the police power, and therefore dismissed an action seeking compensation for a taking. This Court put it this way as it 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*." (*Loretto*, 458 U.S. at 425; emphasis added [Marshall, J.].)

Similarly, in *Kaiser Aetna*, 444 U.S. 164, the Corps of Engineers decreed that a private marina be opened to public use without compensation. This Court disagreed, and explained the relationship between justifiable regulatory actions and the just compensation guarantee of the Fifth Amendment:

> "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*." (*Kaiser Aetna*, 444 U.S. at 174; emphasis added [Rehnquist, J.].)

That is why this 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." (482 U.S. at 315; [Rehnquist, C.J.]; first emphasis, the Court's; second emphasis added.)

In a similar vein are cases like *Preseault v. I.C.C.*, 494 U.S. 1 (1990) (Brennan, J.); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (Blackmun, J.); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (Rehnquist, J.); and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (Brennan, J.). In each of them, this Court was faced with the claim that Congress, in pursuit of legitimate objectives, had taken private property without just compensation in violation of the Fifth Amendment. The governmental goal in each was plainly legitimate (respectively, the creation of recreational hiking and biking trails over abandoned railroad right-of-way easements, obtaining expert input prior to licensing of pesticides to protect the consuming public, dealing with the issue of compensation in the aftermath of the Iranian hostage crisis, and widespread railroad bankruptcy). Nonetheless, the Court did not permit those proper legislative goals to trump the constitutional need for compensation when private property was taken in the process. In each, the Court directed the property owners to the Court of Federal Claims to determine whether these exercises of legislative power, *though substantively legitimate*, nonetheless

required compensation to pass constitutional muster.[6]

In sum, for a taking to occur, it matters not whether the regulators acted in good or bad faith, or for good or bad reasons. What matters is the impact of their acts, not the purity *vel non* of their motives. Indeed, if their motives are benign — or done for the best of reasons — that only fortifies the need for compensation required by the Takings Clause of the Fifth Amendment.[7]

Thus, it is not enough for California to conclude that — as a matter of state policy — it was a good thing to allow uncontrolled picketing at the entry to stores like Ralphs. As a matter of federal Constitutional policy, such a

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[6] To this end, the Fifth Amendment's just compensation guarantee has been held self-executing. The availability of compensation validates and constitutionalizes the otherwise wrongful government action. (*City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 714-715 [1999] [Kennedy, J.]; *United States v. Clarke*, 445 U.S. 253, 257 [1980].)

[7] See *Hughes v. 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 original.)

severe invasion of protected property rights cannot occur unless compensation is paid.

II.

STATE STATUTES CANNOT TRUMP THE FIFTH AMENDMENT

It should go without saying that a state cannot enact statutes that conflict with the U.S. Constitution. It should, but it is evidently necessary because the California Supreme Court seemed to have little trouble holding that two California statutes could run roughshod over the private property rights involved here.

The Constitution is clear:

> "This Constitution . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the . . . laws of any State to the contrary notwithstanding." (U.S. Const., art. VI, cl. 2.)

The California Supreme Court made clear that it was analyzing only the constitutionality of the two statutes at issue here, not the First Amendment or any provision of the California

Constitution. (Pet. App. at 2a.)[8] What that court sought to establish was the primacy of its State's statutes.

The Seventh Circuit said it with simple elegance:

> "The Constitution and the laws of the United States are the supreme law of the land. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Because of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, *states may not enact laws or regulations which are contrary* to federal law." (*Youakim v. Miller*, 562 F.2d 483, 494 [7th Cir. 1977]; emphasis added.)

The Supremacy Clause stands as a barrier to California statutes that trench on the rights of private property owners. The offending statutes are invalid.

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[8] Even if it had made such a Constitutional comparison, this Court has made it plain that "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation . . . ." (*Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].)

CONCLUSION

The Fifth Amendment and this Court's consistent application of it protect the right of property owners to exclude third parties from their premises. The Supremacy Clause prohibits states from enacting legislation that contradicts that settled Constitutional interpretation.

Certiorari should be granted.

Respectfully submitted,

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