No. _____

In The

Supreme Court of the United States

DAVID KAGAN; JUDITH KAGAN;
FRANK REVERE; and RACHEL K. REVERE,

Petitioners,

v.

CITY OF LOS ANGELES; and
CITY OF LOS ANGELES HOUSING AND
COMMUNITY INVESTMENT DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

FRANK REVERE
Revere & Wallace
355 S. Grand Ave.
Suite 2450
Los Angeles, CA 90071
Telephone: (213) 943-1333
frank@reverelawfirm.com

J. DAVID BREEMER*
**Counsel of Record*
DEBORAH J. LA FETRA
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
JBreemer@pacificlegal.org
DLaFetra@pacificlegal.org

Counsel for Petitioners

QUESTION PRESENTED

Frank and Rachel Revere and David and Judith Kagan (Owners) own a duplex in Los Angeles, California, as tenants in common. The Reveres live in one unit. In 2019, the Reveres applied to the City to displace a month-to-month tenant in the other unit, so they could move in their own family members. The City denied the request, concluding the tenant was protected from eviction for a family move-in under Los Angeles' Rent Stabilization Ordinance. The Owners sued, alleging the City's decision forced them to suffer a physical taking of their property.

The question presented is:

Whether a law that bars termination of a tenancy, and compels the occupation of property by an unwanted tenant, amounts to a per se, physical taking, as the Eighth Circuit held in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), or is instead a permissible regulation of property under *Yee v. City of Escondido*, 503 U.S. 519 (1992), as the Ninth Circuit held below.

PARTIES TO THE PROCEEDING

Petitioners David Kagan, Judith Kagan, Frank Revere, and Rachel K. Revere were the plaintiffs-appellants below.

Respondents City of Los Angeles and City of Los Angeles Housing and Community Investment Department were defendants-appellees below.

STATEMENT OF RELATED PROCEEDINGS

Kagan v. City of Los Angeles, No. 21-55233, 2022 WL 16849064 (9th Cir. Nov. 10, 2022) (opinion issued).

Kagan v. City of Los Angeles, No. 2:20-cv-05515-DMG-ADS, 2021 WL 958571 (C.D. Cal.) (judgment entered February 11, 2021).

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PETITION FOR WRIT OF CERTIORARI

Frank and Rachel Revere and David and Judith Kagan respectfully request that this Court issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Ninth Circuit is unpublished, but can be found at *Kagan v. City of Los Angeles*, 2022 WL 16849064 (9th Cir. Nov. 10, 2022), and in Petitioners' Appendix at App.1a. The district court's order is unpublished, but can be found at *Kagan v. City of Los Angeles*, 2021 WL 958571 (C.D. Cal. Feb. 11, 2021), and at App.7a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Ninth Circuit Court of Appeals dismissed this federal constitutional case in an opinion issued on November 10, 2022.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Los Angeles Municipal Code (LAMC) § 151.30 is set forth at App.17a.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE WRIT

The right to move one's own family into a private home is a traditional incident of property ownership. *See Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 520–21 (1977) (Stevens, J., concurring) (concluding that because a zoning ordinance "cuts so deeply into a fundamental right normally associated with the ownership of residential property that of an owner to decide who may reside on his or her property . . . [it] constitutes a taking of property without due process and without just compensation"); *Sabato v. Sabato*, 135 N.J. Super. 158 (1975) (owner of three-unit building had a constitutional right to evict for owner occupancy).

This right has grown in importance as affordable housing options for younger generations have declined. At the same time, municipalities throughout the nation have responded to perceived hardships on tenants by passing laws that limit the ability of rental property owners to evict tenants so the owners can personally use their property. Whether such laws are intended to mitigate COVID-19 hardships or perceived shortfalls in available rental housing, the effect on property owners is the same: they must submit to the unwanted, physical occupation of their property and are unable to use the property for their own purposes. In response, property owners like those in this case have filed lawsuits asserting that eviction bans should be recognized as a per se taking of property. *See Heights Apts., LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022); *Gallo v. District of Columbia*, No. 1:21-cv-03298, 2022 WL 2208934 (D.D.C. June 21, 2022), *and Williams v. Alameda Cnty.*, Nos. 3:22-cv-01274-LB,

3:22-cv-02705-LB, 2022 WL 17169833 (N.D. Cal. Nov. 22, 2022).

This Petition arises from a decision of the Ninth Circuit which held that an eviction prohibition that results in a compelled, indefinite tenant occupation is not a physical taking. In this case, Los Angeles denied the attempt of rental owners to displace an existing, "protected" tenant so that they could move family members into that unit. App.8a. Relying primarily on this Court's decision in *Yee v. City of Escondido,* 503 U.S. 519 (1992), the Ninth Circuit held that the City's decision to require a continued tenant occupation was not a taking. App.3a. The court arrived at this conclusion in part because it believed the Owners could (potentially) entirely remove their property from the rental market, and displace the tenant by that means, provided that they give the tenant a year to vacate and agree not to rent their property for two years. App.3a.

This decision is irreconcilable with physical takings precedent from this Court, such as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). *Loretto* and *Cedar Point* hold that government-authorized physical invasions of property, whether by things or people, qualify as a per se, physical taking of property. *Cedar Point*, 141 S.Ct at 2072. Moreover, a physical occupation is a taking whether it is for one year or a hundred. Thus, that a property owner may be able to remove their property from the rental market, after an unwanted tenant is permitted to remain for a year, does not cure the taking. A year-long, unwanted occupation is still a violation of the owner's right to exclude strangers

from the property, and a taking. *Id.* at 2074 ("[A] physical appropriation is a taking whether it is permanent or temporary. The duration of the appropriation . . . bears only on the amount of compensation." (internal citations omitted)). Finally, contrary to the decision below, *Yee* does not dilute physical takings standards in the context of government-compelled tenancies or foreclose a claim that such tenancies are a taking.

The Ninth Circuit's conclusion also conflicts with many lower court decisions that have concluded that an eviction prohibition results in a per se taking. Most notably, the decision below conflicts with the Eighth Circuit's decision in *Heights*. While the Ninth Circuit concluded in this case that the government may force property owners to acquiesce to a continued, unwanted tenancy, the *Heights* decision holds to the contrary, that such a burden on the right to exclude others from property amounts to a physical taking under *Loretto* and *Cedar Point*. *See Heights*, 30 F.4th at 733.

The Court should grant the Petition (1) to hold that per se, physical takings precedents like *Loretto* and *Cedar Point*, rather than *Yee*, govern the issue of whether an eviction prohibition and resulting compelled tenancy is a taking, and (2) to resolve the conflict between the courts on the issue. *See Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 878 (1983) (Rehnquist, J., dissenting from dismissal of a case as improvidently granted) (arguing that the Court should have considered a case challenging eviction restrictions that amounted to a per se taking).

STATEMENT OF THE CASE

A. The National Context

This case involves a conflict over occupation of a two-unit duplex that has been partially used in the past as a rental unit, but which the Owners now hope to fully use as a family residence. Disputes between the government and property owners over the owners' right to convert small, formerly rented buildings to personal use are increasingly common. According to Census Bureau data, more than 22 million rental units—approximately half of the country's rental units—are found in small buildings with between one and four units. *See* Housing Finance Policy Center, *Small Multifamily Units*, Urban Inst. (May 2020), p. 4.[1] Individual investors, or "mom and pop" landlords, own over 40% of residential rental units,[2] which is approximately 22.7 million rental units. Abby Vesoulis, *How Eviction Moratoriums Are Hurting Small Landlords—and Why That's Bad for the Future of Affordable Housing*, Time Magazine (June 11, 2020).[3]

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[1]https://www.urban.org/sites/default/files/2020/05/15/small_multifamily_units_0.pdf. The real estate market in California trends even more towards lower density small buildings than the nation as a whole due to the nature of the region's housing stock. *See also* Carolina Reid & Meg Heisler, *The Ongoing Housing Crisis: California Renters Still Struggle to Pay Rent Even as Counties Re-Open*, Terner Ctr. for Housing Innovation, U.C. Berkeley (Oct. 2, 2020), https://ternercenter.berkeley.edu/research-and-policy/ongoing-housing-crisis/.

[2] Kristen Broady, et al., *An eviction moratorium without rental assistance hurts smaller landlords, too*, Brookings Inst. (Sept. 21, 2020), https://www.brookings.edu/blog/up-

As new, affordable housing options have decreased, and regulatory burdens on older rental properties have increased,[4] many of the owners of small rental units have sought to convert them into standard, fee simple residential properties. They often do so with the intent to convert the formerly rented units into housing for younger family members who cannot afford housing elsewhere or who simply seek closer family living arrangements. Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L. Rev. 925, 1000; *see also Cwynar v. City & Cnty. of San Francisco*, 90 Cal.App.4th 637, 647–49 (2001);[5] Richard Fry, *Young adults in U.S. are much*

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front/2020/09/21/an-eviction-moratorium-without-rental-assistance-hurts-smaller-landlords-too/.

[3] https://time.com/5846383/coronavirus-small-landlords/.

[4] Studies show that small, residential building owners spend at least half of their rental income on mortgage payments, property taxes, and insurance. Jenny Schuetz, *Halting evictions during the coronavirus crisis isn't as good as it sounds*, Brookings Inst. (Mar. 25, 2020), https://www.brookings.edu/blog/theavenue/2020/03/25/halting-evictions-during-the-coronavirus-crisis-isnt-as-good-as-it-sounds/. Studies also show that rent control devalues these landlords' property by as much as 25% relative to uncontrolled units. *See, e.g.*, David H. Autor, et al., *Housing Market Spillovers: Evidence from the End of Rent Control in Cambridge, Massachusetts*, 122 J. of Pol. Econ. 661 (June 2014), https://www.nber.org/system/files/working_papers/w18125/w18125.pdf.

[5] In *Cwynar*, the court described the plaintiff property owners who sought to move family members into formerly rented property:

> Ed Corvi (Corvi), a San Francisco resident, owns a six-unit building in San Francisco. One of the units is occupied by two of Corvi's sons. One of these sons is engaged to be married and wishes to live in another unit

more likely than 50 years ago to be living in a multigenerational household, Pew Research Center (July 20, 2022) ("The share of young adults who live in a parent's home rose from 8% in 1971 to 17% in 2021[.]").[6]

B. The Owners Acquire Their Property

In 2015, Frank and Rachel Revere and David and Judith Kagan purchased a duplex in Los Angeles, California. App.24a–25a, 28a. The duplex is comprised of an upper and lower unit. The upstairs unit is a 2,400 square foot, three bedroom, two bathroom unit. App.28a. The Reveres reside in the downstairs unit. When the Owners acquired the duplex, the upstairs unit was occupied since 2008 by a tenant, a single man. App.25a.

In 2019, four years after purchasing the unit, the Owners sought permission from the City to terminate the tenant's month-to-month lease to allow the

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> with his new wife. . . . Richard Worner (Worner) owns a three-unit building in San Francisco. Worner, a San Francisco resident, purchased the building in 1974 and has lived there in the past but does not reside in the building at this time. Worner would like his adult son to move into the basement unit of this building . . . . Yasin Salma (Salma), a San Francisco resident for 37 years, purchased a six-unit building in San Francisco in June 1998 with the intention that his four children could each move into their own units.

90 Cal.App.4th at 647–49.

[6] https://www.pewresearch.org/fact-tank/2022/07/20/young-adults-in-u-s-are-much-more-likely-than-50-years-ago-to-be-living-in-a-multigenerational-household/#:~:text=The%20share%20of%20young%20adults,in%20the%20home%20in%202021.

Reveres' son, daughter-in-law, and two grandchildren to live in the upper unit. App.9a.

C. Los Angeles Refuses the Owners' Request to Evict for Family Occupancy

On September 23, 2019, the Owners submitted a Declaration of Intent to Evict Tenant for Landlord Occupancy (Application) with the Los Angeles Housing Department. App.25a. The tenant objected, claiming he was shielded from eviction as a Rent Stabilization Ordinance (RSO)-protected tenant due to his residence in the unit for more than ten years and a claimed, unknown disability. App.30a. Although the Owners contested the disability claim, on October 28, 2019, the City summarily denied the Owners' eviction application because the unit was occupied by a tenant with "protected" status under the RSO. *Id.*

The City enacted the RSO in 1990 in part to address a "shortage of decent, safe and sanitary housing in the City of Los Angeles resulting in a critically low vacancy factor." App.28a. In relevant part, the RSO provides that a landlord "may *not* recover possession of a rental unit" if the tenant is classified as a "protected tenant." App.8a (emphasis added). A tenant has "protected tenant" status under the RSO if he has continuously resided in a unit for over ten years and is either at least 62 years old or is disabled or handicapped, as defined by 42 U.S.C. § 423 or California Health and Safety Code § 50072. App.8a.

The RSO permits a landlord to end the tenancy of a protected tenant only by completely removing the property from the rental market pursuant to code provisions that regulate such withdrawals. A landlord seeking to withdraw rental property from the market

must apply to the City and give affected tenants—even month-to-month tenants—*one year's notice* of the withdrawal and resulting end of a tenancy. App.8a–9a. Any approved withdrawal of property from the rental market is subject to substantial conditions. For instance, a rental owner withdrawing a unit cannot re-rent the subject building within two years of withdrawal. L.A. Mun. Code § 151.25. Further, if the owner of a withdrawn unit seeks to re-rent the building within five years, she may only do so at the rate of rent in existence when the withdrawal occurred. L.A. Mun. Code § 151.26(A).

When the City relied on the RSO to deny the Owners' request to evict a tenant to facilitate a family move-in, the Owners filed a complaint against the City in the United States District Court for the Central District of California.

D. Proceedings Below

The Owners' complaint asserts two causes of action under 42 U.S.C. § 1983: (1) a violation of the Takings Clause of the Fifth Amendment of the United States Constitution and (2) a violation of the Due Process Clause of the Fourteenth Amendment. App.32a–33a. The City moved to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). App.9a.

On February 11, 2021, the district court granted the City's motion to dismiss. With respect to the Owners' takings claim, the court explained that "Plaintiffs assert that the challenged provisions, as applied to their Property, constituted a physical taking by transferring their right to possession to a third party, effectively granting the Tenant a life

estate in the Property." App.10a. Briefly reviewing this Court's precedent, the district court observed that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." App.11a (quoting *Yee*, 503 U.S. at 519). It held that the Owners were not unconstitutionally barred from "terminating a tenancy" because (1) they had "acquired the Property knowing that the Tenant lived there and knowing that it was subject to the RSO," and (2) they "have the option to withdraw the Property from rental housing use, provided they give the Tenant one year's notice." App.11a–12a (citing *Harmon v. Markus*, 412 F.App'x 420, 422 (2d Cir. 2011)).

In thus rejecting the takings claim, the district court relied on *Yee v. City of Escondido*, which it characterized as holding that "a rent control ordinance did not require landowners to submit to the physical occupation of their property because they had 'voluntarily rented their land.'" App.12a (citing *Yee*, 503 U.S. at 528). In the district court's view, *Yee* concluded that "[s]ince the landowners invited the tenants onto the property, the government had not forced the tenants upon the owners." *Id.* The district court also noted that the "ordinance in *Yee* still allowed the landlord to evict tenants, albeit with six- or 12-months' notice." App.12a (quoting *Yee*, 503 U.S. at 527–28). Applying this interpretation of *Yee* to the instant case, the district court held that "[t]he situation is exactly the same here." *Id.* The court stated: "Even if [the Owners] were required to rent to the Tenant for the rest of his life, which they are not, they are not required to lease the Property *permanently*." *Id.* (citing *Troy Ltd. v. Renna*, 727 F.2d 287, 301 (3d Cir. 1984)). Based on these conclusions,

the district court held that the Owners failed to state a valid takings claim. App.12a.

The Ninth Circuit subsequently affirmed. The court recognized that "government effects a *per se* taking whenever a regulation 'requires an owner to suffer a permanent physical invasion of her property'—whatever the purpose of the invasion, and however minor its impact." App.2a (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005)). However, it quickly rejected the Owners' claim that a taking resulted because the City "'granted the Tenant the permanent physical occupation of the Property in perpetuity' by affording him protective status pursuant to the City's Rent Stabilization Ordinance ("RSO") and prohibit[ed] them from reclaiming the Duplex for personal use." App.3a.

Like the district court, the Ninth Circuit relied on *Yee* to support its "no-taking" decision. In the Ninth Circuit's view, *Yee* upheld laws that "regulat[ed] the relationship between landlord and tenant." App.3a. The Ninth Circuit then concluded that, "as in *Yee*, the Owners 'voluntarily rented their land,' and were [therefore] not required to submit to physical occupation by another." *Id.* (citing *Yee*, 503 U.S. at 527). The Ninth Circuit further noted that "the RSO allows at-fault evictions, such as evictions for creating a nuisance, breaking the law, or failing to pay rent, . . . and grants landlords the right to end a protected tenancy by removing the entire property from the rental market with one year's notice." App.3a. Given these purported options, the Ninth Circuit concluded that the City did not force the Owners to "refrain in perpetuity from terminating" the tenancy and,

therefore, did not take property. *Id.* (citing *Yee*, 503 U.S. at 528).

The Owners now petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Conflicts With This Court's Physical Takings Precedent

This Court has long held that a government-authorized physical occupation of private property of any size or duration amounts to a per se taking of property. In concluding that Los Angeles' decision to prohibit the Owners from evicting a tenant so that they can use a unit as a family residence is not a taking, the decision below conflicts with this Court's jurisprudence.

A. This Court's Precedent Indicates That Any Physical Occupation of Property Is a Per Se Taking

Applicable to the states through the Fourteenth Amendment, the Takings Clause of the Fifth Amendment prohibits local governments from taking property without just compensation. Takings can arise from actions that "physically" take property as well as those that impose restrictions on the use of property. *Lingle*, 544 U.S. at 539. A taking is most clear when the government physically occupies or invades property. *See Loretto*, 458 U.S. at 432–35.

In a series of takings decisions beginning with *Loretto*, this Court held that government action resulting in an occupation of private property violates the Takings Clause "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto*,

458 U.S. at 434–35. This Court recently affirmed the *Loretto* physical takings rule in *Cedar Point*, holding that "[w]henever a regulation results in a physical appropriation of property, a *per se* taking has occurred." 141 S.Ct. at 2072. In so doing, *Cedar Point* emphasized that an invasion of property need not be permanent to trigger the per se takings test. A taking will result from a permanent or temporary occupation of property; "[t]he duration . . . bears only on the amount of compensation." *Id.* at 2074 (citing *Loretto*, 458 U.S. at 436–37).

Additionally, in both *Loretto* and *Cedar Point*, this Court concluded that the existence of a physical taking does not depend on whether the government itself occupies property. A physical taking also exists when the government authorizes third parties to occupy property. *Loretto*, 458 U.S. at 432 n.9; *Cedar Point*, 141 S.Ct. at 2072 (The essential question is "whether the government has physically taken property for itself or someone else."); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 (1987) (a physical taking arises when the government authorizes individuals to access private land). Finally, a completed intrusion into property is not needed to state a physical takings claim. A per se, physical taking arises as soon as government *authorizes* the occupation of property. *Cedar Point*, 141 S.Ct. at 2072 ("Government action that physically appropriates property is no less a physical taking because it arises from a regulation.").

In short, this Court's precedent treats almost any government-authorized occupation of property as a "*per se*" physical taking that is unconstitutional without compensation. *Id.*; *Horne v. Dep't of Agric.*,

576 U.S. 350, 360 (2015). Thus, when a property owner asserts that she has suffered an invasion of property at the hands of government, the analysis generally ends, and a viable takings claim exists, without regard to other circumstances.

This Court has grounded the strict physical takings framework on the destructive effect that a physical occupation has on property rights. "Property" is more than a material good; it is a bundle of rights, including a right of possession, a right of use, a right to exclude others from an item, and the right to dispose of it. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). In *Loretto* and *Cedar Point*, this Court emphasized the particular importance of an owner's right to exclude non-owners from private property. *Cedar Point*, 141 S.Ct. at 2072 ("The right to exclude is 'one of the most treasured' rights of property ownership." (quoting *Loretto*, 458 U.S. at 435)). If government takes a property owner's right to exclude others, the property is no longer "private" at all. Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998) ("Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.").

Because a physical occupation of property "chops through the bundle [of property rights], taking a slice of every strand," including the right to exclude others, physical occupations of property trigger a per se takings test. *Loretto*, 458 U.S. at 435–36; *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) ("[T]he '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." (footnote omitted)).

B. The Decision Below Conflicts With the Court's Per Se Physical Takings Precedent

1. The Ninth Circuit's decision conflicts with *Loretto* and *Cedar Point*.

In this case, the Owners sought to evict a tenant, pursuant to the terms of the tenant's month-to-month lease, so they could house family members in the relevant unit. But Los Angeles denied the Owners' request, thereby forcing them to submit to the tenant's continued, indefinite occupation of their property. Under a straightforward reading of *Loretto* and *Cedar Point*, this should qualify as a per se, physical taking. *See Heights*, 30 F.4th at 733; Elizabeth Naughton, *San Francisco's Owner Move-In Legislation: Rent Control or Out of Control?*, 34 U.S.F. L. Rev. 537, 564–65 (2000) (arguing that a city's rent control ordinance that grants "protected class" status to tenants even against an owner's desire to personally occupy the space is a physical taking under *Loretto*); Paul J. Larkin, *The Sturm und Drang of the CDC's Home Eviction Moratorium*, 2021 Harv. J.L. & Pub. Pol'y Per Curiam 18, 28–29 ("The [CDC's] order forces an owner to accept a government-imposed squatter for as long as a moratorium is in effect. Unlike a rent control statute, which limits only increases in what can be charged for a particular unit as long as the lessee is current on his or her rent, the CDC's order entitles a tenant to reside in property that he or she no longer

has a legitimate right to occupy without paying rent." (footnote omitted)).

After all, the City's decision to grant exclusive occupancy of the Owners' unit to the tenant slices through the Owners' entire bundle of rights. The action prevents them from exercising their right to exclude an unwanted person from the property, bars them from possessing the occupied unit as their own, and prevents them from using their property as they wish, i.e., to house their own family members. Just as "government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings," *Cedar Point*, 141 S.Ct. at 2074, a compelled occupation by a tenant should also qualify as a per se taking. *See Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S.Ct. 2485, 2489 (2021) ("[P]reventing [property owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." (citing *Loretto*, 458 U.S. at 435)).

Nevertheless, in the decision below, the Ninth Circuit disregarded the letter and spirit of the Court's physical takings precedent by concluding that a compelled tenant occupancy avoids physical takings analysis because it arises in the context of rental property. The Ninth Circuit concluded that the voluntary nature of a property owner's initial decision to rent property bars the owner from later claiming that a taking results when government makes the tenancy involuntary and continuous. App.3a (citing *Yee*, 503 U.S. at 527).

Such a conclusion is not aligned with this Court's decisions. On several occasions, this Court has repudiated the idea that an owner's decision to use

property a certain way waives their right to claim the protections of the Takings Clause. In *Loretto*, for example, the government argued that a property owner could not challenge the statutorily-compelled placement of a cable box serving tenants as a taking because the owner had elected to rent the building. This Court held that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. More recently, in *Horne*, the Court rejected the contention that a raisin farmer's decision to put his crop into the stream of commerce waived his right to challenge regulations requiring a physical appropriation of the raisins:

> The Government contends that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market. According to the Government, if raisin growers don't like it, they can "plant different crops," or "sell their raisin-variety grapes as table grapes or for use in juice or wine." "Let them sell wine" is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history. In any event, the Government is wrong as a matter of law. . . . Property rights cannot be so easily manipulated.

Horne, 576 U.S. at 365 (cleaned up).

Similarly, a property owner who elects to rent property may *temporarily* relinquish the right to personally use the property, on the understanding that he will regain the property and its use at the end of the tenancy. But nothing in takings doctrine

justifies the conclusion that such a temporary and conditional leasing decision *permanently* forfeits the owners' traditional property rights, or their corollary right to claim a taking when a tenant occupancy becomes government-compelled and permanent, rather than voluntary and temporary. *Cwynar*, 90 Cal.App.4th at 658 ("The City argues that . . . once the landlord has consented to [a tenant's] physical occupation, the government may force him to tolerate the occupation until he removes his property from the rental market. In our opinion, neither *Yee* nor *Loretto* support this proposition."); William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 82 (1995) ("The whole argument" that a property owner's decision at one point to invite someone into their property waives their right to claim a taking later "is a sham—rejected by the Supreme Court.").

The court below also seemed to believe that the City's eviction denial did not create a physical taking because the Owners could seek to take their unit off the rental market—if they give the tenant one year's notice of termination of the lease, and submit to restrictions on the future rental of their property. But this Court's precedent also forecloses this purported takings escape route. In *Cedar Point*, this Court held that "a physical appropriation is a taking whether it is *permanent or temporary*." 141 S.Ct. at 2074 (emphasis added). A year-long compelled occupancy of property is just as much a taking as a ten-year occupancy. *Id.* Therefore, the physical taking occurring here is not obviated by the possibility that the Owners can reclaim and exercise their right to exclude an unwanted tenant by withdrawing their property from the rental market and agreeing to allow

the tenant to remain in the property for another year. If a landlord's "ability to rent property" cannot be conditioned on a physical occupation of property, *Loretto*, 458 U.S. at 439 n.17, certainly a landlord's right to exclude a tenant cannot be conditioned on a one-year physical taking.

2. The Ninth Circuit's interpretation of *Yee* is inconsistent with this Court's understanding of the case.

To be sure, the Ninth Circuit believed that this Court's decision in *Yee* justified its conclusion that a compelled tenancy is not subject to physical takings precedent like *Loretto*. The court below effectively concluded that *Yee* immunizes laws that ban evictions and authorizes unwanted tenant occupations of property from traditional physical takings scrutiny. App.3a. This reading is incorrect and perpetuates a common misinterpretation of *Yee* that has spread throughout the lower courts, one increasingly employed to defeat takings claims arising from coerced tenancies.

In *Yee*, property owners challenged a local rent control ordinance that, in combination with state law, limited the rates that the owner could charge for leases of the land beneath mobile homes. 503 U.S. at 523–25. The *Yee* owners did not seek to evict anyone nor did they object to any particular tenant's occupancy nor did they seek themselves to occupy the property. Rather, the owners asserted that the ordinance caused a physical taking on its face by giving tenants the right to occupy land at a submarket rent, thereby effecting a wealth transfer from the owners to tenants. *Id.* at 527 ("[T]he rent control ordinance has transferred a discrete interest in land—

the right to occupy the land indefinitely at a submarket rent—from the park owner to the mobile home owner.").

The *Yee* Court held its physical takings precedent was not the proper framework for such a challenge. *Id.* at 528. It stated that "the government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 527. While accepting that the ordinance made the tenant's interest more valuable and the owner's interest less valuable, the Court held the owners' takings claim based on this wealth transfer was not governed by physical takings analysis. *Id.* at 529. The Court stated:

> Ordinary rent control often transfers wealth from landlords to tenants by reducing the landlords' income and the tenants' monthly payments, although it does not cause a one-time transfer of value as occurs with mobile homes. . . . The mobile home owner's ability to sell the mobile home at a premium may make this wealth transfer more *visible* than in the ordinary case, but the existence of the transfer in itself does not convert regulation into physical invasion.

Id. at 529–30 (citation omitted).

The Court also rejected the *Yee* plaintiffs' argument that the Ordinance caused a taking by preventing them from employing lease price discrimination to weed out particular tenants. The Court held that this "does not convert regulation into the unwanted physical occupation of land. Because they voluntarily open their property to occupation by

others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 531.

Importantly, the *Yee* Court carefully limited its holding, stating: "A different case would be presented were the statute, on its face or as applied, t*o compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy*." *Id.* at 528 (emphasis added). The Court further observed that "[h]ad the city required such an occupation, of course, petitioners would have a right to compensation, and the city might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right." *Id.* at 532. But the Court concluded that the case did not involve a forced occupancy, "[a]t least on the face of the regulatory scheme." *Id.* at 527–28 (noting that, on the face of the law, "neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so").

The Ninth Circuit's conclusion that *Yee*, rather than physical takings cases like *Loretto* and *Cedar Point*, controls disposition of the eviction ban-challenging takings claim in this case is at odds with the *Yee* decision itself. *See* Jon Houghton, *The Misapplication of* Yee v. Escondido *in Eviction Moratorium Cases*, 39 No. 1 Prac. Real Est. Law. 17, 19 (2023) ("*Yee* does not stand for the legal proposition that the voluntary act of renting waives any subsequent physical takings claim" arising from tenant occupation). Indeed, this case presents the very sort of claim that the *Yee* Court indicated *would* trigger application of a physical takings test, like that in *Loretto*. Here, unlike in *Yee*, the Owners do not

claim that a rent control law has transferred the value of their property to tenants. Instead, their claim arises from the City's decision to prohibit them from displacing a tenant (in accordance with a lease), so that they can move close family members into their property. Their core assertion is that the City *has* "compel[led] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy," the very allegation that the *Yee* Court noted would create a physical takings claim. *See* 503 U.S. at 528.[7]

Unfortunately, as noted, many lower courts have adopted the same broad misreading of *Yee* as the Ninth Circuit in this case. *See, e.g.*, *Elmsford Apt. Assocs., LLC v. Cuomo*, 469 F.Supp.3d 148, 163 (S.D.N.Y. 2020) ("The Supreme Court has ruled that a state does not commit a physical taking when it restricts the circumstances in which tenants may be evicted.") (citing *Yee*). The Court should grant the Petition to hold that *Yee* does not preclude or defeat a physical takings claim against a law that requires the indefinite occupation of private property by an unwanted tenant. Put another way, the Court should hold that *Yee* does not override *Loretto* and *Cedar Point* in the context of claims against a government-compelled tenancy. *See F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987) (the "element of *required acquiescence* is at the heart of the concept of

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[7] When *Yee* was decided, even Respondent City of Escondido recognized that a physical taking would result if the government prevented owners from reclaiming property for personal use. Brief for Respondent, *Yee v. City of Escondido*, 503 U.S. 519 (1992) (No. 90-1947), 1992 WL 545135, at *21 ("[T]he essential right to exclude others inheres only in 'property reserved by its owner for private use.'" (citing *Nollan*, 483 U.S. at 831)).

occupation" for purposes of physical takings analysis (emphasis added)). *See also Pinewood Estates of Michigan v. Barnegat Tp. Leveling Bd.*, 898 F.2d 347, 355 (3d Cir. 1990) (Stapleton, J., concurring) ("[W]here the state permanently takes away a landlord's right to evict a tenant and his successors beyond the end of an agreed upon term a permanent physical occupation occurs and there is a per se taking under *Loretto*[.]").

II. The Decision Below Conflicts With Lower Court Decisions, Including a Recent Decision of the Eighth Circuit

The Ninth Circuit's decision is not only inconsistent with this Court's physical takings jurisprudence, it conflicts with numerous federal and state court decisions issued over the past several decades.

A. The Ninth Circuit Decision Conflicts With the Decision of the Eighth Circuit in *Heights*

In *Heights*, 30 F.4th 720, the state of Minnesota enacted a pandemic-driven law that barred all residential evictions except for those in which the tenants endangered the safety of other residents or significantly damaged the property, or where the owner's family needed to move into the unit. *Id.* at 724–25. The rental owners sued, claiming these eviction restrictions caused a "physical taking[] because they forced landlords to accept the physical occupation of their property regardless of whether tenants provided compensation." *Id.* at 733. The district court dismissed their claims but, on appeal, the Eighth Circuit reversed, holding that the owners

stated a viable physical takings claim. *Id.* In so doing, the *Heights* court rejected the government's argument "that no physical taking has occurred because landlords were not deprived of their right to evict a tenant" but only faced eviction "restriction[s]" "similar to [those in] *Yee v. City of Escondido*, 503 U.S. 519 (1992)." *Id.*

The Eighth Circuit concluded that *Yee* considered laws that "limited the amount of rent that could be charged and neither deprived landlords of their right to evict nor compelled landlords to continue leasing the property past the leases' termination." *Id.* In contrast, the Eighth Circuit emphasized that the orders at issue in *Heights* "forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated, unless the tenants seriously endangered the safety of others or damaged property significantly." *Id.* Therefore, the *Heights* court concluded that the eviction moratorium "turned every lease in Minnesota into an indefinite lease, terminable only at the option of the tenant." *Id.* (citation omitted). The orders "deprived Heights of its right to exclude existing tenants without compensation," and gave rise to a viable physical takings claim under *Cedar Point*. *Id.*

In this case, the Ninth Circuit came to an opposite conclusion. Contrary to the Eighth Circuit's decision in *Heights*, the court below held that an eviction prohibition could not give rise to a viable physical takings claim. Furthermore, the decision below split with the *Heights* court on the scope of *Yee*. While the Eighth Circuit narrowly read *Yee* as a "rent control" decision that did not apply to an eviction prohibition, the Ninth Circuit broadly construed *Yee* to preclude

physical takings claims levied against laws that "regulate the landlord-tenant relationship," including those that authorize an indefinite tenant occupancy. The Court should grant this case to resolve the conflict. *See Heights Apts., LLC v. Walz*, 39 F.4th 479, 482 (8th Cir. 2022) (Colloton, J., dissenting from denial of petition for rehearing en banc) ("Given the broad implications of the panel decision, and the conflicts in authority that the decision has generated, this proceeding involves questions of exceptional importance. . . . [T]he panel decision will live on as a circuit precedent at odds with decisions of the Supreme Court and other federal courts."); *Yee*, 503 U.S. at 526 (granting certiorari to resolve a "takings" conflict among the circuits).

B. The Decision Below Exacerbates a Conflict Among the Lower Courts

The Ninth Circuit's decision is not just in conflict with the Eighth Circuit. Lower courts have long wrestled with the issue of whether a government-compelled tenancy that results in an unwanted occupation of property is a taking. While some courts have held that a forced tenancy causes a taking under this Court's physical takings precedent, others have rejected this view. In refusing to find a taking in this case, the Ninth Circuit decision conflicts with the former decisions, and thus magnifies the long-running split among lower courts on whether this Court's physical takings precedent applies to eviction bans that force property owners to submit to a compelled tenancy.

1. Some courts have held that a government-authorized occupation of property by a tenant is a physical taking.

Over the last several decades, many state appellate courts have concluded that a law that forces a property owner to submit to an indefinite, unwanted tenancy is a per se taking under this Court's physical taking doctrine.[8]

For instance, the highest courts in the states of New York and Massachusetts have held that a compelled tenancy constitutes a physical taking under this Court's precedent. In *Seawall Assocs. v. City of New York*, 74 N.Y.2d 92, 104, *cert. denied*, 493 U.S. 976 (1989), the New York high court concluded that "[a]lthough the Supreme Court has not passed on the specific issue of whether the loss of possessory

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[8] Between 1986–2019, there were far fewer federal court cases than state court cases addressing whether a compelled tenancy violates the Takings Clause. This jurisdictional discrepancy is a consequence of this Court's 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), which held that federal takings claimants must pursue remedies in state court prior to resorting to federal courts. In 2019, the Court overruled *Williamson County*'s "state procedures" requirement, thus making federal courts as equally available for federal takings suits as state courts. *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2167 (2019). A few pre-*Williamson County* federal court decisions do address the eviction ban takings issue. *See, e.g.*, *Rivera v. R. Cobian Chinea & Co.*, 181 F.2d 974, 978 (1st Cir. 1950) (after invalidating anti-eviction law on due process grounds, court noted, "[f]or the Legislature to compel the plaintiff against his will to keep his property in the rental market and to prevent him from using it in his own personal business for the duration of the emergency would appear to be a 'taking'" (citation omitted)).

interests, including the right to exclude, resulting from tenancies coerced by the government would constitute a per se physical taking, we believe that it would."

To the same effect is *Polednak v. Rent Control Board of Cambridge*, 397 Mass. 854, 862 (1986). There, the plaintiff purchased a rented condominium, believing that she could live in it. When a local law interfered with the owner's plan to move in, the Massachusetts Supreme Judicial Court concluded that the law would violate the Constitution if it would "physically exclude her from living in her unit as owner, and would require that the unit be made available for physical occupation by a tenant. . . . [This] would be a taking for which she would be entitled to just compensation." *Id.*

In *Aspen-Tarpon Springs Ltd. P'ship v. Stuart*, 635 So.2d 61 (Fla. Dist. Ct. App. 1994), a Florida appellate court also held that a statute that forced mobile home park owners to acquiesce to indefinite tenant occupation of their property unless they buy the mobile homes was a taking. Relying largely on this Court's physical takings jurisprudence, the Florida court held that "the challenged statute authorizes a permanent physical occupation of the park owner's property and effectively extinguishes a fundamental attribute of ownership, the right to physically occupy one's land." *Id*. at 67–68.

On several occasions, California state courts have also concluded that laws barring rental owners from displacing a tenant so that they may house themselves or their family members constitutes a physical taking under this Court's precedent. *See Bakanauskas v. Urdan*, 206 Cal.App.3d 621, 627

(1988) (An eviction law that barred an owner from "occupy[ing] as a personal residence, while the benefits of the property as a residence could be enjoyed indefinitely by the tenant . . . would render the statute unconstitutionally confiscatory."); *Cwynar*, 90 Cal.App.4th at 654–55.

Cwynar is of particular note. There, rental property owners challenged a law that prohibited them from evicting tenants so that they could house themselves or their family members in their property. The owners claimed that the law caused "a per se physical taking because it effectively grants tenants lifetime tenancies in plaintiffs' buildings by depriving plaintiffs of their rights to both occupy their own property and to exclude others from their property so close family members may occupy it." *Id.* at 653.

The California Court of Appeals concluded that the *Cwynar* owners could establish a valid, "as-applied" physical takings claim by "showing that the challenged ordinance has the effect of compelling them to rent property or to refrain in perpetuity from terminating a tenancy." *Id.* at 655–56. In so doing, the *Cwynar* court distinguished *Yee*. In its view, "*Yee* addressed a narrow issue—*a facial challenge* to a purely economic rent control law" which "deprived [the owners] of the only mechanism they had to control the sale of a home located in their park, the ability to threaten to increase the rent for the mobile home pad." *Id.* at 656–57 (emphasis in original).

But "[i]n contrast to *Yee*, the [*Cwynar*] case involves an *as applied* challenge to a statute that expressly restricts a property owner's right to exclude others and to live in property that he or she owns." *Id.* at 657 (emphasis in original). That is, the owners'

"claim is that the challenged statute itself precludes owners from living in their own property by compelling them to rent property to someone else against their will." *Id.* at 657–58. The court explained that *Yee*

> did not expressly or implicitly overrule the line of authority we have already discussed recognizing that an eviction control ordinance may, under certain circumstances constitute a physical taking. To the contrary, the [*Yee*] Court acknowledged that a physical taking might be caused by a statute that . . . "compel[s] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy."

Id. at 657 (quoting *Yee*, 503 U.S. at 528).

The *Cwynar* court also rejected the claim that per se takings tests like that in *Loretto* are inapplicable to eviction bans because the decision to rent property is "voluntary." The California court stated that the

> question is not whether the property owner is a landlord by choice. The question is whether the regulation at issue authorizes a compelled permanent physical occupation of the landlord's property. The government must pay compensation when a regulation amounts to a physical taking whether or not the property at issue is owned by an individual who has chosen to be a landlord.

Id. at 659. In short, "the fact that the property was voluntarily rented at some time in the past does not preclude the plaintiffs from pleading and proving government coercion" created an unwanted tenant

occupancy. *Id.* at 658. *See also id.* at 659 ("[P]laintiffs' status as voluntary landlords does not preclude them from establishing that [the law], as applied to them, effects a permanent physical taking of the portions of their property that they are precluded from occupying.").

Finally, in *Cwynar*, the California Court of Appeals rejected the argument that a forced tenancy could not be a taking if the owners have the option to take their property off the rental market. The court concluded that "*Yee* does not support the proposition that the option of leaving the rental market altogether is a cure-all mechanism for government coercion." *Id.* at 657.

The Ninth Circuit decision cannot be squared with the foregoing state court decisions. The conflict is particularly striking in relation to the California appellate decision in *Cwynar*. As detailed above, *Cwynar* held that physical takings precedent governs the issue of whether a ban on evictions designed to house family members is a taking. The Ninth Circuit, in contrast, flatly held that physical takings tests do not apply. *Cwynar* narrowly construed *Yee* and held it inapplicable to laws that authorize an indefinite tenancy at the expense of the owners' right to exclude. The decision below broadly construed *Yee* and concluded that it defeats a claim against a forced tenancy. The *Cwynar* court held that the initial voluntary act of renting property does not preclude a takings claim if a law later turns a tenancy into an indefinite, compelled one. On the other hand, in this case, the Ninth Circuit held that an initial voluntary rental decision (by a prior owner) barred the Owners

from asserting that the City's decision to indefinitely continue the tenancy is a per se physical taking.

Of course, the Ninth Circuit's jurisdiction includes the state of California. Given the conflict between the *Cwynar* court and the Ninth Circuit on whether a taking arises from an eviction prohibition that prevents a property owner from housing a family member, California rental owners have very different constitutional rights depending on whether their rights are considered in a state or federal court. In federal court, *Yee* effectively immunizes the government from any takings liability for forcing property owners to submit to an unwanted, indefinite tenancy that prevents the owner from personally using the property. App.3a. Meanwhile, in state court, *Yee* is inapplicable to this type of controversy, and it is instead governed by physical takings precedent like *Loretto*. *Cwynar*, 90 Cal.App.4th at 657–58.

2. Other courts hold that an eviction ban resulting in a compelled tenancy is not a taking.

To be sure, not all lower court decisions are in tension with the Ninth Circuit on the issue of whether a government-compelled tenancy is a taking. Some agree with the decision below in holding that a forced tenancy is not a physical taking.

In *Gonzales v. Inslee*, 21 Wash.App.2d 110, 135 (2022), a Washington state appellate court considered whether a COVID-19-based eviction moratorium was a taking. The court found that "this case is similar to *Yee* and is dissimilar to *Cedar Point Nursery*. As in *Yee*, the eviction moratorium did not require the appellants to submit to the physical occupation of

their property. Instead, the appellants were the ones who invited their tenants to occupy their rental property." *Id.* at 136. "The proclamations merely operated to 'regulate [appellants'] use of their land by regulating the relationship between landlord and tenant.'" *Id.* at 137 (quoting *Yee*, 503 U.S. at 528). Therefore, the Washington court held that "the eviction moratorium did not constitute a physical per se taking." *Id.* Similarly, in *State Agency of Development and Community Affairs v. Bisson*, 161 Vt. 8, 15 (1993), the Vermont Supreme Court rejected the allegation that a mobile home statute that restricted evictions and effectively created a perpetual lease violated the Takings Clause.

Several federal courts have also held that no physical taking arises from an eviction prohibition causing an unwanted, indefinite tenancy. In *Harmon v. Markus*, 412 F.App'x at 422, the Second Circuit held that *Yee* defeated a takings claim against eviction barriers causing an indefinite tenant occupation. The court held that the owners could not state a physical takings claim because they "acquiesced in [the property's] continued use as rental housing" by purchasing rented property. *Id.* (citation omitted).

More recently, in *Gallo v. District of Columbia*, No. 1:21-cv-03298, 2022 WL 2208934 (D.D.C. June 21, 2022), and *Williams v. Alameda County*, Nos. 3:22-cv-01274-LB, 3:22-cv-02705-LB, 2022 WL 17169833 (N.D. Cal. Nov. 22, 2022), two federal district courts rejected takings claims levied against COVID-based restrictions on a property owner's right to evict renters. In both cases, the district courts concluded that the physical takings analysis in *Loretto* and *Cedar Point* was inapplicable to an eviction

prohibition, primarily on the basis of *Yee*. Further, in *Gallo* and *Williams*, the district courts expressly declined to follow the Eighth Circuit's decision in *Heights* (discussed above). While the *Gallo* court admitted that "portions of *Cedar Point* appear to conflict with *Yee*," it concluded that *Heights* misconstrued *Yee*, reading it too narrowly. 2022 WL 2208934, at *9–10 & n.6. The *Gallo* court was "unconvinced" by *Heights* that *Cedar Point*, rather than *Yee*, controlled the issue of whether an eviction ban is a taking. The district court in *Williams* then followed *Gallo*'s refusal to adopt the *Heights* court's analysis. 2022 WL 17169833, at *11; *see also*, *Elmsford Apt. Assocs.*, 469 F.Supp.3d at 163.

The foregoing summary gives rise to several important conclusions. First, in concluding that no taking arises from Los Angeles' decision to deny the Owners' attempt to evict a tenant for a family move-in, the decision below sides with courts that have rejected eviction-ban takings challenges and against other courts finding that such bans create a taking. The Ninth Circuit's decision thus increases the conflict among the lower courts on the issue of whether an eviction prohibition that compels an indefinite tenant occupation is governed by physical takings precedent, like *Loretto* and *Cedar Point*, or by the rent control analysis in *Yee*. Second, the federal court conflict on this issue is growing and now centered on the *Heights* decision. *See Heights*, 39 F.4th at 480 (Colloton, J., dissenting from denial of petition for rehearing en banc). The conflict among the courts on whether physical takings precedent governs a compelled tenancy is thus ripe for resolution. The Court should grant the Petition to resolve the confusion.

"[T]he protection of private property is indispensable to the promotion of individual freedom," and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Cedar Point*, 141 S.Ct. at 2071 (quoting *Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017)). A property owner's right to end a tenancy to house his own family members in residential property is a longstanding aspect of free property ownership. Although this Court's physical takings precedent, and many lower court decisions, indicate that a taking results when government forces a property owner to accept a stranger's indefinite occupation of property, the Ninth Circuit decision holds otherwise. The Court should grant the Petition to explicitly hold that a law that compels an owner to submit to an unwanted and indefinite tenant occupation of property, in derogation of the owner's right to exclude and right to use property, is a physical taking.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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Respectfully submitted,

FRANK REVERE
Revere & Wallace
355 S. Grand Ave.
Suite 2450
Los Angeles, CA 90071
Telephone: (213) 943-1333
frank@reverelawfirm.com

J. DAVID BREEMER*
**Counsel of Record*
DEBORAH J. LA FETRA
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
JBreemer@pacificlegal.org
DLaFetra@pacificlegal.org

Counsel for Petitioners