NO. 22-739

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

BRIEF OF AMICI CURIAE SAN FRANCISCO APARTMENT ASSOCIATION AND CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), the SAN FRANCISCO APARTMENT ASSOCIATION ("SFAA") and the CALIFORNIA APARTMENT ASSOCIATION ("CAA") submit this amici curiae brief in support of Petitioners David Kagan, Judith Kagan, Frank Revere, and Rachel K. Revere.[1]

SFAA, founded in 1917, is a full-service, non-profit trade association of persons and entities who own residential rental properties in San Francisco. SFAA currently has more than 2,800 active members. SFAA and its members have a strong interest in preserving their constitutional rights with respect to real property they own or manage in San Francisco. As part of its mission, SFAA engages in public interest litigation to insure the protection of private property rights in San Francisco through legislative court advocacy and litigation. The regulation challenged in this case is like regulations in San Francisco. Therefore, the Ninth Circuit's reading of *Yee* may have an impact on the validity of San Francisco's regulations as well.[2]

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[1] Pursuant to this Court's Rule 37.2(a), all parties have received timely notice of Amici Curiae's intent to file this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *See*, Fed. R. App. P. 32.1

CAA is the largest statewide rental housing trade association in the country, representing more than 50,000 rental property owners and operators who are responsible for nearly two million rental housing units throughout California. CAA's mission is to promote fairness and equality in the rental of residential housing, and to promote and aid in the availability of high-quality rental housing in California. CAA represents its members in legislative, regulatory, judicial, and other state and local fora. Many of its members are in Los Angeles and are subject to the regulation challenged herein. Moreover, the analysis that the Ninth Circuit has adopted in this case will have likely impacts for small property owners and mom and pop housing providers through similar regulations throughout the State of California.

SUMMARY OF ARGUMENT

This case presents yet another misguided appellate decision expanding the scope and breadth of this Court's holding in *Yee v. City of Escondido*, 530 U.S. 519 (1992). The lower courts' overly broad extension of *Yee* continues to bring harm to property owners, such as Amici's members, throughout California and the Ninth Circuit. In *Yee,* this Court held that a challenge to a purely economic rent control regulation was more appropriately analyzed under regulatory takings, rather than physical takings, jurisprudence. Like the Ninth Circuit here, some courts—not all—have since interpreted this relatively narrow holding of *Yee* to broadly prohibit *any* physical takings challenge to a regulation that generally involves a landlord-tenant

relationship. But this is an incorrect reading of *Yee*, which holds the opposite. This Court's holding in *Yee* expressly reserves a housing provider's right to bring a physical takings challenge to a landlord-tenant regulation that compels physical occupancy.

Lower courts' continued flawed application of *Yee* has enabled multiple local jurisdictions throughout California to repeatedly undercut landlords' property rights by blocking their fundamental right to possess and occupy their own properties. San Francisco and other local jurisdictions enforce laws similar to Los Angeles's here. Covid-related eviction moratoria persist, even despite the end of the Covid-19 emergency, in part on courts' misunderstanding of the scope of *Yee*. Should this Court not intervene to clarify that its decision in *Yee* reserved owners' rights to bring a physical takings challenge to a regulation such as is at issue here, local government will continue to degrade the most essential right in the bundle of sticks of property ownership: the right to exclude. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S.Ct. 2485, 2489 (2021) ("preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude.")

ARGUMENT

I. THE NINTH CIRCUIT'S MISAPPLICATION OF *YEE V. CITY OF ESCONDIDO*, 530 U.S. 519 (1992) WILL RESULT IN CONTINUED ENFORCEMENT OF REGULATIONS THAT UNLAWFULLY DEPRIVE OWNERS OF THE RIGHT TO OCCUPY THEIR PROPERTIES.

The Ninth Circuit here erroneously applied the holding of *Yee v. City of Escondido*, 530 U.S. 519 (1992) to Petitioners' physical takings challenge to a regulation that sanctions compelled physical occupancy. As explained in the petition, *Yee* is distinguishable from this case because it involved a challenge to a rent control regulation, not to one that compelled a permanent physical invasion. And contrary to the Ninth Circuit's holding, the distinction between these two types of regulations in the takings context was recognized by *Yee*, as well as several other federal and state courts. Per these decisions, regulations on rent control should be analyzed under the regulatory takings doctrine, and regulations that compel physical occupancy are properly analyzed under the physical takings doctrine. *Heights Apartments, LLC*, *v. Waltz,* 30 F.4th 720, 734 (2022) *Cwynar v. City of San Francisco*, 90 Cal.App.4th 637, 657 (2001), *Yee,* 530 U.S. at 528.

The Ninth Circuit erroneously held here that a landlord-tenant regulation can *never* result in a physical taking. This Court's clarification of this distinction is crucial to the rights of property owners in the Ninth Circuit. If the Ninth Circuit's faulty application of *Yee* is upheld, local governments throughout

California will continue to unlawfully degrade owners' rights to occupy their own properties.

Los Angeles is not the only jurisdiction that prevents owners from occupying their properties in favor of tenants. Like Los Angeles, San Francisco forbids landlords from terminating tenancies for the purpose of owners occupying their properties if the tenant has a protected status under that regulation.[3] San Francisco Admin. Code §§ 37.9(a)(8), 37.9(i). Moreover, even when the tenant is not protected, San Francisco regulations limit any termination of tenancy for an owner's occupancy to *one* unit (the same unit), in perpetuity. San Francisco Admin. Code § 37.9(a)(8)(vi). In other words, once a tenancy has been terminated in a building for an owner, no other units may ever be recovered for an owner's use—regardless of whether the initial, designated owner's unit recovered is vacant or not. *Id.* Further, San Francisco regulations forbid any termination of a tenancy to permit an owner's relative (including one's children, parents and grandparents) to move into their property unless the owner themself lives there too as their permanent residence. San Francisco Admin. Code § 37.9(a)(8)(ii). San Francisco landlords are subject to civil and criminal penalties, including jailtime, for noncompliance.

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[3] Similar to the Los Angeles regulation at issue, a tenant is protected under San Francisco's regulation when they are disabled, ill, or over the age of 60 years old and have occupied the property for ten years or more. San Francisco Admin. Code § 37.9(i). This ten-year occupancy requirement is shortened to five-years if a tenant is "catastrophically" ill. Tenants are also protected under the regulation if they are under 18, or work as an "educator" (broadly defined) and the notice of termination of tenancy is served during the school year.

See, *e.g.*, San Francisco Admin. Code §§ 37.9(f); 37.10A(h), (j) ; 37.11A.

These laws endure notwithstanding *Cwynar v. City of San Francisco* 90 Cal.App.4th 637 (2001), where the California Court of Appeal determined these San Francisco regulations could effectuate a physical taking of property under this Court's historic jurisprudence. The Court in *Cwynar* considered the San Francisco regulations in the context of both a physical taking challenge and a regulatory taking challenge. *Cwynar,* 90 Cal.App.4th at 644-645, 653-667. Like Los Angeles does here, the city in *Cwynar* claimed that, under the *Yee* Court's analysis, the San Francisco regulations were insulated from a physical takings challenge because the landlords "voluntarily rented their property" to the tenant protected by the regulation. *Cwynar,* 90 Cal.App.4th at 655. But the *Cwynar* court rejected that argument, noting the scope of *Yee* was limited to challenges made to "a purely economic rent control law." *Cwynar,* 90 Cal.App.4th at 657. "In contrast to *Yee*" the *Cwynar* Court explained, the San Francisco regulation at issue "expressly restricts a property owner's right to exclude others and to live in property that he or she owns." *Ibid.* The Court in *Cwynar* further opined that:

> The *Yee* court 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 court acknowledged that a physical taking might be caused by a statute that, on its face or as applied, "compel[s] a landowner over objection to rent his property or to refrain in

> perpetuity from terminating a tenancy." (*Yee, supra,* 503 U.S. at p. 528 [112 S.Ct. at p. 1529].)

Cwynar, 90 Cal.App.4th at 657. Moreover, although a portion of *Cwynar's* analysis on regulatory takings was later abrogated by this Court's holding in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528,[4] the *Cwynar* Court's analysis on whether San Francisco's regulation was a physical taking, and it's related discussion of *Yee,* remains undisturbed by this Court. The same analysis of *Yee* was most recently confirmed by the Eighth District in *Heights Apartments, LLC v. Waltz,* 30 F.4th 720, 733 (2022), which also found a distinction between a challenge to a rent control regulation, and to one that prevented eviction altogether. The former was not subject to a physical takings analysis, but the latter was. *Heights Apartments, LLC,* 30 F.4th at 733.

Despite *Cwynar* and *Heights Apartments*, continued confusion about the reach of *Yee* remains, which is at least, in part, a catalyst for these onerous local regulations persisting. In addition to Los Angeles and San Francisco, multiple other jurisdictions throughout California enforce regulations that prevent landlords from occupying their own properties. *See*, *e.g.*, Berkeley Municipal Code § 13.76.130 (A)(9)(l); Oakland Municipal Code § 8.22.360(9)(e); Santa Monica Municipal Code § 1806(a)(8)(vii).

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[4] The *Cwynar* Court relied on this Court's regulatory takings standard set forth in *Agins v. City of Tiburon*, (1980) 447 U.S. 255, which required a showing that the regulation at issue "substantially advances" legitimate state interests. *Lingle* later overruled that test, finding it more appropriate for a due process inquiry. *Lingle v. Chevron U.S.A. Inc.* 544 U.S. 528, 540 (2005).

Local eviction moratoria also persist on this basis. *See*, Oakland City Council Ordinance No. 13606, Sec. 3; Alameda County Code of Ordinances § 6.120.030; *also see*, San Francisco Administrative Code § 37.9(a)(1)(E). San Leandro has gone so far to extend its non-payment eviction moratorium *after* lifting its local Covid-19 emergency.[5]

Flawed reliance on *Yee* in the compelled-physical-invasion context is also seen in several recent court decisions analyzing eviction moratoria enacted in response to Covid-19. *E.g.*, *California Apartment Association v. Alameda Cnty.,* No. 3:22-cv-02705-LB, 2022 WL 17169833, (N.D. Cal. Nov. 22, 2022), *Williams v. Alameda Cnty.,* No. 3:22-CV-01274-LB, 2022 WL 17169833, (N.D. Cal. Nov. 22, 2022) (Collectively "CAA/Williams"); *Farhoud v.* Brown, No. 3:20-CV-2226-JR, 2022 WL 326092, at *10 (D. Or. Feb. 3, 2022); *Jevons v. Inslee*, 561 F.Supp.3d 1082, 1106 (E.D. Wash. 2021), *Baptiste v. Kennealy*, 490 F.Supp.3d 353, 388 (D. Mass. 2020).

In *CAA/Williams*, for example, the district court recently upheld local Covid-19 eviction moratoria that are ongoing in Alameda County and Oakland that prevent *virtually all evictions*. *CAA/Williams*, 2022 WL 1716983. This unprecedented decision is in part erroneously grounded in the holding of *Yee*, which the district court determined foreclosed any physical takings claim solely based on the fact that the regulations addressed the landlord tenant relationship. *CAA/Williams*, 2022 WL 17169833 *11-12.

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[5] San Leandro ordinance extending eviction moratorium, https://sanleandro.legistar.com/View.ashx?M=F&ID=11646651&GUID=32752451-6EB6-4C16-8A0A-BD9CE4A64E98

The effect of the district court's faulty application of *Yee* in *CAA/Williams* has been injurious to landlords throughout Alameda County and Oakland. The moratoria not only prevent hundreds of landlords from occupying their own properties, but also sanction compelled physical occupancy even when tenants breach their leases by failing to pay rent and notwithstanding a lack of *any* Covid-19 based hardship.

For example, housing provider Stephen Lin, a plaintiff in *CAA/Williams,* owns a rental condominium in Alameda County. *See*, Amici's Letter (Supreme Court Rule 32.3). Lin's tenants stopped paying rent in July 2021 and have not paid anything since. They have refused to cooperate with the state's rental relief program. Even worse, the tenants have damaged the property and refuse Plaintiff Lin's entry to the unit. Notwithstanding, the district court's erroneous application of *Yee* to the moratoria, which forecloses any physical takings claim, prevents Plaintiff Lin from either recovering possession of his property, or being compensated for the compelled occupancy.

Housing provider Robert Vogel, who is semi-retired and a disabled paraplegic, is a landlord in Alameda County whose tenant quit paying rent as soon as the moratoria were enacted, almost three years ago. *See*, Amici's Letter (Supreme Court Rule 32.3). Vogel's property was his primary source of retirement income. As a result of Alameda's compelled physical invasion of his single-family home, Vogel has struggled to make mortgage payments and his meager retirement savings are dwindling.

Housing provider Jacqueline Watson-Baker's tenant also stopped paying rent as soon as the local Covid-19 moratoria went into effect. *See*, Amici's Letter

(Supreme Court Rule 32.3). Not only did the tenant stop payment, but he threatened Watson-Baker, called her racist names, and destroyed her property. Despite so, her hands were tied; the moratoria prevent eviction and the district court's finding that such compelled occupancy falls outside the realm of the physical takings doctrine via *Yee* wrongfully insulates local government from liability for this ongoing harm.

These are but a few examples of the extreme hardships the misapplication of *Yee* has caused, and will continue to cause, if not corrected by this Court. For these reasons and as is further detailed below, the Court should grant certiorari to clarify *Yee* once and for all. Such intervention is crucial to prevent further erosion of owners' basic right to exclude, and to place appropriate limits on government's right to compel physical occupation of rental property.

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT *YEE V. CITY OF ESCONDIDO*, 530 U.S. 519 (1992) DOES NOT PRECLUDE PHYSICAL TAKINGS CHALLENGES TO ALL LANDLORD-TENANT REGULATIONS.

The Court in *Yee* held that a physical takings analysis was inappropriate in the context of a purely economic challenge to rent control. *Yee,* 530 U.S. at 527-528. However, the Court did *not* foreclose all physical takings challenges to regulations that address landlord-tenant relationships—the Court in fact specifically carved out that right. *Yee,* 530 U.S. at 528. Regrettably, the Ninth Circuit's unsupported decision here is yet another in a series of state and federal decisions that extend the holding of *Yee* contrary to this Court's precedent. This factor alone warrants the grant of certiorari. Supreme Court Rule 12(a).

Relying on *Yee*, the Ninth Circuit held here that the subject regulation, which forbids Petitioners from occupying their own property, did not amount to an unlawful physical taking simply because Petitioners voluntarily rented their land. This analysis is flawed. The *Yee* Court did not hold that the *sole act* of voluntarily renting one's land amounts to a permanent waiver of the right to assert physical takings claim. In fact, *Yee* did not even analyze the ordinance at issue in that case under the physical takings doctrine. Rather, the Court in *Yee* noted that the landlord's argument against the rent control ordinance, "cannot be squared easily with our cases on physical takings." *Yee,* 530 U.S. at 528. Instead, a purely economic challenge to rent control was "perhaps within the scope of [the Court's] regulatory takings cases" in which the Court engages "in the 'essentially ad hoc, factual inquires' necessary to determine whether a regulatory taking has occurred." *Yee,* 530 U.S. at 527, 529 quoting *Kaiser Aetna v. United States*, 444 U.S 164, 175 (1979).

And while the *Yee* Court rejected a physical takings analysis in the context of rent control, it specifically distinguished between a challenge to a rent control regulation versus a regulation that compelled a tenant's physical occupation:

> A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.

Yee, 530 U.S. at 528; *also see*, *Heights Apartments, LLC*, 30 F.4th at 733. In such a case, the Court held, "the Takings clause requires compensation if the gov-

ernment authorizes a compelled physical invasion of property." *Yee,* 530 U.S. at 527.

The regulation at issue here, which provides that "[a] landlord *may not recover possession of a rental unit*" for her own use, is precisely the type of government regulation that *Yee* reserved for a physical takings challenge. Los Angeles Municipal Code § 151.30(D)(1), emph. add. That is, the Los Angeles law both "compels a landowner over objection to rent his property" and "compels a landowner over objection . . . to refrain in perpetuity from terminating a tenancy." *Yee,* 530 U.S. at 528.

To hold otherwise, as the Ninth Circuit did here, not only violates the principles set forth in *Yee*, but also this Court's well-established case law on physical takings. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2072 (2021) (stating the "right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'" quoting *Kaiser Aetna*, 444 U.S. at 179–80; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *Alabama Ass'n of Realtors,* 141 S.Ct. at 2489.

This Court should grant review to clarify that the scope of *Yee's* rejection of a physical taking analysis in the landlord-tenant realm was limited *only* to those challenges to rent control regulations—not to those that eliminate the right to exclude and sanction compelled physical occupation of rental housing units.

CONCLUSION

The Court should grant certiorari and use this case as an opportunity to clarify the proper scope of *Yee v. City of Escondido*, 530 U.S. 519 (1992) relative to physical takings challenges to regulations that affect a physical occupation within the landlord-tenant relationship.

Respectfully submitted,

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