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

BRIEF OF *AMICUS CURIAE* APARTMENT ASSOCIATION OF LOS ANGELES COUNTY, INC. DBA APARTMENT ASSOCIATION OF GREATER LOS ANGELES IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Founded in 1917, *Amicus Curiae* Apartment Association of Los Angeles County, Inc. dba Apartment Association of Greater Los Angeles ("AAGLA") is a California non-profit association comprised of over 10,000 members who own and/or manage over 250,000 rental housing units throughout the counties of Los Angeles, Ventura, and San Bernardino. AAGLA's mission is to provide the tools and resources to improve real estate management and operations in order to help its members provide safe housing and to ensure fair returns on their investments. For more than 100 years, AAGLA has been advocating for the protection of property rights on behalf of its members and the rental housing industry at the local, state, and federal levels of government.

This case raises issues of significant interest to AAGLA and its members. AAGLA's membership and demographic makeup is as diverse as the surrounding Los Angeles area, and approximately 80% of AAGLA's members may appropriately be characterized as "mom and pops," owning five or fewer units. Accordingly,

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[1] Pursuant to this Court's Rule 37.2(a), *Amicus Curiae* affirms that the parties, through their respective counsel, have been provided with timely notice of intent to file this brief. Pursuant to Rule 37.6, no party, or counsel for any party, authored this brief in whole in or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *Amicus Curiae*, and its members, or its counsel have made a monetary contribution to this brief's preparation or submission.

many of AAGLA's members may occasionally wish to withdraw their units from the rental market so that, for example, family or friends can move in. Thus, AAGLA and its members have a unique and vital interest in this case, given that many of its members are subject to the regulation challenged herein.

SUMMARY OF ARGUMENT

Thirty years ago, this Court inadvertently let a genie out of a bottle. In deciding *Yee v. City of Escondido*, 503 U.S. 519 (1992)—a case involving relatively narrow questions of law and saturated with nuance and complexity—the Court concluded in part that because the petitioners there voluntarily chose to rent their property to mobile home owners, they could not later claim that a physical taking occurred when challenging a rent control regulation. *Id.* at 527–28.

The Court's brief statements in *Yee* regarding the petitioners' voluntary choice to rent their property have led some courts to believe that an apparent qualification exists to physical takings liability, an "open-door" exception predicated on the idea that once a landlord invites tenants onto their property, then they cannot later complain of a physical taking where laws regulate the ensuing landlord-tenant relationship. But *Yee* was ultimately a case about rent control, and the exception—if there even is one—should have remained cabined to the narrow confines of that decision's unusual facts.

Decades later, the seeds planted in *Yee* are bearing bitter fruit. As time marched on, lower courts have seized upon *Yee*'s language regarding voluntariness to dramatically expand the decision's

scope. Within the last three years especially, lower courts have cited *Yee* to uphold novel and drastic regulations, up to and including laws allowing for indefinite occupation of property by nonpaying tenants—*i.e.*, eviction moratoria.

Not all courts have embraced *Yee* as the Ninth Circuit did here. Indeed, the Eighth Circuit in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), applied physical takings principles as reaffirmed in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), in reviewing a challenge to a COVID-related eviction moratorium, affirmatively rejecting an argument that *Yee* controlled. The circuit split as to *Yee*'s applicability is only bound to grow as additional cases wend their way through the courts.

The petition for certiorari should be granted.

ARGUMENT

A. IT IS TIME TO CLOSE THE DOOR ON ANY INTERPRETATION THAT *YEE* CREATED AN "OPEN-DOOR" EXCEPTION TO TAKINGS LIABILITY

The district court below understood *Yee* to bluntly hold that the rent control ordinance there "did not require landowners to submit to the physical occupation of their property because they had 'voluntarily rented their land.'" Pet. App. 12a (quoting *Yee*, 503 U.S. at 528). In other words, because the petitioners in *Yee* "opened the door" to tenants, subsequent regulation of the ensuing landlord-tenant relationship is immunized from physical takings liability. So, the story goes, the petitioners here failed to state a physical takings claim because they "invited

the tenants onto the property," rather than to have suffered the government "forc[ing] the tenants upon the[m]." Pet. App. 12a.

Over time, courts have greatly expanded the "open-door" theory to reject claims of liability, such that it now threatens to swallow the rule as reaffirmed in *Loretto v. Teleprompter Manhattan CATV Corp.*—itself a physical takings case that arose in the landlord-tenant context. 458 U.S. 419 (1982). Subsequent readings of *Yee* by state and federal courts have misunderstood the opinion as fabricating an escape hatch for local and state regulations affecting landlord-tenant relationships, wrongly placing imprimatur on laws that approximate physical occupation itself, as this case and others show.

Some brief background is in order. Recall that in *Yee*, this Court was asked to consider a relatively narrow challenge to a local ordinance that, on its face, was limited to controlling rents for mobile home communities. *Yee*, 503 U.S. at 524. Petitioners' argument was nuanced and complex, claiming that the local ordinance, when considered in light of a state law that was not challenged, effected a physical taking because of the "unusual economic relationship" between park and mobile home owners—*i.e.*, a bilateral monopoly whereby mobile home owners cannot realistically move their chattel housing, and park owners cannot force the removal of the home nor control the identity of subsequent purchasers. *Id.* at 526–27. Thus, it was claimed, "the rent control ordinance transferred a discrete interest in land—the right to occupy the land indefinitely at submarket rent—from the park owner to the mobile home owner."

Id. at 527. This Court rejected the argument, holding that such claims are more properly cognizable as regulatory as opposed to physical takings. *Id.* Importantly here, *Yee* contained two references to the voluntary nature of petitioners' behavior, namely, that the petitioners "voluntarily rented their land to mobile home owners," and that petitioners' tenants "were invited by petitioners, not forced upon them by the government"—in other words, petitioners "opened the door" to tenants thereby forfeiting the right to challenge subsequent rent control regulation on physical takings grounds. *Id.* at 527, 528.

The limited nature of *Yee*'s voluntariness language is plain and can hardly be said to create a bright-line exception. In *Yee*, the Court discussed features separating permissible economic regulations from laws that operate as physical takings: "'The line which separates [*FCC v. Florida Power Corp.*, 480 U.S. 245 (1987)] from *Loretto* is the unambiguous distinction between a . . . lessee and an interloper with a government license.'" *Yee*, 503 U.S. at 532. The *Yee* Court did not disturb *Loretto*. *Loretto*, though, was a case involving a landlord-tenant relationship. Thus, if *Yee* truly contained a broad exception to physical takings liability based on a landlord opening the door to tenants, then *Yee* would have necessarily rendered *Loretto* dead letter. It did not. *See Cedar Point*, 141 S. Ct. at 2073.

Nevertheless, in one of the first decisions applying *Yee*, a New York trial court held that a challenge to an ordinance requiring certain lease renewal features for not-for-profit hospital tenants was not a physical taking because "regulation of a

landlord-tenant relationship voluntarily entered into by the owner, and not forced upon it by the government, . . . lacks the 'required acquiescence' which 'is at the heart of the concept of occupation.'" *Manocherian v. Lenox Hill Hosp.*, 586 N.Y.S.2d 726, 732 (N.Y. Sup. Ct. 1992) (quoting *Yee*, 503 U.S. at 527). The New York Court of Appeals followed suit in *Rent Stabilization Ass'n of New York City, Inc. v. Higgins*, in which the court held that regulations expanding the class of persons entitled to succeed to rent-controlled apartments did not constitute a physical taking because of the "owner's voluntary acquiescence in the use of its property for rental housing." 83 N.Y.2d 156, 172 (N.Y. 1993). Three years later, the Second Circuit Court of Appeals considered another challenge to New York City's Rent Stabilization Law, finding that application of the law to previously exempt housing did not constitute a physical taking. *Fed. Home Loan Mortg. Corp. v. New York State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47–48 (2d Cir. 1996). The Second Circuit's justification for upholding the law was predicated in part on the idea that "where a property owner offers property for rental housing, . . . government regulation of the rental relationship does not constitute a physical taking." *Id.*

Case law citing *Yee* initially remained cabined to addressing challenges to rent control ordinances, with courts interpreting *Yee* to uphold a relatively narrow class of laws under the open-door theory. *See, e.g.*, *Sandpiper Mobile Vill. v. City of Carpinteria*, 12 Cal.Rptr.2d 623 (Cal. Ct. App. 1992) (mobile home rent control); *Mobile Home Vill., Inc. v. Twp. of Jackson*, 634 A.2d 533 (N.J. Sup. Ct. 1993) (same); *Guimont v. Clarke*, 854 P.2d 1 (Wash. 1993) (mobile

home relocation assistance on park closure); *Margola Assoc. v. City of Seattle*, 854 P.2d 23 (Wash. 1993) (en banc) (rental registry); *Greystone Hotel Co. v. City of New York*, 13 F.Supp.2d 524, 526 (S.D.N.Y. 1998) (rent stabilization ordinance requiring transient hotel to grant leases to permanent tenants at lower rates than transient occupancy).

But eventually, "mission creep" set in. *Yee*'s footprint, once limited predominantly to rent control ordinances, began to expand. In 2001, the D.C. Circuit read *Yee* to preclude on the open-door theory a challenge by property owners to a F.C.C. rule invalidating lease restrictions on tenant installation of satellite equipment because of apparently "extensive case law upholding the government's authority to regulate various aspects of the landlord-tenant relationship." *Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 98 (D.C. Cir. 2001) (citing *Yee*, 503 U.S. 519; *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)). Despite *Yee*'s relatively narrow nature, the D.C. Circuit nevertheless believed that this Court had broadly "rejected the contention that regulation of the terms of a landlord-tenant relationship constitutes on its face an invasion of the landlord's right to exclude." *Bldg. Owners*, 254 F.3d at 99 (citing *Yee*, 503 U.S. at 527–28).

In 2014, the Ninth Circuit's now-defunct decision in *Horne v. U.S. Department of Agriculture*, 750 F.3d 1128, 1142 (9th Cir. 2014), likewise cited *Yee* to support its reasoning. There, the Ninth Circuit stated:

> At bottom, the reserve requirement is a use restriction applying to the Hornes insofar as they *voluntarily choose* to send their raisins into the stream of interstate commerce. The Secretary did not authorize a forced seizure of the Hornes' crops, but rather imposed a condition on the Hornes' use of their crops by regulating their sale. . . . *Yee v. City of Escondido*, 503 U.S. 519, 527–28 (1992) (holding municipal regulation of a mobile home park owners' ability to rent did not work a taking *where park owners voluntarily rented their land and thus acquiesced in the regulation*); *cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) ("a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking").

Horne, 750 F.3d at 1142 (emphasis added).

On appeal, this Court roundly rejected reliance on the open-door theory: "The Government contends that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market. . . . In any event, the Government is wrong as a matter of law." *Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015).

As with many other aspects of American life, the COVID-19 pandemic brought with it a sea change in jurisprudence as lower courts revivified old doctrines and shoehorned them to fit a purported

current need. So, too, for *Yee*, which found renewed vigor in 2021. A flurry of state and federal actions in lower courts around the country have inappropriately relied upon *Yee*'s open-door theory to uphold novel and drastic restrictions on landlord-tenant relationships. Many of these recent decisions involve COVID-related eviction moratoria:

- *Jevons v. Inslee*, 561 F.Supp.3d 1082, 1106 (E.D. Wash. 2021), *appeal docketed*, No. 22-35050 (9th Cir. Jan. 18, 2022); Regarding eviction moratorium: "In this case, just as in *Yee*, Plaintiffs voluntarily invited tenants to occupy their properties as residential homes."
- *S. Cal. Rental Hous. Ass'n v. Cnty. of San Diego*, 550 F.Supp.3d 853, 865 (S.D. Cal. 2021); Eviction moratorium: "Unlike an invasion of property by an uninvited guest, the landlords here have solicited tenants to rent their properties, and the Ordinance simply regulates landlords' relationship with tenants."
- *Farhoud v. Brown*, No. 3:20-CV-2226-JR, 2022 WL 326092, at *10 (D. Or. Feb 3, 2022); Eviction moratorium: "Like the park owners in *Yee*, Plaintiffs here voluntarily invited their tenants onto their property."
- *Rental Hous. Ass'n v. City of Seattle*, 512 P.3d 545, 558 (Wash. Ct. App. 2022); Eviction moratorium: "This case is more analogous to *Yee* than to *Cedar Point*

Nursery. The Landlords voluntarily invited the tenants to live in their homes and the ordinances regulate a landlord-tenant relationship that has already been established by the parties."

- *Gallo v. District of Columbia*, 610 F.Supp.3d 73, 88 (D.D.C. 2022); Eviction moratorium: "The District's laws do not force Gallo to give anyone access to his property that he did not invite. So he does not suffer the same infringement on his right to exclude as the growers in *Cedar Point*."
- *Pakdel v. City & Cnty. of San Francisco*, No. 17-CV-03638-RS, 2022 WL 14813709, at *5 (N.D. Cal. Oct. 25, 2022); Lifetime lease requirement to tenants on condominium conversion: "The common thread that runs through these landlord-tenant cases is the notion that a *per se* physical taking has not occurred because the element of 'required acquiescence' is absent. In other words, unlike instances in which the government has required a property owner to submit to occupation by the government or a third party, a landlord has *voluntarily* invited a tenant to occupy their land."
- *Ballinger v. City of Oakland*, 24 F.4th 1287, 1293 (9th Cir. 2022), *cert. denied* 142 S. Ct. 2777 (2022); Substantial relocation fees: "Here, the Ballingers voluntarily chose to lease their property

and to 'evict' under the Ordinance—conduct that required them to pay the relocation fee, which they would not be compelled to pay if they continued to rent their property."

- *GHP Mgmt. Corp. v. City of Los Angeles*, No. CV-21-06311-DDP, 2022 WL 17069822, at *3 (C.D. Cal. Nov. 17, 2022), *appeal docketed*, No. 23-55013 (9th Cir. Jan. 6, 2023); Eviction moratorium: "'Put bluntly, no government has required any physical invasion of petitioners' property. [The] tenants were invited by [the landlords], not forced upon them by the government.' . . . . A regulation affecting that pre-existing relationship is not a per se taking."
- *Williams v. Alameda Cnty.*, Nos. 3:22-CV-01274-LB, 3:22-CV-02705-LB, 2022 WL 17169833, at *10 (N.D. Cal. Nov. 22, 2022); Eviction moratorium: "The Supreme Court has held repeatedly that it is the invitation to allow a person to occupy a property that distinguishes per se takings from regulatory takings governed by the *Penn Central* factors."
- *But see 301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1383 (8th Cir. 2022) ("This court, before *Horne*, applied *Yee*'s voluntariness rationale. . . . But, since *Horne*, this court has not cited *Yee*, while acknowledging *Horne* and its voluntary exchange principle.").

And here, of course, both the district court and Ninth Circuit interpreted *Yee* to hold that Petitioners could not state a physical takings claim against the regulation challenged herein because Petitioners voluntarily entered the rental market. Pet. App. 3a, 12a.

Thus, since *Yee* was decided, courts have dramatically and erroneously expanded the open-door theory, applying it up to and including circumstances where local ordinances indefinitely prevent property owners from evicting non-paying tenants. This can't be right—and it isn't. *See Alabama Ass'n of Realtors v. Dep't of Health & Human 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").

As Professor Richard Epstein correctly predicted over 30 years ago:

> The dangerous doctrine, which receives a regrettable boost from the *Yee* decision, is that if the landowner voluntarily grants a limited estate, then the state can stretch that interest into a fee simple without paying just compensation. So often legislatures and courts look at the process from the wrong end of the telescope. The lease has already been granted, so what is wrong with helping out a tenant in need by expanding its duration? . . . Any landlord who has agreed to allow a tenant in possession now has to face the risk, first, that the

> tenant cannot be evicted at the end of the lease, and second, that the tenant, while allowed to remain in possession, will pay a rent equal to a fraction of the property's market value. Sometimes this knowledge will induce the owner not to become a landlord in the first place, as the cost of leaving land idle, or placing it out rent-free to a family friend, may be lower than the cost of running the political risk. The long term consequences of the decision in *Yee* can only be negative.

Richard A. Epstein, *Yee v. City of Escondido: The Supreme Court Strikes Out Again*, 26 Loy. L.A. L. Rev. 3, 17–18 (1992).

Indeed, even commentators critical of this Court's recent takings jurisprudence acknowledge that the time is ripe to consider questions raised by the present petition for certiorari:

> It seems possible, even likely, that the Court might revisit *Yee* in a future case and impose some limits on this form of the open-door argument. But for now, the initial invitation may work to preclude application of a *per se* rule in similar situations.

Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 Duke J. of Const. L. & Pub. Pol'y 1, 15–16 (2022).

It is past time for the Court to close the door on *Yee*'s open-door theory. This petition for certiorari presents such an opportunity.

B. A CIRCUIT SPLIT IS GROWING AS TO *YEE*'S APPLICABILITY TO REGULATIONS AFFECTING LANDLORD-TENANT RELATIONSHIPS

Amicus Curiae will not belabor that which has already been amply stated by Petitioners. *See, e.g.*, Pet. Br. 23–33. Needless to say, the Eighth Circuit's decision in *Heights Apartments, LLC v. Walz* concludes that *Cedar Point* is the lodestar case when considering eviction restrictions as opposed to *Yee*. 30 F.4th 720, 733 (8th Cir. 2022). The Ninth Circuit in this case concluded otherwise. *See* Pet. App. 3a.

Counsel for *Amicus Curiae* is aware of at least three cases presently docketed with the Ninth Circuit that depend on the very question raised by Petitioners here, all of which center around local governments' zealous and purposeful mugging of property rights vis-à-vis eviction moratoria. *See GHP Mgmt. Corp. v. City of Los Angeles*, No. CV-21-06311-DDP (C.D. Cal.), *appeal docketed*, No. 23-55013 (9th Cir. Jan. 6, 2023); *El Papel LLC v. City of Seattle*, No. 20-CV-01323-RAJ (W.D. Wash.), *appeal docketed*, No. 22-35656 (9th Cir. Aug. 17, 2022); *Jevons v. Inslee*, No. 1:20-CV-3182-SAB (E.D. Wash.), *appeal docketed*, No. 22-35050 (9th Cir. Jan. 18, 2022).

Even though the decision below is a memorandum disposition, the Ninth Circuit will likely look inward for guidance when deciding these extraordinarily important pending appeals as opposed to the Eighth Circuit's well-reasoned opinion in *Walz*. If so, the Ninth Circuit will only serve to exacerbate a growing circuit split on the important question raised by Petitioners.

CONCLUSION

For the reasons stated herein, AAGLA requests this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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