No. 22-739

In The Supreme Court of the United States

DAVID KAGAN, et al.,

Petitioners,

v.

CITY OF LOS ANGELES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The petitioners in this case bought a duplex subject to the City of Los Angeles's Rent Stabilization Ordinance. When they sought to evict a rent-paying tenant from one of the duplex's two units, the tenant claimed that the Ordinance protected him from eviction because of his tenure in the unit and a legally recognized disability. The tenant would ultimately have had to prove his entitlement to that protection in unlawful detainer litigation with his landlords, the petitioners, but they did not sue to evict him. Instead, the petitioners sued the City on the theory that when it limited the grounds on which they could evict their tenant, the City effected a per se taking of their property without compensating them for it.

In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court held unanimously that regulations governing a landlord's ability to remove an invited tenant are to be distinguished from those that force a property owner to cede possession to someone in the first instance, or in perpetuity. The former are evaluated on an ad hoc basis as regulatory takings; the latter are evaluated as per se takings.

Does *Yee* foreclose a claim that the City effected a per se taking of the petitioners' property by limiting the grounds on which they could evict their rent-paying tenant?

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INTRODUCTION

Must taxpayers compensate landlords whenever a government limits the reasons for which those landlords can evict their invited, rent-paying tenants? The petitioners, the Reveres and the Kagans, think so. (Tracking the Ninth Circuit's opinion, call them the Owners.) They bought a duplex with a tenant living in one of its two units; the Reveres moved into the other one. The Owners contend that the City of Los Angeles effected a compensable taking of their property by placing some limits on their ability to evict the tenant so that they could replace him with more of the Reveres' family. And the Owners are particular about the kind of taking they mean. Their theory is *not* that the City devalued their property by going too far in regulating their ability to use it. Their theory is instead that the City effected a physical occupation of their property by preventing them from evicting their tenant freely, and that they are per se owed compensation for the occupation.

One problem with this theory is that it's foreclosed by *Yee v. City of Escondido*, 503 U.S. 519 (1992). *Yee* observed that it is a landlord—not the government—who places a tenant in possession of the landlord's property. And because the government didn't grant the tenant possession in the first place, it is unlikely that the government effects a physical, per se taking of the property by regulating the landlord's ability to remove the tenant. *Yee* allowed, however, that if the government imposes too onerous a set of limits on the landlord,

then the government might still effect a regulatory, ad hoc taking of the landlord's property.

Yee's distinction between measures restricting the removal of invited tenants (maybe regulatory takings) and measures compelling a property owner to allow an occupation in the first instance (likely per se takings) has proven workable over time. This Court, for example, applied the same distinction two years ago in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021): It contrasted a regulation requiring landowners to admit union organizers in the first instance (a per se taking) with a regulation governing how a landowner can treat people whom it invites onto its premises. The Ninth Circuit had no trouble applying *Yee*'s distinction in this case. It affirmed the dismissal of the Owners' takings claim because they bought property occupied by a tenant that their predecessor invited; the City had at most limited the circumstances under which the Owners could evict the invited tenant; and the Owners had not challenged those limits as effecting a regulatory taking.

Thwarted by settled law, the Owners ask the Court in effect—if not outright—to overrule *Yee*. With no serious conflict over how *Yee* applies, there is no good reason to do that. Outside of a spray of intermediate state court decisions or other decisions predating *Yee*, the petition offers only two cases that can fairly be said to conflict with the Ninth Circuit's decision here. Or to evince any conflict at all in the courts' treatment of *Yee*.

The first of the two decisions is from California's intermediate appellate court. It held in *Cwynar v. City & County of San Francisco*, 109 Cal. Rptr. 2d 233 (Cal. Ct. App. 2001) that a government might effect a per se taking by limiting landlords' ability to recover possession from paying tenants for owner occupancy. Assuming that this 22-year-old decision is in tension with *Yee* and will invite chaos without this Court's intervention now, it's worth asking: What took chaos so long? There is no indication that *Cwynar* has wreaked havoc in the California courts over the last two decades. Perhaps that's because *Cwynar* is poorly reasoned and there is no horizontal stare decisis in the California Court of Appeal. That court could self-correct easily if California trial courts were actually applying *Cwynar* in meaningful derogation of *Yee*. And it can self-correct if the Ninth Circuit's decision here is at odds with its decision in *Cwynar*.

The second decision came from an Eighth Circuit panel, which was evaluating an emergency moratorium on evicting tenants whom COVID-19 left unable to pay rent. The panel in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022) held, with scant analysis, that requiring landlords to forbear temporarily from evicting those tenants could effect a per se taking of the landlords' property, notwithstanding *Yee*. Four Eighth Circuit judges would have reheard *Heights Apartments* en banc because they thought the panel misread and then misapplied *Yee*.

Heights Apartments to one side, the Second Circuit observed recently that the law in this area—the courts'

treatment of *Yee*—has been "exceptionally clear." If *Heights Apartments* is the lone circuit court case to muddle it, better to let other circuits weigh in with reasoned analysis before granting certiorari to resolve a conflict. The Ninth Circuit, for instance, recently heard argument in a case in which the appellants advanced the Owners' views of *Yee* and *Heights Apartments*.

In any event, the Owners' is not a compelling case in which to reconsider what *Yee* means. Why not? Admittedly, the City's long-standing limitations on evicting disabled tenants—the restrictions about which the Owners complain—*might* have prevented the Owners from freely evicting their rent-paying tenant and doing with their property as they saw fit. By the petition's lights, those limitations effect a per se taking of the Owners' property without compensation, and thus violate the Fifth Amendment's Takings Clause.

But even countenancing the petition's takings theory, it's impossible to know if the City's restrictions *would* have prevented the Owners from evicting their tenant, because the Owners did not sue to evict the tenant before suing the City over the constitutionality of its restrictions. Those restrictions, however, function only as affirmative defenses for a tenant: The tenant must plead and prove their applicability in an unlawful detainer action in order to avoid eviction.

The Owners ultimately *did* sue to evict their tenant, successfully, because he stopped paying rent. So assuming for argument's sake that the City's regulations would have prevented the Owners from evicting

their tenant earlier, their alleged injury amounts to being forced to suffer his presence in the meantime for the $4,545 per month he paid in rent. They ask this Court to reconsider its unanimous decision in *Yee* and to conclude that this state of affairs was the equivalent of the City physically occupying their property. With the taxpayers compensating them—by what measure?—for the trouble.

The Court should deny the petition.

STATEMENT

A. The City of Los Angeles gives long-term, rent-paying tenants who are disabled or of a venerable age an affirmative defense against eviction from rent-stabilized housing.

The City of Los Angeles's Rent Stabilization Ordinance prevents landlords from evicting (i) long-term tenants of a venerable age (62 and up) and (ii) long-term tenants with disabilities from rent-stabilized housing to make room for a landlord or a landlord's family to move in. L.A. Mun. Code § 151.30(D)(1)(a) (Pet. App. 19a). If a tenant meeting either the age or the disability criterion has been living in a rent-stabilized unit for a decade, then the tenant can be evicted only for certain reasons—like failure to pay rent or creating a nuisance—or, with sufficient notice, if the landlord decides to take the entire property off the rental market. *E.g.*, *id.* § 151.09(A)(1), (3), (10) (Opp'n App. 2–3, 4–6, 8–9).

But because California does not allow municipal ordinances to prevent landlords from bringing state-law unlawful detainer actions against their tenants, *Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1017 (Cal. 1976), these locally-created protections are in the form of affirmative defenses to landlords' unlawful detainer claims. L.A. Mun. Code § 151.01 (Opp'n App. 2). Which means that to avoid eviction, a tenant who invokes the Rent Stabilization Ordinance's protections has to plead and prove an entitlement to them.

B. Rather than suing to evict their tenant—and so forcing him to prove his entitlement to the City's disabled-tenant protections—the Owners sue the City and claim that those protections are unconstitutional.

The Owners decided to get into the landlord business in 2015. Pet. App. 28a ¶ 9. They paid $2,163,320 for a duplex that was subject to the Rent Stabilization Ordinance. *Id.* 25a ¶ 1, 28a ¶ 9. It had a 57-year-old tenant living in one unit. *See id.* 25a ¶ 1 (the tenant was born in 1958). The Reveres moved into the other unit. Pet. 7. Four years later, the Owners decided they wanted to evict the tenant to move more of the Reveres' family into his unit. Pet. App. 25a ¶ 1.

If a landlord wants to evict a tenant from rent-stabilized housing to move in the landlord's family, the landlord completes a form declaration of intent to evict, sends it to the City and to the tenant, and pays the tenant a relocation fee calculated by reference to

certain statutory criteria that are also summarized on the form declaration. L.A. Mun. Code §§ 151.09(A)(8), (C)(2), 151.30(E) (Opp'n App. 7–8, 12; Pet. App. 19a–20a). The Rent Stabilization Ordinance does not require the City to do anything when it receives the form, and it does not require the landlord to await a response from the City before proceeding with an eviction. *See id.* § 151.09(C)(2) (setting forth the requirements for the declaration) (Opp'n App. 12). As a matter of practice, however, the City processes a landlord's declaration of intent by responding with confirmation that the landlord has properly calculated the relocation fee owed the tenant.

The Owners' tenant didn't want to leave. By the time the Owners decided to dispossess him, he had been renting half of the duplex for over a decade. Pet. App. 30a ¶ 11. When he received his copy of the Owners' form declaration, the tenant told the City that he had a disability. Because a landlord's desire to move in family members is insufficient cause to evict a long-standing tenant with a disability, L.A. Mun. Code § 151.30(D)(1)(a) (Pet. App. 19a), the City replied to the Owners' declaration with a letter refusing to process it. Pet. App. 30a ¶ 11. Nothing about that refusal prevented the Owners from proceeding with an unlawful detainer action either to force the tenant (1) to prove that he met the Rent Stabilization Ordinance's criteria for protection or (2) to move out.

Instead, the Owners sued the City. The tenant, meanwhile, continued to pay the Owners $4,545 per month in rent. Pet. App. 28a ¶ 9.

C. The Owners insist that the City's tenant protections effected a per se taking of their property. The district court dismisses that claim, and the Ninth Circuit affirms.

The Owners alleged that by refusing to process their form declaration, the City had granted their tenant "the permanent physical occupation" of their property "in perpetuity," entitling them to at least (in their view) $1,250,000 in compensation. Pet. App. 25a ¶ 1, 33a ¶ 17. If it were unclear from their allegations that the Owners intended to advance only the theory that the City had effected a per se taking of their property, they waived a regulatory takings theory while litigating dispositive motions in the district court. Pet. App. 10a n.3. The Owners' takings claim would therefore turn only on whether preventing them from evicting their rent-paying tenant, for the reason that they sought to evict him, amounted to allowing the physical occupation of their property.

The district court dismissed the claim. Pet. App. 10a–12a. It observed that the Owners purchased their duplex knowing both that it was subject to the Rent Stabilization Ordinance and that one unit was occupied by a tenant. *Id.* 11a. Relying on this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992), it found that because the City did not grant the tenant possession of half the duplex to begin with, the City had not effected a per se taking by limiting the reasons for which he could be evicted. Pet. App. 12a.

The Ninth Circuit likewise relied on *Yee* to resolve the Owners' appeal in an unpublished memorandum. "Here, as in *Yee*," it held, "the Owners 'voluntarily rented their land,' and were not required to submit to physical occupation by another." Pet. App. 3a. "Moreover," it continued, the Rent Stabilization Ordinance "allows at-fault evictions, such as evictions for creating a nuisance, breaking the law, or failing to pay rent," and it "grants landlords the right to end a protected tenancy by removing the entire property from the rental market with one year's notice." *Id.* Because the Owners were not compelled "to 'refrain in perpetuity from terminating'" the tenancy at issue, *Yee* allowed that they might allege a regulatory—but not a per se—taking. *Id.* & n.1. The Owners, however, had not sought to do that. *Id.*

REASONS TO DENY THE PETITION

A. The Ninth Circuit disposed correctly of the Owners' takings claim by applying the principle this Court announced in *Yee v. City of Escondido* and reaffirmed in *Cedar Point Nursery v. Hassid*—a principle that is in harmony with *Loretto v. Teleprompter Manhattan CATV Corp.*

The bulk of the Owners' petition is an attempt first to confect a rift between "physical takings precedent," embodied by *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and "rent control analysis" embodied by *Yee v. City of Escondido*, 503 U.S. 519

(1992), and then to put the Ninth Circuit's decision in this case on the wrong side of that divide. Pet. 33. But *Loretto* and *Yee* do not offer competing forms of analysis from which a court must choose. *Yee* does not set out a rent-control-analysis exception to *Loretto*'s "very narrow" per se rule that "a permanent physical occupation of property is a taking," 458 U.S. at 441. Instead, *Yee* recognizes that it is improbable that a government has committed a physical occupation *at all* by regulating the manner in which a property owner can dispossess someone else of a right, like a leasehold, that the property owner voluntarily transferred to that person to begin with. *Accord Fed. Comm'cns Comm'n v. Fla. Power Corp.*, 480 U.S. 245, 251–53 (1987); *Block v. Hirsh*, 256 U.S. 135, 153–58 (1921).

Yee explains as much itself, and if there were any question whether *Yee*'s rationale is limited only to cases involving rent control, this Court answered it by relying on the same principle in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), a case having nothing to do with rent control. The Ninth Circuit likewise relied on *Yee*, correctly, to hold that the Owners failed to plead a per se taking of their property here.

1. The Ninth Circuit applied *Yee* correctly.

Start with *Yee*. The Yees owned mobile home parks in Escondido, California. *Yee*, 503 U.S. at 525. That meant they were in the business of renting plots of land on which mobile home owners could place their residences. *Id.* at 523. Once someone puts a mobile

home in place, though, it becomes more of an immobile home. *Id.* Given the difficulty in moving one, when a mobile home owner wants to sell, the buyer typically takes the mobile home in situ and continues to rent the underlying land from the park owner. *Id.*

The Yees complained that between California state law, which "limit[ed] the bases upon which a park owner may terminate a mobile home owner's tenancy," and an Escondido ordinance, which capped the rents for land in mobile home parks, their tenants had been granted "the right to physically permanently occupy and use" the Yees' real property at submarket rents. *Id.* at 525–26. Adding alleged injury to alleged injury, the tenants could transfer their right to occupy the Yees' land at submarket rents when they sold their mobile homes in place. *Id.* at 527. The Yees categorized the injury that they suffered—based on their inability physically to remove their tenants—as a per se taking under *Loretto*, *Yee*, 503 U.S. at 525, which would necessarily entitle them to compensation from the government, *Cedar Point*, 141 S. Ct. at 2071.

The Court rejected, immediately and unanimously, the theory that the eviction controls at issue amounted to per se takings. "The government effects a physical taking only where it *requires* the landowner to submit to physical occupation of his land." *Yee*, 503 U.S. at 527. "But," the Court observed, "the Escondido rent control ordinance, even when considered in conjunction with the California [law], authorizes no such thing." *Id.* The Yees "voluntarily rented their land to mobile home owners." *Id.* "[N]o government has

required any physical invasion of [the Yees'] property," so "[w]hile the 'right to exclude' is doubtless . . . 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,'" that right hadn't been *taken* from the Yees. *Id.* at 528. The only thing that "the state and local laws at issue" did was to "regulate [the Yees'] *use* of their land by regulating the relationship between landlord and tenant." *Id.*

It would have been different, the Court held, had the government compelled the Yees "over objection to rent [their] property or to refrain in perpetuity from terminating a tenancy." *Id.* But the rules that limited the grounds on which the Yees could remove a tenant didn't force them "to refrain in perpetuity from terminating a tenancy," because California law "provide[d] that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months['] notice." *Id.*

It is worth pausing here to note what *Yee* holds and what *Yee* does not hold. *Yee* holds that whether a government has effected a per se taking is tied to *the scope* of the alleged invasion, i.e., whether the government has forced a landowner to open property to a tenant in the first place or whether it has prevented a landlord from removing a tenant in perpetuity. *Id. Yee* does *not* hold that whether the government has effected a per se taking is tied to *the reason* for the alleged invasion; it doesn't ask *why* the government imposed a particular eviction restriction. That's because once an invasion amounts to a physical occupation, the government's reason for the invasion is

irrelevant. *Loretto*, 458 U.S. at 434–35. It must pay compensation. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002).

This means *Yee*'s holding—that a government doesn't effect a per se taking by limiting a landlord's ability to evict—reaches those cases in which the government's reason for limiting evictions is to prevent a landlord from replacing existing tenants with more lucrative ones (i.e., rent control). *See Block*, 256 U.S. at 157–58 ("If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail."). It also means that *Yee*'s holding cannot be limited to cases in which controlling rent is the government's reason for constraining a landlord's ability to evict. "States have *broad power* to regulate housing conditions and the landlord–tenant relationship in particular without paying compensation for all economic injuries such regulation entails." *Loretto*, 458 U.S. at 440 (italics added). *Yee* recognizes as much expressly and with illustrative examples. *Yee*, 503 U.S. at 531.

With the foregoing in mind, compare this case to *Yee*. Like the Yees, the Owners were not forced by law to rent property to their tenant in the first instance. Like the laws at issue in *Yee*, the Rent Stabilization Ordinance allegedly prevented the Owners from subsequently removing that tenant. And as with the laws in *Yee*, the Rent Stabilization Ordinance did not impede the Owners from evicting the tenant for *every* reason, e.g., for failing to pay rent. (That is the reason for which the Owners eventually *did* evict the tenant. *See*

p. 29, *infra*.) For example, as in *Yee*, the Owners could end the tenancy by giving 12 months' notice and removing both units of the duplex from the rental market, which also would have accomplished their stated goal of "fully us[ing] [the duplex] as a family residence." Pet. 5.

Yee therefore dictated the outcome here: As in *Yee*, the Owners could not allege that the City had committed a per se taking of their property by limiting the grounds on which they could evict their tenant—just as the Ninth Circuit concluded.

2. *Yee*, and the Ninth Circuit's application of *Yee*, are consistent with *Loretto*.

Because *Yee* squarely controls this case, the petition is not really arguing that the Ninth Circuit's decision "is irreconcilable with physical takings precedent from this Court, such as *Loretto*," which precedes *Yee*, "and *Cedar Point*," which comes after it. Pet. 3. The petition is actually arguing that *Yee* is inconsistent with *Loretto* and *Cedar Point*, and that *Yee* should be overruled.

Is *Yee* inconsistent with *Loretto*? The petition suggests as much, pointing in particular to *Loretto*'s seventeenth footnote. Pet. 17. That footnote observes that Loretto, who did not want to sully the façade of her building, could have avoided the mandatory installation of aesthetically displeasing cable TV equipment "by ceasing to rent the building to tenants." 458 U.S. at 439 n.17. That, however, would have been an improper

demand to make of Loretto, because "a landlord's ability to rent [her] property may not be conditioned on [her] forfeiting the right to compensation for a physical occupation." *Id.*

According to the petition, the City has put the same kind of improper choice to the Owners: Either submit to a physical taking in the form of a tenant whom you cannot evict at will, or get out of the rental market. Pet. 19. But the Yees also faced this choice. They could have gotten out of the mobile home park business if they wanted to avoid constraints on their ability to evict their tenants. If the choice would have been improper in *Loretto*, why wasn't it improper in *Yee*, and why isn't it improper here?

It would be strange if *Yee* were inconsistent with *Loretto* without *Yee* itself recognizing the inconsistency. Then-Justice Rehnquist, Justice Stevens, and Justice O'Connor were all in the *Loretto* majority, and Justice O'Connor wrote the unanimous opinion in *Yee*. No surprise, then, that *Yee* explained why its result was consistent with *Loretto*—and so why the result in this case is consistent with *Loretto*, too. When the Yees made the same argument as the Owners have here, the Court pointed out that "it fails at its base . . . because there has simply been no compelled physical occupation giving rise to a right to compensation that [the Yees] could have forfeited." *Yee*, 503 U.S. at 532.

In other words, *Yee* and *Loretto* recognize that a government cannot require a landlord to submit to a physical occupation, like a third party's placement of a

cable, as a condition of accepting tenants. The invited tenancies, though, are not themselves the physical occupations on which the improper condition turns. 458 U.S. at 439 n.17; *cf. Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836–39 (1987) (it's likely okay to condition (1) a landowner's ability to build on (2) a height restriction to preserve views, but it's a taking to condition (1) the right to build on (2) the landowner granting an unrelated easement). Or: It is improper to tell a person she must agree to give a cable company an easement as a condition of being a landlord, but it is not improper to regulate a person as a landlord based on the fact that she has tenants.

Suffice it to say that the City did not require the Owners to forfeit a property right in exchange for the ability to rent their property. The Owners instead accepted the imposition of limits on their ability to evict their tenant when they bought voluntarily into the landlord business, which can be regulated like any other. *See*, *e.g.*, *Block*, 256 U.S. at 153–54, 156–58 (a government can regulate a landlord's ability to retake premises from a rent-paying tenant for the landlord's own use); *see also Reitman v. Mulkey*, 387 U.S. 369, 372–73 (1967) (a landlord cannot refuse to continue a month-to-month tenancy "based on racial considerations"). If the City's regulation went too far, the Owners were free to claim a regulatory taking and to pursue compensation for that. *Yee*, 503 U.S. at 530–31; *see generally Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978) (outlining the factors for deciding

whether a government has effected a regulatory taking).

But none of this Court's cases require the City to pay compensation on a per se basis for regulating tenancies. The City need not "regulate by *purchase*," *Andrus v. Allard*, 444 U.S. 51, 65 (1979), just because the business that it happens to be regulating is one offering tenancies in real property. *Block*, 256 U.S. at 157–58.[1]

3. *Cedar Point* reinforces *Yee*'s basic principles, and is likewise consistent with the Ninth Circuit's decision.

If there were any doubts about the continuing vitality of *Yee*'s principles, the Court's opinion in *Cedar Point* should dispel them. The government in that case granted labor organizers easements to enter private

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[1] *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), which found a per se taking when the government conditioned farmers' participation in the raisin market on their entitling the government to a large quantity of raisins, *id.* at 361–62, doesn't have much bearing on the facts of this case. For one thing, unlike the government in *Horne*, the City hasn't taken title to anything by regulating tenancies. Still, *Horne* suggests a thought experiment: If the government limited the grounds on which raisin sellers could terminate requirements contracts with paying raisin buyers, would anyone say that the government had taken the sellers' raisins? Probably not. *See id.* at 362 (marking the distinction between appropriation and regulation). *That* is the analog to limiting a landlord's ability to evict an invited, rent-paying tenant. *See Block*, 256 U.S. at 155 (cautioning against the tendency to view business regulations differently just because they touch on the use of real property).

agricultural properties. *Cedar Point*, 141 S. Ct. at 2069–70. The easements were property rights that the organizers would not otherwise possess; the owners of those properties certainly had not granted them. When the property owners argued that the government had effected a per se taking of their property, though, the government responded that it had merely enacted an "access regulation," which "cannot qualify as a *per se* taking." *Id.* at 2076. The Court disagreed with the government, specifically because—unlike in *Yee*—the *Cedar Point* property owners were being forced in the first instance to give up a property right; the government was not simply regulating the conditions under which the property owners could rescind a right those owners had voluntarily given. *Id.* at 2076–77.

Cedar Point is therefore entirely consistent with *Yee*'s holding that eviction-limiting regulations do not effect physical takings, in part because landlords undertake the tenancies at will. 503 U.S. at 528–29. "[T]he invitation," this Court elsewhere wrote, is what "makes the difference." *Fla. Power Corp.*, 480 U.S. at 252; *see Cmty. Hous. Improvement Program v. City of N.Y.*, 59 F.4th 540, 551–52 (2d Cir. 2023) (likewise observing *Cedar Point*'s consistency with *Yee*).

Cedar Point is also entirely consistent with the Ninth Circuit's judgment in this case. The Court need not grant certiorari to affirm that much.

B. There is no conflict meriting this Court's attention as between the Ninth Circuit's and other courts' applications of *Yee*.

While the Ninth Circuit understood and applied *Yee* correctly in this case, perhaps there would be a reason for the Court to grant certiorari if many other courts did not. The petition essentially concedes, however, that courts have applied *Yee*'s principles uniformly. Pet. 22; *e.g.*, *Cmty. Hous. Improvement Program*, 59 F.4th at 550–53; *Bldg. Owners & Managers Ass'n Int'l v. Fed. Comm'cs Comm'n*, 254 F.3d 89, 97–100 (D.C. Cir. 2001); *McAndrews v. Fleet Bank of Mass., N.A.*, 989 F.2d 13, 17–20 (1st Cir. 1993). The Second Circuit recently called those principles "exceptionally clear." *Cmty. Hous. Improvement Program*, 59 F.4th at 552. Never mind that, though; the petition's authors think courts have gotten the law uniformly wrong. Pet. 22. But of the few decisions the petition says conflict with the Ninth Circuit's—i.e., those the petition suggests have gotten the law right—only two can plausibly be said to understand *Yee* any differently than the Ninth Circuit did.

1. None of the petition's four cases predating *Yee* creates uncertainty about *Yee*'s rule.

Consider first the cases that do not or cannot possibly create a conflict worth this Court's review. That bucket includes cases that predate *Yee*: *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990); *Seawall Associates*

v. City of New York, 542 N.E.2d 1059 (N.Y. 1989); *Bakanauskas v. Urdan*, 253 Cal. Rptr. 764 (Cal. Ct. App. 1988); and *Polednak v. Rent Control Board of Cambridge*, 494 N.E.2d 1025 (Mass. 1986).

The fact that those cases predate *Yee* isn't the only problem with arguing that they evince confusion over how *Yee* applies. Taking them in the order they're listed above, *Yee* itself abrogated *Pinewood Estates*. *Yee*, 503 U.S. at 526, 539. The property owners who claimed a per se taking in *Seawall Associates* were compelled by law to rehabilitate and then to rent out their property *in the first instance*. 542 N.E.2d at 1061–62. That is one—if not the—critical distinction between *Seawall Associates* on one hand, and *Yee*, *Cedar Point*, or this case on the other. The Court need not take this brief's word for it. The same court that decided *Seawall Associates* said as much, after *Yee* was decided, in a case that the petition neglects to mention. "The difference," the New York Court of Appeals wrote in distinguishing *Seawall Associates* from a case in which New York limited landlords' ability to terminate tenancies, "is in the owner's *voluntary acquiescence* in the use of its property for rental housing." *Rent Stabilization Ass'n of N.Y.C., Inc. v. Higgins*, 630 N.E.2d 626, 633 (N.Y. 1993) (italics added).

In *Bakanauskas*, a landlord and tenant were fighting over whether the landlord's three-unit building had a vacant unit comparable to the tenant's. 253 Cal. Rptr. at 765–68. If it did, the landlord could not evict the tenant in order to occupy the tenant's unit himself. *Id*. at 766. California's intermediate appellate

court held that there was no comparable vacant unit, and so permitted the landlord to evict the tenant. *Id.* at 767–68. In dicta, the court mused that if "a landlord could be deprived, possibly indefinitely, of his or her own property," then the regulation that effected the deprivation would be "unconstitutionally confiscatory" as a matter of due process. *Id.* at 767 (citing *Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1027–29 (Cal. 1976)). That dicta, even if it touched on some "important federal question," was not what *Bakanauskas* decided. S. Ct. R. 10(b), (c). (And it is doubtful that *Bakanauskas*'s reasoning on how to evaluate the desirability of an apartment gives rise to a certiorari-worthy conflict.)

Then there's *Polednak*. In that case, the Massachusetts Supreme Judicial Court held that state law prevented Cambridge from forcing an owner to put the condo unit she was living in back on the rental market after she had purchased it as the tenant in possession. 494 N.E.2d at 1026–27. In reaching that conclusion, the court *expressly* did not decide whether Cambridge otherwise would have effected a per se taking of the owner's property. *Id.* at 1026, 1028.

2. Of the petition's three cases postdating *Yee*, only two can fairly be said to conflict with the Ninth Circuit's proper application of *Yee*—and nothing about those conflicts demands the Court's attention here.

At least *Aspen-Tarpon Springs Ltd. Partnership v. Stuart*, 635 So.2d 61 (Fla. Dist. Ct. App. 1994) has the virtue of postdating *Yee*. In that case, Florida's intermediate court of appeals was asked to review a trial court's judgment that restricting the conversion of mobile home parks to other uses effected both a per se and a regulatory taking. 635 So.2d at 64. Florida law required someone seeking to convert a mobile home park to another use either (1) to buy every mobile home in the park or (2) to pay to have them all moved to another park. *Id.* at 63. Either of those options could cost over 10 times the value of the park's land, causing the trial court to conclude as a matter of fact that it was practically impossible ever to change the park's use. *Id.* at 64. That finding, supported by substantial evidence, led the Florida appellate court to hold that the Florida law effected a taking of the park owner's property. *Id.* at 67–68.

Does that decision, coming from an intermediate state court, suggest any kind of conflict worth this Court's attention? No. *Aspen-Tarpon* does not conflict with *Yee* or with this case at all. Most obviously, unlike the restrictions at issue in *Yee* or in this case, the Florida statute in *Aspen-Tarpon* prevented park owners from terminating tenancies even by getting out of the

park business—because the statute made it impossible for them to get out of the park business. *Accord Yee*, 503 U.S. at 527–28.

Meanwhile Florida rewrote its law after *Aspen-Tarpon* to allow a park owner to change a park's use with six months' notice to tenants, *Gallo v. Celebration Pointe Townhomes, Inc.*, 972 So.2d 992, 995 (Fla. Dist. Ct. App. 2008), a regime that should by now sound familiar. And that was the end of *Aspen-Tarpon*: Of the four reported decisions citing the case, none cited it as an authority on takings. *Gallo*, 972 So.2d at 994–95; *Rupp v. Dep't of Health*, 963 So.2d 790, 792–93 (Fla. Dist. Ct. App. 2007); *Munao, Munao, Munao & Munao v. Homeowners Ass'n of La Buona Vita Mobile Home Park, Inc.*, 740 So.2d 73, 76–78 (Fla. Dist. Ct. App. 1999); *State Emps. Att'ys Guild v. Florida*, 653 So.2d 487, 489 (Fla. Dist. Ct. App. 1995).

That leaves only two decisions that the petition says are in tension with the Ninth Circuit's faithful application of *Yee* in this case. In the first, *Cwynar v. City & County of San Francisco*, 109 Cal. Rptr. 2d 233 (Cal. Ct. App. 2001), the California Court of Appeal held that landlords could claim San Francisco effected per se takings of their property when it limited their ability to evict tenants for owner occupancy—even if San Francisco had not forced the landlords to become landlords, and even if those landlords could still remove

their properties entirely from the rental market to end the tenancies. *Id.* at 239–40, 245.[2]

It is fair to assume, for argument's sake, that the decision in *Cwynar* is at odds with *Yee*. Should this Court intervene now to address an intermediate appellate court's 22-year-old error?[3]

No.

In the two decades that have passed since the California Court of Appeal decided *Cwynar*, the petition identifies no jurisprudential chaos that has descended

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[2] As does Los Angeles, other cities in California continue to limit the bases on which landlords can evict rent-paying tenants of venerable age or those with disabilities. *E.g.*, S.F. Admin. Code § 37.9(i); Santa Monica Charter art. XVIII, § 1806(a)(8)(vii). Those protections are not quirks reflecting uniquely Californian mores. Conn. Gen. Stat. § 47a-23c; N.J. Rev. Stat. §§ 2A:18-61.22–61.39; N.Y. Comp. Code R. & Regs. tit. 9, § 2504.4.

[3] It *is* error: *Cwynar*'s rationale for distinguishing *Yee* was a mélange of *Bakanauskas*, *but see* pp. 20–21, *supra*; *Seawall Associates*, *but see* p. 20, *supra*; a district court case from the Northern District of California, *Ross v. City of Berkeley*, 655 F. Supp. 820, 836 (N.D. Cal. 1987), which in turn relied on a Ninth Circuit decision that *Yee* overruled explicitly, *Hall v. City of Santa Barbara*, 797 F.2d 1493 (9th Cir. 1986), *amended*, 833 F.2d 1270, *and overruled by Yee*, 503 U.S. at 526, 539; and a First Circuit decision from 1950 that was called into question even at the time it was decided, *compare Rivera v. R. Cobian Chinea & Co.*, 181 F.2d 974, 976, 978 (1st Cir. 1950) (Puerto Rico eviction restriction effects a physical taking) *with id.* at 980 (Magruder, C.J., dissenting) ("the analogy of eminent domain is of doubtful applicability"). *Cwynar*, 109 Cal. Rptr. 2d at 246. Moreover, *Cwynar* distinguished *Yee* in part because it involved "a purely economic rent control law," *id.* at 248, but (again) the reason that a government limits the ability to evict is irrelevant to the question whether the limitation amounts to a per se taking, *see* pp. 12–13, *supra*.

on California. No other decision appears to have cited *Cwynar* to conclude that an eviction-limiting regulation effected a per se taking of a landlord's property. This Court need not burn a spot on its certiorari docket based on speculation that the Ninth Circuit's unpublished decision in this case will be the catalyst for some new pandemonium. It can wait to see, for example, what the California Supreme Court does with any tension that develops between *Cwynar* and the decision here. S. Ct. R. 10(b). That's assuming, of course, that the California Court of Appeal will not correct itself—an assumption that one should not make readily, because the California Court of Appeal functions jurisprudentially as a single 106-justice court with no horizontal stare decisis rule. *Fudge v. City of Laguna Beach*, 243 Cal. Rptr. 3d 547, 551 (Cal. Ct. App. 2019).

Finally, there is the petition's sole relevant federal appellate decision, *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022). *Heights Apartments* dealt with a series of COVID-19-related Minnesota executive orders and a Minnesota law that required landlords to forbear from evicting tenants with overdue rent, ultimately through June 1, 2022. *Id.* at 724–25. The Minnesota eviction restrictions did not forgive the tenants' rent debt, and landlords could evict tenants for other reasons (like causing property damage or endangering other residents). *Id.* On those facts, a landlord alleged that Minnesota's eviction limitations "unlawfully prevented it from excluding tenants who breached their leases, intruded on its ability to manage

its private property, and interfered indefinitely with its collection of rents." *Id.* at 725.

Faced with a landlord's claim that its eviction restrictions effected a per se taking of the landlord's property, the government argued that "no physical taking has occurred because landlords were not deprived of their right to evict a tenant." *Id.* at 733. Instead, the government "imposed only a restriction on when a landowner could evict a tenant," as in *Yee*. *Id.* The Eighth Circuit panel rejected that argument, holding that "*Cedar Point Nursery* controls here and *Yee* . . . is distinguishable." *Id.*

So the panel set out to distinguish *Yee*, opining that "[t]he rent controls in *Yee* 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.* The panel continued, writing that "[t]he landlords in *Yee* sought to exclude future or incoming tenants rather than existing tenants," while the Minnesota restrictions "forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated. . . ." *Id.* On that understanding of the case, the panel wrote that the landlord had adequately alleged that Minnesota deprived it "of its right to exclude existing tenants without compensation." *Id.*

Dissenting from the denial of en banc rehearing of the panel's decision, Judge Colloton wrote for himself and Chief Judge Smith, Judge Loken, and Judge Kelly

that "the panel . . . misreads the most analogous decision of the Supreme Court on the matter of *per se* takings." *Heights Apartments, LLC v. Walz*, 39 F.4th 479, 480 (8th Cir. 2022). He observed that the panel missed the fact that the Yees, too, complained that they were unable to evict present tenants, but that this Court "held that the disputed laws did not effect a *per se* taking, because the landlords 'voluntarily rented their land to mobile home owners,' and a landlord who wished to 'change the use of his land' could 'evict his tenants, albeit with 6 or 12 months[']' notice.'" *Id.* (quoting *Yee*, 503 U.S. at 527–28). Because the *Heights Apartments* panel began from the mistaken premise that the Yees were not trying to evict present tenants, it "never addressed why the scheme in *Yee* that allowed a landlord to evict existing tenants only for limited reasons after up to 12 months' notice did not constitute a *per se* taking, while a temporary eviction moratorium during a pandemic ostensibly does." 39 F.4th at 480.

Given that the *Heights Apartments* panel ruling diverged from what was otherwise "exceptionally clear" law, *Cmty. Hous. Improvement Program*, 59 F.4th at 552—law that dictated the outcome in this case—someone may eventually have to address Judge Colloton's question or, more generally, address *Yee*'s limits. But it would be premature for this Court to do so now. As one of its amici observes, there are several appeals pending in the Ninth Circuit alone that pose Judge Colloton's question, and probe specifically the extent to which limits on evictions may still amount to per se takings under *Yee*. Br. of Amicus Curiae Apartment

Ass'n of L.A. Cnty. at 14; *see*, *e.g.*, Oral Arg. at 02:33–06:50, 23:31–25:00, *El Papel, LLC v. City of Seattle*, No. 22-35656 (9th Cir. Apr. 10, 2023), https://youtu.be/uy8hUnEThDY. With the corpus of law on one side of this issue and the lone, barely reasoned *Heights Apartments* panel opinion on the other, this Court would benefit from *at least* the Ninth Circuit's post-*Heights Apartments* development of the issue before considering it. *E.g.*, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019).

C. This case is a poor vehicle for reevaluating *Yee*.

Assume—again, for argument's sake—that (1) the question presented (or a more limited subsidiary question) warrants review. If that's so, then (2) there are decisions coming down the pike that promise to be better candidates for taking up that question. To this, it is worth adding that (3) the Owners' is a bad case for taking up their question.

Say that any nascent conflict is about *Yee*'s limits; about what it means to force a landlord "to refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528; *see* Oral Arg. at 17:46–18:26, *El Papel*, No. 22-35656 (9th Cir. Apr. 10, 2023), https://youtu.be/uy8hUnEThDY (exploring the meaning of "perpetuity" in *Yee*). The problem is that the Owners, in no practical sense of the word "perpetuity," can claim to have been forced "to refrain in perpetuity from terminating a tenancy"—though claim it they have. Pet. 22.

The Owners terminated the tenancy at issue before they filed their petition for a writ of certiorari. Their tenant failed to pay rent, and they won a state-court judgment terminating his tenancy even before the Ninth Circuit entered the judgment from which they seek this Court's review. The Owners' successful unlawful detainer proceedings go entirely unmentioned in the petition.[4]

There are other problems with this case that make it a poor candidate for the Court's attention. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (the Court "decides questions of public importance" only "in the context of meaningful litigation"). It isn't that the Owners' eviction of the tenant moots the action. If the City effected a per se taking by preventing the Owners from evicting their tenant previously, then the tenant's subsequent eviction wouldn't moot a claim for compensation during the period in which the City prevented it. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). But there is a serious question whether the Owners haven't already been compensated entirely for any possible taking, and a few additional problems that come with trying to answer it.

First of all, when are the Owners claiming that the City's eviction limitation effected a taking? Having never litigated an unlawful detainer action in which

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[4] Pursuant to Supreme Court Rule 32.3, the City will separately request to submit the complaint and judgment in *Revere v. Mossanen*, No. 22STCV08231.

their tenant successfully raised his tenure and age or disability as an affirmative defense to eviction, how can the Owners claim that the City took their property simply by making the defense available? *See Pakdel v. City & Cnty. of S.F.*, 141 S. Ct. 2226, 2230 (2021) (per curiam) ("a plaintiff must show . . . that there is no question about how the regulations at issue apply to the particular land in question," cleaned up). Even assuming that the tenant would have asserted the defense, and would necessarily have been successful if he had done so after turning 62, the Owners could claim to have suffered a taking only from the time of the tenant's hypothetical success to the time that they ultimately removed him.

Second, maneuvering around the question of when a hypothetical taking occurred, there is still the question of how to measure the Owners' compensation for it. Is it the market value of the leasehold—the market rent? *See Horne*, 576 U.S. at 368–69 (compensation is normally measured by the market value of the property at the time it is taken). Especially if the Owners didn't intend to charge the Reveres' family the market rent, it would be a windfall to compensate them in that amount. (One might fairly wonder whether the Owners intended to charge the Reveres' family at all, and if they did not, why they didn't just take the entire property off the rental market.) So say instead that the Owners should be compensated in the amount of the controlled rent for the time that the Rent Stabilization Ordinance prevented them, hypothetically, from

evicting their tenant. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 128 (1950).

If that's true, then the Owners would be entitled to compensation in the amount of the rent that they were already receiving from their tenant. This is a result that ought to reinforce the conclusion the Court reached in *Yee*: Regulations limiting the grounds for evicting invited, rent-paying tenants are unlikely to amount to uncompensated, per se takings of a landlord's property—*at least* because the landlord is being compensated by the tenants' rent. It is also a result that should cause the Court to ask why this case is a worthwhile candidate for its limited time and attention.

And to conclude that it is not.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

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