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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent City of Los Angeles (City) does not dispute that the decision below raises an important question as to whether a physical taking of property occurs when the government prevents a property owner from terminating a lease and evicting a tenant, compelling an unwanted tenancy in the property. Nor does the City deny that the Ninth Circuit's conclusion that such actions do not cause a physical taking under *Yee v. City of Escondido*, 503 U.S. 519 (1992), directly conflicts with the decision of the Eighth Circuit in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022). Indeed, the City concedes the conflict. Opposition Brief (Opp.) at 2–3.

Instead, the City seeks to undercut this case as a vehicle to address the question presented by introducing misleading, irrelevant, and extra-record information. For instance, the City suggests that the Owners could and should have tried to evict their tenant through a state court "unlawful detainer" suit before they filed suit under the Takings Clause. Not so. The City made a final decision denying the Owners' application to evict, determining that it "does not meet the requirements under the Los Angles Municipal Code" because "there is a tenant with protective status residing in the rental unit." Supplemental Appendix (Supp.App.) 1. This was all that was needed to create a justiciable takings controversy. *See Pakdel v. City & Cnty. of San Francisco*, 141 S.Ct. 2226, 2230 (2021).

The City also notes that the Owners eventually obtained a state court judgment allowing them to evict the tenant for failure to pay rent, suggesting that this mitigated any harm to their property rights caused by

the City's action. But the Owners were able to displace the tenant only after the City forced them to submit to the occupancy of their property by that tenant, rather than their family members, for three years. A three-year physical invasion is still a taking. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2074 (2021).

In a final attempt to unsettle this case, the City injects "just compensation" issues into the mix. But the City did not raise any compensation issues below, and the lower courts did not address or pass on them. The only issue decided below was whether the City's refusal to allow the Owners to evict a tenant to move in their family causes a "taking" within the meaning of the Fifth Amendment. The Ninth Circuit's conclusion that it does not raises an important issue of physical takings law on which lower courts conflict. The statement of four Eighth Circuit justices who dissented from the denial of rehearing en banc in *Heights Apartments, LLC v. Walz*, which raises similar issues, is apt here:

> 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. Further review is warranted.

39 F.4th 479, 482 (8th Cir. 2022) (Colloton, J., dissenting from denial of rehearing en banc).

Ultimately, the City argues that the Court should wait to resolve the issue of whether a government-compelled tenancy is a physical taking because lower

courts continue to wrestle with the issue. But the fact that lower courts are confronting the issue while there is an established and conceded court conflict as to whether *Yee* or other takings precedent, like *Cedar Point*, controls, confirms the need to address the question sooner rather than later.[1]

The Court should grant the Petition.

ARGUMENT

I. This Case Offers an Excellent Vehicle for Addressing the Conflict Over Whether a Compelled Tenancy Is a Physical Taking

A. The City Made a Final Decision That Its Law Prohibited the Owners From Evicting a Tenant for a Family Move-In

In a somewhat veiled effort to suggest that the Owners' takings claim is unripe, the City argues that it did not bar the Owners from evicting a tenant for the purpose of housing family members. The City claims that it merely "refuse[d] to process" the Owners' application to evict, and that "[n]othing about that refusal prevented the Owners from proceeding with an unlawful detainer action" to displace the

[1] The City implies that a few cases pending in the lower courts may also provide appropriate vehicles for addressing the question presented. But this case has several features that make it a particularly excellent vehicle. Unlike cases raising only a "facial" challenge to tenancy laws, the takings issues here arise from an *as-applied* claim after an official government denial of an eviction application. Further, the fact that the eviction denial prevented the Owners from housing their own family puts the issue of whether the compelled tenancy is a taking in stark relief. Other cases lack these features.

tenant. Opp. at 7. This claim is irreconcilable with City law and the facts.

The City's Rent Stabilization Ordinance (RSO) generally allows rental owners to evict tenants so the owner, or the owner's "spouse, grandchildren, children, parents or grandparents," can occupy the subject property. L.A. Mun. Code. § 151.09(A)(8)(b). However, an exception exists when an owner seeks to evict a "protected" tenant, defined as one who has resided in the unit "at least ten years," and "is either: (i) 62 years of age or older; or (ii) disabled." *Id.* § 151.30(D)(1)(a). Rental owners "may not" evict "protected" tenants to house family members. *Id.* To enforce this rule, the RSO imposes a special administrative requirement on owners seeking to evict for a family move-in. They must file a "declaration of intent to evict" with the L.A. Department of Housing. This required document contains information relating to the proposed family move-in eviction and includes a $75.00 fee "for the cost of administering and enforcing" the prohibition on evicting "protected" tenants. *Id.* § 151.09(C)(2).

On September 23, 2019, the Owners filed the mandated declaration with the City when they wanted to evict a month-to-month tenant to move the Reveres' son, daughter-in-law, and two grandchildren into the property. A month later, the City sent a reply. Supp.App.1. Treating the Owners' declaration as an "application," the City rejected it: "It has been determined that your application does not meet the requirements under the Los Angeles Municipal Code[.]" *Id.* The City explained that the Owners' application was denied because "[o]ur records indicate that there is a tenant with protective status residing

in the rental unit." Supp.App.1; *see also* Pet.App.9a; *id.* at 25a. Thus, while the City's denial letter noted that the City could not "process" the Owners' application, it made clear that this was because it "does not meet the requirements" of City law. *Id.*

Given this context, the City's contention that the Owners should have tried to evict the tenant through an unlawful detainer action is baseless. Once the City "denied" the Owners' eviction application, the issue of whether the compelled tenancy resulting from the denial is a "taking" became fit for review, *Pakdel*, 141 S.Ct. at 2230, and the Owners did not need to pursue an alleged alternative state remedy. *Knick v. Township of Scott*, 139 S.Ct. 2162, 2170 (2019).

B. The Owners' Receipt of a Judgment Evicting the Tenant for Failure to Pay Rent Highlights the Burden of the City's Prior Denial of a Family Move-In Eviction

The City also highlights the fact that, in late 2022, the Owners secured a state court judgment allowing them to evict the tenant for failure to pay rent. Although the City does not claim this development moots the Owners' claim, Opp. at 29, it suggests that it dims its viability. The opposite is true: the fact that the tenant was able to occupy the Owners' property for three years because the City denied their 2019 application to house their family members confirms that the Owners were stripped of their right to exclude others and right of possession.

The City denied the Owners' application to move in their family members on October 28, 2019. Pet.App.9a. On October 3, 2022, the Owners received

a state court judgment allowing them to evict the tenant for failure to pay rent. The tenant vacated the property on or about December 1, 2022. Thus, the tenant occupied the Owners' property under authority of the City's "protected" tenant law, and against the Owners' will, for more than three years. That is a long time for property owners to be deprived of the opportunity to live next to their grandchildren because the government prefers that a stranger occupy the premises.

With respect to the takings issue, relying on *Yee*, the City argues that the three-year tenant occupancy is not a taking because the Owners were not forced to surrender their property in "perpetuity." Opp. at 28. But this Court's precedent is clear that a temporary physical invasion is just as much a taking as a permanent one. *Cedar Point*, 141 S.Ct. at 2074 ("[A] physical appropriation is a taking whether it is permanent or temporary."). Once the government's actions have worked a taking of property, "no subsequent action … can relieve it of the duty to provide compensation for the period during which the taking was effective." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012) (quoting *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 321 (1987)). The decision below failed to apply this settled principle.

C. Just Compensation Issues Are Not at Issue Here

The City worries that a decision finding that the compelled tenancy in this case is a taking may raise difficult compensation issues. This is unfounded and meritless, for several reasons. First, the City never raised "just compensation" concerns below, and

neither the district court nor the Ninth Circuit addressed such issues. The only question the lower courts addressed was whether a compensable "taking" exists in the first place due to the City's eviction denial. Pet.App.2a–3a, 11a–12a. This issue must be resolved before just compensation questions come into play. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) ("The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand.").

Second, the Owners have not received "just compensation" for being compelled to house a tenant, rather than family members from October 3, 2019 (the date of the City's eviction denial) to December 1, 2022 (the date the tenant left). The state court judgment awarding some damages remains unsatisfied. Moreover, the judgment did not award the Owners damages for unpaid rent between October 2019 to February 2021.[2] Thus, for many months when the tenant occupied the Owners' property under City authority (i.e., after its denial of the Owners' eviction application), the Owners received no funds from the tenant or City.

If this Court holds that a taking occurred in this case, the City is free to raise its just compensation concerns in the lower courts. But the question at hand

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[2] The City has filed a letter asking the Court to lodge a copy of the complaint and judgment in the relevant state court unlawful detainer action. Petitioners do not believe this is necessary. But if the Court agrees to the City's request, Petitioner notes that the exhibits to the subject complaint show that the state court action did not seek or award damages for the full period of the tenant's occupancy (2019–2022) under color of City law.

is whether a compelled tenant occupancy qualifies as a "taking" of property, as the Eighth Circuit held in *Heights Apartments*, or is instead a permissible "regulation" of landlord-tenant relations, as the decision below holds.

II. The City Confirms That the Decision Below Raises an Important Question as to Whether *Yee* Immunizes the Government From Forced-Tenancy Physical Takings Claims

The City claims that the Ninth Circuit's rejection of the Owners' physical takings claim is consistent with this Court's precedent, particularly *Yee*. Opp. at 10–16. It contends that the court below properly concluded that *Yee* immunizes the government from a physical takings claim in the eviction/compelled tenancy context. The City specifically asserts that the court below correctly interpreted *Yee* to hold that no physical takings can arise from an eviction prohibition because owners voluntarily invite tenants into their property when leasing it. *Id.* In the City's view, "because the government didn't grant the tenant possession in the first place, it is unlikely [under *Yee*] that the government effects a physical, per se taking of the property by regulating the landlord's ability to remove the tenant." Opp. at 1. In other words, when a property owner agrees to lease property, government action to continue the tenancy beyond the lease terms, against the Owners' will, is not a physical invasion and taking, but simply "regulation" of a "voluntary" occupancy. Opp. at 12–13.

The City and the court below misread this Court's precedent. *Yee* itself recognizes that, in the tenancy context, the "line" separating a non-confiscatory

regulation from a physical "taking" is the "distinction between a ... lessee and an interloper with a government license." *Yee*, 503 U.S. at 532 (quoting *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 252–53 (1987)). The Ninth Circuit's decision in this case ignores this distinction.[3] When the City forbade the Owners from terminating a lease to move in family members, and authorized the tenant to remain, the tenant was no longer an invitee. The tenant became "an interloper with a government license." *Id.* That is, the tenancy was no longer "voluntary," but government-compelled; a clear indicia of a physical taking. *Id.* at 528; *cf. F.C.C. v. Florida Power Corp.*, 480 U.S. at 252 (contrasting voluntary leases with involuntary cable box installation in *Loretto*). The court below ignored this guidance.

The City also suggests that the Ninth Circuit correctly applied *Yee* in holding (as a secondary rationale) that an eviction denial cannot be a taking if there is any possible way the tenant could be evicted in the future. *See* Opp. at 9, 13. The decision below reasoned that the City's denial of the Owners' family move-in application was not a taking because the Owners could potentially evict the tenant at some point for "creating a nuisance, breaking the law, or failing to pay rent." Pet.App.3a. But the reality that the tenant could, by his actions, control whether eviction or occupancy occurs, while the Owners could *not* act to end the lease to house their family, hardly demonstrates that the Owners have retained their property rights. It proves the opposite. When, as here, a property owner has no practical control over

[3] The Owners are not asking the Court to overrule *Yee*. They are asking it to clarify and limit *Yee*'s reach.

whether they can end a lease to convert property to personal use, the owner has lost the right of control, exclusion, and possession. Black's Law Dictionary (10th ed. 2014) (defining "possession" as "[t]he right under which one may exercise *control over something to the exclusion of all others*") (emphasis added).

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

DATED: May 2023.

Respectfully submitted,

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Letter from Edward Jacobs at Los Angeles Housing and Community Investment Department to Frank and Rachel K. Revere denying application to evict tenant (dated October 28, 2019) 1

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HOUSING + COMMUNITY
Investment Department
Landlord Declarations Section
1200 W 7th Street, 1st Floor, Los Angeles, CA 90017
Tel: 866-557-7368 | hcidla.lacity.org

October 28, 2019

Frank and Rachel K. Revere
C/O Law Offices of Liddle & Liddle
310 S. Vermont Avenue
Glendora, CA 91741

RE: 103 N ORANGE DR, LOS ANGELES, CA 90036
Assessor's Parcel Number: 5513004015
Landlord Occupancy Eviction – Denied
Landlord Declaration Case Number: LD056143

Dear Frank and Rachel K. Revere:

The Los Angeles Housing and Community Investment Department (HCIDLA) cannot process your Declaration of Intent to Evict for Landlord Occupancy application.

It has been determined that your application does not meet the requirements under the Los Angeles Municipal Code (LAMC).

Your application was denied based on the following:

- Our records indicate that there is a tenant with protective status residing in the rental unit.

Protected Tenants

Pursuant to Section 151.30.D.1 of the LAMC, a landlord may not recover possession of a rental unit for landlord, eligible relative, or resident manager if any tenant in the rental unit has continuously resided in the rental unit for at least ten (10) years and is disabled or handicapped;

Sincerely,

/s/ Edward Jacobs

Edward Jacobs
Los Angeles Housing and Community Investment Department
Landlord Declarations Unit
(213) 808-8678