No. ____

In The
Supreme Court of the United States

El Papel, LLC and Berman 2, LLC,

Petitioners,

v.

The City of Seattle and Bruce Harrell, in his official capacity as Mayor of the City of Seattle,

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

In March 2020, the City of Seattle prohibited almost all residential evictions. It stripped rental property owners of the right to possess and exclude and for the next 18 months, the City dictated the terms, conditions, and duration of tenants' occupancy. Petitioners El Papel, LLC and Berman 2, LLC are housing providers in Seattle. Both were forced to relinquish possession of their rental units to unwelcome occupants. *Ala. Ass'n of Realtors v. Dept. of Health & Human Svcs.*, 141 S.Ct. 2485, 2489 (2021) ("preventing [property owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude"). The Ninth Circuit held that this compelled occupation was not an unconstitutional physical taking under the Fifth Amendment because the court interpreted *Yee v. City of Escondido*, 503 U.S. 519 (1992), to bar all physical takings claims in the context of a rental relationship.

The question presented is:

> Whether an ordinance that compels the possession of property by an unwelcome occupant is a categorical physical taking, as the Eighth Circuit held in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), or a permissible regulation of use under *Yee v. City of Escondido*, as the Ninth Circuit held below?

Parties to the Proceedings and Rule 29.6 Statement

Petitioners El Papel, LLC and Berman 2, LLC were the plaintiffs-appellants in all proceedings below. El Papel, LLC is a limited liability corporation organized under the laws of the State of Washington. It has no parent corporation and issues no shares. Berman 2, LLC is a limited liability corporation organized under the laws of the State of Washington. It has no parent corporation and issues no shares.[1]

Respondents City of Seattle and Bruce Harrell, as Mayor of the City of Seattle,[2] were defendants-appellees in all proceedings below.

Defendant-appellee below Jay R. Inslee, in his official capacity as Governor of the State of Washington, is not directly addressed in this petition.

Related Proceedings

El Papel, LLC v. City of Seattle, No. 22-35656, 2023 WL 7040314 (9th Cir. Oct. 26, 2023).

El Papel, LLC v. Durkan, No. 20-CV-01323, 2022 WL 2828685 (W.D. Wash. July 20, 2022).

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[1] Karvell Li was an original named plaintiff who was voluntarily dismissed prior to any rulings in the district court.

[2] Pursuant to Rule 35, Mr. Harrell is automatically substituted for Jenny A. Durkan, who was sued in her official capacity as the Mayor of the City of Seattle.

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Petition for a Writ of Certiorari

Petitioners El Papel, LLC and Berman 2, LLC respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Opinions Below

The decision of the Ninth Circuit Court of Appeals is unpublished but can be found at *El Papel, LLC v. City of Seattle*, No. 22-35656, 2023 WL 7040314 (9th Cir. Oct. 26, 2023), and is reprinted at Pet.App. 1a–6a. The District Court's decision granting summary judgment to Respondents is unpublished but can be found at *El Papel, LLC v. Durkan*, No. 20-CV-01323, 2022 WL 2828685 (W.D. Wash. July 20, 2022) and is reprinted at Pet.App. 7a–8a. The U.S. Magistrate Judge's Report and Recommendation that was adopted by the District Court is unpublished but can be found at *El Papel, LLC v. Durkan*, No. 20-CV-01323, 2021 WL 4272323 (W.D. Wash. Sept. 15, 2021), and is reprinted at Pet.App. 10a–49a.

Jurisdiction

The lower courts had jurisdiction over this case under the Fifth Amendment to the United States Constitution, 42 U.S.C. § 1983, 28 U.S.C. § 1331 (district court) and 28 U.S.C. § 1291 (Ninth Circuit). The Ninth Circuit entered final judgment on October 23, 2023. Pet.App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provision and Ordinance at Issue

The Fifth Amendment to the U.S. Constitution provides in relevant part, "nor shall private property be taken for public use, without just compensation."

The City of Seattle's Civil Emergency Order proclaiming a Moratorium on Residential Evictions provides:[3]

> A. Effective immediately, a moratorium on residential evictions is hereby ordered until the earlier of the termination of the civil emergency declared in the proclamation of Civil Emergency dated March 3, 2020 or 60 days from the effective date of this emergency order. The decision to extend the moratorium shall be evaluated and determined by the Mayor based on public health necessity;
>
> B. A residential landlord shall not initiate an unlawful detainer action, issue a notice of termination, or otherwise act on any termination notice, including any action or notice related to a rental agreement that has expired or will expire during the effective date of this Emergency Order, unless the unlawful detainer action or action on a termination notice is due to actions by the tenant constituting an imminent threat to the health or safety of neighbors, the landlord, or the tenant's or landlord's household members. Further, no late fees or other charges due to

[3] The order is reprinted in full at Pet.App. 50a–56a.

> late payment of rent shall accrue during the moratorium; and
>
> C. It shall be a defense to any eviction action that the eviction of the tenant will occur during the moratorium, unless the eviction action is due to actions by the tenant constituting an imminent threat to the health or safety of neighbors, the landlord, or the tenant's or landlord's household members. For any pending eviction action, regardless if the tenant has appeared, a court may grant a continuance for a future court date in order for the matter to be heard at a time after the moratorium is terminated; and
>
> D. Effective immediately, the Sheriff of King County is requested to cease execution of eviction orders during the moratorium.

Introduction and Summary of Reasons for Granting the Petition

The government is categorically required to pay just compensation for any compelled physical occupation of private property. U.S. Const. amend. V. This is because a property owner's fundamental right to possess and exclude has always been paramount; forever bound to liberty and individual freedom. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2072 (2021); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432–35 (1982). It does not matter whether the occupation is permanent or temporary, large or small, continuous or intermittent, economically harmful or economically benign. *Cedar Point*, 141 S.Ct. at 2074–75.

However, this constitutionally protected property right has been steadily eroded by a recurring misinterpretation of *Yee v. Escondido*, 503 U.S. 519 (1992). *Yee* pertained to a rent control regulation that limited the rent that could be charged for the land beneath mobile homes. *Id.* at 524. Although the owners were not seeking to evict their current tenants, they nevertheless claimed that rent control was a compelled physical invasion because it allowed continued occupancy at below market rents. *Id.* at 527. In this context, *Yee* held that no physical taking occurred because the owners voluntarily leased space to the occupants and legally retained the right to evict. *Id.* at 524, 527–28. This Court considered rent control to be a regulation of use that must be evaluated under *Penn Central*, not a physical taking of the willingly leased property. *Id.* at 528–30.

Since then, the Ninth Circuit below and many other courts have misappropriated *Yee*'s discussion of "voluntary leasing" to foreclose physical takings claims. It is the basis for a categorical rule that once a property owner grants possession to a third-party occupant, even if that grant is only limited or conditional, the government is then free to authorize a greater or new physical occupation under the terms, conditions, and duration of its choosing and with constitutional impunity. Put differently, when the owner cracks open the door for some, the government has license to open the door widely for most all. Under this interpretation of *Yee*, a rental property owner's fundamental right to possess and exclude is constitutionally lesser than that of other property owners. And the government always has a free hand.

In this case, El Papel and Berman (collectively "El Papel") supply much-needed rental housing to tenants whose possession was conditional upon paying rent, maintaining the property in good condition, abiding by the lease, and leaving when the lease expires. This leasehold agreement between housing provider and tenant was consistent with longstanding property traditions. However, in March 2020, Seattle commandeered all rental properties by way of an "eviction moratorium."[4] It was a response to the COVID-19 pandemic and the City's attempt to ensure that renters could shelter in place. Occupants were legally authorized to continue in hostile possession and exclude the property owner, regardless of whether they complied with an existing lease, or even had a lease, and irrespective of the State's law of unlawful detainer. Pet.App. 53a–55a.

Courts analyzing lawsuits challenging this infringement upon the owner's right to exclude faced a fork in the road: should they analyze the eviction ban under the physical takings line running from *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979), through *Loretto* and culminating in *Cedar Point*,[5] or alternatively, does *Yee* preclude physical takings claims that arise within the rental context?

Most have chosen the view that once a property owner agrees to lease, the government has carte

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[4] A "moratorium" is "1. An authorized postponement, usu. a lengthy one, in the deadline for paying a debt or performing an obligation. 2. The period of this delay. 3. The suspension of a specific activity." Black's Law Dict. (11th ed. 2019). Effectively, the eviction moratorium banned evictions.

[5] *Cedar Point* was decided in June 2021, while Seattle's eviction ban was well underway.

blanche to compel a physical occupation that is distinct from, more than, and longer than, what the owner consented to, without paying just compensation. Adopting this position, the Ninth Circuit upheld Seattle's eviction ban on the categorical basis that "[*Yee*] controls here and forecloses the Landlords' per se physical-taking claim." Pet.App. 4a. While the court acknowledged that El Papel made some "compelling points" in favor of applying *Cedar Point*, El Papel's decision to use their property as rental housing meant that all subsequent government action merely regulated "use" and could never be a physical taking. Pet.App. 4a–5a.

The Ninth Circuit's decision to relieve Seattle of Fifth Amendment liability is irreconcilable with the entirety of the Court's physical takings jurisprudence. *Cedar Point*, 141 S.Ct. 2063; *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015); *Loretto*, 458 U.S. at 435; *Kaiser Aetna*, 444 U.S. at 179–80. Indeed, in *Alabama Association of Realtors v. Department of Health and Human Services*, this Court instructed that "preventing [owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." 141 S.Ct. 2485, 2489 (2021). The Court did not resolve the constitutional implications of such intrusion in *Alabama Association of Realtors*; the question is squarely presented as a constitutional matter here.

The decision below also conflicts with the Eighth Circuit. In *Heights Apartments LLC v. Walz*, the court analyzed a similar COVID eviction ban and held that with respect to the alleged physical taking, *Cedar Point* applied and *Yee* had no place. 30 F.4th 720,

denying rehearing and rehearing en banc, 39 F.4th 479 (8th Cir. 2022).

Opening private property to the beneficial use of others is one of the foundations of our economic system and it cannot be conditioned upon the waiver of a property right that is sacrosanct under the Fifth Amendment. However, across a spectrum of circumstances and a variety of properties, *Yee* has become the pillager of physical takings claims. The Ninth Circuit's decision below is simply the most recent of the repeated distortions of *Yee* at the expense of private property rights. Rental housing, medical housing, and even software has been forced to submit to uncompensated government authorized invasions, partitioning these owners into a subordinate class with less constitutional protection. Intervention by this Court is needed to clarify the scope and limitations of *Yee*, otherwise the dissolution of owners' fundamental property rights will continue unabated.

This Court should grant certiorari.

Statement of the Case

A. Seattle Bans Evictions During COVID, Compelling Private Property Owners to Provide Almost Unconditional Public Housing

In March 2020, Seattle declared a civil emergency in response to the COVID-19 pandemic. Pet.App. 50a. One resulting priority was to ensure that the public could remain housed and shelter in place. Accordingly, Seattle issued a series of emergency orders that prohibited property owners from evicting nonpaying tenants, expired tenants, or other unwelcome occupants from their rental properties.

Pet.App. 50a–56a; 6-ER-1299–1304; 6-ER-1372–1412. The sole exception was if the tenant posed an imminent threat to the health or safety of neighbors, the property owner, or their respective household members. Pet.App. 54a. The eviction ban lasted from March 16, 2020, through September 30, 2021. Pet.App. 50a–56a; 6-ER-1299–1304; 6-ER-1372–1412; Exhibit 1, Defendant City of Seattle's Notice of Supplemental Authority dated June 22, 2021, Case 2:20-cv-01323, ECF No. 124. However, as that period drew to a close, the Seattle City Council enacted an ordinance authorizing occupants who failed to pay rent to retain possession for an additional six months. 6-ER-1399–1400.

El Papel, LLC owns two rental properties in Seattle. 6-ER-1197–98, 5-ER-1194–95. One is a 25-unit micro apartment building. 6-ER-1197–98, 5-ER-1194–95. After Seattle banned evictions, two of its tenants stopped paying their rent. 6-ER-1197–98, 5-ER-1194–95. One tenant, who was employed throughout most of the pandemic, had a monthly rent of $750 and owed $4,235 as of April 7, 2021. 6-ER-1198, 5-ER-1195. The other tenant, with a monthly rent of $925, owed $2,050 as of April 7, 2021. 6-ER-1198, 5-ER-1195. Absent Seattle's eviction bans, El Papel would have evicted them to make the housing available to tenants who would comply with their leases. 6-ER-1198, 5-ER-1195.

El Papel also owns a townhouse in Seattle. 6-ER-1198. On July 31, 2020, the fixed term lease of the two tenants occupying the townhouse expired. The tenants paid no rent and refused to leave. 6-ER-1198. They occupied the residence until December 2020, as they were authorized to do by Seattle's eviction

moratorium. 6-ER-1198. When they finally chose to leave, they owed $3,786.21. 6-ER-1198.

Berman 2, LLC owns and manages a residential building in Seattle with 24 rental units. 5-ER-1191–93. It rents these units to low-income tenants, many of whom were previously homeless, at below-market rates. 5-ER-1192. Berman relies on the eviction process to keep these units safe and comfortable for the tenants and to keep rental rates low. 5-ER-1192. Empowered by Seattle's eviction ban, tenants occupying nine of its rental units stopped paying rent, running up a combined default of $16,479 as of April 8, 2021. 5-ER-1192. Berman attempted to negotiate with the delinquent tenants by phone, text, and in person, and was willing to accept partial payment or repayment; however, the tenants ignored all communications and continued to occupy Berman's rental units in violation of their lease agreements. 5-ER-1192. As Seattle's moratorium implicitly approved one type of lawlessness, other types followed. Berman observed increased drug activity and non-leased occupants living on the property without consent. 5-ER-1192. But for Seattle's eviction ban, Berman would have evicted the tenants in default. 5-ER-1192.

B. Proceedings Below

On September 3, 2020, Petitioners sued in federal court, alleging that Seattle's eviction ban was an unconstitutional impairment of contract and an unconstitutional physical taking of their rental properties, 6-ER-1325–42. Petitioners filed their First (Corrected) Amended Complaint on January 14, 2021. Pet.App. 57a–82a. They sought declaratory relief, injunctive relief, and nominal damages. Pet.App. 80a–82a.

Both parties filed cross-motions for summary judgment, submitted to a magistrate. On September 15, 2021, the magistrate issued a Report and Recommendation in favor of Respondents the City of Seattle and Jenny A. Durkan, in her official capacity as Mayor of the City of Seattle (collectively, "Seattle"). Pet.App. 10a–49a. On July 20, 2022, the district court adopted the magistrate's Report and Recommendation, granted the Motion for Summary Judgment filed by Seattle, and dismissed El Papel's and Berman's causes of action with prejudice. Pet.App. 7a–9a.

El Papel and Berman appealed to the Ninth Circuit Court of Appeals with respect to the takings claim only. Pet.App. 1a–6a. In an unpublished decision, the court affirmed the dismissal, holding that *Yee* "controls here and forecloses the Landlords' per se physical-taking claim." Pet.App. 4a. Distinguishing *Cedar Point*, the court found that no physical occupation occurred because the property owners chose to use their property as residential rentals and thereby consented, in the first instance, to the tenants' occupancy. Pet.App. 4a–5a. The Ninth Circuit also noted that the owners were not completely stripped of their right to exclude and could evict in a limited circumstance. Pet.App. 5a. Lastly, the court distinguished *Alabama Association of Realtors* as a statutory interpretation case with no bearing on the constitutional takings claim.[6] Pet.App. 5a.

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[6] The court below also granted summary judgment to defendant-appellee Jay Inslee, in his official capacity as Governor of the State of Washington, on the grounds that "Section 1983 actions do not lie against a State." Pet.App. 3a. Petitioners do not challenge that determination.

Reasons for Granting the Petition

I. Certiorari Is Needed to Clarify That a Conditional, Limited Grant of Occupancy Does Not Categorically Bar All Future Physical Takings Claims

A. What *Yee* Does—And Does Not—Hold

Property ownership is grounded in certain inherent and well-established rights: the right to possess what you own and to exclude others from it, the right to use property for your benefit, and the right to dispose of it as you wish. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945). These property rights have always been afforded vigilant protection within American jurisprudence because "the protection of private property is indispensable to the promotion of individual freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Cedar Point*, 141 S.Ct. at 2071; *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544, 552 (1972) (property rights are "an essential pre-condition to the realization of other basic civil rights and liberties").

Government regulations that impact property rights are of a "[near] infinite variety." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). To corral them, different legal standards have evolved to identify those regulations that have "gone too far" and are "functionally equivalent to the classic taking." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). With regard to a property owner's right to possess and exclude, a government compelled physical occupation is a categorical taking that requires the payment of just compensation regardless

of any other facts and circumstances. *Loretto*, 458 U.S. at 434. However, with regard to a property owner's right to use, there are two possible paths. When there is a complete taking of all economically beneficial use, the government's liability is, again, categorical. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). For only a partial taking of the right to use, the regulation must be evaluated under the ad hoc test of *Penn Central*, with due consideration given to the regulation's economic impact, the owner's reasonable investment backed expectations, and the regulation's character. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

With the above in mind, the central issue in *Yee* was which of these tests applied. The property owners challenged a local rent control ordinance that, in combination with a state law, limited how much rent the owners could charge for the land beneath their tenants' mobile homes. 503 U.S. at 524–25. But they did not claim that it was a partial taking of the right to use under *Penn Central*. Instead, they alleged a facial physical taking of "a discrete interest in land—the right to occupy land indefinitely at a submarket rent." *Id.* at 527. At the same time, the property owners did not seek to evict anyone, nor object to the occupancy of any particular tenant. Had they wanted to, the owners were free to evict on numerous grounds. *Id.* at 524, 527–28. Consequently, this Court held that the physical taking doctrine was not the correct theory to challenge a rent control regulation. *Id.* at 527 ("This argument, while perhaps within the scope of our regulatory taking cases, cannot be squared easily with our cases on physical takings"). In other words, a potential taking of the right to use cannot be adjudged by the law applicable to the right to possess and

exclude. As the rent control statute at issue "merely regulate[s] petitioners' use of their land," *id.* at 528, it must be evaluated under the ad hoc test of *Penn Central*. *Id.* at 529. Further, *Yee* confirmed that a physical taking would lie if the regulation "compel[led] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528; *id.* at 531–32 ("had the city required such an occupation, of course, petitioners would have a right to compensation, and the city might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right").[7]

B. The *Yee* Juggernaut Wipes Out Virtually All Physical Takings Claims When a Property Owner Initially Grants Limited, Conditional Consent for Entry

In the course of explaining why *Yee* was not a physical takings case, this Court twice referenced the owner's voluntary decision to rent. *Yee*, 503 U.S. at 527 ("the Escondido rent control ordinance, even when considered in conjunction with the California Mobilehome Residency Law, authorizes no such [physical invasion]. Petitioners voluntarily rented their land to mobile homeowners"); *id.* at 531 (the owner's inability to choose its tenants via price discrimination was not a physical taking because "it does not convert regulation into the unwanted physical occupation of land. Because they voluntarily open their property to occupation by others,

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[7] *Cedar Point* confirmed that a "physical appropriation is a taking whether it is permanent or temporary." *Cedar Point*, 141 S.Ct. at 2074.

petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals.").

Ever since, lower courts routinely interpret these discussions of "voluntariness" to mean that anytime a property owner consents to a third-party's possession, regardless of whether it is only limited or conditional, physical takings claims are forever legally barred. Any third-party possession is dispositive and the property owner's objection to a continued occupation is legally irrelevant. *See, e.g.*, *Kagan v. City of Los Angeles*, No. 21-55233, 2022 WL 16849064 (9th Cir. Nov. 10, 2022) (property owner could not evict "protected" tenant even to move his own family members into the unit); *Harmon v. Markus*, 412 F.App'x 420, 422 (2d Cir. 2011) (purchasers of rent-controlled property "acquiesced in its continued use as rental housing"); *Troy Ltd. v. Renna*, 727 F.2d 287, 290–91, 301–02 (3d Cir. 1984) (sustaining a statute that prevented owners who converted a rental apartment building to a condominium from evicting senior citizens and disabled tenants for forty years unless, inter alia, the tenants' income level was above a certain threshold).

Consequently, the government can then forcibly alter and expand the occupancy to a near unlimited degree and without regard to just compensation; irrespective of an owner's consent or the occupant's desire or ability to preserve and pay for the property that it has been given. As one commentator described soon after *Yee* was issued:

> 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? Wholly apart from any inequity to the landlord—an outcome that this Court regards as a philosophical contradiction in terms—the results of this outlook are insidious in the long run.

Richard A. Epstein, Yee v. City of Escondido*: The Supreme Court Strikes Out Again*, 26 Loy. L.A. L. Rev. 3, 17–18 (1992); *see also* William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 82 (1995) (regarding *Yee*, "it is unclear why the initial 'invitation' should be controlling"; the government cannot extend the invitation in perpetuity without just compensation).

As predicted, two years after *Yee*, the New York Court of Appeal held that a compelled, indefinite rental tenancy was not an unconstitutional physical taking. *Rent Stabilization Ass'n of New York City, Inc. v. Higgins* challenged a part of New York's rent control law that forced rent stabilized property owners to "offer a renewal lease to a departed tenant's newly defined family member." 83 N.Y.2d 156, 172 (1993). This newfound authorization created a perpetual leasehold, whereby the tenancy could be passed down from relative-to-relative forever over the property owner's objection. As even the court noted, "a rent-regulated tenancy might itself be of indefinite duration." *Id.* at 172. Nonetheless, based upon *Yee*, the New York court held that this was not a physical

taking. It was dispositive that "the owner [] voluntary acquiesce[d] in the use of its property for rental housing." *Id.* (citing *Yee*).

A few years later, a second New York statute mandated that once a hotel guest checked into a "class B" hotel and stayed for 6 months, that hotel room was transformed into a residential rental and the guest was deemed a rent regulated and permanent tenant. The court found that "the forced conversion from renting to transients, on the one hand, and leasing to permanent tenants, on the other, is not a physical taking." *Greystone Hotel Co. v. City of New York*, 13 F.Supp.2d 524, 527 (S.D.N.Y. 1998). Relying upon *Yee*, it held that the hotel "is not required to enter into a landlord-tenant relationship with a stranger: rather, it is required to expand its relationship with someone to whom it has already rented a room." *Id.*

The trend continued to the latest version of New York's rent control law which forces property owners to renew a tenant's lease regardless of the owner's consent. Lower courts again held, per *Yee*, that this is not a physical taking because the owner voluntarily agreed to rent in the first place. *74 Pinehurst LLC v. New York*, 59 F.4th 557, 563 (2d Cir. 2023), *petition for certiorari pending*, Docket No. 22-1130; *335-7 LLC v. City of New York*, No. 21-823, 2023 WL 2291511, at *2 (2d Cir. Mar. 1, 2023), *petition for certiorari pending*, Docket No. 22-1170; *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 551 (2d Cir. 2023).

Similarly, other jurisdictions have also utilized *Yee* to uphold local ordinances that granted lifetime occupancy. *Kagan*, 2022 WL 16849064, at *1 (citing to *Yee*, the court held that the compelled granting of a

perpetual lease to a "protected" tenant was not a physical taking because the housing provider voluntarily rented the apartment and could evict for fault); *Cienega Gardens v. United States*, 265 F.3d 1237, 1248–49 (Fed. Cir. 2001) (pursuant to *Yee*, a federal ordinance that froze the property as mandatory low-income housing was not a physical taking because it "merely enhanced" an existing possessory interest); *State Agency of Development and Community Affairs v. Bisson*, 161 Vt. 8, 15 (1993) (rejecting the allegation that a mobile home statute that restricted evictions and effectively created a perpetual lease violated the Takings Clause).

Beyond permanent, or near permanent tenancies, *Yee* has arisen in other contexts. The D.C. Circuit Court of Appeals held that an owner's decision to use its property as rental housing meant that the forced affixing of satellite dishes to the real property was not a physical taking. *Bldg. Owners & Managers Ass'n Int'l v. F.C.C.*, 254 F.3d 89, 98 (D.C. Cir. 2001). Forsaking *Loretto* in favor of *Yee*, the court decided that once the owner ceded control to a tenant, the government could force a new physical occupation that the tenant wanted but the owner didn't. *Id.* at 97.

In the field of healthcare, the First and Second Circuits have held that once a medical facility voluntary accepts a patient, the government can then strip the facility of the right to exclude without liability for a physical taking. Obviously, there is an important public interest in guaranteeing access to health care. But under the Takings Clause, due consideration must also be given to those private property owners that are forced to bear the cost of providing public benefits. *See Connecticut Ass'n of*

Health Care Facilities, Inc. v. Bremby, 519 F.App'x 44, 45 (2d Cir. 2013) (a local law prohibited nursing facilities from involuntarily discharging Medicaid patients was not a physical taking under *Yee*, because "the nursing homes here voluntarily accepted nursing home patients as customers"); *Franklin Mem'l Hosp. v. Harvey*, 575 F.3d 121, 126 (1st Cir. 2009) (a state statute that required local hospitals to provide free in-patient medical services to all low-income patients was not a physical taking because, as per *Yee*, if the hospital voluntarily chose to enter the business of healthcare, then it would be subject to this compelled occupation).

Yee has also been dispositive with regard to a government approved invasion into software. Certain Arizona car dealers were locked into a long-term contract with CDK Global and Reynolds & Reynolds (collectively "CDK"), providers of "Dealer Management Software." To the extent that the car dealers' data was held within this software program, it gave CDK a competitive advantage with respect to companion software programs. To wit, it could refuse to unlock the car dealers' data for competitors. Thus, to allow for greater competition, Arizona's Dealer Law authorized car dealers and software competitors to invade these software programs. CDK filed suit, claiming that the statute was a physical taking because it compels them to allow third parties to "to enter, use, and occupy their [Dealer Management Software]." *CDK Glob. LLC v. Brnovich*, 16 F.4th 1266, 1281 (9th Cir. 2021). Relying upon *Yee*, the Ninth Circuit rejected the physical takings claim. The court said that "it is no answer that CDK may not wish to open its DMS to any particular authorized integrator. Once property owners voluntarily open

their property to occupation by others, they cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 1282 (citing *Yee*, 503 U.S. at 530) (cleaned up).

The COVID eviction ban cases are the most recent of those to misinterpret the holding of *Yee.* With the exception of the Eighth Circuit's *Heights Apartments* decision, lower courts have held that the compelled occupation of rental units was not a physical taking because the owner initially agreed to lease. Pet.App. 4a–5a; *see, e.g.*, *GHP Mgmt. Corp. v. City of Los Angeles*, No. CV-21-06311, 2022 WL 17069822, at *3 (C.D. Cal. Nov. 17, 2022) ("as in *Yee*, the Moratorium does not swoop in out of the blue to force Plaintiffs to submit to a novel use of their property.... The tenants were invited by [the landlords], not forced upon them by the government") (cleaned up); *Williams v. Alameda Cnty.*, 642 F.Supp.3d 1001, 1020 (N.D. Cal. 2022) ("Like the laws in *Yee*, the moratoria apply to tenants that the plaintiff landlords had already invited onto their property.... The *Yee* decision compels the conclusion that the moratoria, on their face, are not per se takings."); *Auracle Homes, LLC v. Lamont*, 478 F.Supp.3d 199, 220 (D. Conn. 2020) ("no government has required any physical invasion of Plaintiffs' property.... As in *Yee*, Plaintiffs here voluntarily rented their land to residential tenants.") (cleaned up); *Gonzales v. Inslee*, 535 P.3d 864, 873 (Wash. 2023) (citing *Yee*, holding that "the tenants are on the landlords' property with the landlords' permission under a type of property arrangement that preexists the state and federal constitutions.

Government regulation of that voluntary relationship, without more, is not a taking.”).[8]

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Property owners' fundamental right to possess and exclude has been radically altered by the enduring misinterpretation of *Yee*. For those that choose to rent their property, the cost of doing business is the loss of Fifth Amendment protection. And cast aside is the categorical rule that any government-authorized physical occupation, without the payment of just compensation, is an unconstitutional taking. When considering the deep intertwining of economic development and the unencumbered use of property, this misstep has particularly acute consequences. *See Hendler v. United States*, 952 F.2d 1364, 1375 (Fed. Cir. 1991) (“In addition to its central role in protecting the individual's right to be let alone, the importance

[8] A petition for writ of certiorari will be filed in *Gonzales v. Inslee* on or before February 27, 2024. For other lower court cases upholding COVID eviction moratoria, *see Gallo v. D.C.*, No. 1:21-CV-03298 (TNM), 2023 WL 7552703, at *7 (D.D.C. Nov. 14, 2023) (“He bought what he thought would be a profitable residential unit, and he ended up with a freeloader who avoided eviction because of the District's COVID-related eviction prohibition. But unfortunately for Gallo, binding caselaw simply does not provide a remedy against the city for landlords in his situation.”); *Farhoud v. Brown*, No. 3:20-CV-2226, 2022 WL 326092, at *10 (D. Or. 2022); *Stuart Mills Props., LLC v. City of Burbank*, No. 22-CV-04246, 2022 WL 4493573, at *3 (C.D. Cal. Sept. 19, 2022); *Jevons v. Inslee*, 561 F.Supp.3d 1082, 1106 (E.D. Wash. 2021); *S. California Rental Hous. Ass'n v. Cnty. of San Diego*, 550 F.Supp.3d 853, 865 (S.D. Cal. 2021); *Baptiste v. Kennealy*, 490 F.Supp.3d 353, 388 (D. Mass. 2020)*; Elmsford Apt. Assocs., LLC v. Cuomo*, 469 F.Supp.3d 148, 163 (S.D.N.Y. 2020); *Rental Hous. Ass'n v. City of Seattle*, 22 Wash.App.2d 426, 448–49 (2022); *Matorin v. Commonwealth*, No. 2084CV01334, 2020 WL 12847146, at *10 (Mass. Super. Aug. 26, 2020).

of exclusive ownership—the ability to exclude freeriders—is now understood as essential to economic development, and to the avoidance of the wasting of resources found under common property systems"); Sharon Yamen et al., *In Defense of the Landlord: A New Understanding of the Property Owner*, 50 Urb. Law. 273, 275–76 (2021) (noting that almost half of all rental units are owned by "mom and pop" owners and that "[s]avvy tenants have capitalized on well-intended rent-control ordinances to fraudulently take or maintain possession of units at the expense of property owners, both large and small").

Further, it allows the occupancy of rental property to be dictated by the current government's public policy. Similar to how the desire for guaranteed housing led to the eviction prohibition here, with a showing of public purpose any politically favored lessee could be granted the occupancy rights of the government's choosing. Such lessees could include, for example, farmland, supermarkets, medical facilities, car manufacturers, distribution warehouses, energy companies, tech companies, and everything in between.

Thus, the narrow holding of *Yee* has been steadily expanded into something that is now unrecognizable from what this Court determined. No longer a case about the Fifth Amendment's standard of review for rent control, *Yee* has become the purveyor of categorical immunity from physical takings claims and the means by which rental property has been demoted from the ranks of those entitled to full constitutional protection.

II. Certiorari Should Be Granted to Resolve the Conflict Between the Ninth Circuit and the Decisions of This Court and Other Courts

A. The Ninth Circuit's Decision Conflicts with the Court's Physical Takings Precedent from *Kaiser Aetna* Through *Cedar Point*

Seattle's eviction ban authorized occupants of rental property to remain in hostile possession and exclude the property owner. Pet.App. 53a–55a. This compelled occupation was near absolute and not conditioned upon a lease; or the tenant paying rent, maintaining the property, refraining from criminal conduct, or declining to allow others to share in this unfettered possession. Pet.App. 53a–55a. While the commandeering of private property to guarantee public housing during a health pandemic may have reflected good intentions, the effect of Seattle's eviction ban was no different than the government physically invading and occupying the Petitioners' rental property itself. It erased the "expectancies embodied in the concept of property" derived from the well-established protections of unlawful detainer, and consequently "falls within this category of interests that the Government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179–80.

Accordingly, under a straightforward reading of *Kaiser Aetna*, *Loretto*, and *Cedar Point*, this was a categorical physical taking. *See Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 877 (1983) (Rehnquist, J., dissenting from the denial of certiorari) (when the result of the ordinance is that the property owner cannot possess the property "until the

tenant decides to leave of his own volition" it is a categorical physical taking); *Heights*, 30 F.4th at 733; Paul J. Larkin, *The Sturm und Drang of the CDC's Home Eviction Moratorium*, 2021 Harv. J.L. & Pub. Pol'y Per Curiam 18, 28–29 ("The [CDC's] order forces an owner to accept a government-imposed squatter for as long as a moratorium is in effect. Unlike a rent control statute … the CDC's order entitles a tenant to reside in property that he or she no longer has a legitimate right to occupy without paying rent.") (footnote omitted). As one district court judge held during the emergency of World War II, when the government commandeered private property and sought only to pay rent:

> I know of no power in the government to force one to enter into a lease or contract relating to his property, but on the other hand, I think that the government has ample power to force the owner to surrender his property and that it may name what interest it desires to take and all the terms and conditions surrounding it. But when the government has done that it has taken the property and the owner has his remedy under his constitutional guarantee to receive just compensation to be fixed by a court and jury.

United States v. 9.94 Acres of Land in City of Charleston, 51 F.Supp. 478, 484 (E.D.S.C. 1943).

Physical takings are "perhaps the most serious form of invasion of an owner's property interests." *Loretto*, 458 U.S. at 435. It "chops through" the entire proverbial bundle of sticks, *id.*, and violates "one of the most treasured rights of property ownership." *Cedar Point*, 141 S.Ct. at 2072. Thus, "the right to exclude is

[not] an empty formality, subject to modification at the government's pleasure. On the contrary, it is a fundamental element of the property right, that cannot be balanced away." *Id.* at 2077–78. Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998) ("Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property.").

Consequently, physical takings are "per se" or "categorical" takings. *Cedar Point*, 141 S.Ct. at 2072; *Kaiser Aetna*, 444 U.S. at 179–80. Once this property right has been taken by the government, no other facts or circumstances need be considered. *Horne*, 576 U.S. at 360; *Loretto*, 458 U.S. at 434–35. This Court's precedent therefore treats almost any government-authorized occupation of property as a categorical physical taking absent the payment of just compensation. *Cedar Point*, 141 S.Ct. at 2074 ("[G]overnment-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation."); *Hendler*, 952 F.2d at 1374–75 ("In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to *exclude* strangers, or for that matter friends, but especially the Government.").

The established physical takings precedent is reflected in the recent *Alabama Association of Realtors* decision. In determining that the CDC had exceeded its statutory authority in authorizing a nationwide eviction ban, this Court also reviewed the equities of allowing the eviction ban to continue. It

found that "preventing [owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." 141 S.Ct. at 2489 (citing *Loretto,* 458 U.S. at 435). Pointedly, the Court did not state that *Yee* applied, nor hold that the owner's initial consent to the tenant's possession barred a physical takings claim. *See also Pinewood Estates of Michigan v. Barnegat Twp. Leveling Bd.*, 898 F.2d 347, 355 (3d Cir. 1990) (Stapleton, J., concurring) ("[W]here the state permanently takes away a landlord's right to evict a tenant and his successors beyond the end of an agreed upon term a permanent physical occupation occurs and there is a *per se* taking under *Loretto*[.]").

The Ninth Circuit ignored all of this. Because El Papel and Berman voluntarily chose to enter the residential rental business, the court categorically rejected the physical takings claim that followed. Pet.App. 4a–6a. It explicitly stated that *Alabama Association of Realtors* had no bearing on takings matters, Pet.App. 5a, and it determined that a physical taking must be total in order to be actionable, eschewing the Court's well-established precedent regarding partial physical takings. Pet.App. 5a.

In so holding, the Ninth Circuit was in direct conflict with *Loretto* and its progeny. Constitutional liability for a physical taking is determined only by the government action. *Cedar Point*, 141 S.Ct. at 2072. The compelled occupation of a residential rental is no less a physical taking than the compelled occupation of any other real property. Thus, *Loretto* explicitly held that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.… The right of

a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." 458 U.S. at 439, n.17. Nor has this Court ever countenanced the diminution of Fifth Amendment protection for owners that use their property in the commercial sphere. *Horne*, 576 U.S. at 366 ("selling produce in interstate commerce, although certainly subject to reasonable government regulation, is similarly not a special governmental benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection"); *see Valancourt Books, LLC v. Garland*, 82 F.4th 1222, 1231–32 (D.C. Cir. 2023) (the decision of an artist to enter the stream of commerce does not immunize the government from physical takings claims when it demands a free physical copy of all copyrighted works).

Looking at it from a different perspective, a tenant's occupancy is temporary and conditional, not permanent and absolute. *Garneau v. City of Seattle*, 147 F.3d 802, 814 (9th Cir. 1998) (O'Scannlain, J., concurring in part, dissenting in part) (noting that landlords retain the right to exclude and that "in its conventional sense, a 'tenant' is 'one who has the *temporary* use and occupation of real property' owned by someone else."); Black's Law Dict., *lease* (11th ed. 2019). The government cannot forcibly expand the occupancy that was consented to without the payment of just compensation because "the government does not have unlimited power to redefine property rights." *Loretto*, 458 U.S. at 439 (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)). Accordingly, when the government compels an occupation that is contrary to the property owner's consent, the lease, and the law of unlawful detainer,

this Court's precedent holds that it is a physical taking. *F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987) ("This element of required acquiescence is at the heart of the concept of occupation."); *see also Cable Arizona Corp. v. Coxcom, Inc.*, 261 F.3d 871, 876 (9th Cir. 2001) (were the statute to be read "as authorizing access over private easements [it] would gravely implicate the Takings Clause"); *Smiley First, LLC v. Dep't of Transp.*, 492 Mass. 103, 116 (2023) (because the government expanded the scope of the easement, it was an additional physical taking); *Bogart v. CapRock Commc'ns Corp.*, 69 P.3d 266, 271–72 (Okla. 2003) (a government regulation imposing "an increased servitude or burden" requires the payment of just compensation).

The Ninth Circuit decision likewise conflicts with this Court's precedent in denying a physical takings claim because El Papel and Berman could evict tenants who presented a significant and immediate risk to health and safety. Pet.App. 54a. At most, it meant that Seattle's compelled occupation was partial as opposed to whole. Partial physical takings are indisputably actionable. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002); *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1367 (Fed. Cir. 2012) ("[T]he Supreme Court has defined a taking to be permanent even when specified action initiated by the landowner could terminate the taking.") (citing *Loretto*, 458 U.S. 419).

Cedar Point was a partial physical taking where the owners retained the right to exclude the union organizers outside of the proscribed times. 141 S.Ct. at 2069. In *Loretto*, the owner could exclude the cable company if the property ceased operation as a

residential rental. 458 U.S. at 429. And in *United States v. Causby*, other than intermittent military aircraft above, the property owner retained the right to possess and exclude with respect to anyone and everywhere. 328 U.S. 256, 258 (1946). Contrary to the Ninth Circuit, all uncompensated physical takings—whether full or partial, temporary or permanent, continuous or intermittent, substantial or nominal—are categorically unconstitutional and contrary to the Fifth Amendment. *Cedar Point*, 141 S.Ct. at 2072–75; *Loretto*, 458 U.S. at 434–35.

B. Certiorari Should Be Granted to Resolve the Circuit Split Between the Ninth Circuit Decision, the Eighth Circuit's Decision in *Heights Apartments*, and Numerous State Court Decisions

The only other federal Circuit Court to address a physical takings claim resulting from a COVID eviction ban was the Eighth Circuit's *Heights Apartments, LLC v. Walz*, 30 F.4th 720. It held the exact opposite of the Ninth Circuit.

Like Seattle, the State of Minnesota enacted an eviction ban prohibiting all residential evictions except for those cases where the tenants seriously endangered the safety of other residents or significantly damaged the property, or if the owner's family needed to move into the unit. *Id.* at 724–25. In affirming denial of the government's motion to dismiss, the Eighth Circuit held that the eviction ban implicated the physical takings doctrine and *Yee* did not apply to physical takings claims:

> *Cedar Point Nursery* controls here and *Yee*, which the Walz Defendants rely on, is distinguishable. The 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. The landlords in *Yee* sought to exclude future or incoming tenants rather than existing tenants. Here, the [Executive Orders] forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated, unless the tenants seriously endangered the safety of others or damaged property significantly. According to Heights' complaint, the [Executive Orders] "turned every lease in Minnesota into an indefinite lease, terminable only at the option of the tenant." Heights has sufficiently alleged that the Walz Defendants deprived Heights of its right to exclude existing tenants without compensation. The well-pleaded allegations are sufficient to give rise to a plausible per se physical takings claim under *Cedar Point Nursery*.

Id. at 733 (cleaned up); *see also 301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1383 (8th Cir. 2022) (in holding that a local ordinance restricting the categorical rejection of tenants with criminal histories and bad credit was not a physical taking, the Eighth Circuit noted that "an ordinance that would require landlords to rent to individuals they would otherwise reject might be a physical-invasion taking"). This Court should grant this case to resolve the conflict. *See Heights Apartments, LLC v. Walz*, 39

F.4th 479, 482 (8th Cir. 2022) (Colloton, J., dissenting from denial of petition for rehearing en banc) ("Given the broad implications of the panel decision, and the conflicts in authority that the decision has generated, this proceeding involves questions of exceptional importance.... [T]he panel decision will live on as a circuit precedent at odds with decisions of the Supreme Court and other federal courts.").

The decision below also conflicts with state court decisions, magnifying the divide about whether *Yee* forces property owners to submit to a government-compelled occupation without the payment of just compensation. *See, e.g.*, *Polednak v. Rent Control Board of Cambridge*, 397 Mass. 854, 862 (1986) (a local ordinance prohibiting an owner from moving into her rented condominium was a physical taking); *Aspen-Tarpon Springs Ltd. P'ship v. Stuart*, 635 So.2d 61, 67–68 (Fla. Dist. Ct. App. 1994) (a statute that forced owners to either pay a substantial sum or acquiesce to a tenant's lifetime lease was a physical taking).

Of particular note is *Cwynar v. City & Cnty. of San Francisco*, 90 Cal.App.4th 637, 647–49 (2001), which conflicts with the Circuit where it is located. In that case, a city ordinance prohibited property owners from evicting tenants so that they could house themselves or their family members. The California Court of Appeal distinguished *Yee* as "a facial challenge to a purely economic rent control law," *id.* at 656–57, and explained that *Yee* did not overrule the precedent that an eviction control regulation may be a physical taking. *Id.* at 657 (citing *Yee*, 503 U.S. at 528). Moreover, "the fact that the property was voluntarily rented at some time in the past does not preclude the

plaintiffs from pleading and proving government coercion" created an unwanted tenant occupancy. *Id.* at 658. Thus, Californians with physical takings claims based on the right to exclude have markedly different chances of vindicating their constitutional rights depending on whether they seek relief in state or federal court.

The Ninth Circuit's decision is not reconcilable with this Court's clearly established precedent, the Eighth Circuit's *Heights Apartments*, or the foregoing state court decisions. Certiorari should be granted to resolve this significant conflict.

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Uncompensated physical takings are categorically unconstitutional regardless of the underlying facts and circumstances. Yet, the pervasive misreading of *Yee* by the Ninth Circuit below and other courts has steadily broadened the scope of government action that is exempt from Fifth Amendment scrutiny. *Yee* was never intended to create a license for the government to compel the occupation of rental property without constraint, nor deny these property owners the protections of the Fifth Amendment. Without intervention by this Court, lower courts will continue the dismantling of property owners' fundamental right to possess and exclude and push the boundaries of what the government may compel without the payment of just compensation. Certiorari should be granted to uphold the constitutional protection of private property rights set forth in *Loretto* and *Cedar Point* and confirm that *Yee* does not defeat a physical takings claim in the face of a government-mandated occupation by an unwanted third party.

Conclusion

This Court should grant the petition.

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Respectfully submitted,

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