No. 23-807

In The
Supreme Court of the United States

EL PAPEL, LLC, et al.,
Petitioners,

v.

CITY OF SEATTLE, et al.,
Respondents.

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

BRIEF *AMICUS CURIAE* OF NATIONAL APARTMENT ASSOCIATION, WASHINGTON MULTI-FAMILY HOUSING ASSOCIATION, GRE DOWNTOWNER LLC, AND WEIDNER APARTMENT HOMES IN SUPPORT OF PETITIONERS

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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: Is an ordinance that compels the possession of property by an unwelcome occupant 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?

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INTERESTS OF *AMICI CURIAE*[1]

National Apartment Association (NAA) is the leading voice and preeminent resource for the rental housing industry across the country. As a federation of 141 affiliated apartment associations, NAA encompasses over 95,000 members, representing more than 12 million apartment homes. NAA emphasizes integrity, accountability, collaboration, inclusivity, and innovation, and believes that rental housing is a valuable partner in every community. In addition to providing professional development, education, and credentialing, NAA and its network of affiliated apartment associations work to ensure that public policy does not impede but promotes the ability of apartment owners and operators to run their businesses and provide housing to more than 30 million American households.

As described below, many of NAA's members who own rental properties in San Diego County were, in 2021, deprived by that County of their fundamental right to remove nonpaying and even dangerous tenants from their properties under the pretense of the COVID-19 pandemic. A lawsuit challenged the eviction moratorium on constitutional grounds, including that it effected a *per se* taking. Yet the federal district court granted a motion to dismiss the taking claim, in large part because of *Yee v. City of*

[1] All counsel of record for the parties in this case received timely notice of the filing of this brief. No party or counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution towards the preparation or submission. No person other than amici, their members or counsel made a monetary contribution towards the preparation or submission of this brief.

Escondido, 503 U.S. 519 (1992)—the case at heart of the Petition.

The Washington Multi-Family Housing Association (WMFHA), established in 2003, is the Washington State affiliate of the National Apartment Association (NAA). It represents residential property management companies, managers and owners of multi-family properties, apartment communities, and industry-supplier companies that promote and advance the multi-family housing industry in Washington. WMFHA actively monitors and influences the legislative process to advocate equitably for the industry and the communities it serves. WMFHA's educational and career development programs include national professional accreditation courses, continuing education, and opportunities. When its members' interests are at stake, WMFHA also participates in litigation to protect and promote those interests.

Many of WMFHA's members are rental-housing owners who have suffered under a variety of eviction moratoria enacted throughout the country during COVID-19, including owners with rental properties in Seattle.

One such member is GRE Downtowner LLC (GRE). GRE is the owner and operator of an apartment building located in Seattle, Washington that provides housing for low-income tenants. The apartment building is known as The Addison on Fourth. GRE was directly and adversely harmed by the Seattle moratorium at issue here. For example, in one representative incident in September 2021, GRE was impeded by Seattle's ordinance from expelling a

violent tenant who threatened to kill one of GRE's employee-technicians.

Another member of WMFHA, Weidner Apartment Homes, is an owner-operated company based in Washington, with a portfolio of close to 70,000 apartment homes throughout the United States and Canada. Weidner was extensively and adversely affected by the various federal, state, and local eviction moratoria, including Seattle's ordinance.

Given the real injuries they have suffered under Seattle's and other jurisdictions' eviction moratoria during COVID-19, Amici believe they can provide the Court with a real-world, on-the-ground understanding of how such moratoria have affected the rental housing industry and its ability to provide safe and affordable dwellings.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici agree with Petitioners that the lower courts are divided on the question whether *Yee* categorically precludes owners who rent out or lease their properties from mounting *per se* takings claims against laws, such as the recent spate of COVID-19-related eviction moratoria, that impair their right to exclude tenants and repossess their properties. As interpreted by the lower courts, *Yee* has largely excluded one class of property owners—those who

invite tenants to lease or rent their land[2] or dwelling—from the strong protections that the Takings Clause affords. U.S. Const. amend. V. The Ninth Circuit's decision below, which entrenches that exception, warrants review.

In this brief, Amici seek to underscore the extraordinary harm such oppressive laws have visited upon rental-housing owners across the country—not just in Seattle, where the eviction moratorium at issue originated, but in other jurisdictions as well. Many of these owners are small, mom-and-pop landlords who tirelessly work to provide their communities with safe and affordable housing, but whose efforts have been thwarted by the eviction moratoria. Such laws have threatened owners' operations in ways that risk the very rental housing supply that communities rely upon, especially low-income and vulnerable families,

In addition, the Petition presents the Court with an opportunity to clarify or revisit the notion, suggested in *Yee* and seized upon by lower courts, that, by opening up their land and dwellings to those in need of housing, rental-housing owners are entitled to *less* protection under the Takings Clause than other property owners. As this Court's precedents since *Yee* establish, there is no such exception to the Takings Clause. The Court should take the opportunity in this case to make that clear.

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[2] For example, a property owner may "rent[]" out "a plot of land, called a 'pad'" to a "mobile home owner" who installs the home on the pad. *Yee*, 503 U.S. at 523 (describing the mobilehome park model). Thus, mobile home park owners are property owners who lease or rent their *land* to tenants.

For these reasons, and those stated in the Petition, the Court should grant review.

ARGUMENT

I. The COVID-19 Eviction Moratoria Caused Substantial Harm to Rental-Housing Owners, Including Those Least Equipped To Bear the Financial and Emotional Cost: Small Mom-and-Pop Landlords

A. Seattle Wasn't the Only Jurisdiction To Enact Extreme Laws Stripping Rental-Housing Owners of Their Right to Exclude and Repossess Their Properties Under the Pretense of an Emergency

Seattle wasn't the only jurisdiction to enact an extreme moratorium barring their rental-housing providers from evicting nonpaying and dangerous tenants. Many cities and counties across the country used the COVID-19 emergency to restrict or eliminate rental-housing owners' rights. Two examples from California—the County of San Diego and the City of Berkeley—are representative of this phenomenon.

San Diego County

San Diego County enacted Ordinance 10724[3] on May 4, 2021, with an effective date of June 3, 2021. The Ordinance prohibited any rental-housing owner in the County (including cities within the County)

[3] The Ordinance is available on the County's official site at https://bit.ly/48hUUVQ.

from taking any action to terminate a residential tenancy without "just cause." Ordinance 10724, § 3(c). To prove "just cause," the owner had to show "that the Tenant is an imminent health or safety threat," which was defined as: "a hazard to the health or safety of other tenants or occupants of the same property, taking into account (1) the risk of potential spread of coronavirus caused by the eviction, in case of a Local Emergency due to COVID-19, (2) any public health or safety risk caused by the eviction, and (3) all other remedies available to the landlord and other occupants of the property, against the nature and degree of health and safety risk posed by the tenant's activity." *Id.* §§ 2(b), 3(b).

The Ordinance did not define what rose to the level of a "hazard to the health or safety" of a "tenant or occupant." But it clearly prohibited the removal of a tenant posing a hazard to the health or safety of the rental-housing owner, her family, her employees, and even third parties lawfully on the premises, such as repairmen and those delivering mail and packages. And the Ordinance clearly prohibited the removal of a tenant threatening or engaged in damage or destruction of the owner's property. Needless to say, the Ordinance also relieved tenants from paying rent, for which they could not be removed.

NAA's local affiliate, Southern California Rental Housing Association, sued the County in federal court on behalf of its members, mostly mom-and-pop owners devasted by the moratorium. Among other things, the Association alleged that the Ordinance effectuated a *per se* taking by eliminating landlords' right to exclude and repossess their

dwellings, even if only on a temporary basis. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012) ("[W]e have rejected the argument that government action must be permanent to qualify as a taking" so that "[o]nce the government's actions have worked a taking of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (cleaned up)). When seeking a temporary restraining order and preliminary injunction, the Association presented the uncontested sworn declarations of landlords who were suffering under the moratorium.

Declarants included husband and wife, Michael and April Solis. They owned a single-family, fully furnished home in the City of San Diego. That was their first home and the one their children were born in. They had been renting the home to an individual pursuant to a rental agreement, and the tenancy was set to expire on July 12, 2021—just after the County's Ordinance went into effect. Because they performed income and credit checks prior to renting the property to the tenant, they knew that the tenant was from out-of-state and very wealthy; he owned a home in Northern California and even several income properties. The COVID-19 pandemic had not financially impacted the tenant. *S. California Rental Hous. Ass'n v. Cnty. of San Diego*, Declaration of April Solis ("Solis Decl.") [ECF No. 7, Att. 6, ¶ 3], No. 3:21cv912-L-DEB (May 24, 2021).

After moving in, the Solises' tenant unlawfully moved in another family. Further, the tenant began regularly harassing and sent threatening messages to

the Solises. He threatened the entire family with bodily harm. He threatened bogus slip-and-fall lawsuits and damaged the property, including the pool equipment, slider and window screens, and fencing. Further, he harassed and threatened third parties engaged by the Solis family to maintain and service the property, including a pool repair worker, a utility worker, and a handyman. All these offenses violated the terms of the rental agreement and were legitimate cause for eviction. *Id.*, Solis Decl., [ECF No. 7, Att. 6, ¶ 4].

Given the tenant's gross misconduct and the threat he presented to the Solis family, the family sent him a 60-day notice that they did not wish to extend his tenancy beyond July 12, 2021. However, specifically citing the County's eviction moratorium, the tenant declared that he would stay in the house and boasted that the Solises could not remove him. Mrs. Solis lost her job during the first few months of the pandemic. Mr. Solis owned a business in San Diego for 25 years, but the pandemic negatively affected his business and income. Their dire financial circumstances were such that they and their children needed to move back into their home. Although they wanted to pursue removal of the problematic tenant, in part so that they could move their family back in, the Solises were barred from doing so because of the Ordinance. The Ordinance caused the Solises significant financial and emotional harm and distress. *Id.*, Solis Decl., [ECF No. 7, Att. 6, ¶¶ 6-7].

Another Association member was Larry Gale, who owned a single-family house in the County. The house was rented on a month-to-month basis to a

family for several years, pursuant to a rental agreement. But the tenants breached their obligations under the agreement to maintain and preserve the property in good condition. The yards became weed-infested, and the home itself was substantially damaged by the tenants. Mr. Gale was elderly and was regularly mistreated by the tenants. They did not allow him access to the property, including simply to maintain the yards. They even changed the locks without permission. Mr. Gale wanted to move his daughter into his home because, as a restaurant worker, she had been financially impacted by COVID-19. But Mr. Gale couldn't do so under the County's moratorium, even though the rental agreement with the tenant provided lawful grounds for him to repossess the property. Like the Solises, the Ordinance caused Mr. Gale significant financial and emotional harm and distress. *Id.*, Declaration of Larry Gale, [ECF No. 7, Att. 2, ¶¶ 3-5].

Finally, Irma Pintor was also a member of the Association who owned a duplex in the County. She was a senior citizen and didn't speak English. She used to live in one side of the duplex, while the other side was rented out to a tenant (Tenant 1). But Tenant 1 stopped paying rent. To make ends meet, Ms. Pintor was forced to move out of her own duplex and temporarily sleep in her garage, so that she could bring in a paying tenant (Tenant 2). *Id.*, Declaration of Irma Pintor ("Pintor Decl."), [ECF No. 7, Att. 5, ¶ 4].

Tenant 1 repeatedly harassed Ms. Pintor, to the point where Ms. Pintor felt so uncomfortable living on the premises that she moved out of her garage and

into her son's home. Tenant 1 also repeatedly harassed third parties, including individuals sent to the unit to make requested repairs. Ms. Pintor understood that Tenant 1 was unable to make rent, and did not want to evict the tenant for that reason. But Tenant 1's pattern and practice of gross misconduct toward Ms. Pintor and third parties on the premises was a bridge too far and easily justified Tenant 1's removal but for the County's Ordinance. Like the Solises and Mr. Gale, she was prepared to take all lawful steps to remove Tenant 1, but she was prohibited from doing so because of the County's eviction moratorium. Because of the Ordinance, Ms. Pintor suffered significant financial and emotional harm and distress. *Id.*, Pintor Decl., [ECF No. 7, Att. 5, ¶¶ 5-6].

Never in their wildest imaginations could rental-housing owners like the Solises, Mr. Gale, and Ms. Pintor have foreseen the pandemic and the burdensome regulations against rental-housing owners that would follow in its wake. Never could they have imagined a law, like the County's Ordinance, that eliminated important protections and remedies contained in their rental agreements, and stripped them of their basic property rights. Never before had they faced the prospect of being compelled to indefinitely house tenants, including hostile and dangerous tenants. *Id.*, Solis Decl., [ECF No. 7, Att. 6, ¶ 8]; *id.*, Gale Decl., [ECF No. 7, Att. 2, ¶ 6]; *id.*, Pintor Decl., [ECF No. 7, Att. 5, ¶ 7].

The Ordinance expired 60 days after the California Governor lifted all COVID-related stay-at-home and work-at-home orders. In total, the

Ordinance was in effect for 68 days. While short-lived, the Ordinance occasioned significant harm on owners across the County, as described above. *S. California Rental Hous. Ass'n v. Cnty. of San Diego*, 2022 U.S. App. LEXIS 31034, *2 (9th Cir. 2022).

Days after the Ordinance was enacted and before it went into effect, the Association sought a temporary restraining order and preliminary injunction pending judicial review of the law, which the district court denied. Finding the issue of preliminary relief moot given the Ordinance's expiration, a majority of a Ninth Circuit panel affirmed that denial over Judge Lee's dissent. *S. California Rental Hous. Ass'n*, 2022 U.S. App. LEXIS 31034, **3-4. Judge Lee would have reversed under the Court's "capable-of-repetition-yet-evading exception" since "there is a reasonable expectation that this controversy will recur." *Id.* at 5 (Lee, J., dissenting).

Subsequently, the district court dismissed the Association's claims against the Ordinance, with leave to amend. In dismissing the takings claim, the court relied heavily on *Yee*. While the Ordinance clearly impaired the right of rental-housing owners to exclude and repossess their properties, the court held that "the landlords here have solicited tenants to rent their properties, and the Ordinance simply regulates landlords' relationship with tenants." *S. California Rental Hous. Ass'n v. Cnty. of San Diego*, Order Granting in Part and Denying in Part Defendant's Motion to Dismiss [ECF No. 46] at 21, No. 3:21cv912-L-DEB (S.D. Cal. Sept. 27, 2023) (quoting *Yee*, 503 U.S. at 531).

As of the writing of this brief, the Association's challenge to the Ordinance is pending in federal district court and would benefit from this Court's resolution of the Petition's question presented, especially whether and the extent to which *Yee* categorically precludes *per se* takings claims that rental-housing owners seek to mount.

City of Berkeley

Berkeley's eviction moratorium was as egregious as Seattle's and San Diego's—and it lasted much longer. Berkeley enacted its "COVID-19 Emergency Response" Ordinance on March 17, 2020. City of Berkeley Municipal Code ("Berkeley Code"), Chapter 13.110.[4] It was in effect for over *three years*, concluding at the end of April 30, 2023. This, despite the fact that the State of California allowed its stay-at-home and work-at-home orders to expire almost *two years* earlier on June 15, 2021. California Governor's Exec. Order No. N-07-21 (June 11, 2021).[5]

Like its counterparts in other parts of the country, Berkeley categorically banned *all* attempts to remove residential tenants "unless necessary to stop an imminent threat to the health and safety *of other occupants*" only. Berkeley Code § 13.110.020 (emphasis added). The fact that a tenant presented an imminent threat to the health and safety of the rental-housing owner, her family, her employees and contractors, or third parties otherwise authorized to come onto the property was—for over three years—

[4] Berkeley's COVID-19 Emergency Response Ordinance is available at https://bit.ly/3UC64le.

[5] Available at https://bit.ly/48aUUXS.

insufficient grounds for evicting the tenant and repossessing the unit. The fact that a tenant did not pay rent, caused damage to the property, or otherwise violated the lease also did not justify his removal. A rental-housing owner could not even take possession to move herself and/or her family into the unit.

The Lingering Effects of the Eviction Moratoria

Though the eviction moratoria in Seattle, San Diego, Berkeley, and other jurisdictions may have expired, affected owners have had to deal with the continuing devasting effects of those laws on their rental operations.

Consider GRE's lost rental income associated with its operation of The Addison, which increased exponentially. Prior to Seattle's eviction moratoria, The Addison's losses from unpaid rent fluctuated year to year, ranging from $85,737 in 2016, to $28,628 in 2017, to $15,120 in 2018, and to $123,393 in 2019. But during the eviction moratoria, The Addison's total losses for unpaid rent rose to $463,122 in 2020, to $699,817 in 2021, and to $1,270,757 in 2022. Compare that to what GRE received in federal and state rental assistance in those years: $91,384 in 2020, $442,341 in 2021, and $101,402 in 2022.

What accounts for the considerable losses in rental income in 2020, 2021, and 2022? The only explanation is the eviction moratorium. While the moratorium did not excuse tenants from paying rent, many simply did not pay. And while GRE received federal and state rental assistance for some nonpaying tenants, there was no guarantee that those tenants would continue paying rent, and many did

not. GRE was unable to manage The Addison pursuant to tenants' lease agreements, and was forced to accept the occupation of its property regardless of whether tenants paid rent. GRE was unable to evict The Addison's non-paying tenants. Nor was it able to impose late fees, treat unpaid rent as an enforceable debt, use deposits to cover unpaid rent, or otherwise fully recover its losses.

Moreover, housing providers across the country are still experiencing extraordinary delays in processing their unlawful-detainer actions and repossessing their units. This, despite the fact that many eviction moratoria have long-since expired. *See, e.g.*, Rachel Polansky, *Eviction court backlogs are 'devastating,' metro Atlanta landlords say*, Atlanta News First (July 24, 2023 at 12:25 PM), https://bit.ly/48gGF3F; Ashley Balcerzak, *NJ continues to see backlog in eviction cases, but there are improvements*, northjersey.com (Dec. 27, 2022 at 4:28 AM), https://bit.ly/3wixOBp; Jason Rother, *Small landlords are at the mercy of broken King County eviction court*, The Seattle Times (Nov. 29, 2023 at 3:39 PM), https://bit.ly/3wh5AH5.

B. Close to Half of the Country's Rental Housing Units Are in Single- to Four-Unit Buildings, The Vast Majority of Which Are Owned and Managed by Individuals

Much of the country's rental housing is provided by individuals who own and operate small rental properties. It is these modest owners who are hit the hardest by devastating laws like Seattle's eviction moratorium. The large corporate conglomerates with vast apartment holdings across

the country can more easily absorb the operational and financial strain that such laws impose. As one commentator observed:

> For mom-and-pop landlords, unpaid rent and evictions mean lost income, unpaid mortgages, and unpaid property taxes. These impacts can also lead to income loss and similar traumatic effects for mom-and-pop landlords and their families, as with renters. According to an analysis from the Harvard Joint Center for Housing Studies, renters and owners of small properties are disproportionately likely to face COVID-19 related economic hardship.

Sam Gilman, *The Return on Investment of Pandemic Rental Assistance: Modeling a Rare Win-Win-Win*, 18 Ind. Health L. Rev. 293, 307-08 (2021).

The reality is that mom-and-pop landlords comprise a surprisingly large percentage of those who supply the Nation's rental housing. The United States Census Bureau periodically conducts a "Rental Housing Finance Survey." The purpose of the survey is to evaluate the financial health of rental-housing owners. The Census Bureau conducted its most recent Rental Housing Finance Survey in 2021. *See* United States Census Bureau, *2021 Rental Housing Finance Survey* (last updated July 21, 2022), https://www.census.gov/programs-surveys/rhfs.html.

The survey reveals that, among 49.5 million rental housing units in the country, nearly 46% of

them are small rental properties of one-to-four units. *See* United States Census Bureau, *Infographic*: *2021 Rental Housing Finance Survey*, https://www.census.gov/content/dam/Census/library/visualizations/2021/econ/2021-rhfs-infographic.png. The survey also reveals that, among all owners of rental housing in the United States, 69% are individuals. Further, 69% of those engaged in the day-to-day management of the Nation's rental housing stock are comprised of individual-owners or their unpaid agents. *Id.*

But that is slowly changing, with a strong trend towards the corporate consolidation of rental housing. As one commentator has noted, "[o]wnership of the nation's rental housing stock is in transition," as "[t]he approximately twenty million rental properties in the United States, and fifty million rental units within those properties, have been steadily shifting from individual to corporate hands." Brandon Weiss, *Corporate Consolidation of Rental Housing & The Case for National Rent Stabilization*, 101 Wash. U. L. Rev. 553, 561 (2023). Citing the Census Bureau's 2021 Rental Housing Finance Survey data, the commentator observes:

> [T]he percentage of rental properties owned by individuals dropped by 8 percentage points over the last six years alone, from approximately 78 percent to just under 70 percent, reflecting a decline of more than 3.4 million properties. This is a stark change from 1991, when individuals owned 92 percent of all rental properties.

> Similarly, the percentage of units owned by individuals dropped from 48 percent to 37 percent over the same six-year period, a decline of over 4.5 million units.

Id.

The corporate consolidation of the Nation's housing stock is due, in part, to the extraordinary regulatory burdens and risks associated with rental-housing ownership and management. One rental-housing advocate recently warned that government controls make it so that the rental property "is too costly to maintain" and "upgrade," "[f]orcing the owner to sell an undervalued property with little to no chance of becoming an attractive property to most investors"—"except for large corporations." Chip Ahlswede, *Rent control is the wrong solution to the problem of high housing costs*, Orange County Register (May 2023); *see also* Joint Center for Housing Studies of Harvard University, *America's Rental Housing 2022*, at 18 (2020) ("Individual ownership of rental properties has been on the decline since 2001, with potentially important implications for the stock. Institutional and individual owners generally have different incentives to invest in their rentals, as well as different capacities and resources. . . . [I]ndividual investors spent more per unit because they typically own single-family rentals, which are generally larger and cost more to maintain than multifamily units.").

II. This Case Is an Appropriate Vehicle for Resolving the Confusion Around *Yee*

In *Yee*, the Court considered whether "a local rent control ordinance," coupled with a state law, "amounts to a physical occupation of [park owners'] property, entitling them to compensation." *Yee*, 503 U.S. at 523. Park owners challenged the ordinance and state law on the ground that, together, they "transferred a discrete interest in land—the right to occupy the land indefinitely at a submarket rent—from the park owner to the mobile home owner." *Id.* at 527. This Court rejected the owners' "physical occupation of land" claim, holding that the laws "merely regulate[d] petitioners' use of their land" so that the Court's *per se* takings analysis did not apply. *Id.* at 528.

In reaching its holding, the Court noted that the owners "voluntarily rented their land to mobile home owners" such that "neither the city nor the State compel[led] petitioners, once they have rented their property to tenants, to continue doing so." *Id.* at 527-28. The Court emphasized that the owners "invited" their tenants, who were "not forced upon them by the government." *Id.* at 528. Consequently, the city's and State's laws did not implicate the fundamental "right to exclude." *Id.*

As Petitioners explain, many lower courts have seized on that language in *Yee* to bar one class of property owners—those who rent or lease their lands and dwellings—from the full protections of the Takings Clause. Because all rental-housing owners by definition "invite" tenants to rent or lease their properties, the reasoning goes, such owners are

somehow precluded from mounting challenges to laws that truly impair or eliminate—temporarily or otherwise—the right to exclude. *See, e.g.*, *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540 (2d Cir. 2023) ("As the Supreme Court made pellucid in *Yee*, when, as here, 'a landowner decides to rent his land to tenants' the States 'have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.'" (quoting *Yee*, 503 U.S. at 528-29)); *Greystone Hotel Co. v. City of New York*, 13 F. Supp. 2d 524, 527 (S.D.N.Y. 1998) (citing *Yee* to uphold law requiring hotel "to expand its relationship with someone to whom it has already rented a room"). Courts more recently have cited *Yee* to uphold the recent slew of eviction moratoria across the country. *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 162-63 (S.D.N.Y. 2020) (relying on *Yee* to hold that a temporary eviction moratorium did not amount to a physical taking); *GHP Mgmt. Corp. v. City of Los Angeles*, No. CV-21-06311, 2022 U.S. Dist. LEXIS 209157, at *10 (C.D. Cal. Nov. 17, 2022) ("But, 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," since the "tenants were invited by [the rental-housing owners], not forced upon them by the government") (cleaned up)).

The lone voice in the wilderness has come from the Eighth Circuit Court of Appeals. In *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), the Minnesota Governor issued executive orders barring nearly all residential evictions for an indeterminate time, including for nonpayment of rent.

Id. at 723-24. Rental-housing owners challenged the orders on various grounds, including because the orders effected a *per se* taking by depriving owners of the right to exclude. *Id.* at 724. The district court granted the Governor's motion to dismiss, and a panel of the Eighth Circuit reversed. *Id.*

The appeals court held that the owners stated a takings claim. In so holding, the court concluded that this Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) controlled—and, significantly, that *Yee* was distinguishable. Whereas the laws in *Yee* affected the park owners' ability to "to exclude future or incoming tenants rather than existing tenants," the Minnesota Governor's 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." *Id.* at 733. That was sufficient, in the Eighth Circuit's view, to put the orders outside the purview of *Yee* and allow the rental-housing owners to pursue their takings claim.

In sum, with the important exception of the Eighth Circuit in *Heights Apartment*, the courts below have misused *Yee* to bar an entire class of property owners—those who initially invite tenants onto their lands or dwellings—from the full protections of the Takings Clause, including the right to subsequently exclude those tenants and repossess their property. As one commentator has put it in reference to *Yee*:

> [I]t is unclear why the initial 'invitation' should be controlling. It seems unlikely that this is a principle of general

> applicability. If an owner of unused open land were to permit the government to quarter its troops there for an interim period, is this an 'invitation' that can be extended in perpetuity over the objection of the property owner? Can the government require that its forces remain, without paying just compensation, unless the owner withdraws its land for use for some other purpose?

William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 82 (1995).

The Takings Clause and this Court's takings jurisprudence suggest that the answer to these questions is "no" and that a property owner who leases or rents her land or dwelling enjoys the same right to exclude and repossess her property—subject only to reasonable regulation—as any other owner. *Horne v. Dep't of Agric.*, 576 U.S. 351, 365 (2015) (rejecting Government's argument that "the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market," such that "if raisin growers don't like it, they can 'plant different crops,' or 'sell their raisin-variety grapes as table grapes or for use in juice or wine'"); *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 439 n.17 (1992) (rejecting argument that "New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord" (*Horne*, 576 U.S. at 365)).

The lower-court confusion surrounding *Yee* and its impact on the ability of rental-housing owners to

vindicate their property rights under the Takings Clause justify the Court's review.

CONCLUSION

Amici agree with Petitioners that state and federal courts are deeply divided over whether *Yee* categorically bars a *per se* taking challenge to the government's suspension of a rental-housing owner's right to exclude and repossess her property. *See* Petition at 22-13. This conflict casts doubt on a fundamental constitutional right—the right to be free from uncompensated takings. Further, the petition provides a clean vehicle for resolving the conflict, as there are no procedural concerns and the material facts are undisputed.

For these reasons, the Court should grant the petition.

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Respectfully submitted,

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