No. 23-807

IN THE
Supreme Court of the United States

EL PAPEL, LLC AND BERMAN 2, LLC,

Petitioners,

v.

THE CITY OF SEATTLE, WASHINGTON AND BRUCE HARRELL, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF SEATTLE,

Respondents.

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

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and education institution—a "think tank"—to formulate and promote free-market public policy in the States. The staff at The Buckeye Institute accomplish the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, and promoting those policy solutions for implementation in Ohio and replication across the country. Through its Legal Center, The Buckeye Institute works to restrain governmental overreach and engages in litigation in support of the rights and principles enshrined in the United States Constitution.

The Buckeye Institute supports the principles of limited government and individual liberty. The Buckeye Institute is dedicated to promoting free-market policy solutions and protecting individual liberties, especially those liberties guaranteed by the Constitution of the United States, against government overreach. The Buckeye Institute has taken the lead in Ohio and across the country in advocating for the rollback of government regulations

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[1] *Amicus curiae* states that pursuant to Sup. Ct. R. 37.2, counsel of record for the parties received timely notice of *amicus curiae*'s intent to file this brief. Pursuant to Sup. Ct. R. 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

that burden citizens' ability to exercise their constitutional rights to make free use of their property.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision effectively endorses the taking of property without just compensation. Whether a property owner suffers a physical taking by the government, or government regulations deprive the owner of one of the fundamental elements of property ownership, the result is functionally the same. Each results in a government-compelled physical occupation of the property.

Here, the City of Seattle deprived Petitioners of their right to exclude others from their property. In upholding the city's regulatory scheme, the Ninth Circuit relied on this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992), for the proposition that the city's "eviction restrictions did not impose a physical occupation on the Landlords." Pet. App. 4a (citing *Yee*, 503 U.S. at 527). The Ninth Circuit's reliance on *Yee* is misplaced. Indeed, a number of lower courts have misapplied *Yee* to "steadily erode[]" property rights. *See* Pet. 4. *Amicus curiae* The Buckeye Institute agrees with Petitioners that "[i]ntervention by this Court is needed to clarify the scope and limitations of *Yee*." Pet. 7.

The Buckeye Institute writes separately to emphasize a few key issues for this Court's consideration. First, this Court has long recognized

that the "right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *see also College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (the "hallmark of a protected property interest is the right to exclude others"). As Petitioners explain, "[t]his Court's precedent therefore treats almost any government-authorized occupation of property as a categorical physical taking absent the payment of just compensation." Pet. 24.

Second, the distinction between physical takings and regulatory actions breaks down where, as here, the regulatory scheme functionally deprives property owners of a fundamental element of their property rights. The principles behind the Fifth Amendment should apply whether the government itself takes a partial interest in property or authorizes some private actor to take that property. The harm to Petitioners is government-compelled physical occupation of the property; it makes little difference to the property owner whether the government is doing the occupying itself.

Finally, the Ninth Circuit's reliance on *Yee v. City of Escondido* is misplaced. A fair reading of *Yee* does not require the outcome of the decision below. However, *Yee*'s misapplication to this case underscores why this Court should clarify its scope and limitations. The Ninth Circuit's interpretation is in substantial tension with well-established

principles and precedent. This Court should grant review to bring greater clarity and consistency to this area of the law.

ARGUMENT

I. This Court Should Grant Review to Bring Greater Clarity to Its Takings Clause Jurisprudence.

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Here, the City of Seattle did not take physical possession of Petitioners' property. However, Petitioners argue that through the use of a "Civil Emergency Order," the city allowed others to occupy Petitioners' property "regardless of whether they complied with an existing lease, or even had a lease." Pet. 5; *see also* Pet. App. 50a–56a (Civil Emergency Order).

The right to exclude is "a fundamental element" of the property rights protected by the Fifth Amendment. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149–50 (2021) (citation omitted). This Court has consistently held that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S. at 176; *see also Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (same) (quoting *Kaiser Aetna*, 444 U.S. at 176).

Petitioners' right to exclude was severely curtailed by the Civil Emergency Order's moratorium on residential evictions. *See* Pet. 5 (arguing that "Seattle commandeered all rental properties by way of an 'eviction moratorium'"). However, relying on *Yee v. City of Escondido*, the Ninth Circuit found that Petitioners' decision to use their properties as rental housing "in the first instance" meant that subsequent government actions merely regulated the properties' use and were not a physical taking. Pet. App. 4a–5a.

The Ninth Circuit's decision is inconsistent with numerous Takings Clause precedents, as well as established understandings of property rights in general. The decision below also misapplies this Court's holding in *Yee*. This Court should grant review to clarify this important area of the law.

A. The Right to Exclude is a Fundamental Element of Property Rights.

The City of Seattle imposed an eviction moratorium that severely curtailed Petitioners' right to exclude others from their property, functionally rendering that right null. As Petitioners describe the moratorium, "[o]ccupants 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." Pet. 5 (citing Pet. App. 53a–55a). According to Petitioners, this included (among others) tenants who "ignored all communications" and even "non-leased occupants living on the property without consent." Pet. 9.

This is no small matter. "[T]he right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Cedar Point*, 594 U.S. at 150 (quoting *Kaiser Aetna*, 444 U.S. at 176, 179–80); *see also Dolan*, 512 U.S. at 384, 393.

In 1766, William Blackstone wrote that the right of property includes "the sole … dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, *Commentaries on the Laws of England* 2 (1766); *see also* John Locke, *Two Treatises on Government* 209–10 (1821) ("[Property] being by [man] removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other men."). And this Court has emphasized that the "hallmark of a protected property interest is the right to exclude others." *College Sav. Bank*, 527 U.S. at 673.

Today, the right to exclude remains "an essential element of modern property rights." *Rawlings v. Kentucky*, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring) (citing *Kaiser Aetna*, 444 U.S. at 179–80). Without it, "all other elements would be of little value." *Dickman v. Comm'r*, 465 U.S. 330, 336 (1984) (citation omitted). In fact, "it is difficult to conceive of any property as private if the right to exclude is rejected." Richard A. Epstein, *Takings, Exclusivity*

and Speech: The Legacy of PruneYard v. Robins, 64 U. Chi. L. Rev. 21, 22 (1997).

Though state law generally determines which "sticks" a property owner will have in his "bundle" of rights, *see, e.g.*, *United States v. Craft*, 535 U.S. 274 (2002), there are limits on the government's ability to regulate in ways that alter traditional understandings of property. For example, the government cannot avoid responsibility for a taking merely by reserving some *de minimus* rights to the property owner. *See, e.g.*, *Horne v. Department of Agriculture*, 576 U.S. 350, 362–63 (2015) (holding that the government may not "avoid the categorical duty to pay just compensation" for a taking "by reserving to the property owner a contingent interest in a portion of the value of the property"). *See also* Amicus Br. of the Small Property Owners of San Francisco Institute at 13 (discussing *Horne* and stating that "the Court held that leaving the property owner with one stick out of the bundle is not sufficient to avoid a taking"). That is unsurprising, because the "great and chief end" of government is "the preservation of ... property." John Locke, *Second Treatise of Government* 62 (Blackwell ed., 1946).

B. A Regulatory Scheme That Deprives Owners of a Fundamental Element of Their Property Rights Operates as a Taking.

The Buckeye Institute has argued in another case currently pending before this Court on a petition for a

writ of certiorari that the "physical vs. regulatory" distinction is inconsistent with the logic of the Takings Clause. *See* Amicus Br. of Professor Richard A. Epstein and The Buckeye Institute at 6–9, *74 Pinehurst, LLC v. New York*, No. 22-1130 (filed June 20, 2023). Here, it suffices to show that the distinction between physical takings and regulatory actions breaks down where the regulatory scheme functionally deprives property owners of a fundamental element of their property rights.

As explained above, the right to exclude is an essential stick in the bundle of property rights. *See Cedar Point*, 594 U.S. at 149–50; *Kaiser Aetna*, 444 U.S. at 176; *Dolan*, 512 U.S. at 393. Yet here, the City of Seattle imposed a moratorium on evictions through a Civil Emergency Order that drastically altered Petitioners' ability to enjoy and exercise that right. *See* Pet. App. 50a–56a. Although the government did not take physical possession of Petitioners' property, it permitted—and indeed encouraged—others to do so.

Respectfully, the principles behind the Fifth Amendment should apply whether the government itself takes an interest in property, or it authorizes third parties to do so. The harm to Petitioners is government-compelled physical occupation of the property; it makes little difference whether the government is the occupier. And as Chief Justice Roberts wrote for the Court in *Cedar Point*: "Government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Cedar Point*, 594 U.S. at 149.

This Court's analysis in *Cedar Point* is instructive here. "The essential question is not … whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)." *Id.* Rather, "[i]t is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id.* (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321–23 (2002)).

Thus, a *per se* taking occurs "whenever a regulation results in a physical appropriation of property." *Id.* In *Horne v. Department of Agriculture*, this Court held that an administrative reserve requirement compelling raisin growers to set aside a percentage of their crop for the government constituted a physical rather than a regulatory taking. *Horne*, 576 U.S. at 361. But a taking also occurs even if the property is used by a third party, rather than the government. In *Cedar Point*, this Court considered a regulation that granted union organizers a right to physically enter and occupy an agricultural employer's property for three hours per day, 120 days per year, to solicit support for unionization. *See Cedar Point*, 594 U.S. at 149. The Court held that the "regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking." *Id.* This Court also made clear that it is immaterial whether the

physical invasion is "permanent or temporary," or "intermittent as opposed to continuous." *Id.* at 153.

C. This Court Should Clarify the Scope and Limitations of *Yee v. City of Escondido*.

Finally, *amicus curiae* submits that the Ninth Circuit's reliance on *Yee v. City of Escondido* is misplaced. Relying on *Yee*, the Ninth Circuit found that Petitioners' decision to use their properties as rental housing "in the first instance" meant that subsequent government actions merely regulated the properties' use and were therefore not a physical taking. Pet. App. 4a–5a. Respectfully, this Court's decision in *Yee* does not lead to such an outcome. Indeed, "[i]n the words of Justice Holmes, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *Yee*, 503 U.S. at 529 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). The Ninth Circuit's misapplication of *Yee*—as well as similar applications by numerous other courts, *see* Pet. 14–17—underscores the need for this Court to clarify its scope and limitations.

Yee involved a rent control regulation that limited the rent that could be charged for the land beneath mobile homes. *See Yee*, 503 U.S. at 524–25. The property owners claimed that rent control was a compelled physical invasion because it allowed continued occupancy at below-market rents. *Id.* The owners were not seeking to evict their current tenants, but they maintained the right to do so on

numerous grounds. *See id.* at 524, 527–28. Under those circumstances, this Court found that the rent control must be evaluated under the ad hoc balancing test of *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 124 (1978), rather than as a physical taking of the leased property. *See Yee*, 503 U.S. at 528–31.

Significantly, *Yee* does not establish a categorical rule that once a property owner chooses to lease to an occupant "in the first instance," *see* Pet. App. 4a, the government is free to authorize or require physical occupation of that property under different terms or conditions. The Ninth Circuit is over-reading the scope of *Yee*'s holding.

Importantly, the Eighth Circuit has considered a similar eviction moratorium, and rejected the exact reasoning of the decision below. In considering a similar eviction ban imposed by the State of Minnesota, the Eighth Circuit found that "*Cedar Point Nursery* controls here and *Yee* … is distinguishable." *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022). The court emphasized that the rent control at issue in *Yee* "neither deprived landlords of their right to evict nor compelled landlords to continue leasing the property past the leases' termination." *Id.* (citing *Yee*, 503 U.S. at 527–28). The court held that the property owners made a plausible *per se* physical takings claim where the challenged executive orders "forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated." *Id.*

This Court should grant review to resolve the circuit split between the Eighth and Ninth Circuits. Additionally, *amicus curiae* submits that even in the absence of a circuit split, this Court's review would be warranted to clarify the scope and limitations of *Yee*. The Ninth Circuit's decision is inconsistent with the principles outlined above, as well as this Court's precedents, including *Cedar Point*.

This Court should grant review to clarify this important area of the law.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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