No. 23-935

IN THE

Supreme Court of the United States

GENE GONZALES, *et al.*,

Petitioners,

v.

JAY INSLEE, GOVERNOR OF WASHINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF OF *AMICUS CURIAE* RENTAL HOUSING ASSOCIATION OF WASHINGTON IN SUPPORT OF PETITIONERS

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A. INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Rental Housing Association of Washington ("RHA") is a 5,000 plus member non-profit organization of rental housing owners (single family homes to multi-family communities) in Washington. Its objectives are to oversee the general welfare of the rental housing industry, lead advocacy efforts, provide continuous development of skills and knowledge, and assist members to provide appropriate services to the renting public.

RHA represents the interests of rental housing owners to state and local legislative bodies, news media, and the general public. RHA is actively involved in the Washington Legislature and local governments on any legislation affecting landlords. Its staff studies the regular meeting agendas of the local governments, meets with city and county council members, and reports to its board about any issues which affect the local community. It is also involved in educating and encouraging member involvement on issues affecting the rental housing industry. RHA offers educational programs which enhance rental property owners' knowledge and provides different fora for knowledge sharing and social interaction. RHA also offers products and services rental property owners need to be successful, while encouraging the highest standards of ethics and integrity for its members. RHA promotes the value of the rental housing industry to the community

1. Pursuant to Rule 37, counsel for *amicus* affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amicus,* their members, or counsel, made any monetary contribution to its preparation or submission. Notice was given to the parties as required by SCR 37.2 on April 1, 2024.

and educates renters about the process of becoming a tenant and being a good tenant.

RHA, or its predecessor, has also appeared as an *amicus curiae* in numerous federal and Washington cases.[2]

The State of Washington's ("State") eviction moratorium was discussed in *Jevons v. Inslee*, 2023 WL 5031498 (9th Cir. 2023), *cert. denied*, 2023 WL 8531950 (2023) and *Gonzalez v. Inslee*, 535 P.3d 864 (Wash. 2023). The various gubernational proclamations that resulted in an eviction moratorium deprived landlords like RHA's members of any viable means of evicting tenants who failed to pay rent or held over in violation of the terms of a tenancy. Tenants simply stopped paying rent. By government fiat, Washington landlords were required to bear the brunt of the Covid-19 pandemic's effect on housing. Those landlords were not fully compensated by local, state, and federal public programs for their losses.

Rather than recognizing a fundamental element of property ownership – the right to exclude – the Washington Supreme Court held that this compelled occupation was not an unconstitutional physical taking because it merely "regulat[ed]" an existing landlord-tenant relationship in accordance with *Yee v. City of Escondido*, 503 U.S. 519 (1992). *Gonzalez*, 535 P.3d at 873.

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2. *See, e.g.*, *El Papel, LLC v. City of Seattle* (Supreme Ct. No. 23-807); *Yim v. City of Seattle*, 63 F.4th 783 (9th Cir. 2023); *Yim v. City of Seattle*, 451 P.3d 675 (Wash. 2019); *Faciszewski v. Brown*, 386 P.3d 711 (Wash. 2016); *Segura v. Cabrera*, 362 P.3d 1278 (Wash. 2015); *Cary v. Mason Cty.*, 272 P.3d 194 (Wash. 2012); *City of Pasco v. Shaw*, 166 P.3d 1157 (Wash. 2007); *Arborwood Idaho, LLC v. City of Kennewick*, 89 P.3d 217 (Wash. 2004).

In reality, the State effectuated a physical taking of landlords' property – impacting their rights to possess property and excluded others from it – meriting review by this Court.

B. INTRODUCTION AND SUMMARY OF ARGUMENT

In response to the pandemic's outbreak in the State of Washington, on March 18, 2020, Governor Jay Inslee issued a series of proclamations that prevented residential landlords from evicting tenants for nonpayment of rent.[3] Under these proclamations, the owners of residential rental properties such as RHA's members were the only people who were required by any of the Governor's emergency proclamations to continue to provide a good or service without payment in return.

The proclamations precluded eviction for nonpayment of rent or violations of leasehold terms. They provided that

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3. Governor Inslee signed Proclamation 20-19 on March 18, 2020, establishing a temporary moratorium on evictions in Washington. The Governor issued subsequent proclamations on April 16, 2020 (Proclamation 20-19.1), June 2, 2020 (Proclamation 20-19.2), July 24, 2020 (Proclamation 20-19.3), October 14, 2020 (Proclamation 20.19-4), December 31, 2020 (Proclamation 20-19.5), and March 18, 2021 (Proclamation 20-19.6). Governor Inslee issued another "bridge" proclamation on June 29, 2021 (Proclamation 21-09.23). 61a-197a.

This case presents the exact scenario Justice Thomas called for in denying certiorari in *74 Pinehurst LLC v. New York*, __ S. Ct. __, 2024 WL 674658 (2024) because it is one in which these "specific [Washington] regulations prevent[ed] petitioners from evicting actual tenants for particular reasons." This "an appropriate future case [where the Court] should grant certiorari to address this important question" regarding the Court's takings clause jurisprudence.

RHA's landlord members could only evict tenants if they (a) provide an affidavit that the eviction is necessary to respond to a significant and immediate risk to the health, safety, or property of others created by the resident; or (b) provide at least 60 days' written notice of intent to (i) personally occupy the premises as a primary residence, or (ii) sell the property. Washington's moratoria were the only in the country that did not even require self-certification by a tenant of impact by COVID-19. This Court ruled in *Chrysafis v. Marks*, 141 S. Ct. 2482 (2021) that landlords had a right to contest tenants' self-certification of COVID-related financial hardship. Washington landlords were given no opportunity to address whether tenants should be afforded relief allegedly due to COVID-related financial hardship.

For months, RHA's members and landlords across Washington were also precluded from imposing fees for late payment, regardless of the tenant's ability to pay rent, treating unpaid rent as an enforceable debt or financial obligation, with a narrow exception, and using deposits to cover unpaid rent even when a tenant chose to leave. *Id.*

These events have not only significantly impacted RHA's members but have also negatively impacted the availability of affordable rental housing in Washington State. RHA's members facing such untenable financial choices elected to cease renting properties—either choosing to sell or leave homes empty—due to the tremendous economic burden they were required to shoulder in the furtherance of the public good.

Certiorari is warranted in this important case involving the just compensation clause and the constitutional rights

of private property owners which must not be ignored, even during a pandemic. In justifying broad eviction moratoria that intruded upon RHA's members' fundamental right to exclude persons from their property, the Washington Supreme Court misapplied precedent and glossed over the severe financial impact of its decision. *Amicus* RHA agrees with and adopts the arguments presented by petitioners in this matter, but it offers factual and legal argument on the Washington court's legal error in misapplying *Yee*. RHA further highlights the real world impact the *Gonzalez* court's decision has had on private property owners, including RHA's members. Review is warranted.

C. ARGUMENT

The petition for writ of certiorari filed by petitioners articulates why this case meets the criteria for review in Rule 10. In particular, the Washington Supreme Court decision in this case is fully at odds with this Court's physical takings jurisprudence in cases like *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), and *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021). Moreover, the Washington court's position is contrary to that of the Eight Circuit in *Heights Apartments LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022).

The government must pay just compensation for any compelled physical occupation of private property. U.S. Cont. amend. V. This is because a property owner's fundamental right to possess and exclude is an essential aspect of the property owner's rights. *Cedar Point Nursery*, 594 U.S. at 148-49; *Loretto*, 458 U.S. at 432-

35. Whether permanent or temporary, large or small, continuous or intermittent, a property owner's right to be free of such governmental occupation is at the core of the Fifth Amendment. *Cedar Point*, 594 U.S. at 153.

The Washington Supreme Court all but admitted that its analysis was at odds with this Court's takings clause jurisprudence. It recognized at footnote 9 that the court is "not without sympathy to the fact that the petitioners have been made to bear the cost of accommodating a public need." 535 P.3d at 873 n.9. But by denying the petitioners just compensation for bearing that burden, the court conflicted squarely with this Court's determination that "the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

RHA will not repeat all of the legal arguments advanced by petitioners but will discuss an important facet of this Court's decision in *Yee* that bears upon this Court's analysis, and it will discuss the real world financial impacts of the Washington court's decision on RHA's landlord's members.

(1) *Yee*'s Analysis Must Be Seen in Proper Context

As noted in the petition at 12-23, the Washington court's decision is predicated upon an improper expansion of this Court's actual decision in *Yee*, a case that arose from a challenge to a mobile home landlord-tenant ordinance in Escondido, California.

Unfortunately, courts since *Yee* have failed to recognize that the important factual anchor to that case – mobile home tenancies are unique and present serious problems for state and local decision-makers. Indeed, in *Manufactured Housing Communities of Washington v. State*, 13 P.3d 183 (Wash. 2000), *abrogated on other grounds*, *Yim v. City of Seattle*, 451 P.3d 675 (Wash. 2019), the Washington Supreme Court invalidated a statute on independent state constitutional grounds that purported to afford a right of first refusal to mobile home park tenants to buy a mobile home park where they lived if the owner decided to sell it. Critical to the present analysis, a dissenting justice described the factual context of mobile home park tenancies, noting that "[m]obile homes are not mobile." 13 P.3d at 206 (Talmadge, J. dissenting)[4] and that the relocation of such "mobile" homes is simply not feasible, citing at 206-07, a law review article that stated:

> A home owner owns the mobile home, but only rents the land on which it sits. Closure and conversion of a mobile home park force the owner either to move, or to abandon what may be his most valuable equity investment, a mobile home, to the developer's bulldozer. Displacement from a mobile home park can "mean economic ruin for a mobile home owner."

Karl Manheim, *Tenant Eviction Protection and the Takings Clause,* 1989 Wis. L. Rev. 925, 956 n. 179 (1989). The bulk of mobile home tenants are elderly and low income. *Id*. at 207.

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4. *See,* James Milton Brown, Molly Sellman, *Manufactured Housing: The Invalidity of the 'Mobility' Standard*, 19 Urb. Law 367 (1987).

Critically, there are simply very few pads for mobile home tenants on which to place their homes; there is no real market for mobile home rentals:

> Some towns exclude mobile homes altogether; others limit how long the homes can stay in town. Most frequently, municipalities confine mobile homes to privately-owned mobile home parks and restrict the number of parks permitted in the town. Consequently, there is a major shortage of space for mobile homes. Thus the owner who needs to rent a lot for his mobile home has no choice but to enter the "park owner's market" in which the demand for space far exceeds the supply of available lots.

Thomas G. Moukawsher, *Mobile Home Parks and Connecticut's Regulatory Scheme: A Takings Analysis*, 17 Conn. L. Rev. 811, 814-15 (1985) (footnotes omitted).

Abuses of tenants by park owners abound in the mobile home marketplace, including exorbitant fees. *Id.* at 815. *See also*, *Cider Barrel Mobile Home Court v. Eader*, 414 A.2d 1246, 1248 (Md. 1980) (discussing problems of mobile home ownership); *Green Valley Mobile Home Park v. Mulvaney,* 918 P.2d 1317, 1320-21 (N.M. 1996) (noting mobile home tenants' harm at whim of landlords). This has invited policy makers, state and local, to act, as did Escondido officials.

No such similarity restricted market is present in most communities as to rental housing generally. Typical residential tenants do not have an ownership interest in the dwelling in which they occupy. Instead,

the relationship between the landlords and tenants impacted by local eviction moratoria is contractual, the landlord agreeing to give a tenant the right to occupy the dwelling they own only in exchange for rent. If local, state, or federal governments wish to supersede that agreement and take from the landowner the right to exclude a tenant who fails to pay rent, the takings clause demands just compensation. "[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 19 (2020) (*per curiam*).

The unique circumstances of the mobile home market in Escondido, and elsewhere, does not justify the vast expansion of *Yee's* reach condoned by the Washington court here, as petitioners have forcefully contended.

(2) The Eviction Moratoria Resulted in Devastating Real World Consequences for RHA Landlord Members and Landlords Generally

The real world effect of the State's eviction moratoria was that tenants refused to pay rent and often held over on the premises long past the legal termination of the tenancies. Government programs, local, state and federal did not fully compensate landlords for their massive financial losses. This includes enormous financial strain on those that provide housing for low-income tenants. *See Jevons v. Inslee*, No. 23-490, Br. of Amicus Curiae GRE Downtowner LLC in Support of Petitioners, https://www.supremecourt.gov/DocketPDF/23/23-490/292269/20231205093516355_23-490%20GRE%20Amicus%20Brief%20Final.pdf, (Seattle housing provider documenting $1,270,757 in unpaid rent in 2022, up more than tenfold

from recent years and paling in comparison to the rental assistance received from the State in the same year). Reimbursement programs did not make property owners, like RHA's members, whole.

This financial strain was borne not just by large, sophisticated housing providers. It is well-documented that "about 20 million of the country's 48 million rental units are owned and managed by individual" property owners, not corporations. Scott Lincicome, *The CDC Eviction Moratorium: An Epic Case Study in Very Bad Policy*, CATO INSTITUTE (Sept. 18, 2020) https://www.cato.org/commentary/cdc-eviction-moratorium-epic-case-study-very-bad-policy.

RHA member landlords were forced to suffer tenants occupying their land despite material breaches of their leases. More critically, landowners were forced to "assume the financial distress" of their renters, without adequate compensation from the government. Lincicome, *supra*. While this may be a legitimate social policy during a time of crisis, the Constitution demands that just compensation be paid for this taking, or Washington has exceeded its authority.

This issue is worthy of this Court's attention. In striking down the CDC's federal eviction moratorium as an unconstitutional exercise of federal power, this Court explained the inequitable burden such moratoria place on one subset of citizens – residential lessors:

> The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them

> of rent payments with no guarantee of eventual recovery. Despite the CDC's determination that landlords should bear a significant financial cost of the pandemic, many landlords have modest means. And preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude…It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends.

Alabama Ass'n of Realtors, 141 S. Ct. at 2489–90. Here, it may be desirable to prevent homelessness due to the COVID-19 pandemic, but appropriating private property for that public purpose, without providing just compensation as required by the Fifth Amendment, is "unlawful[]." *Id.* at 2490.

Washington, in effect, commandeered residential landlords by executive action to provide housing to its citizens. The State denied landlords a basic property right, the right to exclude tenants who materially breached their lease for nonpayment of rent, thereby becoming trespassers. Private property owners must be provided just compensation, as the Constitution requires.

D. CONCLUSION

For the reasons set forth by petitioners and fully supported herein by RHA, this Court should grant review.

DATED this 9th day of April 2024.

Respectfully submitted,

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