

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 Writ of Certiorari to the
Supreme Court of Washington

**BRIEF OF *AMICUS CURIAE* GRE
DOWNTOWNER LLC IN SUPPORT OF
PETITIONERS**

W. CHRISTOPHER POOSER

Counsel of Record

STOEL RIVES LLP

101 S. Capitol Blvd., Suite 1900

Boise, ID 83702

(208) 389-9000

christopher.pooser@stoel.com

Counsel for Amicus Curiae GRE Downtowner LLC

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*, 503 U.S. 519 (1992)?

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INTEREST OF *AMICUS CURIAE*

GRE Downtowner LLC (“GRE”) submits this *amicus curiae* brief in support of the petition for certiorari filed by Gene Gonzales et al. (“Petitioners”) from the Washington Supreme Court’s decision in *Gonzales v. Inslee*, 2 Wash. 3d 280 (2023).¹ Like Petitioners, GRE owns residential rental property in the State of Washington. GRE is the owner and operator of an apartment building located in Seattle that provides housing for low-income tenants. The apartment building is known as The Addison on Fourth (the “Addison”).

GRE’s interest in this case stems from the public burden it was compelled to bear, without compensation, after the State of Washington established a moratorium that prohibited owners of residential rental property from evicting tenants for not paying rent during the COVID-19 pandemic. The state-wide eviction moratorium went into effect in March 2020 and extended through October 2021.

During the eviction moratorium, residential rental property owners were required to submit to the physical occupation of their property and had limited

¹ Pursuant to Supreme Court Rule 37(2), all parties received notice of the intent to file this *amicus curiae* brief 10 days prior to the due date for such brief. Pursuant to Supreme Court Rule 37(6), undersigned counsel certifies that (A) no party’s counsel authored this brief, in whole or in part; (B) no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and (C) no person, other than the *amicus curiae*, contributed money that was intended to fund preparing or submitting this brief.

ability to regain control of their property. The moratorium did not simply limit the amount of rent property owners could charge. It deprived property owners of their rights to possess and exclude. This is shown by the economic losses GRE suffered during the moratorium when it was unable to evict existing tenants from the Addison, despite tenants' failure to pay rent or to otherwise abide by the terms of their lease agreement.

GRE's experience supports Petitioners' claims that Washington's eviction moratorium infringed on residential rental property owners' fundamental rights to possess and exclude, was a state-compelled physical occupation of residential rental property, and amounted to a categorical physical taking without just compensation under the Fifth Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

During Washington's moratorium on evictions, the Addison was commandeered, as GRE was unable to make decisions regarding the Addison's management and operation. GRE was prohibited from evicting existing tenants for not paying rent. Nor could GRE charge late fees or recover unpaid rent. Forced to provide housing to existing tenants for a public purpose without compensation and with no guarantee of recovery of unpaid rent, the Addison was physically occupied, and GRE suffered severe economic losses in unpaid rent.

Financial data taken from GRE's audited financial statements shows the burden and economic

impact imposed on the Addison. Unpaid rent is part of the residential rental business, and from 2016 to 2019, the Addison's largest annual loss due to unpaid rent was \$123,393. But GRE had no recourse to evict non-paying tenants or to otherwise recover unpaid rent during the eviction moratorium. From 2020 to 2021, the Addison's losses from unpaid rent rose to \$463,122 and then to \$699,817, respectively.

GRE's losses help illustrate the important federal issue Petitioners seek to raise and that Petitioners were denied the protections required by the Fifth Amendment's takings clause. Washington's eviction moratorium placed an unfair burden on residential rental property owners, such as GRE and Petitioners, that resulted in the physical occupation and hostile possession of their property without just compensation. Whether the Washington Supreme Court erred in failing to recognize a physical taking under the Fifth Amendment presents a federal issue that the Court should decide.

ARGUMENT

I. Development and Management of the Addison

The Addison is located in downtown Seattle. It was built in 1911 as a hotel and was later converted to low-income housing. In 2012, GRE purchased the building for \$12 million. GRE invested \$27 million more in major renovations to convert the building to 254 apartment homes, artist lofts, and musician studios. The Addison reopened in November 2013.

GRE is not the only stakeholder in the Addison. GRE's acquisition and renovation of the Addison were financed primarily with tax-exempt bonds issued by the Washington State Housing Finance Commission and credit-enhanced by the Federal Home Loan Mortgage Corporation. The project is also federally subsidized. So long as the project continues to comply with requirements of the Internal Revenue Code, interest on the bonds is expected to remain exempt from federal income tax. The requirements include limits on the income of apartment residents and limits on the amount of rent that can be charged for an apartment.

Nearly identical restrictions on income levels and maximum rent amounts allow the project to also qualify for federal low-income housing tax credits. The availability of such credits, along with certain historic preservation tax credits for which the Addison also qualified, allowed GRE to obtain third-party investment to provide the equity required for the project.

Given its financing, the Addison provides housing for Seattle residents earning up to 60 percent of the area's median income. For example, in 2020, that was \$45,600 for one person. The maximum monthly rent for a studio apartment was \$1,162, while the maximum monthly rent for a one-bedroom unit was \$1,245. Rental payments for many of the Addison's tenants are subsidized with rental assistance from nonprofits or governmental agencies.

II. The Washington Eviction Moratorium

Beginning in March 2020, Washington State Governor Jay Inslee issued a series of proclamations out of concern that residential tenants would be unable to pay rent during the COVID-19 pandemic and unhoused.² The proclamations established a temporary, state-wide moratorium that prohibited owners of residential rental property from evicting tenants for not paying rent or violating other lease terms during the pandemic.³

Under the eviction moratorium, residential rental property owners could only evict tenants under limited circumstances, such as when a tenant created a significant and immediate risk to the health, safety, or property of others.⁴ The moratorium also precluded landlords from imposing fees for late rent payments occurring after February 29, 2020, treating unpaid rent as an enforceable debt, or recovering unpaid rent

² Governor Inslee's proclamations are available at <https://governor.wa.gov/office-governor/office/official-actions/proclamations?page=0> (last visited Apr. 12, 2024).

³ See Wash. Office of the Governor, Proclamation 20-19 (Mar. 18, 2020); Wash. Office of the Governor, Proclamation 20-19.1 (Apr. 16, 2020); Wash. Office of the Governor, Proclamation 20-19.2 (June 2, 2020); Wash. Office of the Governor, Proclamation 20-19.3 (July 24, 2020); Wash. Office of the Governor, Proclamation 20-19.4 (Oct. 14, 2020); Wash. Office of the Governor, Proclamation 20-19.5 (Dec. 31, 2020); Wash. Office of the Governor, Proclamation 20-19.6 (Mar. 18, 2021); Wash. Office of the Governor, Proclamation 21-09.2 (Sept. 30, 2021).

⁴ See, e.g., Wash. Office of the Governor, Proclamation 20-19.1 at p. 3.

from a tenant's security deposit.⁵ The moratorium ultimately extended through October 2021.⁶

Washington's eviction moratorium did not simply limit the amount of rent property owners could charge, as in *Yee v. City of Escondido*, 503 U.S. 519 (1992), but deprived property owners of their right to exclude, as in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022).

III. Sources of GRE's Data

GRE has gathered financial and other data from the Addison for the four calendar years prior to March 2020, as well as for calendar years 2020 and 2021, when Washington's eviction moratorium was in effect. GRE also gathered data for calendar year 2022. The data includes audited financial data regarding the Addison's maximum rents, losses due to unpaid rent, and federal and state rental assistance received during the COVID-19 pandemic, among other information. GRE keeps its records in the normal course of business, including its audited financial statements. GRE compiled the data from its records for the purposes of this *amicus curiae* brief. The data is submitted in an Appendix ("App.").

GRE's financial data shows the Addison's losses in rental income before and during Washington's eviction moratorium. It starts with the Addison's maximum rents that, being set by federal restrictions,

⁵ See, e.g., *id.* at p. 4.

⁶ See Wash. Office of the Governor, Proclamation 21-09.2.

also tend to represent market rates. To determine the Addison's total revenue each year, GRE's audited financial statements combine "max rents" with other revenue ("gain to lease," "commercial rental revenue"⁷ and "other revenue"⁸) and then subtract losses. *See* App. 1.

The Addison's losses include "loss to lease," "vacancy loss," and "bad debt." *See id.* "Loss to lease" represents the difference between a unit's market rent and the actual rent paid. "Vacancy loss" is the loss from vacant units. "Bad debt" is rent that cannot be collected. The Addison's losses due to unpaid rent are captured year to year by combining "loss to lease" and "bad debt."

Lastly, the Appendix includes federal and state rental assistance. In 2020, 2021, and 2022, GRE received funds through the Coronavirus Aid Relief and Economic Security Act (identified as "CARES Rental Assistance Received").⁹ *See id.* In 2021 and 2022, it also received assistance from Washington state mitigation funds through the Landlord Damage Relief

⁷ The Addison includes commercial rental space. For purposes of the Appendix, "commercial rental income" includes commercial rent less commercial vacancy loss and commercial concessions.

⁸ The Addison also derives income from other sources, such as laundry and vending machines, tenant application fees, and late fees.

⁹ *See* 15 U.S.C. § 9001, *et seq.*

Program and Landlord Covid Relief Program.¹⁰ *See id.*

IV. The Undue Burden and Economic Impact of the Washington Eviction Moratorium on the Addison

GRE can confirm the severe public burden imposed on the Addison by Washington’s eviction moratorium, without just compensation. In the underlying decision, the Washington Supreme Court noted that “Congress and the Washington State Legislature have appropriated significant funds to defray” some of the cost of unpaid rent. *Gonzales*, 2 Wash. 3d at 296 n.9. GRE can also confirm that federal and state rental assistance was woefully inadequate to cover the rental income it lost.

One way to view the Addison’s losses is the total losses due to “loss to lease,” “vacancy loss,” and “bad debt” over time. From 2016 to 2018, the Addison’s total losses were relatively constant, averaging \$186,174 per year. *See* App. 1. Total losses increased to \$439,969 in 2019 and then exploded from 2020 to 2021 when the Addison was subject to the eviction moratorium.¹¹ *See id.* In 2020, the Addison’s total

¹⁰ *See* Wash. Rev. Code § 43.31.605.

¹¹ The Addison’s increase in losses in 2019 can be attributed to a change in screening potential tenants. In February 2018, the City of Seattle enacted an ordinance that prohibits private residential property owners from inquiring into an applicant’s criminal history and from using that information if it is obtained. *See* Seattle Mun. Code § 14.09.025(A)(2). After GRE began to abide by the new ordinance, and natural turnover occurred, living conditions at the Addison declined. As shown in

losses increased to \$983,654 and then to \$1,128,727 in 2021. *See id.* In 2022, the effects of the eviction moratorium were still being felt with the accumulation of “bad debt,” and the Addison’s total losses were \$1,750,794.¹² *See* App. 1.

Those losses include lost rental income from tenants’ inability to pay rent. Part of the Addison’s lost rental income is represented by “loss to lease.” Again, loss or gain to lease is the difference between the Addison’s market rates and the actual rent paid. From 2016 to 2019, the Addison experienced minimal losses to lease, as well as gains to lease, depending on the year. *See id.* But starting in 2020, losses to lease increased tremendously—to \$388,789 in 2020 and to \$649,199 in 2021.¹³ *See id.*

The same was true of “bad debt,” which was relatively constant from 2016 through 2021, averaging \$54,787 a year. *See id.* But in 2022, the Addison’s bad

the Appendix, move outs, evictions, and vacancies all increased in 2019, leading to a large increase in vacancy losses. *See* App. 1.

¹² The Addison’s total losses in 2022 were also due to the continuing effects of an eviction moratorium imposed by the City of Seattle. *See* App. 1. Seattle’s moratorium extended through February 2022, *see* Jamie Housen, Office of the Mayor, Eviction Moratorium Will Expire at the End of February (Feb. 11, 2022), <https://harrell.seattle.gov/2022/02/11/eviction-moratorium-will-expire-at-the-end-of-february/> (last visited Apr. 12, 2024), while an ordinance continued eviction protections for the inability to pay rent through October 2022, *see* Seattle Mun. Code § 22.205.090.

¹³ In 2022, the Addison’s losses to lease increased to \$754,911. *See* App. 1.

debt had accumulated and increased to \$515,846. *See id.*

Altogether, GRE's lost rental income increased exponentially. Prior to the Washington eviction moratorium, 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. *See id.* But during the moratorium, the Addison's total losses for unpaid rent rose to \$463,122 in 2020, to \$699,817 in 2021.¹⁴ *See id.* Compare that to what GRE received in federal and state rental assistance in those years: \$91,384 in 2020 and \$442,341 in 2021.¹⁵ *See id.*

Washington's eviction moratorium accounts for the considerable losses in rental income in 2020 and 2021. While the moratorium did not excuse existing tenants from paying rent, many tenants did not pay, and GRE was unable to evict them. And while GRE received federal and state rental assistance for some non-paying 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 existing tenants' lease agreements and was forced to accept the physical occupation of its property regardless of whether tenants paid rent.

¹⁴ In 2022, the Addison's lost rental income increased to \$1,270,757. *See App. 1.*

¹⁵ In 2022, the Addison received \$101,402 in federal and state rental assistance. *See App. 1.*

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.

As documented above, the public burden and impact to GRE and the Addison was considerable, just as it was on other residential rental property owners in Washington. Like Petitioners, GRE was prohibited from excluding existing tenants. Unable to evict tenants for failing to pay rent, GRE was forced to house many of them for free and suffered significant economic losses as a result. The burden and economic impact of the moratorium on residential rental property owners helps illustrate the important federal issue Petitioners raise in their petition for writ of certiorari. Petitioners should be heard on whether their residential rental properties were physically occupied without just compensation and denied the protections required by the Fifth Amendment.

CONCLUSION

When Governor Inslee established Washington's eviction moratorium, owners of residential rental properties bore a significant societal and economic burden to house tenants without compensation during the COVID-19 pandemic. GRE respectfully urges the Court to grant the petition for writ of certiorari.

Dated this 15th day of April 2024.

Respectfully submitted,

W. CHRISTOPHER POOSER

Counsel of Record

STOEL RIVES LLP

101 S. Capitol Blvd.

Suite 1900

Boise, ID 83702

(208) 389-9000

christopher.pooser@stoel.com

Counsel for Amicus Curiae

GRE Downtowner LLC

APPENDIX

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2016-2022 Data from The AddisonApp.1

2016-2022 Data from The Addison

Annual

Washington Moratorium

		2016	2017	2018	2019	2020	2021	2022
4000-000	REVENUE:							
4005-000	RENTAL REVENUE							
4005-100	Max Rents	\$ 2,922,696	\$ 2,933,739	\$ 3,128,544	\$ 3,415,837	\$ 3,789,921	\$ 3,978,392	\$ 4,082,267
4005-200	Loss/Gain to Lease	\$ (52,623)	\$ 25,668	\$ 25,631	\$ (47,780)	\$ (388,789)	\$ (649,199)	\$ (754,911)
4050-020	Vacancy Loss	\$ (106,954)	\$ (145,400)	\$ (176,684)	\$ (316,576)	\$ (520,532)	\$ (428,910)	\$ (480,037)
	Bad Debt	\$ (33,114)	\$ (54,296)	\$ (40,751)	\$ (75,613)	\$ (74,333)	\$ (50,618)	\$ (515,846)
	Commercial Rental Revenue	\$ 90,668	\$ 190,191	\$ 32,673	\$ 200,000	\$ 204,228	\$ 201,479	\$ 159,023
	Other Revenue	\$ 139,249	\$ 106,276	\$ 112,341	\$ 117,750	\$ 58,373	\$ 41,976	\$ 52,508
	Total Revenue	\$ 2,959,922	\$ 3,056,177	\$ 3,081,754	\$ 3,293,618	\$ 3,068,868	\$ 3,093,120	\$ 2,543,004
	Gross Loss less Vacancy Loss	\$ (85,737)	\$ (28,628)	\$ (15,120)	\$ (123,393)	\$ (463,122)	\$ (699,817)	\$ (1,270,757)
	Gross Total Loss	\$ (192,691)	\$ (174,028)	\$ (191,804)	\$ (439,969)	\$ (983,654)	\$ (1,128,727)	\$ (1,750,794)
	Total Amount of CARES Rental Assistance Received				\$ 91,384	\$ 401,429	\$ 74,003	
	Net Total Loss	\$ (192,691)	\$ (174,028)	\$ (191,804)	\$ (439,969)	\$ (892,269)	\$ (727,298)	\$ (1,676,791)
	Number of Move Outs	118	114	106	131	107	38	77
	Total Debt Received from State Mitigation Funds	n/a	n/a	n/a	n/a	\$ 40,912	\$ 27,399	
	Total Debt Required to forgive from State Mitigation Funds	n/a	n/a	n/a	n/a	\$ (5,796)	\$ (796)	
5001-169	ADMINISTRATION EXPENSES							
5001-290	Evictions	\$ 14,948	\$ 20,112	\$ 26,740	\$ 45,417	\$ 11,223	\$ 5,268	\$ 6,790