

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
MINNESOTA MULTI HOUSING ASSOCIATION
IN SUPPORT OF PETITIONERS**

Philip J. Kaplan
Counsel of Record
ANTHONY OSTLUND LOUWAGIE
DRESSEN & BOYLAN P.A.
90 South Seventh Street
Suite 3600
Minneapolis, MN 55402
(612) 349-6969
pkaplan@anthonyostlund.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	3
REASONS FOR GRANTING THE PETITION.....	4
I. Landlords Were Hit Hard By the Pandemic – Especially Minority-Owned and Low-Income Landlords.....	4
II. Eviction Moratoriums Exacerbated the Financial Harm Landlords Were Already Experiencing from the Pandemic.....	7
III. Landlords Have Not Been Compensated for the Harm Caused by the Eviction Moratoriums.....	10
A. Emergency Rental Assistance Payments Were Insufficient.....	10
B. Lawsuits for Money Judgments Were Insufficient.....	13
C. The Eighth Circuit Correctly Held that Minnesota’s Eviction Moratorium Was a <i>Per Se</i> Physical Taking.....	14
D. The Washington Supreme Court’s Decision in this Case Conflicts with the Eighth Circuit’s Decision in <i>Heights Apartments</i> and Is Erroneous.....	15
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<i>Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.</i> , 141 S. Ct. 2485, 2489 (2021).....	13
<i>Cedar Point Nursery v. Hassid</i> , 141 S. Ct. 2063, 2072 (2021).....	4, 14, 15
<i>Gonzales v. Inslee</i> , 535 P.3d 864, 873 n.9 (Wash. 2023).....	12, 15
<i>Heights Apartments, LLC v. Walz</i> , 30 F.4th 720, 733 (8th Cir. 2022).....	2-4, 13-16
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419, 435 (1982).....	4
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164, 176 (1979).....	4
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992).....	14, 15

Rules and Statutes

E.O. No. 20-79, § 2(a)–(d).....	7, 9
Minn. Stat. § 504B.171, subd. 1.....	9
Minn. Stat. § 504B.291, subd. 1.....	13
Supreme Court Rule 37.2.....	1

Other/Miscellaneous

Elijah de la Campa et. al., <i>How Are Landlords Faring During the COVID-19 Pandemic? Evidence from a National Cross-Site Survey 37</i> (Joint Ctr. For Hous. Stud. of Harvard Univ. 2021), available at https://www.jchs.harvard.edu/sites/default/files/research/files/Harvard_jchs_covid_impact_landlords_survey_de_la_campa_2021_2.pdf	5
--	---

- Elijah de la Campa, *The Impact of COVID-19 on Small Landlords: Survey Evidence from Albany and Rochester, New York 3* (Joint Ctr. For Hous. Stud. of Harvard Univ. 2021), available at https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_small_landlord_survey_de_la_campa_2021_0.pdf..... 6
- Abby Vesoulis, *How Eviction Moratoriums Are Hurting Small Landlords—and Why That’s Bad for the Future of Affordable Housing*, TIME (June 11, 2020), [https:// time.com/5846383/coronavirus-small-landlords/](https://time.com/5846383/coronavirus-small-landlords/)..... 5, 7
- Jung Hyun Choi et. al., *Owners and Renters of 6.2 Million Units in Small Buildings are Particularly Vulnerable during the Pandemic*, Urban Inst.: Urban Wire (Aug. 10, 2020), <https://www.urban.org/urban-wire/owners-and-renters-62-million-units-small-buildings-are-particularly-vulnerable-during-pandemic>..... 6
- Elizabeth Kneebone et. al., *The Impact of the Pandemic on Landlords: Evidence from Two National Surveys 6* (Joint Ctr. For Hous. Stud. of Harvard Univ. 2021), available at https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_impact_on_landlords_two_national_surveys_kneebone_et_al_2021.pdf...6, 8, 11
- Nathaniel Decker, *The Uneven Impact of the Pandemic on the Tenants and Owners of Small Rental Properties 5–6* (Turner Ctr. For Hous. Innovation 2021), available at <https://turnercenter.berkeley.edu/wp-content/uploads/2021/07/Small-Rental-Properties-Decker-July-2021.pdf>..... 6

The Hous. Initiative at Penn, *COVID-19 and Rent Relief: Understanding the Landlord Side* (The Hous. Initiative at Penn 2020), available at https://www.housinginitiative.org/uploads/1/3/2/9/132946414/phl_ownerbrief_final.pdf...6, 7

Laurie S. Goodman et. al., *Housing Policy: Part II. Lessons Learned from Rental Policies and Outcomes, in* *Recession Remedies: Lessons Learned from the U.S. Economic Policy Response to COVID-19* 192, 203 (Edelberg et. al. eds. 2022), available at <https://www.brookings.edu/wp-content/uploads/2022/04/RR-Complete-Volume.pdf>..... 7, 8, 11

Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020)..... 7

Ellen Dewitt, *Eviction Rates In Every State*, STACKER (June 17, 2020), <https://stacker.com/stories/4233/eviction-rates-every-state>.... 8

Minnesota Monthly Eviction Filings Compared to Historical Averages, *Eviction Lab*, <https://evictionlab.org/eviction-tracking/minnesota/>.. 8

Minnesota Monthly Eviction Filings Compared to Historical Averages, *Eviction Lab*, <https://evictionlab.org/eviction-tracking/minnesota/>9

Hennepin County Data Dashboard on Evictions, <https://app.powerbigov.us/view?r=eyJrIjoiYzQ1NDQyYzUtZDY2Zi00OTIxLThiZDgtZGQ3MWYwZjM5NmQ0IiwidCI6IjhhZWZkZjlmLTg3ODAtNDZiZi04ZmI3LTRjOTI0NjUzYTkiZSJSJ9>.... 9

Comm’r Jennifer L. Ho, Minn. Hous. & Fin. Agency,
Update on RentHelpMN at 7 (Feb. 8, 2022),
available at [https://www.Senate.mn/committees/2021-2022/3108_Committee_on_Housing_Finance_and_Policy/RentHelpMN%20Overview%20\(2.8.22\)](https://www.Senate.mn/committees/2021-2022/3108_Committee_on_Housing_Finance_and_Policy/RentHelpMN%20Overview%20(2.8.22))..... 11

RentHelpMN Submitted Applications, Minn. Hous. &
Fin. Agency, <https://www.mnhousing.gov/renthelpmn/renthelpmn-dashboard.html> 11

Rent Debt in America: Stabilizing Renters is Key to Equitable Recovery, PolicyLink,
<https://www.policylink.org/node/63161>12

INTEREST OF AMICUS CURIAE¹

The Minnesota Multi Housing Association (MHA) is a Minnesota non-profit corporation that was founded in 1967 to promote the highest standards in the development, management, and maintenance of rental and owner-occupied multi housing, and to advocate for Minnesota multi-family property owners and landlords. MHA has nearly 2,200 members—most of whom own or manage fewer than 50 units each—who collectively own more than 300,000 residential rental units across Minnesota. Since its founding, MHA has served as an advocate for owners’ property rights and a promoter of sound public and industry policies in the multi housing industry.

MHA’s members need their tenants to pay rent and follow the rules they agreed to. Some MHA members’ survival depends on the right to remove tenants who fail to pay rent or otherwise break the rules. Thus, MHA has a strong interest in preserving its Minnesota-based members’ constitutional rights to determine who can and cannot be on their properties.

In 2020, Minnesota Governor Tim Walz mandated a statewide eviction moratorium, similar to the eviction moratorium at issue in this case, that caused serious harm to MHA’s members. One of MHA’s members, Heights Apartments, LLC, made a constitutional challenge to Minnesota’s eviction moratorium. In that case, the Eighth Circuit Court of Appeals correctly applied this Court’s precedent and held that Heights Apartments pled a valid claim that

¹ No party or counsel for a party authored this brief in whole or in part, and no person or entity other than MHA made any monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, MHA has given timely 10-day notice to all counsel of record of its intent to file this *amicus curiae* brief.

Governor Walz's prohibition on evictions, although temporary, was a *per se* physical taking under the Fifth Amendment to the United States Constitution. *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022). MHA filed an amicus brief in opposition to Governor Walz's unsuccessful petition for a rehearing of that decision.

MHA now appears as amicus in this case because Petitioners present the same argument that Heights Apartments won at the Eighth Circuit and that MHA is interested in reinforcing. MHA agrees with Petitioners that the State of Washington's Moratorium on Residential Evictions, like Governor Walz's eviction moratorium, constituted a *per se* taking of landlords' properties. The Washington Supreme Court erred when it decided otherwise. Granting the petition for certiorari is critical to correct that error and to maintain constitutional protections for property owners in Minnesota and across the nation.

SUMMARY OF ARGUMENT

The eviction moratoriums that were issued in 2020 exacerbated the harm that landlords were already suffering from the COVID-19 pandemic. By prohibiting evictions except in the most extreme circumstances, state governments essentially commandeered landlords' properties to house tenants who were not paying rent, who broke their leases, and who disturbed their neighbors.

The eviction moratoriums constituted *per se* physical takings of property in that they forced landlords to keep, and prevented landlords from excluding, non-paying and lease-breaking tenants. In *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022), the Eighth Circuit Court of Appeals correctly applied this Court's precedent to hold that Minnesota's eviction moratorium was a *per se* taking. But in this case, the Washington Supreme Court misapplied this Court's precedent and reached the opposite conclusion, deciding Washington's eviction moratorium was not a *per se* taking.

The two decisions cannot be reconciled. As a result of these inconsistent rulings, the same government actions now constitute a taking in Minnesota or Missouri, but not in Washington.

This case presents the Court with an opportunity to reaffirm the vitality of the Court's precedents on the Takings Clause, and to resolve a conflict among lower courts about the application of the Takings Clause to government actions that have profoundly harmed the rights of property owners in Minnesota and across the nation. The Court should grant the petition for certiorari, reverse the Washington Supreme Court's decision and the judgment below, and uphold the takings principles

that supported the Eight Circuit’s decision in *Heights Apartments*.

REASONS FOR GRANTING THE PETITION

As this Court has observed, the right to exclude others is “one of the most treasured rights of property ownership” and “is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property[.]’” *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) and *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). “Given the central importance to property ownership of the right to exclude . . . the Court has long treated government-authorized physical invasions as takings requiring just compensation.” *Id.* at 2073.

The Washington Eviction Moratorium at issue in this case, like the Minnesota eviction moratorium that MHA has fought against, violated these foundational constitutional principles. The Court should grant the petition for certiorari to correct the Washington Supreme Court’s error in upholding the Washington eviction moratorium, and to reaffirm protections for property owners across the country who rent their properties.

I. Landlords Were Hit Hard By the Pandemic – Especially Minority-Owned and Low-Income Landlords

The harm Petitioners claim they suffered from the Washington eviction moratorium is not unique to them. Landlords in other states that imposed eviction moratoriums, including Minnesota, suffered the same

kind of damage – damage that remains unremedied to this day.

Landlords were not immune to the economic impacts of the COVID-19 pandemic. In Minneapolis, for example, the number of landlords who received less than 90% of rent due more than tripled in 2020 compared to 2019.² The number of Minneapolis landlords who received less than 50% of rent due doubled in 2020 compared to 2019.³

Small “mom-and-pop” landlords were hit especially hard by the pandemic and the eviction moratoriums that flowed from it.⁴ Landlords renting 1-5 units were the most likely to have tenants deeply behind on rent payments during the pandemic.⁵ These small landlords – which make up as much as 73.3% of

² Elijah de la Campa et. al., *How Are Landlords Faring During the COVID-19 Pandemic? Evidence from a National Cross-Site Survey* 37 (Joint Ctr. For Hous. Stud. of Harvard Univ. 2021), available at https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_covid_impact_landlords_survey_de_la_campa_2021_2.pdf.

³ *Id.* at 38.

⁴ See Abby Vesoulis, *How Eviction Moratoriums Are Hurting Small Landlords—and Why That’s Bad for the Future of Affordable Housing*, TIME (June 11, 2020), <https://time.com/5846383/coronavirus-small-landlords/>; see also Jung Hyun Choi et. al., *Owners and Renters of 6.2 Million Units in Small Buildings are Particularly Vulnerable during the Pandemic*, Urban Inst.: Urban Wire (Aug. 10, 2020), <https://www.urban.org/urban-wire/owners-and-renters-62-million-units-small-buildings-are-particularly-vulnerable-during-pandemic>.

⁵ De la Campa et. al., *supra* note 2, at 2.

total landlords in Minneapolis – suffered the most substantial losses.⁶

Smaller rental properties have the highest share of owners who are racial minorities.⁷ Smaller landlords are also more likely to be retirees and other individuals with limited outside income.⁸ While some interest groups have argued about the disproportionate impact of the pandemic on minority and low-income tenants, they omit that minority and low-income landlords are in the same boat.

Lost rental revenue during the pandemic made it more difficult for landlords to pay their mortgages, property taxes, employee wages, and maintenance and repair costs.⁹ Many small landlords cannot afford to go

⁶ *Id.* at 46; *see also* Elizabeth Kneebone et. al., *The Impact of the Pandemic on Landlords: Evidence from Two National Surveys 6* (Joint Ctr. For Hous. Stud. of Harvard Univ. 2021), available at https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_impact_on_landlords_two_national_surveys_kneebone_et_al_2021.pdf.

⁷ Choi et. al., *supra* note 4; *see also* Nathaniel Decker, *The Uneven Impact of the Pandemic on the Tenants and Owners of Small Rental Properties 5–6* (Turner Ctr. For Hous. Innovation 2021), available at <https://turnercenter.berkeley.edu/wp-content/uploads/2021/07/Small-Rental-Properties-Decker-July-2021.pdf>.

⁸ Elijah de la Campa, *The Impact of COVID-19 on Small Landlords: Survey Evidence from Albany and Rochester, New York 3* (Joint Ctr. For Hous. Stud. of Harvard Univ. 2021), available at https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_small_landlord_survey_de_la_campa_2021_0.pdf.

⁹ The Hous. Initiative at Penn, *COVID-19 and Rent Relief: Understanding the Landlord Side* (The Hous. Initiative at Penn 2020), available at https://www.housinginitiative.org/uploads/1/3/2/9/132946414/phl_ownerbrief_final.pdf; *see also* Kneebone et. al., *supra* note 6, at 18.

months without being paid rent.¹⁰ The financial stress from the pandemic made landlords, particularly small ones, feel pressure to sell their properties to stop the bleeding.¹¹

II. Eviction Moratoriums Exacerbated the Financial Harm Landlords Were Already Experiencing from the Pandemic.

Eviction moratoriums exacerbated landlords' financial losses from the pandemic. In Minnesota, for more than 15 months, the moratorium prohibited all Minnesota landlords from evicting all residential tenants for non-payment of rent and other material lease violations, except under extreme circumstances. Unlike the CDC eviction moratorium,¹² the Minnesota moratorium did not require tenants to certify that they needed rent relief due to pandemic-related hardship.¹³ The Minnesota moratorium allowed all tenants to stay in their units, without paying rent, even if a given tenant did not need such a benefit.¹⁴ The Washington eviction moratorium at issue in this case was similarly overbroad.

¹⁰ See The Hous. Initiative at Penn, *supra* note 9; see also Vesoulis, *supra* note 4; Decker, *supra* note 7, at 2, 15–16.

¹¹ Laurie S. Goodman et. al., *Housing Policy: Part II. Lessons Learned from Rental Policies and Outcomes*, in *Recession Remedies: Lessons Learned from the U.S. Economic Policy Response to COVID-19* 192, 203 (Edelberg et. al. eds. 2022), available at <https://www.brookings.edu/wp-content/uploads/2022/04/RR-Complete-Volume.pdf>; Kneebone et. al., *supra* note 6, at 11.

¹² See *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

¹³ See E.O. No. 20-79, § 2.

¹⁴ See *id.*

The eviction moratoriums eliminated landlords' best tool to mitigate the damage they suffered from the pandemic. "Mom-and-pop" landlords with limited means had little other recourse against non-paying tenants.¹⁵ Landlords were forced to bear the full cost to own and maintain housing (e.g., mortgage payments, property taxes, repair expenses, etc.) for tenants who did not pay full rent.¹⁶ Some landlords decided to cut their losses by agreeing to reduce their rent.¹⁷

The eviction moratoriums effectively required landlords to provide rent-free housing to thousands of tenants. Historically, Minnesota has had one of the lowest eviction rates in the country,¹⁸ with landlords filing between 1,200 and 1,600 eviction actions per month before the pandemic.¹⁹ The eviction moratorium eliminated eviction actions for non-payment of rent and drastically reduced Minnesota's already-low eviction rates. From the time the Minnesota eviction moratorium was first signed on March 16, 2020 until a phaseout statute was enacted effective July 1, 2021, eviction filings were 85-97% lower than the historical average, amounting to more

¹⁵ Goodman et. al., *supra* note 11, at 203.

¹⁶ *Id.*

¹⁷ Kneebone et. al., *supra* note 6, at 12–13.

¹⁸ Ellen Dewitt, *Eviction Rates In Every State*, STACKER (June 17, 2020), <https://stacker.com/stories/4233/eviction-rates-every-state>.

¹⁹ *Minnesota Monthly Eviction Filings Compared to Historical Averages*, *Eviction Lab*, <https://evictionlab.org/eviction-tracking/minnesota/> (under "Trends in eviction filings" section and accompanying graph, select "Filing Counts" under the graph to view historical filings versus filings this year) (last visited April 2, 2024).

than 1,000 fewer evictions per month.²⁰ Eviction filings remained well below their historical averages until February 2022.²¹ Most of these foregone evictions would have been for non-payment of rent.²² Landlords absorbed that lost rent to the extent it was not covered by federal funding (see below).

Landlords' inability to evict non-paying tenants was only part of the problem. The moratoriums also prevented landlords from evicting tenants for a host of material lease violations that were unrelated to the payment of rent or the pandemic. Under the Minnesota eviction moratorium, landlords could evict tenants only if they seriously endangered the safety of other residents, significantly damaged property, or used the premises for certain criminal activity. *See* E.O. No. 20-79, § 2(a)–(d) (citing Minn. Stat. § 504B.171, subd. 1). The Washington eviction moratorium was even more restrictive, allowing evictions only if the landlord could show terminating a tenancy was “necessary to respond to a significant and immediate risk to the health, safety, or property of others created by the resident.”

²⁰ *Minnesota Monthly Eviction Filings Compared to Historical Averages*, *Eviction Lab*, <https://evictionlab.org/eviction-tracking/minnesota/> (under “Trends in eviction filings” section, and accompanying graph, select “Vs. Average” under the graph to view percentages of filings relative to the average for the period in question) (last visited April 2, 2024).

²¹ *Id.*

²² *See Hennepin County Data Dashboard on Evictions*, <https://app.powerbigov.us/view?r=eyJrIjoieYzQ1NDQyYzUtZDY2Zi00OTIxLThiZDgtZGQ3MwYwZjM5NmQ0IiwidCI6IjhhZWZkZjlmLTg3ODAtNDZiZi04ZmI3LTRjOTI0NjUzYThiZSJSJ9> (under “Year,” select 2019, and view “Eviction Judgments by Type,” which shows that 88.17–95.83% of evictions in Hennepin County that year were for non-payment of rent) (last visited April 2, 2024).

Few cases could meet such an incredibly high standard for evictions.²³ Landlords could not evict tenants who, for example: sexually or racially harassed other residents or landlords' staff; made verbal threats to other residents or landlords' staff; smoked in a non-smoking building; left trash and personal property all over the hallways, stairwells, and common areas; held loud parties late at night that disturbed other residents; or overcrowded their units such that they increased the risk of spreading COVID-19. Landlords endured abusive tenants throughout the moratorium because their tenants' behavior did not meet the narrow and extreme circumstances needed to evict them. Some of MHA's members reported that, during the eviction moratorium, they lost staff and paying tenants who became fed up with abusive tenants that could not be evicted for more than 15 months. Prohibiting evictions in these cases punished rule-followers and enabled rule-breakers.

III. Landlords Have Not Been Compensated for the Harm Caused by the Eviction Moratoriums.

Alternative remedies to eviction did not fully compensate landlords for the damage caused by the eviction moratoriums.

A. Emergency Rental Assistance Payments Were Insufficient

In Minnesota, the Emergency Rental Assistance ("ERA") distributed through RentHelpMN was an insufficient remedy for landlords. For starters, not all

²³ *See id.*

tenants were eligible for ERA payments. Tenants were eligible for assistance only if they experienced financial hardship due to the pandemic, they demonstrated a risk of homelessness or housing instability, and their household income was at or below 80% of the median income in the area.²⁴ On the other hand, the eviction moratorium had no such direct connection to the pandemic or tenants' financial needs. The ERA program and eviction moratorium left a gap for non-paying tenants who could not receive rent assistance and could not be evicted.

Even for eligible tenants, the ERA money was slow to come in and did not provide complete relief to landlords.²⁵ RentHelpMN did not start to make ERA payments until May 20, 2021 – over 14 months into the eviction moratorium.²⁶ By October 2022, Minnesota renters had applied for \$539.67 million in rent assistance, but RentHelpMN had paid out \$428 million, meaning more than \$111 million in rent coverage was applied for but denied.²⁷ This number did not account for tenants and landlords who never applied for assistance in the first place. Small landlords were the least likely to participate in or be aware of the ERA program.²⁸ As of April 2, 2024, an

²⁴ Goodman et. al., *supra* note 11, at 205.

²⁵ *Id.* at 205–206.

²⁶ Comm'r Jennifer L. Ho, Minn. Hous. & Fin. Agency, *Update on RentHelpMN at 7* (Feb. 8, 2022), available at [https://www.senate.mn/committees/2021-2022/3108_Committee_on_Housing_Finance_and_Policy/RentHelpMN%20Overview%20\(2.8.22\)_Commissioner_Ho.pdf](https://www.senate.mn/committees/2021-2022/3108_Committee_on_Housing_Finance_and_Policy/RentHelpMN%20Overview%20(2.8.22)_Commissioner_Ho.pdf)

²⁷ *RentHelpMN Submitted Applications*, Minn. Hous. & Fin. Agency, <https://www.mnhousing.gov/renthelpmn/renthelpmn-dashboard.html> (last visited Apr. 2, 2024).

²⁸ Kneebone et. al., *supra* note 6, at 12.

estimated \$97,700,000 in rent debt remained outstanding in Minnesota.²⁹

In the end, the ERA payments did not compensate landlords for: non-paying tenants who were ineligible for assistance; tenants who never applied for assistance; rent discounts that landlords granted to mitigate their damages; the lost time value of money and cash flow that landlords suffered while they waited months or even years for ERA checks to arrive; or the harm caused by abusive tenants who violated non-monetary terms of their leases but could not be evicted due to the moratorium. The Minnesota government did not pay landlords for these losses.

The Washington Supreme Court referenced a similarly inadequate program in its decision below. The court wrote in footnote 9 of its opinion: “We are not without sympathy to the fact that the petitioners have been made to bear the cost of accommodating a public need. We note that both Congress and the Washington State Legislature have appropriated significant funds to defray at least some of that cost in situations where the tenants have not paid rent and have avoided paying their debts.” *Gonzales v. Inslee*, 535 P.3d 864, 873 n.9 (Wash. 2023). This footnote is telling because the court admits the government forced private landlords to use their properties to accommodate the public. By definition, such government action is a taking for which landlords are entitled to compensation. *See* U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”). As the court concedes, the rent relief programs did not fully compensate

²⁹ *Rent Debt in America: Stabilizing Renters is Key to Equitable Recovery*, PolicyLink, <https://www.policylink.org/node/63161> (under “Select a Geography” menu, select “Minnesota” to view applicable data) (last visited April 2, 2024).

landlords for the costs of the public benefit they were forced to provide.

B. Lawsuits for Money Judgments Were Insufficient

Although landlords in Minnesota and elsewhere retained the right to sue non-paying tenants for money judgments, there was little chance that such lawsuits would lead to meaningful relief. Going to court costs time and money. And tenants that struggled to pay rent during the pandemic were unlikely to have the lump sums necessary to cover a judgment for past rent. Landlords will never recoup their losses from these tenants. *See Heights Apartments*, 30 F.4th at 729 n.7 (noting that “monetary relief obtained against a judgment-proof individual is an illusory remedy” (citing *Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021))). Recovering possession of the rental unit was thus the only way for a landlord to begin addressing some of the harm it was suffering during the pandemic.

Simply put, an action to collect unpaid rent does not adequately replace an eviction action. Evicting a problem tenant eliminates the cost of housing that tenant, gives the landlord control over the space, and allows the landlord the option of renting the space to a new tenant that will pay rent and follow the lease. By contrast, a damages award does not give the landlord freedom to reduce its future exposure.

An eviction action also has unique power to cause a non-paying tenant to catch up on past due rent. In Minnesota, when a landlord files for an eviction, the tenant has a statutory right to restore its tenancy by paying back rent before the landlord regains possession. Minn. Stat. § 504B.291, subd. 1.

The “pay and stay” statute gives tenants a strong incentive to pay rent. The eviction moratorium eliminated that incentive because tenants could “stay” regardless of whether they “paid.” The threat of a potentially pointless collection lawsuit, which would not impact the tenant’s right to live on the premises, was no substitute for an eviction action.

C. The Eighth Circuit Correctly Held that Minnesota’s Eviction Moratorium Was a *Per Se* Physical Taking.

The Eighth Circuit correctly decided the Minnesota eviction moratorium was a *per se* physical taking in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022). In reaching that conclusion, the Eighth Circuit followed this Court’s recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) and distinguished this Court’s prior decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992).

Quoting *Cedar Point Nursery*, the Eighth Circuit wrote that “[w]henver a regulation results in a physical appropriation of property, a *per se* taking has occurred.” *Heights Apartments*, 30 F.4th at 733 (quoting *Cedar Point Nursery*, 141 S. Ct. at 2072). The court continued: “It is immaterial whether physical invasion is ‘permanent or temporary,’ ‘intermittent as opposed to continuous,’ or whether the government is directly invading the land or allowing a third party to do so.” *Id.* (quoting *Cedar Point Nursery*, 141 S. Ct. at 2074–76).

The Eighth Circuit determined that “*Cedar Point Nursery* controls here” and “*Yee* . . . is distinguishable.” *Id.* The court explained: “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." *Id.* By contrast, the Minnesota eviction moratorium "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.* Thus, Heights Apartments sufficiently alleged that the eviction moratorium deprived it "of its right to exclude existing tenants without compensation." *Id.* Such allegations, the Eighth Circuit held, gave rise to "a plausible *per se* physical takings claim under *Cedar Point Nursery*." *Id.*

Governor Walz requested a rehearing *en banc*, but his request was denied. *See Heights Apartments, LLC v. Walz*, 39 F.4th 479 (Mem.) (8th Cir. 2022). The Eighth Circuit's decision in *Heights Apartments* remains good law in Minnesota and every other state in the Eighth Circuit.

D. The Washington Supreme Court's Decision in this Case Conflicts with the Eighth Circuit's Decision in *Heights Apartments* and Is Erroneous.

The Washington Supreme Court's decision in this case, which upheld Washington's eviction moratorium, directly conflicts with the Eighth Circuit's decision in *Heights Apartments*. While the Eighth Circuit followed *Cedar Point Nursery* and distinguished *Yee*, the Washington Supreme Court did the reverse. *Gonzales v. Inslee*, 535 P.3d 864, 873 (Wash. 2023).

The Washington Supreme Court's decision here cannot be reconciled with the Eighth Circuit's decision in *Heights Apartments*. The two courts reviewed the

same basic action (an eviction moratorium from COVID-19) under the same constitutional provision (the Takings Clause), but they reached opposite conclusions.

The Eighth Circuit's decision in *Heights Apartments* is correct and the Washington Supreme Court's contrary decision here is erroneous. Despite what the Washington Supreme Court wrote, this Court's decision in *Cedar Point Nursery* sets the proper framework for an eviction moratorium that, although temporary, allows a third party to continue occupying a property owner's land in violation of the parties' lease agreement. The eviction moratoriums are also distinguishable from the law at issue in *Yee* for the reason explained by the Eighth Circuit: the rent control law in *Yee* "neither deprived landlords of their right to evict nor compelled landlords to continue leasing the property past the leases' termination." *Heights Apartments*, 30 F.4th at 733.

This Court should resolve the conflict between the Washington Supreme Court and the Eighth Circuit by reversing the judgment below and deciding the Washington eviction moratorium was a *per se* physical taking of landlords' properties.

CONCLUSION

The dispute over the constitutionality of the Washington eviction moratorium and similar eviction moratoriums is a live controversy, and resolving it will be important to landlords across the country. Landlords still have not been fully compensated for the damage that the eviction moratoriums caused. And absent a decision from this Court reaffirming and clarifying its holdings on the Takings Clause, this dispute is likely to arise again – in the event of another

pandemic or any other situation where a Governor declares an emergency that he or she believes warrants an eviction moratorium. For these reasons, the petition for a writ of certiorari should be granted.

Dated: April 16, 2024

Respectfully submitted,

Philip J. Kaplan
Counsel of Record
ANTHONY OSTLUND LOUWAGIE
DRESSEN & BOYLAN P.A.
90 South Seventh Street
Suite 3600
Minneapolis, MN 55402
(612) 349-6969
pkaplan@anthonyostlund.com

Counsel for Amicus Curiae