No. 23-935

IN THE
Supreme Court of the United States

GENE GONZALES AND SUSAN GONZALES, HORWATH FAMILY TWO, LLC, AND THE WASHINGTON LANDLORD ASSOCIATION,

Petitioners,

v.

GOVERNOR JAY INSLEE AND STATE OF WASHINGTON,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICI CURIAE* MORE HOUSING NOW! AND WASHINGTON MULTI-FAMILY HOUSING ASSOCIATION IN SUPPORT OF PETITIONERS

JOHN A. DILORENZO, JR.
Counsel of Record
CHRISTOPHER SWIFT
DAVIS WRIGHT TREMAINE LLP
560 SW TENTH AVE., SUITE 700
PORTLAND, OR 97205
(503) 241-2300
johndilorenzo@dwt.com
chrisswift@dwt.com

Counsel for Amici Curiae

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

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INTERESTS OF *AMICI CURIAE*[1]

More Housing Now! ("MHN") is a 504(c)(4) organization formed under the laws of the State of Oregon. MHN advocates—through legislative lobbying and otherwise—for policies that protect and expand the housing supply in the State of Oregon. As a part of that advocacy, MHN works closely with property developers and housing providers to develop and implement market-based solutions to address the shortage of housing in Oregon and across the nation.

MHN's advocacy was instrumental to the creation of the State of Oregon's Landlord Compensation Fund Program, which provided compensation to property owners injured by state and local eviction moratoria during the COVID-19 pandemic. As a representative of housing providers and advocate for pro-housing policies, MHN has a significant interest in ensuring that property owners receive just compensation when forced to provide housing without receiving rent payments—in accordance with their fundamental rights under the Fifth Amendment to the Constitution of the United States of America.

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

[1] Pursuant to this Court's Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. *Amici* provided timely notice of this brief to the parties.

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 services. 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 apartment owners who have suffered under a variety of eviction moratoria enacted throughout the country during COVID-19, including owners with rental properties in Seattle.

If left unreviewed, the Supreme Court of Washington's decision in *Gonzales v. Inslee*, 2 Wash. 3d 280, 295-96 (2023), will deny rental property owners those rights. In *Gonzales*, the Supreme Court of Washington misconstrued *Yee v. City of Escondido*, 503 U.S. 519 (1992), and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), as establishing that a government-compelled occupation of private property cannot constitute a taking if the occupier was once an invitee. The Supreme Court of Washington's holding is at odds with *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022), which addressed a similar eviction moratorium. Therefore, a Writ of Certiorari should issue so that the Court may clarify a significant split concerning one of the most fundamental rights held by Americans: a property owner(s)' right to exclude.

SUMMARY OF ARGUMENT

During the COVID-19 global pandemic, an unprecedented wave of government takings occurred in the form of federal, state, and local moratoria on evictions. These mandates compelled property owners to provide housing to tenants whose contractual right to occupy the premises had terminated and who otherwise would have been evicted. Indeed, by January of 2021—a mere eight months into the pandemic—it was estimated that unpaid rents in the United States were "as high as $70 billion."[2]

The federal government—in reaction to the economic pressures caused by the response of various levels of government to the pandemic—passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") which provided $2.2 trillion in economic stimulus. Many of those funds were distributed to the states in order to protect their citizens, stimulate the consumer economy, and provide assistance to those who were affected by an inability—or significantly decreased ability—to earn a living.

Not all public relief was provided at public expense, however. To the contrary, governments across the country adopted programs that forced private property owners to bear the public burden of providing housing without compensation. As a result, rental property owners—who faced the same

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[2] *Q&A: Eviction Moratoriums for Tenants in the United States*, January 26, 2021, Human Rights Watch, https://www.hrw.org/news/2021/01/26/qa-eviction-moratoriums-tenants-united-states.

economic realities as everyone else during the pandemic—were forced to endure the additional government-imposed costs in the form of eviction moratoria like Proclamation 20-19. In other words, not only did landlords likely find their own outside income depressed, they also faced an evisceration of the benefit of their investment incomes as tenants now protected by eviction moratoriums began ceasing paying rent in droves. It is for that reason that the CARES Act was a potential lifesaver in turbulent waters as federal relief was distributed to the state to stimulate the economy and assist the American people.

Certain states chose to use CARES Act money to supplement state expenditures to protect their citizens and to compensate landlords whose physical property was being taken from them in the form of an eviction moratorium that prevented landlords from evicting tenants for nonpayment of rents. For instance, Oregon—in response to efforts of *amicus* MHN and other advocates for housing providers—enacted a program ultimately providing ***full compensation*** to landlords for unpaid rents from tenants who could not be evicted.[3] Under Oregon's program, landlords were able to recoup close to the actual damages caused by *per se* government takings.

Not all landlords around the country fared as well. For instance, landlords just across the border in Washington state were similarly unable to evict breaching tenants for nonpayment of rent but when

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[3] Oregon Landlord Compensation Fund, https://www.portland.gov/phb/rent-relief/oregon-landlord-compensation-fund.

relief came following the passage of the CARES Act, Washington state saw fit to cap rental assistance to landlords caused by tenant nonpayment to $15,000—irrespective of the amount of monthly rent and the number of months missed. Accordingly, a Seattle landlord who was renting a $3,000-per-month home to a tenant would recoup only a small fraction of the amount in arrears in state support. In exchange, that landlord would have to forgo all additional avenues of recourse for the unpaid rent, including the ability to seek other forms of relief.[4]

Aggrieved landlords in Washington sought to challenge Washington's taking of their property without compensation and sued the state and Governor Inslee, culminating in *Gonzales v. Inslee*, 2 Wash. 3d 280, 295-96 (2023), a Supreme Court of Washington decision for which a Writ of Certiorari is now sought by Petitioners.

The Supreme Court of Washington ruled in *Gonzales*, however, that the Washington eviction moratorium imposed by Proclamation 20-19 did not constitute a *per se* taking such that no compensation was required. In so ruling, the Supreme Court of Washington misapplied *Yee v. City of Escondido*, 503 U.S. 519 (1992), under the theory that no taking took place because, at one point in time, a voluntary relationship between the landlord and tenant existed. Based upon that flawed premise, the Supreme Court of Washington determined that *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), was inapposite as the

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[4] Wash. Rev. Code § 43.31.605(c)(iii)(A) & (B).

government intrusion in that case was never premised upon a voluntary relationship. Of course, the Supreme Court of Washington overlooked that *Yee* related to a rent control regulation which did not prevent a landlord from evicting (and therefore excluding) a current tenant who failed to pay rent. Proclamation 20-19 removed Washington landlords' abilities to exclude a tenant who refused to pay any rent and therefore constituted a taking under *Cedar Point*.

For these reasons, *amici* respectfully urge the Court to issue the Writ of Certiorari sought by Petitioners.

ARGUMENT

A. Washington's Eviction Moratorium Was a *Per Se* Taking Requiring Just Compensation.

As set forth in the Petition for Writ of Certiorari (the "Petition"), "Petitioners sued in Washington state court alleging, inter alia, that the State's eviction ban pursuant to Proclamation 20-19, et al., was a physical taking in violation of the Takings Clause of Article I, Section 16 of the Washington Constitute." Pet. at 10-11. The trial court, Court of Appeals of Washington, and the Supreme Court of Washington all ruled against Petitioners. *Id.* Along the way, the courts acknowledged that, while Petitioners brought their claims pursuant to Washington's state constitution, "Washington courts generally apply the federal takings analysis" in analyzing takings claims under the state constitution. *Gonzales v. Inslee*, 21 Wash. App. 2d 110, 134 (2022) ("*Gonzales*

I") (citing *Chong Yim v. City of Seattle*, 192 Wash. 2d 682, 688-89 (2019)).

Indeed, the Supreme Court of Washington decided the takings claim at issue in this case by looking to two of this Court's decisions: *Yee v. City of Escondido*, 503 U.S. 519 (1992), and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). *Gonzales v. Inslee*, 2 Wash. 3d 280, 295-96 (2023) ("*Gonzales II*"). Ultimately relying on *Yee* rather than *Cedar Point*, the Washington Supreme Court held that Proclamation 20-19 was not a taking because a voluntary landlord and tenant relationship preexisted the Proclamation, and "[g]overnment regulation of that voluntary relationship, without more, is not a taking." *Id.* at 295 (quoting *Chong Yim*, 194 Wash. 2d at 673 and citing also *Yee*, 503 U.S. at 532). Under the Supreme Court of Washington's interpretation, a taking can only occur if the party intruding with government sanction initially "***come[s] onto the property without the property owner's permission***." *Gonzales II*, 2 Wash. 3d at 295 (citing *Cedar Point*, 594 U.S. at 162) (emphasis added). In its view, an intruding party's status as either an invitee or a trespasser is immutable and fixed at the moment the party first enters the property. But an invitee's right to occupy a property is not unconditional; it is contingent on compliance with the terms of the parties' agreement. Once a former invitee ceases to have a contractual right to occupy the property, the government cannot compel the property owner to continue to allow the occupation without receiving compensation.

Nothing in *Yee* holds otherwise. The petitioners there were mobile home park owners in Escondido,

California, who rented pads of land to mobile homeowners. *Id.* at 523. The petitioners challenged the City's rent control ordinance that prohibited rent increases absent the City Council's approval. *Id.* at 524-25. This Court held that the rent control ordinance did not authorize an unwanted physical occupation of petitioners' property and therefore did not amount to a *per se* taking. *Id.* at 532. This was because the ordinance neither forced petitioners to rent their property in the first instance, *nor prohibited them from excluding tenants from their land*:

> Petitioners voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, **neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so.**

Id. at 527-28 (emphasis added).

While the Supreme Court of Washington relied on the *Yee* decision's description of states' "broad power to regulate . . . the landlord-tenant relationship," it failed to recognize that power is premised on the landlord's voluntary invitation of the tenant in the first instance *and* the landlord's ongoing right to exclude the tenant pursuant to the terms of the parties' contract—especially for nonpayment of rent. *See Yee*, 503 U.S. at 531 (recognizing "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation") (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439

n.17 (1982)).[5] In fact, the Court expressly acknowledged that compelling landlords to rent their property in the first place would be a taking: "Had the city required such an occupation, of course, petitioners would have a right to compensation, and the city might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right." *Id.* at 532. The same is true when the government compels the continued occupation—without compensation—of private property after a former tenant's contractual right to occupy it has ended. *See id.* at 528 ("A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity *from terminating a tenancy*.") (emphasis added).

The fact that this coerced occupation eventually ended as the pandemic abated does nothing to change this result. In *Cedar Point*, for example, the Court held that a California access regulation that gave outside labor organizers a right to "take access"

[5] The Washington Supreme Court's implicit assumption that rental property owners have diminished rights under the Fifth Amendment compared to all other property owners cannot be squared with this Court's pronouncements. *See Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.* 594 U.S. 758, 765 (2021) ("[P]reventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude."); *see also Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 477 n.1 (2021) (reversing dismissal of landlords' taking claims on exhaustion grounds and urging lower court to reexamine ruling on merits and "give further consideration to these claims in light of our recent decision in *Cedar Point Nursery v. Hassid*." (internal citation omitted).

to agricultural employers' property for limited periods was a *per se* physical taking because it appropriated property owners' right to exclude. 594 U.S. at 152 (quoting Cal. Code Regs., tit. 8, § 20900(e)(1)(C) (2020)).

> The access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.
>
> The right to exclude is "one of the most treasured" rights of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 . . . (1982). According to Blackstone, the very idea of property entails "that sole and despotic 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 W. Blackstone, Commentaries on the Laws of England 2 (1766). In less exuberant terms, we have stated that the 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." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 . . . (1979); . . . see also Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998) (calling the right to exclude the "*sine qua non*" of property).
>
> Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation.

Id. at 149–50.

The Court rejected the notion that the failure of the regulation to invade the property right "round the clock" made the taking any less a taking under the Fifth Amendment. *Id.* at 153-54. "[A] physical appropriation is a taking whether it is permanent or temporary," and "[t]he duration of an appropriation—just like the size of an appropriation, see *Loretto*, 458 U.S. at 436-37—bears only on the amount of compensation." *Id.* at 153. Similarly, the Court held that "physical invasions constitute takings even if they are intermittent as opposed to continuous." *Id.* at 153.

Just as the access regulation in *Cedar Point* constituted a *per se* taking by "grant[ing] labor organizations a right to invade the growers' property," *id.* at 162, so too are eviction moratoria that grant a right for nonpaying tenants to continue to occupy a landlord's property. If the government entered a

lease with a property owner and then announced that it would continue to occupy the property without paying rent for an indefinite period of time, there would be little question that the government had committed a taking. The Washington Supreme Court fails to explain why the result should be different when government authorizes a private individual to do the same.

Accordingly, Respondents' Proclamation 20-19 constituted a *per se* physical taking, and the State of Washington was required to provide just compensation to affected property owners. As shown below, it did not do so.

B. Oregon provided just compensation to rental property owners, and Washington did not.

Like Washington, the State of Oregon imposed eviction moratoria that compelled rental property owners to provide housing without receiving rent. Unlike Washington, the State of Oregon implemented a landlord compensation program intended to provide compensation to landlords injured by the government's actions.

As Oregon's approach demonstrates, it was feasible for states to comply with their Fifth Amendment obligation to compensate property owners for takings. Washington nevertheless failed to do so.

a. Oregon provided compensation to landlords after taking their private property for public use.

Throughout the pandemic, *amicus* MHN helped lead the effort to secure relief for housing providers

suffering an historic shortfall in rent caused by eviction moratoria in Oregon. The legislature provided this relief in two stages.

HB 4401: The legislature began by enacting House Bill 4401, which took effect December 23, 2020. 2020 Or. Laws Third Spec. Sess. Ch. 3, § 2. This initial legislation "compensate[d] residential landlords for 80 percent of the past-due rent of qualified tenants that the landlord has not collected after April 1, 2020" due to hardships related to the COVID-19 pandemic. *Id.*, § 2(1).

But in exchange for this partial compensation, the statute required Oregon landlords to forgive "the remaining 20 percent of the unpaid rent due from qualified tenants that ha[d] accrued between April 1, 2020, and the date of the application, upon receiving a distribution[.]" *Id.* § 2(1)(d). Thus, had the legislature stopped with HB 4401, Oregon residential landlords would have been left without a complete remedy for the losses inflicted by the eviction moratoria.

SB 278: In June 2021, however, the legislature amended HB 4401 to compensate landlords for *100 percent* of unpaid rents. 2021 SB 278, § 12(2), Ch. 420 Or Laws 2021. This change applied retroactively, and the legislature directed the administering agency to "make distributions to adjust the compensation under" HB 4401, "without requiring that the landlord submit an additional application." *Id.* § 13(2).

Moreover, the Oregon Legislative Assembly adequately funded the program, beginning with an allocation of "$150 million in one-time funds for [the

Landlord Compensation Fund]" established by Oregon in order "to assist landlords in keeping financially stressed tenants in their homes." Oregon Landlord Compensation Fund, For Immediate Release (oregon.gov) (Jan. 28, 2021) and https://www.portland.gov/phb/rent-relief/oregon-landlord-compensation-fund.

While the state's administration of the program was far from perfect, Oregon's approach provided an adequate procedure for obtaining just compensation for the losses caused by a government taking—*i.e.*, requiring landlords to continue to house tenants notwithstanding their failure to honor their commitment to pay rent.

b. Washington failed to provide just compensation to landlords after taking their private property for public use.

Across the Columbia River from Oregon, Respondent Inslee signed SB 5160 into law on April 22, 2021, and it became effective that same day. [https://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Session%20Laws/Senate/5160-S2.SL.pdf#page=1.] SB 5160 amended the "landlord mitigation program" which is codified at Wash. Rev. Code § 43.31.605 to include certain relief pertaining to lost rent suffered by landlords in Washington caused by the eviction moratorium imposed by Proclamation 20-19.

Specifically, SB 5160 stated that the "legislature finds that the COVID-19 pandemic is causing a sustained global economic slowdown, and an economic

downturn throughout Washington state . . . disproportionately affecting low and moderate-income workers resulting in lost wages and the inability to pay for basic household expenses, ***including rent***." SB 5160, § 1 (emphasis added). "Because the COVID-19 pandemic has led to an inability for tenants to consistently pay rent, the likelihood of evictions has increased, as well as life, health, and safety risks to a significant percentage of the state's tenants." *Id.* "As a result, [Respondent Inslee] has issued a temporary moratorium on evictions as of March 2020, with multiple extensions and other related actions, to reduce housing instability and enable tenants to stay in their homes." *Id.* The legislature then stated its explicit intent was to provide various "tenant protections," as well as to "ensure tenants and landlords have adequate opportunities to access state and local rental assistance programs to reimburse landlords for unpaid rent and preserve tenancies." *Id.*

Relevant to this case, Senate Bill 5160 allowed landlords to seek limited "reimbursement from the landlord mitigation program account[.]" Wash. Rev. Code § 43.31.605(1). Specifically, landlords could make "[c]laims related to unpaid rent for . . . (A) Up to $15,000 in unpaid rent that accrued between March 1, 2020, and six months following the expiration of the eviction moratorium and the tenant being low-income, limited resourced or experiencing hardship, voluntarily vacated or abandoned the tenancy; or . . . (B) Up to $15,000 in remaining unpaid rent if a tenant defaults on a repayment plan entered into under Wash. Rev. Code § 59.18.630 are eligible for

reimbursement from the landlord mitigation program account subject to the program requirements under this section, provided the tenancy has not been terminated at the time of reimbursement." *Id.*, § 43.31.605(1)(c)(i)(A) & (B).

Further, any landlord that sought reimbursement—even partial reimbursement—under SB 5160 was "prohibited from: . . . [t]aking legal action against the tenant for damages or any remaining unpaid rent accrued between March 1, 2020, and six months following the expiration of the eviction moratorium attributable to the same tenancy[.]" Wash. Rev. Code § 43.31.605(1)(c)(iii)(A).[6]

In other words, after precluding landlords from exercising their constitutionally protected right to exclude, *Ala. Ass'n of Realtors,*, 594 U.S. at 766 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982)), Respondents provided a maximum of $15,000 in compensation—irrespective of the actual damages caused by the eviction moratorium. Moreover, Respondent's conditioned that "assistance" upon the landlord's tolerance of the breaching tenancy's continuation up through the date of collection of the assistance

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[6] The law also prohibited "[p]ursuing collection, or authorizing another entity to pursue collection on the landlord's behalf, of a judgment against the tenant for damages or any remaining unpaid rent" accruing during the same time period. Wash. Rev. Code § 43.31.605(1)(c)(iii)(B). SB 5160 also rendered landlords ineligible for reimbursement "where the tenant vacated the tenancy because of an unlawful detainer action under Wash. Rev. Code § 59.12.030(3)." Wash. Rev. Code § 43.31.605(1)(c)(ii).

(Wash. Rev. Code § 43.31.605(1)(c)(i)(B)), and expressly waiving their right to take legal action to recoup the difference in damages caused by nonpayment of rent and the $15,000 assistance payment, or otherwise attempting to collect any rent shortfall. *Id.*, § 43.31.605(1)(c)(iii)(A) & (B).

Upon signing SB 5160, Respondent Inslee also vetoed Sections 12 and 13.

Section 12 would have required the Washington State Commerce Department to "authorize landlords an opportunity to apply . . . (a) [For] [r]ental assistance provided through the consolidated homeless grant program; (b) [for] rental assistance provided through the emergency solutions grant program; and (c) [to] [a]ny rental assistance program funded through receipt of any federal COVID-19 relief funds." Senate Bill 5160, §§ 12(1)(a)-(c). Section 12 also required the Commerce Department to provide rental assistance to landlords on behalf of specific indigent tenants who were unable to avail themselves of certain welfare relief. *Id.* §§ 12(2)(a)-(b).

Section 13—had Respondent Inslee not vetoed it—would have appropriated $7,500,000 "for the purposes of a landlord grant assistance program to provide grants to eligible landlords for rent that was not paid during the eviction moratorium pursuant to the governor's proclamation 20-19.6."

Thus, Washington's landlord compensation program required aggrieved landlords to waive their due process rights and access to other state and federal programs in exchange for a claim for no more

than $15,000—even before Respondent Inslee reduced total funding available for the program.

In short, whereas Oregon undertook extensive efforts to satisfy its constitutional duty to provide just compensation to landlords who suffered takings, Washington created a fig leaf of a program that provided little assistance to the landlords it compelled to carry the public burden of housing Washingtonians during the COVID-19 pandemic. Washington's refusal to take the necessary steps to compensate property owners flowed from its mistaken belief that no compensation was legally required—a belief that the Washington Supreme Court has now endorsed. That said, the Washington Supreme Court knew the practical impacts of its decision: "We are not without sympathy to the fact that the petitioners have been made to bear the cost of accommodating a public need." *Gonzales II,* 2 Wash. 3d at 297 n.9. Isn't that what a government taking is all about?

The Court should grant the Petition for Writ of Certiorari to clarify that Washington's eviction moratoria constituted takings for which it has a duty to provide just compensation.

CONCLUSION

For the reasons set forth herein, *amici* respectfully request that the Court grant the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

JOHN A. DILORENZO, JR.
CHRISTOPHER SWIFT
DAVIS WRIGHT TREMAINE LLP
560 SW TENTH AVE., SUITE 700
PORTLAND, OR 97201
(503) 241-2300
JOHNDILORENZO@DWT.COM
CHRISSWIFT@DWT.COM

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