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 *AMICI CURIAE* APARTMENT ASSOCIATION OF GREATER LOS ANGELES, CALIFORNIA RENTAL HOUSING ASSOCIATION, AND GHP MANAGEMENT CORPORATION IN SUPPORT OF PETITIONERS

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April 17, 2024

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*[1]

Founded in 1917, the Apartment Association of Los Angeles County, Inc. dba Apartment Association of Greater Los Angeles ("AAGLA") is a California non-profit association comprised of over 10,000 members who own and/or manage over 250,000 rental housing units throughout greater Los Angeles. AAGLA's mission is to provide the tools and resources to improve real estate management and operations in order to help its members provide safe housing and to ensure fair returns on their investments. AAGLA advocates for the protection of property rights on behalf of its members and the rental housing industry at the local, state, and federal levels of government. Approximately 80% of AAGLA's members may appropriately be characterized as "mom and pops," owning five or fewer units.

The California Rental Housing Association ("CalRHA") represents more than 25,000 members, comprised primarily of small, family-owned housing providers that own fewer than ten rental units. CalRHA members provide over 676,000 homes to Californians throughout the state. CalRHA's purpose is to advocate for the rental housing industry to

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[1] Pursuant to this Court's Rule 37.2(a), counsel for the parties have been provided with timely notice of intent to file this brief. Pursuant to Rule 37.6, no party, or counsel for any party, authored this brief in whole in or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *amici curiae*, and its members, or its counsel have made a monetary contribution to this brief's preparation or submission.

collectively address industry needs, including through grassroots mobilization and local and state governmental advocacy aimed at contributing to change in the multifamily housing industry.

GHP Management Corporation ("GHP") is the managing entity of numerous apartment communities in Southern California, providing housing to many thousands of tenants.

This case raises issues of significant interest to the *amici*, as many of AAGLA's and CalRHA's members have been subject to onerous eviction moratoria in various jurisdictions throughout the state, all of which approximate the form and function of the ordinance at issue in the present litigation. Likewise, GHP has experienced firsthand the disastrous effects of ill-conceived and unconstitutional public policy like local municipalities' eviction moratoria. GHP is still owed many millions of dollars in effectively unrecoverable rent from tenants who took overt and abusive advantage of the City of Los Angeles's eviction moratorium.

SUMMARY OF ARGUMENT

Thirty years ago, this Court inadvertently let a genie out of a bottle. In deciding *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court concluded in part that because the petitioners there voluntarily chose to rent their property to mobile home owners, they could not later claim that a physical taking occurred when challenging a rent control regulation. *Id.* at 527–28.

The Court's brief statements in *Yee* regarding the petitioners' voluntary choice to rent their property

have led some courts to believe that an apparent qualification exists to physical takings liability, an exception predicated on the idea that once a landlord invites tenants onto their property, then they cannot later complain of a physical taking where laws regulate the ensuing landlord-tenant relationship. But *Yee* was ultimately a case about rent control, and such an exception—if there even is one—should have remained cabined within the narrow confines of that decision's unusual facts.

Decades later, the seeds planted in *Yee* are bearing bitter fruit. As time marched on, lower courts have seized upon *Yee*'s gratuitous language regarding voluntariness to dramatically expand the decision's scope. Within the last four years especially, lower courts have cited *Yee* to uphold novel and drastic regulations, up to and including laws allowing for indefinite occupation of property by nonpaying tenants like the very eviction moratorium challenged here. And all courts that have done so have relied on the excuse purportedly provided by *Yee* that once the landlord invites the tenant, then the landlord invites all subsequent regulation—regardless of how onerous or personally disastrous such regulation might be. Indeed, the Washington Supreme Court's decision challenged here is but yet another to do so.

Not all courts have embraced *Yee*, however. In fact, in the only published circuit court opinion on the matter, the Eighth Circuit in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), applied physical takings principles as reaffirmed in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), in reviewing a challenge to a COVID-related eviction

moratorium, affirmatively rejecting an argument that *Yee* controlled. Courts at all levels are split as to *Yee*'s applicability, and the confusion is only bound to grow as additional cases wend their way through the courts.

The petition for certiorari should be granted.

ARGUMENT

I. THE COURT SHOULD USE THIS OPPORTUNITY TO CLARIFY THE LIMITED SCOPE OF *YEE* — AND REJECT ANY INTERPRETATION OF A "VOLUNTARY PRINCIPLE" EXCEPTION TO TAKINGS LIABILITY

Yee v. City of Escondido—a case about mobile home rent control—has been misunderstood by many lower courts to immunize local governments from physical takings claims by landlords. Here is why.

Landlords and tenants exchange a set of promises, typically through a lease. A landlord agrees to temporarily forego the absolute right to enter all or some portion of real property that he or she owns, while a tenant agrees to pay rent to the landlord for that privilege.[2] Simple enough.

Eviction moratoria like the one challenged here chop through an essential element of this arrangement by allowing the tenant to unilaterally forego his end of the bargain (agreement to timely pay rent), while simultaneously forcing the landlord's

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[2] *See, e.g.*, *Auto. Supply Co. v. Scene-in-Action Corp.*, 172 N.E. 35, 37 (Ill. 1930): "Rent is the return made to the lessor by the lessee for his use of the land, and the landlord's claim for rent therefore depends upon the tenant's enjoyment of the land for the term of his contract."

acquiescence to the continued quartering of the now-defaulting tenant, often at great personal expense.

It would seem to the casual observer that the City's eviction moratorium "*requires* the landowner to submit to the physical occupation of his land." *Yee*, 503 U.S. 519, 527 (1992). After all, the occupying tenant is in default for lack of payment, and—but for the City's eviction moratorium—the landlord would have removed him through the summary eviction procedures that undergird each and every lease in the United States.[3] As this Court has observed, it is this "element of required acquiescence" that "is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). And yet the tenant remains.

"But wait!" the law's defenders will exclaim. Because the landlord *voluntarily* leased the property to the tenant in the first place, any and all subsequent regulations may properly burden the landlord, and the State shall be absolved from all constitutional liability. If the State is to be believed, this voluntary act in the first instance by the landlord is the difference that makes the difference—the *sine qua non* of constitutionality. Indeed, it will be argued, this is not a coerced occupation at all. Instead, the law is merely a regulation on the *landlord's use* of the property once he or she opened the door to the tenant. But this Court has not countenanced such sophistry in

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[3] *See Lindsey v. Normet*, 405 U.S. 56, 71–72 (1972), discussing the relatively recent provision by states of "a speedy, judicially supervised proceeding" for landlords—*i.e.*, the summary eviction process—in exchange for landlords giving up their historic common law right to self-help.

the context of the Fifth Amendment, *i.e.*, by "us[ing] words in a manner that deprives them of all their ordinary meaning." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987).

Like every other government that has defended eviction moratoria of equal constitutional odium, the usual argument in defense is likely to be an amalgam of lower court decisions that have subsequently, and wrongly, expanded the scope of *Yee*.

For instance, the Washington Supreme Court here understood *Yee* to immunize the government from takings liability because "regulation of that voluntary relationship" between landlord and tenant, "without more, is not a taking." Pet. App. 15a. The Court then cited a district court opinion arising in the Eastern District of Washington[4] for the proposition that an eviction moratorium specifically "does not constitute a per se taking because the moratorium did not require Plaintiffs to submit to physical occupation or invasion of their land and did not appropriate Plaintiffs' right to exclude." Pet. App. 16a.

As the Petitioners rightly observe, courts have seized upon certain language in *Yee*—what this brief refers to as *Yee*'s "voluntary principle"—to reject claims of liability, such that the principle now functionally swallows the rule as affirmed in *Loretto v. Teleprompter Manhattan CATV Corp.*, itself a physical takings case that arose in the landlord-tenant context. 458 U.S. 419 (1982).

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[4] *Jevons v. Inslee*, 561 F. Supp. 3d 1082, 1106 (E.D. Wash. 2021), *vacated as moot*, No. 22-35050, 2023 WL 5031498 (9th Cir. Aug. 8, 2023).

A. *Yee*—A Mobile Home Rent Control Case—Is of Limited Scope Due to Its Unusual Facts and Circumstances

Subsequent readings of *Yee* by state and federal courts have misunderstood the opinion as fabricating an escape hatch for local and state regulations affecting landlord-tenant relationships, wrongly placing imprimatur on laws that constitute physical occupation itself, as this case and others show.

Some brief background is in order. Recall that in *Yee*, this Court was asked to consider a relatively narrow challenge to a local ordinance that, on its face, was limited to controlling rents for mobile home communities. 503 U.S. at 524. Petitioners' argument was nuanced and complex, claiming that the local ordinance, when considered in light of a state law that was not challenged, effected a physical taking because of the "unusual economic relationship" between park and mobile home owners—*i.e.*, a bilateral monopoly whereby mobile home owners cannot realistically move their chattel housing, and park owners cannot force the removal of the home nor control the identity of subsequent purchasers. *Id.* at 526–27. Thus, the petitioners there claimed that "the rent control ordinance transferred a discrete interest in land—the right to occupy the land indefinitely at submarket rent—from the park owner to the mobile home owner." *Id.* at 527. This Court rejected the argument, holding that such claims are more properly cognizable as regulatory takings instead of physical takings. *Id.*

Importantly here, *Yee* contained two references to the voluntary nature of the petitioners' behavior, namely, that the petitioners "voluntarily rented their

land to mobile home owners," and that petitioners' tenants "were invited by petitioners, not forced upon them by the government"—in other words, petitioners "opened the door" to tenants thereby forfeiting the right to challenge subsequent rent control regulation on physical takings grounds. *Id.* at 527, 528.

The limited nature of *Yee*'s voluntariness language is plain and can hardly be said to create a bright-line exception to well-understood takings principles. In *Yee*, the Court discussed features separating permissible economic regulations from laws that operate as physical takings: "'The line which separates [*Florida Power Corp.*, 480 U.S. 245)] from *Loretto* is the unambiguous distinction between a . . . lessee and an interloper with a government license.'" *Yee*, 503 U.S. at 532.

It is important to note that the *Yee* Court did not disturb *Loretto*. *Loretto*, though, was a case involving a landlord-tenant relationship. Thus, if *Yee* truly contained a broad exception to physical takings liability based on a landlord's voluntary letting to tenants, then *Yee* would have necessarily rendered *Loretto* dead letter. It did not. *See Cedar Point Nursery*, 594 U.S. at 151.

B. *Yee*'s "Voluntary Principle" Has Run Amok for Years, Trampling Physical Takings Claimants in a Variety of Contexts

Case law citing *Yee* initially remained cabined to addressing challenges to rent control ordinances, with courts interpreting *Yee* to uphold a relatively narrow class of laws under its voluntary principle.

For instance, the New York Court of Appeals in *Rent Stabilization Ass'n of New York City, Inc. v. Higgins* held that regulations expanding the class of persons entitled to succeed to rent-controlled apartments did not constitute a physical taking because of the "owner's voluntary acquiescence in the use of its property for rental housing." 83 N.Y.2d 156, 172 (N.Y. 1993).

Three years later, the Second Circuit Court of Appeals considered another challenge to New York City's Rent Stabilization Law, finding that application of the law to previously exempt housing did not constitute a physical taking. *Fed. Home Loan Mortg. Corp. v. New York State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47–48 (2d Cir. 1996). The Second Circuit's justification for upholding the law was predicated in part on the idea that "where a property owner offers property for rental housing, . . . government regulation of the rental relationship does not constitute a physical taking." *Id.* Other early cases followed suit, with *Yee* being cited to discharge challenges to either mobile home regulations or rent controls.[5]

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[5] *See, e.g.*, *Sandpiper Mobile Vill. v. City of Carpinteria*, 12 Cal. Rptr. 2d 623 (Cal. Ct. App. 1992) (mobile home rent control); *Mobile Home Vill., Inc. v. Twp. of Jackson*, 634 A.2d 533 (N.J. Sup. Ct. 1993) (same); *Guimont v. Clarke*, 854 P.2d 1 (Wash. 1993) (mobile home relocation assistance on park closure); *Margola Assoc. v. City of Seattle*, 854 P.2d 23 (Wash. 1993) (en banc) (rental registry); *Greystone Hotel Co. v. City of New York*, 13 F. Supp. 2d 524, 526 (S.D.N.Y. 1998) (rent stabilization ordinance requiring transient hotel to grant leases to permanent tenants at lower rates than transient occupancy).

But eventually, *Yee*'s once-limited footprint began to expand, so much so that by 2001, *Yee* was being read in landlord-tenant contexts to swallow the rule laid down in *Loretto*, ultimately itself a landlord-tenant case. At that time, the D.C. Circuit read *Yee* to preclude on the voluntary principle a challenge by property owners to a FCC rule invalidating lease restrictions on tenant installation of satellite equipment because of apparently "extensive case law upholding the government's authority to regulate various aspects of the landlord-tenant relationship." *Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 98 (D.C. Cir. 2001) (citing *Yee*, 503 U.S. 519; *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)). Despite *Yee*'s narrow nature, the D.C. Circuit nevertheless believed that this Court had broadly "rejected the contention that regulation of the terms of a landlord-tenant relationship constitutes on its face an invasion of the landlord's right to exclude." *Bldg. Owners*, 254 F.3d at 99 (citing *Yee*, 503 U.S. at 527–28).

In 2014, the Ninth Circuit's now-defunct decision in *Horne v. U.S. Department of Agriculture*, 750 F.3d 1128, 1142 (9th Cir. 2014), likewise cited *Yee* to support its reasoning. There, the Ninth Circuit stated:

> At bottom, the reserve requirement is a use restriction applying to the Hornes insofar as they *voluntarily choose* to send their raisins into the stream of interstate commerce. The Secretary did not authorize a forced seizure of the Hornes'

> crops, but rather imposed a condition on the Hornes' use of their crops by regulating their sale. . . . *Yee v. City of Escondido*, 503 U.S. 519, 527–28 (1992) (holding municipal regulation of a mobile home park owners' ability to rent did not work a taking *where park owners voluntarily rented their land and thus acquiesced in the regulation*)[.]

Horne, 750 F.3d at 1142 (emphasis added).

On appeal, this Court roundly rejected the Ninth Circuit's reliance on the voluntary principle: "The Government contends that the reserve requirement is not a taking because raisin growers voluntarily choose to participate in the raisin market. . . . In any event, the Government is wrong as a matter of law." *Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015).

As with many other aspects of American life, the COVID-19 pandemic brought with it a sea change in jurisprudence as lower courts revivified old doctrines and shoehorned them to fit a purported current need. So, too, for *Yee*, which found renewed vigor in 2021. A flurry of state and federal actions in lower courts around the country have inappropriately relied upon *Yee*'s voluntary principle to uphold novel and drastic restrictions on landlord-tenant relationships. Many of these recent decisions involve COVID-related eviction moratoria, like the case at bar:[6]

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[6] This list is in no way exhaustive.

- *S. Cal. Rental Hous. Ass'n v. Cnty. of San Diego*, 550 F. Supp. 3d 853, 865 (S.D. Cal. 2021); Eviction moratorium: "Unlike an invasion of property by an uninvited guest, the landlords here have solicited tenants to rent their properties, and the Ordinance simply regulates landlords' relationship with tenants."
- *Farhoud v. Brown*, No. 3:20-CV-2226-JR, 2022 WL 326092, at *10 (D. Or. Feb 3, 2022); Eviction moratorium: "Like the park owners in *Yee*, Plaintiffs here voluntarily invited their tenants onto their property."
- *Rental Hous. Ass'n v. City of Seattle*, 512 P.3d 545, 558 (Wash. Ct. App. 2022); Eviction moratorium: "This case is more analogous to *Yee* than to *Cedar Point Nursery*. The Landlords voluntarily invited the tenants to live in their homes and the ordinances regulate a landlord-tenant relationship that has already been established by the parties."
- *Gallo v. District of Columbia*, 610 F. Supp. 3d 73, 88 (D.D.C. 2022); Eviction moratorium: "The District's laws do not force Gallo to give anyone access to his property that he did not invite. So he does not suffer the same infringement on his right to exclude as the growers in *Cedar Point*."

- *Pakdel v. City & Cnty. of San Francisco*, No. 17-CV-03638-RS, 2022 WL 14813709, at *5 (N.D. Cal. Oct. 25, 2022); Lifetime lease requirement to tenants on condominium conversion: "The common thread that runs through these landlord-tenant cases is the notion that a *per se* physical taking has not occurred because the element of 'required acquiescence' is absent. In other words, unlike instances in which the government has required a property owner to submit to occupation by the government or a third party, a landlord has *voluntarily* invited a tenant to occupy their land."
- *Ballinger v. City of Oakland*, 24 F.4th 1287, 1293 (9th Cir. 2022), *cert. denied* 142 S. Ct. 2777 (2022); Substantial relocation fees: "Here, the Ballingers voluntarily chose to lease their property and to 'evict' under the Ordinance—conduct that required them to pay the relocation fee, which they would not be compelled to pay if they continued to rent their property."
- *GHP Mgmt. Corp. v. City of Los Angeles*, No. CV-21-06311-DDP, 2022 WL 17069822, at *3 (C.D. Cal. Nov. 17, 2022), *appeal docketed*, No. 23-55013 (9th Cir. argued April 11, 2024); Eviction moratorium: "'Put bluntly, no government has required any physical invasion of petitioners' property. [The]

tenants were invited by [the landlords], not forced upon them by the government.' . . . . A regulation affecting that pre-existing relationship is not a per se taking."

- *Williams v. Alameda Cnty.*, Nos. 3:22-CV-01274-LB, 3:22-CV-02705-LB, 2022 WL 17169833, at *10 (N.D. Cal. Nov. 22, 2022); Eviction moratorium: "The Supreme Court has held repeatedly that it is the invitation to allow a person to occupy a property that distinguishes per se takings from regulatory takings governed by the *Penn Central* factors."
- *Kagan v. City of Los Angeles*, No. 21-55233, 2022 WL 16849064, at *1 (9th Cir. 2022); Eviction bar for "protected status" tenant, owner precluded from regaining possession of unit for family use: "Here, as in *Yee*, the Owners 'voluntarily rented their land,' and were not required to submit to physical occupation by another."
- *El Papel, LLC v. City of Seattle*, No. 22-35656, 2023 WL 7040314, at *2 (9th Cir. 2023); Eviction moratorium: "The Landlords here chose to use their property as residential rentals; the tenants' occupancy was not imposed over the Landlords' objection in the first instance."

- *Bols v. Newsom*, No. 22-56006, 2024 WL 208141, at *1 (9th Cir. Jan. 19, 2024); Eviction moratorium: " Here, as in *Yee*, the government did not 'require[ ] any physical invasion of . . . property,' because the 'tenants were invited by [the owners], not forced upon them by the government.'"
- *But see 301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1383 (8th Cir. 2022) ("This court, before *Horne*, applied *Yee*'s voluntariness rationale. . . . But, since *Horne*, this court has not cited *Yee*, while acknowledging *Horne* and its voluntary exchange principle.").

And here, of course, the courts below interpreted *Yee* to hold that Petitioners could not state a physical takings claim against the regulation challenged herein because Petitioners voluntarily entered the rental market. Pet. App. 15a–16a, 61a–64a.

Thus, since *Yee* was decided, courts have dramatically and erroneously expanded the voluntary principle—itself of dubious provenance—applying it up to and including circumstances where local ordinances indefinitely prevent property owners from evicting non-paying tenants. This can't be right—and it isn't. *See Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) ("preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude").

As Professor Richard Epstein correctly predicted over 30 years ago, the "long term consequences of *Yee* can only be negative," because of the "dangerous doctrine . . . that if the landowner voluntarily grants a limited estate, then the state can stretch that interest into a fee simple without paying just compensation." *Yee v. City of Escondido: The Supreme Court Strikes Out Again*, 26 Loy. L.A. L. Rev. 3, 17–18 (1992).

Indeed, even commentators critical of this Court's recent takings jurisprudence acknowledge that the time is right to consider questions raised by the present petition:

> It seems possible, even likely, that the Court might revisit *Yee* in a future case and impose some limits on this form of the open-door argument. But for now, the initial invitation may work to preclude application of a *per se* rule in similar situations.

Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 Duke J. of Const. L. & Pub. Pol'y 1, 15–16 (2022).

C. *Yee*'s "Voluntary Principle" is Arbitrary and Lacks Sound Reasoning

It is hard to discern any sound basis for *Yee*'s supposed "voluntary principle." Even so, as discussed, courts have seized upon this language as if it holds talismanic power to dismiss takings claims by property owners challenging regulations where a tenant is involved. But by reducing the inquiry into a

single question—was the tenant invited?—courts focus on a superficial distinction.

All invitations are contingent. If guests are invited to a holiday dinner, the invitees are rightly expected to not stay until spring.[7] And if a landlord "invites" a tenant to inhabit property through a lease, then it is properly expected that the tenant will abide by the material terms of that lease, including the timely payment of rent. Once that ceases, the invitation no longer operates to control the relationship. Indeed, there no longer is a landlord-tenant relationship when the tenant defaults; while the tenant may hold "naked possession" of the premises until he voluntarily leaves (or is ordered to leave by a court), the landlord holds the "right" to the property's possession. Any regulation preventing the landlord from implementing that right to possess falls squarely within the physical takings doctrine which, at its core, analyzes whether the government has "compelled" the unwanted occupation. That the government could allow the tenant to unilaterally

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[7] Indeed, the contingent nature of invitations is a social principle so widely accepted that its violation even serves as drama and humor in popular culture and cinema. *See*, *e.g.*, NATIONAL LAMPOON'S CHRISTMAS VACATION (Warner Bros. Ent. 1989):

> Cousin Eddie: "That there is an RV . . . . Good looking vehicle, ain't it?"
>
> Clark: "Yeah, it looks so nice parked in the driveway."
>
> Cousin Eddie: "Don't you go falling in love with it now because we're taking it with us when we leave here next month."

expand the terms of the "invitation" destroys the contingent nature of the invitation itself.

All invitations share a second critical feature: they are dependent upon the availability of recourse if the invitee violates the terms and limits of the invitation. Few, if any, invitations would ever be extended otherwise. From the dinner example, the host could ask the guest to leave, a request that is backed by force of law if the guest refuses. Cal. Penal Code § 602(o) (trespass). In modern landlord-tenant contexts, this means the opportunity to remove defaulting tenants via unlawful detainer proceedings. *See, e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 71–72 (1972) (discussing history of the adoption of unlawful detainer schemes to supplant historic common law rights to landlord self-help). Eviction moratoria, like the one challenged here, attack both the contingency and dependency inherent in every landlord-tenant "invitation," *i.e.*, observance of material lease terms and availability of recourse upon their violation.

Furthermore, if the invitation is truly the crux of the issue, then consider the following. It would be peculiar to absolve a local government from takings liability if, for example, a landlord were to extend an invitation to lease property to the government, only to have the government welch on its rent payments and remain on the property indefinitely to the exclusion of its owner. Rather, that would undoubtedly rise to a

compensable, *per se* taking of private property, even if the government later resumed rent payments.[8]

But if the municipality in the hypothetical is swapped for a private citizen who—acting under color of law—welches on rent payments to the same landlord, for the same property, and for the same duration, then there is not a physical taking, at least according to many courts' understanding of *Yee*. Instead, the landlord must take her lumps because nobody forced her to become a landlord, after all.

That is a very strange distinction.

Now that *Yee* has had decades to metastasize, further consider this question in light of the D.C. Circuit's opinion in *Building Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 98 (D.C. Cir. 2001), discussed earlier. There, the court reviewed a rule promulgated by the FCC that prevented landlords from prohibiting tenants from installing satellite dishes, antennae, and other communication devices (which do not seem so different in kind from the cable box in *Loretto*). *Id.* at 91–92. The FCC was sued under the theory that, like in *Loretto*, forcing landlords to accept the installation of such devices on their properties constituted a physical, *per se* taking of property. *Id.* at 97. The D.C. Circuit upheld the rule instead, holding that a "key factor" shielding the rule from *Loretto* was the landlords' "consent to the occupation of the property," and that unlike the landlord in *Loretto*,

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[8] *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 153 (2021) ("we have held that a physical appropriation is a taking whether it is permanent or temporary").

> whose premises were occupied without her consent, the landlord subject to the [FCC] rule has ceded control of his or her property to a tenant with whom the landlord has a contractual relationship. Thus, no "third party" stranger to the property is involved.

Id. at 97 (citing *Loretto*, 458 U.S. at 440–41).

So let's get this straight. In *Loretto*—the lodestar case for modern physical takings doctrine—it *is* a physical, *per se* taking for the government to force a landlord to accept installation of a small device on the outside of the landlord's building *by a third-party*. 458 U.S. at 421.

But in *Building Owners*, it *is not* a physical taking for the government to force a landlord to accept installation of a small device on the outside of a landlord's building *by a tenant*. 254 F.3d at 97–98.

In all relevant ways but one, *Building Owners* was a retread of *Loretto*. Do constitutional guarantees—indeed, a fundamental and "most treasured"[9] stick in the bundle of rights we understand as property—really hinge on *who* the government unilaterally authorizes to install the device?

This Court can do better. It is past time for the Court to revisit *Yee* and begin to repair that decision's disastrous consequences.

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[9] *Cedar Point Nursery*, 594 U.S. at 149–150.

II. CONFUSION IS GROWING AS TO *YEE*'S APPLICABILITY TO REGULATIONS AFFECTING LANDLORD-TENANT RELATIONSHIPS

Amici will not belabor that which has been adeptly stated by Petitioners. Pet. Br. 29–32. Needless to say, the Eighth Circuit's decision in *Heights Apartments, LLC v. Walz* concludes that *Cedar Point* is the lodestar case when considering eviction restrictions as opposed to *Yee*. 30 F.4th 720, 733 (8th Cir. 2022). The Washington Supreme Court and other lower courts around the country have concluded otherwise.

Amicus GHP Management Corporation is presently litigating physical takings claims against the City of Los Angeles over its own eviction moratorium, a moratorium that lasted for years, resulting in many millions of dollars of effectively unrecoverable back rents for GHP alone. *See GHP Mgmt. Corp. v. City of Los Angeles*, No. CV-21-06311-DDP (C.D. Cal.), *appeal docketed*, No. 23-55013 (9th Cir. Jan. 6, 2023). That case was argued before the Ninth Circuit only days ago on April 11, 2024, and the parties await a decision.

The Ninth Circuit has previously considered similar questions of law, although that Circuit has refused so far to publish its decisions on the matter. *See, e.g.*, *El Papel, LLC v. City of Seattle*, No. 22-35656, 2023 WL 7040314 (9th Cir. 2023) (mem. disp.); *Bols v. Newsom*, No. 22-56006, 2024 WL 208141 (9th Cir. 2024) (mem. disp.).

In short, confusion is rapidly growing in courts at every level as to *Yee*'s applicability to landlord-

tenant regulations that frustrate an owner's fundamental right to exclude. This petition for certiorari presents an opportunity to clarify this important area of law.

CONCLUSION

For the reasons stated herein, the *amici curiae* request this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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