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

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Illinois Rental Property Owners Association's *Amicus* Brief In Support of Granting Petition For Writ Of Certiorari

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INTEREST OF *AMICUS CURIAE*[1]

The mission of *Amicus curiae* Illinois Rental Property Owners' Association ("IRPOA") is to provide a statewide organization to promote the interests of persons, firms, and corporations who develop, own, or manage residential rental housing, to inform members about current issues and interests, including legislative activities, and to conduct such activities as are necessary to carry out the goals of the Association. IRPOA represents the interests of eleven Illinois organizations, which associate through IRPOA to help rental property owners across the state. The eviction moratoria in Illinois and across the country, which are the focus of this case, will continue to affect property rights long after the pandemic has ceased.

IRPOA's primary interest in the case comes down to a single word: "are." In the case presented by petition for writ of certiorari, the Washington Supreme Court found that the property owners had suffered no loss of rights recognized by the Takings Clause because "[t]he tenants *are* on the landlords' property with the landlords' permission" (emphasis added). Looming in this use of the present tense is

[1] Pursuant to Rule 37, counsel for *amicus* affirms that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amicus*, their members, or counsel, made any monetary contribution to its preparation or submission. All parties received timely notice of amicus' intention to file.

the conclusion that property owners, having once invited a tenant onto their property, have not suffered a compensable taking when they lose the right to exclude those tenants. This sweeping declaration has the potential to reach far past the strict confines of the landlord-tenant relationship in the COVID-19 context from which it was born—indeed, the COVID-19 pandemic provides the backdrop, but not the justification, for the holding of the Washington Supreme Court.

Because of its mission, IRPOA is greatly concerned by the erosion of property rights such a declaration would bring, including the extension of this decision far beyond the crisis during which it was decided. IRPOA maintains a strong interest in retaining the right not only to begin a landlord-tenant relationship, but to retain the right to end one, and to set reasonable conditions on the terms of the relationship in between.

Because the ruling by the Washington Supreme Court has implications for so many of our member organizations in situations which go beyond the COVID-19 pandemic and into the day-to-day operations of rental properties, *Amicus* IRPOA respectfully requests that this Court grant the petition for a writ of certiorari under Rule 10(c).

INTRODUCTION AND SUMMARY OF ARGUMENT

The eviction moratorium at issue in the case presented was not merely an issue local to Washington; COVID-19 eviction moratoria were enacted by the federal government and forty-four states including Illinois, the home state of *Amicus* IRPOA. The precedents set by COVID-era opinions remain worthy of review even after the pandemic because of the likelihood that they will be read beyond the circumstances which provoked them, even when they clash with precedent this Court has set in less eventful times.

Here, in a lawsuit regarding the eviction moratorium proclaimed by Respondents, the Washington Supreme Court held that the actions of Respondents did not constitute a taking under the meaning of Article I, Section 16 of the Washington Constitution and this Court's Fifth Amendment jurisprudence. This holding misread both *Yee v. City of Escondido* and *Cedar Point Nursery v. Hassid*, by reading the former too broadly and the latter too narrowly. In so doing, the Washington Supreme Court significantly narrowed a property owners' rights to exclude others from their properties under the Takings Clause in a way that conflicts with relevant decisions of this Court.

The right to exclude is the *sine qua non* of property rights, and property owners do not lose

their right to exclude others from their rental properties merely by having entered the rental property business. This Court should grant the petition for writ of certiorari to affirm that its long-standing Takings Clause jurisprudence remains good law, even after the COVID-19 pandemic.

ARGUMENT

The primary issue addressed in this brief is the conclusion of the Court below that a property owner, having invited a tenant to live on their property, may lose the right to exclude the tenant from the property. The Court below concluded that because the landlords had suffered no intrusion from a stranger to their property, they had suffered no taking. *Gonzales v. Inslee*, 535 P.3d 864, 873 (Wash. 2023) .

In coming to this conclusion, the Court over-read *Yee* and under-read *Cedar Point Nursery*. It erred to conclude that these cases compel the conclusion that only a physical intrusion by a stranger constitutes a taking under the Washington or federal constitutions.

I. Background

In response to the COVID-19 pandemic, and the ensuing economic and health crises it caused, the Governor of Washington issued a proclamation "that briefly suspended most residential evictions.

Proclamation 20-19.3. That moratorium was extended and modified over the next year and a half as the pandemic continued to spread." *Gonzales*, 535 P.3d at 869. "While the specifics of the eviction moratoriums shifted over time, generally speaking, they prohibited residential landlords from initiating or enforcing, and law enforcement from assisting in, an eviction based on the failure to pay rent." *Id.*

The moratorium by its express terms required property owners to allow tenants to remain on the property without the landlords' consent regardless of whether rent was paid or the tenant was violating the terms under which the tenancy was established. [2] The question presented by Petitioners' suit was whether they had suffered a compensable taking when the State of Washington had ordered them to accept the continued physical occupation of their property beyond the terms of the leases of their tenants.

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[2] While the Court below was focused on evictions for non-payment of rent, the terms of the Governor's Proclamation were not so limited. Tenants, of course, may normally lose their right to occupy a rental unit for any number of reasons which violate the terms of their leases, including non-payment of rent but also including the expiration of the term of the lease, or violations of the lease terms (such as occupancy limits or prohibitions on pets or smoking indoors). The Proclamations at issue prohibited eviction for anything except immediate and significant health and safety violations, or when the owner herself was going to move into the property. *See Gonzales*, 535 P.3d at 869, n.3, n.4.

II. This Court's Jurisprudence Requires Compensation When Property Owners Are Forced To Accept Continued, Physical Occupation Of Their Property By Governmental Action

In *Cedar Point Nursery*, this Court examined its precedent related to *per se* takings. It concluded that the Court's "line of precedent is that government authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 152 (2021) . Importantly, the physical taking need not be by the government's own agents. In *Loretto v. Teleprompter Manhattan CATV Corp.*, this Court held that a government regulation which required property owners to submit to the installation of cable by cable companies constituted a *per se* taking. 458 U.S. 419, 423 (1982). In *Nollan v. California Coastal Commission*, this Court confirmed that governmental action which would require property owners to allow public access across their property would constitute a physical taking. 483 U.S. 825, 831 (1987).

The Court has also examined whether a rent control ordinance might constitute a physical taking. *Yee v. City of Escondido, Cal.* involved only a physical-takings claim related to a rent control ordinance. 503 U.S. 519, 523 (1992) . In that case,

this Court found that the physical taking argument "fails at its base, however, because there has simply been no compelled physical occupation giving rise to a right to compensation that petitioners could have forfeited. 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 (citing *Nollan*, 483 U. S., at 837). "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 527 (emphasis in original). Important to this Court in *Yee* was that "neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice." *Id*. at 527–28.

With the context of those cases, this Court decided *Cedar Point Nursery*. This Court held that, as in the cases listed above, "the government here has appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers' property—to literally 'take access,' as the regulation provides." 594 U.S. at 152.

III. The Court Below Over-Read *Yee* And Under-Read *Cedar Point Nursery* In Concluding That A Physical Taking Only Occurs With The Physical Intrusion Of A Stranger Onto The Property

Despite this precedent, the Court below explicitly limited the concept of a *per se* taking to mean not only a physical intrusion, but a physical intrusion by a stranger to the property. *Gonzales*, 535 P.3d at 873 ("*Cedar Point* concerned a statute that allowed union organizers to come onto property without the property owner's permission. There has been no similar intrusion here. The tenants are on the landlords' property with the landlords' permission under a type of property arrangement that preexists the state and federal constitutions") (citations omitted). It justified this conclusion by stating "[t]his Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Id.* (quoting *Yee,* 503 U.S. at 528–29).

This holding is in error for two, related reasons. First, nothing in the jurisprudence of the Takings Clause (through which Article I, Section 16 of the Washington Constitution is read) relies on the *per se* taking be a physical occupation by a person

who did not occupy the property before the government action. Second, the idea that a previous or even current license to occupy a property implies a continuing license is fundamentally at odds with our current understanding of property rights.

A. A Taking Occurs When Government Action Causes The Physical Occupation Of A Property

In reviewing regulations related to property, as the Court below noted, it cannot be disputed that states have some power to regulate property owner's rights. *Gonzales*, 535 P.3d at 873. Long gone (if it was ever more than hyperbole) is Blackstone's thunderous declaration of property rights as the "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). But the idea that a property owner loses the right to exclude by inviting another onto her property—the fundamental holding of the Court below—is a misreading of both *Yee* and *Cedar Point Nursery*. Both cases uphold a right of property owners to exclude others from their properties.

This Court has firmly 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." *Cedar Point Nursery*, 594 U.S. at 150 (cleaned up and citations omitted). This Court has gone as far as to quote with approval the statement that "the right to exclude [is] the '*sine qua non*' of property." *Id.* (quoting Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998)). Nothing in either *Cedar Point Nursery* or *Yee* indicates that the right to exclude is lost once a property owner invites a person onto their property, or that the Takings Clause only protects against new (rather than continued) occupations of land.

The Court below read *Yee* beyond its facts, concluding that *Yee* supported the conclusion that the government action here was mere regulation of a pre-existing landlord tenant relationship, not an "intrusion" constituting a taking. *Gonzales*, 535 P.3d at 873. *Yee* involved a rent control ordinance; but importantly, property owners retained the right to sever the landlord-tenant relationship and evict their tenants. 503 U.S. at 527–28. As this Court stated, "[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." *Id.* at 528. This Court noted that the case presented below is a "different case" than the one it examined in *Yee*; the Washington Supreme Court, however,

missed the distinction and the clear indication by this Court that a landlord being forced by government action to continue a pre-existing tenancy would constitute "[a] different case."

The Court below made a similar error by reading *Cedar Point Nursery* overly narrowly, concluding that only entry by strangers onto a property constituted a taking. *Gonzales*, 535 P.3d at 873. Notably, in *Cedar Point Nursery* the "right of access" this Court found to be a taking was not fundamentally about the rights of the union at all. Instead, it was more properly about "self-organization rights of *employees* includ[ing] 'the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support.'" 594 U.S. at 144 (emphasis added); *see id.* at 163 (Kavenagh, J., concurring) (noting that *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) involved "protecting *employees'* rights of collective bargaining under the [National Labor Relations] Act") (emphasis added). The purpose of the union organizers entering onto the property was fundamentally related to the workers already on the property by the owners' invitation (in a similar way that a police officer may validly demand entry to a rental unit in response to a 911 call by a tenant to protect the tenant's interest, but not his own). But regardless of how the right of access was viewed in

that case, nothing about this Court's decision in *Cedar Point Nursery* indicates that a taking occurs only if the physical entry onto a property is by strangers to the property.

Neither *Yee* nor *Cedar Point Nursery* supports the proposition, fundamental to the holding below, that a physical intrusion is only a taking if the intrusion was by a person never before allowed on the property. The Court below therefore misread both *Yee* and *Cedar Point Nursery*, undermining the reasons for its holding.

B. A Past Invitation Onto A Property Does Not Provide License For Indefinite Future Occupation

Fundamentally, the question presented in this case is why Petitioners' tenants were physically occupying Petitioner's properties *at the time of the suit*. Were the tenants occupying Petitioners' properties because the property owners had contracted for it, or because the government had required it? It is beyond doubt that, at least in some cases, the latter was true, and tenants whose lease had expired, who were violating their leases, or who were not paying rent were physically occupying Petitioners' properties solely because Respondents had ordered it. *See Gonzales*, 535 P.3d at 869. The Court below attempted to skirt around the undeniable fact that tenants were continuing to

physically occupy Petitioners' properties without consent by holding that, at least at some point, Petitioners had allowed this occupation. *Id.* at 873 ("The tenants are on the landlords' property with the landlords' permission"). The use of the present tense was legally and factually incorrect, and as noted above, is of primary concern to *Amicus* IRPOA.

The reasoning is contrary to a reasonable understanding of property law. A residential lease is a limited license to occupy—and for the most part, solely occupy[3]—the property of another for a limited time subject to specific, contractual terms.

The idea of a limited license to be physically present on another's property is ubiquitous in our society; it is well understood in both public and private property, by express license or implied, and subject to varying amounts of discretion by the property owner, whose interest the *amicus* represents.

"If the invitee goes outside of the area of his invitation, he becomes a trespasser or a licensee, depending upon whether he goes there without the consent of the possessor, or with such consent." Restatement (Second) of Torts § 332 cmt. l (1965). Thus, a movie theatre invites patrons onto its

[3] Generally, a tenant has a right to exclude others from the property. See 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.5(a), 208–19 (4th ed.2004).

property with an express license: A patron will be required to leave the theatre following the single movie for which they bought a ticket. Similarly, a hotel rents out a room with an express checkout time; the customer has full control of the room during the period for which it is rented but has to leave at the expiration of that time. A property owner may in their discretion customarily exclude an invitee who is disrupting other invitees, such as a disruptive patron at an orchestra or a drunk patron at a bar.

Even without an express license, however, the concept is well-understood: No one would argue that if a person throws a birthday party in their home they have lost the right to exclude guests when the party ends. The Restatement expresses a fundamental concept related to property rights: An invitation once extended does not create an unlimited right of access, but is strictly related to the express or implied invitation for access. *See* Restatement (Second) of Torts § 332 cmt. l.

On the occasion an invitee or licensee violates these limited licenses, it is generally considered a tort without granting the violator any future rights. *Cedar Point Nursery*, 594 U.S. at 159 ("Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. This basic distinction is firmly

grounded in our precedent"). In that case this Court went on to list numerous examples of the isolated examples of governmental intrusions onto private property which do not constitute a taking, such as necessity or pursuant to a valid arrest or search warrant. *Id.* at 160–61. None of these, of course, grant any further access—a police officer entering a property with a valid search warrant cannot then enter and leave the property any other time he pleases.

But by use of the present tense in the case presented, the Court below construed the limited license granted by a lease to be indefinite. *Gonzales*, 535 P.3d at 873 ("The tenants *are* on the landlords' property with the landlords' permission under a type of property arrangement that preexists the state and federal constitutions") (emphasis added). Admittedly, the tenants *were*, at some point, "on landlords' property with the landlords' permission"; at the point where tenants violated the terms of the lease (whether by expiration of the lease, non-payment, or other violation), however, they were no longer "on landlords' property with the landlords' permission." At that point, tenants were on landlords' property solely by the operation of governmental action.

The Washington Supreme Court elided a past permissive occupation with a present adverse occupation, setting a dangerous precedent for

property owners. The Court below offered no support for this proposition, nor is there any. The tenants at issue in the case presented continued their sole, physical occupation of Petitioners' properties only by the Proclamations at issue in this case, and for that reason, a *per se* taking had occurred. The Court below erred to hold otherwise.

CONCLUSION

Amicus IRPOA certainly agrees that the COVID-19 pandemic was a global crisis, which required both the federal and state governments to act to protect the health and well-being of their citizens. The question presented to this Court, at its root, is not whether a strong response to the pandemic was warranted. It is, rather, whether property owners like Petitioners (and the property owners represented by IRPOA) should be forced to shoulder that burden without compensation. This was the conclusion of the Washington Supreme Court, but this Court's precedents dictate otherwise. For these reasons, *Amicus* IRPOA respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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