

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 *AMICI CURIAE* RENTAL PROPERTY
ASSOCIATION OF WISCONSIN, INC., APARTMENT
ASSOCIATION OF NORTHEAST WISCONSIN, INC.,
FOX VALLEY APARTMENT ASSOCIATION, INC.,
AND WISCONSIN REALTORS ASSOCIATION
IN SUPPORT OF PETITIONERS**

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INTEREST OF THE AMICI CURIAE¹

The *amici* described below are associations in the state of Wisconsin representing rental property owners, property managers, real estate investors and real estate brokers, with over 18,600 members collectively, (the “Associations”).

The Rental Property Association of Wisconsin, Inc. (formerly known as the Apartment Association of Southeastern Wisconsin, hereinafter “RPA”) is Wisconsin’s oldest and largest nonprofit rental property owner trade association, with 765 current members. Founded in 1974, the RPA’s motto is “ADVOCATING FOR SUSTAINABLE RENTAL HOUSING” through education, legislative support, and networking opportunities for rental property owners (landlords) in the greater Milwaukee, Wisconsin area.² The RPA believes that for owners to succeed, their tenants must also succeed. The RPA is a charter member of Milwaukee’s *Rental Housing Resource Center*³, which is comprised of social service agencies, tenant advocacy organizations, and landlord interests. The partners in this

1. Pursuant to this Court’s Rule 37.2, timely notice was provided to counsel of record on April 4, 2024. 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 persons other than the *amici curiae* and their members or their counsel have made a monetary contribution to this brief’s preparation or submission.

2. Rental Property Association of Wisconsin, www.aasew.org (last visited Apr. 15, 2024).

3. Milwaukee Rental Housing Resource Center, <https://www.renthelpmke.org/> (last visited Apr.12, 2024)

coalition meet regularly to promote eviction alternatives such as mediation and advocate for more housing assistance for tenants.

The Apartment Association of Northeast Wisconsin, Inc., (“AANW”) with 220 current members was founded in 1995 as a non-profit association whose mission is to support and facilitate its members’ success in ethical rental property ownership, property management, and real estate investment through leadership, education, and support of the government affairs needs of the rental property industry in Wisconsin. Since its inception, the AANW has been advocating for both good landlords (rental property owners) and good tenants (its customers). The AANW creates and hosts various educational events to help owners, managers and investors understand Wisconsin landlord/tenant Law and Fair Housing Laws. The AANW supports and advocates for common sense local, state, and federal legislation that promotes the sustainability of rental housing.⁴

The Fox Valley Apartment Association, Inc. (“FVAA”) with 188 current members was founded to unite the owners and managers of residential rental property in the purpose of advancing the general welfare of the rental housing industry, while also promoting an environment conducive to the business success of its members. The FVAA’s mission statement says that it “is committed to providing its members with opportunities of education in all areas of rental property. This association will endeavor, promote, and foster an environment of free enterprise and

4. Apartment Association of Northeast Wisconsin, <https://www.aanw.org/> (last visited Apr. 15, 2024).

private property ownership rights. The FVAA pledges to promote the highest ethics in pursuit of its goals with the utmost respect and concern for the welfare of our tenant customers.”⁵

The Wisconsin REALTORS® Association (“WRA”) is one of the largest trade associations in the state, representing and providing services to more than 17,500 practicing real estate sales agents, brokers, appraisers, inspectors, bankers, and other professionals who touch real estate. Legislatively, the WRA strives to keep members informed of important policymaking decisions at all levels of government. Additionally, the WRA works to protect the interests and rights of over two million homeowners in Wisconsin with legislation geared toward protecting private property rights, economic growth and keeping housing affordable.⁶

INTRODUCTION AND SUMMARY OF ARGUMENT

Like petitioners, members of the Associations have been subject to restrictions on their ability to evict tenants. First, during the COVID-19 pandemic, Wisconsin landlords were barred from filing eviction actions by an emergency executive order of Governor Tony Evers.⁷

5. Fox Valley Apartment Association, <https://www.fvaa.info/> (last visited Apr. 15, 2024).

6. Wisconsin REALTORS® Association, <https://www.wra.org/> (last visited Apr. 15, 2024).

7. Office of the Governor, Emergency Order No. 15, Temporary Ban on *Evictions and Foreclosures* (Mar. 27, 2020), <https://evers.wi.gov/Documents/COVID19/EO15BanonEvictionsandForeclosures.pdf>.

This order was in effect from March 27, 2020 until May 26, 2020. Additionally, the nationwide CDC eviction moratorium order went into effect on September 4, 2020. Agency Order, 85 Fed. Reg. 55292 (Sept. 4, 2020).

These moratoria had numerous deleterious effects on landlords throughout Wisconsin, including on members of the Associations. In the months thereafter, litigation involving eviction for nonpayment of rent was stayed, forcing landlords throughout the state to bear the costs of nonpaying tenants. And, as described below, rental property owners were not only unable to recoup the costs associated with the inability to evict nonpaying tenants but also incurred additional losses due to ongoing property maintenance costs.

ARGUMENT

The Court's Recent Decision in *Sheetz v. County of El Dorado* Supports the Petition.

The April 12, 2024 decision by the Court in *Sheetz v. County of El Dorado*, __ S. Ct. __, 2024 WL 1588707, No. 22-1074 (Apr. 12, 2024), supports Petitioners' Fifth Amendment Takings claim. The Court summarized its physical takings cases: "The essential question is . . . whether the government has physically taken property for itself **or someone else**." *Sheetz*, 2024 WL 1588707, at *6 (emphasis added) (quoting *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021)). What the State of Washington did here, and what many other state and local government entities did by enacting eviction moratoria, was to take an owner's right to possess and control their property and give that right to someone else—to tenant occupants of

the property. One can conclude that the government took possession of the property **for its own benefit** because the government thus saved the cost of having to financially support tenants at risk of eviction during a pandemic, which is in sharp contrast to the direct support given to unemployed citizens to buy food through the federal Supplemental Nutrition Assistance Program. “[T]he Takings Clause saves individual property owners from bearing ‘public burdens which, in all fairness and justice, should be borne by the public as a whole.’” *Sheetz*, 2024 WL 1588707, at *1 (quoting *Armstrong v. United States*, 364 U. S. 40, 49 (1960)).

Petitioners’ Brief Demonstrates that an Ordinance Excluded Them from Regaining Possession of Their Property.

The Associations agree with Petitioners that the lower courts have misapplied this Court’s decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Yee*, the Court found that a landlord’s voluntary decision to rent their property—in that case, to mobile homeowners—precluded the petitioners from later claiming a physical taking as part of a challenge to rent control rules. *Id.* at 527-28. Since then, numerous state and federal courts have taken this holding and expanded its scope to most, possibly all, of instances in which state and local laws regulate the landlord-tenant relationship. *See, e.g., 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. Jan. 6, 2023) (as applied to an eviction moratorium, noting “[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.” (alterations in original) (citation omitted)); *Williams v. Alameda Cnty.*, 642 F. Supp. 3d 1001, 1018 (N.D. Cal. 2022) (as applied to an eviction moratorium, stating, “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.”); *Rental Hous. Ass’n v. City of Seattle*, 512 P.3d 545, 558 (Wash. Ct. App. 2022) (as applied to an eviction moratorium, “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.”).

This categorical rejection of a physical taking where a landlord-tenant relationship exists is misguided. Forcing property owners to house a nonpaying tenant for an indefinite period, with no compensation is burdensome enough. But that landlord must also bear the costs of utilities, insurance, real estate taxes and other costs associated with upkeep, without income to pay for it. Lesser regulations might not amount to a compelled exclusion rising to the level of a physical taking, such as a local ordinance increasing a “notice of nonpayment” period from 5 to 10 days. But a complete moratorium on evictions exacts a much higher toll, including, as described below, forcing property owners into foreclosure for nonpayment of taxes and mortgages.⁸

Indeed, the prevailing system established by these decisions expanding *Yee* puts landlords in a bind: *keep*

8. For example, under the CARES Act, the Department of Housing and Urban Development requires a 30-day notice to vacate before a property owner may start eviction proceedings. 15 U.S.C. § 9058(c). The issue is thus not moot, but a feature of existing law.

a unit open, with no money coming in, or be formally excluded from taking possession, or take the risk of leasing the unit and facing the possibility of a nonpaying tenant. During the many months when state or federal eviction moratoriums were in effect, the Associations observed that thousands of rental units were turned over. During that period, property owners were, of course, not forced to take a tenant if they believed prevailing legal conditions were not favorable. But the continuing obligation and liability for mortgage debt, physical maintenance, insurance, and real estate taxes *is* forced upon the owner. Whichever options the owner chooses—keep the unit open or fill it and face total exclusion—amounts to a total, or near total, restriction on the owners’ right to use the property. As discussed below, this structure has negative, downstream effects not only on property owners, but on tenants as well.

Academic Studies of Eviction Seldom Report or Analyze the Losses of Landlords

A complete view of legal pauses on evictions must include the financial repercussions on landlords, which would also affect future tenants and the supply of affordable housing generally. The inability to evict nonpaying tenants is not a cost-free public policy intervention. Rather, a study commissioned by the RPA analyzing evictions in Milwaukee County in 2019 demonstrates that landlords suffer financial losses *even when* they can evict nonpaying tenants. Such losses are all the greater if that legal mechanism is removed via government mandate.

The RPA commissioned a study of evictions filed in Milwaukee County, Wisconsin.

Studies of the effects of residential evictions that grab popular attention often focus on tenants and the business practices of their landlords. Indeed, the Pulitzer Prize winning book, *EVICTED: Poverty and Profit in the American City*, looked at these complex relationships within Milwaukee County, Wisconsin.⁹ In the book, author Matthew Desmond relays the story of “Sherrena Tarver”, a pseudonymous landlord who owned 18 rental houses within the City of Milwaukee’s inner city. Desmond accepted Tarver’s boast that she had a net worth of \$2 million and netted \$10,000 a month in rental income.

However, members of the RPA knew that primarily renting to low-income tenants has greater risks and that the need to repeatedly file nonpayment evictions will eliminate income streams and often destroy an owner’s equity. Impelled by this experience, RPA members contacted Sherrena and researched her 70-plus eviction actions and her court and property ownership records. These revealed that her business had failed, and she lost all her properties to mortgage and tax foreclosures within a year of Desmond leaving Milwaukee in 2009.¹⁰

9. Matthew Desmond, *Evicted: Poverty and Profit in the American City* (2017).

10. MilwaukeeJoe, *The 'Hood is Actually Not So Good*, Amazon Review (Apr. 21, 2016), https://www.amazon.com/gp/customer-reviews/R12JWFBNMVJ33S/ref=cm_cr_dp_d_rvw_ttl?ie=UTF8&ASIN=0553447459.

Findings of the 2019 Milwaukee Eviction Study.

In 2021, the RPA hired a credentialed legal researcher to do a study of all eviction cases filed in Milwaukee County during December 2019,¹¹ (the “Eviction Study”). The Eviction Study, which was completed in March 2022, used publicly available data from Wisconsin’s Consolidated Court Automation Program (“CCAP”) to analyze documents filed in all 1,101 residential eviction cases that were pending in December 2019. *Id.* at 2. The study’s researcher reviewed pleadings, which are often unavailable online through CCAP, at the courthouse. *Id.* at 2, 5.

The results from the Eviction Study are telling. Even when landlords are not subject to an eviction ban, they still suffer losses. For example, 50.8% of the cases were dismissed by either stipulation of the parties or by judgment. Yet tenants often did not comply with the stipulation (usually by nonpayment) in 164 instances, which required the property owner to return to court. And, of the 484 cases in which a judgment was given, only 231 were for money judgments in addition to costs. Significantly, in 56% of the cases, *no judgment at all* was entered even though the landlord had incurred costs by filing the case.

The Eviction Study found that the mean amount of rent in arrears at different stages of an action were significant, especially for individual, non-institutional landlords:¹²

11. Apartment Association of Southeast Wisconsin, Inc., Comprehensive Study of One Month of Evictions Filed in Milwaukee County, Wisconsin (Mar. 16, 2022), https://rpawi.org/resources/Documents/AASEW_Eviction_Study_Dec_2019.pdf.

12. Apartment Association of Southeastern Wisconsin, Inc., *Comprehensive Study of One Month of Evictions Filed in*

<u>Notice</u>	<u>Complaint</u>	<u>Requested</u>	<u>Judgment</u>
\$1,242	\$1,436	\$3,178	\$2,672

Because property owners have such difficulty recovering rent and costs, even when no moratorium is in effect, it stands to reason that when landlords' ability to recover possession is delayed or banned, the losses are much greater.

The CDC Eviction Moratorium Caused Losses to Landlords in Wisconsin Despite the Availability of Covid-19 Relief Funds

The pain property owners feel due to an eviction ban of any length is often substantial, even severe. In Wisconsin, the state's eviction ban lasted only two months but was followed by the CDC's eviction ban, which lasted just short of a full year. Although Wisconsin landlords could file eviction actions during the CDC moratorium, tenants would delay or seek a dismissal by filing the CDC's *Eviction Protection Declaration*.¹³

The Associations' members have reported various consequences from the CDC's restrictions. Several small landlords did not have the resources to pay mortgage and maintenance costs while waiting for tenants to pay monthly rent. Often, tenants would refuse to pay while waiting to

Milwaukee County, Wisconsin, Executive Summary, https://aasew.org/resources/Documents/AASEW_Eviction_Study_Dec_2019_ExecSummary.pdf (last visited Apr. 15, 2024).

13. CDC, OMB Control No. 1920-1303, *Eviction Protection Declaration* (Apr. 1, 2021), <https://stacks.cdc.gov/view/cdc/106827>.

receive funds under the Emergency Rental Assistance Program (“ERAP”) overseen by the Department of the Treasury.¹⁴ Sometimes tenants simply moved out and dropped contact with their former landlord who was then unable to get funding from ERAP. One owner of an 8-unit building reported that one tenant had told all the other residents that, “You don’t have to pay rent now” because of the ERAP funds. As a result, tenants did not pay rent and the owner was forced to sell his property. It is reasonable to believe that this was not an isolated occurrence. Indeed, in the Associations’ collective experience, local courts repeatedly chose to not enforce the CDC requirement that tenants ‘make timely partial payments.’¹⁵

This Court has already acknowledged the same issue which the Associations have identified, and which lies at the heart of the harm Petitioners’ claim here. In *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 765–66, 141 S. Ct. 2485, 2489–90, 210 L. Ed. 2d 856 (2021), this Court wrote,

The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery. Despite the CDC’s determination that landlords should bear a significant financial cost

14. Department of Treasury, *Emergency Rental Assistance Program*, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program> (last visited Apr. 15, 2024).

15. CDC, OMB Control No. 1920-1303, *Eviction Protection Declaration* § 2 (Apr. 1, 2021).

of the pandemic, many landlords have modest means. And preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude.

....

It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends.

The Eviction Study confirms this Court’s observation that there is “no guarantee of eventual recovery.” As of March 2022, when the study was completed, only fourteen of the judgments identified from December 2019—which represents just 2.9% of all judgments from that month—had been satisfied. *Eviction Study* at 20. Indeed, a previous study by the RPA found that only 2.5% of eviction judgments from Milwaukee County in 2015 had been satisfied six years later. *Id.* Given how few judgments are satisfied, the Associations’ members report that they typically allow a case to be dismissed if the tenant has moved (either voluntarily or by the sheriff) because it is not worth the time or expense to return to court to secure an uncollectible judgment.

The Consequences of Eviction Bans Negatively Affect both Landlords and Tenants

Economic uncertainty affected not only the thousands of rental property owners in Wisconsin who are members

of the Associations. Lost in the discussion are the negative effects on current, and future, tenants.

The experience of the Associations' members indicates that the prospect of a government-declared emergency will lead to increases in rental rates so that landlords can insulate against future losses from nonpaying tenants. Prospective tenants, in other words, will bear the burden of current tenants who fail to pay but who cannot be evicted. Indeed, for those with prior eviction records and those with a shaky employment history, screening will be more rigorous, resulting in many more being rejected than if landlords maintained the ability to evict for nonpayment.

The threat or existence of eviction moratoriums likely affects the larger rental market as well. It is well accepted that when housing supply decreases, rents increase. Prohibiting landlords from removing nonpaying tenants disincentivizes investment in rental property by institutional investors and individuals investing for retirement. The Federal Reserve Bank of Minneapolis noted in a recent article that creation of new, market-rate housing increases the supply of affordable housing as well. Citing the work of University of Notre Dame economist Evan Mast, the Minneapolis Federal Reserve describes how building new housing “creates a chain of moves” which “lead to apartment openings in other neighborhoods relatively quickly.”¹⁶ If future owners are not assured, however, that they will be able to collect rent, investment in such new projects will be depressed.

16. Tyler Boesch, *et al.*, *How New Apartments Create Opportunities for All*, Fed. Reserve Bank of Minneapolis (Mar. 4, 2024), <https://www.minneapolisfed.org/article/2024/how-new-apartments-create-opportunities-for-all>.

A “Right to Counsel” program has been implemented in various states and counties, including Milwaukee and Dane counties in Wisconsin, to represent tenants facing eviction. A *pro bono* attorney can help tenants negotiate a “pay-and-stay agreement” that allows the tenant to continue living in the unit coupled with a promise to pay arrears and rent.

But all too often, the attorney simply delays the inevitable moveout by a tenant who is too far behind in rent. As the Eviction Study found when evaluating voluntary stipulations, “[t]he landlord returned to court with an affidavit of noncompliance 164 of the 525 times (31.2% of agreements). The noncompliance was often due to failure to make a payment on time (134 instances and 81.7% of the total noncompliance)” *Eviction Study* at 7. This helps a defaulting current tenant but harms existing and future tenants because landlords will then require a double security deposit to recompense them for the extra month of rent lost during the legal process and the extended term of nonpayment brought about by the stipulation.¹⁷

17. Much of the money supporting such free legal counsel programs would be more effective as direct rental assistance. Juliet M. Brodie & Larisa G. Bowman, *Lawyers Aren't Rent*, 75 Stan. L. Rev. Online 132 (July 2023), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2023/07/Brodie-Bowman-75-Stan.-L.-Rev.-Online-132.pdf>.

CONCLUSION

Amici believe this Court must consider the larger effects of eviction moratoriums on property owners and tenants. Excluding owners from possession of their property results in worse outcomes for both parties. We respectfully urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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