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 A Petition For A Writ Of Certiorari To The Supreme Court Of Washington

BRIEF *AMICUS CURIAE* OF THE CALIFORNIA APARTMENT ASSOCIATION AND SAN FRANCISCO APARTMENT ASSOCIATION IN SUPPORT OF PETITIONERS

CHRISTOPHER E. SKINNELL, ESQ.
Counsel of Record
NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP
2350 Kerner Boulevard, Suite 250
San Rafael, CA 94901
Phone: (415) 389-6800
cskinnell@nmgovlaw.com

Counsel for Both Amici Curiae

WHITNEY PROUT, ESQ.
Executive Vice President, Legal Affairs
CALIFORNIA APARTMENT ASSOCIATION
980 Ninth Street, Suite 1430
Sacramento, CA 95814
Phone: (916) 449-6438
wprout@caanet.org

Counsel for Amicus Curiae California Apartment Association

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTERESTS OF *AMICI CURIAE*[1]

The California Apartment Association ("CAA") is the largest statewide rental housing trade association in the country, representing more than 50,000 rental property-owners and operators, who are responsible for nearly two million rental housing units throughout California. CAA's mission is to promote fairness and equality in the rental of residential housing, and to promote and aid in the availability of high-quality rental housing in California. CAA represents its members in legislative, regulatory, judicial, and other state and local fora. Many of its members are located in local jurisdictions that adopted stringent eviction moratorium over the past few years, including San Francisco, Los Angeles, and Oakland. For that matter, the State of California enacted such an eviction moratorium.

Since mid-2022, CAA has been litigating, on behalf of its affected members, the constitutionality of the most extreme of these moratoria, which was adopted by the County of Alameda, California, and which prevented virtually all evictions in the County for a full *three years*, from March 2020 to April 2023. That case raises many of the same issues as this case, including the issue raised in the current Petition: the proper scope of *Yee v. City of Escondido*, 503 U.S. 519 (1992).

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[1] Pursuant to Rule 37.2, *amici* affirm that notice was provided to counsel for all parties of the intent of *amici* to file this brief at least ten days before the deadline. Counsel for *amici* authored this brief in whole. No party, party's counsel, or other person besides *amici* contributed money that was intended to fund preparing or submitting this brief.

See Williams v. Alameda Cty., 642 F. Supp. 3d 1001, 1017 (N.D. Cal. 2022) (denying summary judgment on physical-takings claim, relying on *Yee*). The case remains pending.

The San Francisco Apartment Association ("SFAA") is a full-service, non-profit trade association founded in 1917 of persons and entities who own residential rental properties in San Francisco, which has one of the most stringent rent control regimes in the country, and which also adopted a highly-restrictive eviction moratorium. SFAA has more than 2,800 active members. It is dedicated to educating, advocating for, and supporting the rental housing community and preserving the property rights of all residential rental property providers in San Francisco. SFAA and its members have a strong interest in a preserving their ability to purchase, sell, manage, and otherwise control real property and to exercise their constitutional and statutory rights with respect to real property they own or manage in San Francisco.

CAA's and SFAA's members have a strong interest—just like landlords in Washington—in the standards applicable to the taking of private property for public use.

SUMMARY OF ARGUMENT

It is often said that hard cases make bad law, and it is perhaps tempting to explain the tolerance of the Washington Supreme Court in this case, and the

handful of district courts that reached a similar result in other eviction moratorium cases, to that aphorism—to attribute their willingness to allow state and local governments to force landlords to house nonpaying tenants for an extended period of time, without compensation, to the unusual circumstances of the COVID-19 pandemic. The truth, however, is that those extreme cases merely highlighted—and now threaten to supercharge—an already-growing trend in recent Takings Clause case law as applied to residential rental housing: a tendency to read this Court's decision in *Yee v. Escondido* in an increasingly expansive manner that sanctions ever-more draconian restrictions on rental housing providers' property rights on the theory that they "voluntarily" subjected themselves to those restrictions by making the initial decision to enter the rental market.

Though the Petition in this case deals with Washington's stringent eviction moratorium, many jurisdictions in California imposed similarly—and often more—severe limitations on property-owners' rights beginning in 2020, amounting, as a practical matter, to a rent holiday in many cases. As one especially egregious example, discussed more fully below, Alameda County (home to the Cities of Oakland and Berkeley, among others) adopted a rent moratorium early in the pandemic that barred evictions for virtually any reason—certainly non-payment of rent, but also for reasons like nuisance, waste, fraud, material lease violations, or a landlord's desire to personally reside in the rental unit that he or she owned, as a means of

off-setting the continuing financial burdens of ownership. (Landlords, of course, were not freed of their continuing obligations—financial or otherwise—in connection with these rental units.) And then the County left that moratorium in place for *three years*, long after vaccinations were widely available, "shelter-in-place" was no longer the order of the day, schools and other business had long-since been allowed to operate virtually without restriction, and when the State of California's more tailored tenant protection laws had been fully phased out. Indeed, some aspects of the moratorium continue in place even today—they are permanent.

San Francisco similarly adopted a stringent moratorium. Though not quite as stringent as Alameda County's—surprisingly, given San Francisco's long history of anti-landlord legislation[2]—it, too, placed

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[2] San Francisco's history of anti-landlord legislation is well-documented in the case books. *See*, *e.g.*, *S.F. Apartment Ass'n v. City & Cty. of S.F.*, 881 F.3d 1169 (9th Cir. 2018) (ordinance placing stringent restrictions on landlords' ability to negotiate a voluntary "buyout" of tenants' leases); *S.F. Apartment Ass'n v. City & Cty. of S.F.*, 20 Cal. App. 5th 510 (2018) (ordinance prohibiting no-fault evictions of families with children and educators during the school year); *Levin v. City & Cty. of S.F.*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014) (ordinance imposing requirement that landlords pay lawfully evicted tenants "amounts that range to hundreds of thousands of dollars per unit"), *appeal dismissed as moot*, 680 Fed. Appx. 610 (9th Cir. 2017); *San Remo Hotel v. City & Cty. of S.F.*, 145 F.3d 1095 (9th Cir. 1998) (ordinance requiring owners of residential hotels to obtain special permits from the City before converting residential hotels to tourist hotels, and providing such a permit would only be granted if the landlord promised to make a "one-for-one replacement" of the units being lost); *Tom v. City*

significant burdens on owners' property rights, and it, too, still has aspects that continue to this day.

And it is becoming increasingly clear that such moratoria will not be limited to extraordinary cases like the COVID-19 pandemic for long (contrary to a handful of lower court rulings that challenges were moot because not likely to reoccur). The genie is now out of the bottle. Having imposed draconian eviction moratoria once and gotten away with it, local jurisdictions are increasingly inclined to treat such moratoria as just another tool in their regulatory toolbox. Thus, for example, San Diego County recently enacted a new eviction moratorium in response to flooding in a portion of the County. The City of Los Angeles recently enacted an urgency ordinance adopting a six-month eviction moratorium covering certain renters with pending rental assistance applications, but who have substantial back rent. And with a number of local jurisdictions declaring states of "emergency" based on homelessness, more such moratoria seem likely to follow.

& Cty. of S.F., 120 Cal. App. 4th 674 (2004) (striking down ordinance that sought to discourage Ellis Act evictions by prohibiting tenants-in-common from agreeing to occupy separate units in the property under exclusive right-of-occupancy agreements); *Small Prop. Owners of S.F. v. City & Cty. of S.F.*, 141 Cal. App. 4th 1388 (2006) (ordinance compelling landlords to pay tenants five percent interest on security deposits, regardless of market conditions); *Danekas v. S.F. Residential Rent Stabilization & Arbitration Bd.*, 95 Cal. App. 4th 638 (2001) (ordinance restricting the ability of landlords to evict tenants who replace a departing cotenant, in violation of a lease clause prohibiting sublet and assignment).

Especially in light of the fact that these issues are not likely to go away, it is crucial that this Court intervene to clarify growing confusion in the case law regarding physical takings as that case law applies to rental housing—confusion that has ripened into a circuit split. As the Petition rightly observes, the Washington Supreme Court's holding below conflicts with the Eighth Circuit's ruling in *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 726-27 (8th Cir. 2022) ("*Heights Apartments*"), *reh'g en banc denied at* 39 F.4th 479 (8th Cir. June 16, 2022). The latter case applied this Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) ("*Cedar Point Nursery*"), to uphold a physical-taking claim to an eviction moratorium, brought by landlords.

But the Washington Supreme Court declined to follow *Cedar Point Nursery* or *Heights Apartments*, though no discussion is given of the latter. Relying instead on *Yee*, the Washington Supreme Court held that the landlord-tenant relationship is exempt from the traditional physical-takings analysis, because unlike the "trespassers" invited on the plaintiff's property by the government in *Cedar Point Nursery*, the tenants in rental housing units are initially invited by the property-owner, negating the necessary element of governmental coercion. Besides conflicting with *Heights Apartments*, the Washington Supreme Court's analysis conflicts with the California Court of Appeal's holding in *Cwynar v. City & Cty. of San Francisco*, 90 Cal. App. 4th 637 (2001) ("*Cwynar*").

The Takings Clause contains no exception for rental housing properties; they, too, cannot be taken without just compensation. But the standards currently being applied by many courts, including the Washington Supreme Court, the Ninth Circuit,[3] and other lower courts, mean state and local governments are increasingly free to deprive those owners of all of the key rights of ownership—to exclude, occupy, use, change the use of, and dispose of their property—without consequence. They effectively hold that by choosing to enter the rental housing market, property-owners forfeit their rights to just compensation when the government compels them to permit the ongoing occupation of those housing units. That is contrary to this Court's decisions, and *Amici* respectfully request that this Court grant the petition for certiorari to clarify the proper application of the Takings Clause to such properties.

ARGUMENT

I. The Issues Raised by the Petition Have Nationwide Implications.

Though this case deals with the eviction moratorium in the State of Washington, it raises important issues that affect landlords in jurisdictions throughout

[3] *See El Papel, LLC v. City of Seattle*, No. 22-35656, 2023 U.S. App. LEXIS 28487 (9th Cir. Oct. 26, 2023), *cert. denied*, 218 L. Ed. 2d 33 (U.S., Feb. 20, 2024).

the nation, who are similarly affected by severe limitations on their fundamental property rights.

A. Alameda County's Moratorium as an Example of Another Jurisdiction with Extreme Constraints on Rental Property-Owners' Rights, Purportedly Justified by the Fact that the Owners "Voluntarily" Chose to Rent Their Properties.

In March 2020, in response to the COVID-19 pandemic, Governor Gavin Newsom declared a State of Emergency in California, and on March 16, 2020, he issued an executive order, which, in relevant part, temporarily limited landlords' ability to evict tenants for nonpayment of rent due to the COVID-19 crisis, though only to the extent the tenants' inability to pay was attributable to negative financial impacts caused by the COVID-19 pandemic itself.[4] That order ran parallel to a number of simultaneously-adopted local health orders—including one covering the seven San Francisco Bay Area counties—that order residents to "shelter-in-place" for several weeks, unless necessary to engage in specified "essential" activities.

On April 21, 2020, the Alameda County's Board of Supervisors took things much, much further. It

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[4] *See* Cal. Executive Order ("EO") N-28-20 (Mar. 16, 2020), ¶ 2, *available online at* https://www.gov.ca.gov/wp-content/uploads/2020/03/3.16.20-Executive-Order.pdf#page=2 (last visited Feb. 10, 2024).

adopted Urgency Ordinance No. O-2020-23,[5] which imposed a moratorium on virtually all evictions in Alameda County, for any reason at all. The Moratorium prohibited "all evictions from residential units in the unincorporated and incorporated areas of the county" subject to very few exceptions, regardless of ability to pay.[6] These exceptions were: (1) Ellis Act withdrawals;[7] (2) government orders requiring the unit to be vacated; or (3) "the resident poses an imminent threat to health or safety."[8] And even these narrow exceptions did not apply when the tenant claimed a financial hardship due to the COVID-19 pandemic.[9] The County's

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[5] *Available online at* https://agendadocsearch.acgov.org/ViewDocument.aspx?printData=1&documentData=0a7ff8d6-5bbb-c687-93fe-71c797900000 (last visited Feb. 10, 2024). The language in the urgency ordinance was made a permanent part of the County's Code of Ordinances on June 23, 2020. *See* Alameda Cty. Code of Ordinances ("ACCO"), ch. 6.120, *available online at* https://library.municode.com/ca/alameda_county/codes/code_of_ordinances?nodeId=TIT6HESA_CH6.120TEREEVMOINUNARCODUCO (last visited Feb. 10, 2024).

[6] ACCO § 6.120.030.

[7] Adopted in 1985, the Ellis Act, Cal. Govt. Code §§ 7060-7060.7, was enacted to guarantee property-owners' rights to permanently remove a building from the rental market.

[8] ACCO § 6.120.030(F).

[9] ACCO § 6.120.040. The district court in the *Williams* case held, in November 2022, that landlords did, in fact, retain the right to "exit" the rental market under the Ellis Act, even when the tenant had a financial hardship, and the court considered that as a factor that mitigated the argument that a physical taking had occurred. *See* 642 F. Supp. 3d at 1018, 1020, 1031-32. But, besides being contrary to the apparent terms of the Moratorium itself, that interpretation was of little comfort to landlords when it finally was handed down, because for two years prior the

Moratorium provided that it is an "absolute defense" to an unlawful detainer action brought during its term.[10]

And the term of the Moratorium was open-ended and indeterminate. As enacted, the Moratorium was set to expire sixty days "after the expiration of the local health emergency," at some unspecified point in the future.[11] And, as it turned out, the emergency wasn't lifted until February 28, 2023; the Moratorium therefore did not expire until April 29, 2023.[12] In short, landlords in Alameda County were precluded from evicting tenants for nonpayment of rent, or for virtually any

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County's website had advised landlords to the contrary and the local courts in Alameda County refused to grant evictions on that basis. Additionally, to take advantage of the Ellis Act a property-owner must remove an entire building from the market—not an individual unit—so people who owned, for example, a condominium that they were renting out could not avail themselves of that option. *See Valnes v. Santa Monica Rent Control Bd.*, 221 Cal. App. 3d 1116 (1990) (Act not applicable to condominium in a multi-unit building). Moreover, this Court has squarely held that the ability to wholly exit an industry avoids a taking on the ground that the property-owner chose to "voluntarily" participate. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982); *Horne v. Dep't of Agric.*, 576 U.S. 351, 365 (2015).

[10] ACCO §§ 6.120.030(D), 6.120.040(D).

[11] ACCO § 6.120.030.

[12] *See* Alameda Cty. Health Servs. Agency, Office of Emergency Servs., "Alameda County Health Care Services Agency Statement on End of the Local Public Health Emergency" (Feb. 28, 2023), *available online at* https://covid-19.acgov.org/covid19-assets/docs/press/press-release-2023.02.28.pdf (last visited Feb. 10, 2024).

reason, for *more than three years*, regardless of their ability to pay. The County gave tenants a virtually unqualified right to occupy landlords' properties with no real obligation—or at most an illusory obligation, as this Court and others have recognized[13]—to pay rent or comply with the terms of a lease for that duration.

Additionally, a permanent provision of the Moratorium provides that any rent a tenant failed to pay during the declared state of emergency can *never* be the basis of an eviction, even if the tenant refuses to pay after the state of emergency ended.[14] Additionally, while the Ordinance disclaims any intent to relieve tenants of their obligation to pay back rent, the Ordinance limits landlords' ability to pursue contract remedies for overdue back-rent, providing that any rent that came due while the Moratorium was in effect may only be collected as consumer debt, and "[s]uch back rent may not be collected through the unlawful detainer process."[15] Thus, even if a tenant is evicted for post-Moratorium reasons, the landlord still cannot seek back rent through that summary proceeding; he or she must file an entirely separate lawsuit, subject to much longer and more elaborate procedural hurdles. And finally, landlords continue to be prohibited from

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[13] *See Heights Apartments*, 30 F.4th at 729 n.7 (the nominal ability to seek monetary damages in the form of back rent from a potentially judgment-proof tenant—is an "illusory remedy, as has been recognized by the Supreme Court." (citing *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021)).

[14] ACCO § 6.120.090(B) & (D).

[15] ACCO § 6.120.090(D).

enforcing provisions of their leases that would entitle them to charge late fees or interest on unpaid rent.[16]

Whatever the rationale for imposing the Moratorium in the early months of the pandemic, it cannot be disputed—indeed, Alameda County has expressly admitted—that by May of 2022, two years into the pandemic, "the Bay Area ha[d] seen significant improvement in circumstances relating to the pandemic since March of 2020 and ha[d] a relatively high rate of vaccinations." The County also "admit[ted] that there [we]re fewer restrictions on business and lower unemployment rates compared to the immediate economic impacts of the pandemic in early 2020."[17]

The California state courts' temporary moratorium on unlawful detainer actions was repealed effective September 1, 2020, Cal. R. Ct., Appx., Emergency Rule 1(e). Governor Newsom's March 2020 executive order temporarily limiting COVID-19-related nonpayment evictions expired a month later, on September 30, 2020.[18] State and County "stay-at-home" orders, which initially closed nonessential businesses and restricted them on an ongoing basis were repealed in June 2021, and businesses and schools fully

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[16] *See* ACCO §§ 6.120.030(E) and 6.120.040(E).

[17] *See* County of Alameda's Answer (ECF No. 18), ¶ 74, *Cal. Apt. Assn. v. Cty. of Alameda*, Case No. 3:22-cv-02705-LB (N.D. Cal. 2022).

[18] *See* Exec. Order N-71-20 (June 30, 2020), ¶ 3, *available online at* https://www.gov.ca.gov/wp-content/uploads/2020/06/6.30.20-EO-N-71-20.pdf (last visited Feb. 10, 2024).

reopened.[19] Nevertheless, the County persisted in maintaining the Moratorium.

With no end in sight, in May 2022 CAA filed a suit challenging the continued maintenance of the Moratorium on behalf of its affected members in Alameda County. The Association was joined by several individual landlords who were dramatically affected by the County's draconian Moratorium.

Each of the individual Plaintiffs had a tenant who failed to make substantial rent payments during the effective period of the Moratorium:

- Rakesh and Trupti Jain's tenant paid nothing from January 2020 onward. His security deposit and first month's rent check both bounced. The Jains never collected any money from him, and by the time the suit was filed the tenant owed back rent in an amount of at least $58,000 for 16 months' worth of unpaid rent.
- Stephen Lin's tenant stopped paying rent in July 2021, and by the time the lawsuit was filed he was behind on his rent in an amount of at least $24,000.
- Alison Mitchell's tenant paid no rent beginning in March 2020, when the pandemic

[19] *See* Alameda Cnty. Pub. Health Dep't, "Alameda County Is Aligned with the State's Beyond the Blueprint Framework" (June 14, 2021), *available online at* https://covid-19.acgov.org/covid19-assets/docs/press/press-release-2021.06.14.pdf (last visited Feb. 10, 2024) ("Alameda County is rescinding its Shelter-in-Place Order . . . ").

began, and had an outstanding balance of at least $75,000.

- Michael Hagerty's tenant did not pay any rent for most months during the approximately two years between the time the pandemic began and the suit was filed and was behind on his rent in an amount of at least $47,350.
- Dani and Alex Alvarezes' tenant also stopped paying rent in early 2020 and owed more than $24,000 in back rent when the suit was filed.

Of course, all of these numbers continued to grow with every month that the Moratorium remained in place, yet these property-owners were still prohibited from evicting these delinquent tenants. Moreover, while the State, County and municipal governments established "rent relief" programs that were supposed to aid landlords, those programs ran out of funds quickly. While some of the plaintiffs received partial payments to cover small portions of their losses, it was nowhere near the full amount. And some of the plaintiffs were unable to receive any reimbursements at all, either because their tenants refused to cooperate with the application process or because the tenant was deemed to be ineligible. In any event, even taking into account the relief payments that were available, all of these plaintiffs had tenants who owe *substantial* back rent.

Of course, these property-owners were not relieved of their own financial obligations with respect to these properties. They were still expected to pay mortgages, insurance premiums, utility bills, and to bear

the costs of maintaining the property in accordance with stringent state law—or potentially face a suit from the non-paying tenant for lack of habitability.[20] They were still expected to pay property taxes to the County of Alameda.

Nor was money the only problem. Most of these landlords also experienced significant problems with material breaches of the lease. Stephen Lin's case is perhaps the most egregious example. Though the lease agreement permitted two small dogs, from mid-2021 on his tenants housed three large German Shepherds and a Huskie, which bark constantly, resulting in neighbors complaining to the homeowners' association and County animal control. The tenants ignored repeated requests to address the barking. The dogs also defecated and urinated all over the patio and garage, which the tenants addressed by hosing those two areas down at least three times a day. The water bill for the unit more than doubled as a result, and it caused moisture to build up outside on the stucco, resulting in algae growth outside and black mold in the garage from the constant water exposure. Mr. Lin repeatedly asked the tenants to stop hosing down the patio and garage, but they refused, and they refused to grant Mr. Lin entry to the property to abate the mold. Mr. Lin also received a public health notice from the City of Fremont, informing him that the home has become infested with cockroaches.

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[20] *See Landeros v. Pankey*, 39 Cal. App. 4th 1167, 1169 (1995).

Mr. Lin's homeowners' association repeatedly complained to him about the conditions at the unit and threatened him with fines authorized under the CCRs. Mr. Lin attended numerous HOA meetings to apologize to his neighbors for the conditions caused by his tenants, but his hands were tied; he had no ability to address any of these problems due to the County's Moratorium.

Finally, several of these Plaintiffs specifically purchased the properties in question with the intention of eventually taking possession for their own use or they proposed to do so as result of the pandemic. But they were precluded by the Moratorium from doing even that. And attempts to stop the bleeding, selling the units, were unsuccessful—who would want to buy a rental unit with a nonpaying tenant that cannot be evicted for an indefinite period of time?

In summary, Alameda County mandated that these property-owners allow tenants to live in their properties for three years, without paying rent and without the ability to evict them for destruction of property, nuisance, and material breaches of the lease. It effectively gave them a long-term servitude or easement. Nevertheless, the district court held that the County had not committed a physical taking of the owners' property. For this proposition, it relied upon this Court's decision in *Yee*, which held that rent control—normal, plain vanilla rent control, in which the amount was limited but still required to be paid—does not effect a physical taking because the government did not coerce the landlord into inviting the tenant in

the first place. That the terms of the invitation had been entirely negated by the Moratorium, from the landlord's side, made no difference.

B. The Significance of the Issues Raised by the Petition Is, Unfortunately, Not Limited to the Extreme Circumstances of the COVID-19 Pandemic.

As discussed above, one might be tempted to treat this as merely a one-off case, limited to the extraordinary circumstances of the COVID-19 moratorium. If only that were true. Local governments' success in enforcing COVID-19 moratoria with judicial approval has emboldened them.

For example, when recent rains in San Diego County resulted in flooding, the County adopted a new eviction moratorium.[21] The moratorium was, in many ways, similarly broad like the one adopted in Washington and Alameda County in that, for those subject to its protections, evictions were only permitted if there was an imminent health or safety threat *caused by the tenant*. The moratorium's provisions were narrowed a bit by the fact that it applied only to specified storm-affected zip codes, and technically the moratorium wa also only applicable to tenants who had suffered an "economic loss" related to the storm, but that limitation was also illusory. For one thing, the definition of

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[21] *See* San Diego Cty. Ord. No. 10887 (N.S.), *available online at* https://bosagenda.sandiegocounty.gov/cobservice/cosd/cob/content?id=0901127e8107246f (last visited Feb. 12, 2024).

"economic loss" was so broad as to apply to essentially anything (*e.g.*, "other personal economic consequences directly or indirectly caused by the Flood"). Moreover, tenants were not required to give notice or provide proof that they had suffered such a loss, and the ordinance placed the burden on the landlord to prove the tenant had *not* suffered an economic loss to recover possession. Taken together, these factors meant the premise that the moratorium was only for storm-affected tenants was purely theoretical. As a practical matter, there was effectively a blanket ban on evictions in the listed zip codes. While this new moratorium has since expired, it further supports the fact that moratoria are increasingly viewed as commonplace.

For another example, take Los Angeles. That City's COVID moratorium ended on April 1, 2023. However, a permanent component of that moratorium gave tenants up to a year following its expiration to pay back rent incurred during the moratorium without being evicted. On February 5, 2024, just as that one-year repayment period was about to expire, the City adopted a new moratorium (supposedly limited to 60 days), applicable to tenants who applied for rental assistance and still have applications pending. Thus, a subset of landlords will have been precluded from reclaiming their property for more than *four* years.[22]

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[22] *See* L.A. City Ord. No. 188109, *available online at* https://clkrep.lacity.org/onlinedocs/2021/21-0042-S7_ord_188109_2-7-24.pdf (last visited Feb. 10, 2024).

And finally, as noted above, a number of California jurisdictions have recently begun to declare "states of emergency" with respect to homelessness.[23] (It is estimated that California has approximately 25% of the country's homeless population.) While none of those homelessness emergencies have included outright eviction moratoria yet, if the COVID-19 emergency justified such moratoria, without requiring compensation to property-owners, it is not hard to imagine that these new "emergencies" will soon be claimed to justify them too.

II. Review by this Court is Necessary to Clarify the Reach of *Yee v. City of Escondido*, Especially in Light of this Court's More Recent Decision in *Cedar Point Nursery v. Hassid*, and to Resolve a Circuit Split on This Question.

A physical taking occurs "whether the government has physically taken property for itself or someone

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[23] *See*, *e.g.*, Los Angeles Mayor Karen Bass, "Declaration of Local Emergency" (Dec. 12, 2022), *available online at* https://mayor.lacity.gov/sites/g/files/wph2066/files/2023-03/20221212%20Mayor%20Emergency%20Declaration%20Homelessness%20Crisis%20signed%20by%20clerk.pdf (last visited Feb. 8. 2024); Diaz, "Long Beach declares state of emergency for homelessness crisis," LONG BEACH SIGNAL-TRIB. (Jan. 12, 2023), *available online at* https://sigtrib.com/long-beach-declares-state-of-emergency-for-homelessness-crisis/ (last visited Feb. 8, 2024); City of Culver City, "Proclamation of a Local Emergency on Homelessness by the Director of Emergency Services of the City of Culver City, California" (Jan. 3, 2023), *available online at* https://www.culvercity.org/files/assets/public/v/1/documents/services/housing-health-amp-human-services/2023-01-03_-proclamation-of-local-emergency-on-homelessness.pdf (last visited Feb. 8, 2024).

else—by whatever means . . . " *Cedar Point Nursery*, 141 S. Ct. at 2072. A physical taking is automatically, categorically entitled to compensation. *Id*. at 2071. And compensation is due regardless of whether the invasion is permanent or temporary. "The duration of an appropriation—just like the size of an appropriation [citation]—bears only on the amount of compensation." *Id*. at 2074.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, this Court identified three critical property rights—"'sticks in the bundle of rights that are commonly characterized as property'"—that a physical occupation impairs: "'the rights to possess, use, and dispose of it.'" 458 U.S. at 434-35 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), & *United States v. General Motors Corp*., 323 U.S. 373, 378 (1945)). A physical occupation destroys an owner's "right to possess the occupied space himself, and also [the] power to exclude the occupier from possession and use of the space," 458 U.S. at 435; it denies an owner the "power to control the use of the property" and obtain a profit from it, *id*. at 436; and "[f]inally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Id*. The moratoria at issue in this case—like the one in CAA's Alameda case—damaged all of these rights.

In *Cedar Point Nursery*, this Court held that a California regulation granting labor unions a right to

access an agricultural employer's property in order to solicit support for unionization amongst the owner's employees constituted a *per se* physical taking because, under the regulation, the government had appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, up to 120 days a year. 141 S. Ct. at 2072. In the same manner here, the State of Washington conferred a right on tenants to physically occupy property that they would otherwise have no legal right to occupy, due to their failure to pay rent or material breaches of the lease.

It cannot be gainsaid that if the government commandeered these rental units to house homeless strangers during the course of the pandemic—or as "government offices," or for any other purpose, for that matter—that a physical taking would result. *See Loretto*, 458 U.S. at 439 n.17. This is not materially different. *But for* the moratorium, tenants who failed to pay their rent or otherwise materially violated their leases, would have no legal right to possess these properties. The owners would have the right to exclude them, but the government vested the breaching tenants with the equivalent of a servitude or easement in the landlord's property for an indeterminate period.[24]

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[24] Alameda County acknowledged as much with respect to hotel rooms, paying hundreds of dollars a night to house homeless individuals. *See* https://calmatters.org/housing/homelessness/2024/02/fema-roomkey-october-letter/ (last visited Feb. 12, 2024). But private homeowners are forced to bear the burden themselves.

The Washington Supreme Court distinguished *Cedar Point Nursery*, however, and held that a physical-takings analysis is inapplicable because landlords voluntarily invited the tenants to possess their property in the first instance. For this distinction it relied on *Yee*. But that reliance is misplaced, as the Eighth Circuit held in *Heights Apartments*, reversing the dismissal of a physical-takings challenge to Minnesota's eviction moratorium.

In *Yee*, owners of a mobile home park alleged that a city's mobile home rent control ordinance effected a physical taking of their property because preexisting state law limited the bases upon which the park owner could terminate the mobile homeowner's tenancy to "the nonpayment of rent, the mobile home owner's violation of law or park rules, and the park owner's desire to change the use of his land." 503 U.S. at 523. The park owners argued that the rent control law, when viewed in the context of state law, constituted a physical-takings because it transferred significant value of the property from the owner to the (incumbent) tenant, *id*. at 529-30, and because it deprived them "of the ability to choose their incoming tenants," *id*. at 530-31. With respect to the former argument, the Court held that virtually any regulation could be held to transfer value or wealth, and that the allegations, though potentially relevant to a regulatory-takings claim, did not establish a physical taking. *Id*. at 529-30. Regarding the latter, the Court held, "Because they voluntarily open their property to occupation by others, petitioners

cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id*. at 531.

But this statement has to be read in context. *Yee* simply did *not* hold that the government could relieve mobile home park tenants of the need to pay rent altogether, for an indefinite period of time, while still retaining possession, and that such continuous adverse possession would not be a physical taking. Rather, *Yee* addressed a normal landlord-tenant relationship: in which tenants were expected to pay rent (regulated, but still required to provide the landlord a fair return on investment[25]) or face eviction; where the landlord could evict for violations of the law or park rules; and where the landlord retained the right to cease renting altogether. *See Yee*, 503 U.S. at 527-28.

Essentially, the Washington Supreme Court adopted the untenable position that once a tenant is invited to occupy a rental premises, no subsequent change in circumstances can alter or undermine the "voluntariness" of the landlord's relationship to the tenant for purposes of a physical-takings analysis. "But the *Yee* court *did not* hold or intimate that government coercion is relevant only if it corresponds to the initial physical occupation of the premises." *Cwynar*, 90 Cal. App. 4th at 658 (italics in original). In fact, the *Yee* Court acknowledged that even though a landlord initially chose to rent the property, a statute that, for example, compelled the landlord to refrain in

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[25] *Pennell v. San Jose*, 485 U.S. 1, 13-14 (1988).

perpetuity from terminating a tenancy might constitute a physical taking. 503 U.S. at 528.[26] This is simply inconsistent with the idea that the initial invitation forever precludes a physical taking.

Indeed, such a holding would be contrary to basic common law principles, under which a person who enters another's property as an invitee may be converted to a mere trespasser if the invitee "unnecessarily remains upon the premises of another," *Roseberry v. Edward F. Niehaus & Co.*, 166 Cal. 481, 484 (1913), or exceeds "the circumstances and conditions of his invitation," *Pierson v. Holly Sugar Corp.*, 107 Cal. App. 2d 298, 302-03 (1951). Consistent with those rules, California law has long held that a tenant who retains possession when no longer entitled to under the lease is a "trespasser." *See* 12 Witkin, SUMM. OF CAL. LAW (11th ed. 2017), *Real Prop.*, § 532 (citing cases). The same is true under Washington law. *See Owens v. Layton*, 133 Wash. 346, 347-48 (1925). In other words, an "invitation" has always been understood to be contingent upon the terms of the invitation—in this case, upon the payment of a lawful rent and compliance with the covenants in the lease—and

[26] Though *Yee* talked about being obliged to rent "in perpetuity," *Cedar Point Nursery* clarified that compensation is due regardless of whether the invasion is permanent or temporary. *See* 141 S. Ct. at 2074 ("The duration of an appropriation—just like the size of an appropriation [citation]—bears only on the amount of compensation.").

the invitation can be extinguished by subsequent events such as the nonpayment of rent. *Id*.

CONCLUSION

The Washington Supreme Court in this case and the Ninth Circuit as well as several district courts in other cases have interpreted *Yee* as standing for the proposition that once a tenancy is voluntarily created, no subsequent change in circumstances can alter the voluntariness of that arrangement. Accordingly, government regulations forbidding a landlord from evicting a tenant will never have the necessary element of governmental "coercion" to create a *per se* physical taking. The Eighth Circuit in *Heights Apartments* and the California Court of Appeal in *Cwynar* squarely rejected this premise. Review by this Court is warranted to resolve this split of authority and to clarify the proper scope of *Yee*'s voluntariness principle and its relationship to the Court's decision in *Cedar Point Nursery*. *Amici*, therefore, respectfully request that the Court grant the petition.

Respectfully submitted,

CHRISTOPHER E. SKINNELL, ESQ.
Counsel of Record
NIELSEN MERKSAMER
PARRINELLO GROSS & LEONI LLP
2350 Kerner Boulevard, Suite 250
San Rafael, CA 94901
Phone: (415) 389-6800
cskinnell@nmgovlaw.com

Counsel for Both Amici Curiae

WHITNEY PROUT, ESQ.
Executive Vice President, Legal Affairs
CALIFORNIA APARTMENT ASSOCIATION
980 Ninth Street, Suite 1430
Sacramento, CA 95814
Phone: (916) 449-6438
wprout@caanet.org

Counsel for Amicus Curiae
California Apartment Association

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