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 *AMICUS CURIAE* CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the right to own and use private property to the exclusion of all others. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Sheetz v. County of El Dorado*, -- S.Ct. -- (2024) (No. 22-1074); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Murr v. Wisconsin*, 582 U.S. 383 (2017); *California Building Industry Ass'n v. City of San Jose*, 577 U.S. 1179 (2016); and *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), to name a few

SUMMARY OF ARGUMENT

During the Covid pandemic panic, Washington's Governor issued a proclamation prohibiting the eviction of renters who stopped paying rent. The purpose of the order was to commandeer landowners' property to serve as places of confinement during the state's "stay at home" order. The Washington Supreme Court ruled that this proclamation commandeering landowners' property served an important purpose. But an important purpose does not free the State from

[1] All parties were notified of the filing of this brief more than 10 days prior to filing. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

the strictures of the Takings Clause. At most, an important purpose merely satisfies the Fifth Amendment's requirement that the Taking is for a "public use" which this Court has converted into a "public purpose." *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting).[2] The state court confused the requirement of "public use" with the requirement of compensation – both are required to overcome a property owner's right to exclude.

The Fifth Amendment Takings Clause is unique among the other provisions of the Bill of Rights. While government suppression of other rights generally requires something between an important and a compelling interest, the Fifth Amendment merely requires payment of just compensation. Yet state and local governments chafe at even this minimal requirement for the trampling of a fundamental individual right.

The fact that the government can overcome individual rights in property by the mere payment of money does not mean that property rights are a "poor relation" to the other liberties listed in the Bill of Rights. The right to own and use property is a fundamental right that includes the right to exclude others. The Washington proclamation at issue eviscerates that right by requiring property owners to suffer the

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[2] The Governor's no-eviction order does not qualify as a "public use" as that phrase was originally understood. Indeed, taking property from "A" and giving it to "B" was, for the Founders, the very definition of illegitimate governmental action. *Calder v. Bull*, 3 Dall. 386, 388 (1798). Whether it qualifies as a "public purpose" under the expanded interpretation articulated in *Kelo* is itself questionable, for unlike in *Kelo*, there is no claim of broader economic benefit to the community at issue here.

invasion of their property. The proclamation eliminates state court remedies for removing former renters who have effectively become squatters – occupying property while refusing to pay rent. Even if the commandeering of private property to serve as a place of confinement during the "stay at home" order were a "public use," the failure to pay compensation violates the Fifth Amendment. There is no warrant in the Fifth Amendment to avoid the payment of compensation based on the nature of the public use that is claimed.

REASONS FOR GRANTING THE WRIT

I. Review Should Be Granted to Protect the Natural Right to Own and Use Property Which Is a Foundation of Individual Liberty.

This Court has so often characterized individual rights in property as "fundamental" that it is difficult to catalogue each instance. The Court has noted that these rights are among the "sacred rights" secured against "oppressive legislation." *Bartemeyer v. State of Iowa*, 85 U.S. 129, 136 (1873). These rights are the "essence of constitutional liberty." *Johnson v. United States*, 333 U.S. 10, 17 n.8 (1948). In a word, they are "fundamental." *In re Kemmler*, 136 U.S. 436, 448 (1890). Justice Washington noted that rights that are "fundamental" are those that belong "to the citizens of all free governments." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). He listed individual rights in property as one of the primary categories of fundamental rights. *Id.*

This Court has followed Justice Washington's view, noting that constitutionally protected rights in

property cannot be viewed as a "poor relation" with other rights secured by the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994); *see also Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citing to John Locke, Blackstone, and John Adams, the Court noted that "rights in property are basic civil rights").

Moreover, the individual right in property is not one of mere ownership. Instead, this Court has noted that the right in property is the right to use that property to the exclusion of others. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). The right to exclude others is key. *Dolan*, 512 U.S. at 384; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). This Court did not invent the idea of the ownership and use of private property as a fundamental right. The individual rights in private property are a cornerstone of the liberties enshrined in the Constitution.

Although there was little mention of a fear of federal confiscation of property during the ratification debates, James Madison included the Takings Clause in the proposed Bill of Rights based on the protections included in the Northwest Ordinance. *See* THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDERSTANDING, (Eugene W. Hickcok, Jr., ed.) (Univ. Press of Virginia 1991) at 233. The Northwest Ordinance of 1787 included the first analog of the Bill of Rights and it expressly protected property from government confiscation. Robert Rutland, THE BIRTH OF THE BILL OF RIGHTS (Northeastern Univ. Press 1991) at 102. The drafters of the individual rights

provisions of the Northwest Ordinance took their cue from the 1780 Massachusetts Constitution. *Id.* at 104.

While Madison may have used the language of the Massachusetts Constitution in crafting protections for individual rights in property, those protections, were firmly grounded in the Founders' theory of individual liberty and government's obligation to protect that liberty. This is the theory of government that animates our Constitution.

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments but are inalienable. Declaration of Independence ¶2, 1 Stat. 1. The Fifth Amendment seeks to capture a part of this principle in its announcement that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V.

The importance of individual rights in property predated the Declaration of Independence and the American Constitution. Blackstone noted that property is an "absolute right, inherent in every Englishman … which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND Bk. 1, Ch. 1 at 135 (Univ. of Chicago Press 1979) (1765). From the pronouncement that "a man's house is his castle" (Sir Edward Coke, THIRD INSTITUTE OF THE LAWS OF ENGLAND at 162 (William S. Hein Co. 1986) (1644)) to William Pitts' argument that the "poorest man" in the meanest hovel can deny entry to the King (*Miller v. United States*, 357 U.S. 301, 307 (1958)), the common law recognized

the individual right in the ownership and use of private property. Blackstone captures the essence of this right when he notes that the right of property is the "sole and despotic dominion … over external things of the world, in total exclusion of the right of any other person in the universe." Blackstone, COMMENTARIES, *supra*, Bk. 2, Ch. 1 at 2. The individual rights in private property are part of the common law heritage that our Founders brought with them to America.

Alexander Hamilton argued that the central role of property rights is the protection of all of our liberties. If property rights are eliminated, he argued, the people are stripped of their "security of liberty. Nothing is then safe—all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). This idea was also endorsed by John Adams: "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). Our nation's Founders believed that all which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 10, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION (Philip B. Kurland and Ralph Lerner, eds., Univ. Chicago Press 1987) 597.

II. The Court Should Grant Review on the Important Question of Whether the Emergency Proclamation, by itself, Extinguishes the Property Owner's Right to Exclude.

The lower court ruled that allowing former renters to remain in possession of the landlord's property rent-free was a mere regulation of a "voluntary relationship" between landlord and tenant. Pet. App. At 15a. But this is not a "mere regulation." The only way that the tenants were on the landlord's property is through the tenants' agreement to pay rent. Once that State absolved the tenants of that obligation and prohibited the landlord from evicting the tenants, the State erased that landowners' right to exclude.

"The right to exclude is 'one of the most treasured' rights of property ownership." *Cedar Point Nursery*, 594 U.S. at 149; *Kaiser Aetna*, 444 U.S. at 176 (The right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."). The *Kaiser* Court held "that the 'right to exclude'" is so fundamental that the Government may not take that right "without compensation." *Id.* at 179; *Dolan*, 512 U.S. at, 384.

The Washington Court's classification of this proclamation as a mere regulation of property is similar to the argument that this Court rejected in *Nollan*, *supra*. There, this Court declined to classify a condition on a building permit requiring the owner to allow public access to his private beach as a mere restriction on use. Such a "restriction" usurps the right to exclude others. *Nollan*, 483 U.S. at 831. The Fifth Amendment prohibits such an action without the payment of just compensation.

This is quite different from the situation at issue in *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980), relied on by the court below. In *PruneYard*, the shopping center sought to bar individuals from distributing brochures and soliciting signatures for petitions in the area of the shopping mall open to the public. *Id*. at 78. The shopping center had invited the general public onto the property – more than 25,000 people visited the center each day. *Id*. The Court did not consider the question of whether the commercial tenants of the mall – the stores – could retain their space without paying rent. It is one thing to require that the public areas of the mall be open to all and quite another to say that any store can usurp space in that mall without paying rent to the owner.

In this case, the renters initially occupied their apartments under an agreement to pay rent to the landowner. The Washington proclamation essentially canceled the obligation to pay rent and forced the landowners to allow the renters to become squatters on the owners' property. This is a physical invasion. Even conceding, for the sake of argument, that the State had an important purpose, it could have served that purpose by paying the rent of the tenants to the landlord. That would have been just compensation.

The purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). If the State of Washington believed that a public purpose could be accomplished through allowing individuals to remain on the landlords' property rent free, that was a public burden that should be borne by the public as a whole through

the payment of just compensation. The commandeering of private property for the purpose of confining citizens during a "stay at home" order (Pet. App. at 6a (the proclamation allowed as many as 790,000 people to remain rent free on their landlords' properties); 4a (citizens ordered to stay at home)) is not a traditional "public use" under "the most natural reading" of the "public use" requirement of the Fifth Amendment. That natural reading requires that the public be allowed to use the property or that ownership is transferred to the government. *See Kelo*, 545 U.S. at 508 (Thomas, J., dissenting). But even if the State's public purpose qualifies as a public use it still requires compensation to be paid to the landowner. The public use requirement of the Takings Clause is a precondition to the government's power of taking the property. *See id.* at 496, (O'Connor, J., dissenting). Even with a public use, compensation is still required. These two conditions ensure that the great object of government in securing the right to property is upheld. *Id*.

CONCLUSION

The Court should grant review in this case because the right to exclude others is a core aspect of the individual's rights in property protected by the Constitution. The decision below stripped that right from Washington landowners. The Fifth Amendment only requires the payment of money to the property owner. The State's belief that its purpose for invading the right to exclude is sufficiently important *may* qualify as a "public purpose" under this Court's decision in *Kelo* to replace the "public use" requirement with a deferential public purpose requirement. It does not, however, free the State of the obligation to pay just compensation.

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