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 Petition for Writ of Certiorari to the Supreme Court of Washington

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

When the Center for Disease Control enacted an eviction ban to keep tenants in place during the COVID-19 lockdown, this Court said that "preventing [owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.,* 594 U.S. 758, 765 (2021) (per curiam).

When the State of Washington implemented a similar eviction ban for the same reason, the Washington Supreme Court below "was not without sympathy to the fact that the petitioners have been made to bear the cost of accommodating a public need." Pet.App. 16a. Nonetheless, it held that commandeering private property for public pandemic housing was not a physical taking. It cannot be reconciled with the precedents of this Court and the Eighth Circuit.

Whether a local housing ordinance effects an unconstitutional physical taking is a persistently misunderstood aspect of Fifth Amendment jurisprudence. It has caused splits of opinion amongst the lower courts and is "an important and pressing question." *74 Pinehurst LLC v. New York*, 218 L.Ed.2d 66, 66 (2024) (Thomas, J., respecting denial of certiorari). Private property owners cannot be singled out to bear the cost of public needs, *Armstrong v. United States*, 364 U.S. 40, 49 (1960), but it still happens nonetheless, as it did here.

This case presents an opportunity for this Court to clarify and resolve the dispute about whether *Yee v. Escondido* or *Cedar Point Nursery v. Hassid* governs

physical takings claims in the context of housing regulations. It is an as-applied challenge to a Washington executive order that "prevent[s] petitioners from evicting actual tenants for particular reasons," *74 Pinehurst LLC*, 218 L.Ed.2d at 66, but without the reliance interests of other contexts such as rent control.

The state court decision below was based upon federal regulatory takings law and is justiciable. Further, the Washington Supreme Court held that its determination was not moot upon grounds that also satisfy Article III.

The petition should be granted.

ARGUMENT

I. Certiorari Is Needed to Resolve this Conflict of Law

Although the State does not fully acknowledge the conflict with this Court's takings precedents, it does recognize the conflict with the Eighth Circuit's *Heights Apartments, LLC v. Walz*, 30 F.4th 720, *rehearing and rehearing en banc denied*, 39 F.4th 479 (8th Cir. 2022). Yet, by characterizing *Heights* as incorrectly decided and siding with the dissent, the State only emphasizes the need for this Court to resolve the question, which has citable authority on both sides.

The court below made two related substantive holdings that warrant this Court's review: (1) that a physical taking can only occur upon an original invasion by a stranger; and (2) that regulations of the landlord-tenant relationship are exempt from physical takings scrutiny.

Specifically, it held that because Petitioners voluntarily signed a lease with their tenants at the outset, the tenants are not strangers; and therefore, Petitioners are not subject to a forced occupation—regardless of whether the lease expired or the tenants violated the terms. Pet.App.15a. The court's adoption of this irrevocable invitation is unsupported and unsupportable and transforms all leases into a new and qualitatively different occupancy of the State's choosing. It cannot be reconciled with *Loretto v. Teleprompter Manhattan CATV Corp.*, which held that a physical invasion was categorically unconstitutional and not simply a permissible regulation of use; and moreover, that a landlord's ability to rent its property may not be conditioned upon the waiver of a physical takings claim. 458 U.S. 419, 438–39 (1982).

Under Washington's eviction ban, the tenant is only the beneficiary of the property right commandeered by the State to serve the public need of housing people during a lockdown. Whether government-mandated access to property ultimately benefits a third-party (as in *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 143 (2021)), the public (*Kaiser Aetna v. United States*, 444 U.S. 164, 166 (1979)), or the government itself (*United States v. Causby*, 328 U.S. 256, 259 (1946)), the identity of the beneficiary does not change the fact that the State appropriated this fundamental property right in the first place. *Loretto*, 458 U.S. at 432 n.9 (a physical taking is "without regard to whether the State, or instead a party authorized by the State, is the occupant"). When the State takes absolute control of the right to exclude it is a categorical physical taking. *F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252–53 (1987) ("this element of

required acquiescence is at the heart of the concept of occupation" and transforms third parties into "interloper[s] with a government license").

Consequently, the decision below conflicted with this Court's precedent when it placed all regulations of the landlord-tenant relationship in a bucket marked "not a taking." *Yee v. Escondido* does not categorically ban all physical takings cases within the landlord-tenant sphere. Rather, it holds that complaints about economic use and the amount of rent that a housing provider can charge are to be evaluated under *Penn Central*. *Yee v. Escondido*, 503 U.S. 519, 531 (1992) (citing *Penn Central Transp. Co. v. City of New York,* 439 U.S. 883 (1978)). It also specifically determined that a forced occupation could be actionable as a physical takings claim. *Id.* at 531–32.

II. The Decision Below Was Grounded in Federal Law

State court decisions are reviewable by this Court when the "decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long,* 463 U.S. 1032, 1040–41 (1983); *Florida v. Powell*, 559 U.S. 50, 50–51 (2010). Conversely, there is no jurisdiction if the decision was based upon an independent state ground that is "expressly assert[ed]" to be "distinct from, or broader than, those delineated in [the Fifth Amendment]." *Powell*, 559 U.S. at 50. The independent state ground must render any decision by this Court superfluous; in other words, as no more than "an advisory opinion" that the state court could

freely ignore, leaving the original decision intact. *Long*, 463 U.S. at 1042.

This Court has jurisdiction. Takings claims brought under the Washington constitution are decided based upon federal law. *Wash. Food Indus. Ass'n & Maplebear, Inc. v. City of Seattle*, 1 Wash.3d 1, 29–35 (2023) (equivalent treatment of state and federal takings claims, relying on federal caselaw); *Yim v. City of Seattle*, 194 Wash.2d 651, 658–59 (2019) (Washington "define[s] regulatory takings consistent with federal courts applying the takings clause of the Fifth Amendment," and declines to recognize a Washington-specific definition). When a state constitution is applied identically to that of the U.S. Constitution, jurisdiction is warranted. *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 106 (2003); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

In addition, the court below assumed that federal law applied to its Takings question, Pet.App.15a, and expressly based its reasoning upon its interpretation of *Cedar Point*, *Yee*, and *Loretto*. Pet.App.14a–16a. It held that the physical intrusion here was distinct from the intrusion in *Cedar Point* and more akin to the permissible regulation of the landlord-tenant relationship in *Yee*. Pet.App.15a.

This Court is not deprived of jurisdiction because the court below "assumed without deciding" that federal law applied and cited to a state case. Pet.App.15a. *See, e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 36–37 (1996); *Delaware v. Van Arsdall*, 475 U.S. 673, 678, n. 3 (1986). In fact, the only state case referenced was *Yim*, which followed federal regulatory takings law. Pet.App.15a. *See Illinois v. Rodriguez,* 497 U.S. 177, 182 (1990). Nor does the Court lack jurisdiction

because Petitioners raised state causes of action in state court. The Washington Supreme Court expressly distinguishes independent state law when it wants to. *See Collier v. City of Tacoma*, 121 Wash.2d 737, 745–46 (1993). Here it did not, and instead relied on federal law to resolve the dispute. As such, review by this Court is warranted. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 568 (1977) ("at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did").

III. The Decision Below Is Justiciable

The Washington Supreme Court held that this case was justiciable even after the state rescinded the eviction ban. It considered (1) whether the case is a matter of public concern, (2) the need for an authoritative determination to guide public officials, (3) the likelihood of recurrence, and (4) the quality of the advocacy. Pet.App.8a. "All four factors weigh[ed] in favor of considering this case on the merits." *Id.*; Pet.App.47a–48a (Washington's intermediate appellate court held the same based on the first three factors).

Likewise, Article III requires this Court to consider Cases or Controversies, and mootness is one element of general justiciability. For reasons substantially similar to those found by the court below, both exceptions to mootness under Article III are satisfied, each of which independently provides jurisdiction. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189–91 (2000) (discussing the voluntary cessation exception and the capable of repetition yet evading review exception).

First, the State voluntarily ceased its eviction ban after litigation was underway. "The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012). Moreover, "by the time mootness is an issue, the case has been brought and litigated, often (as here) for years [and] [t]o abandon the case at an advanced stage may prove more wasteful than frugal." *Friends of the Earth, Inc.*, 528 U.S. at 191–92. Thus, to defeat this exception, the government has a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* at 189. If that burden remains unsatisfied, "the courts have rightly refused to grant defendants such a powerful weapon against public law enforcement." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

The State's "triple confirmation" that the eviction ban was rescinded (BIO.21) does not change the fact that cessation was voluntary, nor prevent the State from implementing it again; particularly when it was enacted by executive order. Pet.App.79a–95a. Furthermore, "since the [State] continues to defend the legality of [its action], it is not clear why the [State] would necessarily refrain from [the same conduct] in the future." *Knox*, 567 U.S. at 307. Thus, the Washington Supreme Court expressly held that there was a "likelihood of recurrence" of the government conduct at issue and a corresponding need for an authoritative determination to guide public officials. Pet.App.8a ("Undoubtedly, our state will face crisis again that will call for the use of

emergency power. It is appropriate for this court to consider whether that power was used lawfully here to guide its use in the future").

Second, the eviction ban is capable of repetition yet evading review. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (when the disputed action was too short in duration to be fully litigated and there was a reasonable expectation that the complaining party would be subject to the same action again). For short lived orders especially, review shall not be denied "simply because the order attacked has expired[.]" *Gannett Co. v. DePasquale*, 443 U.S. 368, 377 (1979); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976).

Here, the executive order that stripped Petitioners of their right to exclude lasted just fifteen months. Pet.App.79a–95a. The short duration of the eviction ban evades review. *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 774 (1978) (eighteen months was "too short a period of time for appellants to obtain complete judicial review"); *S. Pac. Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498, 514–16 (1911) (two-year period was too short); *Burlington N. R. Co. v. Bhd. of Maint. of Way Emps.*, 481 U.S. 429, 436, n. 4 (1987) (disputes resolved by executive or legislative action are capable of repetition yet evading review).

It can also be reasonably assumed that Petitioners will someday be subjected to a similar order. *Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty.*, 478 U.S. 1, 6 (1986). The Petitioners remain housing providers in Washington, Pet.App.37a, and the court below, familiar with the practices of Washington's political branches, recognized a likelihood of future recurrence that mandated judicial guidance. Pet.App.8a. The anticipated recurrence

does not depend on a future pandemic, but an eviction ban enacted in response to *any* perceived emergency. *See* Cal. Apt. Ass'n (CAA) Amicus Br. 5, 17–19 ("local jurisdictions are increasingly inclined to treat such moratoria as just another tool in their regulatory toolbox") (citing San Diego's eviction ban in response to flooding and Los Angeles's eviction ban to prevent homelessness).[1]

IV. The Substantial Public Interest Warrants Review

In the rush to protect tenants, government officials often overlook that housing providers are worthy of protection, too. And when the government attempts to improve the public condition by forcing private owners to pay for public benefits, there are often cascading, negative impacts beyond just the constitutional implications of taking "[the] shorter cut." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Recognizing this, Oregon, for example, compensated its landlords after it forced them to provide public pandemic housing. *See* More Housing Now Amicus Br. 12–14. But most governments, including Washington, do not. The Constitution exists to correct such oversights.

Petitioners Gene and Susan Gonzales exemplify many of the nation's housing providers. Pet.App.37a. These small "mom and pop" landlords collectively own approximately 50% of the single-family rental units and 77% of the small building units; and one-third are

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[1] It is also arguable whether the constraints of Article III apply this circumstance, where the Washington Supreme Court determined that this case was justiciable and there were no subsequent intervening events. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617–23 (1989); *U.S. Dep't of Lab. v. Triplett*, 494 U.S. 715, 730 (1990) (Marshall, J., concurring).

retirees who need the rental income to survive. *See* Cato Inst. Amicus Br. 17. This group was also the most likely to have tenants default on rent during the pandemic. *See* Minn. Multi-Housing Ass'n (MMHA) Amicus Br. 5.

When the government compels an owner to house a non-paying, non-lease abiding tenant, often for an indefinite term, the resulting distress hurts everyone. The financial implications can be both lasting and profound. *See* MMHA Amicus Br. 5, 8, 11–12 (estimating $97 million in rental debt in Minnesota in 2024); Apt. Ass'n of Greater L.A. Amicus Br. 21; GRE Downtowner Amicus Br. 8–9. Particularly when the owner remains responsible for the mortgage, taxes, insurance, and maintenance. *See* MMHA Amicus Br. 6–7; CAA Amicus Br. 14–15; Rental Prop. Ass'n of Wisc. Amicus Br. 7, 10. Eviction bans also force owners to house tenants who engage in abusive or criminal conduct or damage the property. *See* MMHA Amicus Br. 10; CAA Amicus Br. 15.

Money judgments can be an insufficient remedy. *See* MMHA Amicus Br. 13. And ultimately, eviction bans decrease the availability of affordable housing as owners struggle to shoulder the heavy burden of maintaining this public benefit. *See* Rental Prop. Ass'n of Wisc. Amicus Br. 10–14; Rental Housing Ass'n of Wash. Amicus Br. 4; Cato Inst. Amicus Br. 14–16, 18–19. This is no small problem considering the severe national housing shortage and the fact that in 2020, there were 9.2 million units in arrears on rent. Cato Inst. Amicus Br. 16, 18–19.

Moreover, neither Washington's eviction ban, nor COVID eviction bans in general, are isolated incidents. *Yee* "inadvertently let a genie out of the

bottle." CAA Amicus Br. 2. Forced transfers of property rights, "are becoming commonplace," Small Prop. Owners of S.F. Inst. Amicus Br. 2, and part of "an already growing trend … applied to residential rental housing." CAA Amicus Br. 4. Aspects of the bans have remained permanent in some jurisdictions, *id.* at 4–5, 11–15, 17–20, new bans have arisen, *id.* at 5, 17–18, and declarations of emergency foreshadow more. *Id.* at 5, 19.

Nonetheless, the government, as always, retains the power to regulate the landlord-tenant relationship. The Fifth Amendment does not circumscribe that power but simply holds that when regulation "goes too far," the government must also pay for the property rights taken. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005). Consequently, the State's concerns about the potential impact upon its legislative prerogative are unfounded. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 36–37 (2012) ("Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. … The sky did not fall after *Causby,* and today's modest decision augurs no deluge of takings liability.") (cleaned up).

Nor do Petitioners seek the all-encompassing rule that the State claims. Petitioners agree that anti-discrimination laws, such as those that drew the State's concern, could be implemented free of the claim that their enactment was an unconstitutional physical invasion. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964). Rather, Gonzales asks this Court to determine the narrow but

critically important question of whether *Yee* or *Cedar Point* applies to regulations that force property owners to cede their fundamental right to exclude to tenants beyond the terms of a valid lease.

CONCLUSION

This Court should grant the petition.

DATED: May 2024.

Respectfully submitted,

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