No. 24-435

IN THE

Supreme Court of the United States

GHP MANAGEMENT CORPORATION, *et al.*,

Petitioners,

v.

CITY OF LOS ANGELES, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief of the Liberty Justice Center as Amicus Curiae Supporting Petitioners

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Question Presented

The Takings Clause protects the right of property owners to be compensated when their property is taken for public use, even if only temporarily. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 32 (2012). When the government authorizes a third party to enter and occupy private property this infringes upon the owner's fundamental right to exclude and constitutes a compensable taking. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150 (2021).

The City of Los Angeles imposed an eviction moratorium preventing landlords from evicting tenants for nonpayment of rent or other violations of their rental agreements, including the presence of pets and unauthorized additional occupants, during the "Local Emergency Period" of indefinite duration declared in response to the COVID-19 pandemic.

The question presented is whether an eviction moratorium depriving property owners of the fundamental right to exclude nonpaying tenants effects a physical taking deserving of just compensation.

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Interest of the Amicus Curiae[1]

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation firm that pursues strategic, precedent-setting litigation aimed at revitalizing constitutional restraints on government power and protecting individual rights. The Liberty Justice Center is interested in this case because the protection of private property rights is a core value vital to a free society.

Summary of Argument

In response to the COVID-19 pandemic, the City of Los Angeles enacted a series of ordinances that effectively acted as an eviction moratorium, prohibiting property owners from evicting tenants for the indefinite duration of a "Local Emergency Period." The City justified this scheme as a public-health measure, maintaining that it would prevent uncessary housing displacement and housed individuals from falling into homelessness during a global pandemic. But property owners were left with no recourse against tenants who either lived in their properties rent-free or violated their lease agreements by housing unauthorized occupants, keeping pets, or causing nuisances. No late fees could be charged for unpaid rent. Landlords lost all control over their property, even losing the ability to remove

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. All parties received timely notice of Amicus's intent to file this brief.

the property from the rental market for their own personal use. The City authorized this intrusion and empowered tenants to bring a private cause of action against any landlord who dared to question the applicability of the eviction protections to the tenant's circumstances. If that does not constitute a physical taking of property, it is difficult to imagine what would.

There is no shortage of how-to guides[2] and legal resources for tenants looking to evade eviction during the COVID-19 pandemic and otherwise. And it is no surprise that many people have done so—living rent-free for three or more years in one of the most expensive cities in the world is an unbeatable deal. But the Constitution forecloses Los Angeles from providing this gravy train at Petitioners' expense. If the City wants to commandeer Petitioners' property to use as free housing in an emergency, it must pay just compensation to the rightful property owners. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

This Court should grant the petition and put an end to this racket. Absent judicial action, cities will be free to enact similar eviction moratoriums that commandeer private property for public use on a

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[2] *See, e.g.,* Stay Housed LA, https://www.stayhousedla.org; Tenant Power Toolkit, https://tenantpowertoolkit.org

whim, without compensating property owners for their loss.

Argument

I. The right to exclude is a fundamental aspect of property rights, and by transferring this right from property owner to tenant, the eviction moratorium imposes a taking.

Property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, Commentaries, *2; *see also Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("One of the main rights attaching to property is the right to exclude others" (citing 2 William Blackstone, Commentaries, ch. 1)). That right of exclusion is core to property itself, such that this Court has described the "right to exclude [as] 'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

Indeed, this Court's cases repeatedly emphasize that "the right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* at 150 (2021) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)).

But the eviction moratorium adopted by the City of Los Angeles took that important stick from the bundle of rights held by property owners who rent their property and transferred it to their tenants by granting tenants immunity from eviction.

In *Hassid*, this Court rejected the Ninth Circuit's holding that an easement for unions to enter a property 120 days out of the year was simply a use restriction rather than a taking. *Id.* at 154. "Saying that appropriation of a three hour per day, 120 day per year right to invade the growers' premises 'does not constitute a taking of a property interest but rather . . . a mere restriction on its use, is to use words in a manner that deprives them of all their ordinary meaning.'" *Id.* (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987)).

This Court should also reject the Ninth Circuit's holding in this case that the eviction moratorium is a reasonable regulation of the landlord-tenant relationship, which denies landlords the right to evict nonpaying tenants or tenants who otherwise violate the rental agreement. To call the City's eviction moratorium a "mere restriction" on use rather than a taking deprives words of their ordinary meaning. *Id.*

The eviction moratorium is one method of protecting tenants from eviction, but it shifts the full costs of this protection onto the landlords. For various reasons related to COVID-19, the City believed it was important to public health and safety that tenants remain housed, even if they were

unable to pay their rent. But rather than subsidizing the rent of tenants who found themselves unable to pay, or providing substitute housing for tenants facing eviction, or implementing other programs to help tenants refrain from violating the provisions of their rental agreements, Los Angeles instead decided to place the burden of keeping tenants housed solely on Petitioners.

That is exactly the solution the Takings Clause forecloses. The Takings Clause is "designed 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). Government actors are therefore barred from putting the private property of an individual to a public use without first providing that individual compensation for the exaction—it is neither right nor just to single out individuals to bear the cost of fulfilling the public good. And yet that is precisely what the City's eviction moratorium does.

II. The Ninth Circuit has misinterpreted the "voluntary" distinction in *Yee*.

In denying that the eviction moratorium violates the Takings Clause, the Ninth Circuit erred in relying on *Yee v. City of Escondido*, 503 U.S. 519 (1992). The Ninth Circuit held that *Yee* stands for the proposition that landowners who voluntarily enter the rental market necessarily subject themselves to regulation of the landlord-tenant relationship and forfeit the right to exclude a tenant

from the property or to complain of a physical taking in the future. *GHP Mgmt. Corp. v. City of L.A.*, No. 23-55013, 2024 U.S. App. LEXIS 13097, at *3 (9th Cir. May 31, 2024). But *Yee* concerned a local rent control law for mobile home parks. It did not involve a government restriction on the right to exclude.

In *Yee*, this Court determined that the government had not mandated a physical invasion of landlords' property—and therefore had not taken their right to exclude—because the tenants were invited by the landlords, "not forced upon them by the government." 503 U.S. at 528. The regulatory scheme in *Yee* limited rent increases but did not decrease the rent already owed, and the property owner retained the right to evict a tenant with 6 or 12 months notice. *Id*. at 527–528. By contrast, the eviction moratorium functionally prohibits eviction for any reason—including nonpayment of rent—during the "Local Emergency Period," an indefinite period of time when enacted, which ultimately lasted more than three years.

The Ninth Circuit's focus on *Yee's* voluntary landlord-tenant relationship is misplaced in this case for three reasons.

First, the lower court's reasoning ignores the fact that tenants invited to occupy a property may lose that right if they violate the terms of their rental agreement or fail to pay rent. Ordinarily, a landlord retains the right to exclude tenants for violating provisions of the rental agreement, nonpayment of rent, or upon deciding to move into the property

themselves. The landlord here never voluntarily agreed to rent the property to the tenant for free, indefinitely, or unconditionally. Rather, the landlord agreed to rent to the tenant *only if* certain conditions were satisfied, including timely payment of rent and conformance with other terms of the rental agreement. The eviction moratorium throws these conditions out the window and purports to authorize a tenant to violate provisions of the rental agreement without facing any consequences. Indeed, the conditions set forth in the rental agreement that the tenant must meet constitute the landlord's exercise of the right to exclude. But the eviction moratorium effectively removes those conditions without compensation and thus prohibits the landlord from exercising the right to exclude.

The involuntary continuation of occupancy at a price of *zero dollars* necessarily results in the physical occupation by the tenant of the landlord's property pursuant to a public command. A tenant who is no longer authorized to occupy the property under the terms of their rental agreement but is instead unilaterally authorized to do so by government ordinance cannot continue to be called a lessee; they are more accurately described as an "interloper with a government license." *See FCC v. Fla. Power Corp.*, 480 U.S. 245, 252–253 (1987).

A second reason why the Ninth Circuit's focus on *Yee's* voluntary landlord-tenant relationship is misplaced is that, contrary to the Ninth Circuit's finding, the eviction moratorium does not merely

regulate the voluntary landlord-tenant relationship. Quoting *Yee*, the Ninth Circuit stated that "'[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land' by a third party." *GHP Mgmt. Corp.*, 2024 U.S. App. LEXIS 13097, at *2 (quoting *Yee*, 503 U.S. at 527) (emphasis in original).

Although this Court has consistently held that the states have broad power to regulate housing conditions and the landlord-tenant relationship, in those cases the government did not authorize an "occupation of the landlord's property by a third party." *Loretto*, 458 U.S. at 440. This Court held in *Hassid* that a regulation granting union organizers a right to physically enter and occupy a grower's property was a per se physical taking because one does not forfeit the right to exclude anyone from one's property by inviting particular people on to the property. 594 U.S. at 149. In constrast, in *Yee*, "Petitioners' tenants were invited by petitioners, not forced upon them by the government." 503 U.S. at 528.

The eviction moratorium prohibits a landlord from evicting third parties expressly barred by the rental agreement—additional occupants or pets. *See Loretto*, 458 U.S. at 440. When a landlord enters into a rental agreement expressly prohibiting pets and additional occupants it cannot fairly be said that the landlord has *voluntarily* invited these prohibited third parties onto their private property. And a landlord's decision to open a property up to

particular tenants does not mean that the landlord has voluntarily opened the property to *any* tenants.

A final reason the Ninth Circuit's focus on *Yee's* voluntary landlord-tenant relationship is misplaced is that *Yee* distinguished the scenario presented in this case and suggested it might require a different outcome: "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528 (citing *Fla. Power Corp*., 480 U.S. at 251–52, n.6; *see also Nollan*, 483 U.S. at 831–32; *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 877 (1983) (Rehnquist, J., dissenting)).

"Perpetuity" means an "endless or indefinitely long duration or existence." *Valley Park Ranch, LLC v. Commissioner*, No. 12384-20, 2024 U.S. Tax Ct. LEXIS 792, at *33 (T.C. Mar. 28, 2024) (citing *Perpetuity, Random House Webster's College Dictionary* (2d ed. 2001)). Here, Los Angeles has, in fact, "compel[led] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528. At the start of the eviction moratorium, no end date was set; the only limitation was the duration of the "Local Emergency Period," which was repeatedly extended by cities and states all over the country. The eviction moratorium prohibits the property owner from removing their property from the rental market for the indefinite duration of the "Local Emergency Period," and in Phase I (ultimately lasting from

March 2020 to June 1, 2022) landlords could not do so even for their own personal use.

The Ninth Circuit incorrectly held that physical possession of the rental property by nonpaying tenants for the indefinite duration of the "Local Emergency Period" was acceptable because theoretically a landlord could evict a tenant for "reasons not otherwise prohibited." *GHP Mgmt. Corp.,* 2024 U.S. App. LEXIS 13097, at *3. But in reality, the eviction moratorium operated as a "get out of jail free card" for the duration of the "Local Emergency Period" because a tenant merely needed to declare, without any substantiating proof, that COVID-19 was the cause of their violation or nonpayment, and this allowed them to evade eviction indefinitely.

Granting tenants (and unauthorized occupants) the ability to violate their rental agreements without consequence goes far beyond regulating a voluntary landlord-tenant relationship and constitutes an unconstitutional taking under the Fifth Amendment.

III. Granting tenants a right to retain possession of property indefinitely, for free, and in violation of provisions of their rental agreement is a physical taking requiring compensation.

"Government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Hassid*, 594 U.S. at 149. "The essential question is not . . . whether the government

action at issue comes garbed as a regulation, . . . it is whether the government has physically taken property for itself or someone else." *Id.*

In *Hassid*, the regulation requiring access was a per se physical taking because it "appropriate[d] for the enjoyment of third parties the owners' right to exclude." *Id.* Similarly, the eviction moratorium transfers the right to exclude from the landlord to the nonpaying tenant and their unauthorized occupants and pets. It does not matter "that the physical occupation here is by tenants and not by the [City] itself." *Hall v. Santa Barbara*, 833 F.2d 1270, 1277 (9th Cir. 1986). As this Court noted in *Loretto*, "[a] permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant" 458 U.S. at 433 n.9. The eviction moratorium clearly authorizes a physical occupation by the tenant contrary to the terms of the tenant's rental agreement.

Moreover, the temporary yet indefinite nature of the "Local Emergency Period" cannot save the eviction moratorium from constituting a compensable taking. A taking does not need to be permanent to be compensable; even temporary invasions are compensable takings. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 337 (2002); *see also Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012) ("Ordinarily,

this Court's decisions confirm, if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking.").

The war against COVID-19 is not the first time the government has temporarily commandeered private property in the name of public necessity. In the World War II era, "[i]n support of the war effort, the Government took temporary possession of many properties. These exercises of government authority, the Court recognized, qualified as compensable temporary takings." *Ark. Game & Fish Comm'n*, 568 U.S. at 33; *see also First English Evangelical Lutheran Church*, 482 U.S. at 318 (noting the compensation required for "temporary" government appropriations of private property in the WWII era). This Court has recognized a period of seizure as short as five and one-half months as a compensable taking. *See United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (holding that the government must pay just compensation to the coal company in the amount of the operating loss sustained during the period that the government possessed and operated the mine to avert a strike). Here, the eviction moratorium lasted for 47 months, more than eight times as long as the compensable taking in *Pewee Coal*.

Under this Court's takings jurisprudence, brief invasions are compensable. The duration of the invasion affects the amount of compensation due, but not whether compensation is required. *United States v. Dow,* 357 U.S. 17, 26 (1958); *see also United States*

v. Gen. Motors Corp., 323 U.S. 373, 380 (1945). To put it simply, "the more you take the more you pay." Richard A. Epstein, *Simple Rules for a Complex World*, 131, (1995). If temporary flooding in *Arkansas Game & Fish Commission* was a taking of property, then indefinite flooding must also be a taking. Indefinite physical occupations are what the eviction moratorium required on its face at the time of enactment; the eviction moratorium was set to last for the duration of the "Local Emergency Period" defined as "March 4, 2020 to the end of the local emergency as declared by the Mayor."[3]

The government is not only required to pay the equivalent rental value of a building that it has temporarily commandeered, but must also compensate the rightful owner for damage or depreciation in value of the property. *Gen. Motors Corp.*, 323 U.S. at 383–84. Los Angeles has permanently devalued Petitioners' property, placing the cost of protecting public health during the COVID-19 emergency on Petitioners, rather than accepting the burden as the City's own responsibility. *See Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 765 (2021) ("Despite the [government's] determination that landlords should bear a significant financial cost of the pandemic, many landlords have modest means. And preventing them from evicting tenants who breach their leases

[3] Ordinance No. 186585, available at http://clkrep.lacity.org/onlinedocs/2020/20-0147-S19_ORD_186585_03-31-2020.pdf

intrudes on one of the most fundamental elements of property ownership—the right to exclude.").

The Ninth Circuit claims that Petitioners' lost rent payments does not represent a diminution in property values. But the value of a rental property is determined by approximating the value of future rents to be collected from that property.[4] The prospect of future emergencies justifying eviction moratoriums thus devalues the properties in the eyes of any prudent investor, who stands to lose money even if such policies only delay the collection of rent, due to the time value of money, and who faces the risk that a judgment-proof tenant will not actually pay the full amount of their past-due rent at the end of the moratorium period.[5] There is no way of knowing when the City will implement such a policy again, and there is no shortage of housing-related "emergencies" in a state with ever-rising housing costs and a growing unhoused population that the government has attributed to the "winding down" of pandemic-era eviction protections.[6]

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[4] Damon Darlin, "Home valuation: Pull out your calculator," N.Y. Times, April 3, 2006, https://www.nytimes.com/2006/04/03/realestate/home-valuation-pull-out-your-calculator.html

[5] Catherine Cote, "Time Value of Money (TVM): A Primer," Harvard Business School Online, June 16, 2022, https://online.hbs.edu/blog/post/time-value-of-moneyy

[6] HUD Press Release No. 23-278, December 15, 2023, https://www.hud.gov/press/press_releases_media_advisories/HUD_No_23_278 ("This rise in first-time homelessness is likely

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra*, 535 U.S. at 322 (citing *Pewee Coal Co.*, 341 U.S. at 115). The City has done exactly that by commandeering Petitioner's property for the promotion of public health, but it has shirked it's duty to compensate Petitioners. Picking the pockets of landlords one "Local Emergency Period" at a time cannot withstand constitutional scrutiny. In the interest of justice, the Court must enforce the duty imposed by the Takings Clause and require the City to pay for what it has taken from Petitioners.

Conclusion

In what meaningful sense could Petitioners be said to actually *own* the properties in question during the emergency period? They were prohibited from physically occupying them and from renting those properties to another tenant who might actually pay their rent. Worse, they were tasked with a continuing duty to maintain the residences in accordance with California law,[7] at their own

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attributable to a combination of factors, including but not limited to, the recent changes in the rental housing market and the winding down of pandemic protections and programs focused on preventing evictions and housing loss.")

[7] Calif. Civ. Code §§ 1941, 1942.

expense, solely for the benefit of nonpaying tenants who violated their rental agreements.

The Takings Clause does not allow the government to force landlords to provide the use of their property for the public benefit simply because of the existence of a public emergency like COVID-19. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed 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*, 364 U.S. at 49.

And enforcing the Takings Clause leads to efficient outcomes for all. "Placing the government under a price system (through the payment of just compensation) increases the odds that takings will only occur when their social gains exceed their social costs." Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 Stanford L. Rev. 99, 101 (2012). If the City of Los Angeles deems it important to keep people housed, the City must bear the cost of subsidizing such an endeavor rather than foisting the costs onto landlords. "Public necessity does not defeat the obligation to pay compensation." Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brook. L. Rev. 741, 748 (1988). Landlords did not volunteer to rent their properties for free, nor to tenants who violate their rental agreements.

This Court should grant the petition and hold that the perpetual right to occupy property effects a permanent physical taking requiring just compensation.

Respectfully submitted,

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