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 *AMICI CURIAE* MORE HOUSING NOW! AND WASHINGTON MULTI-FAMILY HOUSING ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Constitutional Provisions

State Statutes

Rules

Legislative History

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

More Housing Now! ("MHN") is a 504(c)(4) organization formed under the laws of the State of Oregon. MHN advocates—through legislative lobbying and otherwise—for policies that protect and expand the housing supply in the State of Oregon. As a part of that advocacy, MHN works closely with property developers and housing providers to develop and implement market-based solutions to address the shortage of housing in Oregon and across the nation.

MHN's advocacy was instrumental to the creation of the State of Oregon's Landlord Compensation Fund Program, which provided compensation to property owners injured by state and local eviction moratoria during the COVID-19 pandemic. As a representative of housing providers and advocate for pro-housing policies, MHN has a significant interest in ensuring that property owners receive just compensation when forced to provide housing without receiving rent payments—in accordance with their fundamental rights under the Fifth and Fourteenth Amendments to the Constitution of the United States of America.

The Washington Multi-Family Housing Association (WMFHA), established in 2003, is the Washington State affiliate of the National Apartment Association (NAA). It represents residential property

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[1] Pursuant to this Court's Rule 37, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. *Amici* provided timely notice of this brief to the parties.

management companies, managers and owners of multi-family properties, apartment communities, and industry supplier companies that promote and advance the multi-family housing industry in Washington. WMFHA actively monitors and influences the legislative process to advocate equitably for the industry and the communities it services. WMFHA's educational and career development programs include national professional accreditation courses, continuing education, and opportunities. When its members' interests are at stake, WMFHA also participates in litigation to protect and promote those interests.

Many of WMFHA's members are apartment owners who—like Petitioners—have suffered under a variety of eviction moratoria enacted throughout the country during COVID-19 without receiving just compensation.

If left unreviewed, the United States Court of Appeals for the Ninth Circuit's decision below will deny rental property owners the protections enshrined in the Fifth and Fourteenth Amendments. Indeed, the Ninth Circuit now declares that a government *cannot* commit a *per se* taking when it burdens a rental property owner for the benefit of a former tenant. According to the Ninth Circuit, a government-compelled occupation of private property does not constitute a taking if the occupier was once an invitee. To reach this sweeping conclusion, the Ninth Circuit misconstrues this Court's decisions in *Yee v. City of Escondido*, 503 U.S. 519 (1992), and *FCC v. Florida Power Corp.,* 480 U.S. 245, 252 (1987), and breaks with its sister circuits' rulings in *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir.

2022), and *Darby Dev. Co. v. United States*, 112 F.4th 1017, 1037 (Fed. Cir. 2024). Therefore, a Writ of Certiorari should issue so that the Court may correct the Ninth Circuit's misapplication of the Court's precedent and resolve a significant Circuit split concerning one of the most fundamental rights held by Americans: a property owner(s)' right to exclude.

SUMMARY OF ARGUMENT

During the COVID-19 global pandemic, an unprecedented wave of government takings occurred in the form of federal, state, and local moratoria on evictions. These mandates compelled property owners to provide housing to tenants whose contractual right to occupy the premises had terminated and who otherwise would have been evicted. Indeed, by January of 2021—a mere eight months into the pandemic—it was estimated that unpaid rents in the United States were "as high as $70 billion."[2]

The federal government—in reaction to the economic pressures caused by the response of various levels of government to the pandemic—passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") which provided $2.2 trillion in economic stimulus. Many of those funds were distributed to the states in order to protect their citizens, stimulate the consumer economy, and provide assistance to those who were affected by an inability—or significantly decreased ability—to earn a living.

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[2] *Q&A: Eviction Moratoriums for Tenants in the United States*, January 26, 2021, Human Rights Watch, https://www.hrw.org/news/2021/01/26/qa-eviction-moratoriums-tenants-united-states.

Not all public relief was provided at public expense, however. To the contrary, governments across the country adopted programs that forced private property owners to bear the public burden of providing housing without compensation. As a result, rental property owners—who faced the same economic realities as everyone else during the pandemic—were forced to endure the additional government-imposed costs in the form of eviction moratoria like Ordinance No. 186585 (the "Eviction Moratorium") enacted by the City of Los Angeles (the "City"). In other words, not only did landlords likely find their own outside income depressed, they also faced an evisceration of the benefit of their investment incomes as tenants now protected by eviction moratoriums began ceasing paying rent in droves. It is for that reason that the CARES Act was a potential lifesaver in turbulent waters as federal relief was distributed to the state to stimulate the economy and assist the American people.

Certain state and local governments chose to use CARES Act money to supplement state expenditures to protect their citizens and to compensate landlords whose physical property was being taken from them in the form of an eviction moratorium that prevented landlords from evicting tenants for nonpayment of rents. For instance, Oregon—in response to efforts of *amicus* MHN and other advocates for housing providers—enacted a program ultimately providing ***full compensation*** to landlords for unpaid rents

from tenants who could not be evicted.[3] Under Oregon's program, landlords were able to recoup close to the actual damages caused by *per se* government takings.

Not all landlords around the country fared as well. A day's drive south, property owners in Los Angeles were similarly unable to evict breaching tenants for nonpayment of rent. Like Oregon, the City used a large portion of its CARES Act funding to provide rental assistance to tenants. But unlike Oregon, the City capped rental assistance at just *$2,000* per household—irrespective of the amount of monthly rent and the number of months missed.[4] This sum barely covers a single month's rent in an average Los Angeles rental unit, allowing property owners to recover only a small fraction of the costs imposed by the City.[5] Even this minimal payment was available only when qualifying low-income tenants applied for assistance and, quite literally, won the lottery. Because the program was capped at

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[3] Oregon Landlord Compensation Fund, https://www.portland.gov/phb/rent-relief/oregon-landlord-compensation-fund.

[4] *See* City of Los Angeles Emergency Renters Assistance Program, https://perma.cc/HP5P-QPHG.

[5] *See, e.g.*, Fiscal Year 2020 Fair Market Rent Documentation System, U.S. Dept. of Housing and Urban Development, http://www.huduser.gov/portal/datasets/fmr/fmrs/FY2020_code/2020summary.odn?&year=2020&fmrtype=Final&cbsasub=METRO31080MM4480 (estimating fair market rent of benchmark rental unit in Los Angeles metro area).

50,000 tenants, the City used a lottery system to distribute funds to tenant applicants.[6] Property owners themselves had no recourse.

Injured property owners in Los Angeles sought to challenge the City's taking of their property without just compensation, culminating in the Ninth Circuit's decision in *GHP Management. Corp. v. City of Los Angeles*, 2024 WL 2795190 (9th Cir. May 31, 2024).

In a short, unpublished decision, the Ninth Circuit held that the Eviction Moratorium did not constitute a *per se* taking. In so ruling, the court misconstrued *Yee v. City of Escondido*, 503 U.S. 519 (1992), as establishing that no taking can occur where, at one point in time, a voluntary relationship between a landlord and tenant existed. *GHP Mgmt. Corp.*, 2024 WL 2795190, at *1. Building on that flawed foundation, the Ninth Circuit attempted to distinguish *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), by suggesting that only "government-authorized invasions of property … are physical takings," *id.* at 152—without explaining why the government-authorized invasion of Petitioners' property failed to satisfy this standard. In the Ninth Circuit's view, the government may compel the uncompensated occupation of property so long as the property owner is a landlord. 2024 WL 2795190, at *1. This status alone transforms a *per se* taking into a

[6] *See* Supplemental Report on the Implementation of Citywide Emergency Rental Assistance Subsidy Program for Tenants Unable to Pay Rent Due to Circumstances Related to the Coronavirus (COVID-19) Pandemic, June 12, 2020, https://perma.cc/C4VN-6FPT.

law "that merely adjusts the existing relationship between landlord and tenant[.]" *Id.* This is incorrect.

Entering a lease agreement does not strip property owners of their constitutional right to exclude—but the Eviction Moratorium attempts to do so. The Eviction Moratorium therefore constituted a taking under *Cedar Point*, and *amici* respectfully urge the Court to issue the Writ of Certiorari sought by Petitioners.

ARGUMENT

A. The City's Eviction Moratorium Was a *Per Se* Taking Requiring Just Compensation.

As set forth in the Petition for Writ of Certiorari (the "Petition"), "Petitioners filed suit against the City … and asserted in the complaint that the City's eviction moratorium constituted an uncompensated physical taking of private property in violation of the Fifth Amendment." The Ninth Circuit affirmed dismissal of that claim by looking to two of this Court's decisions: *Yee v. City of Escondido*, 503 U.S. 519 (1992), and *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). Ultimately relying on *Yee* rather than *Cedar Point*, the Ninth Circuit held that the Eviction Moratorium was not a taking because it "merely adjusts" a preexisting voluntary landlord and tenant relationship. According to the Ninth Circuit, an intruding party's status as either an invitee or a trespasser is immutable and fixed at the moment the party first enters the property. But an invitee's right to occupy a property is not unconditional; it is contingent on compliance with the terms of the parties'

agreement. Once a former invitee ceases to have a contractual right to occupy the property, the government cannot compel the property owner to continue to allow the occupation without receiving compensation.

Nothing in *Yee* holds otherwise. The petitioners there were mobile home park owners in Escondido, California, who rented pads of land to mobile homeowners. *Id.* at 523. The petitioners challenged the City's rent control ordinance that prohibited rent increases absent the City Council's approval. *Id.* at 524-25. This Court held that the rent control ordinance did not authorize an unwanted physical occupation of petitioners' property and therefore did not amount to a *per se* taking. *Id.* at 532. This was because the ordinance neither forced petitioners to rent their property in the first instance, *nor prohibited them from excluding tenants from their land*:

> Petitioners voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, **neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so.**

Id. at 527-28 (emphasis added).

While the Ninth Circuit relied on the *Yee* decision's description of states' "broad power to regulate . . . the landlord-tenant relationship," it failed to recognize that power is premised on the landlord's voluntary invitation of the tenant in the first instance *and* the landlord's ongoing right to exclude the tenant pursuant to the terms of the parties' contract—

especially for nonpayment of rent. *See Yee*, 503 U.S. at 529, 531 (recognizing "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation") (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982)).[7] In fact, the Court expressly acknowledged that compelling landlords to rent their property in the first place would be a taking: "Had the city required such an occupation, of course, petitioners would have a right to compensation, and the city might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right." *Id.* at 532. The same is true when the government compels the continued occupation—without compensation—of private property after a former tenant's contractual right to occupy it has ended. *See id.* at 528 ("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*.") (emphasis added).

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[7] The Ninth Circuit's implicit assumption that rental property owners have diminished rights under the Fifth Amendment compared to all other property owners cannot be squared with this Court's pronouncements. *See Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.,* 594 U.S. 758, 765 (2021) ("[P]reventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude."); *see also Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 477 n.1 (2021) (reversing dismissal of landlords' taking claims on exhaustion grounds and urging lower court to reexamine ruling on merits and "give further consideration to these claims in light of our recent decision in *Cedar Point Nursery v. Hassid*."

The fact that this coerced occupation eventually ended as the pandemic abated does nothing to change this result. In *Cedar Point*, for example, the Court held that a California access regulation that gave outside labor organizers a right to "take access" to agricultural employers' property for limited periods was a *per se* physical taking because it appropriated property owners' right to exclude. 594 U.S. at 152 (quoting Cal. Code Regs., tit. 8, § 20900(e)(1)(C) (2020)).

> The access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.
>
> The right to exclude is "one of the most treasured" rights of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 . . . (1982). According to Blackstone, the very idea of property entails "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 W. Blackstone, Commentaries on the Laws of England 2 (1766).

> In less exuberant terms, we have stated 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." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 . . . (1979); . . . see also [Thomas] Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998) (calling the right to exclude the "*sine qua non*" of property).
>
> Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation.

Id. at 149–50.

The Court rejected the notion that the failure of the regulation to invade the property right "round the clock" made the taking any less a taking under the Fifth Amendment. *Id.* at 153–54. "[A] physical appropriation is a taking whether it is permanent or temporary," and "[t]he duration of an appropriation—just like the size of an appropriation, see *Loretto*, 458 U.S. at 436–37—bears only on the amount of compensation." *Id.* at 153. Similarly, the Court held that "physical invasions constitute takings even if they are intermittent as opposed to continuous." *Id.*

Just as the access regulation in *Cedar Point* constituted a *per se* taking by "grant[ing] labor organizations a right to invade the growers' property," *id.* at 162, so too are eviction moratoria that grant a right for nonpaying tenants to continue to occupy a landlord's property. If the government entered a lease with a property owner and then announced that it would continue to occupy the property without paying rent for an indefinite period of time, there would be little question that the government had committed a taking. The Ninth Circuit fails to explain why the result should be different when government authorizes a private individual to do the same.

Accordingly, the City's Eviction Moratorium constituted a *per se* physical taking, and the City of Los Angeles was required to provide just compensation to affected property owners. As shown below, it did not do so.

B. Oregon provided just compensation to rental property owners, and Los Angeles did not.

Like the City of Los Angeles, the State of Oregon imposed eviction moratoria that compelled rental property owners to provide housing without receiving rent. Unlike the City, however, the State of Oregon implemented a landlord compensation program sufficient to provide just compensation to landlords injured by the government's actions.

As Oregon's approach demonstrates, it was feasible for states to comply with their Fifth Amendment obligation to compensate property owners for takings. The City nevertheless failed to do so.

a. Oregon provided compensation to landlords after taking their private property for public use.

Throughout the pandemic, *amicus* MHN helped lead the effort to secure relief for housing providers suffering an historic shortfall in rent caused by eviction moratoria in Oregon. The legislature provided this relief in two stages.

HB 4401: The legislature began by enacting House Bill 4401, which took effect December 23, 2020. 2020 Or. Laws Third Spec. Sess. Ch. 3, § 2. This initial legislation "compensate[d] residential landlords for 80 percent of the past-due rent of qualified tenants that the landlord has not collected after April 1, 2020" due to hardships related to the COVID-19 pandemic. *Id.* § 2(1).

But in exchange for this partial compensation, the statute required Oregon landlords to "forgive the remaining 20 percent of the unpaid rent due from qualified tenants that ha[d] accrued between April 1, 2020, and the date of the application, upon receiving a distribution[.]" *Id.* § 2(1)(d). Thus, had the legislature stopped with HB 4401, Oregon residential landlords would have been left without a complete remedy for the losses inflicted by the eviction moratoria.

SB 278: In June 2021, however, the legislature amended HB 4401 to compensate landlords for *100 percent* of unpaid rents. 2021 SB 278, § 12(2), Ch. 420 Or. Laws 2021. This change applied retroactively, and the legislature directed the administering agency to "make distributions to adjust the compensation under" HB 4401, "without requiring that

the landlord submit an additional application." *Id.* § 13(2).

Moreover, the Oregon Legislative Assembly adequately funded the program, beginning with an allocation of "$150 million in one-time funds for [the Landlord Compensation Fund]" established by Oregon in order "to assist landlords in keeping financially stressed tenants in their homes." Oregon Landlord Compensation Fund, For Immediate Release (oregon.gov) (Jan. 28, 2021) and https://www.portland.gov/phb/rent-relief/oregon-landlord-compensation-fund.

While the state's administration of the program was far from perfect, Oregon's approach provided an adequate procedure for obtaining just compensation for the losses caused by a government taking—*i.e.*, requiring landlords to continue to house tenants notwithstanding their failure to honor their commitment to pay rent.

b. The City failed to provide just compensation to landlords after taking their private property for public use.

The City enacted the Eviction Moratorium in March 2020, banning property owners from terminating tenancies based on nonpayment of rent and other specified grounds. *See* Los Angeles Mun. Code §§ 49.99 – 49.99.9.[8] By doing so, the City authorized

[8] The Eviction Moratorium was originally imposed by Ordinance No. 186585 and was amended in May 2020 by Ordinance No. 186606.

tenants to occupy property indefinitely after terminating rent payments—which they could do without notice or any demonstration of their pandemic-related inability to pay.

After taking property owners' right to exclude and compelling them to provide free public housing throughout the pandemic, the City did not provide just compensation—or, for most landlords, *any* compensation at all. Instead, the City created the Emergency Rental Assistance Subsidy Program, which paid a maximum of two months of $1,000 rent subsidies—that is, $2,000 total—to qualifying low-income households that applied to the program.[9] Few could do so, however, because the program accepted applications for just one week: July 13-17, 2020.[10] Tenants who managed to apply during this short window were then entered into a lottery, with only 50,000 randomly selected tenants receiving any assistance.[11]

In other words, after precluding landlords from exercising their constitutionally protected right to exclude, *Alabama Ass'n of Realtors,* 594 U.S. at 765 (quoting *Loretto*, 458 U.S. at 425), the City provided

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[9] *See* City of Los Angeles Emergency Renters Assistance Program, https://perma.cc/HP5P-QPHG.

[10] *See* Los Angeles Housing & Community Investment Department, *Emergency Renters Relief Program: About the Program,* https://hcidla2.lacity.org/wp-content/uploads/2020/07/ERAS-FLYER.pdf.

[11] *See* City of Los Angeles Emergency Relief Program Application, https://perma.cc/PY2X-MNT4.

a maximum of $2,000 in compensation—which, in most cases, would not even cover the unpaid rent accrued during the two months the subsidy was paid, much less the actual damages caused by the Eviction Moratorium.

In short, whereas Oregon undertook extensive efforts to satisfy its constitutional duty to provide just compensation to landlords who suffered takings, the City created a fig leaf of a program that provided little assistance to the landlords it compelled to carry the public burden of providing housing during the COVID-19 pandemic. The City's refusal to take the necessary steps to compensate property owners flowed from its mistaken belief that no compensation was legally required—a belief that the Ninth Circuit has now endorsed and that will remain the law of the land in much of the country absent correction by this Court.

The Court should therefore grant the Petition for Writ of Certiorari to clarify that the City's Eviction Moratorium effected takings for which it has a duty to provide just compensation.

CONCLUSION

For the reasons set forth herein, *amici* respectfully request that the Court grant the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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