No. 24-435

IN THE

Supreme Court of the United States

GHP MANAGEMENT CORPORATION, *et al.*,

Petitioners,

v.

CITY OF LOS ANGELES, CALIFORNIA, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Faced with the unprecedented COVID-19 pandemic, the City of Los Angeles ("the City") enacted a temporary ordinance in March 2020 that provided residential tenants with affirmative defenses to certain COVID-19 related evictions, including evictions for failure to pay rent due to COVID-19. The ordinance expired on January 31, 2023 and required tenants to pay all rental arrears in full by February 1, 2024.

The District Court dismissed Petitioners' as-applied challenge to the ordinance seeking compensation for alleged physical and regulatory takings. The Ninth Circuit affirmed in a nonprecedential memorandum disposition.

The question presented by this Petition is:

- Whether the Ninth Circuit erred in applying more than four decades of settled Takings Clause doctrine in issuing a nonprecedential memorandum disposition that affirmed the District Court's finding that the particular allegations in Petitioners' complaint failed to plausibly allege that local, temporary, and now-expired emergency COVID-19 eviction protections were a *per se* taking in violation of the Fifth Amendment's Takings Clause.

RULE 29.6 STATEMENT

Intervenor-Respondents, Alliance of Californians for Community Empowerment ("ACCE") Action, Strategic Actions for a Just Economy ("SAJE"), and Coalition for Economic Survival ("CES") represent thousands of Los Angeles tenants. ACCE and CES are 501(c)(4) nonprofit organizations and SAJE is a 501(c)(3) nonprofit organization. They have no parent entities and no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

Petitioners ask this Court to depart from over four decades of well-established and uniform Takings Clause precedent to reverse a nonprecedential memorandum disposition affirming a motion to dismiss a *per se* takings challenge to the City of Los Angeles' temporary and expired emergency COVID-19 protections. No circuit split or question of recurring nationwide importance justifies granting this request. The Petition for Certiorari should be denied.

In March 2020, the City of Los Angeles enacted several ordinances to protect public health, avoid exacerbating Los Angeles' homelessness crisis, and prevent mass death during the COVID-19 pandemic, including Ordinance No. 186585, later amended by Ordinance No. 186606 (collectively "the Ordinance"). Contrary to Petitioners' characterization, the Ordinance was not a "moratorium," as it did not prevent landlords from filing, litigating, and enforcing evictions. The Ordinance instead temporarily provided residential tenants with affirmative defenses for a subset of evictions that included, among others, the inability to pay rent due to the COVID-19 pandemic. Landlords were entitled to collect the same amount of rent, tenants were required to pay back all rental arrears by February 1, 2024 at the latest, and any tenants who failed to meet the February 1, 2024 deadline were (and are) subject to eviction after that date. To offset any financial impact of the pandemic and the Ordinance on landlords, the City of Los Angeles and the State of California provided over $1.49 billion in direct payments to landlords through a set of emergency rental assistance programs. The Ordinance's provisions expired over two years ago on January 31, 2023.

Petitioners GHP Management Corporation et al., Los Angeles landlords, sought compensation for the Ordinance as a violation of the Takings Clause. Petitioners' complaint was dismissed with leave to amend. Petitioners elected not to amend their complaint, instead choosing to appeal. The Ninth Circuit affirmed. Now, Petitioners ask this Court to grant review on a straightforward Takings Clause claim. Petitioners' request should be rejected for four reasons.

First, Petitioners' claimed split between the Eighth, Ninth, and Federal Circuits is nonexistent because there is no material inconsistency across the circuits. The Eighth and Federal Circuits did not apply a different legal standard than the Ninth Circuit to a Takings Clause challenge, but applied the same long-standing takings precedent to materially distinct ordinances. The doctrine for *per se* takings is well-settled: laws "regulating the economic relations of landlords and tenants are not per se takings." *F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)); *see also Yee v. City of Escondido,* 503 U.S. 519, 529 (1992) (citing *Loretto* and *Fla. Power Corp.* for the same proposition). And the dispositive question when assessing a physical takings claim is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) (citing *Tahoe-Sierra Pres. Council. Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 321–23 (2002)). The Ninth Circuit, in its nonprecedential affirmance, applied this precedent and held that Los Angeles's Ordinance was a classic regulation of the landlord-tenant relationship

that falls outside the world of *per se* takings. *GHP Mgmt. Corp. v. City of Los Angeles*, No. 23-55013, 2024 WL 2795190, at *1 (9th Cir. May 31, 2024) (citing *Yee v. City of Escondido,* 503 U.S. at 527-528). Addressing challenges to different laws, the Eighth and Federal Circuits applied the same precedent and found that those enactments went beyond just regulating "economic relations" and constituted physical takings. *See Heights Apartments, LLC v. Walz,* 30 F.4th 720, 733 (8th Cir. 2022) (Minnesota executive orders banned landlords from filing eviction lawsuits); *Darby Development Company v. United States,* 112 F.4th 1017, 1035 (Fed. Cir. 2024) (CDC Order banned the enforcement of evictions). In short, each appellate court did what appellate courts routinely do: apply a settled body of law to distinct factual circumstances.

Second, long-expired and one-time COVID eviction protections and moratoria lack the ongoing national importance necessary to warrant a grant of certiorari. Petitions for certiorari should only be granted for questions of special gravity and *recurring* national importance. Los Angeles' eviction protections, like all other COVID eviction protections and moratoria across the country, have been expired for years. They are one-of-a-kind products of the COVID-19 pandemic. This Court need not devote resources to reviewing a nonprecedential disposition on an unprecedented emergency situation that has now passed.

Third, this Court has recently and repeatedly denied review for petitions claiming the same nonexistent circuit split alleged by Petitioners in cases involving physical takings claims in the broader landlord-tenant context. Nothing has changed that justifies a different outcome here. *El Papel, LLC v. City of Seattle, Washington*, 144 S. Ct. 827, 218 L. Ed.

2d 33 (2024); *Gonzales v. Inslee*, 535 P.3d 864, 867 (Wash. 2023), *cert. denied*, 144 S. Ct. 2685 (2024); *G-Max Mgmt., Inc. v. New York*, No. 23-1148, 2024 WL 4743157 (U.S. Nov. 12, 2024), *cert. denied; see also Jevons v. Inslee*, 561 F. Supp. 3d 1082 (E.D. Wash. 2021), *vacated as moot*, No. 22-35050, 2023 WL 5031498 (9th Cir. Aug. 8, 2023) (unpublished), *cert. denied*, 144 S. Ct. 500 (2023); *see also Apt. Ass'n of L.A. Cnty., Inc. v. City of Los Angeles*, 142 S. Ct. 1699 (2022) (Contract Clause challenge).

Finally, the Ninth Circuit's nonprecedential disposition was undoubtedly correct. Judges Bea, Ikuta, and Siler unanimously held that the Ordinance did not run afoul of the Takings Clause because "statutes regulating the economic relations of landlords and tenants are not per se takings." *GHP Mgmt. Corp. v. City of Los Angeles*, No. 23-55013, 2024 WL 2795190, at *1 (9th Cir. May 31, 2024) (quoting *F.C.C. v. Fla. Power Corp.*, 480 U.S. at 252).

For these reasons, this case is not a good candidate for review and this Court should deny the Petition.

STATEMENT OF THE CASE

A. The Takings Clause

The Takings Clause provides "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. There are two classes of takings claims. First, there are physical, or *per se,* takings, which occur "[w]here the government authorizes a physical occupation of property." *Yee*, 503 U.S. at 522. Second, there are regulatory takings, which occur where "a regulatory action is functionally equivalent to a classic taking." *Tahoe-Sierra,* 535 U.S. at 322. Regulatory takings are analyzed under the

Penn Central test, which looks at the economic impact and character of the governmental action. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978).

For more than four decades, it has been settled law that "statutes regulating the economic relations of landlords and tenants are not *per se* takings." *Fla. Power Corp.,* 480 U.S. at 252. This Court's modern jurisprudence on *per se* takings began in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982). In *Loretto,* this Court considered whether a New York law that required landlords to permit cable television companies to install cable facilities on their properties constituted a *per se* taking. Noting "the historical rule that a permanent physical occupation of another's property is a taking," this Court held that the New York requirement did constitute a *per se* taking. *Loretto,* 458 U.S. at 438. At the same time, the Court emphasized that it left unquestioned the State's "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Id.* at 440. The bright line established in *Loretto* was that "[s]o long as these [landlord-tenant] regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *Id.* at 440. In other words, if the government does not force landlords to accept physical occupation of their property by a third party in the first instance, a *per se* takings analysis is inappropriate and a regulatory takings analysis should be undertaken instead.

The Court emphasized the importance of voluntariness in its *per se* takings jurisprudence in *F.C.C. v. Fla. Power Corp.,* 480 U.S. 245 (1987), when it assessed a federal law regulating the rates that utility companies could charge to cable television companies for renting space on utility poles to attach cables. These charges were known as pole attachment rates. *See Fla. Power Corp.*, 480 U.S. at 250. The Court held that the law did not effect a *per se* taking because "nothing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators." *Id.* at 251. In its holding, the Court emphasized that "[t]his element of required acquiescence is at the heart of the concept of occupation." *Id.* at 252. For the Court, "[i]t is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license." *Id.* Voluntariness became the watchword for any analysis of *per se* takings.

In *Yee*, the Court affirmed the principle that landlord-tenant regulations are not *per se* takings. The Court evaluated whether a local mobile home rent control ordinance, when examined against the backdrop of a California state law that "limits the bases upon which a park owner may terminate a mobile home owner's tenancy," constituted a *per se* taking against the mobile home park owners. *Yee,* 503 U.S. at 524. Specifically, the mobile home park owners challenged their inability to evict tenants of mobile homes and their successors in the City of Escondido as a *per se* taking. *Id.* at 525. Under the mobile home scheme created by state and local law, park owners

could evict existing tenants for only limited reasons after providing 6 or 12 months' notice. *Id.* at 528. The Court held that this regulatory scheme did not effect a *per se* taking. Relying on *Loretto* and *Fla. Power Corp.,* the Court held that because the property owners "voluntarily open[ed] their property to occupation by others" in the first place, they could not claim subsequent government regulation of the landlord-tenant relationship to be a *per se* taking. *Id.* at 529. In the Court's words: "[b]ecause the Escondido rent control ordinance does not compel a landowner to suffer the physical occupation of his property, it does not effect a *per se* taking under *Loretto.*" *Id.* at 538-539. *Yee* affirmed *Loretto's* principle that states have broad power to regulate the landlord-tenant relationship without paying compensation. *Id.* at 528-29. However, *Yee* did create two limited exceptions to this rule. The first exception is where the government "*requires* [a] landowner to submit to the physical occupation of his land" in the first place. *Id.* at 519 (emphasis in original). The second exception is where the government obligates a landowner to "refrain in perpetuity from terminating a tenancy." *Id.* at 528.

Next, the Court clarified the distinction between government appropriation and regulation when assessing *per se* and regulatory takings claims in *Horne v. Department of Agriculture,* 576 U.S. 350 (2015). *Horne* concerned a federal order requiring raisin growers to give a percentage of their crop to the government, which raisin farmers challenged as a *per se* taking. The Court held that the order was a *per se* taking because it physically appropriated actual raisins "from the growers to the Government." *Horne,* 576 U.S. at 361. The holding in *Horne* rests on a crucial distinction between appropriation and regulation. While the physical appropriation of raisins is a

per se taking, a regulatory limit on production is not. *Id.* at 362. For the Court, "[a] physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends. The Government has broad powers, but the means it uses to achieve its ends must be 'consist[ent] with the letter and spirit of the constitution.'" *Id.* (quoting *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922)). To determine the appropriate class of takings analysis, the Court must look to the means through which the law operates, rather than its economic impact. This determination hinges on whether a law functions through direct physical appropriation (*per se* taking) or through regulatory limitations (regulatory taking).

Finally, *Cedar Point Nursery v. Hassid,* 594 U.S. 139 (2021) somewhat relaxed the permanency requirement for *per se* takings, but did not otherwise substantially alter the rule established through *Loretto, Fla. Power Corp., Yee,* and *Horne*. In *Cedar Point,* the Court considered whether a California regulation requiring agricultural employers to grant access to their property for labor organizers for up to three hours per day for 120 days per year constituted a *per se* taking. Reasoning that the regulation appropriated a right of access in contravention of the property owner's right to exclude, the Court held that the regulation constituted a *per se* taking, regardless of whether the occupation was temporary or permanent, intermittent or continuous. Under *Cedar Point*, the dispositive question to determine the appropriate form of analysis remains whether the government has physically taken property by any means or has instead limited a property owner's ability to use their property. *See Cedar Point,* 594 U.S. at 149 (citing

Tahoe-Sierra, 535 U.S. at 321-23). Where the government directly invades, or grants a right to invade, private property, it will give rise to a *per se* takings claim. But where the government only restricts a property owner's ability to use their own property, a regulatory takings claim is proper. Read alongside *Yee*, *Cedar Point* is a consistent application of *Yee*'s distinction between regulations of the voluntary landlord-tenant relationship and involuntary invasion. The rule consistently articulated in *Loretto* through *Cedar Point* is that mere regulation of the voluntary landlord-tenant relationship is not a *per se* taking.

B. The City of Los Angeles' Eviction Ordinance

In March 2020, faced with the unprecedented and deadly global COVID-19 pandemic, the City of Los Angeles enacted the Ordinance to address housing instability and prevent mass death. Designed to "protect public health, life, and property" by keeping residents in their homes, the Ordinance provided temporary, narrow, and limited eviction protections for residential tenants during the COVID-19 pandemic. L.A., Cal. Mun. Code § 49.99. Specifically, the Ordinance provided an affirmative defense to residential evictions of a "tenant for nonpayment of rent . . . if the tenant is unable to pay rent due to circumstances related to the COVID-19 pandemic." *Id.* § 49.99.2(A). The Ordinance also provided affirmative defenses to residential evictions "for a no-fault reason" and evictions "based on the presence of unauthorized occupants" and pets "or for nuisance related to COVID-19." *Id.* §§ 49.99.2(B)-(C). Nothing in the Ordinance eliminated any obligation of tenants to "pay lawfully charged rent." *Id.* § 49.99.2(A).

Unlike pandemic-era eviction moratoria elsewhere in the country, the Ordinance did not place a blanket moratorium on evictions and preserved a landlord's ability to bring an unlawful detainer action to adjudicate an eviction. Landlords could still bring and win unlawful detainer actions under the Ordinance, including for nonpayment of rent. Indeed, the Ordinance explicitly allowed landlords to evict tenants "for a lawful purpose and through lawful means." L.A., Cal. Mun. Code § 49.99.2(G). This meant landlords could evict tenants for any number of reasons, including, *inter alia,* (1) nonpayment of rent for tenants with the ability to pay; (2) nonpayment of rent if the inability to pay is unrelated to COVID-19; (3) nuisances unrelated to COVID-19; and (4) illegal activity. *See id.* § 49.99.2(G). It is for this reason that the Ordinance is best characterized as a set of eviction *protections*, rather than a blanket eviction *moratorium*.

To assert the Ordinance's narrow set of temporary eviction protections, tenants were required to invoke them as affirmative defenses in unlawful detainer proceedings. *Id.* § 49.99.6. Petitioners never claim to have actually tried to evict a tenant under the Ordinance. Nevertheless, Petitioners assert that "[t]he moratorium provided no definition of what constitutes an inability to pay, so that inquiry would boil down to taking tenants at their word." Pet. 7 & n.2. This is patently false. The Ordinance provided a list of factors that constitute an inability to pay, including "loss of income due to a COVID-19 related workplace closure, child care expenditures due to school closures, health-care expenses related to being ill with COVID-19 or caring for a member of the tenant's household or family who is ill with COVID-19, or reasonable expenditures that stem from government-ordered

emergency measures." L.A., Cal. Mun. Code § 49.99.2(A). Petitioners' claim that the Ordinance would "leave [the definition of an inability to pay] to wildly varying judgment calls by unlawful detainer courts" is both utterly unfounded (as the Ordinance expressly defines an inability to pay) and dismissive of the integrity and abilities of unlawful detainer courts. Pet. 7 & n.2.

Petitioners also claim that the Ordinance's affirmative defenses are "in substance an irrebuttable defense" because "the ordinance did not require tenants to offer any evidence at all regarding their purported inability to pay." Pet. 7. This argument betrays a basic lack of understanding of elementary civil procedure. Tenants could not "nakedly assert such an inability." Pet. 8. Like any other affirmative defense, the validity of these defenses were subject to the judicial fact-finding mechanisms of discovery, pretrial motion practice, and trial. If a tenant asserted an affirmative defense under the Ordinance, the tenant bore the burden of proof to establish the affirmative defense by a preponderance of the evidence. *See* Cal. Evid. Code § 500 ("a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting"); *see also Wong v. Markarian,* 82 Cal.App.5th Supp. 24, 34 (2022) ("The tenant [in an unlawful detainer action] bears the burden of proof to establish such an affirmative defense by a preponderance of the evidence.") Practically, this would mean producing documents showing termination of employment, loss of income, childcare expenditures, health care bills, or other COVID-19 related expenses. L.A., Cal. Mun. Code § 49.99.2(A). Landlords could then litigate and overcome the affirmative defense through the normal unlawful detainer process, just as they would when faced with any other affirmative defense.

See Cal. Civ. Pro. § 437c(o)(p)(2) (explaining the burden-shifting process in a motion for summary judgment); *see also California Valley Properties LLC v. Berlfein,* 48 Cal.App.5th Supp. 1, 6-7 (2020) ("When a defendant [in an unlawful detainer] moves for summary judgment, he or she may present evidence to show that one or more elements of the cause of action cannot be established by the plaintiff, or that the defendant has established an affirmative defense to the cause of action. Once the defendant's initial burden has been met, the burden shifts to the plaintiff to demonstrate there is a triable issue of material fact as to the cause of action or affirmative defense.") Even if a landlord lost their case because the tenant successfully proved one of the Ordinance's affirmative defenses to a judge or jury, the landlord would still be protected from civil liability and administrative penalties so long as they brought the case with a "good faith basis to believe that the tenant does not enjoy the benefits" of the Ordinance. L.A., Cal. Mun. Code § 49.99.1(B). Petitioners' so-called "vexing problem" never existed. Pet. 8.

The Ordinance and its limited number of COVID-19-related affirmative defenses expired over two years ago on January 31, 2023. *See* L.A., Cal. Mun. Code § 49.99.2(A). The Ordinance set specific deadlines for tenants to pay COVID-19-related rental arrears. For rental arrears accumulated between March 1, 2020 and September 30, 2021, tenants were required to pay the arrears by August 1, 2023. For rental arrears accumulated between October 1, 2021 and January 31, 2023, tenants were required to pay the arrears by February 1, 2024. A tenant's failure to pay the rental arrears in full and on time as specified in the Ordinance provided grounds for landlords to bring an unlawful detainer action for nonpayment of rent.

See id. § 49.99.2(A). Together with the Ordinance, the City created the Emergency Rental Assistance Program using state and federal funding. The City and State of California allowed both landlords and tenants to apply for assistance in paying back rental arrears. To date, City and State records show that over $1.49 billion in back-rent has been paid or is in progress to be paid. *See* LAHD, Report Dashboard for ERAP, online at https://housing.lacity.org/erap (accessed Feb. 16, 2025) ($221 million paid to landlords through the City's emergency rental assistance program); California COVID-19 Rent Relief Dashboard, online at https://housing.ca.gov/covid_rr/dashboard. html (accessed Feb. 16, 2025) ($1.459 billion paid to Los Angeles landlords through the State of California's rental assistance program); LAHD, United to House LA Emergency Rental Assistance Program Dashboard, online at https://housing.lacity.gov/ula-erap (accessed Feb. 16, 2025) ($30 million paid to landlords through the City's United to House LA rental assistance program).

C. Procedural Background

In August 2021, Petitioners filed suit challenging the Ordinance under the Takings Clause of the U.S. Constitution and the California Constitution's Takings Clause, under both *per se* and regulatory takings theories. In November 2021, the District Court granted Respondents' motion to intervene as of right and permissive intervention in the alternative, for intervenors to advocate for the distinct legal interest low-income tenants have in defending the constitutionality of Los Angeles's eviction protections.

In November 2022, the District Court granted Respondents' and the City's motions to dismiss Petitioners' complaint, granting Petitioners leave to

amend their deficient pleadings. Petitioners chose to stand on their complaint, and in December 2022 the District Court dismissed the complaint with prejudice. In doing so, the District Court held that Petitioners failed to sufficiently state a claim for relief for its federal constitutional Takings Clause claim. *GHP Mgmt. Corp. v. City of Los Angeles*, No. CV 21-06311 DDP (JEMX), 2022 WL 17069822, at *6 (C.D. Cal. Nov. 17, 2022), *aff'd*, No. 23-55013, 2024 WL 2795190 (9th Cir. May 31, 2024). The court found that the Ordinance was a regulation of the landlord-tenant relationship, permissible under longstanding Supreme Court jurisprudence. *Id.* at *3. The District Court also held that GHP failed to allege a regulatory taking, finding that the Ordinance "indisputably promotes the common good" and that GHP failed to "allege any diminution in value, let alone a diminution high enough to function as the equivalent of a classic taking." *Id.* at *6.

GHP appealed the District Court's dismissal. In May 2024, the Ninth Circuit affirmed the District Court's order in a unanimous nonprecedential memorandum disposition by Judges Siler, Bea, and Ikuta. The Ninth Circuit held that the Ordinance was not a *per se* taking, under longstanding Supreme Court jurisprudence, as the Ordinance solely governed "the existing relationship between landlord and tenant, including adjusting rental amount [and] terms of eviction." *GHP*, No. 23-55013, 2024 WL 2795190, at *1 (9th Cir. May 31, 2024). In characterizing the Ordinance, Judges Siler, Bea, and Ikuta wrote: "[h]ere section 49.99 does not effect a physical taking because the Landlords voluntarily opened their property to occupation by tenants. Moreover, section 49.99 did not compel landlords to rent property in perpetuity, but rather allowed landlords to evict their previously

invited tenants for reasons not otherwise prohibited." *Id.* at *1.

The Ninth Circuit also affirmed the District Court's dismissal of Petitioners' regulatory takings claim. Judges Siler, Bea, and Ikuta held that Petitioners had alleged "only the amount of rent lost" and "failed to allege the diminution in property values they suffered" required to allege a regulatory taking. *Id.* at *2. The Ninth Circuit held that "mere loss of some income because of regulation does not itself establish a taking." *Id.* at *2 (quoting *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018). Instead, "our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property." *Id.* at *2 ((quoting *Murr v. Wisconsin*, 582 U.S. 383, 395 (2017)) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987))). Petitioners were unable to make any allegations regarding a diminution in total property value.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT SPLIT THAT WARRANTS REVIEW.

After declining to amend their complaint before the District Court, Petitioners now attempt to dress up a traditional regulatory takings claim as a *per se* taking and allege a non-existent circuit split based on a nonprecedential memorandum disposition. Petitioners' primary argument is that the opinion below conflicts with the Federal Circuit case *Darby Development Company v. United States,* 112 F.4th 1017 (Fed. Cir. 2024) and the Eighth Circuit case *Heights Apartments, LLC v. Walz,* 30 F.4th 720, 733 (8th Cir. 2022). But

no such circuit split exists. *Darby* and *Heights Apartments* reached different results from the Ninth Circuit below because the cases presented different facts, not because of a divergence in the legal standard applied.

A. *Darby Development Company v. United States* Presents No Conflict with the Ninth Circuit's Decision.

Petitioners contend that the Federal Circuit's decision in *Darby* creates a conflict as to whether "cases like *Cedar Point* apply to physical takings claims against eviction moratoria, or if *Yee* is instead the proper focus." Pet. 14. However, Petitioners mischaracterize the Federal Circuit's reasoning and the facts underlying the case. The Federal Circuit follows the same test applied by the Ninth Circuit and any difference in result between *Darby* and the opinion below can be explained by distinctions in their facts. Petitioners' true dispute is with the Ninth Circuit's Takings Clause analysis, and not the legal standard applied.

In *Darby,* the Federal Circuit reviewed a U.S. Court of Federal Claims order granting a motion to dismiss a *per se* Takings Clause challenge to the Centers for Disease Control and Prevention ("CDC") COVID-19 eviction moratorium ("the Order"). Issued in September 2020, the Order "prevent[ed] any *actual* eviction for nonpayment of rent from occurring" in states or territories with documented cases of COVID-19. *Darby,* 112 F.4th at 1020 (emphasis in original). Rental property owners challenged the Order as an unconstitutional *per se* taking under the Fifth Amendment. The U.S. Court of Federal Claims granted the United States' motion to dismiss the *per se* Takings

Challenge, holding that the Order "could not constitute a physical taking because it merely regulated the landlord-tenant relationship." *Id.* at 1022. The Federal Circuit reversed, holding that the Order's wholesale removal of landlords' "ability to evict non-rent-paying tenants" constituted a *per se* taking. *Id.* at 1034. This is an exception to the general rule that *Yee* itself contemplates. *See Yee,* 503 U.S. at 527. In reaching its conclusion, the Federal Circuit emphasized the narrow scope of its holding, which was compelled by the "highly unusual" and "unprecedented" scope of the Order. *Darby,* 112 F.4th at 1036-1037.

Accordingly, Petitioners are completely incorrect in claiming that the Federal Circuit was faced with "the identical legal question" as in the case below and "held opposite to the Ninth Circuit on the same posture." Pet. 16. The Federal Circuit itself expressly stated that "we do not pass on" the legality of other government acts (such as the Ordinance) that may make "it more onerous or time-consuming to realize an eviction." *Id.* at 1037. The Federal Circuit took care to highlight the limited nature of its holding. In addressing concerns that ruling against the Order would open the floodgates to litigation challenging other forms of eviction protection, the Federal Circuit stated that its ruling was compelled by the "highly unusual" and "unprecedented" nature of the CDC's Order, which "outright prevented evictions for non-payment of rent." *Id.* It distinguished the CDC's Order from other "run-of-the-mill law[s] implicating the landlord-tenant relationship," and cited the Second Circuit for the "well settled" rule "that limitations on the termination of a tenancy do not effect a [physical] taking *so long as there is a possible route to an eviction*." *Id.* (citing *Community Housing Improvement Program v. City of New York*, 59 F.4th 540 (2d Cir.

2023) (emphasis added by the Federal Circuit), *cert. denied*, 144 S. Ct. 264 (2023)). The Los Angeles Ordinance was just such a 'run-of-the-mill' law, providing affirmative defenses to tenants while preserving landlords' eviction rights. L.A., Cal. Mun. Code §§ 49.99.2(G); 49.99.6.

Unlike the CDC Order, which "outright prevented evictions for nonpayment of rent," the Ordinance did no more than provide tenants with temporary and limited COVID-19 affirmative defenses that had to be proven in court during an unlawful detainer proceeding. *Darby,* 112 F.4th at 1036-1037; L.A., Cal. Mun. Code § 49.99.6. Petitioners impliedly concede as much, claiming not that the Ordinance banned evictions but instead only made it "unlikely that owners would file, and likely did not file, unlawful detainers in the first place." Pet. 7 n.2. Following *Horne*, the Federal Circuit clarified that its holding did not extend to such laws, like the Ordinance, which may make it harder to realize an eviction but preserve a route to an eviction nonetheless. *Darby*, 112 F.4th at 1037 (citing *Horne*, 576 U.S. at 362 for the "settled difference . . . between appropriation and regulation").

Thus, while the Federal Circuit held that there was a plausible Takings Clause claim alleged in *Darby*, the case differs from the opinion below not in the legal standard applied but in its underlying factual circumstances. No conflict exists between *Darby* and the Ninth Circuit's decision.

B. *Heights Apartments, LLC v. Walz* Does Not Conflict with the Ninth Circuit's Decision.

Petitioners further attempt to manufacture a circuit split by arguing that the Eighth Circuit in *Heights*

Apartments held "opposite to the Ninth Circuit on identical posture to this case." Pet. 14. Once again, Petitioners' argument rests on misconstruing both the Eighth Circuit's reasoning and the underlying facts of that case. Any difference in result between *Heights Apartments* and the opinion below can be explained by differences in their factual circumstances, not by the legal standard applied.

Heights Apartments concerned a series of executive orders issued by the Governor of Minnesota starting in March 2020 in response to the COVID-19 pandemic ("the EOs"). The EOs prohibited residential landlords from filing eviction actions for nonpayment of rent. Specifically, the EOs suspended the ability of "property owners, mortgage holders, or other persons entitled to recover residential premises after March 1, 2020 because a household remains in the property after a notice of termination of lease, after the termination of the redemption period for a residential foreclosure, after a residential lease has been breached, or after nonpayment of rent…to file an eviction action." *See* Minn. Exec. Order No. 20-79: Modifying the Suspension of Evictions and Writs of Recovery During the COVID-19 Peacetime Emergency (July 14, 2020). The EOs contained exceptions for tenants who "(1) seriously endangered the safety of other residents; (2) engaged in illicit activity on the leased premises, as described in Minn. Stat. § 504B.171, subd. 1; (3) remained on the property after receiving a notice to vacate or of nonrenewal, but only when the landlord's family needed to move into the unit and would do so within seven days after the tenant vacated the property; or (4) materially violated the lease by seriously endangering the safety of others or significantly damaging property on the leased premises." *Heights Apartments,* 30 F.4th 720, 725.

In September 2020, Heights Apartments, a Minnesota landlord, sued the Governor of Minnesota, alleging that "the EOs unlawfully prevented it from excluding tenants who breached their leases, intruded on its ability to manage its private property, and interfered indefinitely with its collection of rents." *Heights Apartments,* 30 F.4th at 725. Heights alleged, *inter alia,* that the EOs were an unconstitutional *per se* taking in violation of the Fifth and Fourteenth Amendments because the EOs "'turned every lease in Minnesota into an indefinite lease, terminable only at the option of the tenant.'" *Id.* at 733 (quoting Heights' complaint). The District Court granted the Defendants' motion to dismiss the complaint. Heights appealed to the Eighth Circuit. The Eighth Circuit reversed with respect to the physical taking claim, holding that Heights had "sufficiently alleged that the Walz Defendants deprived Heights of its right to exclude existing tenants without compensation. The well-pleaded allegations are sufficient to give rise to a plausible *per se* physical takings claim under *Cedar Point Nursery*." *Id.* Importantly, the Eight Circuit's analysis turned on the fact that the EOs forbade "the nonrenewal and termination of ongoing leases, even after they had been materially violated, unless the tenants seriously endangered the safety of others or damaged property significantly." *Id.* Petitioners falsely claim that the Eighth Circuit faced the same "single . . . question of constitutional law" as in the present case, and "held opposite to the Ninth Circuit." Pet. at 18, 17. Once again, this is incorrect. *Heights Apartments* concerned a COVID-19 eviction moratorium which banned nearly all evictions, including those for non-payment of rent. *Id.* at 725. The Eighth Circuit concluded that the plaintiff sufficiently alleged a physical takings claim because the order "forced landlords to accept the

physical occupation of their property regardless of whether tenants provided compensation" and "forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated." *Id.* at 733. Accordingly, the Eighth Circuit held that the moratorium effected a physical taking by depriving landlords of their "right to exclude existing tenants without compensation." *Id.*

By contrast, the Ordinance imposed no such eviction ban. Unlike the EOs at issue in *Heights Apartments*, which imposed a blanket ban on even *filing* eviction actions, the Ordinance merely provided temporary COVID-19-related affirmative defenses that tenants could raise during eviction proceedings—while leaving landlords' eviction rights intact. *See* L.A. Mun. Code § 49.99.6. Los Angeles landlords could still file, litigate, and enforce evictions against nonpaying tenants. Petitioners' claim that the EOs and Ordinance are "identical" ignores these crucial differences. Pet. at i. Indeed, a District Court in the Eighth Circuit subsequently exhibited the continuing importance of the specific factual circumstances at issue when assessing a landlord-tenant regulation, even after *Heights Apartments*. *See Woodstone Limited Partnership v. City of Saint Paul, Minnesota*, 674 F.Supp.3d 571, 601 (D. Minn. 2023) (upholding ordinance limiting landlords' ability to determine rent, while preserving landlords' eviction rights, as ordinance was "not a physical invasion" (citing *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 436 (8th Cir. 2007)). The Ninth Circuit engaged in this standard fact-specific analysis and concluded that the Ordinance did not effect a physical taking under this Court's precedent.

The difference in outcome between the Ninth Circuit's unanimous decision in this case and in *Heights Apartments* is due to the markedly different facts at issue, not a difference in the legal standard applied. No conflict exists between the Ninth Circuit's opinion and *Heights Apartments*.

II. LONG-EXPIRED COVID EVICTION PROTECTIONS ARE NOT ISSUES OF RECURRING NATIONWIDE IMPORTANCE.

The Court should grant certiorari "only in cases of peculiar gravity and general importance." *American Const. Co. v. Jacksonville, T. & K.W. Ry. Co.,* 148 U.S. 372, 383 (1893); *see also Fields v. United States*, 205 U.S. 292, 296 (1907). When granting certiorari, the Court's consideration of "'[s]pecial and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955). Such problems must involve "questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation." *Forsyth v. City of Hammond,* 166 U.S. 506, 512 (1897).

Long-expired COVID-19 eviction protections and moratoria are not matters of recurring national importance. Instead, they are episodic, short-term, laws that are no longer in effect. All of the COVID-19 eviction protections and moratoria that Petitioners cite or complain of have been expired for years. The Ordinance expired over two years ago when the Local Emergency Period ended on January 31, 2023. *See* L.A., Cal. Mun. Code § 49.99.2. The Minnesota Eos at issue in *Heights Apartments* were voided and superseded by state statute nearly four years ago on

June 30, 2021, after being in effect for only a year. *See* Act of June 29, 2021, 2021 Minn. Laws 1st Spec. Sess. Ch. 8, art. 5. Finally, the CDC Order at issue in *Darby* expired over three years ago on October 3, 2021, a little over a year after it first took effect. *See* 86 Fed. Reg. 16731 (Mar. 31, 2021) (extending through June 30, 2021); 86 Fed. Reg. 34010 (June 28, 2021) (extending through July 31, 2021); 86 Fed. Reg. 43244 (Aug. 6, 2021) (extending through October 3, 2021).

This Court should not grant certiorari and create new precedent based on an unprecedented emergency situation that has now passed. No matter how much Petitioners beg this Court to ignore the "pandemic-era trappings" of this case and swear that "it has little to do with the coronavirus," the challenged Ordinance is undeniably the product of a particular, unusual, and singular moment in history: the COVID-19 pandemic. Pet. 5-6. The nation's various COVID-19 eviction protections and moratoria have all been expired for years. These provisions were episodic and temporary emergency enactments in response to a unique and unprecedented global public health pandemic. And as the pandemic ended, so did the enactments. As such, Petitioners' claims lack the recurring national importance necessary to warrant a grant of certiorari.

III. THIS COURT HAS OFT AND RECENTLY DENIED SIMILAR PETITIONS FOR CERTIORARI IN *EL PAPEL V. SEATTLE, GONZALES V. INSLEE*, AND *G-MAX V. NEW YORK*.

This Court has recently and repeatedly denied review in cases claiming the same circuit split alleged by Petitioners involving similar physical takings claims. Petitioners identify no changed circumstances warranting a different outcome here. Given that this

Court has denied review in multiple similar cases in the past year alone, there is no reason to grant review of this nonprecedential memorandum disposition. *El Papel, LLC v. City of Seattle, Washington*, 144 S. Ct. 827, 218 L. Ed. 2d 33 (2024); *Gonzales v. Inslee*, 535 P.3d 864, 867 (Wash. 2023), *cert. denied*, 144 S. Ct. 2685 (2024); *G-Max Mgmt., Inc. v. New York*, No. 23-1148, 2024 WL 4743157 (U.S. Nov. 12, 2024), *cert. denied; see also Jevons v. Inslee*, 561 F. Supp. 3d 1082 (E.D. Wash. 2021), *vacated as moot*, No. 22-35050, 2023 WL 5031498 (9th Cir. Aug. 8, 2023) (unpublished), *cert. denied*, 144 S. Ct. 500 (2023); *see also Apt. Ass'n of L.A. Cnty., Inc. v. City of Los Angeles*, 142 S. Ct. 1699 (2022) (Contracts Clause challenge).

This Court denied review in *El Papel* in February 2024, in a case involving physical takings claims related to short-term COVID eviction laws. *El Papel, LLC v. City of Seattle*, No. 22-35656, 2023 WL 7040314, at *1 (9th Cir. Oct. 26, 2023), *cert. denied* 144 S. Ct. 827, 218 L. Ed. 2d 33 (2024). In *El Papel*, the Ninth Circuit held that Seattle's COVID-19 eviction protections did not constitute a physical taking, as the protections did not compel landlords to "use their property for a specific purpose" and they preserved landlords' eviction rights by "allow[ing] the Landlords to evict their tenants for some specified purposes." *Id.* at *2. Indeed, amici for Petitioners helpfully illuminate the similarity of both cases, as the majority of amicus briefs submitted in support of Petitioners are copied almost entirely verbatim from amicus briefs filed in support of the petitioners in *El Papel*. *Compare, e.g.,* Brief for the California Apartment Association and San Francisco Apartment Association as Amicus Curiae Supporting Petitioners at 8-17, *El Papel, LLC v. City of Seattle, Washington,* Docket No.

23-807 (S. Ct. Feb. 14, 2024) (arguing that *Alameda County's* eviction moratorium, which was not at issue in *El Papel,* is a Takings Clause violation) *with* Brief for the California Apartment Association and San Francisco Apartment Association as Amicus Curiae Supporting Petitioners at 7-18, *GHP Mgmt. Corp. v. City of Los Angeles*, Docket No. 24-435 (S. Ct. Nov. 18, 2024) (arguing that *Alameda County's* eviction moratorium, which is not at issue in *GHP,* is a Takings Clause violation). Petitioners attempt to distinguish *El Papel* because the petitioners in that case alleged only nominal damages, but this is irrelevant to the worthiness of the Petition. The type of damages sought has no bearing on whether a case presents "questions of such public and national importance" warranting this Court's attention. *Forsyth,* 166 U.S. at 512. This Court correctly denied review of *El Papel*, and nothing has changed warranting a different result here.

Similarly, this Court denied review in *Gonzales* in June 2024, in another case involving landlord-tenant physical takings claims for temporary COVID eviction laws. The Supreme Court of Washington held that the Governor's temporary COVID-19 protections did not effect a physical taking, as the protections were regulations of the pre-existing landlord-tenant relationship that fell within the well-recognized "'broad power [of States] to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.'" *Gonzales,* 535 P.3d at 873 (citing *Yee*, 503 U.S. at 528-29 (quoting *Loretto*, 458 U.S. 419)). And while the case involved state constitutional claims, rather than federal claims, the court relied exclusively on federal physical takings jurisprudence to inform its holding on the matter. *See, e.g., id.* (discussing *Loretto*, *Yee,* and *Cedar Point*).

This Court denied review in *Gonzales*, and contrary to Petitioners' claim, nothing warrants a different result here.

As Petitioners themselves acknowledge, the only development since *El Papel* and *Gonzales* is the Federal Circuit's decision in *Darby*, in which the Federal Circuit explicitly cabined its decision due to the "highly unusual" and "unprecedented" factual circumstances in that case. *Darby,* 112 F.4th at 1036-1037; *see discussion supra*, Section I(A).

Indeed, this Court denied certiorari in *G-Max* just three months ago, in November 2024, where the petitioners alleged the exact same circuit split as here involving *Heights Apartments* and *Darby*. *G-Max Mgmt., Inc. v. New York*, No. 23-1148, 2024 WL 4743157 (U.S. Nov. 12, 2024), *cert. denied.* Petitioners in *G-Max* alleged that *Darby* had "deepened" a supposed "division in the lower courts" regarding this Court's physical takings jurisprudence in the landlord-tenant context. *G-Max*, Pet'rs.' Suppl. Br. at 2. The Second Circuit held that the New York landlord-tenant law at issue was an ordinary "'[regulation of] the landlord-tenant relationship'" permitted under long-standing Supreme Court precedent. *Id.* (quoting *Community Housing Improvement Program v. City of New York*, 59 F.4th 540, 553 (2d Cir.), *cert. denied*, 144 S. Ct. 164 (2023)). This Court denied review and nothing has changed in the few short months since that denial to warrant a different outcome here.

IV. THE NINTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENT.

The Ninth Circuit's nonprecedential memorandum decision to affirm the District Court's grant of a motion

to dismiss was entirely correct. Under more than four decades of settled Supreme Court precedent, laws that only regulate the landlord-tenant relationship are not *per se* takings.

First, the Ninth Circuit was correct in holding that under long-standing Supreme Court precedent, "a statute that merely adjusts the existing relationship between landlord and tenant, including adjusting rental amount, terms of eviction, and even the identity of the tenant, does not effect a taking." *GHP Mgmt. Corp. v. City of Los Angeles*, No. 23-55013, 2024 WL 2795190, at *1 (9th Cir. May 31, 2024). This reflects Supreme Court precedent pre-dating even *Yee*, where the Court has ruled that "statutes regulating the economic relations of landlords and tenants are not *per se* takings." *F.C.C. v. Fla. Power Corp.*, 480 U.S. at 252 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 440). These rulings compel the dismissal of Petitioners' physical taking claim. Here, the Ordinance only regulated property owners' relationship with tenants "invited by [GHP], not forced upon them by the government." *Yee,* 503 U.S. at 528.

Petitioners' attacks on *Yee's* "voluntary principle" are misguided and based on a fundamental misunderstanding of the Ordinance. The Ordinance does not permit the government to "unilaterally extend the 'invitation,'" nor does it "attack both the contingency and dependency inherent in every owner-tenant 'invitation.'" Pet. 25. Under the Ordinance, landlords retained the power to initiate eviction actions and could evict tenants for any reasons not otherwise prohibited. As the District Court noted, the Ordinance prohibited evictions for only a limited set of reasons and for only a "limited . . . time," and the Ordinance

did not require Petitioners to "submit to a novel use of their property." *GHP Mgmt. Corp. v. City of Los Angeles*, No. CV 21-06311 DDP (JEMX), 2022 WL 17069822, at *3 (C.D. Cal. Nov. 17, 2022), *aff'd*, No. 23-55013, 2024 WL 2795190 (9th Cir. May 31, 2024). Judges Ikuta, Bea, and Siler were entirely correct to affirm the dismissal of Petitioners' physical takings claim.

Despite Petitioners' repeated assertions to the contrary, the Ordinance was a law just like those "at issue in *Yee* [that] expressly permitted eviction for nonpayment of rent." Pet. 21 (quoting *Darby*, 112 F.4th at 1035), and 20 (citing *Yee,* 503 U.S. at 524). The Ordinance permitted evictions for nonpayment of rent, and simply provided tenants an affirmative defense where nonpayment was due to COVID-19 related reasons. L.A., Cal. Mun. Code § 49.99.2(G). Landlords could initiate unlawful detainer actions, and tenants were required to invoke an affirmative defense in unlawful detainer proceedings and provide documentation proving the defense. *Id.* § 49.99.6; *see discussion supra*, Section B. The Ninth Circuit did not engage in an "expansive and repeated misreading of *Yee*," but instead straightforwardly applied decades of Supreme Court precedent to an Ordinance materially similar to the enactment at issue in *Yee*. Pet. 19.

Since before *Yee*, this Court has made an "unambiguous distinction between a commercial lessee and an interloper with a government license." *Fla. Power*, 480 U.S. at 252–53. Petitioners wish to collapse this long-standing distinction and view any regulation of landlord-tenant relations–including conditional, temporary limitations on the obligation to pay rent–as transforming some lawful tenants into interlopers with a government license. Pet. 21-22. This

is not the law, nor should it be. It is black letter law, and has been for decades, that States "have broad power to regulate . . . the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Yee*, 503 U.S. at 528-529 (quoting *Loretto,* 458 U.S. at 440); *see also Ballinger v. City of Oakland*, 24 F.4th 1287, 1292 (9th Cir. 2022), *cert denied* 142 S. Ct. 2777 (citing *Loretto* and *Yee* for this same rule); *Community Housing Improvement Program,* 59 F.4th at 552 (2d Cir. 2023) (describing *Yee*'s principles as "exceptionally clear"); *74 Pinehurst LLC v. New York,* 59 F.4th 557, 563 (2d Cir. 2023) (characterizing *Yee*'s doctrine as "pellucid"). And this Court has stated clearly that the central question when evaluating a physical takings claim remains whether the government has physically taken property or has regulated a property owner's ability to use their property. *Cedar Point*, 594 U.S. at 149 (citing *Tahoe-Sierra,* 535 U.S. at 321-23). Petitioners are simply wrong that ordinary government regulations of the landlord-tenant relationship amount to a physical invasion, converting (at least some) otherwise lawful tenants into mere interlopers. The law is clear: where, as here, a government regulation does not grant a right to invade private property, it does not give rise to a physical taking claim.

Longstanding Takings Clause precedent compels the dismissal of Petitioner's case, and the District Court and Ninth Circuit correctly applied settled law. This Petition is not worthy of this Court's review.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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