Case No: 21-1278

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Heights Apartments, LLC,

Plaintiff-Appellant,

Walnut Trails, LLLP,

Plaintiff,

vs.

Tim Walz, in his individual and his official capacity as Governor of the State of Minnesota; Keith M. Ellison, in his individual and his official capacity as Attorney General of the State of Minnesota; JOHN DOE,

Defendants-Appellees.

Appeal from the United States District Court of Minnesota
No. 20-cv-02051 (NEB/BRT)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN OPPOSITION TO PETITION FOR REHEARING

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> *The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery. 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 intrudes on one of the most fundamental elements of property ownership—the right to exclude.*

Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) citing *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982), *quoted in* Panel op. at 20.

INTRODUCTION

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in opposition to the Defendants-Appellants' Petition for Rehearing or Rehearing En Banc (Petition), and in support of Plaintiff-Appellant Heights Apartments, LLC. At issue are certain Minnesota Executive Orders (EOs) that were enacted during the COVID-19 pandemic prohibiting landlords from evicting tenants that had breached the material terms of their leases. A panel of this Court held that Plaintiff had sufficiently pled that the EOs were both a physical occupation taking of the Plaintiff's right to exclude and a regulatory taking that effectively commandeered Plaintiff's property for public pandemic housing. As the panel opinion is consistent with controlling U.S. Supreme Court precedent, the Petition should be denied.

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded nearly 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in several landmark Supreme Court cases in defense of the right to make reasonable use of property and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226 (2021); *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF also frequently participates as amicus curiae in cases that pertain to important property rights issues.

ARGUMENT

After the Executive Orders were issued, some of the tenants who reside at Plaintiff's properties stopped paying rent. Some created nuisances that forced other tenants to leave the building. And some tenants violated City ordinances. As an example, because of the nuisances created by one particular tenant, the City of Columbia Heights demanded "that [the tenant's] lease be terminated and eviction

proceedings started, under threat of loss of the rental license." *See* Complaint ¶ 32 (Sept. 20, 2020).

However, the EOs shielded these tenants from eviction and imposed criminal sanctions upon owners that sought a tenant's removal. Owners were forced to provide public housing, even if the beneficiaries of the EO refused to pay rent, and even to those that impaired their neighbors and their surroundings. And, despite the fact that many tenants did not pay rent, owners were still obligated to continue paying taxes, mortgages, insurance, and maintenance.

The Just Compensation Clause ensures that when Minnesota commandeers private property for public pandemic housing, the economic burden of what may be a laudable public purpose is distributed fairly among the benefitted public and is not placed solely on the shoulders of private owners. As the Supreme Court explained, "[w]e are in danger of forgetting that 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." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922); *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("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").

Therefore, the panel was correct in determining that the allegations of the Complaint, if proven, supported a physical taking of the Plaintiff's right to exclude (*Cedar Point*) and/or a regulatory taking of the Plaintiff's right to make reasonable economic use of its property (*Penn Central*). Because the panel decision does not conflict with the decisions of the U.S. Supreme Court, the Petition should be denied.

I. THE PANEL OPINION IS CONSISTENT WITH THE U.S. SUPREME COURT WHEN IT HELD THAT PLAINTIFF SUFFICIENTLY PLED A PHYSICAL TAKINGS CLAIM

A tenant's occupancy is neither absolute nor eternal. Rather, pursuant to common law and statute, it is conditioned upon a tenant's compliance with the material terms of the lease including the continued payment of rent. Therefore, because the Minnesota eviction moratorium precluded Plaintiff from lawfully evicting persons with no legal right to possession, the moratorium was contrary to the 5th Amendment takings clause. "Government action that physically appropriates property is no less a physical taking because it arises from a regulation," and includes those circumstances where "the regulation appropriates for the enjoyment of third parties the owner's right to exclude." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021)

The polestar for physical takings is the Supreme Court's determination in *Loretto*. Oft cited, the case pertained to whether the installation of a cable on the side

of a building was a physical taking contrary to the Fifth Amendment. The Court held it to be so and discussed the issue as follows:

> The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the government does not simply take a single strand from the bundle of property rights: it chops through the bundle, taking a slice of every strand.
>
> Property rights in a physical thing have been described as the rights to possess, use and dispose of it. To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Loretto, 458 U.S. at 435–36 (cleaned up).

The Supreme Court's recent decision in *Cedar Point* also pertained to physical takings and reaffirmed *Loretto*'s foundational principle. The regulation at issue permitted labor organizations the right to access private property for certain periods of time "for the purpose of meeting and talking with employees and soliciting their

support." *Cedar Point Nursery*, 141 S. Ct. at 2069. The Court held that this partial taking of the right to exclude was a per se physical taking. "The upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation." *Cedar Point Nursery*, 141 S. Ct. at 2074.

That the physical taking here is at the hands of the tenant is irrelevant to the determination. Rather, the two key facts are that a tenant with no legal right to possess the unit is nonetheless permitted to possess it and that this state of affairs was directly caused by the Minnesota moratorium. As *Loretto* explained, "[t]he City of New York and the opinion of the Court of Appeals place great emphasis on *Penn Central*'s reference to a physical invasion 'by government,' and argue that a similar invasion by a private party should be treated differently. We disagree. 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." *Loretto*, 458 U.S. at 432, n.9; *Cedar Point Nursery*, 141 S. Ct at 2072 ("[t]he essential question 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. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred").

So, too, is the fact that the physical taking in this case is assumed to be only temporary. Physical takings are categorical regardless of the element of time. *Cedar Point Nursery*, 141 S. Ct. at 2074 ("a physical appropriation is a taking whether it is permanent or temporary"); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002) ("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. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary").

Accordingly, to the extent that the Minnesota eviction moratorium precludes Plaintiff from possessing its real property and forces it to house a third party with no legal right to remain, it is a physical taking. Or put differently, the effect of the Minnesota moratorium is to give the tenants an easement right to Plaintiff's property. *Cedar Point Nursery*, 141 S. Ct. at 2073 ("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. The Court has often described the property interest taken as a servitude or an easement.")

A. The Panel Correctly Distinguished Yee

The panel opinion correctly determined that *Yee v. Escondido*, 503 U.S. 519 (1992) "is distinguishable. The rent controls in *Yee* limited the amount of rent that could be charged and neither deprived landlords of their right to evict nor compelled landlords to continue leasing the property past the leases' termination." Panel op. at 17.

Yee involved a facial, physical takings claim, but not with respect to the occupation of real property. Instead, the plaintiffs contended that certain rent control laws effected a physical taking of money by mandating a transfer of wealth from the owner to the tenant, courtesy of the premium that the mobile homeowners were able to sell their mobile homes for due to the below market rents caused by the rent control ordinance. The Court found that ordinary transfers of wealth are not facially unconstitutional. *Yee*, 503 U.S. at 529. The Court additionally reasoned that the physical taking doctrine was not the correct theory under which to challenge a regulation on the use of property that does not mandate an unwanted occupation. *Id.* at 528.

Although *Yee* is primarily a rent control case, Defendants, and other amici, seize upon *Yee*'s statement that a regulation burdening the landlord-tenant relationship "does not convert regulation into the unwanted physical occupation of land. Because they voluntarily open their property to occupation by others,

petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals." *Yee*, 503 U.S. at 530–31.

That rationale does not apply here. The Minnesota ordinance does not involve rent control and does not pertain to the units' use. Nor does Plaintiff seek to choose who their tenants are in a manner contrary to law. *Cf.*, *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 261 (1964).

Rather, to the extent that the tenants have violated the material terms of their leases and can be evicted, Plaintiff merely asks to do what they are already legally entitled to do under Minnesota law. The tenant's right to possess is both temporary and conditional, and dependent upon the tenant's adherence to the terms of a lease. When the tenant materially breaches the lease, the "voluntariness" referenced in *Yee* disappears and the owner can terminate the tenant's right to possess and simultaneously enforce the right to exclude. In this context, *Yee* does not stand for the proposition that the Plaintiff has forfeited the right to exclude tenants whom it previously allowed to occupy its properties. As *Yee* noted, "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; *see Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("But simply denominating a governmental measure as a business regulation does not

immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights").

Defying the Plaintiff's legal right to evict their tenants, the moratorium has transformed the tenants into "interlopers with a government license." *See F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252–53 (1987) ("This element of required acquiescence is at the heart of the concept of occupation…Appellees contend, in essence, that it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. But it 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").

In a recent matter, the Supreme Court also signaled that eviction moratoriums may constitute a physical taking. In the context of nullifying the CDC's right to enact a national eviction moratorium, the Court, in a per curiam opinion, stated that "preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Alabama Ass'n of Realtors,* 141 S. Ct. at 2489, citing *Loretto*, 458 U.S. at 435.

The panel's determination that Plaintiff alleged a viable physical takings claim is consistent with Supreme Court precedent.

II. THE PANEL OPINION IS CONSISTENT WITH THE U.S. SUPREME COURT WHEN IT HELD THAT PLAINTIFFS SUFFICIENTLY PLED A NON-CATEGORICAL REGULATORY TAKINGS CLAIM

Non-categorical regulatory takings claims are particularly unsuited to summary dismissal on the pleadings because they are "essentially ad hoc, factual inquiries," that examine three factors, none of which are dispositive. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The overall effect of the regulation and the entirety of the facts must be considered. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, concurring) ("the Takings Clause requires careful examination and weighing of all the relevant circumstances in this context. The court below therefore must consider on remand the array of relevant factors under *Penn Central* before deciding whether any compensation is due"); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) (the goal of the inquiry is a determination of whether a regulation has so burdened the owner's use of his property "that its effect is tantamount to a direct appropriation or ouster").

To that end, the panel opinion was in accord with Supreme Court precedent in weighing and assessing all of the *Penn Central* factors and not making the determination based upon a single factor (i.e., character).

The panel decision also correctly viewed the character prong of *Penn Central* in light of Supreme Court jurisprudence. Character is more than an either/or determination about whether the regulation is a physical invasion or an adjustment

to the property's use in the name of police power. Rather, it is what the regulation does, who it impacts, how it affects the owner's reasonable expectations of "property" and how the burden is distributed as between the individual owner and the public. *See Lingle*, 544 U.S. at 539–40; *Penn Central*, 438 U.S. at 124–128.

In arguing that the character prong was wrongly interpreted, Defendants focus on the fact that the eviction moratorium was a valid exercise of police power. But that does not immunize the State from takings liability.

Police power neither dictates whether a taking has occurred, nor subsumes the character prong of the *Penn Central* analysis. Rather, police power is what provides the government with the authority to take action. *See, e.g.*, *Panhandle E. Pipeline Co. v. State Highway Comm'n of Kansas*, 294 U.S. 613, 622 (1935); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 429 (1935).

A valid exercise of police power can also be a taking contrary to the Fifth Amendment. As the Court noted in *Mahon*,

> [T]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Mahon, 260 U.S. at 415; *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 647 (1981) (Brennan, J., dissenting from denial of cert.) ("As explained in Part II, *supra*, the California courts have held that a city's exercise of its police power, however arbitrary or excessive, cannot as a matter of federal constitutional law constitute a taking within the meaning of the Fifth Amendment. This holding flatly contradicts clear precedents of this Court"), *citing Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *Penn Central*, 438 U.S. at 122, and *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

Thus, "as its text makes plain, the Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power. In other words, it is designed not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Lingle*, 544 U.S. at 536–37, citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 314–15 (1987); *Panhandle E. Pipeline Co.*, 294 U.S. at 619 ("A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions"); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) ("In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the

Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question").

In light of the above, the panel's determination regarding the character prong of *Penn Central* was in accord with existing Supreme Court precedent.

CONCLUSION

For the reasons set forth above, the Defendants' application for rehearing or rehearing en banc should be denied.

DATED: May 27, 2022.

Respectfully submitted,

s/ *Joshua P. Thompson*

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