Case No: 100992-5

Court of Appeals Cause No. 55915-3-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Gene Gonzales and Susan Gonzales, Horwath Family Two, LLC, and the Washington Landlord Association,

Petitioners,

v.

Governor Jay Inslee and State of Washington,

Respondents.

BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

SAM SPIEGELMAN
Counsel of Record
BRIAN T. HODGES
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 419-7111
BHodges@pacificlegal.org
SSpiegelman@pacificlegal.org

JONATHAN M. HOUGHTON
Of Counsel
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd.,
Suite 1000
Arlington, Virginia 22201
(202) 888-6881
JHoughton@pacificlegal.org

Attorneys for Amicus Curiae Pacific Legal Foundation

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STATEMENT OF THE ISSUE

Whether the eviction bans enacted by the State of Washington and Governor Jay Inslee in response to the COVID-19 pandemic were a categorical physical taking contrary to the Takings Clause of the Fifth Amendment.

IDENTITY AND INTEREST OF AMICUS CURIAE

Founded in 1973, Pacific Legal Foundation[1] is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF was founded in 1973 and has since become widely recognized as the most experienced nonprofit legal foundation of

[1] Counsel for all parties have consented to the filing of this brief. *Amicus* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

its kind. PLF attorneys have participated as lead counsel in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021); *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226, 210 L. Ed. 2d 617 (2021); *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019); *Murr v. Wisconsin*, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017); *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997). And as *amicus curiae*, PLF attorneys participated in some of the most consequential property cases. *See, e.g.*, *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624,

143 L. Ed. 2d 882 (1999); and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

In Washington, PLF attorneys have decades of litigation experience, having participated as lead counsel or *amicus curiae* in *Yim v. City of Seattle*, 194 Wn.2d 651, 451 P.3d 675 (2019); *Church of the Divine Earth v. City of Tacoma*, 194 Wn.2d 132, 449 P.3d 269 (2019); *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008); *City of Olympia v. Drebick*, 156 Wn.2d 289, 126 P.3d 802 (2006); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002); *Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995); *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992); *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992); and *R/L Assocs., Inc. v. City of Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989). This case implicates significant questions about how the Fifth Amendment's Takings Clause applies in the rental property owner-tenant context. PLF offers a discussion of

the relevant constitutional principles and the potential dire consequences of ignoring them in this context.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In response to the COVID-19 pandemic, Governor Inslee instituted an eviction moratorium with respect to all rental properties within the state. This action, soon bolstered by legislative enactment, was tantamount to a forcible taking of the right to possess and exclude. It gave the State complete ownership and control over who could possess rental properties, under what circumstances, and for how long. The lower court erred in determining that these eviction moratoriums were constitutional.

Relying on *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992), the court held that once an owner rented his or her property to a tenant, a subsequent physical takings claim became a legal impossibility. But a lease is temporary and conditional, not permanent and absolute. When

the government compels the occupation of someone else's private property regardless of the owner's consent, the payment of rent, the compliance with the terms of a lease, the destruction of the owner's property, the engagement of criminal conduct on the property, or any other facts and circumstances, it is still a compelled occupation. That the owner may have entered into a lease, months or years before, does not absolve the government of the consequences of forcing a property owner to house an occupant against the owners' will and in contravention of the law of unlawful detainer.

Therefore, the court erred in using the facial rent control case of *Yee* as a means to deny that an unconstitutional physical taking had occurred.[2] In so doing, it also placed itself at odds with

[2] *See Williams v. Alameda Cnty.*, No. 22-1274, 2022 WL 17169833, at *11–12 (N.D. Cal. Nov. 22, 2022) (the challenged COVID-related eviction moratorium is constitutional under *Yee*); *Gallo v. District of Columbia*, No. 21-3298, 2022 WL 2208934, at *8–10 (D.D.C. June 21, 2022) (same); *Farhoud v. Brown*, No. 20-2226, 2022 WL 326092, at *10 (D. Or. Feb. 3, 2022) (same); *Jevons v. Inslee*, 561 F. Supp. 3d 1082, 1106–07

the Supreme Court's physical takings jurisprudence including *Loretto v. Teleprompter Manhattan CATV Corp*., which specifically held that "[a] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. 419, 439, n.17, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). Similarly, the lower court failed to credit *Yee*'s explanation that "[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*, 593 U.S. at 528. "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 531–32.

(E.D. Wash. 2021) (same); *S. Cal. Rental Hous. Ass'n v. Cnty. of San Diego*, 550 F. Supp. 3d 853, 865–67 (S.D. Cal. 2021) (same).

The lower court's decision was also contrary to the Supreme Court's recent decision in *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485, 210 L. Ed. 2d 856 (2021). There, in the course of invalidating the CDC's COVID eviction moratorium, the Court held that "preventing [owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Id.* at 2489; *see also Yim*, 194 Wn.2d at 658 ("[T]his court has always attempted to define regulatory takings consistent with federal courts applying the takings clause of the Fifth Amendment."). The U.S. Supreme Court did not equivocate and did not cite to *Yee* as having any relevance to this determination.

Therefore, the lower court's determination should be reversed.

ARGUMENT

Physical takings cases are "special." *Loretto*, 458 U.S. at 432. This is because "the right to exclude is [not] an empty

formality, subject to modification at the government's pleasure. On the contrary, it is a fundamental element of the property right, that cannot be balanced away." *Cedar Point Nursery*, 141 S. Ct. at 2077–78 (cleaned up). In this case, the State of Washington and Governor Inslee's eviction bans were a physical occupation of the plaintiff-owners' rental properties in the name of public pandemic housing. Being an occupant became the only criterion for possession and the normal distinctions between lawful tenants, occupants in default, and illegal squatters disappeared. Divested of their fundamental property rights, the owners could not possess what they owned and could not exclude those with no right to be there. Yet these owners were still burdened with the financial and physical obligation to maintain their real properties for the benefit of the public. *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960) (the Takings Clause "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").

Thus, the effect of the State of Washington and Governor Inslee's eviction bans was no different than the government physically invading and occupying the rental property itself.

I.

THE LAW OF PHYSICAL TAKINGS

Property ownership is grounded in certain inherent and well-established rights: the right to possess what you own, the right to use it for your benefit, and the right to dispose of it as you wish. *Gen. Motors Corp. v. United States*, 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311 (1945). These property rights have always been given vigilant protection within American jurisprudence because "the protection of private property is indispensable to the promotion of individual freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Cedar Point Nursery*, 141 S. Ct. at 2071.

A physical taking is "perhaps the most serious form of invasion of an owner's property interests." *Loretto*, 458 U.S. at

435. It violates "one of the most treasured rights of property ownership" and "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Cedar Point Nursery*, 141 S. Ct. at 2072. And the impact is such that "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." *Loretto*, 458 U.S. at 435.

Consequently, physical takings are "per se" or "categorical" takings. *Cedar Point Nursery*, 141 S. Ct. at 2072 ("whenever a regulation results in a physical appropriation of property, a per se taking has occurred, and *Penn Central* has no place"); *Loretto*, 458 U.S. at 434–35 ("In short, when the character of the governmental action is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.") (cleaned up). Liability is based upon the regulatory act itself regardless of the reason for that act

or the underlying facts and circumstances. *Cedar Point Nursery*, 141 S. Ct. at 2074.

That the taking occurred pursuant to a valid public purpose does not relieve the government of constitutional liability. *Loretto*, 458 U.S. at 434–35 (a physical taking is a categorical deprivation "without regard to whether the action achieves an important public benefit"). It is likewise irrelevant whether the physical taking arose from a regulation or was the product of a direct occupation. *Cedar Point Nursery*, 141 S. Ct. at 2072.

A physical taking can be either permanent or temporary. *Id.* at 2074; *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 318, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) ("'Temporary' regulatory takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."). It may be only an intermittent occupation. *Cedar Point Nursery*, 141 S. Ct. at 2075. Partial physical takings are also actionable. *Id.* at 2069; *Loretto*,

458 U.S. at 421–22 (a physical taking of a portion of the exterior by cable companies).

II.

APPELLEES' EVICTION BANS PHYSICALLY TOOK THE OWNERS' PRIVATE PROPERTY

The rental property owner's right to possess and exclude is well-established in Washington, both in the common law and by statute. *See, e.g.*, *FPA Crescent Assocs., LLC v. Jamie's, LLC*, 190 Wn. App. 666, 675, 360 P.3d 934 (2015) ("The action of unlawful detainer is the legal substitute for the common-law right of personal reentry for breach. The statutory action relieves a landlord of having to file an expensive and lengthy common law action of ejectment."); RCW § 59.12.030. Consequently, when the eviction bans took ownership and control of this fundamental property right, it was an unconstitutional physical taking. It granted possession of private property to third parties regardless of the property owner's consent, the law of unlawful detainer, the terms and conditions of a lease, or any other facts or circumstances. The occupants became "interlopers with a

government license," *F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 253, 107 S. Ct. 1107, 94 L. Ed. 2d 282 (1987), free to continue in hostile possession against the owners' will interminably, subject only to the State of Washington and Governor Inslee's unilateral terms and conditions. *Gen. Motors Corp.*, 323 U.S. at 378 ("When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership."). The eviction bans were the equivalent of the physical taking of an easement under Washington property law, defined as "a right to enter and use property for some specified purpose." *Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 458, 243 P.3d 521 (2010); *State ex rel. Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 494, 156 P.2d 667 (1945) ("an easement []is a privilege to use another's land in a certain manner which must originate by grant or its equivalent").

The impact of the easement that was forced upon the owners was not far removed from the physical taking in *Loretto*, where the Supreme Court found that the rights to possess, use, and dispose of property were effectively destroyed. 458 U.S. at 435–36. The owners here could not possess their property, nor profitably use it, nor profitably sell it, as they were beholden to occupants that could not be forced to leave and whose possession was not conditioned upon the payment of rent or the adherence to a lease. *See also Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("[T]he moratorium has put the applicants, along with millions of rental property owners across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery.").

The owners also had no control over the timing, extent, or nature of the forced occupation of their rental properties. If and when the owners got their property rights back—whether it would be all of those rights or just some of them—and the value of their private property when the eviction bans were finally

rescinded, were all indeterminate and at the sole discretion of the government. *See Horne v. Dep't of Agric.*, 576 U.S. 350, 363, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015) ("When there has been a physical appropriation, we do not ask whether it deprives the owner of all economically valuable use of the item taken. . . . The fact that the [owners] retain a contingent interest of indeterminate value does not mean there has been no physical taking, particularly since the value of the interest depends on the discretion of the taker, and may be worthless[.]") (cleaned up).

Therefore, while it has been frequently stated that "the government does not have unlimited power to redefine property rights," that is exactly what happened here. *Loretto*, 458 U.S. at 439 (citing *Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) ("a State, by ipse dixit, may not transform private property into public property without compensation")).

III.

YEE V. CITY OF ESCONDIDO DOES NOT APPLY TO EVICTION BANS

Relying upon *Yee v. City of Escondido*, the lower court dismissed the owners' Fifth Amendment claim based upon the proposition that the voluntary act of leasing waived the owners' future physical takings claim. It also held that the Supreme Court's physical takings doctrine under *Cedar Point* did not apply. These determinations were in error. To hold that the forced occupation of the owners' properties by defaulted tenants that the owners wanted to evict was somehow a "voluntary" possession "is to use words in a manner that deprives them of all their ordinary meaning." *See Cedar Point Nursery*, 141 S. Ct. at 2075.

To this end, the lower court's decision was contrary to multiple cases, including the Eighth Circuit's *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (2022), and the Supreme Court's physical takings cases including *Cedar Point*, *Loretto*, and, most particularly, the pronouncement in *Alabama*

Association of Realtors that "preventing [owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." 141 S. Ct. at 2489.

Heights Apartments, LLC, pertained to a COVID-19 eviction ban similar to the one at issue here. Minnesota moved to dismiss the action under Fed. R. Civ. P. 12(b)(6), arguing the plaintiffs had not stated a viable claim for the physical taking of their rental properties. The Eighth Circuit disagreed and, in so doing, reached a conclusion to the opposite of the lower court in this case, "*Cedar Point Nursery* controls here and *Yee*, which the [Government] Defendants rely on, is distinguishable." *Heights Apartments, LLC*, 30 F.4th at 733 (internal citation altered).

At issue in *Yee* was a facial challenge to a local rent control ordinance that limited the rates that could be charged for the land beneath the tenants' mobile homes. 503 U.S. 519. The Yees owned a mobile home park and filed suit alleging that this ordinance was a regulatory taking. They did not object to a

particular tenant's occupancy, or allege that a tenant failed to pay the required rent, or that a tenant violated any of the material terms of the lease. Nor did the owners seek to evict anyone. Rather, the real dispute was about money and how the forced rent reduction damaged the property owners' bottom line. But because the right of the government to enact rent control was well-established by this time, the Yees did not contend that rent control devalued their land. Rather, they argued that the regulation effected a taking of the cash premium that the law transferred from owner to tenant—not a transfer of a physical property attribute. *Id.* at 527.

The Court held that the physical taking doctrine was not the correct theory to facially challenge a rent control regulation. *Id.* at 528. It also found that this transfer of wealth (such that the rent control regulation made the tenant's interest more valuable and the owner's interest less so) was not unconstitutional. *Id.* at 529.

It is also noteworthy that in *Yee* the owners were free to evict the tenant on numerous grounds. 503 U.S. at 524. Had that not been the case, the Court would have looked at things differently: "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." *Id.* at 528. "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 531–32.

But here, the owners were compelled to submit to the occupation of their property and were precluded from terminating any tenancies. That the taking of this fundamental right was only temporary as opposed to permanent does not make it any less of a per se constitutional violation. *Cedar Point Nursery*, 141 S. Ct. at 2074 ("[A] physical appropriation is a taking whether it is permanent or temporary. Our cases establish

that compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary. The duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation.") (cleaned up); *Ark. Game & Fish Comm'n*, 568 U.S. at 33 ("we have rejected the argument that government action must be permanent to qualify as a taking"); *First English*, 482 U.S. at 318–19 ("These cases reflect the fact that temporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.").

Given the lower court's determination, it is also worth examining the context in which the Court's discussion of "voluntariness" arose within *Yee*. It was referenced twice and both times the focus of the Court's discussion was upon the rental price point, not physical possession. In the first, and as discussed above, the Yees alleged that the rent control regulations allowed mobile home tenants to occupy the land at a below market rent.

Yee, 503 U.S. at 526. But when the property owner retains the right to exclude the tenant and take possession in the event of default, a price limitation is not a physical taking. *Id.* at 527–28.

The second reference to "voluntariness" was similar. Yee further complained that rent control precluded him from using price discrimination as a tool to choose one particular tenant over another, *i.e.*, favorable prospective tenants would be quoted favorable rents, while unfavorable prospective tenants would be quoted markedly higher rents. *Id.* at 530–31 & n.*. But, again, the Yees were not looking to evict, or retake possession, or exclude a defaulted tenant. Therefore, the Court said that the inability to employ price discrimination "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." *Id.* at 531.

Accordingly, neither *Yee* nor the lower court's discussion of voluntariness apply here. The act of allowing a tenant to take possession at lease signing does not waive future claims that a physical taking has occurred, nor insulate the State of Washington and Governor Inslee from the consequences of taking the owner's fundamental property rights. Rather, as a result of the eviction bans, the owners' right to possess and exclude were appropriated. The property owner's consent to the tenant's possession became an irrelevancy, replaced by State of Washington and Governor Inslee's unilateral determination as to who can possess a rental unit, when, and for how long. That is not "voluntary" renting but forced occupation. *Fla. Power Corp.*, 480 U.S. at 252 ("This element of required acquiescence is at the heart of the concept of occupation.").

IV.

COVID-RELATED EVICTION MORATORIUMS UNDERMINE FUTURE EFFORTS TO MAXIMIZE HOUSING DURING PUBLIC HEALTH EMERGENCIES

Beyond their manifold legal defects, eviction moratoriums like those the State of Washington and Governor Inslee imposed create serious adverse policy consequences. By heaping additional disincentives on the leasing of residential property—an industry already beset with often prohibitively expensive regulatory compliance costs—the COVID-era slew of moratoriums have made future owner-tenant transactions even costlier for the former. This increases the likelihood that when the next public emergency arrives, the stock of available rental properties will be even lower than it was during this last episode.

While "[o]n social media, the [then-]looming eviction crisis [was] often rendered in Dickensian" terms—"greedy fat-cat landlords pushing vulnerable tenants into the street amid the worst health crisis in a century"—in reality things were more complicated: "More than 70% of properties with four or fewer

rental units aren't owned by fat cats at all, according to the National Association of Realtors, but rather . . . mom-and-pop landlords who often live nearby; manage the property themselves; and rely on the rental income to pay their own mortgages, health care bills and monthly expenses." Abby Vesoulis, *Millions of Tenants Behind on Rent, Small Landlords Struggling, Eviction Moratoriums Expiring Soon: Inside the Next Housing Crisis*, TIME, Feb. 18, 2021, https://time.com/5940505/housing-crisis-2021/. "These small landlords . . . shoulder[ed] a huge burden during the pandemic." *Id.* Next time many of these mom-and-pop owners consider remaining in or reentering the landlord business, their and others' poor experience during this pandemic will cause them to think twice. *See* Kalie Greenberg, *Small Landlord Says He's Leaving Seattle Over the City's Rental Laws*, KIRO5, Apr. 27, 2022, https://bit.ly/3ifzgh0 (discussing Rental Housing Association of Washington data showing Seattle lost 11,521 rental units in 2021).

And for those owners who do not exit the residential leasing business altogether, the experience of COVID-related eviction moratoriums have still created new barriers to housing. One survey of more than 1,000 landlords found that "39 percent . . . are now using more stringent screening criteria, and landlords who have missed rental payments are becoming especially cautious, with 49 percent of these landlords tightening screening criteria, versus 32 percent [among those] who did not miss rental income"—that is, their tenants never missed a payment. Jung Hyun Choi, et al., *The Real Rental Housing Crisis Is on the Horizon*, URBAN INST., Mar. 11, 2022, https://www.urban.org/urban-wire/real-rental-housing-crisis-horizon.

To the extent that keeping as many existing tenants housed in place as possible is a worthwhile public-health policy, the government must compensate those stakeholders that are, in consequence, forced to provide goods and services to nonpaying customers. *Amicus* does not contend that government has no right

to ban the eviction of tenants, even for being in arrears. Rather, it is our position simply that the public must pay for imposing outsized costs on private individuals who did not create the harms these public costs are designed to address. Doing so is not only "fair and just"—per *Armstrong*—but also avoids disincentivizing the future private provision of a public good.

CONCLUSION

For the foregoing reasons, and those the owners presented, this Court should reverse the decision of the lower court and hold that the Appellees' eviction moratoriums were an unconstitutional taking contrary to the Fifth Amendment, together with such other and further relief as the Court deems appropriate and just.

RAP 18.17(b) CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing document complies with the rules of this Court and contains 4,411 words.

DATED: January 6, 2023. Respectfully submitted,

By: *s/ Sam Spiegelman*

SAM SPIEGELMAN, WSBA #58212
BRIAN T. HODGES, WSBA #31976
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
SSpiegelman@pacificlegal.org
BHodges@pacificlegal.org

JONATHAN M. HOUGHTON
Of Counsel
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, Virginia 22201
Telephone: (202) 888-6881
JHoughton@pacificlegal.org

Attorneys for Amicus Curiae
Pacific Legal Foundation