No. 24-435

In the Supreme Court of the United States

GHP MANAGEMENT CORPORATION, *et al.*,
Petitioners,

v.

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

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

BRIEF AMICUS CURIAE OF WASHINGTON BUSINESS PROPERTIES ASSOCIATION IN SUPPORT OF PETITIONERS

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Question Presented

In March 2020, the City of Los Angeles adopted one of the most onerous eviction moratoria in the country, stripping property owners like Petitioners of their right to exclude nonpaying tenants. The City pressed private property into public service, foisting the cost of its coronavirus response onto housing providers to avoid expensive and less expedient—but constitutional—means to help those in need. In doing so, the City in effect imposed and transferred to defaulting tenants an exclusive easement in the private property of others without paying for it. By August 2021, when Petitioners sued the City seeking just compensation for that physical taking, back rents owed by their unremovable tenants had ballooned to over $20 million. The moratorium concluded in 2024.

Relying on a mobile home rent control case from this Court, *Yee v. City of Escondido*, the Ninth Circuit affirmed dismissal of Petitioners' complaint because they "voluntarily opened" their properties to tenants in the first instance and thus could never state a physical takings claim against the City's law, drastic as it was. The Federal and Eighth Circuits disagree. In *Darby Development Co. v. United States* and *Heights Apartments, LLC v. Walz*, both courts held *Yee* inapposite and validated identical claims because moratoria like the City's deprive owners of the right to exclude akin to *Cedar Point Nursery v. Hassid*.

The question presented is:

Whether an eviction moratorium depriving property owners of the fundamental right to exclude nonpaying tenants effects a physical taking.

Table of Contents

Table of Authorities

Page(s)

Cases

Rules of Court

Other Authorities

Interest of Amicus Curiae

Washington Business Properties Association ("WBPA") is a member-based nonprofit organization advocating for property owners against burdensome taxation and encroaching overregulation of property. It is a broad coalition of businesses and professional associations focused on commercial, residential, and retail real estate, and property rights in Washington state. WBPA represents the interests of business owners to state and local legislative bodies, news media, and the general public. It is actively involved in the Legislature and local governments on any legislation affecting property rights and property taxation.

WBPA has a strong interest in the outcome of this case as it is committed to the protection of property rights throughout the United States. Amicus believes that if the lower court's opinion stands, it will incentivize other state and local governments to further erode the fundamental protections constitutionally afforded to private property.[1]

Summary of Reasons for Granting the Petition

The lower courts are irreconcilably divided about the holding of *Yee v. Escondido*. 503 U.S. 519 (1992).

Some courts, including the Ninth Circuit below, believe that *Yee* stands for the proposition that a physical taking cannot exist as a matter of law within

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[1] Pursuant to Sup. Ct. R. 37.2, all parties received notice of intent to file this brief. Pursuant to Sup. Ct. R. 37.6, Counsel of Record states that no party authored this brief in whole or in part, and that no one, other than *Amicus Curiae*, its counsel, and its members, made any monetary contribution intended to fund the preparation or submission of this brief.

the landlord-tenant relationship. Consequently, the instant that an owner and a lessee sign a lease, the government may, by regulation, forcibly take control of the tenancy and do as it pleases free from Fifth Amendment scrutiny. The lease matters little, and so does the owner's consent. If the government decrees it so, a tenant may continue to possess the property and to exclude the owner even after the lease has expired. In fact, should the government so choose, it can grant the occupant a lifetime tenancy. The government can force the owner to house people not listed on the lease. The government can force the owner to house occupants that refuse to pay rent, or who commit criminal acts, or who harass other tenants, or who destroy the owner's property to the point where it is no more than a pile of sticks. Who can reside there, for how long, and the terms and conditions of the tenancy are the government's decisions to make.

And there is nothing that the property owner can do about it. There is no recourse and the owner just has to take whatever punishment is dished out as the cost of doing business in the commercial realm. The government can exert as much power and control in "adjusting the landlord-tenant relationship" as it wishes, with complete immunity from the Fifth Amendment's requirement of just compensation.

But not every court believes this to be true. Indeed, the above interpretation is both contrary to what *Yee* actually decided and in conflict with the multiple holdings of this Court that all physical invasions by the government, without the payment of just compensation, are categorically unconstitutional. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 148–49 (2021); *Loretto v. Teleprompter Manhattan CATV*

Corp., 458 U.S. 419, 434–35 (1982). Thus, a circuit split has arisen. In an analogous context, the Eighth Circuit Court of Appeals and the Federal Circuit Court of Appeals held to the exact opposite of the Ninth Circuit below, to wit, that *Yee* is inapplicable and does not preclude physical takings claims in the landlord-tenant context. *See Darby Dev. Co. v. United States*, 112 F.4th 1017 (Fed. Cir. 2024); *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022).

The error in interpreting *Yee* is also far broader than simply the case below. It is a stubbornly persistent misinterpretation that has been carried forward by numerous lower courts in numerous contexts and led to the dissipation of fundamental property rights. Therefore, certiorari should be granted to reconcile the competing legal viewpoints and to provide much needed clarity to the law of takings.

Reasons for Granting the Petition

I. The Misinterpretation of *Yee v. Escondido* Erodes Fundamental Property Rights

The Ninth Circuit rejected the physical takings claim as a matter of law based upon *Yee*. It held:

> The Landlords failed to state a claim for a Fifth Amendment per se physical taking. Under the Supreme Court's current jurisprudence, 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. *See Yee v. City of Escondido*, 503

> U.S. 519, 527–28 (1992); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987) ("[S]tatutes regulating the economic relations of landlords and tenants are not *per se* takings.") . . . . Here section 49.99 does not effect a physical taking because the Landlords voluntarily opened their property to occupation by tenants.

GHP Mgmt. Corp. v. City of Los Angeles, No. 23-55013, 2024 WL 2795190, at *1 (9th Cir. May 31, 2024).

But *Yee* contains no such holding. And the longer that this error continues, the greater the damage done to property rights.

A. For Some Courts, *Yee*'s Dicta Outstrips Its Holding

In *Yee*, the controversy arose from the owner's decision to utilize a takings test that did not strictly apply. Yee owned a mobile home park and was subject to a local rent control ordinance that limited the rents that could be charged for the land beneath the tenants' mobile homes. *Yee*, 503 U.S. at 524. Yee filed suit alleging that the rent cap was an unconstitutional taking.

The owner's underlying complaint was that the forced rent reduction damaged the bottom line. *Id.* at 526–27. Before the California appellate court, Yee framed the dispute as follows:

> [P]laintiffs argue, the price of used mobilehomes in Escondido has increased dramatically since passage of the rent control ordinance due entirely to the fact that existing tenants are able to monetize the value to mobilehome owners living in a

> rent controlled jurisdiction. According to plaintiffs, Escondido's rent control ordinance constitutes a "taking" because it transfers this monetary interest from park owners—who would normally capture the value through increased rents—to tenants.

Yee v. City of Escondido, 224 Cal. App. 3d 1349, 1352 (Cal. Ct. App. 1990).

But Yee did not allege that this regulation was a taking of the right to economic use. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Instead, he claimed that the local government's price control measures were a categorical physical taking. Under this test, once a government forcibly invades private property, liability is absolute regardless of any underlying facts and circumstances. *Loretto*, 458 U.S. at 434–35. Placing a square peg into a round hole, Yee asserted a facial physical invasion and the taking of "a discrete interest in land—the right to occupy land indefinitely at a submarket rent." *Yee*, 503 U.S at 527.

Notwithstanding, under the local law Yee maintained the right to evict under numerous grounds. *Id.* at 524 (permissible reasons to evict included "the nonpayment of rent, the mobile homeowner's violation of law or park rules, and the park owner's desire to change the use of his land"); *id.* at 527–28 ("At least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so."). And the owner did not object to any 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.

Yee's invocation of the law of physical takings to challenge an economic restriction was summarily rejected. "When government acts to restore fair rents by imposing rent control, the fact that the price of used mobilehomes rises has not unreasonably taken anything from the landlord, let alone caused a permanent physical occupation of the landlord's property." *Yee*, 224 Cal. App. 3d at 1357.

Consequently, *Yee* did not hold that physical takings are a legal impossibility within the context of a residential rental property. Rather, *Yee* simply determined that the physical takings doctrine does not apply to claims that a regulation stripped the property owner of a portion of its economic use:

> Petitioners emphasize that the ordinance transfers wealth from park owners to incumbent mobile home owners. Other forms of land use regulation, however, can also be said to transfer wealth from the one who is regulated to another. Ordinary rent control often transfers wealth from landlords to tenants by reducing the landlords' income and the tenants' monthly payments, although it does not cause a one-time transfer of value as occurs with mobile homes. Traditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline but the value of his neighbor's property may rise. The mobile

> home owner's ability to sell the mobile home at a premium may make this wealth transfer more *visible* than in the ordinary case, see Epstein, Rent Control and the Theory of Efficient Regulation, 54 Brooklyn L.Rev. 741, 758–759 (1988), but the existence of the transfer in itself does not convert regulation into physical invasion.

Yee, 503 U.S. at 529–30.

Yee may have looked at things differently had the rent control statute precluded eviction. The Court 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." *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 532; *see also F.C.C.*, 480 U.S.at 252 n.6 ("We do not decide today what the application of [*Loretto*] would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements.").

Contrary to the above however, the Ninth Circuit and other courts have seized upon two discussions within *Yee* to justify the alternate holding that all physical takings claims are precluded as a matter of law within the owner-lessee context.

First, they focus upon the fact that Yee "voluntarily" rented to his tenants.[2] Their reading of the case is that the agreement to rent at the lease's inception renders the owner's invitation irrevocable.

Yee contains no "once-invited-you-can-stay-forever" rule. *See* William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 Hofstra L. Rev. 1, 82 (1995) (regarding *Yee*, "it is unclear why the initial 'invitation' should be controlling;" the government cannot extend the invitation in perpetuity without just compensation). A lessee's occupancy is temporary and conditional, not permanent and absolute. And allowing a lessee to take possession at lease signing does not insulate local governments from the consequences of taking the owner's fundamental property rights. Rather, once the government takes control of the right to exclude, whatever consent the owner may have given in the past based upon the conditional terms and conditions of a lease becomes an irrelevancy, replaced by the government's unilateral

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[2] *Yee*, 503 U.S. at 527–28 ("The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land.… But the Escondido rent control ordinance, even when considered in conjunction with the California Mobile Home Residency Law, authorizes no such thing. Petitioners voluntarily rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so."); *id.* at 530–31 (the inability of a property owner to choose tenants via 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 n*.

determination as to who can possess a rental unit, when, and for how long.

Second, the Ninth Circuit and others give outsized relevance to *Yee*'s observation that the rent control regulations, facially, merely regulated the landlord-tenant relationship.[3] And while that was true for a City of Escondido ordinance that allowed evictions and was focused on capping rental rates, that is decidedly not true for ordinances that summarily banned evictions.

By improperly focusing upon the landlord-tenant relationship, the Ninth Circuit ignored the transfer of the property right to the government and instead, placed false emphasis on who the government gave that property right to after they took it. *Yee*, 224 Cal. App. 3d at 1356 ("If an owner's property has been taken by the government, it should be of no constitutional consequence to whom the property has been given.").

In other words, if a thief steals your car, it does not matter whether the thief keeps the car himself, gives your car to a stranger, or gives it to your neighbor.[4]

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[3] *Yee*, 503 U.S. at 528 ("On their face, the state and local laws at issue here merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant.").

[4] In the context of a *Penn Central* case regarding an owner's reasonable investment backed expectations, Justice Scalia stated in a concurrence that:

> there is nothing to be said for giving [a windfall] to the *government*—which not only did not lose something it owned, but is both the *cause* of the miscarriage of fairness and the only one of the three parties involved in the miscarriage (government,

Regardless of who gets it in the end, your car is still stolen, and the thief is still the one that took it.

Likewise, if the government forcibly takes the right to exclude, whether it keeps that right for itself or assigns it to a third-party lessee, it does not change the fact that this fundamental property right was taken. *Cedar Point Nursery,* 594 U.S. at 149; *Loretto*, 458 U.S. at 432 n.9. To force owners to house occupants against their will, contrary to the lease, and irrespective of local detainer laws, and to then characterize those occupants as still "invited" due to the government's "mere adjustment of the landlord-tenant relationship," "is to use words in a manner that deprives them of all their ordinary meaning." *See Cedar Point Nursery,* 594 U.S. at 154.

Lastly, the Ninth Circuit's reading of *Yee* is directly contrary to *Loretto*. Therein, the condemnor argued that because the property owner voluntarily chose to use her building as a residential rental, the

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> naive original owner, and sharp real estate developer) which *acted unlawfully*—indeed *unconstitutionally*. Justice O'CONNOR would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the unjust profit *to the thief*.

Palazzolo v. Rhode Island, 533 U.S. 606, 636–37 (2001) (Scalia, J., concurring); *see also Knick v. Twp. of Scott*, 588 U.S. 180, 193 (2019) ("A bank robber might give the loot back, but he still robbed the bank. The availability of a subsequent compensation remedy for a taking without compensation no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care.").

physical attachment of the cable box was a regulation of use, not a physical taking. *Loretto*, 458 U.S. at 438–39. The Court disagreed. A physical taking is a physical taking regardless of how the property is being used. *Id.* at 438–39. As the Court held, "[a] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Id.* at 439 n.17. *See also Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015) (the voluntary decision to enter the raisin market did not obviate the taking, as "property rights cannot be so easily manipulated.").

B. The Misinterpretation of *Yee* Is a Pervasive Problem

As one commentator predicted after *Yee* was decided, "if the landowner voluntarily grants a limited estate, then the state can stretch that interest into a fee simple without paying just compensation." Richard A. Epstein, Yee v. City of Escondido*: The Supreme Court Strikes Out Again*, 26 Loy. L.A. L. Rev. 3, 17–18 (1992). Unfortunately, the prediction has come true. Time and time again, lower courts have incorrectly held that if a property owner initially consents to a third-party's possession, regardless of whether it is only limited or conditional, any subsequent physical takings claim is legally barred. Consequently, the government is free to forcibly alter and expand the occupancy to a nearly unlimited degree and without regard to just compensation; irrespective of an owner's consent, the owner's contract rights, or the occupant's desire or ability to preserve and pay for the property that it has been given.

Thus, with *Yee* as their guidepost, courts have held that a compelled, indefinite rental tenancy was not an unconstitutional physical taking. *See*, *e.g.*, *74 Pinehurst LLC v. New York*, 59 F.4th 557 (2d Cir. 2023), *cert. denied*, 218 L. Ed. 2d 66 (2024); *Kagan v. City of Los Angeles*, No. 21-55233, 2022 WL 16849064 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 71 (2023); *Harmon v. Markus*, 412 F. App'x 420, 422 (2d Cir. 2011); *Cienega Gardens v. United States*, 265 F.3d 1237, 1248–49 (Fed. Cir. 2001); *Greystone Hotel Co. v. City of New York*, 13 F. Supp. 2d 524, 527 (S.D.N.Y. 1998); *Troy Ltd. v. Renna*, 727 F.2d 287, 290–91, 301–02 (3d Cir. 1984); *Rent Stabilization Ass'n of New York City, Inc. v. Higgins*, 83 N.Y.2d 156, 172 (1993); *State Agency of Development and Community Affairs v. Bisson*, 161 Vt. 8, 15 (1993).

The D.C. Circuit held that an owner's decision to use its property as rental housing meant that the forced affixing of satellite dishes to the real property was not a physical taking. *Bldg. Owners & Managers Ass'n Int'l v. F.C.C.*, 254 F.3d 89, 98 (D.C. Cir. 2001). And in the field of healthcare, the First and Second Circuits have held that once a medical facility voluntarily accepts a patient, the government can then strip the facility of the right to exclude without liability for a physical taking. *See Connecticut Ass'n of Health Care Facilities, Inc. v. Bremby*, 519 F. App'x 44, 45 (2d Cir. 2013); *Franklin Mem'l Hosp. v. Harvey*, 575 F.3d 121, 126 (1st Cir. 2009).

Yee has also been dispositive with regard to a government approved invasion into software. *CDK Glob. LLC v. Brnovich*, 16 F.4th 1266, 1282 (9th Cir. 2021) ("It is no answer that CDK may not wish to open its [Dealer Management System] to any particular

authorized integrator. Once property owners voluntarily open their property to occupation by others, they cannot assert a *per se* right to compensation based on their inability to exclude particular individuals.") (quotations and citation omitted).

The COVID eviction ban cases, inclusive of the instant matter, are simply the most recent of those to misinterpret the holding of *Yee*. The Eighth Circuit Court of Appeals and more recently, the Federal Circuit Court of Appeals, are the steadfast outliers, holding that *Yee* does not apply and that an eviction ban implicates the takings clause. *Darby Dev. Co.*, 112 F.4th 1017; *Heights Apartments*, 30 F.4th 720. But many others have held that a compelled occupation of rental units was not a physical taking because the owner initially agreed to lease. *See, e.g.*, *El Papel, LLC v. City of Seattle*, No. 22-35656, 2023 WL 7040314 (9th Cir. 2023), *cert. denied sub nom. El Papel, LLC v. City of Seattle*, 144 S. Ct. 827 (2024); *Williams v. Alameda Cnty.*, 642 F. Supp. 3d 1001, 1020 (N.D. Cal. 2022); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 220 (D. Conn. 2020); *Gonzales v. Inslee*, 535 P.3d 864 (Wash. 2023), *cert. denied*, 144 S. Ct. 2685 (2024).

Conclusion

The enduring misinterpretation of *Yee* has radically altered property owners' fundamental right to possess and exclude. Unequivocally, an owner's decision to use property commercially does not come at the cost of losing Fifth Amendment protection. But nonetheless, many lower courts have not seen it that way and *Yee* has been steadily expanded into something that is now unrecognizable from what this Court determined; it is a purveyor of categorical

immunity from physical takings claims and the means by which commercial property has been demoted from the ranks of those entitled to full constitutional protection. Clarity must be provided to correct the lower courts' frequent misinterpretation of *Yee* and the concomitant erosion of constitutional protection. The Petition should be granted.

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Respectfully submitted,

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