No. 23-490

IN THE

Supreme Court of the United States

ENRIQUE JEVONS, AS A MANAGING MEMBER OF JEVONS PROPERTIES LLC, *ET AL.*,
Petitioners,

v.

JAY INSLEE, GOVERNOR OF WASHINGTON, *ET AL.*,
Respondents.

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

BRIEF OF CITIZEN ACTION DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JACKSON MAYNARD
Counsel of Record
SAM SPIEGELMAN
Citizen Action Defense Fund
111 21st Avenue SW, Ste. 13
Olympia, Wash., 98501
850.519.3495
jackson@citizenactiondefense.org
sam@citizenactiondefense.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

This *amicus* brief is submitted by the **Citizen Action Defense Fund** ("CADF"). CADF is an independent, nonprofit organization based in Washington State that supports and pursues strategic, high-impact litigation to advance free markets, restrain government overreach, and defend constitutional rights. As a government watchdog, CADF files lawsuits, represents affected parties, intervenes in cases, and files *amicus* briefs when the state enacts laws that violate the state or federal constitutions, when government officials take actions that infringe upon the First Amendment or other constitutional rights, and when agencies promulgate rules in violation of state law.

Amicus has a strong interest in the outcome of this case as they are committed to the protection of property rights in Washington State and throughout the United States. Specifically, *amicus* is concerned that if the lower court's opinion in this case stands, it will incentivize other state and local governments to further erode the fundamental protections constitutionally afforded to private property.

INTRODUCTION AND SUMMARY OF ARGUMENT

In March 2020, Washington Governor Jay Inslee instituted an eviction moratorium in response to a

---

[1] Pursuant to Rule 37, counsel for *amicus* affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amicus*, their members, or counsel, made any monetary contribution to its preparation or submission. All parties received timely notice of *amicus*' intention to file.

growing COVID-19 pandemic, a public health crisis that would largely come to define American life and politics in the years to come. Under the moratorium, residential rental owners were prohibited from evicting tenants under almost any circumstances, including but not limited to (a) nonpayment of rent, (b) the expiration of the lease term, and (c) violation of lease terms for which eviction is a prescribed or otherwise lawful remedy. Pet. Br. at 4. These restrictions were a patent violation of Washington rental owners' constitutional "right to exclude" others from their property, which—it should be obvious—extends to those who, though invited in, wind up long overstaying their contractual welcome. The right with which Governor Inslee has interfered is a *fundamental* attribute of ownership—one that dates to the salad days of the Anglo-American legal tradition, and was, before that, a mainstay of ancient and medieval Western legal codes. As the Court recently made clear in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021), the Constitution continues to robustly protect the right:

> The right to exclude is "one of the most treasured" rights of property ownership. According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." In less exuberant terms, we have stated that the right to exclude is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."

Id. at 2072 (internal citations omitted).

In this brief, *amicus* begin with a history of the right to exclude. This history demonstrates that the right long predates the Constitution and has been within the pantheon of Anglo-American law since at least 1215. *Amicus* then explain how the lower courts' reliance on *Yee v. City of Escondido*, 503 U.S. 519 (1992), to uphold this and several other covid-related eviction moratoria fatally misreads the Court's opinion in that case and in *Cedar Point*, and makes it far too easy for officials to interfere with the well-worn rules and customs of the owner-tenant relationship. After placing the right to exclude within the Anglo-American legal tradition and discussing how lower courts have and continue to misconstrue *Yee* and *Cedar Point* in the eviction-moratorium context, *amicus* conclude with why this particular case is so important and therefore worthy of the Court's review.

Permitting Governor Inslee and other public officials to run roughshod over the fundamental rights of ownership without compensation exposes housing providers across the United States to future extraconstitutional restrictions under false claims or exaggerations of an "emergency." Covid-related eviction moratoria predictably have generated substantial litigation in recent years and there is widespread concern that if the Court does not intervene it will further embolden state and local officials to trample civil rights using subterfuge. In light of these factors, covid-related eviction moratoria—even those that have expired—together serve as an ideal vehicle through which the Court can make clear to the Ninth and other circuits that fundamental rights are fundamental, *no matter the reasons for which they have been violated*.

ARGUMENT

I. As The Court Confirmed in *Cedar Point*, the "Right to Exclude" Others From One's Property Is a Longstanding and Fundamental Attribute of the Anglo-American Conception of Ownership

A. The Right to Exclude Is the Sine Qua Non of Ownership

The Court regularly—and properly—relies upon legal history and tradition to site fundamental rights, even those not explicitly included in the Constitution's text (*cf.*, the right to free speech). *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2246–48 (2022). The history of the "right to exclude" in particular highlights its consistent and quintessential role in limiting governmental overreach. In a celebrated article, Professor Thomas Merrill called the right "more than just 'one of the most essential' constituents of property—it is [its] *sine qua non*"—*i.e.*, ownership could not exist without it. Thomas W. Merrill, *Property and the Right to Exclude,* 77 Neb. L. Rev. 730, 730–31 (1998). This is especially so in the Anglo-American conception of property, though the right to exclude has been a mainstay of most legal and cultural frameworks since the dawn of civilization. *See* Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 Chi.-Kent L. Rev. 321, 341 (1995) ("The foundational norm of private property" being "the right to control entry. On this legal issue there is much textual evidence from Mesopotamia and Israel, the two civilizations for which law codes have been found."). The right to exclude as the *sine qua non* of ownership

has been central to *Western* legal theory since at least the Greek Golden Age and the *Pax Romana*. *See* Aristotle, *Rhet.*, 1361a (c. 4th cent. BCE) (writing that a thing "is our own if it is in our power to dispose of it or not"); Juan Javier Del Granado, *The Genius of Roman Law from a Law and Economics Perspective*, 13 San Diego Int'l L.J. 301, 316 (2011) ("Roman property law typically gives a single property holder a bundle of rights with respect to everything in his domain, to the exclusion of the rest of the world.").

In light of what had already been its long history, it is no surprise that the "right to exclude" was among the core freedoms English King John's rebellious barons demanded from him in the Magna Carta (1215)—the "Great Charter" that put a (granted, *temporary*) stop to their uprising. Specifically, the Great Charter includes that "[n]o free man shall be seized or imprisoned, or stripped of his rights *or possessions* . . . except by the lawful judgments of his equals or by the law of the land." Magna Carta art. 39 (cleaned up) (emphasis added).

By the 1600s, after centuries of violent struggle between kings, nobles, and crowds for overall political hegemony of Europe's nation-states, many "Enlightenment" thinkers began gravitating towards the most rights-based theories of government theretofore conceived. Most prominent among those spearheading this welcome shift was English philosopher John Locke, who soon after the Glorious Revolution of 1688 declared that the "great and chief end" for which men "unite into commonwealths" is to ensure the "preservation of their property." John Locke, *Second Treatise of Government*, IX § 123 (1689) (cleaned up). Locke himself found inspiration in the

writings of Dutchman Hugo Grotius, who earlier offered that "no man could justly take from another, what he had thus first taken to himself." Hugo Grotius, *De Jure Belli ac Pacis* § II.II.II (1625).

Shortly after ratification, Madison gave full endorsement to his intellectual forebears' understanding of *property*, declaring "[t]his being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." James Madison, "Property," in *James Madison: Writings* 515 (Jack N. Rakove, ed., 1999) (1792). And in this he was hardly alone.

B. The Original Public Meaning of "Property"

Summarizing the classical-liberal contours of public authority, preeminent legal scholar Richard Epstein declared that "the proper ends under the police power are those of the private law of nuisance, no more and no less." Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* 353 (2014). Epstein did not devise this approach in a vacuum. Rather, it reflects the consensus understanding of government—and the limitations thereon, especially with respect to property rights—shared between the Constitution's Framers and among late-eighteenth and early-to-mid-nineteenth centuries American courts tasked with interpreting their words. Together, their conception of the Takings Clause and *property* in general comprise the former's original public meaning, a theory of interpretation that, with some ebbs and flows, has proven the most durable means of constitutional interpretation. Precisely because it asks what the document was popularly understood to mean *at*

ratification. *See* Jack N. Rakove, *Original Meanings* 339–68 (1996).

The Framers, following in Locke's footsteps, understood the necessity for robust constitutional protection of property. James Madison, the chief author of the Constitution (including of the Takings Clause), already enamored of Locke and Grotius, also relied upon eminent English jurist William Blackstone's definition of *property—viz.*, "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." W. Blackstone, *Commentaries on the Laws of England* *2 (1768); Madison, *supra*, at 515 ("This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.'").

The Court has wholeheartedly endorsed the Blackstonean definition of *property* as essentially the right to exclude, most recently in *Cedar Point*. 141 S.Ct. at 2072. "The Founders," Chief Justice Roberts eloquently wrote, "recognized that the protection of private property is indispensable to the promotion of individual freedom." As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." "Discourses on Davila," in 6 *Works of John Adams* (C. Adams ed., 1851). This Court agrees, having noted that protection of property rights is "necessary to preserve 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." *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017).

Four decades earlier, a majority of the justices acknowledged, "in less exuberant terms," *id.*, that the right to exclude is "universally held to be a fundamental element of the property right" that is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). *See also Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978) ("One of the main rights attaching to property is the right to exclude others . . ."); *United States v. Causby*, 328 U.S. 256 (1946) (agreeing that military flyovers into skies about private farmland, without compensating the owner, is a takings violation); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (similar to *Causby*, but involving the military's firing cannons over private airspace).

After *Kaiser Aetna* the Court went even further, concluding in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), that "[t]he historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it." *Id.* at 435. "Such an appropriation is perhaps the most serious form of invasion of an owner's property interests." *Id.* Why? Because unlike restrictions on use, "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." *Id.* (citing *Andrus v. Allard*, 444 U.S. 51, 6 –66 (1979)). Without the right to exclude, an owner loses "any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property." *Id.* at 436. And this is *exactly* what Governor Inslee has taken from Petitioners.

C. The Cedar Point *Per Se Takings Test*

The majority in *Cedar Point* distinguished between the "physical appropriation of property" ala *Loretto* (which involved the running of television cable on top of private apartments), and governmental trespasses or occupations that are conditions for "the grant of a benefit such as a permit, license, or registration." 141 S.Ct. at 2079. The latter will often involve state actions designed specifically to prevent or minimize the nuisant use of one's property, which has never been within the common-law ambit of ownership. *See* Scott M. Reznick, *Empiricism and the Principle of Conditions in the Evolution of the Police Power: A Model for Definitional Scrutiny*, 1978 Wash. U. L.Q. 1, 10 (1978) ("*Sic utere* [*tuo alienum non laedas*]"—roughly, 'do not use your land so as to injure others'—is the fountainhead maxim from which both the common law of nuisance and the police power arose. As originally applied, *sic utere* 'operated to protect real property from what the courts thought were injuries resulting from the use of another of his real property.' That is, the courts used *sic utere* principles to resolve cost spillover conflicts between the existing uses of neighboring landowners. This relationship in tort between property owners originally caused the maxim and the emerging police power to be defined in terms of the prevention of harms.").

The distinction between takings, on the one hand, and anti-nuisance rules or benefit-conditional "government health and safety inspection regimes" on the other is simple enough, and certainly does not complicate the high standard of review that the *per se* rule imposes on physical occupations. While the

application of the rule to Governor Inslee's eviction moratorium is reserved for the merits, at this stage *amicus* urge the Court to consider the importance of reviewing an appeals-court ruling that—especially after *Cedar Point*—maintains the false premise that nearly *any* public purpose justifies and excuses invasions of private property.

Taking all of this into consideration, it is reasonable to ascribe to *Cedar Point* the following foundational test: Outside of standing "inspection regimes" and other laws designed to prevent nuisant uses of private property—*i.e.*, state actions preventing owners from utilizing their properties in ways the common law already patently prohibits—government must *always* pay for what it takes. 141 S.Ct. at 2071. Applied here, the test requires Washington compensate Petitioners for lost rent and any other provable damages resulting from the third-party occupation of their properties—that is, for the period *past the point* at which the contractual or *de jure* owner-tenant relationship in each case had ended. And it is this detail—the moratorium's forced *extension* of tenancies—that renders *Yee* all but irrelevant to whether Governor Inslee's actions violated the Takings Clause.

II. The Court Should Grant Review In Order to Clarify That *Yee v. City of Escondido* Does Not Protect Emergency, Covid-Related Eviction Moratoria from Heightened Scrutiny Under *Cedar Point*'s *Per Se* Takings Test

The District Court for the Western District of Washington relied upon *Yee* to uphold Governor

Inslee's covid-related eviction moratorium, concluding that "Plaintiffs' attempt to distinguish *Yee* from this case fails, as the plaintiffs in *Yee* similarly argued that the ordinance required them to lease to tenants beyond their original lease terms." *Jevons*, 561 F.Supp.3d 1082, 1106. Other courts have done the same or similar. *See infra*. This comparison ignores a crucial distinction between the two cases, however. The local ordinance in *Yee* did not "require" mobile park owners in the City of Escondido "to lease to tenants beyond their original lease terms," but merely prohibited them from raising rents on mobile home "pads" (*i.e.*, lots), allowing those selling their mobile homes within the park to pocket "a premium from the purchaser corresponding to" the added value of "the right to occupy a pad at below-market rent indefinitely." 503. U.S. 527. It is vital to note, however, that the Yees were at all times legally free to withdraw from the rental market altogether (first subject, of course, to any outstanding contractual terms), and that the entire outcome would have been different if "the statute . . . [were] to compel a landowner over objection to rent his property or *to refrain in perpetuity from terminating a tenancy*." 503 U.S. at 528 (emphasis added). "On their face," the *Yee* Court continued, "the state and local laws at issue here merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant." *Id.* (emphasis original). It forced mobile park owners to host tenants at apparently below-market rates, not to continue hosting them until the government permitted their removal. Yet Governor Inslee's moratorium did all of this and more. It thwarted one Petitioner's "attempt[] to evict a tenant who had stopped paying rent"—an evictable offense—

"and created enough noise in her unit that a neighbor complained." Pet. Br. at 6. Another Petitioner "had 171 tenants who were not current with their rent" *Id.* at 5. And all the while the Petitioners still could not evict anyone who wished to stay. *Id.* at 4. In short, Governor Inslee's eviction moratorium went far beyond the permissible "regulating [of] the economic relations" between "landlords and tenants," *Fed. Elec. Comm'n v. Fla. Power Corp.* 480 U.S. 245, 252 (1987), and into the realm of occupation.

And it should go without saying: occupation is *not* regulation. While the Yees could not "set rents or decide who their tenants will be," they were at least allowed to take each pad out of the rental market altogether. *Yee*, 503 U.S. at 526. Petitioners here had no such luxury. So long as the government maintained a pandemic state of emergency, Petitioners would be forced to continue housing most holdovers—*i.e.*, trespassers—with eviction permitted under only the narrowest of circumstances. In this light, *perpetuity* does not mean "permanent"—nor must it. Just as *Loretto* clarified that neither the *purpose* nor *extent* of an invasion is relevant to whether a physical occupation works a taking, 458 U.S. at 436–37, *Cedar Point* explained—though hardly for the first time in the Court's history—that an invasion's *temporary duration* is also far from dispositive:

> To begin with, we have held that 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. For example, after finding a taking by physical invasion, the Court in *Causby* remanded the case to the lower court to determine "whether the easement taken was temporary or permanent," in order to fix the compensation due.

141 S.Ct. at 2074 (internal citations omitted). The duration of Governor Inslee's eviction moratorium is therefore irrelevant to the overall takings question. It is only useful as a gauge for how much compensation the government owes to each owner who was forced to host "tenants" beyond the conclusion of their leases. *Id.* at 2074 ("The duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation."). And so it is that "the line which separates [cases involving no forced physical occupation] from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license." *Florida Power,* 480 U.S. at 253.

As Professor Epstein reiterated soon after the Court decided *Cedar Point*: "It is pure sophistry to claim that the state does not engage in a taking when it authorized a tenant to stay continuously in possession of the leased premises after the expiration of the lease at a rent that is consciously set below market value." Richard A. Epstein, *A Bombshell Decision on Property Takings*, Hoover Inst., June 28, 2021, https://rb.gy/qcn6nu. That is, "invitation" implies *continual* consent, which can be *legally* withdrawn at any time (again, whether that would constitute a private breach is another matter). When one welcomes invited dinner guests into their vacation

home, for example, the parties agree that the invitation ends that evening. If someone invites a friend to stay with them—free of charge—until the latter is "back on their feet," the former does not, *nor should they reasonably expect*, that that friend will continue staying there once they are back in a position to live elsewhere. In either case, the parties are free to draw up a new agreement—perhaps, say, extending the dinner party into a full weekend retreat. But that would mean creating an entirely *new* invitation. Compared to these hypotheticals, Governor Inslee's eviction moratorium *at least* violated each Petitioner's reasonable expectation that once their tenants' lease agreements ended—by expiration or the lessee's violation of terms—so too would their *invitation* to continue occupying the property.

Some courts—though not all—have denied or ignored this crucial point, and have misread or misconstrued *Yee* to all but entirely exempt state-protected tenant holdovers from *Cedar Point*'s *per se* takings test. For example, in *Rental Housing Association v. City of Seattle*, a Washington State appeals court heard a challenge to Seattle's covid-related eviction moratorium. Finding for Seattle, the court conceded that "*Yee* was premised on the fact that the applicable rent control laws did not affect the landlords' right to exclude anyone from their property." 22 Wash.App.2d 426, 448 (2022). Yet it proceeded to apply it favorably to an ordinance that did *just* that, on the flawed premise that Seattle's eviction moratorium "d[id] not require a landlord to rent property to anyone with whom the landlord has not *already* voluntarily entered into a lease agreement." But an initial invitation does not cancel

out all the other terms of a lease agreement. To suggest otherwise is to stretch the concept until it consumes the entirety of the owner-tenant relationship, when in fact it merely marks its *commencement*.

Other courts have made the same categorical error when using *Yee* to uphold covid-related eviction moratoria. One court presumed that the "mobile home eviction bar" in *Yee* "did not constitute a 'compelled physical invasion' because the Yees had 'voluntarily rented their land to mobile home owners' in the first place." *Gallo v. District of Columbia*, 2023 WL 7552703, at *5 (D.D.C. Nov. 14, 2023) (slip op.). "In other words," the court continued, "the Yees had consented to the initial physical occupation of their land when they leased the property to the tenants. At most, the government policy prolonged that occupation." *Id.* In truth, *Yee* involved a *rate control* ordinance that "took" from the plaintiffs the amount by which they could have increased rent between tenants, but for the local law preventing them from quickly delisting and then re-renting its pads. 503 U.S. at 526–27. That is, the Yees could not reject new tenants *in order to* skirt the ordinance by briefly removing units from the rental market. At no time were the Yees legally prohibited from *actually* removing their pads from the rental market and thus out from under the disputed ordinance's mandate. Plaintiffs challenging covid-related eviction moratoria did not have this option so long as their state or local ban remained in effect. *Gallo*, 2023 WL at *7 ("To be sure, Gallo was unlucky in the timing of his real-estate investment. He bought what he thought would be a profitable residential unit, and he ended up with

a freeloader who avoided eviction because of the District's COVID-related eviction prohibition.").

In *El Papel, LLC v. City of Seattle*, the Ninth Circuit recently reached the same flawed conclusion, reasoning that because the eviction ban did not entail physical invasions *from the get-go* that it could not have effected any takings. 2023 WL 7040314, at *2 (9th Cir. Oct. 26, 2023). The Ninth Circuit also noted that the eviction moratorium in issue still "allowed the [l]andlords to evict their tenants for some specified purposes," and that this also saves it by making the physical occupation less than all-encompassing. *Id.* But under *Loretto* and *Cedar Point* the right to exclude is *all or nothing*. The government violates it regardless of the extent or duration of the interference, and thus whether or not the owner can exercise the right *in some cases*. 141 S.Ct. at 2074 (discussing *Loretto*'s "heightened concerns associated with '[t]he permanence and absolute exclusivity of a physical occupation," 458 U.S. at 435, before proceeding to the narrow "inspections" and anti-nuisance carveouts that merely illustrates the Takings Clause protects the common-law conception of property; no more, no less). *See also Gonzales v. Inslee*, 535 P.3d 864, 870, 873 (Wash. Sep. 28, 2023) (holding that even if *Cedar Point* applies to Washington's takings clause, it does not protect rental owners from the challenged moratorium because "there has been no similar intrusion here"); *Williams v. Alameda Cnty., Cal.*, 642 F.Supp.3d 1001, 1007 (N.D. Cal. 2022) (ignoring *Loretto* and concluding that the challenged moratoria "are not an impermissible physical or per se taking because they are temporary and not definite on their face"); *GHP Mgmt. Corp. v.*

City of Los Angeles, 2022 WL 17069822, at *3 (C.D. Cal. 2022) (incorrectly distinguishing a covid-related eviction moratorium's "limited, albeit indeterminate" duration from a law that forces an owner to "refrain in perpetuity from terminating a tenancy"); *Auracle Homes, LLC v. Lamont*, 478 F.Supp.3d 199, 220 (D. Conn. 2020) (incorrectly assuming that *Yee*, in holding "government effects a physical taking only when it requires the landowner to submit to the physical occupation of the land," forever exempted from its sweep any state-sponsored trespass that did not *start out* as one).

In excellent contrast to the outcomes in *Rental Housing Association*, *Gallo*, *El Papel*, and like opinions, the Eight Circuit in *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), held *Yee* "distinguishable" from Minnesota's eviction moratorium, on the same basis upon which Petitioners' do theirs. *Id.* at 733. "The landlords in *Yee* sought to exclude future or incoming tenants rather than existing tenants," while "here, the [executive orders] forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated." *Id.* The Eighth Circuit begins and ends their *Yee* analysis there. There is, after all, not much more to say. While the other courts hyper-focused on *initial invitations* to conclude that no *invasions* occurred, the Eighth Circuit looked past the semantics and asked, simply, whether the public is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. at 49 (1960). With the case then still at the pleadings stage, the Eighth Circuit accepted *Heights Apartments, LLC*'s

argument that Minnesota's eviction moratorium "improperly imposed the cost of fighting homelessness on a subset of the population: rental property owners." *Heights Apartments*, 30 F.4th at 734. Relying upon this Court's ruling in *Alabama Association of Realtors v. Department of Health & Human Services*, the Eighth Circuit remained "*unconvinced* that as a matter of law the [Minnesota executive orders] are permissible non-compensable takings." *Id.* at 735 (citing 141 S.Ct. 2485, 2489 (2021)).

If this circuit split is not, by itself, reason enough for the Court to grant review of this case, it certainly becomes so when considering the broader context. As the pandemic unfolded, lawmakers and bureaucrats across the country breathlessly declared that in times of crisis the Constitution is no barrier to action. And the lower courts largely deferred to such claims. *See* Kenny Mok & Eric A. Posner, *Constitutional Challenges to the Public Health Orders in Federal Courts During the Covid-19 Pandemic*, 102 B.U. L. Rev. 1729, 1733 (2022) ("In the aggregate, federal courts ruled in favor of plaintiffs—striking down public health orders—in 14.2% of the cases, suggesting a high level of deference to the government."). If the Court does not put a stop to this behavior its silence will embolden public officials to make increasingly outrageous *ultra vires* gambits, and it will strengthen the already-perilous incentive structure that let those officials take things this far in the first place.

III. The Court Should Grant Review to Prevent Public Officials From Using "Emergencies" to Take *Ultra Vires* Actions

Unless the Court intervenes here, lower courts will continue permitting state and local officials to exaggerate or invent emergency powers to shield *ultra vires* acts from the judicial scrutiny they deserve. In *Block v. Hirsch*, the Court upheld a District of Columbia rent-control ordinance on the grounds that the emergency—urban overpopulation resulting from the rapid acceleration of industrial output during the First World War—was "a publicly, notorious and almost worldwide fact." 256 U.S. 135, 154 (1921). Whether the coronavirus pandemic was an emergency sufficient to justify state-sponsored holdover tenancies and other drastic measures is a matter of much greater debate. *See, e.g.*, Amanda L. Taylor, *Judicial Review in Times of Emergency: From the Founding Through the Covid-19 Pandemic*, 109 Va. L. Rev. 489 (2023); John Yoo, *Emergency Powers During a Viral Pandemic*, 15 N.Y.U. J.L. & Liberty 822 (2022). Thus did the White House, states, counties, and municipalities offer wildly different and often divergent responses. *See* R. Hamad, K.A. Lyman *et al.*, *The U.S. COVID-19 County Policy Database: A Novel Resource to Support Pandemic-Related Research*, 22 BMC Public Health 1882 (2022); Thomas J. Bollyky, Emma Castro *et al.*, *Assessing Covid-19 Pandemic Policies and Behaviours and Their Economic and Educational Trade-Offs Across U.S. States From Jan. 1, 2020 to July 31, 2022: An Observational Analysis*, 401 Lancet 1341 (2023). Among these measures, one stands out as particularly bold: the Centers for Disease Control and Prevention's ("CDC") nationwide

eviction moratorium, which the Court dispatched *per curiam*. *Ala. Ass'n of Realtors*, 141 S.Ct. 2485 (2021). Though its ultimate conclusion was that Congress, rather than a lone federal agency, decides what constitutes an "emergency" of the caliber necessary to justify the disruption of property rights, the Court in *Alabama Association of Realtors* crucially noted that the CDC's "preventing [rental 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.

Perhaps on the merits the Court will find, in view of the Framers' intent and its own emergencies doctrine, that Governor Inslee indeed acted within his police powers when he instituted the eviction moratorium here in issue. Still, as the Court noted in an earlier covid case, "even in a pandemic the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Bklyn. v. Cuomo*, 141 S.Ct. 63, 68 (2020). That is, "emergencies" are not get-out-jail-free cards for those who have sworn to uphold the Constitution. This is especially the case for property rights—the ends of government, as Locke declared—which are particularly susceptible to erosion when the majority takes unfettered and unprincipled actions. The Takings Clause *is* that restraining mechanism. Casting it aside in times of crisis is a recipe for constitutional disaster.

In *Armstrong v. United States*, 364 U.S. 40 (1960), the Court noted that 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." *Id.*

at 49. To this equation *Cedar Point* adds that the government "must pay for what it takes" *unless* it is not taking anything at all but merely restricting harmful uses or acting in accordance with longstanding legal practice. 141 S.Ct. at 2079–80. Under *Armstrong* and *Cedar Point*, therefore, emergency measures involving uncompensated physical invasions of private property are only justified if the state's legal tradition, narrowly construed, allows it, *or* if the cost to the impacted owners is commensurate with the public losses resulting from the use or misuse the measure is designed to prevent. 141 S.Ct. at 2079 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028–29 (1992) for the proposition that "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights"); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (suggesting that certain would-be takings are no longer so—or are at least thereby just compensation *in-kind*—when the disputed restrictions benefit the impacted owners as much (or more) than it costs them; *i.e.*, if it gives them a "reciprocity of advantage").

Whether Governor Inslee's eviction moratorium fits either of these frameworks ultimately is a question for the merits. But posing the question here shows both the doctrinal and real-world stakes involved. And it hints strongly at the potential costs of the Court's failing to intervene. Washington legal history all but rules out the first option—that Governor Inslee was operating under well-worn state practice. *See* Bryan L. Page, *State of Emergency: Washington's Use of Emergency Clauses and the*

People's Right to Referendum, 44 Gonz. L. Rev. 219, 238–46 (2009). It remains to be seen whether Governor Inslee's eviction moratorium meets the second criterion of a physical invasion that merely forces rental owners' to internalize the would-be public costs of their use or misuse thereof. It is hard to see a proximate causal connection between the enforcement of ordinary contractual obligations and the makings of a public health disaster. The two are only connected insofar as shelter is *always* necessary to human life and thus always something to consider when formulating public policies. In its uber-deference to official characterizations of Governor Inslee's eviction moratorium, the Western District of Washington and the Ninth Circuit took this for granted. Meanwhile in *Apartment Heights* the Eighth Circuit rightly asked that the government first provide *some* evidence that using the impacted units for anything other than housing former tenants would cause public harms that then *doing so* prevented. The Court's emergency-takings precedent suggests the answer is *no*. That it is not enough for the government to proffer that a property interference is preventing public harm rather than merely conferring a public benefit (for which compensation is owed). *See* Brian A. Lee, *Emergency Takings*, 114 Mich. L. Rev. 391, 392 – 401 (2015) (discussing the Court's varying treatment of the Takings Clause within different emergency contexts). Whatever the outcome, *amicus* urge the Court to grant review of this case in order to resolve these and the other outstanding legal questions at stake.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant review of the Petition, reverse the Ninth Circuit, and remand the case for further proceedings in accordance with the Court's longstanding recognition that state-compelled third-party occupations of property beyond the parties' agreed-upon terms violates the fundamental right to exclude.

Respectfully submitted,

DECEMBER 2023

/S/ JACKSON MAYNARD
Counsel of Record
SAM SPIEGELMAN
Citizen Action Defense Fund
111 21st SW, Ste. 13
Olympia, Wash., 98501
jackson@citizenactiondefense.org
sam@citizenactiondefense.org

Counsel for Amicus Curiae