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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

As a once-in-a-century pandemic shuttered its businesses and schools, the City of Los Angeles employed temporary, emergency measures to protect residential renters against eviction. Backstopped by the State of California's overlapping, complementary, and partially preemptive legislation, the City promulgated an ordinance that allowed tenants to plead and prove COVID-19-related economic hardship as an affirmative defense to an unlawful detainer claim. The City's ordinance, which lapsed from effect with the end of the City's COVID-19 state of emergency, expressly did not excuse any rent debt that an affected tenant accrued.

The petitioners—the owners and managers of "luxury apartment communities"—did not allege that they initiated unlawful detainer proceedings against any tenant. Nor did they allege that any tenant relied on the ordinance's affirmative defense to thwart an eviction. They nevertheless claimed that the ordinance effected a physical taking of their property, giving it over to their tenants in default. That, the petitioners asserted, required the City to compensate the petitioners on a per se basis. The district court concluded, and the Ninth Circuit held, that the petitioners failed to allege facts amounting to a physical, per se taking. The petitioners waived a claim premised on a regulatory takings theory.

The question presented is:

Does a government effect a per se taking of landlords' property by temporarily enacting an affirmative defense to a subset of unlawful detainer claims?

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INTRODUCTION

If a government takes property, it must pay for it. For more than a century, though, this Court has recognized that governments do not appropriate property rights solely by virtue of regulating them. This distinction—appropriation or regulation?—matters acutely when it comes to dealing with the property-bound relationships between landlords and their tenants. The upshot is that governments can regulate those relationships without being forced to compensate landlords for every regulatory burden that they impose; they can govern without paying landlords for the privilege.

Not that this leaves landlords to be mulcted by lawmakers at every turn. The Court has also long recognized that there is such thing as too onerous a regulation, and that a property owner burdened by one may be entitled to compensation on an ad hoc basis. To make out that kind of a regulatory taking, the property owner must plead and prove (1) the regulation's economic impact, (2) the extent to which the regulation has interfered with the owner's investment-backed expectations, and (3) that the regulation is something more like a physical invasion of the property than it is an economic burden.

But landlord GHP—collapsing to a singular noun what is otherwise a tangle of 14 related corporations and limited partnerships—would prefer not to have to prove anything, beyond the bare fact that it was regulated, before demanding that the City of Los Angeles compensate it for the alleged costs of its compliance. So GHP has petitioned the Court to throw out around 104 years of jurisprudence and to conclude that the City must reimburse it on a per se basis for those costs.

What, in GHP's view, justifies this radical departure from precedent?

Shortly after the onset of the COVID-19 pandemic, the City temporarily enacted a new and targeted affirmative defense to eviction. A residential tenant could assert the defense by pleading and proving in unlawful detainer proceedings that a failure to pay rent was due to pandemic-related circumstances, like "loss of income due to a COVID-19 related workplace closure," or "child care expenditures due to school closures." The tenant's success would forestall eviction, but it would not discharge the tenant's debt to the landlord. The City also created a private right of action that a tenant could assert against a landlord for attempting an eviction in violation of the ordinance—but only after giving the landlord 15 days to abandon the effort. (The private right of action also came with fee-shifting in the landlord's favor if a tenant brought a frivolous claim.)

By GHP's lights, hindering it from expeditiously evicting defaulting tenants was equivalent to appropriating its property and giving that property to those tenants. The problems with GHP's position are likely as plain to this Court as they were to the district court and the Ninth Circuit.

There is, of course, the fact that it conflicts with so much of this Court's jurisprudence distinguishing appropriation from regulation—cases that were decided as they were for good and practical reasons. Consider: If any regulation that hinders a landlord from evicting a defaulting tenant amounts to an appropriation of the landlord's property, then a government will find itself paying compensation even to impose a routine notice

period before a landlord can begin eviction proceedings. Is a three-day notice period a three-day taking for which the government must compensate landlords? If not, why not? What about thirty days? Sixty? To adopt GHP's position is either to force governments to pay for every property-related imposition or to invite anew the same line-drawing problem that the Court's regulatory takings jurisprudence already solves.

Little surprise, then, that the vast majority of courts to consider arguments like GHP's have rejected them. The few courts to have given those arguments credence, meanwhile, have offered little reasoning to support their decisions. For its part, this Court has recently denied at least two petitions for writs of certiorari—in *El Papel, LLC v. City of Seattle* and in *Kagan v. City of Los Angeles*—that have made the same arguments.

That GHP's petition demands an unnecessary and incoherent turn from a century of law is enough to warrant its denial. But that's not the only problem with it. Given the allegations in GHP's complaint, one might wonder exactly *when* the City's emergency measures effected a taking of any kind. The ordinance has bite only under certain conditions, and GHP has never alleged—or even argued—that those conditions occurred. It has nowhere alleged, for instance, that even one of its tenants thwarted an eviction by invoking the City's ordinance and proving COVID-19-related hardship in unlawful detainer proceedings. Nor has GHP alleged that a tenant sued it for attempting an eviction in the face of the tenant's COVID-19-related hardship. GHP hasn't even argued that it could amend its pleadings to allege those things. (That's just as well, because GHP waived its right to amend in order to get more quickly in front of this Court.)

Which is another way of saying that GHP is asking this Court to remake a century of takings jurisprudence over an ordinance that, as far as GHP's pleadings make out, *might* have been invoked against it.

The Court should deny GHP's petition.

STATEMENT

A. The City of Los Angeles, in step with the State of California, enacts since-expired measures to protect residential tenants from eviction during the COVID-19 pandemic.

For all that has happened since, it is tempting to forget the economic and social upheaval that accompanied the outbreak of the COVID-19 pandemic in the United States in early March, 2020. *See* CBS News, *From the Archives: The First Days of COVID-19 Shutdown in U.S.*, YouTube (Mar. 14, 2024), https://youtu.be/Xhm6Y_bXAhk?si=xEMCsGkgOFYwOJzE. Businesses closed their doors. Their employees were encouraged to stay home to slow the spread of a disease that was overwhelming hospitals' ability to care for patients. *See* David Vergun, *USNS Mercy Arrives in Los Angeles to Aid COVID-19 Response* (Mar. 27, 2020), https://www.defense.gov/ News/News-Stories/article/article/2129077/usns-mercy-arrives-in-los-angeles-to-aid-covid-19-response/ [https://perma.cc/9644-ZZDA] (Navy hospital ship dispatched to alleviate the burden on hospitals).

But if they couldn't go to work to earn money, residential renters faced the prospect of defaulting on their leases and being turned out of their homes at

precisely the time when they needed to stay in them. Governments at all levels worked rapidly to avoid that problem. By the end of March, the City of Los Angeles had enacted the ordinance at issue in this case, Los Angeles Municipal Code section 49.99.

As revised in mid-May of that year, section 49.99 acknowledged the state of emergency and the City's responsibility to exercise its police powers to protect "public health, life, and property." (The latter being a category that—not for nothing—includes residential tenancies.) In service of that goal, section 49.99 temporarily proscribed the evictions of tenants for nonpayment of rent, but only for those tenants who were "unable to pay rent due to circumstances related to the COVID-19 pandemic." L.A. Mun. Code § 49.99.2(A) (Pet. App. 66a–67a). The ordinance provided examples to define those "circumstances," including "loss of income due to a COVID-19 related workplace closure, child care expenditures due to school closures, health-care expenses related to being ill with COVID-19 or caring for a family member of the tenant's household or family who is ill with COVID-19, or reasonable expenditures that stem from government-ordered emergency measures." *Id.* (Pet. App. 67a).

Though section 49.99's text proscribed a specific subset of evictions, California law bars local governments from imposing conditions before landlords can initiate unlawful detainer actions. *Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1015–17 (Cal. 1976). Local governments can, however, create affirmative defenses that apply in unlawful detainer actions once they are filed. *Id.* Consequently, section 49.99's principal application—the one that GHP calls

"particularly troublesome," Pet. 7—was as an affirmative defense to eviction. L.A. Mun. Code § 49.99.6 (Pet. App. 70a). Like any other affirmative defense, tenants who sought section 49.99's protection would have borne the burden of pleading and proving that their failure to pay rent was due to an ordinance-protected circumstance. *See W. Land Office, Inc. v. Cervantes*, 220 Cal. Rptr. 784, 789 (Cal. Ct. App. 1985).

Section 49.99 also provided tenants a private right of action against landlords who violated its terms, but it required a tenant first to give a wayward landlord 15 days' opportunity to cure a violation. L.A. Mun. Code § 49.99.7 (Pet. App. 70a–71a). And it allowed fee-shifting in a landlord's favor if a court determined that a tenant sued frivolously. *Id.*[1]

What section 49.99 did not do, though, was to excuse any tenant's debt to a landlord, *id.* § 49.99.2(A) (Pet. App. 67a), or prevent a landlord from recovering that debt, at any time, by bringing a breach of contract action against the tenant (for example).

The ordinance was not operating in a vacuum, either. The State of California, among other governments, simultaneously took steps to protect tenants from eviction.

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1. The ordinance additionally contained a provision that allowed the City to enforce it by issuing administrative citations. L.A. Mun. Code § 49.99.9 (Pet. App. 71a). GHP has not alleged that it was cited—or even threatened with citation—for violating the ordinance. Nor has it alleged that anyone else was, either. For its part, the City found no record of anyone ever being cited for violating the ordinance.

California's state courts quickly enacted a rule halting summonses in all unlawful detainer actions, unless necessary to protect public health and safety, between April 6 and September 1, 2020. Cal. R. Ct. Emergency Rule 1(b) [https://perma.cc/V84U-GUZ5].

Then, to coincide with the lapse of the state courts' rule, the California Legislature enacted and repeatedly amended a series of statutes that allowed tenants to declare "COVID-19-related financial distress." Cal. Civ. Proc. Code § 1179.03. Tenants who made those declarations would avoid eviction by repaying a percentage of their accumulated back rent by specific deadlines. *E.g.*, *id.* § 1179.03(c)(6). The Legislature also preemptively set deadlines for the repayment of back rent under any local COVID-19 tenant protections. To avoid eviction, state law required a tenant to have begun repayment by no later than August 1, 2022, and to have finished by August 31, 2023. *Id.* § 1179.05(a)(2).

Just as governments at all levels enacted tenant protections at the pandemic's onset, governments at all levels phased out those protections when COVID-19 shifted from pandemic to endemic. Section 49.99 ceased to provide protection for any new rent defaults at the end of January 2023, and it no longer protects any residential tenant from eviction over any unpaid rent.

B. GHP alleges that the City's COVID-19 tenant protection measures effected a physical taking of GHP's property.

Like other governments around the country, the City was sued promptly and repeatedly, under different legal theories, for its emergency measures. *See*, *e.g.*, *Apartment*

Ass'n of L.A. Cnty. v. City of L.A., 500 F. Supp. 3d 1088 (C.D. Cal. 2020) (denying a preliminary injunction sought on the theory that the measures violate the Contracts Clause), *aff'd*, 10 F.4th 905 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 1699 (2022).

GHP, which provides "over 4,800 units" in "luxury apartment communities" to "predominantly high-income tenants," filed this lawsuit in August 2021. Pet. 10. It alleged that section 49.99 stripped landlords of "all remedies" against tenants who defaulted on their rent, without so much as requiring those tenants "to demonstrate an inability to pay rent." Pet. App. 30a ¶ 2. (Never mind that both the ordinance's plain text and hornbook law contradict that allegation flatly. *See* pp. 5–6, *supra*.) As a result, GHP alleged, its predominantly high-income tenants took advantage of section 49.99 "to withhold payment." *E.g.*, Pet. App. 33a ¶ 10. In other words, those tenants allegedly defaulted en masse on a term of their leases (i.e., payment) because they no longer risked eviction, and the result was that GHP lost millions of dollars in revenue.

In GHP's view, it was therefore as if section 49.99 took new leaseholds in GHP's property—minus the requirement of periodic payment—and transferred those leaseholds to GHP's tenants in default. GHP claimed that this amounted to a classic, physical taking of a property right, per se entitling GHP to compensation from the City. Pet. App. 53a–56a ¶¶ 57–67.

GHP nowhere alleged, however, that it had actually tried to evict one of its nonpaying tenants. That means GHP also could not have, and did not, allege that a single tenant avoided eviction by successfully asserting the City's

protections against it in an unlawful detainer action. Nor did GHP allege that a tenant ever sued it, or threatened to sue it, pursuant to section 49.99's private right of action. In general, GHP never identified precisely when it believed that the City's ordinance effected the taking that it alleged.

To the City, the absence of such allegations suggested a serious justiciability problem with GHP's takings claim. But if that problem existed, the district court opted to bypass it. Pet. App. 22a n.5. That court instead concluded in relevant part that section 49.99 fit within a government's broad authority to regulate the landlord–tenant relationship without effecting a per se—as opposed to a regulatory—taking. *Id.* at 10a. The City had not, after all, compelled GHP to lease its property to tenants in the first instance. *Id.* at 14a–15a. Nor had it foreclosed every means by which GHP could remove those tenants. *Id.* at 14a–15a. So the district court dismissed GHP's takings claim.[2]

C. Adhering to this Court's jurisprudence, the Ninth Circuit holds that the City's temporary adjustment of the landlord–tenant relationship did not amount to a physical taking of GHP's property.

GHP appealed, and a unanimous Ninth Circuit panel affirmed in an unpublished memorandum. The panel held first that there was no question of GHP's standing, because

2. GHP refused to allege the facts necessary to advance a regulatory takings argument. Pet. App. 15a–17a. It declined to amend its complaint to add them, and has since waived reliance on the theory. Pet. 11 n.4; Pet. App. 25a–26a.

it adequately alleged an injury that it blamed on the City. Pet. App. 2a–3a. The panel, Judges Ikuta, Bea, and Siler, then held that GHP's physical takings claim nevertheless failed on its merits. *Id.* at 3a.

As did the district court, the panel—citing this Court's opinions in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), *Yee v. City of Escondido*, 503 U.S. 519 (1992), and *Federal Communications Commission v. Florida Power Corp.*, 480 U.S. 245 (1987)—observed that "a statute that merely adjusts the existing relationship between landlord and tenant, including adjusting the rental amount, terms of eviction, and even the identity of the tenant, does not effect a taking." Pet. App. 3a. Instead, the panel wrote, "'[t]he government effects a physical taking only where it *requires* the landowner to submit to physical occupation of his land' by a third party." *Id.* (quoting *Yee*, 503 U.S. at 527).

It follows, the panel held, that "section 49.99 does not effect a physical taking because [GHP] voluntarily opened [its] property to occupation by tenants." *Id.* at 4a. And rather than "compel" GHP to continue renting to those tenants in "in perpetuity," section 49.99 allowed GHP "to evict [its] previously invited tenants for reasons not otherwise prohibited." *Id.*

REASONS TO DENY THE PETITION

A. Following this Court's holdings in *Block v. Hirsh*, *Loretto v. Teleprompter Manhattan CATV Corp.*, *Federal Communications Commission v. Florida Power Corp.*, *Yee v. City of Escondido*, and *Cedar Point Nursery v. Hassid*, the Ninth Circuit disposed correctly of GHP's takings claim.

Reading the petition, one would be forgiven for thinking that the Court's relevant takings jurisprudence is limited principally to one case, *Yee*, which the Ninth Circuit misreads routinely, Pet. 6, 19–27; that *Yee* is inconsistent with "more apt precedent, like *Cedar Point*," Pet. 24; that the latter, not the former, dictates the correct outcome here; and that at least nine different judges, in three different appeals, all somehow missed this "more apt precedent," Pet. 15. That includes, in this case, the judge whose dissenting opinion in *Cedar Point Nursery v. Shiroma*, 956 F.3d 1162, 1165–75 (9th Cir. 2020), is echoed in this Court's *Cedar Point* decision. *See Cedar Point*, 594 U.S. at 146–47 (summarizing Judge Ikuta's dissent from denial of rehearing en banc).

The reality is instead that there is over a century of the Court's jurisprudence bearing on this case; that the decisions comprising that body of law, including both *Yee* and *Cedar Point*, are entirely consistent with one another; and that the Ninth Circuit applied the well-worn law correctly to decide this case—as well as to decide *Bols v. Newsom*, No. 22-56006, 2024 WL 208141, *1 (9th Cir. Jan. 19, 2024) (Boggs, J., Rawlinson, J., H.A. Thomas, J.), and *El Papel, LLC v. City of Seattle*, No. 22-35656, 2023 WL 7040314, *1–2 (9th Cir. Oct. 26, 2023) (Bybee, J., Forrest, J., Gordon, J.), *cert. denied*, 144 S. Ct. 827 (2024).

1. Focusing on *Yee*, the petition ignores a century's worth of cases explaining why the City did not, by regulating leaseholds, effect a per se taking of GHP's property.

One hundred and four years of this Court's takings cases stand for three basic principles that together explain why section 49.99 did not effect a per se taking of GHP's property.

First, to determine whether a government has taken a property right, courts generally look to the state law that creates and defines those rights. *Cedar Point*, 594 U.S. at 155. Though GHP continually refers to the property right involved in this case as "an exclusive easement" for tenants to occupy apartments, *e.g.*, Pet. 19, it ought to be uncontroversial that the property right at issue here is a leasehold. If a government *appropriates* a leasehold, a per se rule applies: "The government must pay for what it takes." *Cedar Point*, 594 U.S. at 148; *e.g.*, *United States v. Petty Motor Co.*, 327 U.S. 372, 373–74 (1946).

Second, when a government instead *regulates* a leasehold, it is doing just that. It isn't taking anything. So, for example, if a tenant leases property from a landlord at an agreed price, and the government by regulation lowers the rent by 75 percent, then the government has only regulated the lease—it has *not* appropriated a new, cheaper leasehold from the landlord and given it to the tenant. *Fla. Power Corp.*, 480 U.S. at 252. *Contra* Pet. 19–20 (asserting that by regulating the conditions under which GHP could evict tenants, the City "in effect [took] from [GHP] an exclusive easement and g[ave] it to tenants in default").

Third, because a government does not take leaseholds solely by virtue of regulating them, it has no per se obligation to compensate landlords if (for instance) it prohibits landlords "from evicting tenants unwilling to pay a higher rent." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322–23 (2002). If a regulation is too onerous, though, a landlord may have a claim for compensation on an ad hoc basis, "balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Cedar Point*, 594 U.S. at 148 (citing *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978)).

Those three rules dispose of GHP's claim that the City effected a per se taking of GHP's property when it regulated leaseholds, preventing GHP temporarily from pursuing one remedy (eviction) for one kind of default (nonpayment of rent because of COVID-19-related circumstances). And they do it without any reference to GHP's circa-1992 bugbear, *Yee*, a case that is only one instance of the rules' application. The rules themselves go back—at least in embryonic form—to World War I (and also, in an unhappy coincidence, to the time of the last global pandemic).

Because of "emergencies growing out of the war with the Imperial German Government," Washington, D.C. became crowded both with "public officers and employees whose duties require them to reside within the District" and with "other persons whose activities are essential to the maintenance and comfort of such officers and employees." Food Control and District of Columbia Rents Act, Pub. L. No. 66-63, ch. 80, § 122, 41 Stat. 297,

304 (1919). The influx of people made "rental conditions in the District of Columbia dangerous to the public health," which "embarrass[ed] the Federal Government in the transaction of the public business." *Id.*

That led Congress to enact a statute both controlling rents and giving tenants the right to continue their tenancies at controlled rents, "notwithstanding the expiration of the term fixed by . . . lease or contract." *Id.* § 109, 41 Stat. at 301. There was an exception to the rule: A landlord could evict a tenant, with 30 days' notice, "for actual and bona fide occupancy by himself." *Id.* Unless repealed, the Rents Act's limitations on landlords' right to exclude were effective for two years. *Id.* § 122, 41 Stat. at 304.

During that time, Hirsh bought a building in which Block rented space. *Block v. Hirsh*, 256 U.S. 135, 153 (1921). Hirsh wanted Block out of the building when Block's lease ended. *Id.* Block preferred to stay. *Id.* Hirsh, who wanted to move in himself, did not want to give Block the required notice. *Id.* at 154. Hirsh therefore challenged the Rents Act, in part as effecting a taking. *Id.* at 153.

He failed. Writing for the Court, Justice Holmes observed that rights in tangible property can be modified "not only by the doctrine of eminent domain, under which what is taken is paid for, but by the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay." *Id.* at 155. Recognizing that "letting portions" of "[t]he space in Washington" is "as much a business as any other," the Court noted that "[a]ll the elements of a public interest justifying some degree of public control are present." *Id.* at 156. Consequently, "[t]he only matter that seems to us

open to debate is whether the statute goes too far." *Id.* "For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulation of the present sort pressed to a certain height might amount to a taking." *Id.*; *accord Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

But, according to the Court, the Rents Act did not go that far, even though it *both* limited Hirsh's ability to profit from renting his property *and* curtailed his right to exclude Block. *Block*, 256 U.S. at 157–58.

Block's understanding of governments' ability to regulate landlord–tenant relationships without effecting per se takings has been settled since that case was decided. (Though *Penn Central* now provides a mechanism more formal than Justice Holmes's "storied but cryptic formulation" for discerning that a regulation has gone too far. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).) GHP has offered not a single one of this Court's decisions that calls *Block* into question.

Because no case does. Even as the Court has since emphasized that *to appropriate* any property right is to effect a taking that per se requires compensation, it has also repeated that governments maintain "broad power *to regulate*" property rights—"and the landlord–tenant relationship in particular"—without compensating landlords "for all economic injuries that such regulation entails." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (italics added); *see Horne v. Dep't of Agric.*, 576 U.S. 350, 362 (2015) (emphasizing the distinction "in our takings jurisprudence between appropriation and regulation").

This explains why the Court held unanimously that a government *regulated* a property right when it reduced a tenant's rent under a lease from $7.15 to $1.79. *Fla. Power Corp.*, 480 U.S. at 252. That was contrary to the landlord's position, i.e., that the government had appropriated a new $1.79-leasehold for which it per se owed compensation. *Id.*; *cf. Tahoe-Sierra*, 535 U.S. at 331 ("defining the property interest taken in terms of the very regulation being challenged is circular," and will cause every regulation of property to effect a per se taking).

Correspondingly, the Court has held that when a government forced a landowner to grant a third party the right to access its property in the first instance, then that government had *appropriated* an easement for which it per se owed compensation. *Cedar Point*, 594 U.S. at 143–45, 152, 155; *see id.*, 156–57 (distinguishing the appropriation of a right to access property from the regulation of access to a place that is already open to the public).

Against that backdrop, consider *Yee*.

2. The Ninth Circuit properly relied upon, and correctly applied, *Yee*.

The Yees owned a mobile home park, which meant that they leased land to the owners of mobile homes. *Yee*, 503 U.S. at 523. California law restricted the Yees' ability to evict tenants freely from the park. *Id.* at 524. If a mobile home's owner wanted to sell the mobile home, California law also restricted the Yees' ability to refuse to continue renting the underlying land to the mobile home's purchaser. *Id.*

At the same time, a City of Escondido ordinance effectively capped the rents that the Yees could charge for the land they were leasing to the mobile home owners. *Id.* at 524–25. As a result, the Yees argued, mobile home owners gained a transferrable "right to occupy the land indefinitely at a submarket rent," which was "no less than a right of physical occupation of the park owner's land." *Id.* at 527.

The *Yee* Court rejected that argument, because "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* (original italics). That had not happened in *Yee*, the Court noted, because it was the Yees who "voluntarily rented their land to mobile home owners." *Id.* The Yees, in other words, were the ones who transferred a property right to their tenants, and they did so freely—no government had appropriated the property from them. *Id.* at 528; *accord Cedar Point*, 594 U.S. at 156–57. Moreover, the Yees retained the ability, characteristic of leases, to evict their tenants for *some* reasons. *Yee*, 503 U.S. at 528. They were not required "to refrain in perpetuity from terminating a tenancy." *Id.*[3]

Consequently, the Court observed, "[o]n their face, the state and local laws at issue here merely regulate [the Yees'] *use* of their land by regulating the relationship between landlord and tenant." *Id.* "When a landlord decides to rent his land to tenants, the government may

3. The Court likely emphasized these points in particular precisely because they are characteristic of leaseholds. A government could not regulate away all the characteristics of a leasehold while continuing to call it one. *See Cedar Point*, 594 U.S. at 157–59.

place ceilings on the rents the landowner can charge or require the landlord to accept tenants he does not like without automatically having to pay compensation." *Id.* at 529 (internal citations omitted). If the Yees were owed compensation at all for suffering that regulatory burden, they would have to seek it under a regulatory takings theory. *Id.* at 529–31.

The *Yee* Court's unanimous decision, recognizing the distinction between appropriating and regulating property rights—between the right to compensation per se and the right to seek compensation on an ad hoc basis—is consistent with everything from *Block* to *Cedar Point*. The Ninth Circuit applied the rule correctly to conclude that section 49.99 regulated, rather than appropriated, existing leaseholds; that GHP has no per se entitlement to compensation.

That *Yee* is consistent with, and follows from, its forbears also means that GHP cannot meaningfully cast doubt on *Yee*'s applicability by limiting the case to its facts. Pet. 19–22. Regardless, the limits GHP would impose on *Yee* are either nonsensical or beside the point.

For instance, it makes no difference to *Yee*'s outcome that the case involved "the 'unusual economic relationship' between park and mobile home owners." Pet. 20. The Court itself said as much, noting that the unusual economics occasioned by the City of Escondido's rent controls had "nothing to do with whether the ordinance causes a physical taking." *Yee*, 503 U.S. at 530 (italics omitted). Answering *that* question depended only on whether the law required the Yees "to submit to the physical occupation of their land." *Id.*

Nor does it make sense to distinguish *Yee* as "'fundamentally a rent-control case,' not a physical takings case." Pet. 19 (internal citation omitted). The reason for "rent-control case[s]" like *Yee* or *Block* or *Florida Power* is that a landlord argued (unsuccessfully) that a regulatory adjustment of a leasehold—including, but not limited to, rent control—amounted to a per se taking. *See Yee*, 503 U.S. at 524 (law "limits the bases on which a park owner may terminate a mobile home owner's tenancy"); *Fla. Power Corp.*, 480 U.S. at 248–49, 252 (law cuts rent by 75 percent); *Block*, 256 U.S. at 153, 157–58 (law imposes limits on rent and restrictions on eviction).

But perhaps GHP means that *Yee*, *Block*, and *Florida Power* stand only for the proposition that rent controls are not per se takings, while this case is about a categorically different type of adjustment to the landlord–tenant relationship.

Is it?

GHP nowhere explains why a regulation that temporarily prevented the exercise of one remedy (eviction) for one kind of default (nonpayment for a COVID-19-related reason) should be treated any differently than a regulation that forced a landlord to continue renting to a tenant whose lease had expired. *Block*, 256 U.S. at 153, 157–58. Or why it should be treated differently than a regulation that required a landlord to keep a tenant on at 75 percent less rent than its lease agreement stipulated. *Fla. Power Corp.*, 480 U.S. at 252.

GHP offers no explanation because there is none. Those regulations of property—not appropriations of it—are different in degree, not kind. If one or more of them went too far, the law since *Block*, and certainly since *Penn Central*, has recognized both the propriety of compensation and a path to securing it. It is not the Court's problem, warranting the issuance of a writ of certiorari, that GHP decided not to pursue that path. Or even seriously to acknowledge its existence.

3. There is nothing "unsound" about distinguishing appropriation from regulation, and compensating for the latter on an ad hoc basis.

In a world where the Court's regulatory takings jurisprudence *does* exist, there is little force to GHP's objection that if something "cannot be a physical taking," then a property owner who is subjected to the regulation "of fundamental features of property like the right to exclude" can do nothing but "take her lumps." Pet. 24, 26. The obvious response is that the hypothetical property owner could pursue a claim based on a regulatory takings theory. The possibilities are not a per se taking or nothing.

In pretending otherwise, GHP collapses "the settled difference" in the Court's "takings jurisprudence between appropriation and regulation," *Horne*, 576 U.S. at 362, into appropriation or nothing, posits a couple situations in which to say "nothing" would be absurd, and declares that the Court's intervention is therefore necessary to avert "disastrous" consequences. Pet. 25–27.

The Court is thus invited to consider a scenario in which "guests are invited to a holiday dinner." Pet. 25. The guests are "rightly expected not to stay until spring." *Id.* The implication is that if a government by regulation stretches the length of the guests' stay longer than the host intended, surely the government should be required to compensate the host.

Indulge the hypothetical. The answer is that the government effected no per se taking.

Of course, that is not the end of the analysis. Assume that by regulating the scope of dinner invitations, the government regulates a property right—like a license. And assume the right carries a set of investment-backed expectations—say, that guests will consume only a meal's worth of groceries and then depart. Now there is an argument that the economic burden imposed on the host when the government extended the guests' stay for months amounted to a regulatory taking. *See Cedar Point*, 594 U.S. at 148. Absurd as the entire thing may be, that is not a particularly "disastrous" state of affairs.

If one wishes to court disaster, better to look instead at the promise of GHP's per-se-takings-or-nothing world; a world in which there is no distinction between appropriation and regulation; a world in which "depriv[ing] owners of fundamental features of property like the right to exclude" is *always* a per se taking. Pet. 24. *Contra, e.g.*, *Block*, 256 U.S. at 156–58.[4]

4. Though rhetorically powerful, GHP makes no meaningful point when it quotes dicta from *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 594 U.S. 758, 765

Footnote continues on the following page.

Now consider another hypothetical: Say that a state responds to its courts' crushing backlog of criminal cases by delaying the processing of other kinds of cases—cases like unlawful detainers. And say that the state imposes that delay by extending the length of the period between when a tenant defaults and when a landlord may bring an unlawful detainer action. *Cf.* Oral Arg. at 04:09–05:20, *El Papel, LLC v. City of Seattle*, No. 22-35656 (9th Cir. Apr. 10, 2023), https://www.youtube.com/watch?v=uy8hUnEThDY (hypothesizing similar facts). Has the state just incurred an absolute obligation to pay every landlord for that period, no matter its length?

It is difficult to imagine that the answer should be "yes," given that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pa. Coal*, 260 U.S. at 413. "To require compensation in all such circumstances would effectively compel the government to regulate by purchase." *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (italics omitted).

(2021) (per curiam), on the importance of the right to exclude. Put aside the fact that this Court exercises a "customary refusal to be bound by dicta" and a "customary skepticism toward per curiam dispositions that lacked the reasoned consideration of a full opinion." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (italics omitted). There is also the fact that no one disputes the importance of the right to exclude. But important as the right may be, it does not follow that *any* interference with it amounts to a per se taking. *E.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–84 (1980); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964). Nor did *Alabama Ass'n of Realtors* imply as much.

But maybe GHP doesn't mean every regulation impinging on a property owner's right to exclude amounts to a taking—maybe just some of them do. Maybe GHP means only that, at some point, a regulation impinging that right will have gone too far. All that GHP is asking, then, is for the Court to grant certiorari to announce a rule for determining when a regulation has gone too far in burdening property rights.

That is a strange thing to ask. *See Penn Central*, 438 U.S. at 124 (it's already been done).

B. There is no conflict warranting this Court's attention as between the Ninth Circuit's and other courts' applications of this Court's takings decisions.

Putting aside the fact that the Ninth Circuit applied sound and long-settled principles to resolve this case correctly, granting certiorari might nevertheless be worthwhile if there were a pressing need to use this case to bring other courts in line. But the majority of courts to consider whether tenant protections like the City's effect per se takings have reached the same conclusion as the Ninth Circuit did here.[5]

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5. The United States District Courts for the Northern District of California and the District of Columbia are discussed in the text, below. *See* p. 26, *infra*. Others include the United States District Courts for the District of Oregon, *Farhoud v. Brown*, No. 3:20-cv-2226-JR, 2022 WL 326092, *10 (D. Or. Feb. 3, 2022), the Eastern District of Washington, *Jevons v. Inslee*, 561 F. Supp. 3d 1082, 1105–07 (E.D. Wash. 2021), *vacated on other grounds*, 2023 WL 5031498 (9th Cir. 2023), the Western District of Washington, *El Papel, LLC v. Durkan*, No. 2:20-cv-01323-RAJ-JRC (W.D.

Footnote continues on the following page.

What, then, of the "clear circuit split" GHP identifies? Pet. 5, 16–19.

GHP observes accurately that an Eighth Circuit panel in *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 724–25, 733 (8th Cir. 2022), held that Minnesota's COVID-19 tenant protections—which limited the bases on which landlords could evict tenants—could be analyzed as per se takings. The panel did so in a scant page of reasoning that first sets up a false choice between *Yee* and *Cedar Point*, as if distinguishing one on its facts meant that the other dictated the result. *Id.* at 733.

Then, having set forth the false choice, the panel held that *Yee* was distinguishable on its facts, because (1) the laws at issue in *Yee* "neither deprived landlords of their right to evict nor compelled landlords to continue leasing the property past the leases' termination," and (2) "the landlords in *Yee* sought to exclude future or incoming tenants rather than existing tenants." *Heights Apartments*, 30 F.4th at 733. Neither of those things is true. *See Yee*, 503 U.S. at 524 (California law restricts the bases on which park owners can evict); Mobilehome Residency Law, ch. 1032, § 13, 1978 Cal. Stat. 3186, 3189 (codified as amended Cal. Civ. Code § 798.55) (absent

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Wash. Sept. 15, 2021), *aff'd*, 2023 WL 7040314 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 827 (2024), the Southern District of California, *S. Cal. Rental Housing Ass'n v. Cnty. of San Diego*, 550 F. Supp. 3d 853, 864–66 (S.D. Cal. 2021), the District of Massachusetts, *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 387–88 (D. Mass. 2020), the District of Connecticut, *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 220–21 (D. Conn. 2020), and the Southern District of New York, *Elmsford Apartment Assocs. v. Cuomo*, 469 F. Supp. 3d 148, 162–64 (S.D.N.Y. 2020).

specified reasons for refusal, California law then and now required park owners to renew tenancies); *see also Yee*, 503 U.S. at 525 (both current and future tenants had been granted a "right to physically permanently occupy" the property).

Distinguishing *Yee* incorrectly on those two facts meant, to the panel, that the plaintiffs' allegations must "give rise to a plausible per se physical takings claim under *Cedar Point*." *Id.* (italics omitted).

Four judges indicated they would have granted rehearing en banc. Judge Colloton wrote an opinion to that effect. *Heights Apartments, LLC v. Walz*, 39 F.4th 479, 480 (8th Cir. 2022) (Colloton, J., dissenting from denial of rehearing en banc). He, too, detected the panel's misreading of *Yee*, this Court's "most analogous decision." *Id.* And, Judge Colloton observed, having misread *Yee*, "the panel decision never addressed why the scheme in *Yee* that allowed a landlord to evict existing tenants only for limited reasons after up to 12 months' notice did not constitute a per se taking, while a temporary eviction moratorium during a pandemic ostensibly does." *Id.* (italics omitted).[6]

Judge Colloton got it right, which is likely why—at least as far as the City can discern—only two decisions have cited the *Heights Apartments* panel's reasoning with approval. Both of them are unreported, in ongoing

6. The Eighth Circuit ultimately held that all of the government-official defendants in the case were immune from suit, including on the plaintiffs' takings claim. It affirmed a judgment on the pleadings for the defendants. *Heights Apartments, LLC v. Walz*, No. 23-2686, 2024 WL 4850745, *1 (8th Cir. Nov. 21, 2024) (per curiam).

California state trial court proceedings before the same trial judge. (GHP identified one of the two. Pet. 19.)

Meanwhile, the *Heights Apartments* panel's reasoning has been expressly rejected by the Ninth Circuit (in this case), Pet. App. 4a n.2, and before that, by the United States District Courts for the Northern District of California, *Williams v. Alameda Cnty.*, 642 F. Supp. 3d 1001, 1019 (N.D. Cal. 2022), and the District of Columbia, *Gallo v. District of Columbia*, 610 F. Supp. 3d 73, 87–89 (D.D.C. 2022), *appeal docketed*, No. 23-7158. It has also been rejected by the Minnesota Court of Appeals. *Fletcher Props., Inc. v. City of Minneapolis*, 2 N.W.3d 544, 555 n.6 (Minn. Ct. App. 2024).

Then there is the Federal Circuit's decision in *Darby Development Co. v. United States*, 112 F.4th 1017, 1033–37 (Fed. Cir. 2024). The landlord–plaintiffs in that case sued the United States over the CDC's "eviction moratorium." *Id.* at 1020. As did GHP, the plaintiffs in *Darby* "expressly disclaimed any regulatory-taking theory," and sought to be compensated only on the theory that the CDC's actions effected a per se taking of their property. *Id.* at 1033.

The United States argued in the Court of Federal Claims both that "a takings claim cannot be premised on government action that was unauthorized"—which it said the CDC's was—and that the CDC's action "could not constitute a physical taking because it merely regulated the landlord–tenant relationship." *Id.* at 1022. The Court of Federal Claims did not reach the United States' second argument; it dismissed the plaintiffs' complaint based on the first argument alone. *Id.*

The Federal Circuit reversed. Judge Prost, writing for herself and for Judge Stoll, decided first that the CDC's action was "'authorized' in the way takings law contemplates" for a claim against the United States. *Id.* at 1027. But rather than reverse and remand for the Court of Federal Claims to consider the substantive takings question in the first instance, the majority went on to tackle the issue for itself. *Id.* at 1033. In doing so, it held that the CDC's action "fits within the Court's conception of a physical taking" of the plaintiffs' property. *Id.* at 1037.

Judge Dyk dissented on the authorization issue alone. *Id.* at 1053 n.16. He therefore declined to opine on the takings question at all. *Id.*

There is no need here to battle the Federal Circuit majority at length. It is enough to say that its opinion obscures the difference between appropriating a property right and regulating an existing one. *See Darby*, 112 F.4th at 1034.

More importantly for present purposes, the United States petitioned the Federal Circuit to rehear *Darby* en banc. Pet. for En Banc Reh'g, *Darby*, No. 22-1929 (Fed. Cir. Jan. 10, 2025), ECF No. 92. It sought rehearing on both grounds decided by the *Darby* majority. Shortly thereafter, the Federal Circuit invited the plaintiffs to respond to the United States' petition. Letter, *Darby*, No. 22-1929 (Fed. Cir. Jan. 27, 2025) ECF No. 101. The United States' petition remains pending.

Weighed against the broad consensus that COVID-19 tenant protections like the City's do not effect per se takings, *Darby* and the orphaned decision in *Heights Apartments* hardly augur a level of disarray meriting this Court's valuable time and attention to correct. And even if they did, *Darby*'s procedural posture counsels the Court's forbearance in *this* case.

C. In any event, this case is an abysmal vehicle for undoing a century's worth of consistent takings jurisprudence.

But in the end, if nothing else marks GHP's petition for denial, the serious justiciability problems with its would-be per se takings claim should.

"A property owner has an actionable takings claim when the government takes his property without paying for it." *Knick v. Twp. of Scott*, 588 U.S. 180, 185 (2019). Correspondingly, if the government hasn't yet taken anything, the plaintiff is "prematurely suing over a hypothetical harm." *Pakdel v. City & Cnty. of S.F.*, 594 U.S. 474, 479 (2021) (per curiam); *accord Knick*, 588 U.S. at 187–88.

If there was a per se taking here, when did the City appropriate GHP's property?

Was it the instant that the City enacted section 49.99? *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 736 n.10 (1997). Or maybe it was whenever one of GHP's tenants defaulted on a rent payment? After all, GHP's argument that something was taken from it turns on its alleged loss of the ability promptly to evict nonpaying tenants. Pet. 19–20.

But if a taking occurred when GHP was unable to evict a nonpaying tenant, where is the allegation that it ever tried to evict one? And without making that attempt, how to say that it was any defaulting tenant's—let alone every defaulting tenants'—hypothetically successful assertion of the City's affirmative defense that prevented an eviction? Especially given California's overlapping state-law protections. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412–13 (2013) (a plaintiff has a justiciability problem if it must speculate that one of several laws will injure it, and then speculate how a court might apply that law to cause the injury).[7]

GHP practically admits that it did not attempt any evictions, even as it asserts baldly that the ordinance made its ability to evict "illusory;" that it needed to allege no other facts to show that "at least $20 million in damages result[ed] directly from the City's moratorium." Pet. 7 n.2, 29. GHP's argument should sound familiar. The Yees unsuccessfully tried essentially the same argument to escape the problem that the laws they were challenging likewise left open the possibility of removing the tenants whom they alleged had been granted "the right to physically permanently occupy" their property. *Yee*, 503 U.S. at 525, 528.

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7. To be clear, this is *not* an argument that GHP must first exhaust some kind of state-court takings remedy. *Knick*, 588 U.S. at 184–85. It is a question whether any taking can be attributed to the City in the first place, *at least* until its ordinance can have been said actually to have prevented an eviction. *Id.* at 187.

Never mind that GHP's argument about the difficulty of pursuing an eviction also proves too much: It is an indictment, in parts, of the common law, the factfinding process, and the lack of horizontal stare decisis among trial courts. Pet. 7 n.2. It isn't as if there is something especially objectionable (or innovative) about leaving it to courts to develop and apply the law, even in the landlord–tenant context. *See*, *e.g.*, Cal. Civ. Proc. Code § 1174.2 (a warranty-of-habitability affirmative defense to eviction is demonstrated by a "material" breach of health and safety standards); Emergency Housing Laws of the State of N.Y., ch. 944, §§ 1–4, 1920 N.Y. Laws 2480–81 (in an action to recover unpaid rent, a tenant could plead that the rent was "unjust and unreasonable" and force a landlord to prove the contrary to collect it); *see also Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 248–50 (1922) (upholding the aforementioned New York statute against the challenge that "unjust and unreasonable" was too indefinite a standard).

More importantly, though, it is demonstrably false that section 49.99 made the prospect of evicting tenants "illusory." The Court need not look too much further than its own docket for a demonstration.

Two Terms ago, a landlord came to this Court with an argument that a different landlord–tenant regulation effected a per se taking of his property. Pet. for Writ of Cert. at i, *Kagan v. City of L.A.*, No. 22-739 (Feb. 3, 2023). The landlord in *Kagan* wanted to evict an infirm tenant from a rent-stabilized apartment in order to replace him with the landlord's family members. *Id.* at 7–8. An ordinance made a tenant's age or infirmity an affirmative defense in an action for an owner-occupancy eviction.

Id. at 8; Br. in Opp'n at 5–7, *Kagan*, No. 22-739 (May 3, 2023). But during the course of the litigation challenging the ordinance's constitutionality, the tenant defaulted on his rent payments and the landlord brought an unlawful detainer action against him for *that* reason. Br. in Opp'n at 29, *Kagan*, No. 22-739 (May 3, 2023).

This happened in 2022, while the tenant in *Kagan* could still plead section 49.99 as an affirmative defense to his eviction for nonpayment of rent. He did. He lost anyway. The state court issued a judgment awarding the landlord possession and lost rent.[8]

Some illusion.

Considering what is and what is not alleged in GHP's complaint, if there is any trick to be done here, it would be in disappearing the century's worth of precedent dictating that GHP has no per se entitlement to compensation from the City. The Ninth Circuit followed that precedent to reach the correct result. The Court should decline GHP's invitation to undo either the result or the precedent.

8. Pursuant to Supreme Court Rule 32.3, the City will separately request to submit the complaint, answer, and judgment after court trial from the Los Angeles Superior Court's docket in *Revere v. Mossanen*, No. 22STCV08231.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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