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

CONSOLIDATED REPLY

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CONSOLIDATED REPLY

Respondents[1] prefer a world where government enjoys absolute immunity from as-applied physical takings claims against regulations affecting owner-tenant relationships, even where such laws preclude eviction for non-payment of rent. The Fifth Amendment stands for no such thing.

Petitioners' claim reflects a straightforward application of the doctrine of physical takings reaffirmed in *Cedar Point Nursery v. Hassid*. Petitioners should not have been turned away at the courthouse doors on the sole basis that they "invited" tenants to lease in the first place, per *Yee v. City of Escondido*. That distinction motivates the question presented by this petition, a question that was squarely considered by both courts below, as well as other appellate courts from which the Ninth Circuit now splits.

It is time for clarity. Eviction moratoria functionally commandeer private property for the public's benefit under the guise of merely tinkering with owner-tenant relationships. Such laws will be adopted again to satisfy the purported needs of the day—including just last week in connection with recent wildfires (*see infra* § II (eviction moratorium adopted in County of Los Angeles applicable to 88 cities)).

The petition should be granted.

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[1] This Consolidated Reply responds to opposition briefs submitted separately by the City of Los Angeles ("City Br.") and Intervenors ("Int Br.").

I. THE PLAIN TEXT OF THE CITY'S MORATORIUM PROHIBITED EVICTIONS.

The City's ordinance flatly prohibited evictions—just as in *Darby Development Co. v. United States* and *Heights Apartments, LLC v. Walz*:

> **SEC. 49.99.2. PROHIBITION ON RESIDENTIAL EVICTIONS.**
>
> A. During the Local Emergency Period and for 12 months after its expiration, *no owner shall endeavor to evict or evict a residential tenant for non-payment of rent* during the Local Emergency Period if the tenant is unable to pay rent due to the COVID-19 pandemic.

App. 66a–67a (emphasis added); *compare id.*, *with Darby Dev. Co. v. United States*, 112 F.4th 1017, 1020 (Fed. Cir. 2024) ("a landlord . . . shall not evict any covered person from any residential property in any State") *and Heights Apartments, LLC v. Walz*, 30 F.4th 720, 724–25 (8th Cir. 2022) (a series of executive orders that "mirrored, in part, an eviction moratorium established by the federal government"); *see also* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, 55294 (Sept. 4, 2020) (federal moratorium prevented evictions for contractual violations concerning "timely payment of rent or similar housing-related payment").

Judge Ikuta agreed. "A landlord who is following the law would say, 'I may not endeavor to evict or evict a tenant for nonpayment of rent if the tenant is unable to pay rent due to circumstances related to the pandemic.' So that is just a flat

prohibition on a certain type of action." Oral. Arg. at 15:36–15:53, *GHP Mgmt. Corp. v. City of Los Angeles*, No. 23-55013, 2024 WL 2795190 (9th Cir. May 31, 2024) (hereafter, "Oral Arg.").[2]

As discussed in the petition, Section 49.99.2 was backed by the threat of significant administrative penalties and liability directly to tenants for property owners found to "violate[] this article." *See* Pet. 8; App. 71a (§ 49.99.8). The City's retort that no penalties were ever apparently levied under this provision only proves the chilling effect Section 49.99.2 had on evictions that the City now (but only now) suggests might have been meritorious. *See* City Br. 6 n.1.

Here is why this is important. By claiming that the eviction moratorium did not actually prohibit evictions (its plain text notwithstanding), Respondents use this fundamental inaccuracy to argue that (1) no circuit split exists because, unlike *Darby* and *Heights Apartments*, the moratorium's provision of an affirmative defense was doing the real work here and that fact somehow makes a difference, and (2) because the plain text of the moratorium apparently did not prohibit evictions, Petitioners' case suffers from justiciability problems. Both arguments target the petition's suitability for this Court's review, and neither of them ring true for reasons explained below.

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[2] *See 23-55013 GHP Management Corporation v. City of Los Angeles*, YOUTUBE (Apr. 11, 2024) https://www.youtube.com/watch?v=1dB8HIr8YTI.

But at bottom, through myopic focus on the provision of the affirmative defense in an attempt to dodge certiorari, Respondents avoid the broader point. Petitioners alleged that the moratorium prevented them from removing non-paying tenants in contravention of their fundamental right to exclude under the Fifth Amendment. This scheme effectively transferred an exclusive easement to tenants at the behest of government.[3] Petitioners' allegations should have been enough to survive a motion to dismiss—and would have been, but for the Ninth Circuit's aggressive extension of *Yee*'s capacious language regarding the initial "invitation" of the tenant, which was interpreted to provide absolute immunity from physical takings claims. It is ultimately immaterial *how* the moratorium prevented the exclusion of non-paying tenants, it only matters that *it did*. *See, e.g.*, App. 54a–55a (¶¶ 61, 62, 64) (allegations in complaint to this effect).

II. THIS PETITION PRESENTS A RECURRING CONSTITUTIONAL QUESTION OF NATIONAL IMPORTANCE.

Intervenors argue that the eviction moratorium here was a "one-of-a-kind" public benefit program designed only to mitigate the spread of coronavirus. Int. Br. 3, 22–23. The point is not well taken. Eviction

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[3] The City fashions this transfer as a "leasehold" as opposed to an exclusive easement. City Br. 12 ("[I]t 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.'"). Without conceding the point, whatever the form of the interest, it was appropriated.

moratoria like this one have already been (and will continue to be) adopted moving forward. But why take Petitioners' word for it?

The City did it once. App. 63a–71a.

Then, the City did it again. L.A., CAL., MUN. CODE § 165.11 (2024) (novel moratorium in 2024 prohibiting evictions for tenants with pending rental assistance applications).

Now, the City is considering doing it a third time in response to the recent wildfires. *See* L.A. City Clerk Connect, Council File No. 25-0006-S16 (*available at* https://perma.cc/ZU5R-5REW) (further consideration by City Council scheduled for March 4, 2025).

Six days ago, the County of Los Angeles did it. L.A. County, Cal., Resolution Protecting Qualifying Income Eligible Tenants Directly Financially Impacted by the January 2025 Windstorm and Critical Wildfire Events (Feb. 25, 2025). That ordinance precludes evictions for non-paying tenants purportedly affected by the recent wildfires for six months (for now), with a twelve-month repayment period thereafter, and applies to all 88 cities within the County and unincorporated areas, totaling nearly 27 percent of California's population. *Id.*

Further, the County of San Diego implemented yet another eviction moratorium last year on account of flooding. *See* San Diego County, Cal., Ordinance 10887 (N.S.) (Jan. 30, 2024) (*available at* https://perma.cc/R47K-AAL4).

Eviction moratoria are the new normal.

III. A CIRCUIT SPLIT EXISTS, AND THIS COURT SHOULD RESOLVE IT.

Respondents do not refute that a clear circuit split exists on the question presented. For its part, the City opines that the Eighth Circuit just got it wrong in *Heights Apartments* (*see* City Br. 24–25)—although ultimately conceding that the Eighth Circuit's "reasoning has been expressly rejected by the Ninth Circuit (in this case)"—and otherwise declines to engage with the *Darby* decision (City Br. 26–27).[4] The Intervenors try to distinguish *Darby* and *Heights Apartments*, but only on the thin reed that those cases considered different facts because the City's moratorium, if Intervenors are to be believed, only provided an affirmative defense and not an outright bar. Int. Br. 16–22.

Not so.

As discussed (*see supra* § I), the plain text of the City's eviction moratorium operated in ways like the federal government's and Minnesota's respective moratoria by flatly prohibiting evictions for non-payment of rent. Further, those decisions did not turn on particular mechanics of the challenged laws. "Just as in [*Cedar Point*]—where, absent the regulation, the employers could have excluded the union organizers from their property—here Appellants alleged (and there has been no dispute) that, absent the Order, they

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[4] Even if the Federal Circuit exercises its discretion to take *Darby* en banc and vacates the current decision on takings grounds—two big ifs—the circuit split would remain. Further, foregoing certiorari here in favor of *Darby* later (if appeal is even sought) offers no benefit because that case concerns identical legal questions on the same procedural posture.

could have evicted (or 'excluded' from their property) at least some non-rent-paying tenants." *Darby*, 112 F.4th at 1034 (citation omitted); *see also Heights Apartments*, 30 F.4th at 733 ("Heights alleges the EOs effectuated physical takings because they forced landlords to accept the physical occupation of their property regardless of whether tenants provided compensation. . . . The well-pleaded allegations are sufficient to give rise to a plausible per se physical takings claim under *Cedar Point Nursery*.").

Intervenors cling to the City's surplus provision of an affirmative defense as the distinguishing feature between those cases and this one. But *Darby* suggests that fact alone has no bearing on the analysis. In a vein similar to the affirmative defense here, the federal moratorium applied only to "[c]overed person[s]," which, "generally meant someone who supplied a sworn declaration attesting to economic hardship." 112 F.4th at 1021 n.2. The government never argued that this qualification affected the takings analysis in any way. *Id.* Perhaps recognizing that this distinction would amuse only sophists, the Federal Circuit, "for simplicity's sake," understood the moratorium "generally as having prevented evictions for nonpayment of rent." *Id.*

Put simply, *how* the City prevented owners like Petitioners from excluding non-paying tenants is immaterial. Whether the moratorium flatly prohibited evictions (it did), or whether the moratorium provided tenants with an affirmative defense (it also did)—the result is the same because either way both features of the regulation operated to deprive owners of the right to exclude.

Even assuming counterfactually that the moratorium only provided an affirmative defense, how would that fact help the City? If a property owner brought an unlawful detainer action and the tenant successfully asserted the affirmative defense, the owner would be in the same position as if there were a flat prohibition. In that instance, the non-paying tenant cannot be excluded from the property as the direct result of the City's moratorium.

IV. THIS CASE PRESENTS A JUSTICIABLE CONTROVERSY AND IS A GOOD VEHICLE FOR REVIEW.

A. The City has twice failed to convince anybody that Petitioners lack standing or that their claims are not ripe.

Hoping that a third time is the charm, the City once more claims that Petitioners' case suffers from justiciability problems, effectively suggesting that Petitioners should have first broken the City's law by attempting to evict non-paying tenants to preserve or proceed with their takings claims. City Br. 28–29. The lower courts did not buy this argument, and neither should this one.

The City first tried this argument before the district court. *See* Motion to Dismiss at 10, *GHP Mgmt. Corp. v. City of Los Angeles*, No. 2:21-cv-06311-DDP-JEM 2022 WL 17069822 (C.D. Cal. Nov. 17, 2022), ECF No. 17. Judge Pregerson did not seem too bothered by it because he jumped straight to the constitutional question—which is notable because if the City's position had any merit, the issue would have

been front and center as it would inform Article III jurisdiction. App. 22a n.5; *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (before reaching a constitutional question, a court "must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature'"). Yet here we are.

The City then tried this argument before the Ninth Circuit where it met with even less success. *See* City's Answering Brief at 33, *GHP Mgmt. Corp. v. City of Los Angeles*, No. 23-55013, 2024 WL 2795190 (9th Cir. May 31, 2024) ECF No. 21 ("It follows that in the absence of the tenants' successful assertion of a section 49.99 defense, the landlord's takings claim presents serious standing or ripeness questions."). The Ninth Circuit entertained this, including nearly seven minutes of questioning at oral argument—and explicitly disagreed. App. 2a; Oral Arg. at 14:23–21:10.

This Court should conclude the same.

But what is so peculiar about the City's position is what the City is actually saying. Essentially, Petitioners are being condemned for *not* violating the City's law because to preserve their right to bring a takings challenge to the moratorium, Petitioners should have first broken that law (penalties and liability notwithstanding). That is strange. Judge Ikuta at oral argument was equally perplexed by this suggestion: "[T]hey are at risk of this private right of action and the civil penalties . . . so I just don't see how that means that the landlord has to move to evict first." Oral Arg. at 17:16–30.

Further, the City's citation to extra-record court materials to prove its point does not help it. *See* City Br. 31 n.8; Letter from City to Court Re: Lodging Non-Record Material per Sup. Ct. R. 32.3 (Feb. 18, 2025). The complaint, answer, and judgment in that action provide no information or context regarding the applicability of the City's eviction moratorium, other than that the tenant asserted as one of his nineteen affirmative defenses that the action was "barred by various COVID-related resolutions." The judgment is silent as to that affirmative defense one way or the other, and there is no suggestion that the defense was ever at issue.

But even assuming what the City says is true, by doing so, the City attempts to transmute this *as-applied* action into a facial challenge by pointing to one time where one court allowed an eviction to proceed. That alone does not have any bearing on the question presented by this petition, nor its worthiness of review.

As a final point, the City once again tries to point the finger at the State of California's "overlapping" protections to create a traceability problem where there is none. City Br. 29. The courts below did not countenance it, even though the City argued the same there. But for present purposes, as Petitioners alleged, at all relevant times the City's moratorium operated to prevent evictions for tenants within its jurisdiction. App. 48a–50a (¶¶ 45–49). Further, the City's ordinance was never preempted by

the State's law that provided fewer amenities and lasted for a shorter period of time.[5]

B. The status of the decision below is no bar to this Court's review.

The Intervenors note no fewer than 10 times that the Ninth Circuit's decision is "nonprecedential." Int. Br. QP, 1, 2, 3, 4, 14, 15, 24, 26. The City mentions it only once in passing. City Br. 9.

Little need be said in response. Members of this Court have recognized that a decision's "unpublished" status is "irrelevant" for purposes of certiorari. *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., joined by O'Connor, J., and Souter, J., dissenting from denial of certiorari). To that end, the Court has granted certiorari to review unpublished opinions. *See, e.g.*, *Mata v. Lynch*, 576 U.S. 143 (2015); *Los Angeles County. v. Rettele*, 550 U.S. 609 (2007); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

The status of the decision below is no bar to review.

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[5] This is not to suggest the State's moratorium was any less infirm. Entities related to Petitioners have sued the State in a separate action for properties outside the City's jurisdiction. *See* App. 72a–88a (state court denying motion to dismiss despite identical legal arguments by State and County defendants); *see also Palmer Ontario Properties, L.P. v. City of Ontario*, No. CIVSB2404455 (San Bernardino, Cal. Super. Ct. Oct. 25, 2024) (same, for State and City of Ontario defendants).

V. THE COURT SHOULD DISREGARD THE CITY'S ALTERNATIVE QUESTION PRESENTED.

The City posits a contrary question presented, attempting to force a dichotomy between appropriation and regulation that is inapplicable in this context. *See generally* City Br. QP, 12–16. In doing so, the City attempts to redirect the Court's attention to cases like *Block v. Hirsh*, 256 U.S. 135 (1921), and others. The Court should not indulge the City.

This case, and those like it, turns on whether physical takings doctrine governs a claim that eviction moratoria operate to deprive owners of the fundamental right to exclude (*i.e.*, *Cedar Point*), or whether the owners' initial invitation to a tenant is sufficient to confer absolute immunity against such claims (*i.e.*, *Yee*). The lower courts understood this to be the question, as a discussion of *Block* is nowhere to be found in their respective decisions. *See* App. 3a–4a, 10a–15a. *Block* is not mentioned in *Heights Apartments*. *Darby*'s silence is perhaps most explicit: "The parties' dispute over whether the complaint stated a physical-taking claim centers largely on two Supreme Court cases. Appellants rely on *Cedar Point*, and the government relies on *Yee*." 112 F.4th at 1033. That distinction is the focus of this petition.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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