No. 100992-5

SUPREME COURT OF THE STATE OF WASHINGTON

GENE GONZALES; SUSAN GONZALES; HORWATH FAMILY, TWO, LLC; AND WASHINGTON LANDLORD ASSOCIATION,
Petitioners,

v.

GOVERNOR JAY INSLEE AND STATE OF WASHINGTON,
Respondents.

BRIEF OF APPLESEED FOUNDATION, ALLIANCE FOR JUSTICE, AND WESTERN CENTER ON LAW AND POVERTY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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I. INTRODUCTION

Amici are organizations dedicated to promoting just access to safe and affordable housing and protecting tenants from eviction. Amici agree with the Court of Appeals and with Respondents that Washington's eviction moratorium in effect during the COVID-19 pandemic did not constitute a physical taking of private property under the Washington Constitution. Amici submit this brief to demonstrate that Takings Clause challenges to regulations of the landlord-tenant relationship—like the eviction moratorium at issue here—are governed by the standard set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *Penn Central* has provided the appropriate standard since long before the decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), and it remains the appropriate standard following *Cedar Point*. Petitioners' argument that the eviction moratorium effected a *physical* taking of their property under *Cedar Point* therefore fails, and the Court of Appeals correctly granted summary judgment to Respondents

on that claim.[1]

II. STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in Respondents' Supplemental Brief (at 5–13), and set forth the facts most relevant to this brief. The eviction moratorium was effectuated through numerous Governor Proclamations over an approximately sixteen-month period during the COVID-19 pandemic. To protect vulnerable people from COVID-19 and to preserve valuable resources in combatting the disease, the Governor imposed a temporary eviction moratorium that, in its final form, prohibited landlords from evicting their tenants unless eviction was "necessary to respond to a significant and immediate risk to health, safety, or property of others created by the resident," or unless the landlord intended to "personally

[1] Petitioners assert a physical takings claim under the Washington Constitution, art. I, § 16. Washington Courts generally follow federal law applying the Takings Clause of the Fifth Amendment of the United States Constitution. *Chong Yim v. City of Seattle*, 194 Wash. 2d 651, 658, 451 P.3d 675, 682 (2019).

occupy" or "sell the property." Procl. 20-19.6 at 5 [hereinafter Eviction Moratorium]. The Eviction Moratorium did not forgive any unpaid rent. The Eviction Moratorium was in effect from March 18, 2020, through June 30, 2021. *See* Procl. 20-19; Procl. 20-19.6.

III. ARGUMENT

A. The Eviction Moratorium is not a per se, physical taking.

This case concerns the regulation of contracts between landlords and the tenants they voluntarily invite onto their properties. The Eviction Moratorium temporarily prohibited landlords from evicting their tenants—subject to specified exceptions—during a time of emergency. For decades, courts have consistently rejected landlords' arguments that regulations of the landlord-tenant relationship effect a physical, "per se" taking of property. *Cedar Point*, 141 S. Ct. 2063, which held that governments generally may not require property owners to suffer the intrusion onto their property of uninvited third parties without just compensation, does not upset—but instead reaffirms—the

established case law subjecting regulations of the landlord-tenant relationship to a regulatory takings analysis under *Penn Central*.

1. Regulations of the landlord-tenant relationship are properly challenged as regulatory takings governed by the *Penn Central* analysis.

Compensable takings come in two main varieties: physical takings and regulatory takings. "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992); *see also Cedar Point*, 141 S. Ct. at 2072 (physical taking occurs when "the government has physically taken property for itself or someone else"). By contrast, the government effects a so-called regulatory taking when it "restrict[s] a property owner's ability to use his own property," *Cedar Point*, 141 S. Ct. at 2072, and that use restriction "goes too far," *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Both physical takings and use restrictions "that completely deprive an owner of '*all* economically beneficial us[e]' of her

property" require just compensation regardless of how beneficial the public use of the property may be. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)). The doctrines governing physical takings and "total regulatory takings" under *Lucas*, *id.*, are designed to justly compensate property owners for the destruction of *all three* of their rights as owners to (1) possess, (2) use, and (3) dispose of their property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). But "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 327 (2002) (quotation omitted).

Regulations that do not fall into the "relatively narrow categories" of physical takings and *Lucas* takings, *Lingle*, 544 U.S. at 538—the vast majority of regulations that affect private property—are governed by the "flexible test" set forth in *Penn Central*. *Cedar Point*, 141 S. Ct. at 2071–72. Under *Penn*

Central, courts consider (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124. The *Penn Central* factors "aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. *Penn Central* supplies the "default rule" for takings challenges. *Tahoe-Sierra*, 535 U.S. at 332. "This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Id.* at 323.

The Court of Appeals correctly concluded that Washington's "eviction moratorium did not constitute a physical

per se taking." *Gonzales v. Inslee*, 21 Wash. App. 2d 110, 137, 504 P.3d 890, 904–05 (2022). Rather, regulations affecting the landlord-tenant relationship that are challenged as violations of the Takings Clause are subject to *Penn Central*'s fact-specific inquiry. Indeed, the United States Supreme Court "has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto*, 458 U.S. at 440; *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987) ("[S]tatutes regulating the economic relations of landlords and tenants are not *per se* [physical] takings.").

The reason for this is simple: Tenants are people whom property owners invite onto their properties. As the Supreme Court explained in *Yee*, landlords "voluntarily rent[] their land." 503 U.S. at 527. Because tenants are invitees of the landlord, they are not third-party intruders like the union organizers in *Cedar Point*, 141 S. Ct. at 2072, 2076, or the cable boxes in *Loretto*,

458 U.S. at 440.[2] In *Yee*, property owners argued that a rent control ordinance, in conjunction with a state law restricting their ability to evict mobile home park tenants, effected a physical taking by enabling mobile home park tenants to be "effectively . . . perpetual tenant[s]." 503 U.S. at 527. The Supreme Court rejected this argument. Because the tenants "were invited by petitioners, not forced upon them by the government," as a matter of fact "no government ha[d] required any physical invasion of petitioners' property." *Id.* at 528; *see also* Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L. Rev. 925, 996–97 (1989) ("Existing tenants . . . are not strangers. By renting to them initially, the landlord voluntarily yielded certain rights, notably those associated with possession . . . . [A] tenant's presence does not constitute 'occupation' of property because it is, or was, by invitation.").

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[2] The fact that tenants are invited onto the property is key, but nothing in this brief should suggest that all regulations involving access to property of people other than invitees cause a physical taking. *See also infra* note 8.

Petitioners misconstrue *Yee*. They assert that "*Yee* did not involve a prohibition on eviction." Pet. for Review at 17. Yet *Yee* certainly did involve a prohibition on eviction. Yee challenged a local mobile home rent ordinance "against the backdrop" of a state statute prohibiting eviction of mobile home park tenants except under certain circumstances. 503 U.S. at 523, 524. The statute's limitation on eviction was central to Yee's argument that a physical taking had occurred. *Id.* at 526–527. The Supreme Court nonetheless held that "no government" had effected a physical taking because mobile home park owners elected to rent their property in the first instance, and the restrictions on eviction did not force property owners "to refrain in perpetuity from terminating a tenancy." *Id.* at 528.

Petitioners also emphasize a sentence in the *Yee* opinion that they claim the Court of Appeals overlooked: "[N]either the city nor the State compels petitioners, once they have rented their property to tenants, to continue doing so." Pet.'s Supp. Br. at 30 (quoting *Yee*, 503 U.S. at 527–28). But this observation is

consistent with *Yee*'s holding and supports Respondents' position, not Petitioners'. The mobile home park owners in *Yee* could not evict tenants except under certain circumstances and were subject to a local rent control ordinance, yet the court found that this did not amount to being forced to continue renting their property to tenants in perpetuity. Washington's Eviction Moratorium, which likewise temporarily prohibited evictions except under specified circumstances, similarly does not amount to forcing landlords to continue renting to their tenants forever. Under *Yee*, then, any physical takings challenge to the Eviction Moratorium is off the table.

This crucial distinction between regulation of the relationship between landlords and invited tenants, on the one hand, and regulation that permits "an interloper with a government license" to intrude upon property, on the other hand, has long determined whether the physical takings or regulatory takings doctrine applies. *Fla. Power*, 480 U.S. at 253. As the Ninth Circuit recently reaffirmed, "[w]hen a person voluntarily

surrenders liberty or property, like when the [property owners] chose to rent their property causing them to [be subject to rental housing regulation], the State has not *deprived* the person of a constitutionally protected interest." *Ballinger v. City of Oakland*, 24 F.4th 1287, 1293 (9th Cir. 2022), *cert. denied*, 142 S. Ct. 2777 (2022) (quotation omitted); *see also Better Hous. for Long Beach v. Newsom*, 452 F. Supp. 3d 921, 934 (C.D. Cal. 2020) ("[B]ecause they regulate the use of property, rent control provisions and restrictions on terminating tenancies are examined under *Penn Central*'s regulatory takings test." (citing *Yee*, 503 U.S. at 522–23, 528–30)). Accordingly, the Ninth Circuit and courts across the country consistently reject property owners' arguments that tenant-protective regulations can constitute physical takings.[3]

[3] *See, e.g.*, *Ballinger*, 24 F.4th at 1293 (regulations such as rent control ordinances or relocation fees "'merely regulate[] [property owners'] *use* of their land by regulating the relationship between landlord and tenant,'" and are not physical takings (quoting *Yee*, 503 U.S. at 528)); *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1086–87 (9th Cir. 2015)

Based on these established principles, two federal courts have already rejected landlords' arguments that the Eviction Moratorium constitutes a physical taking. In *Jevons v. Inslee*, the Eastern District of Washington held that the Eviction Moratorium "does not constitute a *per se* taking because the moratorium did not require Plaintiffs to submit to physical occupation or invasion of their land and did not appropriate Plaintiffs' right to exclude." 561 F. Supp. 3d 1082, 1105-06 (E.D. Wash. Sept. 21, 2021), *appeal docketed*, No. 22-35050 (9th Cir. Jan. 18, 2022). The Western District of Washington likewise held

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(rejecting property owners' "novel legal theory" that rent control ordinance be governed by anything other than "established regulatory-takings jurisprudence"); *Cmty. Hous. Improvement Program v. City of New York*, 492 F. Supp. 3d 33, 44 (E.D.N.Y. 2020) (rejecting landlords' argument that regulations regarding rent control and tenant consent for condominium conversion should be analyzed as physical takings); *Rent Stabilization Ass'n of New York City, Inc. v. Higgins*, 83 N.Y.2d 156, 172 (N.Y. 1993) ("That a rent-regulated tenancy might itself be of indefinite duration—as has long been the case under rent control and rent stabilization—does not, without more, render it a permanent physical occupation of property.").

that the Eviction Moratorium was not a physical taking because "the government has not required a physical invasion of plaintiffs' property." *El Papel LLC v. Durkan*, No. 220CV01323RAJJRC, 2021 WL 4272323, at *16 (W.D. Wash. Sept. 15, 2021), *report and recommendation adopted as modified sub nom. EL Papel LLC v. Durkin*, No. 20-CV-01323-RAJ, 2022 WL 2828685 (W.D. Wash. July 20, 2022), *appeal docketed*, No. 22035656 (9th Cir. Aug. 17, 2022).

Numerous courts have sustained other state and local governments' eviction moratoriums during the ongoing COVID-19 pandemic. For example, the Northern District of California recently held that Los Angeles's eviction moratorium was not a physical taking because it "d[id] not swoop in out of the blue to force Plaintiffs to submit to a novel use of their property," nor did it "compel[] a landowner to 'refrain in perpetuity from terminating a tenancy.'" *GHP Mgmt. Corp. v. City of Los Angeles*, No. CV2106311DDPJEMX, 2022 WL 17069822, at *3

(C.D. Cal. Nov. 17, 2022) (quoting *Yee*, 503 U.S. at 528).[4] These consistent cases apply directly here. Landlords freely agree to place their unit onto the rental market and invite a tenant to take possession of it. Like other regulations of the relationship between landlords and their invited tenants, the Eviction Moratorium does not effect a physical intrusion onto property. Courts have rejected physical takings challenges to regulations that prohibit eviction of tenants for a much longer period than sixteen months. *See, e.g.*, *Pakdel v. City & Cnty. of San*

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[4] *Accord Williams v. Alameda Cnty.*, No. 3:22-CV-01274-LB, 2022 WL 17169833, at *12 (N.D. Cal. Nov. 22, 2022); *Stuart Mills Props., LLC v. City of Burbank*, No. 222CV04246RGKAGR, 2022 WL 4493573, at *3 (C.D. Cal. Sept. 19, 2022); *Gallo v. D.C.*, No. 1:21-CV-03298 (TNM), 2022 WL 2208934, at *10 (D.D.C. June 21, 2022); *Farhoud v. Brown*, No. 3:20-CV-2226-JR, 2022 WL 326092, at *10 (D. Or. Feb. 3, 2022); *S. Cal. Rental Hous. Ass'n v. Cnty. of San Diego*, 550 F. Supp. 3d 853, 866 (S.D. Cal. 2021); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 220 (D. Conn. 2020); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 388 (D. Mass. 2020); *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 163 (S.D.N.Y. 2020), *appeal dismissed sub nom. 36 Apartment Assocs., LLC v. Cuomo*, 860 F. App'x 215 (2d Cir. 2021).

Francisco, No. 17-CV-03638-RS, 2022 WL 14813709, at *6 (N.D. Cal. Oct. 25, 2022) (condominium conversion requirement that landlords offer tenants lifetime lease was not a physical taking); *335-7 LLC v. City of New York*, 524 F. Supp. 3d 316, 323 (S.D.N.Y. 2021) (rent control regulation "requir[ing] landlords to renew leases for rent-stabilized tenants and some successors" and restricting landlords' ability to evict tenants was not a physical taking).

Although the Eighth Circuit held that landlords challenging Minnesota's COVID-19 eviction moratorium stated a physical takings claim, that court's reasoning is flawed. As do Petitioners, the Eighth Circuit mischaracterized the regulations at issue in *Yee* as *not* "depriv[ing] landlords of their right to evict," *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022), even though the regulations at issue in that case in fact prevented mobile home park owners from evicting tenants unless the owners were changing the use of their land—and even then, eviction required a six- or twelve-month notice. *Yee*, 503

U.S. at 526–28. Courts have found *Heights Apartments*' reasoning unpersuasive. *Williams*, 2022 WL 17169833, at *11; *Gallo*, 2022 WL 2208934, at *9. In any case, *Heights Apartments* is distinguishable because the eviction moratorium at issue there had no specified end date. 30 F.4th at 725.

Petitioners quote one sentence of *dicta*, without elaboration, of the Supreme Court's decision in *Alabama Association of Realtors v. HHS*, that a moratorium preventing landlords "from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." Pet.'s Supp. Br. at 28 (quoting 141 S. Ct. 2485, 2489 (2021)). That sentence does not alter the analysis of physical takings claims. The merits of a Takings Clause challenge to the Center for Disease Control's temporary eviction moratorium were not before the Court. Nor did the Court purport to overrule or abrogate its decisions that address the Takings Clause, such as *Yee* or *Cedar Point*. *See GHP Mgmt. Corp.*, 2022 WL 17069822, at *3 (concluding that *Alabama*

Ass'n of Realtors cannot be read to abrogate *Yee*).

The established case law applying a multi-factor test for takings challenges to regulations of the rental housing market, rather than the per se test under the physical takings doctrine, reflects the significant public policy interests underlying such regulations. State and local governments have a profound interest in ensuring housing stability, which is crucial to the health and welfare not only of individual tenants, but also local economies. *See Fisher v. City of Berkeley*, 37 Cal. 3d 644, 652 (Cal. 1984), *aff'd sub nom. Fisher v. City of Berkeley, Cal.*, 475 U.S. 260 (1986); Manheim, at 943–44. Regulations of the landlord-tenant relationship intend to avoid these disruptions, and they are such a core and historically recognized power of local governments that they typically cannot be viewed as takings without the individualized analysis required by *Penn Central*. *See Loretto*, 458 U.S. at 440; *see also Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986). Indeed, temporary restrictions on owners' right to evict tenants have been

upheld as non-takings for over a century. *See, e.g.*, *Block v. Hirsh*, 256 U.S. 135, 157–58 (1921) (Washington, D.C. war-time regulation controlling rents and prohibiting eviction except in cases of owner occupancy did not violate the Takings Clause).

States' interest in ensuring housing stability is arguably at its peak during times of emergency—especially where, as here, an increase in the number of unhoused people in the state would likely increase the rate of transmission of a deadly disease. The COVID-19 pandemic wreaked havoc in Washington and across the country. As of June 30, 2021—the date the eviction moratorium expired—451,595 people had contracted COVID-19, and 1,656 people had died from COVID-19 in Washington. Seattle Times, *Coronavirus daily news updates, June 30: What to know today about COVID-19 in the Seattle area, Washington state and the world* (June 30, 2021), https://bit.ly/3DjR15r. Unhoused people are at increased risk of contracting SARS-CoV-2 and of developing severe COVID-19 symptoms relative to housed people. Melissa Perri et al., *COVID-19 and people*

experiencing homelessness: challenges and mitigation strategies, 192 Canadian Med. Ass'n J. E716 (June 29, 2020), https://bit.ly/3zsHvM9. Restrictions on eviction, among other regulations such as rent control, have long been a crucial tool for state and local governments to protect vulnerable tenants from displacement. Manheim, at 954–55.

Washington is not unique in desiring to prevent displacement of tenants during the COVID-19 pandemic or other types of emergencies. *See supra note* 4 (string cite of cases upholding state and local eviction moratoriums during the COVID-19 pandemic). The Eviction Moratorium, like most other regulations of the landlord-tenant relationship, has the effect of "transfer[ring] wealth from landlords to tenants." *Yee*, 503 U.S. at 529. However, "the existence of the transfer in itself does not convert regulation into physical invasion." *Id.* at 529–30. Were courts to consider regulations that protect tenants from displacement to be physical, per se takings, therefore demanding just compensation without applying the *Penn Central* factors,

state and local governments' ability to effectively protect tenants from displacement—especially in times of emergency—would be severely and impracticably curtailed.

To be sure, there are limited situations in which a rental housing regulation may go beyond regulating voluntarily entered landlord-tenant relationships and effect a physical taking. Consistent with the principles set forth in *Yee* and related precedent, the case law reflects that a regulation affecting the landlord-tenant relationship might constitute a physical taking where it requires a property owner to rent their property in the first instance—thereby imposing a new use of the property[5]—or where it deprives the owner of their reversionary interest.[6] The

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[5] *See, e.g.*, *Higgins*, 83 N.Y.2d at 172 (distinguishing between regulation of "owner's voluntary acquiescence in the use of its property for rental housing" and forcing owners to "subject their properties to a use which they neither planned nor desired" and "accept a purported stranger as a tenant"); *Loretto*, 458 U.S. at 436.

[6] *See Yee*, 503 U.S. at 528 (distinguishing between regulation restricting a property owner's ability to evict tenants and compelling owner "to refrain in perpetuity from terminating a tenancy"); *cf. 335-7 LLC*, 524 F. Supp. 3d at 330 ("[G]iven the

Eviction Moratorium did neither of these things. The Eviction Moratorium preserved landlords' ability to evict tenants where "necessary to respond to a significant and immediate risk to health, safety, or property of others created by the resident," or where the landlord intended to "personally occupy" or "sell the property." Procl. 20-19.6 at 5. The Eviction Moratorium clarified that tenants "who are not materially affected by COVID-19 should and must continue to pay rent." *Id.* at 2. And although it temporarily prohibited landlords from treating unpaid rent as an enforceable debt, it made an exception where the tenant failed to comply with a reasonable re-payment plan. *Id.* at 6. The Eviction moratorium did not forgive any unpaid rent. Petitioners' claim is therefore appropriately considered a regulatory takings claim

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right to evict [for cause] . . . , 'the tenancies are not perpetual' and 'the owners are not deprived of their reversionary interest.'" (quoting *Higgins*, 83 N.Y.2d at 171–73)); Manheim, at 991 (lifetime leases or leases of indefinite duration are not permanent, physical occupations because "possession will revert to the landlord when the tenant vacates, voluntarily or pursuant to just cause eviction").

because the regulation they challenge—a temporary eviction moratorium—regulates landlords' relationships with their invited tenants and preserves landlords' rights of reversion.

The applicable case law thus demonstrates that reflexively dubbing any restrictions on a landlord's ability to evict a tenant a per se taking that must be compensated is not appropriate. Rather, the question whether a regulation of the landlord-tenant relationship amounts to a taking is answered by applying the *Penn Central* factors. The Takings Clause is intended to justly compensate property owners for costs "which, in all fairness and justice, should be borne by the public as a whole," *Tahoe-Sierra*, 535 U.S. at 321 (quotation omitted), not to insulate landlords from a tradition of regulation that predates the Constitution, *see Munn v. Illinois*, 94 U.S. 113, 125–26 (1876). This Court should reject Petitioners' attempt to use the physical takings doctrine "as an end-run around established regulatory-takings jurisprudence." *See Rancho de Calistoga*, 800 F.3d at 1087. Any takings challenge to the Eviction Moratorium sounds in the regulatory

takings doctrine and the Court of Appeals properly rejected Petitioners' physical takings theory.[7]

2. *Cedar Point* reaffirmed, without expanding, longstanding physical takings doctrine.

The Supreme Court's recent *Cedar Point* decision reaffirms that this case does not involve a physical taking. The Court took the opportunity in *Cedar Point* to clarify two points. First, when "the government has physically taken property for itself or someone else," it has effected a "physical appropriation of property," and "a *per se* taking has occurred," regardless whether the government's action is garbed as a regulation. 141 S. Ct. at 2072. Second, as the Court had already made clear in previous cases, the government's physical appropriation of

[7] Because Petitioners did not pursue a regulatory takings theory, the Court need not evaluate the *Penn Central* factors. If it were to do so, however, that analysis would show that the Eviction Moratorium is not a compensable regulatory taking. *See, e.g.*, *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148, 165 (S.D.N.Y. 2020), *appeal dismissed sub nom. 36 Apartment Assocs., LLC v. Cuomo*, 860 F. App'x 215 (2d Cir. 2021) (New York's eviction moratorium effective during COVID-19 pandemic was not a regulatory taking).

property need not be continuous to be a per se physical taking. *Id.* at 2075. The Court did not redefine physical takings doctrine in *Cedar Point*; rather, it summarized the existing takings case law to elucidate the line between physical and regulatory takings. The Court reiterated that takings challenges to governmental restrictions on the use of property are regulatory takings claims and are subject to the *Penn Central* balancing test. *Id.* at 2072.

Most relevant to the issues here, the Court specified in *Cedar Point* that a regulation effects a physical taking where it "appropriates for the enjoyment of *third parties* the owners' right to exclude." *Id.* (emphasis added); *see also id.* at 2071 ("When the government, rather than appropriating private property for itself or a *third party*, instead imposes regulations that restrict an owner's ability to use his own property, [the *Penn Central*] standard applies." (emphasis added)). As discussed above, the Supreme Court has stated on multiple occasions that tenants are invitees of the property owners and *not* uninvited third parties. *See Loretto*, 458 U.S. at 440 (distinguishing cases affirming

states' "broad power to regulate . . . the landlord-tenant relationship" from government authorization of "the permanent occupation of the landlord's property by a third party"). *Cedar Point* does not purport to displace, expressly or impliedly, the established case law distinguishing between regulations permitting the intrusion of third parties onto private property, on the one hand, and those that regulate an existing use of property or the relationship between property owners and their invitees, on the other hand. *Cedar Point* is thus consistent with *Yee* and other cases that analyze takings challenges to regulations of the landlord-tenant relationship, which distinguish between uninvited third parties and invited tenants.[8]

The post-*Cedar Point* case law is consistent with this

[8] Governments may also protect the rights of uninvited visitors to access private property without compensating the owners in a variety of circumstances, including numerous "background restrictions on property rights" and "health and safety inspection regimes." *Cedar Point*, 141 S. Ct. at 2079. Nor do property owners have a right to compensation for instances of trespass. *Id.* at 2078–79.

analysis. Courts agree that *Cedar Point* did not expand the physical takings doctrine, but instead "reiterated *Tahoe-Sierra's* distinction between physical appropriations and use restrictions." *301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1381 (8th Cir. 2022). Beyond that, many courts that have interpreted the *Cedar Point* decision have highlighted that its holding addressed a "unique, narrow question." *Hardy v. United States*, 156 Fed. Cl. 340, 344–45 (2021); *see also Blevins v. United States*, 158 Fed. Cl. 295, at 305 (Fed. Cl. Feb. 18, 2022) (same, quoting *Hardy*); *Munzel v. Hillsborough Cnty.*, No. 8:21-CV-2185-WFJ-AAS, 2022 WL 671578, at *4 (M.D. Fla. Mar. 7, 2022) (observing that *Cedar Point* is consistent with previous takings precedents and declining to consider governmental action a physical taking where it "does not involve an agricultural access regulation given to labor organizations to enter property to solicit support for unionization").

Even more to the point, courts have consistently rejected property owners' attempts to use the *Cedar Point* opinion to

expand the physical takings doctrine by treating regulations of the landlord-tenant relationship like requirements that property owners admit uninvited third parties. In *Farhoud v. Brown*, for example, the landlord plaintiffs argued that a COVID-19-related eviction moratorium effected a per se taking. No. 3:20-cv-2226-JR, 2022 WL 326092, at *9 (D. Or. Feb. 3, 2022). The court held that *Yee*, not *Cedar Point*, governed the landlords' takings claim, because the eviction moratorium granted "no right to third parties to access Plaintiffs' properties. Instead, only those tenants to whom Plaintiffs ha[d] already granted possession [could] remain on Plaintiffs' property." *Id.* at *10.[9] Because the Eviction Moratorium "did not require that [landlords] allow third parties to enter and take access to their property," it is a restriction on landlords' use of their property, not a physical taking. *Gonzalez*,

[9] *See also DiVittorio v. Cnty. of Santa Clara*, No. 21-CV-03501-BLF, 2022 WL 409699 (N.D. Cal. Feb. 10, 2022); *Jevons*, 561 F. Supp. 3d 1082; *Bldg. & Realty Inst. v. New York*, 2021 WL 4198332; *S. Cal. Rental Hous. Ass'n*, 550 F. Supp. 3d 853.

21 Wn. App. 2d at 137, 504 P.3d at 904. Even outside of the landlord-tenant context, courts have consistently rejected property owners' arguments that *Cedar Point* expanded the physical takings doctrine.[10] *Cedar Point*, in short, has no bearing on Petitioners' takings claim.

IV. CONCLUSION

For the reasons stated above and in Respondents' filings, Amici urge this Court to affirm the decision of the Court of Appeals.

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[10] *See, e.g.*, *Pavlock v. Holcomb*, 35 F.4th 581, 590 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 374 (2022); *Golf Vill. N., LLC v. City of Powell, Ohio*, 14 F.4th 611 (6th Cir. 2021); *Blevins v. United States*, 158 Fed. Cl. 295; *Hinkle Fam. Fun Ctr., LLC v. Grisham*, 586 F. Supp. 3d 1118 (D.N.M. Feb. 17, 2022); *Hardy*, 156 Fed. Cl. 340; *KI Fla. Properties, Inc. v. Walton Cty.*, No. 3:20CV5358-RH-HTC, 2021 WL 5456668, at *4 (N.D. Fla. Oct. 15, 2021); *Skatemore, Inc. v. Whitmer*, No. 1:21-CV-66, 2021 WL 3930808 (W.D. Mich. Sept. 2, 2021); *Valancourt Books, LLC v. Perlmutter*, 554 F. Supp. 3d 26 (D.D.C. July 23, 2021).

I certify that in accordance with RAP 18.17 this document contains 4,918 words.

Respectfully submitted,

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