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No. 100992-5

SUPREME COURT
OF THE STATE OF WASHINGTON

GONZALES, *et al.*,

Appellants,

v.

INSLEE, *et al.*

Respondents.

BRIEF OF AMICUS CURIAE CITY OF SEATTLE

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TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

II. IDENTITY AND INTEREST OF AMICUS CURIAE 2

III. STATEMENT OF THE CASE 3

IV. ARGUMENT 3

A. Plaintiffs' per se physical invasion takings claim fails under controlling and persuasive case law. 3

1. *Loretto*, *F.C.C.*, and *Yee* instruct that regulating the landlord-tenant relationship effects no per se physical invasion taking 3

2. Other courts follow that authority to reject physical invasion takings claims in the landlord-tenant context. 8

3. Every federal district court and Washington Court of Appeals panel to have considered a per se physical invasion takings claim against a pandemic-related eviction moratorium followed *Yee* to reject it. 10

4. Under *Yee*, Plaintiffs' claim fails because the moratorium neither required them to acquiesce to a stranger's invasion nor forced them to remain landlords in perpetuity. 13

B. Plaintiffs' arguments lack merit.............................. 14

1. *Cedar Point*, which struck down a law requiring an invasion by a third-party stranger, is distinguishable. 14

2. An outlier, the Eighth Circuit in *Heights Apts*. incorrectly applied *Cedar Point* rather than *Yee* to an eviction moratorium challenge. 16

3. *San Telmo* and *Granat* involved no per se physical takings claim and are no longer good takings law. 18

4. *Alabama Realtors* addressed no takings claim and left *Yee* undisturbed. 20

5. *Cwynar*, relying on one of *Yee*'s exceptions, is distinguishable. 22

6. *Armstrong* and *Mission Springs* are irrelevant to Plaintiffs' per se physical invasion takings claim. 23

V. CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

Alabama Ass'n of Realtors, v. Department of Health & Human Services, Order on App. to Vacate Stay, 141 S. Ct. 2485 (2021) (per curiam) 20, 21, 22

Armstrong v. United States, 364 U.S. 40 (1960) 23, 24, 25, 26

Auracle Homes, LLC v. Lamont, 478 F. Supp. 3d. 199, (D. Conn. 2020) 12

Ballinger v. City of Oakland, 24 F.4th 1287 (9th Cir. 2022) 8, 9

Baptiste v. Kennealy, 490 F. Supp. 3d 353 (D. Mass. 2020) 12

Building and Realty Institute of Westchester and Putnam Counties, Inc. v. State of New York, No. 19-CV-11285 (KMK), No. 20-CV-634 (KMK), 2021 WL 4198332 (S.D.N.Y. Sept. 14, 2021) *appeal docketed sub nom.*, *G-Max Mgmt., Inc. v. State of New York*, No. 21-2448 (2nd Cir. Sept. 28, 2021) 10

Building Owners and Managers Ass'n v. F.C.C., 254 F.3d 89 (D.C. Cir. 2001) 9

CDK Global LLC v. Brnovich, 16 F.4th 1266 (9th Cir. 2021) 9

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) 15

Cwynar v. City and County of San Francisco,
90 Cal. App. 4th 637 (2001) 23

Dolan v. City of Tigard,
512 U.S. 374 (1994)... 24

El Papel, LLC v. Durkan, Report & Rec.,
No. 2:20-cv-01323-RAJ-JRC, 2021 WL 4272323 (W.D. Wash. Sept. 15, 2021), *order adopting Report & Rec.*, 2022 WL 2828685 (July 20, 2022), *appeal docketed sub nom.*, *El Papel, LLC v. City of Seattle*, No. 22-35656 (9th Cir. Aug. 17, 2022) 2

Elmsford Apartment Associates, LLC v. Cuomo,
469 F. Supp. 3d. 148, (S.D.N.Y. 2020), *appeal dismissed sub nom.*, *36 Apt. Associates, LLC v. Cuomo*, 2021 WL 3009153 (2nd Cir. July 16, 2021) (summary order)............. 12

F.C.C. v. Florida Power Corp.,
480 U.S. 245 (1987)... 5, 6

Farhoud v. Brown,
No. 3:20-cv-2226-JR, 2022 WL 326092 (D. Or. Feb. 3, 2022) 11, 12, 16

Federal Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal,
83 F.3d 45 (2d Cir. 1996) 9

Gallo v. District of Columbia,
___F. Supp. 3d ___, 2022 WL 2208934 (D.D.C. June 21, 2022) 11, 16, 18

GHP Mgmt. Corp. v. City of Los Angeles,
No. CV 21-06311 DDP (JEMx), 2022 WL 17069822 (Nov. 17, 2022) 11, 16, 22

Gonzales v. Inslee,
21 Wn. App. 2d 110, 504 P.3d 890 (2022).......................... 13

Granat v. Keasler,
99 Wn.2d 564, 663 P.2d 830 (1983).................................... 19

Heights Apts., LLC v. Walz,
30 F.4th 720 (8th Cir. 2022) 17, 18

Heights Apts., LLC v. Walz,
510 F. Supp. 3d 789, (D. Minn. 2020), *rev'd*, 30 F.4th
720 (8th Cir. 2022).. 12

In re Recall of Inslee,
199 Wn.2d 416, 508 P.3d 635 (2022).................................. 26

Jevons v. Inslee,
561 F. Supp. 3d 1082 (E.D. Wash. 2021), *appeal docketed*, No. 22-35050 (9th Cir. Jan. 18, 2022)........... 11, 16

Lingle v. Chevron USA, Inc.,
544 U.S. 528 (2005).. 3, 19, 24, 25

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982)... 4, 5

Mission Springs v. City of Spokane,
34 Wn.2d 947, 954 P.2d 250 (1998)................................... 26

Nollan v. Cal. Coastal Comm'n,
483 U.S. 825, 835 n.4 (1987)... 24

Pakdel v. City and County of San Francisco,
No. 17-cv-03638-RS, 2022 WL 14813709 (Oct. 25, 2022) 9, 16

Palazzolo v. Rhode Island,
533 U.S. 606 (2001)... 24

Rental Housing Ass'n v. City of Seattle,
22 Wn. App. 2d 426, 512 P.3d 545 (2022)................ 2, 13, 16

San Telmo Associates v. City of Seattle,
108 Wn.2d 20, 735 P.2d 673 (1987).................................... 19

Slidewaters LLC v. Washington State Dep't of Labor and Industries,
4 F.4th 747 (2021) 26

Southern Cal. Rental Housing Ass'n v. County of San Diego Bd. of Supervisors,
No. 3:21cv912-L-DEB, 2021 WL 3171919 (S.D. Cal. July 26, 2021) 12, 16

Stuart Mills Props., LLC v. City of Burbank,
No. 2:22-cv-04246-RGK-AGR, 2022 WL 4493573 (C.D. Cal. Sept. 19, 2022) 11, 16

Tuck's Restaurant and Bar v. Newsom,
No. 2:20-cv-02256-KJM-CKD, 2022 WL 5063861 (E.D. Cal. Oct. 4, 2022)... 16

Whole Woman's Health v. Jackson, Order on App. for Injunctive Relief,
141 S. Ct. 2494, 2500 (2021).. 20

Williams v. Alameda County,
___ F. Supp. 3d ___, 2022 WL 17169833 (C.D. Cal. 2022) 8, 11, 16, 18

Yee v. City of Escondido,
503 U.S. 519 (1992)... passim

Yim v. City of Seattle,
194 Wn.2d 651, 451 P.3d 675 (2019)............................... 4, 19

Other Authorities

Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019) 20

Washington State Econ. & Revenue Forecast Council, *Econ. & Revenue Update* (Sept. 16, 2020) 25

William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U.J.L. & LIBERTY 1 (2015) 20

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court should reject the per se physical invasion takings claim pressed by Appellants Gonzales, et al. ("Plaintiffs"). That claim fails under controlling and persuasive case law. A trio of U.S. Supreme Court decisions instructs that regulating the landlord-tenant relationship effects no per se physical invasion taking because it does not require the landlord to acquiesce to a third-party stranger's invasion. Exceptions arise only for regulations forcing a property owner to become a landlord or a landlord to continue serving as such in perpetuity. Other courts follow that authority to reject physical invasion takings claims in the landlord-tenant context. And every federal district court—at least a dozen so far—and Washington Court of Appeals panel to have considered a per se physical invasion takings claim against a pandemic-related eviction moratorium followed this controlling and persuasive authority to reject the claim. Plaintiffs' claim likewise fails because the moratorium they challenge neither required them to acquiesce to a

stranger's invasion nor forced them to remain landlords in perpetuity. Plaintiffs' arguments—which rely on distinguishable, incorrect, or irrelevant case law—lack merit.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae City of Seattle is a first-class Washington charter city. Because the City has adopted tenant protections that have faced or continue to face per se physical invasion takings claims in other courts, the City has an interest in assisting this Court in properly resolving the identical claim here. *See, e.g.*, *El Papel, LLC v. Durkan*, Report & Rec., No. 2:20-cv-01323-RAJ-JRC, 2021 WL 4272323, at *15–17 (W.D. Wash. Sept. 15, 2021), *order adopting Report & Rec.*, 2022 WL 2828685 (July 20, 2022), *appeal docketed sub nom.*, *El Papel, LLC v. City of Seattle*, No. 22-35656 (9th Cir. Aug. 17, 2022); *Rental Housing Ass'n v. City of Seattle*, 22 Wn. App. 2d 426, 444–51, 512 P.3d 545 (2022).

III. STATEMENT OF THE CASE

The City relies on the statement provided by Respondents Jay Inslee, et al.

IV. ARGUMENT

A. Plaintiffs' per se physical invasion takings claim fails under controlling and persuasive case law.

1. *Loretto*, *F.C.C.*, and *Yee* instruct that regulating the landlord-tenant relationship effects no per se physical invasion taking.

Government implicates the Takings Clause by directly appropriating or invading private property or effectively ousting the owner from their domain through regulation. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 537–39 (2005). Plaintiffs claim a per se regulatory taking from an eviction moratorium they contend causes them to suffer a physical invasion. Plaintiffs' Opening Brf. at 43–48. That claim fails because a trio of U.S. Supreme Court opinions instructs that regulating the landlord-tenant relationship effects no per se physical taking. *See Yim v. City of Seattle*, 194 Wn.2d 651, 672, 681, 451 P.3d

675 (2019) (Washington follows federal case law when addressing a takings claim under the Washington Constitution).

First, when announcing the per se physical invasion takings test, *Loretto* rejected concerns that the test would undercut landlord-tenant regulations: “This 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 v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 440 (1982). Through a “very narrow” holding, *Loretto* ruled that a law forcing a property owner to suffer a physical invasion from a stranger outside the landlord-tenant relationship—there in the form of a cable company installing its cable on the property—constituted a per se taking. *Id*. at 441. *Accord id*. at 436 (“an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner’s property”), 449 (distinguishing the cable company’s rights from the tenants’).

"So long as . . . regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party," they effect no per se physical invasion. *Id*. at 440.

Second, *F.C.C.* reaffirmed that the per se test does not apply to a landlord-tenant regulation that requires no landlord to acquiesce to a third-party stranger's invasion. *F.C.C. v. Florida Power Corp.,* 480 U.S. 245, 250–53 (1987). In *F.C.C.*, utility pole owners challenged a federal agency ruling that reduced the annual rent the owners could charge cable companies to attach to a pole, from as high as $7.15 to $1.79. *Id*. at 247–49. Echoing *Loretto*, *F.C.C.* observed that "statutes regulating the economic relations of landlords and tenants are not per se takings." *Id*. at 252. Building on *Loretto*'s warning that the per se test applies only to regulations requiring a landlord to acquiesce to a stranger's invasion, *F.C.C.* observed that "[t]his element of required acquiescence is at the heart of the concept of occupation." *Id*. A landlord who leases to a tenant voluntarily acquiesces to the tenant's occupation and cannot

claim a physical invasion when the government adjusts the landlord-tenant relationship:

> [Landlords] contend, in essence, that it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79. But it is the invitation, not the rent, that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.

Id. at 252–53.

Finally, heeding *Loretto* and *F.C.C.*, *Yee* held that the per se physical invasion test does not apply to most residential landlord-tenant regulations, particularly those denying a landlord the discretion to exclude individuals who pay on terms the landlord disfavors. *Yee v. City of Escondido*, 503 U.S. 519 (1992). *Yee* rejected a per se physical invasion claim from mobile home park landlords who complained that an ordinance—combined with a state law—limited their ability to evict a tenant who did not pay the higher rent a landlord demanded. *Id*. at 526–27. That claim failed because the landlord

invited the tenant onto the property—the tenant did not enter as a third-party stranger with a government license:

> Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government. While the "right to exclude" is doubtless, as petitioners assert, "one of the most essential sticks in the bundle of rights that are commonly characterized as property," we do not find that right to have been taken . . . .
>
> . . .
>
> Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals.

Id. at 528, 531 (citations omitted). *Yee* noted two exceptions: a landlord-tenant regulation might effect a per se physical invasion taking if it requires someone to become an involuntary landlord, or forces a landlord to continue serving as such in perpetuity. *Id*. at 528.

2. Other courts follow that authority to reject physical invasion takings claims in the landlord-tenant context.

Persuasive decisions from other courts follow *Loretto*, *F.C.C.*, and especially *Yee* to reject physical invasion takings claims in the landlord-tenant context. For example, the Ninth Circuit "has held consistently that laws governing the landlord-tenant relationship are not subject to a categorical per se takings analysis." *Williams v. Alameda County*, ___ F. Supp. 3d ___, 2022 WL 17169833, at *9 (C.D. Cal. 2022). Most recently, *Ballinger* rejected a per se physical invasion takings challenge to an ordinance that requires a landlord who reoccupies their home upon a lease's expiration to pay the tenant a relocation fee. *Ballinger v. City of Oakland*, 24 F.4th 1287, 1291 (9th Cir. 2022). Relying on *Yee* and *F.C.C.*, *Ballinger* reasoned that a law that forces a landlord to accept tenants the landlord dislikes, or transfers wealth from landlords to tenants, does not effect a taking—it is merely an economic regulation of the landlord's use of their property. *Id*. at 1292–94. Because the challenged

law did not force a property owner to become a landlord, the element of required acquiescence was absent. *Id*. at 1293 n.3. *Accord CDK Global LLC v. Brnovich*, 16 F.4th 1266, 1281–82 (9th Cir. 2021).

Other federal courts employ the same reasoning. *E.g.*, *Building Owners and Managers Ass'n v. F.C.C.*, 254 F.3d 89, 98–99 (D.C. Cir. 2001) (noting "the extensive case law upholding the government's authority to regulate various aspects of the landlord-tenant relationship" without effecting a physical invasion taking); *Federal Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45, 47–48 (2d Cir. 1996) ("where a property owner offers property for rental housing, the Supreme Court has held that government regulation of the rental relationship does not constitute a physical taking"); *Pakdel v. City and County of San Francisco*, No. 17-cv-03638-RS, 2022 WL 14813709, at *5 (Oct. 25, 2022) ("The common thread that runs through these landlord-tenant cases is the notion that a *per se* physical taking has not

occurred because the element of 'required acquiescence' is absent."); *Building and Realty Institute of Westchester and Putnam Counties, Inc. v. State of New York*, No. 19-CV-11285 (KMK), No. 20-CV-634 (KMK), 2021 WL 4198332, at *19 (S.D.N.Y. Sept. 14, 2021) ("the case law is clear: property owners who offer their properties for rent do not suffer from a taking based on laws that regulate the rental of that property"), *appeal docketed sub nom.*, *G-Max Mgmt., Inc. v. State of New York*, No. 21-2448 (2nd Cir. Sept. 28, 2021).

Plaintiffs acknowledge none of that persuasive authority.

3. Every federal district court and Washington Court of Appeals panel to have considered a per se physical invasion takings claim against a pandemic-related eviction moratorium followed *Yee* to reject it.

Federal district courts—at least a dozen so far—have uniformly applied *Yee* to reject per se physical invasion takings challenges to pandemic-related eviction moratoria, which neither force landlords to acquiesce to invasion by a third-party stranger nor require them to serve as landlords in perpetuity:

1. *Williams*, 2022 WL 17169833, at *8, 11 ("In the context of regulations affecting the landlord-tenant relationship, the main Supreme Court case is *Yee*");

2. *GHP Mgmt. Corp. v. City of Los Angeles*, No. CV 21-06311 DDP (JEMx), 2022 WL 17069822, at *2–4 (Nov. 17, 2022);

3. *Stuart Mills Props., LLC v. City of Burbank*, No. 2:22-cv-04246-RGK-AGR, 2022 WL 4493573, at *3 (C.D. Cal. Sept. 19, 2022) ("Plaintiff's situation is more akin to the facts in *Yee*");

4. *El Papel, LLC v. Durkan*, Report & Rec., No. 2:20-cv-01323-RAJ-JRC, 2021 WL 4272323, at *16 (W.D. Wash. Sept. 15, 2021) ("*Yee* supplies the rule that is dispositive of the physical taking arguments in this matter."), *order adopting Report & Rec.*, 2022 WL 2828685 (July 20, 2022), *appeal docketed sub nom.*, *El Papel, LLC v. City of Seattle*, No. 22-35656 (9th Cir. Aug. 17, 2022);

5. *Gallo v. District of Columbia*, ___F. Supp. 3d ___, 2022 WL 2208934, at *8–9 (D.D.C. June 21, 2022) (*Yee* "controls");

6. *Farhoud v. Brown*, No. 3:20-cv-2226-JR, 2022 WL 326092, at *10 (D. Or. Feb. 3, 2022);

7. *Jevons v. Inslee*, 561 F. Supp. 3d 1082, 1106 (E.D. Wash. 2021), *appeal docketed*, No. 22-35050 (9th Cir. Jan. 18, 2022);

8. *Southern Cal. Rental Housing Ass'n v. County of San Diego Bd. of Supervisors*, No. 3:21cv912-L-

DEB, 2021 WL 3171919, at *8 (S.D. Cal. July 26, 2021);

9. *Heights Apts., LLC v. Walz*, 510 F. Supp. 3d 789, 812 (D. Minn. 2020), *rev'd*, 30 F.4th 720 (8th Cir. 2022);

10. *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 387–88 (D. Mass. 2020);

11. *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d. 199, 220–21 (D. Conn. 2020); and

12. *Elmsford Apartment Associates, LLC v. Cuomo,* 469 F. Supp. 3d. 148, 162–64 (S.D.N.Y. 2020), *appeal dismissed sub nom*., *36 Apt. Associates, LLC v. Cuomo*, 2021 WL 3009153 (2nd Cir. July 16, 2021) (summary order).

Plaintiffs acknowledge practically none of that persuasive authority.[1]

And the Washington Court of Appeals has twice applied *Yee* to reject per se physical invasion takings claims challenging

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[1] Plaintiffs invoke *Heights Apts., LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), which reversed a district court ruling. Plaintiffs' Supp. Brf. at 32. The City addresses *Heights Apts*. below. Plaintiffs cite *Auracle*, *Baptiste*, and *Farhoud*, but not their treatment of takings law. *Id*. at 32 n.9 (citing *Farhoud*); Plaintiffs' Reply Brf. at 36, 39 (citing *Auracle*), 37 n.3 (citing *Baptiste*).

pandemic-related eviction moratoria. One decision is on appeal here. *Gonzales v. Inslee*, 21 Wn. App. 2d 110, 134–36, 504 P.3d 890 (2022), *review granted*, No. 100992-5 (Wn. Oct. 14, 2022). The other rejected a challenge to an extension of Seattle's moratorium. *Rental Housing Ass'n v. City of Seattle*, 22 Wn. App. 2d 426, 447–51, 512 P.3d 545 (2022).

4. Under *Yee*, Plaintiffs' claim fails because the moratorium neither required them to acquiesce to a stranger's invasion nor forced them to remain landlords in perpetuity.

Yee controls and resolves Plaintiffs' per se physical invasion takings claim. Like the *Yee* landlords, Plaintiffs invited tenants onto their property—the moratorium did not require Plaintiffs' acquiescence to a stranger's invasion. Like the *Yee* landlords' claimed right to exclude tenants who refuse to pay more than less, Plaintiffs assert a right to immediately exclude tenants who fall behind in rent, even though the tenants remain obligated to pay their debt. The *Yee* landlords claimed that, because of local rent control and state just-cause eviction

limitations, they were locked into renting to lower-paying tenants in perpetuity. *Yee*, 503 U.S. at 526–27. Plaintiffs' claim is weaker because the moratorium they challenge was temporary and did not lower rent—tenants remained responsible for back rent and governments offered funding to help cover any shortfall.

What was true in *Yee* is true here. "Put bluntly, no government has required any physical invasion of [Plaintiffs'] property. [Their] tenants were invited by [them], not forced upon them by the government." *Id*. at 528. "Because they voluntarily open their property to occupation by others, [Plaintiffs] cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 531.

B. Plaintiffs' arguments lack merit.

1. *Cedar Point*, which struck down a law requiring an invasion by a third-party stranger, is distinguishable.

This Court should distinguish *Cedar Point*. *See* Plaintiffs' Supp. Brf. at 27–28 (relying on *Cedar Point Nursery*

v. Hassid, 141 S. Ct. 2063 (2021)); Plaintiffs' Opening Brf. at 44–45 (same).[2] Far from overruling *Yee*, *Cedar Point* cited it favorably for takings principles. *Cedar Point*, 141 S. Ct. at 2072. Consistent with *Yee*, *F.C.C.*, and *Loretto*, *Cedar Point* struck down a law forcing certain landowners (agricultural employers) to suffer an invasion by third-party strangers (union organizers). *Id*. at 2069. And *Cedar Point* distinguished laws—like the moratorium at issue here—that regulate how landowners must treat those they have already invited onto their land: "Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." *Id*. at 2077.

Again, federal district courts and the Washington Court of Appeals uniformly distinguish *Cedar Point* when raised in a

[2] To avoid overlap with the brief of amici Appleseed Foundation, et al., this brief largely defers to that brief's discussion of *Cedar Point*.

challenge to an eviction moratorium specifically or a landlord-tenant regulation generally. *E.g.*, *Williams*, 2022 WL 17169833, at *9; *GHP Mgmt.*, 2022 WL 17069822, at *3–4; *Pakdel*, 2022 WL 14813709, at *6; *Tuck's Restaurant and Bar v. Newsom*, No. 2:20-cv-02256-KJM-CKD, 2022 WL 5063861, at*9–10 (E.D. Cal. Oct. 4, 2022); *Stuart Mills Props.,* 2022 WL 4493573, at *2–3; *Gallo*, 2022 WL 2208934, at *8; *Farhoud*, 2022 WL 326092, at *10; *Building and Realty Institute*, 2021 WL 4198332, at *22 n.26; *Jevons*, 561 F. Supp. 3d at 1106–07; *Southern Cal. Rental Housing Ass'n*, 2021 WL 3171919, at *8; *Rental Housing Ass'n*, 22 Wn. App. 2d at 446–47. This Court should too.

2. An outlier, the Eighth Circuit in ***Heights Apts.*** incorrectly applied ***Cedar Point*** rather than ***Yee*** to an eviction moratorium challenge.

The Eighth Circuit's *Heights Apts.* decision, which swims against this tide of controlling and persuasive authority,

is an incorrect outlier.[3] *Cf*. Plaintiffs' Opening Brf. at 32 (relying on *Heights Apts., LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022)). In a two-paragraph analysis, *Heights Apts.* followed *Cedar Point* instead of *Yee* to hold that landlords had pleaded a "plausible" per se physical invasion takings claim against Minnesota's eviction moratorium, at least sufficient to reverse a motion to dismiss and remand to the district court. *Heights Apts.*, 30 F.4th at 733.

As the dissent from the Eighth Circuit's order denying a petition for rehearing en banc accurately noted, the Eighth Circuit panel distinguished *Yee* based on the incorrect premise that the *Yee* landlords "sought to exclude future or incoming tenants rather than existing tenants." *Compare id. with Heights Apts., LLC v. Walz*, Order Denying Petition for Rehearing En Banc, 2022 WL 2167494, at *1 (8th Cir. June 16, 2022)

[3] To avoid overlap with the brief of amici Appleseed Foundation, et al., this brief largely defers to that brief's discussion of *Heights Apts*.

(Colloton, J., dissenting). Perhaps the Eighth Circuit panel erred on that crucial point because it ruled without the benefit of briefing on *Cedar Point*—briefing in *Heights Apts.* concluded in May 2021, before the Supreme Court's June 2021 *Cedar Point* decision. *See* Petition for Rehearing or Rehearing En Banc at 5, *Heights Apts., LLC v. Walz* (8th Cir. No. 21-1278) (*Cedar Point* "came after the parties had briefed the merits of this appeal"); *accord* Docket, *Heights Apts.* (8th Cir. No. 21-1278).

No matter the error's source, courts outside the Eighth Circuit have found *Heights Apt.*'s treatment of the per se physical invasion takings claim unpersuasive. *E.g.*, *Williams*, 2022 WL 17169833, at *8; *Gallo*, 2022 WL 2208934, at *9. This Court should too.

3. ***San Telmo* and *Granat* involved no per se physical takings claim and are no longer good takings law.**

Plaintiffs invoke two decisions from this Court that fail to advance their claim. *See* Plaintiffs' Opening Brf. at 47–48.

San Telmo resolved no takings claim. *San Telmo Associates v. City of Seattle*, 108 Wn.2d 20, 23–24,735 P.2d 673 (1987). Its offhand statement about a potential taking, relying on *Granat*, is dictum. *Id*., 108 Wn.2d at 24–25 (citing *Granat v. Keasler*, 99 Wn.2d 564, 663 P.2d 830 (1983)).

And *Granat* involved no per se physical invasion taking claim. *See Granat*, 99 Wn.2d at 568–70. Even for other types of takings claims, *Granat* is no longer valid. In *Yim* in 2019, this Court clarified that Washington follows federal takings law, as outlined by the U.S. Supreme Court in *Lingle*, and abrogated Washington precedent that approached a regulatory takings claim differently than *Lingle*. *Yim*, 194 Wn.2d at 661–62, 668–72 (citing *Lingle*, 544 U.S. 528). *Granat*, issued decades before *Yim*, is among that abrogated Washington precedent because it found that a law effected a taking based on "reasonableness" and balancing tests—standards absent from *Lingle* and no longer valid in Washington. *See Granat*, 99 Wn.2d at 568–70.

4. ***Alabama Realtors* addressed no takings claim and left *Yee* undisturbed.**

Plaintiffs latch onto a sentence from *Alabama Realtors*, an unsigned Supreme Court "shadow docket"[4] order issued in response to an emergency motion for injunctive relief. Plaintiff's Supp. Brf. at 28 (quoting *Alabama Ass'n of Realtors, v. Department of Health & Human Services*, Order on App. to Vacate Stay, 141 S. Ct. 2485 (2021) (per curiam)); Plaintiffs' Opening Brf. at 45 (same).

Plaintiffs gain nothing from that sentence. *Alabama Realtors* challenged an administrative eviction moratorium enacted by the Centers for Disease Control and Prevention

[4]A law professor coined "shadow docket" to refer to the orders and summary decisions that do not result from the Court's formal merits docket. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U.J.L. & LIBERTY 1 (2015). *See also Whole Woman's Health v. Jackson*, Order on App. for Injunctive Relief, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (noting "just how far the Court's 'shadow-docket' decisions may depart from the usual principles of appellate process"); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019) (critiquing the shadow docket's use).

(“CDC”). *Alabama Realtors*, 141 S. Ct. at 2487–88. The trial court ruled that the CDC lacked authority to enact the moratorium, but the court stayed its order pending appeal—a stay the Court of Appeals retained. *Id*. The sole issue before the Supreme Court was whether to grant the plaintiffs’ emergency motion to vacate the stay pending the CDC’s appeal. *Id*.

The Supreme Court granted the motion after considering the likelihood of success on the merits and balancing the equities. *Id. at* 2488–90. On the likelihood-of-success prong, the Court addressed no takings claim—it found only that, although Congress could adopt a moratorium, the CDC lacked authority to do it administratively: “If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it.” *Id. at* 2490. Turning to the equities, the Court concluded its list of harms landlords would suffer with the sentence Plaintiffs invoke: “And preventing them from evicting tenants who breach their leases intrudes on one of the most

fundamental elements of property ownership—the right to exclude." *Id.* at 2489 (citing *Loretto*).

That sentence fails to advance Plaintiffs' argument because *Alabama Realtors* addressed no takings claim and failed to mention, let alone overrule, *Yee*. Rather than erect a constitutional hurdle to eviction moratoria, the Court invited Congress to authorize one. The sentence merely acknowledged an "intrusion" on the right to exclude—a principle that *Yee* also acknowledged while nevertheless rejecting a per se physical invasion takings claim. *See Yee*, 503 U.S. at 528 ("the right to exclude is doubtless . . . one of the most essential sticks in the bundle of rights that are commonly characterized as property") (internal quotation marks omitted); *accord GHP Mgmt.,* 2022 WL 17069822, at *2 (distinguishing *Alabama Realtors*).

5. ***Cwynar*, relying on one of *Yee*'s exceptions, is distinguishable.**

Plaintiffs gain nothing from a lower California appellate court decision that distinguished *Yee*. *See* Plaintiffs' Supp. Brf. at 31–32 (relying on *Cwynar v. City and County of San*

Francisco, 90 Cal. App. 4th 637 (2001)). That decision addressed a statute that fell within an exception *Yee* recognized—a law that effectively forced the landlord plaintiffs into serving as landlords in perpetuity by granting tenants a lifetime tenancy. *E.g.*, *Cwynar*, 90 Cal. App. 4th at 653 ("Plaintiffs contend that [the law] constitutes a per se physical taking because it effectively grants tenants lifetime tenancies"). Plaintiffs here can make no such claim against a temporary moratorium.

6. ***Armstrong*** **and** ***Mission Springs*** **are irrelevant to Plaintiffs' per se physical invasion takings claim.**

Over sixty years ago, *Armstrong* claimed—with no citation to history or law—that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Even if historically accurate, that line

fails to advance Plaintiffs' case. *Cf*. Plaintiffs' Supp. Brf. at 34 (citing *Armstrong*); Plaintiffs' Opening Brf. at 42 (same).

Although the Court often repeats *Armstrong*'s assertion about the Takings Clause's objective, *e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617–18 (2001); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987), *Lingle* rejected *Armstrong*'s "in all fairness and justice" language as a takings test:

> [The property owner] appeals to the general principle that the Takings Clause is meant "'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" But that appeal is clearly misplaced . . . [because a] test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation.

Lingle, 544 U.S. at 542–43 (citations omitted). Instead of a test that identifies what burdens should properly be borne by the public, *Lingle* explained that the primary touchstone of takings law is a test that discerns "regulatory actions that are

functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id*. at 539. Instead of probing the justification for or distribution of the burden, the focus must be "directly upon the severity of the burden that government imposes upon private property rights." *Id*. It does not matter what the government gets from the taking or even whether the government should have secured it from others.

Even if *Armstrong*'s line were the test, Plaintiffs have not met it. Given the pandemic's widespread economic impact, the breath of business regulations imposed to address the pandemic, and the availability of governmental funding to mitigate unpaid rent, Plaintiffs should not overstate the exclusiveness or magnitude of the burden they carried. *See, e.g.*, Washington State Econ. & Revenue Forecast Council, *Econ. & Revenue Update* (Sept. 16, 2020) (noting that Washington lost half a million jobs in March and April of 2020, with the unemployment rate reaching 16.3% in April—the highest in

decades), *available at* https://erfc.wa.gov/sites/default/files/public/documents/publications/sep20.pdf (last visited Jan. 6, 2023); *Slidewaters LLC v. Washington State Dep't of Labor and Industries*, 4 F.4th 747, 753 (9th Cir. 2021) (discussing enforcement of other state regulations); *In re Recall of Inslee*, 199 Wn.2d 416, 421–22, 508 P.3d 635 (2022) (discussing various state regulations).

Plaintiffs do not quote *Armstrong* directly, relying instead on *Mission Springs*'s quotation of *Armstrong*. Plaintiffs' Supp. Brf. at 34 (citing *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 964, 954 P.2d 250 (1998)); Plaintiffs' Opening Brf. at 42 (same). But *Mission Springs* is irrelevant because it turned on a due process claim, not a takings claim. *Mission Springs*, 134 Wn.2d at 963 ("This situation must be analyzed under well-established due process criteria as distinguished from that associated with taking property without just compensation.").

V. CONCLUSION

This Court should reject Plaintiffs' per se physical invasion takings claim because it fails under controlling and persuasive case law. The moratorium merely regulated the landlord-tenant relationship—it neither required landlords to acquiesce to an invasion by a third-party stranger nor forced them to remain landlords in perpetuity.

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I certify under penalty of perjury under the laws of the State of Washington that today I filed this document via the Clerk's electronic portal filing system, which should cause it to be served by the Clerk on all parties and existing amici curiae, and emailed a courtesy copy of this document to:

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