FILED
SUPREME COURT
STATE OF WASHINGTON
2/2/2023 3:04 PM
BY ERIN L. LENNON
CLERK

see errata filed February 9, 2023

Supreme Court No. 100,992-5

Court of Appeals No. 55,915-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

Gene Gonzales and Susan Gonzales, Horwath Family Two, LLC, and the Washington Landlord Association,

Appellants

v.

Governor Jay Inslee and State of Washington,

Respondents.

Appellants' Answer to Briefs of Amici Curiae

STEPHENS & KLINGE LLP
Richard M. Stephens, WSBA # 21776
10900 NE 4th Street, Suite 2300
Bellevue, WA 98004
(425) 453-6206
stephens@sklegal.pro
Attorneys for Appellants

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Other Authorities

Introduction

The Court has granted motions for interested parties to file six separate amicus curiae briefs—a brief by Pacific Legal Foundation (PLF), the City of Seattle, the Appleseed Foundation and others (Appleseed Foundation), the King County Bar Association (KC Bar Association), the Rental Housing Association of Washington (RHA), and Citizen Action Defense Fund (CADF). Most address Appellants' (Housing Providers') argument that the Proclamations caused a temporary taking of their property. The RHA brief also addresses the interference with access to the judiciary and the CADF brief deals with the question of legislative authority and constitutionality of delegating authority to the Governor to suspend statutes.

Housing Providers' answer to each is in the order of the amici curiae listed above.

A. Housing Providers' answer to PLF.

The PLF brief appropriately begins with the longstanding and foundational understanding that physical presence or occupation of another's property is a significant deprivation of a basic property right. PLF Br. at 9-11. In contrast, the State, and amici supporting the State, contend that if someone has given up the right to exclusive possession by choosing to invite in renters, then one cannot complain if government mandates the continuation of possession beyond the tenancy's agreed-upon expiration date or conditions. The State's approach that, "once invited in," a tenant can continue to stay past the owner and tenants' agreed-upon expiration date for any period short of "perpetuity" has no root in takings jurisprudence.

The right to control when and on what terms someone may occupy one's property—including rented rooms in one's home—is a fundamental attribute of ownership.

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021). Consequently, occupancy should be subject only to the conditions to which the owner and occupant agree, such as timely payment of rent, proscription of nuisances, terms to prevent property damage and the duration of the tenancy.

The various amici supporting the State contend that the only interference with the time aspect that could cause a taking is if the State mandated occupation "in perpetuity." A hundred years is not in perpetuity; but under this theory, the State could mandate an owner host a room occupant in their home for the rest of the owner's life without requiring the State to pay just compensation for the taking of that interest—essentially a leasehold interest, or as PLF explains, an easement. PLF Br. at 13. Regardless, mandatory occupation of private property under terms and conditions never agreed to by the owner or tenant takes a significant interest in property deserving of the only

protection the Fifth Amendment provides—payment of just compensation for what was taken for the time it was taken.

PLF addresses the reasons *Yee v. City of Escondido*, 503 U.S. 519 (1992), does not preclude finding a taking in forcing an owner to endure a tenant's continued occupation beyond the agreed-upon conditions of the leasehold. PLF Br. at 16. As Housing Providers has explained, a prohibition on eviction was not at issue in *Yee. See* Appellants' Supplemental Brief (App.Supp.Br.), at 29-31.

Moreover, PLF notes an important feature of the *Yee* decision which heretofore has been paid little attention.

> [T]he Yees did not contend that rent control devalued their land. Rather, they argued that the regulation effected a taking of the cash premium that the law transferred from owner to tenant—not a transfer of a physical property attribute.

PLF Br. at 18 (citing *Yee*, 503 U.S. at 527).

Yee's discussion of the physical taking argument must be read in view of its contemporary jurisprudence. Shortly

before the *Yee* case was originally filed as the Court in *Yee* noted, the Ninth Circuit ruled in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), that "a similar mobile home rent control ordinance effected a physical taking." *Yee*, 503 U.S. at 525. At the trial level, the Yees "relied almost entirely on *Hall*" and "the *Hall* decision was used [as] a guide in drafting the … Complaint." *Id*. In essence, the Santa Barbara ordinance permitted the tenant of a rental unit to transfer the suppressed rents to the next tenant, allowing the previous tenant to capitalize on the difference between the fair market rental value and the lower controlled rent.

The Court in *Hall* concluded, when taking all the owners' allegations as true, that the Santa Barbara law transferred to the tenants an interest in property that would otherwise belong to the landlord. *Hall*, 833 F.2d at 1282.

> [T]he tenant is able to derive an economic benefit from the statutory leasehold by capturing a rent control premium when he sells his mobile home. In

> effect, the tenant is given an economic interest in the land that he can use, sell or give away at his pleasure; this interest (or its monetary equivalent) is the tenant's to keep or use, whether or not he continues to be a tenant.

Id. at 1276-77; *see also id*. at 1276 ("this interest is transferable, has an established market and a market value").

The Supreme Court in *Yee* undermined *Hall* but did not touch the underlying rationale that the transfer of a new interest in property effects a taking. Rather, the *Yee* Court ruled as it did because rent price control has nothing to do with physical occupation. Unlike *Yee*, this case involves the involuntary physical occupation of owners' properties without compensation.

Finally, PLF draws attention to the fact that the Proclamations' restrictions on eviction and ability to collect rent had the unintended consequence of pushing many out of the rental business entirely, particularly those who would be most likely to provide low-income housing—

those who rent rooms, portions of duplexes, guest cottages or tiny homes. This unintended consequence of shrinking the housing supply is not a basis for concluding that a taking occurred, but the required constitutional remedy of just compensation alleviates the Proclamations' negative impact on the availability of housing—especially for those who can least afford it—where future emergencies necessitate takings of this sort.

B. Housing Provider's answer to the City of Seattle.

Seattle asserts that forcing someone to endure the continuation of possession of rental property can never be a taking except in two circumstances—forcing someone to be a landlord initially or forcing the acceptance of the occupation of another "in perpetuity." Seattle Br. at 1. Under this theory, anyone who chooses to be a landlord can be forced to be one for their entire lifespan—without payment—if the government so choses. It is no wonder there is a housing supply crisis and people have fled the

rental business when they no longer have even the basic right to be paid for allowing someone to occupy their property.

1. Seattle's trio of cases—*Loretto, Florida Power,* and *Yee*—do not create an exemption for landlord-tenant regulation from the reach of the Fifth Amendment.

Seattle argues that *Loretto,*[1] *Florida Power,*[2] and *Yee* demand the conclusion that landlord-tenant regulations are somehow exempt from the protection of the Fifth Amendment. As Seattle notes, *Loretto* holds that the *per se* physical occupation taking does not "undercut landlord tenant regulations." Seattle Br. at 4. But *Loretto* was not creating an overarching exemption for landlord-tenant regulations. Rather, it was merely noting that typical

---

[1] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[2] *F.C.C. v. Florida Power Corp.*, 480 U.S. 245 (1987). Seattle shortens the name to "*F.C.C.,*" but Housing Providers shorten the case name to "*Florida Power*" because there are fewer cases with that name in their title.

landlord tenant regulations at the time would probably not come under that rule.

Neither, Seattle, nor any other amici citing *Loretto*'s statement about landlord-tenant relationships, cites the context:

> 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, 458 U.S. at 440 (emphasis added) (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Realty Co. v. Saxl,* 328 U.S. 80 (1946) (fire regulation); *Bowles v. Willingham,* 321 U.S. 503 (1944) (rent control); *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398 (1934) (eviction moratorium resulting from foreclosure); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block v. Hirsh*, 256 U.S. 135 (1921) (rent control)). States

are not required to pay for *all economic injuries* to landlords, but this regulation—mandated occupation by others—strikes at the heart of the exclusive possession interest in property.[3]

Some landlord-tenant regulations might cause economic injuries, but they are not automatically compensable because of the injury is not an unwanted physical occupation.

> [O]ur holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire

---

[3] In fact, the *Loretto* Court gave the example of a theoretical regulation of landlord-tenant relations:

> Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking.

Id. at 436. If a mandated swimming pool is a taking, then mandated occupation of former tenants is as well.

> extinguishers and the like in the common area of a building.

Loretto, 458 U.S. at 440.[4] Many landlord-tenant regulations do not invoke the *per se* rule as at issue here because of the intrusion into one of the most basic attributes of private property—the right to control who occupies one's property. *See Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979) ("one of the most essential sticks in the bundle").

The reason the *Loretto* holding did not undercut landlord tenant regulations is not because there is some exemption for landlord-tenant regulations from the physical occupation rule, but because landlord-tenant regulations typically do not involve physical occupations.

---

[4] As the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), some regulations create an "average reciprocity of advantage," thereby not requiring compensation. This is likely true with utilities, mailboxes, smoke detectors, etc. Requiring a landlord to make utilities available make the property more attractive to tenants and requiring fire alarms provides a benefit to the owner.

Here, there were no prior landlord-tenant regulations that required one to tolerate the occupation of another subject to no conditions, like payment of rent and care for the physical condition of the rental unit. But there have been prior cases where owners were not allowed to occupy, namely, *Blaisdell,* 290 U.S. 398*,* and the New York cases on which it relies, but the emergency regulations in those cases required the owner to endure the occupation of (the former owner), on the condition that fair rental value be paid. *See* App.Supp.Br. at 43.

Seattle then turns to *Florida Power*, a landlord-tenant case in a unique commercial context—power companies renting space on their power poles to cable companies to attach their cables. Seattle argues:

> *FCC*, like *Yee*, was purely a rent control regulation—regulating the amount of money people could charge—not requiring anyone to endure the occupation of property with zero rent.

Seattle Br. at 6.

Seattle's reliance on *Florida Power* is misplaced because the City ignores the context. It was a case involving review of utility rates by a Commission which established the rates for cable companies to attach cable to existing power poles. The power company argued that the regulation of the rates it charged caused a physical invasion of space on their power poles. But utility rates have long been regulated by government and guided by the principle that a private utility provider has a right to recover a return on its investment,[5] but not necessarily charge whatever the market will bear. *Florida Power* is purely a rent control case; the present case is not.

The Court in *Florida Power* rejected the physical invasion argument in that because the government mandated no physical invasion at all.

> [N]othing in the Pole Attachments Act as interpreted by the FCC in these cases gives cable companies

[5] *See, e.g., People's Organization for Washington Energy Resources v. Washington Utilities and Transportation Commission*, 104 Wn.2d 798, 812 (1985).

> any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.

Id. at 251. Utility pole owners could "evict" the cable companies from their poles. This is plainly different from the present case where Housing Providers were required to allow others to occupy their properties.

Moreover, the Court in *Florida Power* explicitly recognized the problem with mandatory occupation by others—even those wanting to place a cable on an existing power pole.

> "[P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion."

Id. at 252 (quoting *Loretto*, 458 U.S. at 436). As noted by Seattle, the *Florida Power* court noted that it was the

invitation, not the rent, that makes the difference. *Id*. But unlike the power companies in *Florida Power* who had no obligation to retain the cable companies' use of their poles, the essence of the dispute now before the Court is that Housing Providers were required to retain the tenants in their property regardless of payment of rent.

2. Lower court decisions cited by Seattle do not demand the conclusion that Housing Providers were not forced to endure a physical invasion of their property.

Seattle argues that other courts have rejected physical invasion cases in the landlord-tenant context. Seattle Br. at 8. It cites *Williams v. Alameda County*, 2022 WL 17169833, at *9 (C.D. Cal 2022), as if there is an exemption from physical occupation takings for landlord-tenant situations. While the quoted language from *Williams* suggests that is its view, there is no Supreme Court precedent that supports such a conclusion.

Similarly, *Ballinger v. City of Oakland,* 24 F.4th 1287 (9th Cir. 2022), *cited in* Seattle Br. at 8 is not about required possession of property by those who don't pay rent, but rather about a requirement that landlords pay a relocation fee. The Ninth Circuit called it a "wealth-transfer provision" but not a taking. The ordinance appeared more like an excise tax. But this Court in *Sintra v. Seattle,* 119 Wn.2d 1 (1992),[6] rejected the notion that landlords can be required to pay relocation fees.

---

[6] *Sintra* was disavowed in *Yim v. City of Seattle*, 194 Wn.2d 651, 664 (2019) "to the extent that it defines regulatory takings in a manner that is inconsistent with [*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005)]".

> [O]ur prior regulatory takings cases allow a regulation to be "insulated from a 'takings' challenge" if it "protects the public from harm" and require courts to consider whether the challenged "regulation substantially advances legitimate state interests." … *Sintra*, 119 Wash.2d at 14-17, 829 P.2d 765 …. That precedent can no longer be valid because it may provide less protection for private property rights than the federal constitution does.

Yim, 194 Wn.2d at 671. But *Sintra* is more than just the "substantial advance" insulator (footnote continued)

CDK Global LLC v. Brnovich, 16 F.4th 1266 (9th Cir. 2021), *cited in* Seattle Br. at 9, is inapposite as well. In *CDK Global*, the Court noted that a business regulation did not cause a physical invasion because the granted access to a computer system was voluntary, not mandated, and wasn't a physical occupation at all. *Id.* at 1282.

Building Owners and Managers Ass'n v. F.C.C., 254 F.3d 89, 98-99 (D.C. 2001), *cited in* Seattle Br. at 9, was not about a physical invasion but the scope of tenants' rights in the leasehold. Owners of leased property complained that F.C.C. regulations prohibited restrictions on antennas for over-the-air reception. *Id.* at 91. It was not

---

disavowed in *Yim*. This Court concluded in *Sintra* that the "regulation required the improper additional step of providing new housing. Moreover, this burden was unfairly allocated to individual property owners, rather than equally distributed among all citizens." *Sintra,* 118 Wn.2d at 15-16. *Sintra* concluded requiring landlords to provide new housing when evicting tenants would constitute a taking and *Yim* does not disavow this conclusion.

a requirement allowing tenants to occupy without paying rent, but rather a federal communications rule that required presumably paying tenants to have antennas. It regulated what tenants could do in their tenancies—not mandate that unwanted tenancies continue.

Federal Home Loan Mortg. Corp. v. New York State Div. of Housing and Community Renewal, 83 F.3d 45 (2nd Cir. 1996), *cited in* Seattle Br, at 9, is also inapt. The case merely recognizes that regulation of a rental relationship typically does not result in a physical taking. The court specifically noted that the owner could still collect rent. *Id.* at 48 ("may still … collect the regulated rent").

In *Community Housing Improvement Program (CHIP) v. City of New York,* 492 F.Supp.3d 33 (E.D. N.Y. 2020), the Court addressed the attempt to interpret *Yee* as making the Fifth Amendment inapplicable to landlords because they initially voluntarily invited the tenants—described as the "acquiescence theory."

> In *Horne*, decided subsequent to *Yee*, this strain of reasoning came under criticism. *See Horne*, 576 U.S. at 365 (rejecting argument that "raisin growers voluntarily choose to participate in the raisin market" and could leave the industry to escape regulation); *see also Loretto*, 458 U.S. at 439 n.17 (noting that "a landlord's ability to rent his property may not be conditioned on forfeiting the right to compensation for a physical occupation").

CHIP, 492 F.Supp.3d at 44 (citing *Horne v. Dep't of Agriculture*, 576 U.S. 350, 364 (2015)).

Pakdel v. City & Cnty. Of San Francisco, No. 17-CV-03638-RS, 2022 WL 14813709 (N.D. Cal. Oct. 25, 2022), *cited in* Seattle Br. at 9, is also unhelpful to resolution of this case. The Court in *Pakdel* recognized that the City did not require the offer of a lifetime lease to all landlords, but only those that voluntarily applied for a condominium conversion. *Id*. at *6. It would be a different case if "the City required all landlords (or a subset of them) to offer lifetime leases to their tenants." *Id.* Tenants in *Pakdel* still had to pay rent. *Id.*

Building and Realty Institute of Westchester and Putnam Counties, Inc. v. New York, 2021 WL 4198332 (S.D. N.Y. 2021), *cited in* Seattle Br. at 10, supports Housing Providers because the salient distinguishing feature was that "landlords can evict unsatisfactory tenants." *Id*. at *15.

3. Because *Yee* was a challenge to rent control, it does not control cases where eviction—the right to exclude—is at stake.

Seattle argues that a dozen cases dealing with eviction moratoria arising from the pandemic have concluded that *Yee* controls to reject a *per se* taking. Seattle Br. at 11-12. These cases largely involve different eviction moratoria which were not as harsh as the ones at issue here. But more importantly, as addressed in this brief, the PLF Brief, and Housing Providers' Supplemental Brief, to read *Yee* as precluding a taking in this case stretches it beyond what the case was about—controls on rent and not mandatory occupation.

Seattle's direct analysis of *Yee* begins by blatantly mischaracterizing Housing Providers as "assert[ing] a right to immediately exclude tenants who fall behind in rent." Seattle Br. at 13. Housing Providers have always been willing to work with tenants who could not pay; moreover, they do not assert a right to "immediately exclude." More importantly, they do not contend that they have the right, or the state cannot prohibit the eviction of nonpaying tenants. The remedy of the just compensation clauses in Article I, Section 16 and the Fifth Amendment is compensation, not an injunction. Finally, and completely unaddressed by the City, is that these tenants had no pandemic-related loss of income or reason for not paying. They didn't pay because there was no reason to do so.

4. The property right to exclude is not limited to excluding "strangers."

Seattle's limitation of *Cedar Point Nursery* to "strangers" is unconvincing. Seattle argues that the

required invasion that caused a taking in *Cedar Point Nursery* were union organizers—strangers to the owner and that Housing Providers' tenants are not strangers. Seattle Br. at 14. It is difficult to imagine the Supreme Court's decision in *Cedar Point Nursery* would be any different if the union organizers were also customers of the nursery or a known competitor—not a stranger--seeking to steal workers or customers away.

If the right to exclude only applies to strangers as Seattle argues, Seattle Br. at 15, then a landlord who takes on tenant who later uses the property for criminal activity—a meth lab or human trafficking—cannot evict because the tenant is not a stranger. Limiting the right to exclude to strangers has no basis in existing precedent.

5. *San Telmo* and *Granat* remain instructive.

Seattle takes issue with Petitioners' reference to *San Telmo Assocs. v. City of Seattle*, 108 Wn.2d 20 (1987) and *Granat v. Keasler,* 99 Wn.2d 564 (1983), as not

involving physical takings and no longer good law. Seattle Br. at 18 (citing A.O.B. at 47-48). Housing Providers' citation to *San Telmo* was simply noting that the need for housing should be treated as a societal burden, not foisted on Housing Providers. *San Telmo* was not a taking case. But the Court concluded that the discriminatory burden on property owners was a nonuniform tax. 108 Wn.2d at 25. But nothing suggests that *San Telmo*'s recognition of the public nature of the burden of housing is contrary to any more current law.

As to *Granat*, Seattle argues that it did not involve a physical invasion and, even if it did, it is no longer good law. Seattle Br. at 19. Although not expressly addressed as a physical invasion case, it clearly was. In *Granat*, the City prohibited a landowner from using his own property unless he found a suitable replacement for his tenant. 99 Wn.2d at 570. The ordinance mandated, subject to

conditions, the continued occupation of the owner's property. *Id.*

As to the notion that *Granat* is no longer good law, Seattle claims that this Court overruled *Granat* in *Yim,* 194 Wn.2d at 661-62, because discussions of reasonableness and balancing are no longer appropriate tests for a taking. Seattle Br. at 19. This Court was quite clear in *Yim* as to which precedent it was disavowing, listing seven cases and *Granat* is not one of them. *Yim*, 194 Wn.2d at 659. The reason is obvious. While the discussion of reasonableness from *Granat* is no longer the preferred way to address the issue, the holding of *Granat* is still intact—an ordinance that mandates occupancy of property by someone other than the owner, even a tenant, constitutes a taking. *Id.* at 570.

6. The Supreme Court's statement in *Alabama Realtors* is worthy of note.

Seattle urges the Court to ignore the Supreme Court's statement in *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (per curiam) about the Center for Disease Control's eviction moratorium. The Supreme Court stated that laws preventing landlords "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.

Seattle argues the statement is *dicta* and the Court should ignore it. Housing Providers agree the statement is *dicta*. That simply means that it is not binding. It does not mean, as Seattle suggests, that it is not worth any consideration. *See Humphrey's Executor v. United States*, 295 U.S. 602, 627–628, 5 (1935). The Supreme Court's statement in *Alabama Realtors* is persuasive in that it is

consistent with a long history of treating the right to exclude a fundamental element of property ownership.[7]

Seattle also notes that this statement in *Alabama Realtors* does not overrule *Yee*. Seattle Br. at 22. Of course not. Not only is it *dicta,* there was no occasion to overrule *Yee*. *Yee* does not hold that a prohibition on *evicting* tenants is immune from the Supreme Court's physical takings jurisprudence simply because the Yees' challenge to a *rent control* ordinance was not a *per se* taking.

7. *Cwynar* is instructive regarding *Yee*.

Seattle argues that *Cwynar v. City and County of San Francisco*, 90 Cal.App. 4th 637 (2001), is distinguishable. Seattle Br. at 22. It asserts that *Cwynar* involved a claim of permanent physical occupation. But the Court didn't

---

[7] *See, e.g., Kaiser Aetna,* 444 U.S. at 176 (describing exclusive possession as "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); *Byrd v. United States,* 138 S.Ct. 1518, 1527 (2018).

distinguish *Yee* on that basis. Rather the Court in *Cwynar* viewed *Yee* for what it was—a challenge to a rent control ordinance where the owner was free to evict.

Cwynar reasoned that the voluntariness of the initial occupancy did not deprive the owners of the protection of the Fifth Amendment. Essentially, it rejected Seattle's "stranger" theory from *Yee.*

> As the court explained in *Loretto*, "[t]he right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." (*Loretto, supra,* 458 U.S. at p. 439, fn. 17.) The City argues that this rule applies only to the "initial occupancy" and once the landlord has consented to that physical occupation, the government may force him to tolerate the occupation until he removes his property from the rental market.
>
> In our opinion, neither *Yee* nor *Loretto* supports this proposition.

Cwynar, 90 Cal. App. 4th at 658.

Other courts have recognized that the reference to "permanent" occupations cannot mean "into eternity." The Federal Circuit directly addressed this issue in *Hendler v.*

United States, 952 F.2d 1364 (Fed. Cir. 1991), a case where the government installed test wells on the owner's property.

> In this context, 'permanent' does not mean forever, or anything like it. …
>
> In *United States v. General Motors Corp.*, 323 U.S. 373 (1945), the government's appropriation of the unexpired term of a warehouse lease was a taking; the fact that it was finite went to the determination of compensation rather than to the question of whether a taking had occurred. *Accord, United States v. Petty Motor Co.,* 327 U.S. 372 (1946) (federal government acquired the remainder of a lease for a building); (federal government appropriated private business for public use during World War II; a taking).

Hendler, 952 F.2d at 1376 (parallel citations omitted). The Court concluded that the government's intrusion was **not** a "momentary excursion … and thus little more than a trespass." *Id.* at 1376.

The Supreme Court's view that the taking of an easement, whether "temporary" or "permanent" constitutes a taking. *United States v. Causby*, 328 U.S.256, 267

(1946) ("Since on this record it is not clear whether the easement taken is a permanent or a temporary one, it would be premature for us to consider whether the amount of the award made by the Court of Claims was proper").

8. The Court should not take Seattle's invitation to write off the Supreme Court's explanation of the purpose of the just compensation requirement of the Fifth Amendment in *Armstrong.*

Housing Providers argued that the purpose of 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), *cited in* A.O.B. at 42.[8] While recognizing the

[8] Seattle complains that the Supreme Court did not cite history or law for its conclusion this is a purpose of the takings clause. Seattle Br. at 23. It clearly is. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness." *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950). This purpose is also self-evident. When compensation is paid, the public bears the burden that would otherwise be borne by the ones whose property is taken.

Supreme Court repeatedly references this underlying purpose, Seattle proposes that the Supreme Court is repeatedly wrong.

Seattle argues that the Supreme Court in *Lingle*, 544 U.S. 528, rejected *Armstrong* because it 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." *Id.* at 543. But that simply explains why it is not a "test" for determining whether a taking occurs.

The *Lingle* court continues to explain why the test doesn't work in the context of that case where the Court removed the substantially advance test as a takings test:

> The owner of property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the

> owner of a property subject to an *ineffective* regulation.

Id. (emphasis in original). That is why the substantially advance test is no longer applicable to takings claims. It does not mean that the purpose of the takings clause is no longer to require the public to bear the burden of public needs instead of individual property owners. Importantly, the *Lingle* Court was not concluding the *Armstrong* principle was meaningless, but rather that it didn't apply to the facts in *Lingle*.

Here, regardless of whether the Proclamations were effective or not, the burden on Housing Providers was real and palpable, not spread among the public as a whole, and the burden was imposed to solve a societal burden.

Further regarding *Armstrong*, Seattle argues if it were a test, Housing Providers haven't experienced a disproportionate burden because unemployment reached high levels and businesses were shut down. But no

business was required to provide its goods and services for free, nor was any worker required to work without payment. None. What relief was there for the duty to pay mortgages, utilities, insurance, taxes or maintenance of units that nonpaying tenants who suffered no loss of income? None. The pandemic hurt many people, but the State mandated only that Housing Providers continue to bear all the expense of continuing with business as usual, but without even a bare minimum of payment.

C. Housing Providers' answer to the Appleseed Foundation.

1. While the taking claim here should not be evaluated under *Penn Central,* existing precedent applying *Penn Central* requires the conclusion a compensable taking occurred.

Appleseed Foundation's primary argument is that determination of whether a taking occurs is governed by the analysis in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Appleseed Br. at 1.

Housing Providers disagree, but if it applies, then the Court should follow Justice O'Connor's decision in *Hodel v. Irving*, 481 U.S. 704 (1987). The case challenged a federal regulation governing the inheritance of land owned by native Americans to preserve ownership within the tribe. The *Hodel* Court followed the *Penn Central* analysis. It found that the impact on the owners of less than $3,000 was substantial. *Id.* at 714. "These are not trivial sums." *Id.* The investment-backed expectations of the property owners were "dubious." *Id.* at 715. But the Court explained:

> If we were to stop our analysis at this point, we might well find § 207 constitutional. **But the character of the Government regulation here is extraordinary.** In *Kaiser Aetna v. United States*, 444 U.S., at 176, 100 S.Ct., at 391, we emphasized that the regulation destroyed "one of the most essential sticks in the bundle of rights that are commonly characterized as property—**the right to exclude others**."

Id. at 716 (emphasis added). Because the last factor—the character of the governmental action in taking physical

control of the property—weighed so heavily in favor of finding a taking occurred that the Court concluded the regulation caused a taking of property. *Id.* at 718.[9]

Here, the character of the government action is similar and the amount at stake is not trivial. If *Penn Central* provides the analysis, a taking occurred as in *Hodel.* But as argued by Housing Providers, the *per se* taking analysis applies because of the Proclamations mandated that people occupy their property who had no right to do so.

2. The Proclamations caused a physical taking by requiring that people remain on Housing Providers' property when their right to occupy expired.

Appleseed Foundation repeats the common conclusion that regulation of landlord-tenant relationship can never constitute a "per se" taking. Appleseed Br. at 3. But no

[9] The law in *Hodel* was addressing "a serious public problem." *Id.* at 718. Whether the problem to be alleviated is serious is irrelevant to the question as to whether property has been taken and compensation is owing.

court has said the landlord-tenant relationship has some exemption from this principle of law. Rather, as discussed *supra* at 11, most landlord tenant regulations would not cause physical occupations of something or someone unwanted on private property, regulations requiring functioning utilities or fire alarms. But a regulation that prohibits an owner from obtaining exclusive possession of the property when a tenant breaches the conditions that created the right to occupy is a regulation completely unlike most landlord-tenant regulations.

Appleseed Foundation argues that compensable takings must fit into one of two types—physical takings or regulatory takings.[10] It describes regulatory takings as

---

[10] The Supreme Court has warned "there is no magic formula enables a court to judge, in very case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules." *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012).

ones restricting use of property and physical takings where the government "has physically taken property for itself or someone else." Appleseed Br. at 4 (quoting *Cedar Point Nursery*, 141 S. Ct. at 2072). But physical takings can occur in a variety of ways—flooding,[11] cable boxes,[12] physical appropriation of goods,[13] invading airspace[14] or allowing members of the public to invade.[15] Sometimes the physical taking occurs is by means of regulation and other times the physical invasion just shows up, *i.e.*, as in flooding. It does not matter the method by which the physical occupation exists; what matters is whether it is imposed by the government.

This is evident from Justice Ginsburg's decision in *Arkansas Game and Fish,* 568 U.S. 23.

> [O]ur decisions confirm that takings temporary in duration can be compensable. This principle was

---

[11] *United States v. Cress*, 243 U.S. 316 (1917).
[12] *Loretto,* 458 U.S. 419.
[13] *Horne*, 576 U.S. at 364.
[14] *Causby*, 328 U.S. at 265 and n. 10.
[15] *Kaiser Aetna*, 444 U.S. 164.

> solidly established in the World War II era, when "[c]ondemnation for indefinite periods of occupancy [took hold as] a practical response to the uncertainties of the Government's needs in wartime." *United States v. Westinghouse Elec. & Mfg. Co*., 339 U.S. 261, 267, 70 S.Ct. 644, 94 L.Ed. 816 (1950).
>
> In support of the war effort, the Government took temporary possession of many properties. These exercises of government authority, the Court recognized, qualified as compensable temporary takings. *See Pewee Coal Co.*, 341 U.S. 114, 71 S.Ct. 670, 95 L.Ed. 809; *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949); *United States v. General Motors Corp.,* 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945). …
>
> Ever since, we have rejected the argument that government action must be permanent to qualify as a taking. Once the government's actions have worked a taking of property, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English*, 482 U.S., at 321, 107 S.Ct. 2378.

Arkansas Game and Fish, 568 U.S. at 32-33 (paragraph breaks added).

Appleseed Foundation continues by arguing that physical takings and "total regulatory takings"[16] 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." Appleseed Br. at 5 (citing *Loretto*, 458 U.S. at 435). It then notes that the destruction of one strand in the bundle of property rights is not a taking. Appleseed Br. at 5 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 327 (2002)).

Appleseed Foundation's argument that *all three rights* must be destroyed is inconsistent with the Supreme Court's jurisprudence on this question. This is evident from *Lucas*, where the owner was deprived of all economic use, but nothing prevented the owner from disposing of or possessing the land exclusively. 505 U.S. 1003. Similarly,

---

[16] *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019 (1992).

a restriction on bequeathing property can alone constitute a taking. *See Hodel*, 481 U.S. 704.

Rather than all three rights being taken, the critical question is the importance that attaches to the strand, or strands, that are plucked out of the bundle. The right to make some economic use of property is but one strand, and taking all economic use is a categorical taking, regardless of whether one retains the right to sell or devise to heirs. *See Lucas*, 505 U.S. 1003. And the right to be free from unwanted occupation by another is one of those critical strands. *Kaiser Aetna*, 444 U.S. at 176. The notion that there must be destruction of "all three" of these rights as asserted by Appleseed Foundation is plainly wrong.

Housing Providers agree that many situations involving potential takings of property by government require the analysis of factors addressed in *Penn Central*. The goal of those factors is to determine when regulations "are functionally equivalent to the classic taking in which the

government directly appropriates private property or ousts the owner from his domain." Appleseed Br. at 5 (quoting *Lingle,* 544 U.S. at 539). Here, mandating that people occupy Housing Providers' property has appropriated a leasehold and leaseholds have long been recognized as a compensable property interest. *See Kimball Laundry,* 338 U.S. 1.

Appleseed Foundation also argues that *Tahoe-Sierra* requires that the law of physical takings is not controlling in regulatory takings case. Appleseed Br. at 6 (quoting *Tahoe-Sierra*, 535 U.S. at 323. The Court in *Tahoe-Sierra* rejected the idea that a deprivation of use for a period of time was automatically a taking.

The Supreme Court explicitly recognized this in *Tahoe - Sierra*, 535 U.S. at 322.

> Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules. …

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary.

Tahoe-Sierra, 535 U.S. at 322 (citations omitted).

But Appleseed Foundation proposes it is impossible for the government to cause a taking of a property interest, presumably even by the classic taking of mandatory physical occupation, because tenants are initially invited by the owner and therefore Appleseed Br. at 7. Under this proposal, government could mandate that tenants may remain in rental housing without paying, without complying with rules for the rest of their lives, even though this is a mandatory physical occupation after the invitation expires. Under the Appleseed Foundation reasoning, government might cause a taking if property owners were required to

house people who are uninvited but, once an owner lets someone in the door, government can mandate that they stay for any period of time without any obligation to pay compensation for meeting a public need.

Appleseed Foundation is careful not make the uninvited nature of tenants the critical distinguishing feature, asserting “Government may also protect the rights of **uninvited** visitors to access private property without compensating the owners.” Appleseed Br. at 25 n.8 (emphasis added). Although citing no authority for the proposition, Appleseed Foundation seeks to pave the way for a massive restructuring of property rights—government may require people who never were landlords take strangers into their homes, perhaps to alleviate the very real and concerning homelessness problem. Under Appleseed Foundation’s view, the burden of meeting that very real public need would not fall on the public generally but only on those who have habitable space.

In its effort to suggest that *Yee* was about evictions, Appleseed Foundation argues that the Yees challenged a rent control ordinance "against the backdrop" of a statute regulating evictions. *Yee,* 503 U.S. at 523, 524, *quoted in* Appleseed Br. at 9. While true regarding the "background," the Yees made no claim against the State of California regarding that statute which restricted evictions to 6 to 12 months' notice. *Id.* at 528. They made a facial challenge to the City ordinance. *Id.* at 534.

Further on this point, the Court in *Yee* stated that nothing "compels petitioners, once they have rented their property to tenants, to continue doing so." *Id.* at 527-28. Appleseed Foundation argues that this means that the Yees could be forced to be landlords, as long as it wasn't "in perpetuity" and that alone takes the right to compensation "off the table." Appleseed Br. at 10. Nothing in *Yee* suggests such a draconian rule that government can force to keep tenants—without paying rent—for any

time period short of “perpetuity” without a just compensation remedy.

Appleseed Foundation also relies on *Ballinger*, 24 F.4th 1287, which is addressed *supra* at 16 and will not be repeated here. Additionally, the Appleseed Foundation cites *Better Housing for Long Beach v. Newsom*, 452 F. Supp. 3d 921 (C.D. Cal 2020), *cited in* Appleseed Br. at 11, which like *Ballinger*, is not about physical occupation but the requirement of paying a relocation fee—essentially a tax. *Id.* at 931 (discussing taxes).

Appleseed Foundation notes that other courts have upheld eviction moratoria primarily on the basis that the government did not force owners to a “novel use” of their property or refrain from terminating a tenancy “in perpetuity.” Appleseed Br. at 13 (citations omitted). Novel use has never been the test. When the federal government needed to use the laundry in *Kimball Laundry* for the war effort, it had to pay regardless of whether the

occupation was a novel use or not. 338 U.S. 1. “In perpetuity” is not the standard, to allow requiring occupation by a nonowner without any payment whatsoever as long as the time period is something shy of eternity.

Relying on *Pakdel,* 2022 WL 14813709 (addressed *supra* at 19-20), Appleseed Foundation weaves the authorities it cites to come with a completely new, legally unrecognizable, cloth—government can require owners to endure occupants for the rest of their lives and those occupants need not pay rent. This is completely inconsistent with the purpose of the Fifth Amendment or Article I, Section 16.

Appleseed Foundation also criticizes the Eighth Circuit’s recognition in *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022), that *Yee* did not deprive the owners of their right to evict. But to support the criticism it must reconstrue the phrase “the regulations at

issue." Appleseed Br. at 15. It was the City's rent control ordinance that was at issue. In fact, the Court specifically acknowledged that the Yees could evict. 503 U.S. at 528.[17]

Appleseed Foundation also proposes that the multifactor analysis under *Penn Central* is important because of governmental "profound interest in ensuring housing stability." But the multifactor *Penn Central* analysis does not consider the significance of the governmental interest as critical. As explained in *Lingle*, the takings analysis focuses on the burden to the landowner. 544 U.S. at 539.

The *Penn Central* factors are the economic impact, interference with investment-backed expectations and the

---

[17] Appleseed Foundation also suggest that *Heights Apartments* is distinguishable because the eviction moratorium had no specified end date. Appleseed Br. at 16. The fact that the Proclamations had end dates, but were renewed over and over, is not a distinguishing feature of creating any meaningful distinction between the cases.

character of the governmental action. *Penn Central*, 438 U.S. at 124. “Character of the governmental action” is not “importance of the governmental action.” *See* discussion of *Hodel*, *supra* at 33-34. The significance of the interest of the government is irrelevant to the taking question—all government interests are considered significant enough to justify the taking of property. Takings require compensation even if the government has a really, really important reason for its action.

Neither should the method of analysis be different. Housing Providers concede that the Governor had a significant interest, but that should not be the deciding factor—or any factor—as to whether Housing Providers should be compensated for their property interests temporarily taken.

Appleseed Foundation also cites *Block v. Hirsh*, 256 U.S. 135, 157-58 (1921), *cited in* Appleseed Br. at 18, a war-time regulation prohibiting eviction and prohibiting

increases in rent during an emergency which the Court concluded did not cause a compensable taking. Of course, the salient fact was this:

> The right of a tenant to occupy any … "rental property" … is to continue notwithstanding the expiration of his term, at the option of the tenant … **so long as he pays the rent and performs the conditions as fixed by the lease.**

Id. at 153-54 (emphasis added). Despite Appleseed Foundation's efforts, *Block* does not support its notion that government can prohibit eviction without payment of rent or compliance with conditions, placing the burden solely on the property owner.

Unlike Seattle, Appleseed Foundation recognizes that the Takings Clause was intended to compensate property owners for costs "which, in all fairness and justice, should be borne by the public has a whole." Appleseed Br. at 22 (quoting *Tahoe-Sierra*, 535 U.S. at 321, which quoted *Armstrong,* 364 U.S. at 49). Housing Providers agree, but Appleseed Foundation's suggestion that Housing

Providers' claim seeks to "insulate landlords from a tradition of regulation that predates the Constitution" is absurd. Appleseed Br. at 22 (quoting *Munn v. Illinois*, 94 U.S. 113, 125-26 (1876) (state legislature can regulate the rates charged by warehouses; no taking claim even made, *id.* at 123)). There is no tradition of regulation that predates the constitution prohibiting eviction or taking any efforts to collect rent; not *Munn,* not *Block*, nor any case cited by any party or amici.

Even if some pre-constitutional tradition of the king to mandate that landlords provide housing with no reimbursement existed, as in the quartering of soldiers, explicitly rejected by the new Nation in the Third Amendment, it would be a strange result to attribute the powers of royalty to the State after this Nation fought a war for independence and freedom.

2. *Cedar Point Nursery* reaffirmed the principle that mandated physical occupation is a *per se* taking.

Appleseed Foundation argues that *Cedar Point Nursery* reaffirmed but didn't expand the physical takings rule. Housing Providers agree. Appleseed Br. at 23. Physical occupations, regardless of their frequency, duration, or identify of the occupier makes any difference to liability for a taking. But Appleseed Foundation capitalizes on the reference to the appropriation "for the enjoyment of *third parties* the owners' right to exclude." Appleseed Br. at 24 (quoting *Cedar Point Nursery*, 141 S. Ct. at 2072) (emphasis by Appleseed). Tenants are third parties. They are neither the owner, nor the government.

Appleseed Foundation argues that other courts have described *Cedar Point Nursery* as retaining the distinction between physical appropriations and use restrictions. Appleseed Br. at 26 (quoting *301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1381 (8th Cir.

2022)). But importantly, the Eighth Circuit found that because a landlord could use an individual assessment to exclude tenants, the regulation in Minneapolis was not a physical invasion-style taking. *Id.* at 1383. No such option existed here.

Describing *Cedar Point Nursery* as involving a "unique narrow question," apparently Appleseed Foundation hopes this Court will interpret that characterization to mean that the holding or analysis can be ignored. Appleseed Br. at 26 (quoting *Hardy v. United States*, 156 Fed. Cl. 340, 344-45 (2021); and citing *Blevins v. United States*, 158 Fed. Cl. 295 (2022); *Munzel v. Hillsborough Cnty*, 2022 WL 671578 (M.D. Fla. 2022) (declining to consider governmental action a physical taking where it "does not involve and agricultural access regulation given to labor organizations to enter property to solicit support for unionization")). Apparently, the Court in *Munzel* finds the Supreme Court decision meaningless unless the facts are

completely identical to those in *Cedar Point Nursery.* The Washington Supreme Court is far more concerned with applying the law correctly than making up distinguishing features that ignore the basic legal principles.

Finally, Appleseed Foundation asserts that multiple courts have concluded that *Cedar Park Nursery* has not changed the law. As stated above, Housing Providers agree that the law has always required owners of property to be compensated for the possession of their property if government requires someone to occupy their property—without payment of rent.

D. Housing Providers' answer to KC Bar Association.

The KC Bar Association's primary message is that eviction in the time of a pandemic is bad, which is generally not disputed in this case. The taking claim is based on the question as to who should be responsible for alleviating the public emergency. Without citing any authority, the KC Bar Association contends that in "many

of these cases [of eviction] the amount the tenant owes *is less than $100*." KC Bar Br. at 1 (emphasis in original). Housing Providers find this assertion to be frankly unbelievable in that the cost of pursuing an eviction is far greater than that amount. After digging through the cited references, one finds that in a study in Seattle, there were 21 eviction proceedings out of 1218 evictions for tenants with $100 or less in unpaid rent—or 1.7% (Losing Home report at 41), which strongly suggests that there was something else going on, such as impermissible discrimination by the landlord or rule breaking by the tenant. The report does not say that these 21 involved **only** nonpayment of rent. The economics of eviction strongly suggest something else going on.

The KC Bar Association also notes that Congress and the Center for Disease Control issued moratoria. KC Bar Br. at 2. It ignores that the Supreme Court discredited the

CDC eviction moratorium in *Alabama Realtors*, 141 S.Ct. 2485.

Nevertheless, Housing Providers briefly address some of the new information offered by the KC Bar Association. The first study is about low-income households being more likely to be evicted where “stagnant wages” can’t compete with “increases in rent.” KC Bar Br. at 5. There is no evidence that Appellants increased rent and the Proclamations prohibited that from happening. It’s a nonissue.

Housing Providers assume for the sake of argument that most evictions are for nonpayment of rent, but the facts here are that Housing Providers had tenants who could pay rent and who violated other rules in the lease, by causing nuisances and destroying the property. CP 251.

> Appellants contend that that the temporary moratorium did not advance its purpose in an appropriate, reasonable, or rational manner.

KC Bar Br. at 20 (footnote omitted). The KC Bar Association doesn't identify what it is referring to, other than in a footnote it contends that a rational basis is all it takes for depriving one of access to the court. Bar Br. at 20 n. 49. Housing Providers claim that their properties were temporarily taken is not based on the Proclamations not being "appropriate, reasonable, or rational." *Id.* The taking occurred because Housing Providers were required to keep people in their property who did not pay rent or follow the rules of the tenancy to not destroy the premises or create nuisances for neighbors. CP 251. They had no pre-existing right to remain in the property.

The King County Bar Association also asserts that some people did evict during the pandemic even in

violation of the proclamation. KC Bar Br. at 25.[18] Whether that is true, Appellants do not know, but they do know that they did not, and whether others violated the Proclamation is completely irrelevant to the issues in this case.[19]

The KC Bar Association cites several rental assistance programs that were supposedly intended to benefit tenants and landlords. KC Bar Br. at 29-32. However, as the Supreme Court has held, whether the State has provided funding for a taking only "goes, at most, to the question of just compensation." *Horne*, 576 U.S. at 364. But the assistance referenced was not tailored to provide just compensation.

---

[18] Referring to BIPOC populations, the King County Bar Association seeks to inject into this case—never intimated by any party—that Appellants are discriminatory. This suggestion is highly offensive.

[19] Again, while completely irrelevant to the issues in this case, the KC Bar Association notes that the number of landlords using the intent to sell "loophole" was an alarming 6 out of 93, or 6%.

For instance, the KC Bar Association references HB 1368. That law provided money to households with income less than 80% of the area median income. Section 3(2)(a). Section 7(a) provided $2,000,000 for grants to "eligible landlords who have encountered a significant financial hardship from elective nonpayer tenants." *Id.* But to be "eligible" one must own no more than four dwelling units Section 7(b)(iii). Eligibility criterion b(iv) disqualifies people who have a property manager, like the Horwath Family who retired in Alaska. And, if your tenant caused damage to the unit, you're simply out of luck because any efforts to seek damages disqualifies the owner. Section 7(e)(i).

The KC Bar Association also cites RCW 43.31.605(1)(c). While being subject to actual appropriation, this law too prohibits landlords from seeking damages for damage to the unit. Section (c)(iii)A) or

seeking the rest of unpaid rent (B). There are fewer funds for damage, but subject to numerous conditions.

Finally, in a footnote, the KC Bar Association cites SB 5092 Section 129 (45), *cited in* Bar Br. at 31 n. 61. It provides funding to the department of commerce to provide grants to local housing providers. The department must consider the number of unemployed persons or renters. From the context, it appears that "housing providers" are not the landlords because subsection (b)(i) says "[p]roviders must make rental payments directly to landlords." Funds were also available to tenants. but they had no incentives unless given a notice to pay or vacate, which was prohibited by the Proclamations. And, the funds available are designed to be able to keep tenants in their rentals. For those whose tenants have skipped out with a large amount of rent owing, there are no funds available.

The KC Bar Association's funding looks good on paper, but the devil is in the details. Only a requirement that

Housing Providers be paid just compensation ensures that the people entitled to compensation actually receive it.

E. Housing Providers' answer to the RHA.

RHA begins with arguing that the Proclamations' prohibitions on even demanding payment of rent, let alone threatening eviction, constitutes a governmental rewriting every contract. RHA Br. at 4. Housing Providers have argued under the authority of *Blaisdell,* 290 U.S. 398, that rewriting contracts in this way violates the Contracts Clause, but only because the basic bargain to the property owner is not provided—fair market rent or compensation for the delay in access to the property occasioned by the emergency. *See* App.Supp.Br. at 42-44.

As RHA notes, the restrictions on eviction were not tied in any way to impact from the pandemic or the ability to pay rent. RHA Br. at 5. The evidence in this case is that the Gonzales tenant lost no ability to pay because of the

pandemic but chose not to pay because not paying had no consequence. CP 251.

RHA also addresses the complete bar on Housing Providers to access to the judiciary to resolve any disputes with tenants. However, RHA notes that the "only types of cases the Proclamation allows housing providers to bring are cases for a money judgment that do not impact the possession of the real property." RHA Br. at 9. This would presumably include tort claims. But even if one were seeking a money judgment for unpaid rent and not eviction, that was barred unless the owner offered a repayment plan that was "reasonable based on the individual financial, health, and other circumstances of that resident." https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-19.6.pdf. And the undisputed evidence in this case is that there was no way for the Horwath Family to make such a repayment plan because

their tenant would not communicate with them about their individual financial, health or other circumstances. CP 246.

Moreover, the Proclamations wouldn't allow probing into these person details. The only allowed communications with tenants were those which were "customary and routine communications" defined as preexisting practices," (*id.*) but only to the extent those communication notify a resident of upcoming rent that is due, provide notice of community events, news, or updates, document a lease violation without threating eviction, or are otherwise consistent with this order." *Id.* This explanation of permissible communications did not include, "tell me about your health or your income." Given the criminal penalties that would attach for violating the Proclamations, Housing Providers should not bear the brunt of complying with this provision.

Finally, RHA asserts that the taking here is for the private use of tenants and, therefore, is banned under

Article I, Section 16. RHA Br. at 19-20. While that is a completely understandable argument, Housing Providers are not taking that position here. They contend that Article I, Section 16, and the Fifth Amendment simply require the payment of just compensation.

F. Housing Providers' answer to CADF.

The Amicus Brief of the Citizen Action Defense Fund deals primarily with Housing Providers' claim that the Proclamations were not authorized by RCW 43.06.020(1)(h) and, if they were, the Legislature unconstitutionally delegated pure legislative power to suspend statutes. Housing Providers agree that the legislative history addressed in this brief is helpful to the resolution of their claim that the Proclamations lacked authorization, or the legislative authorization constituted an unlawful delegation.

However, Housing Providers emphasize that the authorization question is completely separate from

whether a taking of property occurred. Government authorized takings are still takings. *Cedar Point Nursery*, 141 S. Ct. 2074. So are unauthorized takings. *See Armstrong v. City of Seattle,* 180 Wash. 39, 43 (1934). The constitution is concerned with the right to compensation when property is taken, not the reasons for the taking or whether the taking was authorized or not.

Conclusion

For all the reasons addressed above, Housing Providers seek reversal of the Court of Appeals' and Superior Court's decision in this case.

The undersigned certifies that this answer contains 9896 words in compliance with RAP 18.17(c)(6) and this Court's order enlarging the word limit to 10,000 words dated January 26, 2023.

Respectfully submitted this 2nd day of February 2023,

by

STEPHENS & KLINGE LLP

/s/ Richard M. Stephens
Richard M. Stephens, WSBA 21776

Attorneys for Petitioners and
Appellants Below

Declaration of Service

I, Richard M. Stephens, declare as follows pursuant to GR 13 and RCW 9A.72.085 that counsel for Respondents was served through the Court's electronic filing portal on February 2, 2023.

Executed this 2nd day of February 2023, at Woodinville, Washington.

/s/ Richard M. Stephens
Richard M. Stephens

STEPHENS & KLINGE LLP

February 02, 2023 - 3:04 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,992-5
Appellate Court Case Title:	Gene and Susan Gonzales, et al. v. Jay Inslee and State of WA
Superior Court Case Number:	20-2-02525-6

The following documents have been uploaded:

- 1009925_Briefs_20230202150253SC383181_3502.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was Appellants' Answer to Amici.pdf

A copy of the uploaded files will be sent to:

- Jennifer.Wood@atg.wa.gov
- SGOOlyEF@atg.wa.gov
- SSpiegelman@pacificlegal.org
- brian.rowe@atg.wa.gov
- bth@pacificlegal.org
- christopher@cuttinglaw.com
- comcec@atg.wa.gov
- cristina.sepe@atg.wa.gov
- dawn.taylor@pacificalawgroup.com
- dpatterson@corrcronin.com
- edmundw@kcba.org
- eric.nygren@seattle.gov
- jacksonm@biaw.com
- jeff.weber@seattle.gov
- jeffrey.even@atg.wa.gov
- jwmaynard2003@yahoo.com
- paul.lawrence@pacificalawgroup.com
- rfried@democracyforward.org
- roger.wynne@seattle.gov
- sam.spiegelman1@gmail.com
- victoria.ainsworth@jacksonlewis.com
- yuant@kcba.org

Comments:

Sender Name: Richard Stephens - Email: stephens@sklegal.pro
Address:
10900 NE 4TH ST STE 2300
BELLEVUE, WA, 98004-5882
Phone: 425-453-6206

Note: The Filing Id is 20230202150253SC383181