NO. 100992-5

SUPREME COURT OF THE STATE OF WASHINGTON

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

Petitioners,

v.

GOVERNOR JAY INSLEE and STATE OF WASHINGTON,

Respondents.

RESPONDENTS' ANSWER TO BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION

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I. INTRODUCTION

The Moratorium did not effect a physical taking. It was limited to temporarily pausing eviction proceedings by landlords. The Moratorium did not force new occupants onto any landlord's property or relieve any existing tenant's obligation to pay rent. It was limited by its exceptions: landlords could evict a defaulting tenant if they wished to sell the property or occupy it themselves, or if the tenant posed a risk to others or the property. Landlords thus remained in ultimate control of their properties, subjected only to temporary regulation of their use. Coupled with relief measures that made available rental assistance to tenants and reimbursement to landlords for unpaid rents, the Moratorium posed a temporary economic burden at most.

Such regulation of the landlord-tenant relationship does not effect a physical taking—that is, "the permanent occupation of [a] landlord's property by a third party." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). This is because landlords

"voluntarily rented their land" to tenants, who "were invited by [landlords], not forced upon them by the government." *Yee v. City of Escondido*, 503 U.S. 519, 527-28, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992).

The arguments made by amicus curiae Pacific Legal Foundation (PLF) suffer from two fundamental errors: a false equivalency between the Moratorium and actual physical occupations, and a mischaracterization of *Yee* as only about rent control. But the Moratorium imposed no uninvited physical occupation, and *Yee* also involved restrictions on evictions. The fact that some tenants fell behind on rent does not change the rule, as confirmed by almost all courts to consider its application to eviction moratoria: an occupation initiated by a landlord's invitation is not a physical taking. That invitation, "not the rent, [ ] makes the difference." *F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252, 107 S. Ct. 1107, 94 L. Ed. 2d 282 (1987). This Court should likewise affirm that rule by upholding the Moratorium against the Landlords' takings claim.

II. ARGUMENT

A. The Moratorium's Regulation of Tenancies that Landlords Voluntarily Invited Was Not a Physical Taking or Akin to an Easement

The Moratorium temporarily prevented landlords from evicting tenants whom they had *voluntarily invited*. It did not force landlords to let strangers onto their properties nor undo any of their tenants' obligations, but merely put the remedy of eviction on hold in some situations. This kind of regulation of voluntary relationships does not constitute a physical taking.

As discussed in the State's Supplemental Brief, the Landlords alleged only a physical type of taking, where "the government authorizes a physical occupation of property (or actually takes title)," as opposed to non-physical takings, "where the government merely regulates the use of property" without authorizing its occupation or seizure. *Yee*, 503 U.S. at 522; *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (further describing types of non-physical takings). The Landlords' (and PLF's) theory is

directly contrary to U.S. Supreme Court precedent. "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land," and landlords were not required to so submit when they "voluntarily rented their land[.]" *Yee*, 503 U.S. at 527. Because the Moratorium did not impose any new invasion or occupation of their property, the physical takings claim fails.

1. The Landlords' invitation of tenants subjects them to regulation and distinguishes the Moratorium from a physical taking

Courts have consistently recognized that "[s]tates 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 (1982); *accord Yee*, 503 U.S. at 528-29; *Fla. Power*, 480 U.S. at 252; *accord Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 335, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) ("A rule that required compensation for every delay in the use of property

would render routine government processes prohibitively expensive or encourage hasty decisionmaking."). States' "broad power" to regulate relationships between landlords and tenants is perfectly compatible with the rule that the government may not compel "the permanent occupation of the landlord's property by a third party." *Loretto*, 458 U.S. at 440-41.

The Moratorium fit squarely within the State's broad power to regulate landlord-tenant relationships. Indeed, PLF's contention that the Moratorium was "a physical occupation" of the Landlords' properties, PLF Br. at 8, is directly at odds with U.S. Supreme Court authority. The Court has made clear that a physical taking occurs only when the government subjects a property owner to a "permanent physical occupation" of the owner's property, *Loretto*, 458 U.S. at 436, not when the government regulates the relations between tenants and "landlords who have voluntarily entered into leases," *Fla. Power*, 480 U.S. at 252.

In *Loretto*, for example, the government forced a property owner to accept the installation of cable equipment on the owner's property—a "permanent physical occupation" that the owner never invited. 458 U.S. at 421. Though the owner had rented the property to a tenant, the owner had not invited the installation of a third party's cable equipment. The Court contrasted the uninvited physical installation with "substantial regulation of an owner's *use* of his own property," which "the Court has often upheld[.]" *Id.* at 426 (emphasis added). What mattered was the government's imposition of a physical invasion by an uninvited "stranger." *Id.* at 434, 436. The "stranger" was not a tenant—whose relationship with a landlord the government has "broad power to regulate"—but an uninvited third party. *Id.* at 440.

The Court rejected the notion that this "physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships." *Loretto*, 458 U.S. at 440; *see also Fla. Power*, 480 U.S.

at 252 ("[S]tatutes regulating the economic relations of landlords and tenants are not *per se* takings[.]"). Rather, under *Loretto*, a state's "broad" power to regulate landlord-tenant relations extends so long as the government does not compel "the permanent occupation of the landlord's property by a third party." 458 U.S. at 440. Unlike the cable installations in *Loretto*, here, the Landlords' tenants were not foreign fixtures on their properties, but were people the Landlords had voluntarily invited onto their properties. The Moratorium thus falls outside *Loretto*'s "very narrow" definition of a physical taking. *Id.* at 441.

In their effort to construe the Moratorium's limited restriction on evictions as a physical taking, PLF exaggerates the Moratorium's effects and ignores its exceptions. The Moratorium did not prevent landlords from "possess[ing] their property," "profitably us[ing] it," or "profitably sell[ing] it." PLF Br. at 14. It did not give rights to "illegal squatters,"[1] transform

[1] The Moratorium did not prohibit removal of unauthorized persons under RCW 9A.52.105.

tenants into "interlopers with a government license," or allow tenants to remain "interminably[.]" *Id.* at 8, 12-13. Nor did the Moratorium affect "the value of [landlords'] private property when the [Moratorium was] finally rescinded," *id.* at 14-15, at which point landlords could fully pursue unpaid rent, eviction, and re-rental to new tenants. The Moratorium merely put certain evictions on pause, while preserving landlords' rights to recover any past-due rents. And the pause was only partial—it allowed evictions when tenants posed risks to others, when landlords wished to reside on the property, and when landlords wished to sell the property. *See* Procl. 20-19.6 at 5. Landlords retained title to their properties, and the only occupation was that which they had invited. If they did not wish to wait for the Moratorium's expiration, landlords had avenues to recover possession from their tenants.

PLF cites no controlling physical takings case where the occupation originated in a property owner's voluntary invitation. A tenant's unpaid rent does not transform a landlord's prior

invitation into an unwanted invasion, and the U.S. Supreme Court's clear precedent remains: "'it is the invitation, not the rent, that makes the difference.'" *Yee*, 503 U.S. at 532 (quoting *Fla. Power*, 480 U.S. at 252).

2. The Moratorium did not cause an uninvited occupation

PLF fails in its attempt to liken the Moratorium to an easement or other intrusion on the Landlords' properties. The Moratorium did not determine "who could possess rental properties" or make the Landlords' tenants possession "interminabl[e]." PLF Br. at 4, 13. The Landlords remained owners and retained the right to collect rent. The Landlords could completely avoid the Moratorium's restrictions if they wanted to sell their property or occupy it themselves, or if their tenant posed a risk to others. Given the Landlords' ability to evict their tenants in anticipation of sale, it is manifestly false for PLF to argue that landlords "could not possess what they owned[.]" PLF Br. at 8. There was no comparable escape valve in *Loretto* or *Cedar Point*

(discussed *infra* at pp. 22-23), nor in any physical easement to which the Landlords compare the Moratorium.

As the U.S. Supreme Court held in *Penn Central Transportation Co. v. City of New York*, it is a "fallacy" to contend that "a 'taking' must be found to have occurred whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel." 438 U.S. 104, 130 n.27, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). This is because restrictions on the economic use of land, though they may be comparable to an easement, are not physical occupations. They do not "destroy[] *each* of the[] rights" to "possess, use and dispose of" the land. *Loretto*, 458 U.S. at 435 (internal quotation marks and citation omitted). Indeed, landlords remained free to retake possession or dispose of their properties under the Moratorium. Instead, regulations that temporarily regulate property owners' use of their properties are subject to the *Penn Central* regulatory takings standard, which the Landlords eschew. *See Tahoe-Sierra*, 535 U.S. at 334-42.

Even when a regulation is comparable to an easement, the property owner has not necessarily suffered a physical taking. *See, e.g.*, *Brace v. United States*, 72 Fed. Cl. 337, 365 (2006), *aff'd*, 250 F. App'x 359 (Fed. Cir. 2007) (consent decree did not "create[ ] an easement or a servitude, at least in the sense of those types of interests that might support a takings[ ]"); *Stearns Co. v. United States*, 396 F.3d 1354, 1357 (Fed. Cir. 2005); *Seiber v. United States*, 53 Fed. Cl. 570, 576-77 (2002), *aff'd*, 364 F.3d 1356 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 873 (2004) (imposition of logging restrictions on property did not, as a servitude, effectuate a physical taking). The key, again, is that the tenancies began with the Landlords' voluntary invitations, which subjected the Landlords to regulation of the use of their properties.

PLF cites *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 135 S. Ct. 511, 184 L. Ed. 2d 417 (2012), to argue the temporary character of the Moratorium "does not make it any less of a per se constitutional violation." PLF Br. at 19-20.

But *Arkansas Game* involved an uninvited physical invasion (flooding) and did not hold that every temporary regulation amounts to a categorical taking. It held, "simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." *Arkansas Game*, 568 U.S. at 38. Such a "temporary physical invasion[]" of property "should be assessed by case-specific factual inquiry" under *Penn Central*. *Arkansas Game*, 568 U.S. at 38. In conducting that inquiry, "time is indeed a factor in determining the existence *vel non* of a compensable taking." *Id.* The Moratorium was temporary, but the Landlords do not even purport to satisfy the *Penn Central* test that would apply to a temporary physical taking per *Arkansas Game*.

PLF also cites *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), to further argue that takings can be temporary. PLF Br. at 11, 20. But *First English* concerned a regulatory taking, not a physical taking, which again is governed

by the standards set forth in *Penn Central*, not the *per se* test PLF and the Landlords invoke here. *See Tahoe-Sierra*, 535 U.S. at 325-32. Moreover, *First English* "did not address . . . whether the temporary regulation at issue had in fact constituted a taking," but proceeded on the assumption of a taking, which the courts later found had not occurred. *Id.* at 328-29. And though the regulation in *First English* was temporary, it also denied the landowner "all use" of its property—a standard the Landlords could not meet even if they had pled the regulatory standard. *First English*, 482 U.S. at 321.

PLF also characterizes eviction as a "fundamental right" but cites no authority so holding. PLF Br. at 19. To the contrary, "[t]he right to use property as one wishes is . . . not a fundamental right." *Slidewaters LLC v. Wash. State Dep't of Lab. & Indus.*, 4 F.4th 747, 758 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 779 (2022); *see also Rental Hous. Ass'n v. City of Seattle*, 22 Wn. App. 2d 426, 462-64, 512 P.3d 545 (2022) (eviction rights not fundamental under Constitution's privileges and immunities

clause); *301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1385 (8th Cir. 2022) (exclusion rights not fundamental for purposes of substantive due process); *DeKalb Stone, Inc. v. County of DeKalb*, 106 F.3d 956, 959 n.6 (11th Cir. 1997) (property rights, though derived from common law, "are not equivalent to fundamental rights"). In Washington, a landlord's right to evict has long been regulated and limited under the unlawful detainer statute, RCW 59.12.030. In short, the Moratorium's temporary limitation on evictions, aimed at ameliorating a deadly pandemic and economic catastrophe, does not interfere with the fundamental rights of landlords.

A physical takings claims cannot be premised on the theory that the occupation of the tenants voluntarily invited by landlords amounts to an uninvited physical occupation or easement. The physical occupation began with their invitation, not by any action by the government, and unpaid rent cannot transform the Moratorium into an easement. *Fla. Power*, 480 U.S. at 252 ("Th[e] element of required acquiescence is at the

heart of the concept of occupation."). *Yee* confirmed the maxim earlier established by *Florida Power*: "'it is the invitation, not the rent, that makes the difference.'" *Yee*, 503 U.S. at 532 (quoting *Fla. Power*, 480 U.S. at 252). Numerous other courts, as the court below, have applied *Yee* and *Florida Power* this way, have distinguished *Cedar Point*, and have thus correctly rejected physical takings claims against eviction moratoria. *See* State Suppl. Br. at 13 n.4 (citing cases); *see also GHP Mgmt. Corp. v. City of Los Angeles*, No. CV-21-06311 DDP (JEMx), 2022 WL 17069822, at *3 (C.D. Cal. Nov. 17, 2022); *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). This Court should likewise affirm.

B. *Yee* Applies Because the Voluntary Nature of Landlords' Initial Invitation to Tenants Forecloses a Physical Takings Claim

If *Loretto* had left any doubts that landlord-tenant regulations fall outside the physical occupation rule, the Court dispelled them in *Yee*. In *Yee*, mobile home park owners

challenged an ordinance that, along with a state law, they claimed prevented them from either "set[ting] rents," "decid[ing] who their tenants will be," "evict[ing] a mobile home owner," or "easily convert[ing] the property to other uses." 503 U.S. at 526-27. These laws, the owners contended, made "the mobile home owner . . . effectively a perpetual tenant of the park," according to the owners. *Id.* at 527. They argued for a *per se* taking under *Loretto*, because "what has been transferred from park owner to mobile home owner is no less than a right of physical occupation of the park owner's land." *Id.* The U.S. Supreme Court rejected the park owners' expansive theory of physical takings. *See id.* at 532. Reiterating the central holding in *Loretto*, the Court explained that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 527. The mobile home laws did "no such thing" because the park owners had "voluntarily rented their land to mobile home owners." *Id.* Given that voluntary acquiescence, the laws "merely regulate[d] petitioners' *use* of

their land by regulating the relationship between landlord and tenant[,]" and did not constitute a physical taking. *Id.* at 528.

Like the park owners in *Yee*, the Landlords here "voluntarily open[ed] their property to occupation by others." *Id.* at 531. They did not suffer any trespass and were not forced to accept tenants; the Moratorium gave no third party any right to access their properties. The Landlords were subject only to the tenancies they had previously invited. Moreover, the Landlords could still evict tenants for reasons other than nonpayment of rent, and they thus retained rights to exclude. *See id.* at 528 (rejecting argument that park owners were forced to be landlords in perpetuity because "a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice[ ]"). The Moratorium simply did not compel the Landlords "over objection to rent [their] property" or prohibit them "in perpetuity from terminating a tenancy." *Id.*

The Moratorium, too, regulated the landlord-tenant relationship by delaying some landlords' recourse to eviction. It

did not transfer possession to anyone. As in *Yee*, because the Landlords "voluntarily open[ed] their property to occupation by others," they "cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Id.* at 531. Because the Landlords voluntarily invited tenants onto their properties and had thus subjected the use of their properties to regulation, the Moratorium's regulation of their rental relationships effected no physical taking.

Like the Landlords, PLF narrowly casts *Yee* as a rent-control case. *See* PLF Br. at 5, 17. But *Yee* was more than that. It involved a combination of state and municipal law that restricted evictions as well. The state law "limit[ed] the bases upon which a park owner may terminate a mobile home owner's tenancy," which, together with the municipal ordinance, prevented park owners from evicting owners of mobile homes to obtain higher-paying tenants. *Yee*, 503 U.S. at 524; *see also, e.g.*, *id.* at 526-27 ("Because under the California Mobilehome Residency Law the park owner cannot evict a mobile home owner or easily convert

the property to other uses, the argument goes . . . ."); *Gallo v. District of Columbia*, No. 1:21-cv-03298 (TNM), 2022 WL 2208934, at *9 (D.D.C. June 21, 2022) ("the plaintiffs in *Yee* also alleged they were unable to evict current tenants"). Here too, the Moratorium prevented landlords from replacing their tenants to obtain more rent. In both situations, governments regulated the terms on which landlords could terminate the relationships they had voluntarily started with their tenants. That is not a physical taking.

It is true that in *Yee* the park owners could pursue eviction for nonpayment of rent. But they otherwise could not evict their rent-controlled tenants—even upon expiration of a lease—as long as they wished to rent out their property. If not for the prohibition on eviction at issue in *Yee*, the park owners could have side-stepped rent control and re-rented their properties at higher rates. As in *Yee*, PLF cannot assert a physical takings claim out of the Landlords' inability to evict their old tenants and re-rent to new ones. And the fact that a park owner in *Yee* could

evict a mobile home owner for other reasons—such as the "owner's desire to change the use of his land[,]" 503 U.S. at 524—further likens *Yee* to this case, as the Landlords here were just as free to evict their tenants and retake possession for that same reason. *Compare id.* at 528 ("a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice"), *with* Procl. 20-19.6 at 5 (requiring 60-day notice for sale or re-occupation). Put simply, the basis for *Yee*'s holding was not the park owners' ability to evict a defaulting tenant but their prior voluntary invitation of a tenancy regulated by law. The Moratorium's regulation of the economic relationship between landlords and tenants is well within the State's "broad power" and cannot be a *per se* taking. *Yee*, 503 U.S. at 528-29 (citing *Loretto*, 458 U.S. at 440).

Yee also undercuts PLF's reliance on *Loretto*'s statement that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." PLF Br. at 6 (quoting *Loretto*, 458 U.S.

at 439 n.17). *Yee* clarified that *Loretto*'s statement does not apply when "there has simply been no compelled physical occupation" in the first place. *Yee*, 503 U.S. at 531-32 (distinguishing *Loretto*, 458 U.S. at 439 n.17). Indeed, the Ninth Circuit recently drew this same distinction—that a landlord's voluntary choice to enter a regulated relationship with a tenant precludes the casting of regulation as a physical taking: "'when a person voluntarily surrenders liberty or property,' like when the [plaintiff landlords] *chose to rent their property* causing them to pay the relocation fee when they caused the tenants to relocate, 'the State has not *deprived* the person of a constitutionally protected interest.'" *Ballinger v. City of Oakland*, 24 F.4th 1287, 1293 (9th Cir.), *cert. denied*, 142 S. Ct. 2777 (2022) (first emphasis added) (citation omitted).

Because *Yee* is premised on a landlord having already voluntarily invited tenants onto the property, PLF cannot support the Landlords' takings claim with cases about the government taking actual possession or imposing physical easements to force

a landowner to suffer an original invasion. *See, e.g.*, PLF Br. at 13 (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378, 65 S. Ct. 373, 89 L. Ed. 2d 311 (1945)). This is particularly true of *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021), upon which PLF rests much of its argument. *See* PLF Br. at 11, 16. *Cedar Point* addressed an access regulation forcing certain property owners (agricultural employers) to suffer an intermittent invasion by third parties they never invited onto their land (union organizers). *Cedar Point*, 141 S. Ct. at 2069. The only new issue in *Cedar Point* was whether the law created any less a physical invasion for purposes of a *per se* taking when the imposition of uninvited third parties did not span every hour of every day of the year but was "temporary" in the sense of "intermittent." *Id.* at 2074-75.

Cedar Point in no way disturbs precedent that "statutes regulating the economic relations of landlords and tenants are not *per se* takings." *Fla. Power*, 480 U.S. at 252; *see also id.* ("This element of required acquiescence is at the heart of the concept of

occupation."). Rather, *Cedar Point* confirmed that a *per se* takings claim turns on "whether the government has physically taken property . . . or has instead restricted a property owner's ability to use his own property." *Cedar Point*, 141 S. Ct. at 2072. *Cedar Point* did not overrule or undermine *Yee* but cited it favorably for general takings principles. *Id.* at 2072. *Cedar Point* distinguished laws 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. *Yee* makes clear that the same is true for rental property: limitations on how a landlord may treat tenants it has voluntarily invited onto its property are distinct from regulations granting a right to invade property closed to the public. *See Yee*, 503 U.S. at 527-28, 531.

Every federal district court to address this issue has agreed, applying *Yee* to dismiss takings challenges to eviction

moratoria. *See, e.g.*, *GHP Mgmt. Corp.*, 2022 WL 17069822, at *2-4; *Stuart Mills Props.*, 2022 WL 4493573, at *3; *Farhoud v. Brown*, No. 3:20-cv-2226-JR, 2022 WL 326092, at *10 (D. Or. Feb. 3, 2022); *S. Cal. Rental Hous. Ass'n v. County of San Diego*, 550 F. Supp. 3d 853, 865-66 (S.D. Cal. 2021). Respectfully, the Eighth Circuit and PLF misread *Yee* in concluding that the park owners in *Yee* "sought to exclude future or incoming tenants rather than existing tenants." *Heights Apts., LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022) (cited at PLF Br. at 16-17). The plaintiffs in *Yee* also alleged they were unable to evict current tenants: "According to the complaint, 'the rent control law has had the effect of . . . granting to the tenants of mobilehomes *presently in The Park*, as well as the successors in interest of such tenants, the right to physically permanently occupy and use the real property of Plaintiff.'" 503 U.S. at 525 (emphasis added) (citation omitted). The U.S. Supreme Court held there was no *per se* taking because the park owners "voluntarily rented their land to mobile home owners." *Id.* at 527. As Judge Colloton

explained, the *Heights Apartments* panel "never addressed why the scheme in *Yee* that allowed a landlord to evict existing tenants only for limited reasons after up to 12 months' notice did not constitute a *per se* taking, while a temporary eviction moratorium during a pandemic ostensibly does." *Heights Apts., LLC v. Walz*, 39 F.4th 479, 480 (8th Cir. 2022) (Colloton, J., dissenting from denial of rehearing en banc); *see also, e.g.*, *Gallo*, 2022 WL 2208934, at *9 (declining to follow *Heights Apartments*); *Williams v. Alameda County*, No. 3:22-cv-01274-LB, 2022 WL 17169833, at *11 (N.D. Cal. Nov. 22, 2022) (same). The Eighth Circuit's disregard of *Yee* thus rests on misinterpretation and has no bearing here.

Nor does *Alabama Association of Realtors* have any force here. *Contra* PLF Br. at 7, 16-17. That case concerned whether a federal agency was statutorily authorized to impose an eviction moratorium. *See Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488, 210 L. Ed. 2d 856 (2021). It therefore had no reason to mention *Yee*. Though it cited

Loretto, it did not hold that an eviction moratorium amounts to a physical taking. And in distinguishing the federal agency's scope of authority, it recognized that landlord-tenant relationships fall under "the particular domain of state law." *Id.* at 2489.

C. PLF's Flawed Policy Arguments Provide No Reason to Interfere with the Regulation of Landlord-Tenant Relationships

After asserting the irrelevance of "the reason for [the Moratorium] or the underlying facts and circumstances," PLF Br. at 10-11, PLF nonetheless offers policy arguments about the wisdom of COVID-19 eviction moratoria and their effects on "the stock of available rental properties," PLF Br. at 23. PLF's policy arguments have no place here, because "[t]he Takings Clause is not a means for federal courts to second-guess the legislature's choices about the best mechanisms to achieve what are undeniably public policy goals." *Fideicomiso De La Tierra Del Caño Martin Peña v. Fortuño*, 604 F.3d 7, 19 (1st Cir. 2010); *In re Recall of Inslee*, No. 101117-2, 2023 WL 308217, at *8 (Wash. Jan. 19, 2023) ("Particularly in areas 'fraught with

medical and scientific uncertainties,' the governor's 'latitude must be especially broad,' and we 'appropriately defer to such decisions.'" (Citation omitted.)).

Even if indulged, PLF's policy arguments are not credible. PLF first argues small landlords might not "remain[] in or reenter[] the landlord business" because of the government's response to the eviction crisis. PLF Br. at 24. But the "landlord business," *id.*, is distinct from the building business. Landlords do not create housing by entering the landlord business; nor do they destroy housing by leaving it. What PLF refers to as landlords' "provision" of housing, *id.* at 26, requires nothing more than the changing of hands of existing housing. Presumably, when residential property owners leave the landlord business, their properties do not disappear but are sold to new owners, who rent it to new tenants or occupy it themselves. Even the television-news article PLF cites notes a landlord's intent to sell his property when he leaves the landlord business: "when his tenant moves out, he's selling." Kalie Greenberg, *Small landlord*

says he's leaving Seattle over the city's rental laws, KING 5, *updated* Apr. 28, 2022, https://bit.ly/3ifzgh0 (cited at PLF Br. at 24). PLF gives no reason to believe that a landlord's exit from the landlord business will reduce the stock of housing.

PLF next argues that landlords' "experience of COVID-related eviction moratoriums [sic] have still created new barriers to housing"—those barriers including more stringent screening criteria that landlords impose on future tenants. PLF Br. at 25. Though it is clear that landlords' screening criteria may create difficulties in the housing market for tenants, that is a policy problem best left to the policymakers, not a reason to gut regulatory authority itself.

PLF concludes with a general appeal to what is "fair and just," citing *Armstrong v. United States*, 364 U.S. 40 (1960). PLF Br. at 25-26. As the City of Seattle explains, *Armstrong*'s "in all fairness and justice" language is not a takings test. City of Seattle Br. at 24. And as the City also points out, "fairness and justice" do not favor landlords here anyway. *Id.* at 25-26. PLF ignores

that the Moratorium forgave no rent, allowed landlords to pursue unpaid rent, and gave landlords multiple escape valves through which they could evict their tenants and recover their properties; and that the government has made relief funds available to landlords and tenants to relieve the burden of unpaid rent. Everyone had to bear burdens throughout the pandemic, though not everyone has been given the consideration that landlords have received. PLF's one-sided presentation of burdens cannot support the Landlords' physical takings claim.

III. CONCLUSION

The Court should affirm summary judgment in favor of the State, including on the Landlords' physical takings claim.

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RESPECTFULLY SUBMITTED this 2nd day of February 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed in the Washington State Supreme Court and electronically served according to the Court's protocols for electronic filing and service upon all parties.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of February 2023, at Seattle, Washington.

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WA STATE ATTORNEY GENERAL'S OFFICE, COMPLEX LITIGATION DIVISION

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