No. 24-435

In the Supreme Court of the United States

GHP MANAGEMENT CORPORATION, ET AL.,
Petitioners,
v.
CITY OF LOS ANGELES, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF THE BUCKEYE INSTITUTE AND MANHATTAN INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an eviction moratorium depriving property owners of the fundamental right to exclude nonpaying tenants effects a physical taking.

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INTEREST OF *AMICI CURIAE*[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits *amicus* briefs. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, MI has historically sponsored scholarship and filed briefs opposing government overreach.

This case interests *amici* because the expansive regulatory authority over property that the Ninth Circuit's decision permits is inconsistent with the protections guaranteed by the Constitution.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision below, *GHP Mgmt. Corp.* v. *City of Los Angeles*, No. 23-55013, 2024 WL 2795190 (9th Cir. May 31, 2024), effectively endorses the taking of property without just compensation. Whether a property owner suffers a physical taking by the government, or government regulations deprive the owner of one of the fundamental elements of property ownership, the result is functionally the same. Each results in a government-compelled physical occupation of the property.

Here, the city of Los Angeles deprived Petitioners of their right to exclude others from their property. In upholding the city's ordinance, the Ninth Circuit relied on this Court's decision in *Yee* v. *City of Escondido*, 503 U.S. 519 (1992). Specifically, relying on *Yee*, the court emphasized that "a statute that merely adjusts the existing relationship between landlord and tenant, including adjusting rental amount[s], terms of eviction, and even the identity of the tenant, does not effect a taking." Pet. App. 3a (citing *Yee*, 503 U.S. at 527–28). However, the power to "adjust" is not unlimited. It seems unlikely that the *Yee* Court expected that lawmakers and lower courts would view its decision as *carte blanche* to the extent it has been used in eviction moratoriums. *Amici* therefore agree with Petitioners that "[i]f this Court is inclined to clarify *Yee's* limited scope and further affirm the sanctity of private property rights, this petition presents the best chance to do so." Pet. 27. Indeed, *amici* urge the Court to take this case to limit *Yee* and thereby reign in lawmakers that are pushing the boundaries of *Yee*.

Amici write separately to emphasize a few key issues. First, this Court has long recognized that the "right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979); see also *College Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (the "hallmark of a protected property interest is the right to exclude others"). As the Ninth Circuit admits, this Court's precedent acknowledges that almost any "government-authorized invasions of property . . . are physical takings." Pet. App. 4a (quoting *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 152 (2021)).

Second, the distinction between physical takings and regulatory actions breaks down where, as here, the regulatory scheme functionally deprives property owners of a fundamental element of their property rights. The principles behind the Fifth Amendment should apply whether the government itself takes a partial interest in property or authorizes some private actor to take that property. Here, the harm to Petitioners is government-compelled physical occupation of the property. It makes little difference to a property owner whether the government is doing the occupying itself or allowing others to do so.

Finally, the lower courts' reliance on *Yee* is misplaced. See Pet. App. 3a; see also *id.* at 14a (decision of the district court) ("[L]aws that 'merely regulate [landlords'] *use* of their land by regulating the relationship between landlord and tenant' do not constitute per se takings.") (quoting *Yee*, 503 U.S. at 528) (emphasis in original). The ordinance here goes

beyond "mere regulation" and *Yee* does not compel the decision below. The Ninth Circuit and other courts have misapplied *Yee*, which underscores why this Court should clarify its scope and limitations.

ARGUMENT

I. The Court should grant review to bring greater clarity to its Takings Clause jurisprudence.

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Here, the city of Los Angeles did not take physical possession of Petitioners' property. However, Petitioners argue that by using city ordinances and related housing practices, the city "deprived property owners within its jurisdiction of the fundamental right to exclude others from private property." Pet. 6; see also Pet. App. 63a–71a (city ordinance).

The right to exclude is "a fundamental element" of the property rights protected by the Fifth Amendment. *Cedar Point Nursery*, 594 U.S. at 149–50 (citation omitted). The Court has consistently held that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S. at 176; see also *Dolan* v. *City of Tigard*, 512 U.S. 374, 393 (1994) (same).

Petitioners' right to exclude was severely curtailed by the city's moratorium on residential evictions. See Pet. 9 (arguing that "[b]y depriving Petitioners of their right to exclude defaulting tenants, the City plucked one of Petitioners' most essential sticks from their

bundle of rights"). However, relying on *Yee*, the lower court found that the landlords' initial invitation to tenants meant that the city's eviction ban was merely the regulation of the landlord-tenant relationship, and not a physical taking. See Pet. App. 1a–6a.

The Ninth Circuit's decision is inconsistent with numerous Takings Clause precedents, as well as established understandings of property rights in general. It also misapplies *Yee*. This Court should grant review to clarify this important area of the law.

A. The right to exclude is a fundamental element of property rights.

The city of Los Angeles imposed an eviction moratorium that severely curtailed Petitioners' right to exclude others from their property, functionally rendering that right null. As Petitioners describe, "[t]he moratorium prevented Petitioners from pursuing their only legal remedy to remove nonpaying tenants from their properties—*i.e.*, seeking redress through well-established state eviction laws." Pet. 10 (citing Pet. App. 31a). According to Petitioners, this included (among others) tenants who defaulted on rent payments, resulting in millions of dollars in back rent. See Pet. 10 (citing Pet. App. 51a).

This is no small matter. As this Court has recognized, "the right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Cedar Point Nursery*, 594 U.S. at 150 (quoting *Kaiser Aetna*, 444 U.S. at 176, 179–80); see also *Dolan*, 512 U.S. at 384, 393.

In 1766, Blackstone wrote that property rights include "the sole . . . dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, *Commentaries on the Laws of England* 2 (1766); see also John Locke, *Two Treatises on Government* 209–10 (1821) ("[Property] being by [man] removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other men."). And this Court has emphasized that the "hallmark of a protected property interest is the right to exclude others," *College Sav. Bank*, 527 U.S. at 673—a right the city extinguished here.

Today, the right to exclude remains "an essential element of modern property rights." *Rawlings* v. *Kentucky*, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring) (citing *Kaiser Aetna*, 444 U.S. at 179–80). Without it, "all other elements would be of little value." *Dickman* v. *Comm'r*, 465 U.S. 330, 336 (1984) (citation omitted). In fact, "it is difficult to conceive of any property as private if the right to exclude is rejected." Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of* PruneYard v. Robins, 64 U. Chi. L. Rev. 21, 22 (1997).

Just as "it is well-settled that state-created property interests . . . are entitled to protection under the procedural component of the Due Process Clause," *Nicholas* v. *Penn. State Univ.*, 227 F.3d 133, 140 (3d Cir. 2000) (Alito, J.), those same interests are subject to the just compensation requirement of the Fifth Amendment. While state law generally determines which "sticks" a property owner will have in his

"bundle" of rights, see, *e.g., United States* v. *Craft*, 535 U.S. 274 (2002), there are limits on the government's ability to regulate in ways that alter traditional understandings of property. For example, the government cannot avoid responsibility for a taking merely by reserving some *de minimis* rights to the property owner. See, *e.g.*, *Horne* v. *Dept. of Agriculture*, 576 U.S. 350, 362–63 (2015) (holding that the government may not "avoid the categorical duty to pay just compensation" for a taking "by reserving to the property owner a contingent interest in a portion of the value of the property"). That is unsurprising because the "great and chief end" of government is "the preservation of . . . property." John Locke, *Second Treatise of Government* 62 (Blackwell ed., 1946).

The government also cannot change a property's nature by waving a magic wand. In *Phillips* v. *Wash. Leg. Found.*, the Court found that the interest accrued in attorneys' IOLTA accounts is a client's property for purposes of the Takings Clause. 524 U.S. 156, 159 (1998). In *Phillips*, Texas adopted a program that took the income generated from IOLTA accounts and paid it to third-party "foundations that finance[d] legal services for low-income individuals." *Id.* at 160. Yet, the Court found that "'a State, by *ipse dixit,* may not transform private property into public property without compensation' simply by legislatively abrogating the traditional rule that 'earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.'" *Id.* at 167 (quoting *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980)).

Los Angeles's conduct is the exact behavior that *Phillips* and *Webb's Fabulous Pharmacies* prohibit. First, by allowing tenants to stay on Petitioners' property without paying rent, the city converted Petitioners' private property into public property via a city ordinance. Like in *Phillips*, third parties, not the government, benefited from the illicit conversion but that does not mean a taking did not occur.

Second, the city "abrogat[ed] the traditional rule" that property owners have the right to exclude by baring Petitioners from evicting non-paying tenants. To describe the right to exclude as "traditional" is an understatement. As discussed above, it is a rule that has not only been recognized by this Court, see *Rawlings*, 448 U.S. at 112, but it precedes the very existence of the nation. Blackstone, *supra*, at 2.

Third, just as the state in *Phillips* attempted to sever the property right in earned interest from its principal, the city here attempted to sever Petitioners' right to rent payments from its rental property. As "earnings of a fund are incidents of ownership of the fund itself," rent from a rental property is incident of ownership of the real property itself. *Phillips*, 524 U.S. at 167 (quoting *Webb's Fabulous Pharmacies*, 449 U.S. at 164). But when it comes "to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Id.*

B. A regulatory scheme that deprives owners of a fundamental element of their property rights operates as a taking.

The distinction between physical takings and regulatory actions breaks down where the regulatory scheme functionally deprives property owners of a fundamental element of their property rights.

Again, the right to exclude is an essential stick in the bundle of property rights. See *Cedar Point Nursery*, 594 U.S. at 149–50; *Kaiser Aetna*, 444 U.S. at 176; *Dolan*, 512 U.S. at 393. Yet, here, Los Angeles imposed a moratorium on evictions that drastically altered Petitioners' ability to enjoy and exercise that right. See Pet. App. 63a–71a. Although the government did not take physical possession of their property, it permitted (and effectively encouraged) others to do so. See, *e.g.*, Pet. 10. The city encouraged residents to use the ordinance "as an affirmative defense in an unlawful detainer action" and property owners "who violated the ordinance . . . were subject to administrative penalties and between $10,000 to $15,000 in civil liability directly to the nonpaying tenant, along with payment of the tenant's attorney's fees and costs." Pet. 7–8 (citing Pet. App. 70a–71a).

Not only did the city violate the Fifth Amendment, but it then stacked the deck against property owners to scare them into submission. The hefty penalties were set up to dissuade any property owners from stepping out of line and attempting to vindicate their property rights. This shows the vindictive and conniving nature of the city's conduct in the first place—conduct which cannot be ignored.

The principles behind the Fifth Amendment should apply whether the government itself takes an interest in property, or it authorizes third parties to do so. The harm to Petitioners is a physical occupation of the property; it makes little difference whether the government is the occupier. As Chief Justice Roberts wrote for this Court in *Cedar Point Nursery*, "[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation." 594 U.S. at 149.

The Court's analysis in *Cedar Point Nursery* is instructive here. "The essential question is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)." *Id.* Rather, "[i]t is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id.* (citing *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 321–23 (2002)).

Thus, a *per se* taking occurs "whenever a regulation results in a physical appropriation of property." *Id.* In *Horne*, the Court held that an administrative reserve requirement compelling raisin growers to set aside a percentage of their crop for the government constituted a physical rather than a regulatory taking. *Horne*, 576 U.S. at 361. But a taking also occurs even if the property is used by a third party, rather than the government. In *Cedar Point Nursery*, this Court considered a regulation that granted union organizers a right to physically enter and occupy an agricultural employer's property for three hours per day, 120 days

per year, to solicit support for unionization. See 594 U.S. at 149. The Court held that the "regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking." *Id.* The Court also made clear that it is immaterial whether the physical invasion is "permanent or temporary," or "intermittent as opposed to continuous." *Id.* at 153.

At issue here is a regulation that caused a physical invasion that lasted nearly four years. Pet. 9. What the city did would be egregious and illegal if it lasted four months, let alone four years. To make matters worse, the eviction moratorium was initially enacted in response to COVID-19, but it lasted far beyond the official end of the pandemic. The moratorium ended in January 2024 even though, according to the Department of Health and Human Services, the pandemic ended on May 11, 2023. Pet. 4; *COVID-19 Public Health Emergency*, Dep't Health & Hum. Servs. (Dec. 15, 2023).[2] So the moratorium lasted eight months longer than the pandemic. And, for many people, the pandemic ended far earlier than May 2023, as many businesses returned to in-person work in March 2022 or earlier. Tim Smart, *The Great Return: Companies Are Calling Their Workers Back to the Office as COVID-19 Fades*, U.S. News & World Report (Mar. 4, 2022).[3] That calls into question the motivation behind the city's eviction-moratorium scheme.

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[2] https://www.hhs.gov/coronavirus/covid-19-public-health-emergency/index.

[3] https://www.usnews.com/news/economy/articles/2022-03-04/the-great-return-companies-are-calling-their-workers-back-to-the-office-as-covid-19-fades.

Even if the city was justified in its initial decision to impose an eviction ban—it was not—it overstayed its welcome. As the district court noted, the moratorium precluded evictions for an "indeterminate" amount of time. Pet. App. 14a. By its own language, the moratorium was to last "[d]uring the Local Emergency Period and for 12 months after its expiration," which gave property owners zero foresight of the moratorium's duration or how long they would have to go without collecting rent or evicting non-paying tenants. Pet. App. 66a. As the pandemic began to wind down, and eventually end, the moratorium continued to live on, preventing Petitioners from exercising their property rights.

C. This case is a proper vehicle for the Court to clarify and limit the scope of *Yee*.

The Ninth Circuit's reliance on *Yee* is misplaced. Many courts and lawmakers—in addition to the Ninth Circuit—have stretched *Yee* far beyond its original intent. "It is troubling that some federal judges appear keen to contort *Yee* into excusing categories of regulation to which its signatories deemed it inapposite." Sam Spiegelman, *Rent Controls and the Erosion of Takings-Clause Protections: A Sordid History with Recent Cause for Optimism*, 51 Fordham Urb. L.J. 357, 400 (2023).

Unfortunately, as Professor Epstein predicted, "[w]here the Court grants an inch, state and local governments will quickly take a mile . . . ." Richard A. Epstein, Yee v. City of Escondido*: The Supreme Court Strikes Out Again*, 26 Loy. L.A. L. Rev. 3, 15 (1992).

Los Angeles and other governments have taken full advantage of the conceptual consequences of *Yee*. As Professor Epstein explained,

> [b]efore *Yee*, land use regulation referred to the use restrictions placed on a single owner in possession, and thus determined what could be done with the land. Now "use" refers to who can occupy the land—the tenant or the landlord. In *Yee* the tenant may use what the landlord may not. If that is not a case of dispossession, then it is hard to see what is.

Id. at 16.

Now that various governments have "take[n] a mile," it is time for the Court to put on the brakes and remind governments and courts alike that a taking is a taking, and *Yee* cannot be used to evade the Fifth Amendment. The Court recently rejected two eviction moratorium cases, see *Gonzales* v. *Inslee*, 535 P.3d 864 (Wash. 2023), *cert. denied*, 144 S. Ct. 2685 (2024), and *El Papel, LLC* v. *City of Seattle*, No. 22-35656, 2023 WL 7040314 (9th Cir. Oct. 26, 2023), *cert. denied sub nom. El Papel, LLC* v. *City of Seattle, Washington*, 144 S. Ct. 827 (2024), but since then, the circuit split has increased.

In 2022, the Eighth Circuit considered a similar eviction moratorium and rejected the exact reasoning of the decision below. In considering a similar eviction ban imposed by the State of Minnesota, the Eighth Circuit found that "*Cedar Point Nursery* controls here and *Yee* . . . is distinguishable." *Heights Apartments,*

LLC v. *Walz*, 30 F.4th 720, 733 (8th Cir. 2022). The court emphasized that the rent control at issue in *Yee* "neither deprived landlords of their right to evict nor compelled landlords to continue leasing the property past the leases' termination." *Id.* (citing *Yee*, 503 U.S. at 527–28). The court held that the property owners made a plausible *per se* physical takings claim where the challenged executive orders "forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated." *Id.*

In August this year the Federal Circuit reached the same conclusion in *Darby Dev. Co., Inc.* v. *U.S.*, 112 F.4th 1017, 1037 (Fed. Cir., 2024). Holding that *Cedar Point Nursery* controlled, the court reasoned that "at a fundamental level, we cannot reconcile how forcing property owners to occasionally let union organizers on their property infringes their right to exclude, while forcing them to house non-rent-paying tenants (by removing their ability to evict) would not." *Id.* at 1035. Conversely, *Yee* "was fundamentally a rent-control case," and "the laws at issue in *Yee* expressly *permitted* eviction for nonpayment of rent." *Id* (emphasis in original).

Darby is instructive on another point too. What is salient in these eviction-moratorium cases is not only the end result, but the means the government uses to get there. *Id.* at 1037. "The Constitution, however, is concerned with means as well as ends. . . . As Justice Holmes noted, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way.'" *Horne*, 576 U.S. at 362 (quoting *Penn. Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922)). If the city wanted

to prevent evictions it could have attempted to do so legally—by compensating landowners as the Fifth Amendment requires. Instead, it chose to cut corners to reach the result it wanted: free housing.

By contrast, the Ninth Circuit found that the property owners' merely renting their properties meant that almost any government actions that "adjust[ed] the existing relationship between landlord and tenant" would not be a physical taking. See Pet. App. 3a–4a. *Yee* does not compel such an outcome. Indeed, "[i]n the words of Justice Holmes, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *Yee*, 503 U.S. at 529 (quoting *Penn. Coal Co.*, 260 U.S. at 415).

Yee involved a rent control regulation that limited the rent that could be charged for the land beneath mobile homes. See *id.* at 524–25. The property owners claimed that rent control was a compelled physical invasion because it allowed continued occupancy at below-market rents. *Id.* The owners were not seeking to evict their current tenants, but they maintained the right to do so on numerous grounds. See *id.* at 524, 527–28. Under those circumstances, the Court found that the rent control must be evaluated under the *ad hoc* balancing test of *Penn Central Transp. Company* v. *New York City*, 438 U.S. 104, 124 (1978), rather than as a physical taking of the leased property. See *Yee*, 503 U.S. at 528–31. Significantly, *Yee* does *not* establish a categorical rule that once a property owner chooses to lease to an occupant the government is free to authorize or require physical occupation of that property under different terms or conditions.

The various courts' misapplication of *Yee*, see Pet. 28, underscores the need for this Court to clarify *Yee*'s scope and limitations. "The [circuit] split thus far is rooted in some courts' misunderstanding of *Yee's* limited application. . . . Crucially, the decision in *Yee* did not force any owner to bear interminable third-party occupation without or well past the expiration of agreed-upon terms." Spiegelman, *supra*, at 398.

Ironically, governmental "regulatory" takings such as the eviction moratorium cause more harm than they do good. Like a sugar high, they feel good until they wear off; but long term, they are not healthy for tenants, landlords, cities, or the economy. "Economists across the political spectrum are in virtual agreement that tenancy controls tend to reduce the quantity and quality of affordable housing." *Id*. at 392–93.

There is no dispute that eviction moratoria financially harm landlords. But more fundamentally, the moratoria violate their constitutional rights. While money can be repaid, rights, once deprived, can never be fully restored. See *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14, 19 (2020) (*per curiam*) (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976)) (noting that deprivation of a fundamental right "for even minimal periods of time, unquestionably constitutes irreparable injury"). The Takings Clause's fundamental purpose is to prevent the government "from commandeering . . . property, especially where the requisition is unrelated to any harmful use on the owners' parts." Spiegelman, *supra*, at 397. Indeed,

> [o]vernight, moratoria cancelled arms-length, agreed-upon terms made between tens of thousands of tenants and

> landlords operating in the free market. State and local eviction bans indeed "compelled" owners to host trespassers who, while it is true were initially invited, had long outstayed their welcome. And, having violated the terms of their lease, or, more commonly, having seen its expiration, these tenants lost all proprietary interest in those units that only the state's intervention then enabled them to occupy.

Id. at 399.

The Court should grant review to resolve the split between the Eighth Circuit and the Federal Circuit on one side, and the Ninth Circuit and the Washington Supreme Court on the other. It is time to clarify the scope and limitations of *Yee*.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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