No. 24-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In March 2020, the City of Los Angeles adopted one of the most onerous eviction moratoria in the country, stripping property owners like Petitioners of their right to exclude nonpaying tenants. The City pressed private property into public service, foisting the cost of its coronavirus response onto housing providers to avoid expensive and less expedient—but constitutional—means to help those in need. In doing so, the City in effect imposed and transferred to defaulting tenants an exclusive easement in the private property of others without paying for it. By August 2021, when Petitioners sued the City seeking just compensation for that physical taking, back rents owed by their unremovable tenants had ballooned to over $20 million. The moratorium concluded in 2024.

Relying on a mobile home rent control case from this Court, *Yee v. City of Escondido*, the Ninth Circuit affirmed dismissal of Petitioners' complaint because they "voluntarily opened" their properties to tenants in the first instance and thus could never state a physical takings claim against the City's law, drastic as it was. The Federal and Eighth Circuits disagree. In *Darby Development Co. v. United States* and *Heights Apartments, LLC v. Walz*, both courts held *Yee* inapposite and validated identical claims because moratoria like the City's deprive owners of the right to exclude akin to *Cedar Point Nursery v. Hassid*.

The question presented is:

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

PARTIES TO THE PROCEEDINGS

GHP Management Corporation; 918 Broadway Associates, LLC; LR 9th & Broadway, LLC; Palmer Temple Street Properties, LLC; Palmer/City Center II; Palmer Boston Street Properties I, LP; Palmer Boston Street Properties II, LP; Palmer Boston Street Properties III; Bridewell Properties, Limited; Palmer St. Paul Properties, LP; Palmer/Sixth Street Properties, L.P.; Figter Limited; Warner Center Summit Ltd.; and Palmer/Third Street Properties, L.P., were the plaintiffs and appellants in all proceedings below.

The City of Los Angeles was the defendant and appellee in all proceedings below.

Alliance of Californians for Community Empowerment Action, Strategic Actions for a Just Economy, and Coalition for Economic Survival were intervenor-defendants and intervenor-appellees in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Petitioner GHP MANAGEMENT CORPORATION is a California corporation, has no parent corporation and is not a publicly traded corporation.

Petitioner 918 BROADWAY ASSOCIATES, LLC, a Delaware limited liability company, is owned in part by Palmer Broadway, L.P., and also in part by LR Broadway Holdings, LLC, and issues no shares.

Petitioner LR 9TH & BROADWAY, LLC, a California limited liability company, is owned in part

by Palmer Broadway, L.P., and also in part by L&R Investment Company, and issues no shares.

Petitioner PALMER TEMPLE STREET PROPERTIES, LLC, a California limited liability company, is owned in part by Da Vinci Apartments, LLC, and issues no shares.

Petitioner PALMER/CITY CENTER II, a California limited partnership, issues no shares.

Petitioner PALMER BOSTON STREET PROPERTIES I, LP, a Delaware limited partnership, issues no shares.

Petitioner PALMER BOSTON STREET PROPERTIES II, LP, a Delaware limited partnership, is owned in part by Palmer Boston Street Properties II, Inc., a California corporation, and issues no shares.

Petitioner PALMER BOSTON STREET PROPERTIES III, a California limited partnership, is owned in part by Orsini III, LLC, a Delaware limited liability company, and issues no shares.

Petitioner BRIDEWELL PROPERTIES, LIMITED, a California limited partnership, is owned in part by Pasadena Park Place, LLC, a Delaware limited liability company, and issues no shares.

Petitioner PALMER ST. PAUL PROPERTIES, LP, a Delaware limited partnership, is owned in part by Piero Properties, Inc., a California corporation, and issues no shares.

Petitioner PALMER/SIXTH STREET PROPERTIES, L.P., a California limited partnership, is owned in part by Piero Properties II, LLC, a

Delaware limited liability company, and issues no shares.

Petitioner FIGTER LIMITED, a California Limited Partnership, is owned in part by Figter, Inc., a California corporation, and issues no shares.

Petitioner WARNER CENTER SUMMIT, LTD., a California Limited Partnership, is owned in part by Summit Warner Center Apartments, LLC, a Delaware limited liability company, and also in part by Palmer-Warner Center, LTD., a California limited partnership, and issues no shares.

Petitioner PALMER/THIRD STREET PROPERTIES, L.P., a California limited partnership, is owned in part by Visconti Apartments, LLC, a Delaware limited liability company, and issues no shares.

Other entities holding interests in Petitioners include Malibu Consulting Corp., Palmer/City Center II, Inc., and Palmer Boston Street Properties, I, Inc., each a California corporation that issues no shares except to principals of the firm.

No publicly traded company holds shares in any of the corporations or entities listed in this statement.

RELATED PROCEEDINGS

GHP Mgmt. Corp. v. City of Los Angeles, No. 23-55013, 2024 WL 2795190 (9th Cir. May 31, 2024).

GHP Mgmt. Corp. v. City of Los Angeles, No. 2:21-cv-06311-DDP-JEM, 2022 WL 17069822 (C.D. Cal. Nov. 17, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners GHP Management Corporation, et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–6a) affirming the district court can be found at 2024 WL 2795190. The decision of the district court (App. 7a–22a) dismissing Petitioners' claims can be found at 2022 WL 17069822.

JURISDICTION

The Ninth Circuit issued its opinion on May 31, 2024. App. 1a. Justice Kagan extended the time to file a petition for a writ of certiorari to October 13, 2024, with additional extension pursuant to SUP. CT. R. 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND ORDINANCE AT ISSUE

The Fifth Amendment to the United States Constitution provides in relevant part, "nor shall private property be taken for public use, without just compensation."

The City of Los Angeles's eviction moratorium provided at the time of filing the complaint:[1]

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[1] The ordinance at issue is reprinted in full at App. 63a–71a. While this case was pending appellate review, the ordinance was amended to reflect the end of the "Local Emergency Period." *See* L.A., CAL., MUN. CODE ch. IV, art. 14.6, § 49.99.2 (2024)

A. During the Local Emergency Period and for 12 months after its expiration, no Owner shall endeavor to evict or evict a residential tenant for non-payment of rent during the Local Emergency Period if the tenant is unable to pay rent due to circumstances related to the COVID-19 pandemic. These circumstances include loss of income due to a COVID-19 related workplace closure, child care expenditures due to school closures, health-care expenses related to being ill with COVID-19 or caring for a member of the tenant's household or family who is ill with COVID-19, or reasonable expenditures that stem from government-ordered emergency measures. Tenants shall have up to 12 months following the expiration of the Local Emergency Period to repay any rent deferred during the Local Emergency Period. Nothing in this article eliminates any obligation to pay lawfully charged rent.

(amendments effective January 27, 2023). This petition will refer to the ordinance as it was adopted at the time of filing the complaint in August 2021 unless otherwise noted.

INTRODUCTION

This petition presents an important question concerning limits to the government's power to take private property without paying for it, and is one in which several courts of appeals are in sharp divide: whether eviction moratoria that deprive property owners of the right to exclude nonpaying tenants effect a physical taking necessitating payment of just compensation.

Over the last century, this Court has routinely affirmed that private property ownership, and the legal system's protection of it, is fundamental to social order. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021). Recognized protections are broad. Absent just compensation, the government cannot take title to private property. U.S. CONST. amend. V. The government cannot regulate its use in ways that, in the enduring words of Justice Holmes, go "too far." *Pennsylvania Coal Co. v. Mahon* 260 U.S. 393, 415 (1922). And—relevant here—the government cannot conscript private property through physical occupation or authorize others to do so, at least without paying the owner for the privilege. *Cedar Point*, 594 U.S. at 152–53.

Even so, the City of Los Angeles, like many other cities and states around the country, effectively deprived property owners within its jurisdiction of the fundamental right to exclude others from private property. The reasons for doing so were putatively public; faced with the spread of coronavirus, the City hastily confected a prohibition on owners evicting nonpaying tenants via the state's unlawful detainer laws.

This prohibition lingered for years and lured hundreds of thousands of tenants into moral hazard, each often racking up tens of thousands of dollars in back rents that, in reality, will never be repaid. Petitioners alone were owed over $20 million by unremovable tenants in August 2021 when suit was brought against the City while the moratorium was still in effect. The moratorium finally concluded in January 2024.

Observing that Petitioners' nonpaying tenants could not be removed as a direct consequence of the City's eviction moratorium, Petitioners argued in the district court that the moratorium constituted a physical taking necessitating the payment of just compensation under cases like *Cedar Point*, but otherwise did not question the policy's wisdom and did not seek to enjoin it. Their claim was bolstered by this Court's remarks affirmatively linking the federal government's eviction moratorium with the lodestar case for physical takings: "preventing [owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 765 (2021) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

The district court dismissed the complaint on the City's motion, holding that because Petitioners initially invited the tenants via a lease, that alone would forever defeat a physical takings claim as a matter of law, citing *Yee v. City of Escondido*, 503 U.S. 519 (1992). The Ninth Circuit affirmed.

But not all courts agree. In fact, the Ninth Circuit is of the minority view so far as federal appellate courts are concerned. Had Petitioners been situated to bring suit in either the Federal or Eighth Circuits, this case would have proceeded to discovery and trial. Relying on *Cedar Point*, the Federal Circuit held that a physical takings claim was stated against the federal government's eviction moratorium for depriving the plaintiffs there of the right to exclude. *See Darby Dev. Co. v. United States*, 112 F.4th 1017, 1034–37 (Fed. Cir. 2024). "*Yee*, meanwhile, is distinguishable and does not control here." *Id.* at 1035. The Eighth Circuit holds likewise. *See Heights Apartments, LLC v. Walz*, 30 F.4th 720, 732–33 (8th Cir. 2022).

With a clear circuit split on a single and important constitutional question, it is time for clarity on the answer.

This petition does not claim that the City's eviction moratorium augurs a slippery slope of worse things to come. This is because we have already tumbled to the bottom. It is hard to imagine a more drastic restriction that is not plainly a taking—and the City's moratorium proved to be one of the most severe in the country. Whether Petitioners are entitled to a particular amount of compensation is a matter for another day, but Petitioners cannot even make it past the courthouse doors to ask the question if the Ninth Circuit is to be believed.

Make no mistake—while this case comes garbed in pandemic-era trappings, it has little to do with the coronavirus. Rather, the pandemic served only as a catalyst for an unprecedented expansion of

power in which local electeds arrogated the means to press private property into public service without paying for it. The only grounds claimed for such sweeping authority? *Yee*. Nothing more.

And certainly not the Constitution.

The petition should be granted.

STATEMENT OF THE CASE

A. The City of Los Angeles enacted one of the most severe eviction moratoria in the country effectively banning evictions for nonpayment of rent, thereby compelling owners of private property to provide almost unconditional public housing.

On March 27, 2020, the Los Angeles City Council enacted an ordinance imposing a moratorium on most all evictions. *See* App. 47a–48a (¶¶ 40–43), 63a. The eviction moratorium was signed by Mayor Eric Garcetti on March 31, 2020, but retroactively applied to "nonpayment eviction notices, no-fault eviction notices, and unlawful detainer actions based on such notices, served or filed on or after the date on which a local emergency was proclaimed." App. 70a (§ 49.99.5). The eviction moratorium was to remain in effect for the duration of the indefinite "Local Emergency Period," which ran from March 4, 2020 to the end of the emergency as declared by the Mayor. App. 66a–67a (§§ 49.99.1(C), 49.99.2(A)).

The City's eviction moratorium prohibited property owners from terminating tenancies based on (1) a tenant being "unable to pay rent" due to the coronavirus; (2) any "no-fault" reason for termination;

(3) certain lease violations relating to unauthorized occupants, unauthorized pets, and nuisance; and (4) the Ellis Act, a state law that otherwise allows housing providers to exit the rental market. App. 66a–67a, 69a (§§ 49.99.2(A)–(C), 49.99.4).

The eviction moratorium provided that owners could not "endeavor to evict" any tenant with such an inability to pay, in addition to providing that tenants could assert an affirmative defense to an unlawful detainer action on those grounds. App. 66a–67a, 70a (§§ 49.99.2(A), 49.99.6). The law's provision of an affirmative defense was particularly troublesome because the ordinance did not require tenants to offer any evidence at all regarding their purported inability to pay. *See* App. 65a–66a, 70a (§§ 49.99.1(B) (providing in triple-negative fashion that evictions are prohibited where an owner "lacks a good faith basis to believe that the tenant does not enjoy the benefits of this article," but otherwise not requiring any effort by the tenant to show protections were legitimately asserted), 49.99.6 (providing simply: "Tenants may use the protections afforded in this article as an affirmative defense in an unlawful detainer action."). Thus, it was in substance an irrebuttable defense.[2]

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[2] The City argued below that tenants would eventually need to prove their inability to pay before an unlawful detainer court. This is illusory. The moratorium provided no definition of what constitutes an inability to pay, so that inquiry would boil down to taking tenants at their word. At best, it would leave it to wildly varying judgment calls by unlawful detainer courts. Further, it is unlikely that owners would file, and likely did not file, unlawful detainers in the first place due to risk of liability to the tenant for "endeavoring to evict" them, explained below.

Housing providers who violated the ordinance—*e.g.*, by "endeavoring to evict" a tenant—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. App. 70a–71a (§§ 49.99.7, 49.99.8). This presented a vexing problem for property owners like Petitioners. If they were wrong in their hunch that their tenant was in fact able to pay—and it could only ever be a hunch because the City did not require evidence of, or even an attestation by tenants reflecting, such inability—they were at risk of crushing civil liability and penalties. If they were right (though they could never know it), tenants could, and very likely did, capitalize on the lack of required proof to nakedly assert such an inability, once again subjecting owners to harsh liability and penalties.

The City eventually amended its eviction moratorium to conclude the Local Emergency Period on January 31, 2023. *See* L.A., CAL., MUN. CODE ch. IV, art. 14.6, § 49.99.2(A) (2024). This meant that evictions could proceed for rent debts accruing in February 2023 and thereafter. However, evictions continued to be prohibited for an additional six months for rent debts accruing between March 2020 and September 2021, and for twelve months for rent debts accruing between October 2021 and January 31, 2023. *Id.*

While the text of the moratorium purported to not eliminate the obligation to pay lawfully charged rent, it did not provide any assurances that property owners will actually recover back rents owed by tenants at the end of the grace period. App. 67a

(§ 49.99.2(A)). For example, it only provided that tenants "may" agree to a contractual repayment plan, but were not required to do so. *Id.*

In short, a tenant who failed to pay rent at any time during the Local Emergency Period—potentially as early as March 2020—could simply stop paying rent, provide no proof that they were unable to pay, and refuse to repay back rents incurred until either August 2023 or February 2024 (depending on the circumstances) before a property owner had any legal way to remove them from the property. Meanwhile, owners were not excused from property tax liabilities, insurance costs, debt service, payment of utilities, or any of the other substantial costs incurred to maintain habitable dwellings. App. 49a (¶ 46). The entirety of the ordinance thus inured to the exclusive benefit of tenants while forcing owners to indefinitely provide the equivalent of public housing at their sole expense.

By depriving Petitioners of their right to exclude defaulting tenants, the City plucked one of Petitioners' most essential sticks from their bundle of rights. In effect, the City imposed and transferred to each and every defaulting tenant an exclusive easement in Petitioners' property. The City took this exclusive easement interest for public use *without* paying any form of just compensation to Petitioners for that taking.

B. Petitioners are only some of the thousands of housing providers that were prevented for years from removing nonpaying tenants by the City's eviction moratorium.

Petitioners own and manage luxury apartment communities, providing over 4,800 units to predominantly high-income tenants in the City of Los Angeles. *See* App. 33a–41a (¶¶ 9–22).

Petitioners alleged at the time of filing the complaint in August 2021 that back rents were "well in excess" of $20 million as a direct result of the City's eviction moratorium. App. 32a, 51a (¶¶ 7, 50). The 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.[3] App. 31a (¶ 3). Instead, they were "required to allow defaulting tenants to accrue millions of dollars in back rents, and have been prevented from physically removing any defaulting tenants and replacing them with paying tenants." App. 51a (¶ 51).

C. Proceedings Below

In August 2021, Petitioners filed suit against the City in the Central District of California, and the case was assigned to the Honorable Dean D. Pregerson. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367(a). Petitioners asserted in the complaint that the City's

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[3] *See Lindsey v. Normet*, 405 U.S. 56, 71–72 (1972), discussing the provision by states of "a speedy, judicially supervised proceeding" in exchange for owners giving up their common law right to self-help.

eviction moratorium constituted an uncompensated physical taking of private property in violation of the Fifth Amendment. *See* App. 53a–56a (¶¶ 57–67).[4] Specifically, it was alleged that the moratorium required Petitioners to continue furnishing their properties, at that time indefinitely, to defaulting and nonpaying tenants. App. 54a (¶ 61). Moreover, by depriving Petitioners of their historic right to institute unlawful detainer proceedings against nonpaying tenants, the City stripped Petitioners of the legal means to physically remove tenants in default. *Id.* In doing so, the City took from Petitioners "the fundamental right to exclude." *Id.* On these terms, it was alleged that the City's eviction moratorium constituted "government-authorized physical invasions . . . requiring just compensation." App. 54a–55a (¶ 61).

Petitioners recognized in their complaint that the owner-tenant relationship has been the subject of reasonable regulation historically, but "property owners have never been subject to regulations requiring persistent and indefinite occupation by defaulting and nonpaying tenants." App. 55a (¶ 62). On this point, Judge Pregerson previously agreed in an earlier case addressing the validity of the law: "[T]he scope and nature of the COVID-19 pandemic,

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[4] Petitioners asserted identical claims arising under the California Constitution. *See* App. 60a–61a (¶¶ 79–84); *see also Cal. Bldg. Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 1008 (Cal. 2015) (Werdegar, J., concurring) (California takings claims are analyzed congruent with federal law). Petitioners also asserted that the eviction moratorium constituted a regulatory taking under *Penn Central Transp. Co. v. City of New York*, 439 U.S. 883 (1978), but do not now seek review of those claims.

and of the public health measures necessary to combat it, have no precedent in the modern era, and that no amount of prior regulation could have led landlords to expect anything like the blanket Moratorium." *Apartment Ass'n of Los Angeles Cnty., Inc. v. City of Los Angeles*, 500 F.Supp.3d 1088, 1096 (C.D. Cal. 2020).

Petitioners prayed only for a declaration establishing the City's liability for just compensation in an amount to be determined by a jury, an award of damages pursuant to 42 U.S.C. § 1983, and an award of reasonable attorney's fees and costs under 42 U.S.C. § 1988. App. 61a–62a (Complaint, Prayer at ¶¶ 1–3). Petitioners did not seek to enjoin the moratorium.

Judge Pregerson dismissed the complaint on the City's motion pursuant to Rule 12(b)(6). *See* App. 7a–22a. To do so, the district court relied on *Yee v. City of Escondido*, 503 U.S. 519 (1992), and rejected Petitioners' argument that *Loretto* and *Cedar Point* are instead the controlling authority.

The court broadly read *Yee*—a case concerning a local rent control law for mobile home parks—to hold essentially that because Petitioners "invited" tenants onto their property via a lease, subsequent regulation of that relationship is rendered immune from physical takings claims: "A regulation affecting that pre-existing relationship is not a per se taking." App. 14a, 15a. Judge Pregerson explained:

> [A]s in *Yee*, the Moratorium does not swoop in out of the blue to force Plaintiffs to submit to a novel use of their property. Nor does the Moratorium present the type

> of different case, contemplated by *Yee*, where a regulation compels a landowner to "refrain in perpetuity from terminating a tenancy." The Moratorium only precludes evictions for a limited, albeit indeterminate, time.

App. 14a (quoting *Yee*, 503 U.S. at 528).

The district court granted leave to amend, but it was plain that if *Yee* precluded Petitioners' physical takings claims by sole virtue of their "invitation" to tenants to lease, then no set of facts could be pled which would overcome a second motion to dismiss as a matter of law. Accordingly, Petitioners elected to stand on their pleadings and the district court dismissed the complaint with prejudice. App. 25a–26a (notice of intent to not amend), 23a–24a (dismissal). Petitioners timely appealed.

On May 31, 2024, the Ninth Circuit affirmed. *See* App. 1a–6a. Relying on *Yee*, the Ninth Circuit concluded that the City's eviction moratorium "does not effect a physical taking because the Landlords voluntarily opened their property to occupation by tenants." App. 4a. The court continued:

> Under the Supreme Court's current jurisprudence, a statute that merely adjusts the existing relationship between landlord and tenant, including adjusting rental amount, terms of eviction, and even the identity of the tenant, does not effect a taking.

App. 3a (citing *Yee*, 503 U.S. at 527–28; *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987)).

The Ninth Circuit dismissed Petitioners' argument that it should follow the only then-existing circuit authority on the question, *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), that validated a claim against an eviction moratorium per *Cedar Point* and found *Yee* inapposite. Despite *Heights Apartments*' persuasive nature due to its strikingly similar posture and substance to this case, the Ninth Circuit believed itself to be "bound by *Yee*." App. 4a n.2.

Justice Kagan granted an extension for filing of this petition until October 13, 2024, which is further extended pursuant to SUP. CT. R. 30.1. Petitioners now seek timely review.

REASONS FOR GRANTING THE PETITION

A. Certiorari is needed to resolve the split between the Ninth Circuit applying *Yee* on one hand, and the Federal and Eighth Circuits applying *Cedar Point* on the other, to physical takings claims against eviction moratoria.

The Ninth Circuit is now decidedly split with the Federal and Eighth Circuits on the question of whether cases like *Cedar Point* apply to physical takings claims against eviction moratoria, or if *Yee* is instead the proper focus. Certiorari should be granted to clarify the lodestar.

The Ninth Circuit below was squarely asked whether Petitioners stated a claim for a physical taking against the City of Los Angeles's eviction moratorium because the ordinance deprived them of the right to exclude nonpaying tenants. The Ninth

Circuit held that Petitioners did not, citing *Yee*, and affirmed dismissal of Petitioners' claims. *See* App. 1a–6a.

This is par for the course in the Ninth Circuit. That court earlier affirmed a grant of summary judgment in favor of the City of Seattle facing physical takings claims against its own eviction moratorium. *See El Papel, LLC. v. City of Seattle*, No. 22-35656, 2023 WL 7040314 (9th Cir. Oct. 26, 2023), *cert. denied* 144 S. Ct. 827 (2024). The Ninth Circuit held there that *Yee* "forecloses the Landlords' per se physical-taking claim." *Id.* at *2. While recognizing that the appellants made "some compelling points" that *Cedar Point* should apply, the Ninth Circuit distinguished *Cedar Point* because "Seattle's eviction restrictions did not impose a physical occupation on the landlords," nor did it "compel the Landlords to use their property for a specific purpose." *Id.* Above all, the owners in *El Papel* "chose to use their property as residential rentals; the tenants' occupancy was not imposed over the Landlords' objection in the first instance." *Id.* (citing *Yee*, 503 U.S. at 528).

Likewise, in *Bols v. Newsom*, No. 22-56006, 2024 WL 208141 (9th Cir. Jan. 19, 2024), the Ninth Circuit rejected a *Cedar Point*-based argument against a commercial eviction moratorium. Citing *Yee*, the court held that the moratorium "does not constitute an 'invasion' of property because it does not require commercial lessees to accommodate tenants other than those that they already voluntarily invited." *Id.* at *1.

Thus, it is plain that *Yee* serves as the touchstone in the Ninth Circuit for physical takings

claims made against regulations that deprive property owners of their fundamental right to exclude nonpaying tenants, not *Cedar Point*. And under that standard, owners simply cannot survive a motion to dismiss as a matter of law because they initially "invited" the tenant onto the property by way of a lease.

The Federal Circuit sees things the other way. *See Darby Dev. Co. v. United States*, 112 F.4th 1017 (Fed. Cir. 2024). There, the court was faced with the identical legal question regarding the CDC's eviction moratorium and held opposite to the Ninth Circuit on the same posture. *Id.* at 1022.

In holding that *Cedar Point* provides the appropriate standard instead, the court emphasized that just as in *Cedar Point*, where absent a regulation, the property owners retained the right to exclude union organizers from their property, "here Appellants alleged (and there has been no dispute) that, absent the Order, they could have evicted (or 'excluded' from their property) at least some non-rent-paying tenants." *Id.*; *compare id.*, *with* App. 54a (Complaint, ¶ 61). "And, just as the *Cedar Point* regulation resulted in government-authorized physical invasion . . . here, too Appellants alleged that the Order, by removing their ability to evict non-rent-paying tenants, resulted in 'government-authorized invasion, occupation, or appropriation' of their property." *Darby*, 112 F.4th at 1034; *compare id.*, *with* App. 54a–55a (¶ 61).

The *Darby* court extensively reviewed *Yee*, which it held to be inapposite as it was "fundamentally a rent-control case." *Darby*, 112 F.4th at 1035. "The

[*Yee*] Court simply was not presented with something akin to what has been challenged here: an outright prohibition on evictions for nonpayment of rent." *Id.*; *see also id.* (noting that the petitioners in *Yee* retained the right to evict tenants for nonpayment of rent).

The Eighth Circuit is in accord with the Federal Circuit. In *Heights Apartments, LLC v. Walz*, that court also held opposite to the Ninth Circuit on identical posture to this case. 30 F.4th 720 (8th Cir. 2022). There, property owners sued Minnesota Governor Tim Walz claiming that the Governor's executive order imposing a statewide residential eviction moratorium constituted a physical taking of property. *Id.* at 724.

The district court dismissed the plaintiffs' claims pursuant to Rule 12(b)(6). *Id.* at 725. On appeal, the owners argued that this Court's opinion in *Cedar Point* was the appropriate standard because the Minnesota law "forced landlords to accept the physical occupation of their property regardless of whether tenants provided compensation." *Id.* at 733. Governor Walz argued in response that the moratorium "imposed only a restriction on when a landowner could evict a tenant," and therefore *Yee* was the controlling authority. *Id.*

The Eighth Circuit unambiguously held in favor of the owners: "*Cedar Point Nursery* controls here and *Yee*, which the Walz Defendants rely on, is distinguishable." *Id.* "Here, the [executive orders] forbade the nonrenewal and termination of ongoing leases, even after they had been materially violated[.]" *Id.* And because the *Heights Apartments* plaintiffs alleged that the Minnesota law "turned every lease in

Minnesota into an indefinite lease, terminable only at the option of the tenant," they "sufficiently alleged that the Walz Defendants deprived [them] of [their] right to exclude existing tenants without compensation," and such allegations were sufficient to survive a motion to dismiss pursuant to *Cedar Point*. *Id.*

Accordingly, Petitioners present the Court with a single and important question of constitutional law upon which at least three federal circuits are squarely split. But by granting this petition, the Court can also clarify this question for litigants who may pursue state-based takings claims throughout the country, as state courts are in equal discord on the answer. An "overwhelming majority" of states have parallel takings provisions in their own constitutions. Gerald S. Dickinson, *Federalism, Convergence, and Divergence in Constitutional Property*, 73 U. MIAMI L. REV. 139, 156 (2018). State courts "prefer to follow, rather than diverge from, the Supreme Court's takings jurisprudence." *Id.* at 142.

Granting certiorari can therefore help to quiet a disquieting area of law—including instances, like here, where the Petitioners have experienced diametric outcomes between state and federal courts interpreting the identical law to answer the identical question.

For example, Petitioner GHP Management Corporation and related plaintiffs also brought suit in state court against the County of Los Angeles and State of California for eviction moratoria governing other properties under an identical physical takings theory. The Los Angeles Superior Court denied the

government defendants' motions to dismiss pursuant to *Loretto* and *Cedar Point* and held *Yee* to be inapposite. *See GHP Mgmt. Corp. v. County of Los Angeles*, No. 21CHCV00595 (L.A. Super. Ct. Apr. 15, 2022) (reprinted at App. 72a–88a). That matter is in discovery and trial is anticipated to commence in 2026. This is, however, not a uniform outcome. *Compare id.*, *with Gonzales v. Inslee*, 535 P.3d 864 (Wash. 2023) *cert. denied*, 144 S. Ct. 2685 (2024) (Washington Supreme Court affirming dismissal of state-based takings claims against an eviction moratorium, citing *Yee* and rejecting application of *Cedar Point*).

B. The Ninth Circuit falls on the wrong side of the split via its expansive and repeated misreading of *Yee*.

Properly read, *Yee* is not actually in tension with cases like *Cedar Point* and *Loretto*. This is because *Yee* is "fundamentally a rent-control case," not a physical takings case. *Darby*, 112 F.4th at 1035. It involves a highly "unusual" property arrangement, namely, ownership of chattel housing by tenants on real property owned by others. *Yee*, 503 U.S. at 523–24, 526. And it further reaffirms, as in both *Cedar Point* and *Loretto*, that "the 'right to exclude' is doubtless . . . 'one of the most essential sticks'" in the property rights bundle. *Id.* at 528 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

The problem with *Yee* stems from lower courts' misapplication of its holding to wildly different facts—including, as here, where the City's eviction moratorium deprived Petitioners for years of the fundamental right to exclude nonpaying tenants, in effect taking from Petitioners an exclusive easement

and giving it to tenants in default. *See Darby*, 112 F.4th at 1035 ("The Court simply was not presented with something akin to what has been challenged here[.]"). This is puzzling for several reasons, not the least of which is because of *Yee*'s express recognition that the park owners there retained the right to evict tenants for "nonpayment of rent," tenant violation of law or park rules, or to exit the mobile home park market altogether. *Yee*, 503 U.S. at 524; *contra* App. 66a–67a (§ 49.99.2(A)–(C)). *That* case is not *this* case.

In *Yee*, this Court was asked to consider a relatively narrow challenge to a local ordinance that, on its face, was limited to controlling rents for mobile home communities. *See* 503 U.S. at 524–25. Petitioners' argument was nuanced, claiming that the local ordinance, when considered in light of a state law that was not directly challenged, effected a physical taking because of the "unusual economic relationship" between park and mobile home owners—*i.e.*, mobile home owners cannot realistically move their chattel housing, and park owners cannot force the removal of the home nor control the identity of subsequent purchasers ("provided that the purchaser has the ability to pay the rent"). *Id.* at 524 (citing CAL. CIV. CODE § 798.74), 526–27.

The petitioners claimed that "the rent control ordinance has transferred a discrete interest in land—the right to occupy the land indefinitely at a submarket rent—from the park owner to the mobile home owner." *Id.* at 527. The "tenants could thus reap value that the park owners asserted belonged to them." *Darby*, 112 F.4th at 1034. Under those facts,

bizarre as they were, "no physical taking occurred." *Id.*

In holding that the rent control law at issue could not be challenged on physical takings grounds, the *Yee* decision makes reference to the voluntary nature of the petitioners' behavior. The petitioners had "voluntarily rented their land to mobile home owners," and that petitioners' tenants "were invited by petitioners, not forced upon them by the government." *Yee*, 503 U.S. at 527, 528. For support, *Yee* quoted another rent control case, *FCC v. Florida Power Corp.*, 480 U.S. 245, 252–53 (1987), to emphasize "the unambiguous distinction between a . . . lessee and an interloper with a government license." *Yee*, 503 U.S. at 532.

As explained above, however, and unlike here, "the laws at issue in *Yee* expressly *permitted* eviction for nonpayment of rent." *Darby*, 112 F.4th at 1035. And for its part, *Florida Power Corp.* was not a physical takings case based on the deprivation of the right to exclude because there the Court merely rejected a challenge to a law *reducing rents* charged by public utilities to cable providers for placement of lines on existing utility poles. *See Florida Power Corp.*, 480 U.S. at 252 ("Appellees contend, in essence, that it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79.").

It is true that the *Florida Power Corp.* opinion suggests that in that context, "it is the invitation, not the rent, that makes the difference." *Id.* But this statement can only take the government so far because the Court also recognized that at some point

the reduced rents would become unconstitutionally confiscatory, and that the regulation there still provided for payment of a "minimum reasonable rate." *Id.* at 253 (citing *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936)). In that case, just as in *Yee*, the Court was simply not faced with anything like here: a deprivation of the right to exclude vis-à-vis a prohibition on evictions *for nonpayment of rent*. *See Darby*, 112 F.4th at 1035. *Florida Power Corp.* cannot be read to mean that a regulation allowing cable providers to unilaterally withhold payment of pole rents without consequence would be a legitimate stretch of the original bargain.

What *Yee*'s properly understood holding accomplished is relatively narrow. What *Yee* does not hold, however, is much broader. As the Federal Circuit noted in *Darby*, *Yee* did not hold "that government actions implicating the landlord-tenant relationship can never be physical takings." *Id.* While *Yee* might confirm that state and local governments have the power to regulate tenancies in some ways, nothing in the decision can or should be read to *categorically* immunize government action from physical takings claims. *Yee*'s own language belies any such thing by providing the caveat that it would be a "different case" if a regulation were "to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528.

Further, *Yee*'s language suggesting that a physical takings claim might lie only where a regulation requires an owner to submit to tenant occupation "in perpetuity" must be discounted in light

of subsequent clarity provided by *Cedar Point* itself. As the Court has since made clear, "physical appropriation is a taking whether it is permanent or temporary." *Cedar Point*, 594 U.S. at 153.; *see also Darby*, 112 F.4th at 1036 (recognizing same). It matters not whether a physical taking is temporary or permanent—that fact only bears on the measure of compensation, *not* on whether a taking has occurred in the first place. *Cedar Point*, 594 U.S. at 153.

Given the dissimilarity between this case and *Yee*, the Ninth Circuit should have instead applied *Cedar Point*, just as the Federal and Eighth Circuits have done. As in *Cedar Point*, Petitioners have alleged that but for the City's regulation, they would have retained their right to exclude. App. 54a (¶ 61). And, also just as in *Cedar Point* where it was alleged that the challenged regulation resulted in a government-authorized occupation of their property through the deprivation of that right, Petitioners have done so here. App. 54a–55a (¶ 61).

As this Court recently observed in *Sheetz v. County of El Dorado*, "the right to compensation is triggered" where the government "interfere[s] with the owner's right to exclude others from it." 601 U.S. 267, 274 (2024) (citing *Cedar Point*, 594 U.S. at 149–52). "That sort of intrusion on property rights is a *per se* taking." *Id.* (citing *Loretto*, 458 U.S. at 426). This simple principle applies here with equal vigor. Petitioners remain baffled, like the Federal Circuit, "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." *Darby*, 112 F.4th at 1035.

It is no surprise that this Court has already agreed with this principle *in the very context presented by this petition*, because it is one that is so basic as to be beyond reproach: "preventing [owners] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 765 (2021) (citing *Loretto*, 458 U.S. at 435).

C. *Yee*'s "voluntary principle" is unsound, and this Court should use this opportunity to limit it.

In some sense, this case revolves around the significance (or not) of Petitioners' initial invitation to lease the premises. That is certainly the hook upon which both lower courts hung their respective hats, finding *Yee*'s "voluntary principle" enough to dismiss Petitioners' constitutional claims at the courthouse doors. App. 3a–4a, 14a–15a. The lower courts here are not alone in seizing upon this language as if it holds singular power to dismiss such claims, even where the challenged regulations indisputably operate to deprive owners of fundamental features of property like the right to exclude.

But it is hard to discern any sound basis for this principle. By reducing the inquiry into a single question—was the tenant invited?—courts focus on a superficial distinction while ignoring more apt precedent, like *Cedar Point*.

All invitations are contingent. If guests are invited to a holiday dinner, the invitees are rightly expected to not stay until spring. And if a property owner "invites" a tenant to inhabit property through a lease, then it is properly expected that the tenant will abide by the material terms of that lease, including the timely payment of rent. Once that ceases, the invitation no longer operates to control the relationship. That the government could allow the tenant to unilaterally extend the "invitation" destroys the contingent nature of the invitation itself.

All invitations share a second critical feature: they are dependent upon the availability of recourse if the invitee violates the conditions of the invitation. Few, if any, invitations would ever be extended otherwise. From the dinner example, the host could ask the guest to leave, a request that is backed by force of law if the guest refuses. *See* CAL. PENAL CODE § 602(o) (Deering 2024) (trespass). In modern tenant-law contexts, this means the opportunity to remove defaulting tenants via unlawful detainer proceedings. *See, e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 71–72 (1972). Eviction moratoria, like the one challenged here, attack both the contingency and dependency inherent in every owner-tenant "invitation," *i.e.*, observance of material lease terms and availability of recourse upon their violation.

Furthermore, if the invitation is truly the crux of the issue, then consider this. It would be unthinkable to absolve a local government from takings liability if, for example, a property owner were to extend an invitation to lease property to the government, only to have the government welch on its

rent payments and remain on the property to the exclusion of the owner. Rather, that would undoubtedly rise to a compensable physical taking of private property, even if the government later resumed rent payments.[5]

But if the hypothetical municipality is swapped for a private citizen who—acting under color of law—welches on rent payments to the same owner, for the same property, and for the same duration, then there cannot be a physical taking, at least according to the Ninth Circuit. Instead, the property owner must take her lumps because nobody forced her to lease, after all.

That is a very strange distinction. The Federal Circuit has rightly observed the paucity of reason behind it. By taking *Yee*'s voluntary principle to its logical end, there is no limit to its scope: "that would essentially mean that *all* government actions implicating the landlord-tenant relationship are immune from being treated as physical takings" because "just about every landlord-tenant relationship stems from a voluntary 'invitation' from the landlord to a tenant." 112 F.4th at 1036.

This principle has troubled legal commentators from the get go. As Professor Richard Epstein correctly predicted over 30 years ago:

> The dangerous doctrine, which receives a regrettable boost from the *Yee* decision, is that if the landowner voluntarily grants a limited estate, then the state can stretch

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[5] *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 153 (2021) ("we have held that a physical appropriation is a taking whether it is permanent or temporary").

> that interest into a fee simple without paying just compensation. . . . The long term consequences of the decision in *Yee* can only be negative.

Richard A. Epstein, Yee v. City of Escondido*: The Supreme Court Strikes Out Again*, 26 LOY. L.A. L. REV. 3, 17–18 (1992).

Even commentators critical of this Court's recent takings jurisprudence admit that this Court will eventually consider the question raised by the present petition:

> It seems possible, even likely, that the Court might revisit *Yee* in a future case and impose some limits on this form of the open-door argument. But for now, the initial invitation may work to preclude application of a *per se* rule in similar situations.

Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. OF CONST. L. & PUB. POL'Y 1, 15–16 (2022).

It is past time for the Court to limit *Yee*'s disastrous and unintended consequences. This petition presents such an opportunity.

D. This case presents a clean vehicle to check the government's power to take private property without paying for it.

If 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. This case revolves around a single legal

question for this Court's consideration, and its procedural posture is ideally situated for the Court to answer it as a matter of law.

The question presented was directly considered by the courts below, as well as the Eighth and Federal Circuits, against which the Ninth Circuit has split. And further, the answer is dependent solely on the Court's interpretation of its own precedent, including how physical takings claims against eviction moratoria interact with cases like *Loretto* and *Cedar Point*.

Finally, this Court's jurisdiction and the jurisdiction of the lower courts cannot be questioned—the matter clearly arises as a federal question and all relevant procedural requirements have been observed on this case's journey here. *See also* App. 2a–3a (Ninth Circuit rejecting City's claim that Petitioners lacked standing); 7a–22a & 22a n.5 (district court considering claims on the merits and expressly declining to consider ripeness and standing challenges).

While it is true that this Court recently twice passed on petitions similar to this one, that fact should not give the Court pause. In both cases—*El Papel, LLC. v. City of Seattle*, No. 22-35656, 2023 WL 7040314 (9th Cir. 2023), *cert. denied* 144 S. Ct. 827 (Feb. 20, 2024), and *Gonzales v. Inslee*, 535 P.3d 864 (Wash. 2023), *cert. denied*, 144 S. Ct. 2685 (June 24, 2024)—this Court did not have the benefit of the more recent decision issued by the Federal Circuit on August 7, 2024 in *Darby Development Co. v. United States*, further widening the circuit split. Now, the Federal *and* Eighth Circuits are opposed to the Ninth

Circuit on a squarely considered question of constitutional law. Further, the petitioners in *El Papel* only asserted nominal damages, whereas Petitioners here have asserted at least $20 million in damages resulting directly from the City's moratorium. *Compare El Papel*, 2023 WL 7040314, at *1, *with* App. 32a, 51a (¶¶ 7, 50). Moreover, the petitioners in *Gonzales* did not assert any federal claims in their suit against the State of Washington, and the petition for certiorari was sought on a challenge to the Washington Supreme Court's review of state-based claims. *See Gonzales*, 535 P.3d at 288–89. None of these arguable hurdles to certiorari are present here. Instead, this case presents a single, live, federal question for review, and Petitioners have asserted significant and serious losses that depend on the answer.

Finally, it is worth noting that nothing in this petition threatens the authority of the City, nor any other municipality for that matter, to respond to emergencies. *See Knick v. Township of Scott*, 588 U.S. 180 (2019) ("So long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities."). As its text makes plain, the Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power by requiring just compensation. *See, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536–37 (2005). Petitioners here did not seek to enjoin the City's moratorium, but only ask to be compensated for property interests taken from them by way of the City's eviction moratorium—"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).

* * *

Petitioners are property owners who were commanded by the City to bear the brunt of the public's response to the pandemic. They paid for it out of their own pockets to the tune of millions of dollars in unrecoverable rents. And they suffered years of forced acquiescence to housing nonpaying tenants whom they could not physically remove from their properties. The eviction moratorium challenged here, as Petitioners have amply alleged, was one of the most onerous in the country. This case therefore provides the Court with a rare opportunity to limit at the margins the rapidly expanding scope of municipal power to take private property without paying for it.

The Court should recognize this petition for what it is—a chance to once again affirm that the Fifth Amendment's protection of private property is not a second-class right.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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APPENDIX

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APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MAY 31, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55013

D.C. No. 2:21-cv-06311-DDP-JEM

GHP MANAGEMENT CORPORATION; *et al.*,

Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES,

Defendant-Appellee,

STRATEGIC ACTIONS FOR A JUST ECONOMY; *et al.*,

Intervenor-Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted April 11, 2024
Pasadena, California

Appendix A

Before: SILER,* BEA, and IKUTA, Circuit Judges.

MEMORANDUM**

GHP Management Corp. and thirteen owners of Los Angeles apartment buildings (collectively, "Landlords") appeal the district court's dismissal of their Fifth Amendment Takings Clause claims challenging section 49.99 of the Los Angeles Municipal Code, the City's eviction moratorium enacted during the COVID-19 pandemic. We have jurisdiction under 28 U.S.C. § 1291, and review de novo the grant of a motion to dismiss. *Fort v. Washington*, 41 F.4th 1141, 1144 (9th Cir. 2022).

The City argues that the Landlords lack standing to bring this action because they did not allege that section 49.99 thwarted their eviction of the tenants, and a landlord suffers no injury unless a tenant successfully raises section 49.99 as a defense to an effort to evict. We disagree. To demonstrate standing, a plaintiff must show an "injury in fact," among other elements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The City has prohibited landlords from evicting or endeavoring to evict a tenant for non-payment of rent "if the tenant is unable to pay rent due to circumstances related to the COVID-19 pandemic." L.A., Cal., Mun. Code § 49.99.2(A). A landlord who complies with this legal requirement must forego rental payments that would otherwise be due

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

under the lease. Each of the Landlords here has alleged either that some of its tenants "have taken advantage of the Eviction Moratorium to withhold payment of rent," or that it lost rent due to owning an apartment community in Los Angeles that is subject to the moratorium. These allegations of lost rent as a result of compliance with the City's applicable ordinances constitute an injury in fact; "[c]ertainly the Supreme Court has been satisfied by less." *Barnum Timber Co. v. U.S. EPA*, 633 F.3d 894, 898 (9th Cir. 2011); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012 n.3, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (holding that a complaint's prayer for "damages for the temporary taking" of property was sufficient to allege injury in fact at the pleading stage).

The Landlords failed to state a claim for a Fifth Amendment per se physical taking. Under the Supreme Court's current jurisprudence, a statute that merely adjusts the existing relationship between landlord and tenant, including adjusting rental amount, terms of eviction, and even the identity of the tenant, does not effect a taking. *See Yee v. City of Escondido*, 503 U.S. 519, 527-28, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 252, 107 S. Ct. 1107, 94 L. Ed. 2d 282 (1987) ("[S]tatutes regulating the economic relations of landlords and tenants are not *per se* takings."). "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land" by a third party. *Yee*, 503 U.S. at 527. The Supreme Court has made an "unambiguous distinction between a commercial lessee and an interloper with a government license." *Fla. Power*, 480 U.S. at 252-53; *cf. Cedar Point Nursery v. Hassid*, 594 U.S. 139, 152,

141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021) (explaining that "government-authorized invasions of property . . . are physical takings").[1] And the Court may consider whether a statute effected a taking "were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528. Here section 49.99 does not effect a physical taking because the Landlords voluntarily opened their property to occupation by tenants.[2] Moreover, section 49.99 did not compel landlords to rent property in perpetuity, but rather allowed landlords to evict their previously invited tenants for reasons not otherwise prohibited.[3]

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1. Therefore *Horne v. Department of Agriculture*, relied on by the Landlords, is not on point, because it involved a third party (the government) taking property, rather than an adjustment of voluntary relations between a landlord and a tenant. 576 U.S. 351, 365, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015).

2. Because we are bound by *Yee*, we decline to follow *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), which ruled that an eviction ordinance that prohibited the nonrenewal or termination of a lease absent specified circumstances constituted a per se physical taking. In reaching this conclusion, *Heights Apartments* distinguished *Yee* on the ground that the ordinance in that case did not deprive landlords of their right to evict. *Id.* at 733. But as explained by Judge Colloton, *see Heights Apartments, LLC v. Walz*, 39 F.4th 479, 480 (8th Cir. 2022) (Colloton, J., dissenting from denial of rehearing en banc), the ordinance in *Yee* did preclude landlords from evicting their present tenants, as well as their tenants' successors in interest, for most reasons, and yet "did not effect a *per se* taking."

3. The Landlords' reliance on *Alabama Association of Realtors v. Department of Health and Human Services*, 594 U.S. 758, 141

The Landlords also failed to state a claim for a Fifth Amendment regulatory taking. Here the Landlords failed to allege the diminution in property values they suffered as a result of the eviction moratorium, and alleged only the amount of rent lost. "But the mere loss of some income because of regulation does not itself establish a taking." *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018). Instead, "economic impact is determined by comparing the total value of the affected property before and after the government action." *Id.; see also Murr v. Wisconsin*, 582 U.S. 383, 395, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property.") (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)). Although *Colony Cove* considered the economic impact of an alleged taking after a jury trial, its formula for determining economic impact is binding at all stages of the litigation process. 888 F.3d at 451. While such diminution in value need not be shown where a statute completely abolishes "both the descent and devise of a particular class of property," *Hodel v. Irving*, 481 U.S. 704, 717, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987), such unusual circumstances are not present here.

Because we affirm the grant of the motion to dismiss, the question whether the district court erred in

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S. Ct. 2485, 210 L. Ed. 2d 856 (2021) (per curiam), is misplaced, because that case held only that the Centers for Disease Control and Prevention lacked the authority to pass an eviction moratorium, and did not address a per se physical takings claim. *Id.* at 763-65.

granting the motion of the Alliance of Californians for Community Empowerment Action, Strategic Actions for a Just Economy, and Coalition for Economic Survival to intervene is moot. *See Prete v. Bradbury*, 438 F.3d 949, 959-60 (9th Cir. 2006).

AFFIRMED.[4]

4. The motion for judicial notice, at Dkt. 9, is granted. *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001); Fed. R. Evid. 201(b). The motion to file an amicus brief in support of the City, Dkt. 29, is denied as moot. The motion to file an amicus brief, Dkt. 52, is denied as untimely. Fed. R. App. P. 29(a)(6).

APPENDIX B — ORDER GRANTING MOTIONS TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED NOVEMBER 17, 2022

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 21-06311 DDP (JEMx)
[Dkt 17, 43]

GHP MANAGEMENT CORPORATION,

Plaintiff,

v.

CITY OF LOS ANGELES,

Defendant.

Filed November 17, 2022

ORDER GRANTING MOTIONS TO DISMISS

Presently before the court are two Motions to Dismiss Plaintiffs' Complaint, one filed by Defendant City of Los Angeles ("the City") and the other filed by Intervenors Alliance for Community Empowerment ("ACCE"); Strategic Actions for a Just Economy ("SAJE"); and Coalition for Economic Survival ("CES") (collectively, "Intervenors"). Having considered the submissions of the parties, the court grants the motions and adopts the following Order.

Appendix B

I. Background

At the outset of the COVID-19 pandemic, the City enacted Ordinance No. 186585, which was later updated by Ordinance No. 186606 (collectively, the "Eviction Moratorium" or "Moratorium"). Plaintiffs allege that the Eviction Moratorium "effectively precludes residential evictions." (Complaint ¶ 45.) The Moratorium prohibits landlords from terminating tenancies due to COVID-related nonpayment of rent, any no-fault reason, certain lease violations related to additional occupants and pets, or removal of rental units from the rental market. (Complaint ¶ 46; LAMC § 49.99.2, 49.99.4.)[1] Landlords are also prohibited from charging interest or late fees on COVID-related missed rent. (LAMC § 49.99.2(D).) The Moratorium further allows tenants who have missed rent payments a one-year period to pay delayed rent, starting from the end of the ongoing local emergency period. (Compl. ¶ 46; LAMC § 49.99.2) Tenants may sue landlords and seek civil penalties for violations of the Moratorium. (Compl. ¶ 49; LAMC § 49.99.7.)

Plaintiffs, comprised of (1) thirteen limited liability corporations or limited partnerships that own apartment buildings and (2) the management company that manages the buildings, own or manage nearly five thousand apartment units in Los Angeles. Plaintiffs allege that the Moratorium constitutes an uncompensated taking of private property in violation of the Fifth Amendment's Takings Clause, as well as the California Constitution's Takings Clause. Plaintiffs' Complaint seeks an award

1. The City's Request for Judicial Notice is granted.

of "just compensation," costs, and attorney's fees, but does not seek to invalidate or enjoin enforcement of the Moratorium.

Intervenors and the City now move separately to dismiss Plaintiffs' Complaint.

II. Legal Standard

A complaint will survive a motion to dismiss when it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When considering a Rule 12(b)(6) motion, a court must "accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff." *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). Although a complaint need not include "detailed factual allegations," it must offer "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. Conclusory allegations or allegations that are no more than a statement of a legal conclusion "are not entitled to the assumption of truth." *Id.* at 679. In other words, a pleading that merely offers "labels and conclusions," a "formulaic recitation of the elements," or "naked assertions" will not be sufficient to state a claim upon which relief can be granted. *Id.* at 678 (citations and internal quotation marks omitted).

"When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of

relief." *Iqbal*, 556 U.S. at 679. Plaintiffs must allege "plausible grounds to infer" that their claims rise "above the speculative level." *Twombly*, 550 U.S. at 555-56. "Determining whether a complaint states a plausible claim for relief " is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

III. Discussion

A. Per Se Taking

Movants contend that the Moratorium is not a permanent physical invasion of Plaintiffs' properties, and therefore does not constitute a per se taking. (E.g., City Mot. at 15.) *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) ("We affirm the traditional rule that a permanent physical occupation of property is a taking.") In *Loretto* itself, the Supreme Court recognized "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[,] . . . [s]o long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party." *Id.* Later, in *Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992), the Court held that a combination of rent control laws and eviction protections that limited property owners' ability to evict tenants did not constitute governmental authorization of "a compelled physical invasion of property" that would constitute a per se taking. *Yee*, 503 U.S. at 527-28.

Appendix B

In *Yee*, a local rent control ordinance limited a mobile home park owners' ability to raise rents, while a state law simultaneously protected mobile home owners' ability to transfer mobile homes sited on rented mobile home park land. *Id.* at 524-25. The park owners alleged that the rent control scheme, against the backdrop of the state law, constituted a physical taking of park land, insofar as it granted tenants and their successors "the right to physically permanently occupy and use the real property of Plaintiff." *Id.* at 525. The Court disagreed. "When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, or require the landowner to accept tenants he does not like, without automatically having to pay compensation." *Id.* at 529 (internal citations omitted). "Petitioners' tenants were invited by petitioners, not forced upon them by the government. . . . A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* at 528.

In response to Movants' arguments that *Yee* controls here, Plaintiffs argue primarily that *Yee* is no longer good law because "six members of the Supreme Court obviously disagree" with its central premise: that once a landlord chooses to rent to tenants, the government may regulate the landlord-tenant relationship without automatically engaging in a per se taking. (Opp. to City Mot. at 18:17.) To support their assertion, Plaintiffs point to the Supreme Court's recent decisions in *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), and *Pakdel v. City & Cty. of San*

Francisco, 141 S. Ct. 2226 (2021). These cases bear only tangentially however, if at all, on the continued validity of *Yee*. In Alabama Association of Realtors, the Supreme Court granted an emergency application to vacate a stay of a judgment invalidating the Centers for Disease Control and Prevention ("CDC")'s eviction moratorium. *Alabama Ass'n of Realtors*, 141 S.Ct. at 2486, 2490. The Court did not address any takings issue anywhere in its opinion. Although the Court did, citing *Loretto*, recognize that the right to exclude is "one of the most fundamental elements of property ownership," *Yee* acknowledged the very same principle. *Id.*; *Yee*, 503 U.S. at 528 ("[T]he right to exclude is doubtless . . . one of the most essential sticks in the bundle of rights that are commonly characterized as property. . . . ") (internal quotation marks omitted).

Pakdel did involve a takings claim, albeit a regulatory takings claim rather than a per se claim. *Pakdel*, 141 S.Ct. at 2228. The Court's opinion, however, was limited to the question whether petitioners were required to exhaust local government administrative procedures before filing suit pursuant to 42 U.S.C. § 1983, even after the local government had rendered a final regulatory decision. *Id.* In the course of answering that question in the negative, the Court stated in a footnote that "[o]n remand, the Ninth Circuit may give further consideration to [merits] claims in light of our recent decision in *Cedar Point Nursery v. Hassid*."[2] *Id.* at 2229 n.1 (citation omitted). In *Cedar Point*, the Court concluded that a California law requiring farmers to grant union organizers access to private

2. The district court in *Pakdel* did not reach the merits of the takings claims. *Pakdel*, 141 S.Ct. at 2228-29.

property for up to three hours per day, 120 days per year, constituted a per se physical taking. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069, 2080 (2021). Although the Court did cite *Yee*, it did so only once, and then only as an example of a decision that has "described use restrictions that go 'too far' as 'regulatory takings.'" *Id.* at 2072. The Court then observed that the "regulatory takings" label can be misleading where, as in *Cedar Point*, "a regulation results in a physical appropriation of property." *Id.* The Court made no further mention of *Yee*, let alone the principle that a regulation governing an existing landlord-tenant relationship is distinguishable from a regulation compelling physical occupation in the first instance, or in perpetuity. Thus, contrary to Plaintiffs' suggestion, the Court's footnote in *Pakdel*, indicating that the Ninth Circuit remains free to consider *Cedar Point* if and when the Ninth Circuit, on remand, reaches merits issues that were never reached by the district court, does little to vitiate *Yee*.[3]

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3. This Court acknowledges that in *Heights Apartments, LLC v. Walz*, the Eighth Circuit found *Yee* distinguishable and applied *Cedar Point* to sustain a per se takings challenge to an eviction moratorium. *Heights Apartments*, 30 F.4th 720, 733 (8th Cir. 2022). That has not, however, been the Ninth Circuit's approach. In *Ballinger v. City of Oakland*, for example, the Ninth Circuit addressed a takings challenge to an ordinance requiring payments to tenants prior to an eviction, even for good cause. *Ballinger*, 24 F.4th 1287, 1292 (9th Cir. 2022), *cert. denied sub nom. Ballinger v. City of Oakland*, California, 142 S. Ct. 2777 (2022). Citing to both *Cedar Point* and *Yee*, the court applied the latter, concluding that even a regulation mandating payments from landlords to tenants constituted a regulation of the use of property, and not a per se taking, such as those described in *Yee*, compelling the creation of a new landlord-tenant relationship or

This Court declines Plaintiffs' invitation to read the tea leaves, such as they are, in *Alabama Association of Realtors*, *Pakdel*, and *Cedar Point*. None of those cases can be read to abrogate *Yee* or its prescription that laws that "merely regulate [landlords'] *use* of their land by regulating the relationship between landlord and tenant" do not constitute per se takings. *Yee*, 503 U.S. at 528 (emphasis original).

Plaintiffs also argue, briefly, that the Moratorium constitutes a per se taking even under *Yee* because it "*requires* the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.'" (Opp. to Intervenors' Mot. at 3:23-28.) *Yee*, 503 U.S. at 527 (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) (emphasis original)). But, as in *Yee*, the Moratorium does not swoop in out of the blue to force Plaintiffs to submit to a novel use of their property. Nor does the Moratorium present the type of different case, contemplated by *Yee*, where a regulation compels a landowner to "refrain in perpetuity from terminating a tenancy." *Id.* at 528. The Moratorium only precludes evictions for a limited, albeit indeterminate, time. *Compare id.* (discussing Cal.Civ.Code § 798.56(g) requirement of up to 12 months notice prior to eviction). "Put bluntly, no government has required any physical invasion of petitioners' property. [The] tenants were invited by [the landlords], not forced upon them by the government." *Yee*, 503 U.S. at 528; *see also Ballinger*, 24

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barring the termination of a tenancy "in perpetuity." *Id.* at 1293-94 (quoting *Yee*, 503 U.S. at 528).

F.4th at 1293 (No per se taking, even where regulation required payment by landlord to tenants prior to eviction for good cause, because landlord plaintiffs "voluntarily chose to lease their property. . . . "). A regulation affecting that pre-existing relationship is not a per se taking.

B. Regulatory taking

"[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). "[C]ompensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee*, 503 U.S. at 522-23 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-125 (1978)). The relevant *Penn Central* factors "include the regulation's economic impact on the claimant, the extent to which the regulation interferes with distinct investment-backed expectations, and the character of the government action." *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013).

1. Economic Impact

The Ninth Circuit discussed the *Penn Central* factors, including the economic impact factor, at length in *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445 (9th

Cir. 2018). As the court explained, "[n]ot every diminution in property value caused by a government regulation rises to the level of an unconstitutional taking." *Colony Cove*, 888 F.3d at 451. Similarly, "the mere loss of some income because of regulation does not itself establish a taking." *Id.* Rather, courts look to whether a regulation is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[4] *Id.* (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005)). Accordingly, the threshold is high. Indeed, the Ninth Circuit has observed that a diminution in property value as high as 92.5% does not constitute a taking, and no court has found a taking where the diminution of value does not exceed 50%. *Id.*

To determine a diminution in value for purpose of evaluating the economic impact on a plaintiff, courts "compare the value that has been taken from the property with the value that remains in the property." *Colony Cove*, 888 F.3d at 451 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). Here, however, Plaintiffs' Complaint does not allege any particular diminution in value, or specific pre- or post-Moratorium values from which a level of diminution could be calculated.

Plaintiffs assert that this pleading deficiency is not fatal, and that they need not allege any quantitative facts pertaining to valuation, because the Ninth Circuit's *Colony*

4. This same fundamental inquiry underpins analyses of per se takings. *See Lingle*, 544 U.S. 538-39.

Cove opinion is wrong. (Opp. to Intervenors' Mot. at 6:1-4, 7 n.4.) Plaintiffs contend that because the *Penn Central* factor analysis is "essentially ad hoc," the allegation that Plaintiffs have lost rents as a result of the Moratorium is alone sufficient to satisfy the economic impact factor. *See Penn Central*, 438 U.S. at 124.

Even if this Court were to agree with the substance of Plaintiffs' arguments, the court could not simply disregard *Colony Cove* and excuse Plaintiffs of their burden to allege and show the requisite adverse economic impact. "A district court bound by circuit authority . . . has no choice but to follow it, even if convinced that such authority was wrongly decided." *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001). Plaintiffs' allegation that their tenants are $20 million in arrears is presented in a vacuum, and cannot alone demonstrate a significant economic impact, notwithstanding Plaintiffs' vague and conclusory allegation that "the economic impact of the Eviction Moratorium is severe and ruinous." (Compl. ¶ 71.)

2. Interference with investment-backed expectations

The next *Penn Central* factor is "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. "To 'expect' can mean to anticipate or look forward to, but it can also mean 'to consider probable or certain,' and 'distinct' means capable of being easily perceived, or characterized by individualizing qualities." *Guggenheim*

v. City of Goleta, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc). "To form the basis for a taking claim, a purported distinct investment-backed expectation must be objectively reasonable." *Colony Cove*, 888 F.3d at 452; *see also Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 226 (1986). "[W]hat is relevant and important in judging reasonable expectations is the regulatory environment at the time of the acquisition of the property." *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 634 (9th Cir. 2020) (internal quotation marks and citation omitted). "[T]hose who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 645 (1993) (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)) (internal alterations omitted).

Movants argue that Plaintiffs knowingly chose to invest in the highly-regulated rental housing market, and that any subjective expectations Plaintiffs may have had that the regulatory environment would remain static were and are objectively unreasonable. The City raised, and this Court rejected, a similar argument in the context of a Contracts Clause challenge to the same Moratorium at issue here. *See Apartment Ass'n of Los Angeles Cnty., Inc. v. City of Los Angeles*, 500 F. Supp. 3d 1088, 1095 (C.D. Cal. 2020), aff'd, 10 F.4th 905 (9th Cir. 2021), cert. denied, 212 L. Ed. 2d 595, 142 S. Ct. 1699 (2022). Had Plaintiffs acquired their rental properties in the midst of the pandemic, Movants' argument might be more

compelling. The regulatory environment existing prior to the pandemic, however, gave Plaintiffs little reason to expect that they might be barred from evicting tenants for nonpayment of rent. *Bridge Aina Le'a*, 950 F.3d at 634. "'Distinct investment-backed expectations' implies reasonable probability, *like expecting rent to be paid*, not starry eyed hope of winning the jackpot if the law changes. *A landlord buys land burdened by lease-holds in order to acquire a stream of income* from rents and the possibility of increased rents or resale value in the future." *Guggenheim*, 638 F.3d at 1120 (emphases added). As this Court has stated, "the scope and nature of the COVID-19 pandemic, and of the public health measures necessary to combat it, have no precedent in the modern era, and [ ] no amount of prior regulation could have led landlords to expect anything like the blanket Moratorium." *Apartment Ass'n of Los Angeles*, 500 F.Supp. 3d at 1096; *see also Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 390 (D. Mass. 2020). The extent to which the Moratorium interferes with Plaintiffs' reasonable expectations thus weighs in favor of a regulatory taking.

3. Character of the Moratorium

"A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. For example, rent control ordinances intended to shield residents from

"excessive rent increases," have been found to constitute "precisely such a program." *Colony Cove*, 888 F.3d at 454. Here, there can be little doubt the Moratorium is geared toward promoting the common good. Indeed, the Moratorium is predicated on the City's findings that "[t]he COVID-19 pandemic threatens to undermine housing security and generate unnecessary displacement of City residents." (LAMC § 49.99.) There can be little dispute that, absent the Moratorium's protections, significant numbers of tenants with COVID-related loss of income would have been evicted, resulting not only in the harms typical of mass displacements, but exacerbating the spread of COVID-19 as well, to the detriment of all. Other courts, addressing similar regulations, have reached the same conclusion. *See, e.g.*, *Baptiste*, 490 F. Supp. At 390 (D. Mass. 2020); *S. California Rental Hous. Ass'n v. Cty. of San Diego*, No. 3:21CV912-L-DEB, 2021 WL 3171919, at *9 (S.D. Cal. July 26, 2021).

With respect to the "character" factor, Plaintiffs largely reiterate their argument, rejected above, that the Moratorium is a per se taking. Beyond that, Plaintiffs contend in a footnote that, although rent control schemes may qualify as sufficiently public-oriented, the Moratorium "is far different and significantly more serious." (Opp. to Intervenors' Mot. at 9 n.5.) Plaintiffs do not, however, explain how a regulation intended to minimize the displacement of financially vulnerable tenants in the midst and as a result of a public health emergency unprecedented in modern history is less protective of the common good than are rent control ordinances. As to seriousness, it is

not clear to the court what bearing the "seriousness" of the Moratorium has on the public nature of its purpose. To the extent Plaintiffs intend to emphasize the shifting of financial burdens from tenants to landlords, the Ninth Circuit has recognized that commonplace regulations, including rent control, zoning schemes, and other land use restrictions, "can also be said to transfer wealth from the one who is regulated to another." *Yee*, 503 U.S. at 529. And, to the extent Plaintiffs use the word "serious" to refer to the degree of the Moratorium's financial effects, they have failed, as discussed above, to plead any facts establishing a "serious" economic impact.

4. Balance of *Penn Central* factors

Plaintiffs have adequately alleged that the Moratorium has interfered with the reasonable, investment-backed expectations Plaintiffs had when they acquired their rental properties. The Complaint does not, however, allege any diminution in value, let alone a diminution high enough to function as the equivalent of a classic taking. Because the Moratorium also indisputably promotes the common good, the balance of the *Penn Central* factors weighs heavily against a determination that the Moratorium constitutes a regulatory taking.

IV. Conclusion

For the reasons stated above, the motions to dismiss are GRANTED.[5] Plaintiffs' Complaint is DISMISSED, with leave to amend. Any amended complaint shall be filed within twenty-one days of the date of this Order.

IT IS SO ORDERED.

Dated: November 17, 2022

/s/
DEAN D. PREGERSON
United States District Judge

5. Having determined that Plaintiffs' Complaint fails to allege either a per se or regulatory taking, the court does not reach the City's arguments that any takings claims are unripe, or that Plaintiffs lack standing to assert any such claims.

APPENDIX C — JUDGMENT OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED DECEMBER 29, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 21-CV-06311 DDP (JEMx)

Honorable Judge Dean D. Pregerson

GHP MANAGEMENT CORPORATION,
A CALIFORNIA CORPORATION, *et al.*,

Plaintiffs,

vs.

CITY OF LOS ANGELES,

Defendant.

JUDGMENT OF DISMISSAL

Date Action Filed: August 4, 2021
Trial Date: None

This Court, having issued its November 17, 2022 Order granting the City's and Intervenors' Motions to Dismiss the Complaint of Plaintiffs GHP Management Corporation; 918 Broadway Associates, LLC, dba "Broadway Palace Apartments;" LR 9th & Broadway, LLC, dba "Broadway Palace Apartments;" Palmer Temple Street Properties, LLC, dba "The Da Vinci Apartments;" Palmer/City

Center II, L.P., dba "The Da Vinci Apartments;" Palmer Boston Street Properties I, L.P., dba "The Orsini;" Palmer Boston Street Properties II, L.P., dba "The Orsini;" Palmer Boston Street Properties III, L.P., dba "The Orsini;" Bridewell Properties, L.P., dba "Pasadena Park Place;" Palmer St. Paul Properties, L.P., dba "The Piero Apartments;" Palmer/Sixth Street Properties, L.P., dba "The Piero Apartments;" Figter Ltd., dba "Skyline Terrace Apartments;" Warner Center Summit, Ltd, dba "Summit at Warner Center;" and Palmer/Third Street Properties, L.P., dba "The Visconti Apartments" (collectively, "Plaintiffs"), **IT IS ORDERED, ADJUDGED AND DECREED** that Plaintiffs' Complaint is dismissed with prejudice pursuant to the Court's November 17, 2022 Order.

Dated: December 29, 2022

/s/ Dean D. Pregerson
Honorable Dean D. Pregerson
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:21-cv-06311-DDP-(JEMx)

GHP Management Corporation, a California corporation 918 Broadway Associates, LLC, a Delaware limited liability company dba "Broadway Palace Apartments;" LR 9th & Broadway, LLC, a California limited liability company dba "Broadway Palace Apartments;" Palmer Temple Street Properties, LLC, a California limited liability company dba "The Da Vinci Apartments;" Palmer/City Center II, L.P., a California limited partnership dba "The Da Vinci Apartments;" Palmer Boston Street Properties I, L.P., a Delaware limited partnership dba "The Orsini;" Palmer Boston Street Properties II, L.P., a Delaware limited partnership dba "The Orsini;" Palmer Boston Street Properties III, L.P., a California limited partnership dba "The Orsini;" Bridewell Properties, L.P., a California limited partnership dba "Pasadena Park Place;" Palmer St. Paul Properties, L.P., a California limited partnership dba "The Piero Apartments;" Palmer/Sixth Street Properties, L.P., a California limited partnership dba "The Piero Apartments;" Figter Ltd., a California limited partnership dba "Skyline Terrace Apartments;" Warner Center Summit, Ltd, a California limited partnership dba "Summit at Warner Center;" Palmer/Third Street Properties, L.P., a California limited partnership dba "The Visconti Apartments," plaintiffs,

vs.

City of Los Angeles, and Does 1-25, inclusive, defendants.

Date Action Filed: August 4, 2021 Trial Date: Not Set

PLAINTIFFS' NOTICE OF INTENT NOT TO FILE AN AMENDED COMPLAINT

Appendix D

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs GHP Management Corporation; 918 Broadway Associates, LLC, dba "Broadway Palace Apartments;" LR 9th & Broadway, LLC, dba "Broadway Palace Apartments;" Palmer Temple Street Properties, LLC, dba "The Da Vinci Apartments;" Palmer/City Center II, L.P., dba "The Da Vinci Apartments;" Palmer Boston Street Properties I, L.P., dba "The Orsini;" Palmer Boston Street Properties II, L.P., dba "The Orsini;" Palmer Boston Street Properties III, L.P., dba "The Orsini;" Bridewell Properties, L.P., dba "Pasadena Park Place;" Palmer St. Paul Properties, L.P., dba "The Piero Apartments;" Palmer/Sixth Street Properties, L.P., dba "The Piero Apartments;" Figter Ltd., dba "Skyline Terrace Apartments;" Warner Center Summit, Ltd, dba "Summit at Warner Center;" and Palmer/Third Street Properties, L.P., dba "The Visconti Apartments" (collectively, "Plaintiffs"), currently do not intend to file a First Amended Complaint in this action, but will stand upon the existing pleadings and appeal the Court's November 17, 2022 Order (ECF No. 53) to the Court of Appeals for the Ninth Circuit. To that end, Plaintiffs respectfully request that a judgment of dismissal be entered in this action, pursuant to the Court's November 17, 2022 Order, so that such Order may be made final and appealable.

Dated: December 8, 2022

RUTAN & TUCKER, LLP
DOUGLAS J. DENNINGTON
JAYSON PARSONS

By: /s/ Douglas J. Dennington
Douglas J. Dennington
Attorneys for Plaintiffs

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.

GHP Management Corporation, a California corporation 918 Broadway Associates, LLC, a Delaware limited liability company dba "Broadway Palace Apartments;" LR 9th & Broadway, LLC, a California limited liability company dba "Broadway Palace Apartments;" Palmer Temple Street Properties, LLC, a California limited liability company dba "The Da Vinci Apartments;" Palmer/City Center II, L.P., a California limited partnership dba "The Da Vinci Apartments;" Palmer Boston Street Properties I, L.P., a Delaware limited partnership dba "The Orsini;" Palmer Boston Street Properties II, L.P., a Delaware limited partnership dba "The Orsini;" Palmer Boston Street Properties III, L.P., a California limited partnership dba "The Orsini;" Bridewell Properties, L.P., a California limited partnership dba "Pasadena Park Place;" Palmer St. Paul Properties, L.P., a California limited partnership dba "The Piero Apartments;" Palmer/Sixth Street Properties, L.P., a California limited partnership dba "The Piero Apartments;" Figter Ltd., a California limited partnership dba "Skyline Terrace Apartments;" Warner Center Summit, Ltd, a California limited partnership dba "Summit at Warner Center;" Palmer/Third Street Properties, L.P., a California limited partnership dba "The Visconti Apartments," plaintiffs,

vs.

City of Los Angeles, and Does 1-25, inclusive, defendants.

Filed: August 4, 2021

COMPLAINT

Appendix E

COMPLAINT FOR:

1) UNCOMPENSATED PER SE PHYSICAL TAKING IN VIOLATION OF THE 5TH AMENDMENT TO UNITED STATES CONSTITUTION (42 U.S.C. § 1983);

2) UNCOMPENSATED REGULATORY TAKING IN VIOLATION OF THE 5TH AMENDMENT TO UNITED STATES CONSTITUTION (42 U.S.C. § 1983); AND

3) UNCOMPENSATED TAKING IN VIOLATION OF ARTICLE I, SECTION 19 OF CALIFORNIA CONSTITUTION.

JURY TRIAL DEMANDED FOR BOTH LIABILITY AND DAMAGES PER CITY OF MONTEREY V. DEL MONTE DUNES MONTEREY, LTD., 526 U.S. 687 (1999)

Plaintiffs GHP MANAGEMENT CORPORATION, a California corporation; 918 BROADWAY ASSOCIATES, LLC, a Delaware limited liability company dba "Broadway Palace Apartments;" LR 9TH & BROADWAY, LLC, a California limited liability company dba "Broadway Palace Apartments;" PALMER TEMPLE STREET PROPERTIES, LLC, a California limited liability company dba "The Da Vinci Apartments;" PALMER/CITY CENTER II, A CALIFORNIA LIMITED PARTNERSHIP, a California limited partnership dba "The Da Vinci Apartments;" PALMER BOSTON STREET PROPERTIES I, LP, a Delaware limited partnership dba "The Orsini;" PALMER BOSTON STREET PROPERTIES II, LP, a Delaware limited partnership dba "The Orsini;" PALMER BOSTON STREET PROPERTIES III, A CALIFORNIA LIMITED PARTNERSHIP, a California

limited partnership dba "The Orsini;" BRIDEWELL PROPERTIES, LIMITED, A CALIFORNIA LIMITED PARTNERSHIP, a California limited partnership dba "Pasadena Park Place;" PALMER ST. PAUL PROPERTIES, LP, a Delaware limited partnership dba "The Piero Apartments;" PALMER/SIXTH STREET PROPERTIES, L.P., a California limited partnership dba "The Piero Apartments;" FIGTER LIMITED, A CALIFORNIA LIMITED PARTNERSHIP, a California limited partnership dba "Skyline Terrace Apartments;" WARNER CENTER SUMMIT, LTD,, A CALIFORNIA LIMITED PARTNERSHIP, a California limited partnership dba "Summit at Warner Center;" and PALMER/THIRD STREET PROPERTIES, L.P., a California limited partnership dba "The Visconti Apartments," (collectively, "Plaintiffs") allege as follows:

INTRODUCTION

1. At the outset of the COVID-19 pandemic ("Pandemic") in March 2020, Defendant City of Los Angeles ("City") hastily instituted a series of ordinances (the "Eviction Moratorium") prohibiting lessors and landlords, such as Plaintiffs, from bringing unlawful detainer actions against tenants who refused to pay rent on the grounds that they had been impacted by the Pandemic.

2. The Eviction Moratorium, among other things, contains provisions that *indefinitely* prohibit landlords and property owners from initiating (or continuing to prosecute existing) residential eviction proceedings premised upon the non-payment of rent. Lessors were (and still are) forbidden not only from commencing eviction

proceedings for a tenant's failure to pay contractual rent, but from charging any late fees or interest to which they were entitled. Under the Eviction Moratorium, tenants may continue to occupy their respective premises at no charge, utilizing the water, power, trash, sewage, and other fees that the landlords must continue to pay without reimbursement. By stripping all remedies away from owners — and without requiring tenants to demonstrate an inability to pay rent — the Eviction Moratorium discouraged (and continues to discourage) tenants who can pay all or some of what they owe from doing so.

3. The Eviction Moratorium also provides tenants a full twelve months following expiration of the "Local Emergency Period" — itself a moving target — to repay back rent, irrespective of the tenant's ability to pay some or all rent, the term of the lease, any agreed plan or schedule for repayment, or any evidence demonstrating that the tenant will actually be capable of paying back rent at the expiration of the one-year grace period. For the vast majority of "qualifying" tenants, the "rent deferral" provision will operate as rent forgiveness, as it is unlikely that tenants who do not pay rent during the Local Emergency Period will be in a position to pay back rent, in addition to their current rent, at the conclusion of the grace period (whenever that may be). Indeed, as one federal District Court has already found, notwithstanding the provisions in eviction moratoria providing that tenants remain obligated to pay rent at some distant point in the future, "*this right is largely illusory*, as tenants who have not paid their rent for many months because of economic distress — or indeed for any other reason — are *unlikely to pay a money judgment against them*."

Baptiste v. Kennealy, 490 F.Supp.3d 353, 376 (D. Mass. 2020) (emphasis added). Indeed, the Eviction Moratorium prevents owners, like Plaintiffs, from pursuing their *only available remedy* to replace a nonpaying tenant with a paying tenant. Every month a landlord is prevented from renting its unit to a *paying tenant* is a month for which the landlord has permanently been deprived of its fundamental right to exclude defaulting tenants from its property and for which the landlord will be forever deprived of the ability to mitigate losses by re-letting the premises to a paying tenant. The Eviction Moratorium forces owners to allow tenants who have stopped paying — and may never pay again — to continue to occupy their units for what will amount to "years" after the initial onset of the Pandemic.

4. The Eviction Moratorium also fails to address how a landlord or property owner would actually be able to collect rent from those tenants, like a substantial number of Plaintiffs' tenants, who take advantage of the Eviction Moratorium, but move to a different location prior to the expiration of the Eviction Moratorium, or prior to the one-year grace period afforded to tenants under the Eviction Moratorium. While owners can theoretically sue such tenants for back rent at some distant point in the future (but not *ever* for any interest or late fees), their likelihood of actually collecting on a judgment is minimal, at best, and that assumes the landlord can even locate and serve the departing tenant by the time landlords are free to institute collection proceedings against tenants in the City. As for those tenants who move prior to the time owners may sue to recover back rent, there is no realistic chance to recover such rent and, even if there were, the

owner would incur tremendous (and as a practical matter unrecoverable) litigation expenses just to recover that to which the owner is already entitled.

5. The Eviction Moratorium further prohibits all evictions based on the presence of unauthorized occupants or pets, as well as for undefined "nuisance[s] related to COVID-19."

6. The Eviction Moratorium further indefinitely prohibits all "no-fault" evictions during the indefinite and now sustained duration of the Eviction Moratorium, such as evictions needed for owners intending to withdraw their properties from the rental market, evictions needed for owners (or family members) who intend to personally occupy the premises, and any other "no fault" eviction as defined in Cal. Civ. Proc. Code § 1946.2(b). The Eviction Moratorium also indefinitely prohibits "at fault" evictions such as those needed to eliminate a nuisance if the nuisance is in any way related to the Pandemic.

7. Plaintiffs are the owners of numerous apartment communities located within the City, and have suffered astronomical rent losses and related financial losses attributable to the Eviction Moratorium. Plaintiffs have suffered rent losses well in excess of $20 Million, to date, which losses are anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace periods afforded to tenants, expire. In addition, Plaintiffs have suffered related financial losses attributable to the refusal of lending institutions to finance and/or refinance loans on Plaintiffs' apartment community properties, specifically on account of the Eviction Moratorium.

8. As set forth below, Plaintiffs assert that the Eviction Moratorium effected an uncompensated taking of private property in violation of the Fifth Amendment to the United States Constitution and Article I, Section 19 of the California Constitution, entitling Plaintiffs to payment of just compensation in an amount in excess of $100,000,000, according to proof.

PARTIES

9. Plaintiff GHP MANAGEMENT CORPORATION is a corporation organized and existing under the laws of California, and at all relevant times herein, managed (and currently manages) the apartment communities owned by the other named Plaintiffs in this action.

10. Plaintiff 918 BROADWAY ASSOCIATES, LLC is a limited liability company organized and existing under the laws of the State of Delaware, doing business as "Broadway Palace Apartments" ("918 Broadway"). 918 Broadway owns fee title to the real property located at 928 S. Broadway, Los Angeles, California 90015, which is improved with a 413-unit luxury apartment community. The 918 Broadway apartment community, also known as "Broadway Palace North," is located within the City's territorial limits and, thus, is subject to the Eviction Moratorium. Numerous tenants occupying the "Broadway Palace North" community have taken advantage of the Eviction Moratorium to withhold payment of rent. As of the filing of this Complaint, the rent losses suffered by 918 Broadway total approximately $1,353,000. The total rent losses are anticipated increase significantly by the time the Eviction Moratorium, and the one-year grace

period afforded to tenants under the Eviction Moratorium, expire.

11. Plaintiff LR 9th & BROADWAY LLC is a limited liability company organized and existing under the laws of the State of California, doing business as "Broadway Palace Apartments" ("Broadway"). Broadway owns fee title to the real property located at 1026 S. Broadway, Los Angeles, California 90015, which is improved with a 236-unit apartment community. The apartment community, also known as "Broadway Palace South," is located within the City's territorial limits and, as such, is subject to the Eviction Moratorium. Many of the tenants occupying the "Broadway Palace South" community have taken advantage of the Eviction Moratorium to withhold payment of rent during the course of the Pandemic. As of the filing of this Complaint, the rent losses suffered by Broadway total approximately $774,000. The total rent losses to be sustained by Broadway are anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace period afforded to tenants under the Eviction Moratorium, expire.

12. Plaintiff PALMER TEMPLE STREET PROPERTIES LLC, is a limited liability company organized and existing under the laws of the State of California, doing business as "The Da Vinci Apartments" ("PTSP"). At all relevant times, PTSP owned fee title to the real property located at 909 W. Temple Street, Los Angeles, California 90012, which is improved with a 526-unit apartment community. The PTSP apartment community, also known as "The Da Vinci," is located

within the City's territorial limits and, as such, is subject to the Eviction Moratorium. Numerous tenants occupying The DaVinci took advantage of the Eviction Moratorium to withhold payment of rent during the course of the pandemic. As of the filing of this Complaint, the rent losses suffered by PTSP total approximately $2,766,000. The total rent losses to be sustained by PTSP are anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace period afforded to tenants under the Eviction Moratorium, expire.

13. Plaintiff PALMER/CITY CENTER II, A CALIFORNIA LIMITED PARTNERSHIP, is a California limited partnership organized and existing under the laws of the State of California, doing business as "the Medici Apartments" ("Palmer/City Center"). Palmer/City Center own fee title to the real property located at 722 Bixel Street, Los Angeles, California 90017, which is improved with a 632-unit apartment community. The Palmer/City Center apartment community, also known as "The Medici," is located within the City's territorial limits and, as such, is subject to the Eviction Moratorium. Numerous tenants occupying The Medici community took advantage of the Eviction Moratorium to withhold payment of rent during the course of the pandemic. As of the filing of this Complaint, the rent losses suffered by Palmer/City Center total approximately $2,747,000. The total rent losses to be sustained by Palmer/City Center are anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace period afforded to tenants under the Eviction Moratorium, expire.

Appendix E

14. Plaintiff PALMER BOSTON STREET PROPERTIES I, LP, is a limited partnership organized and existing under the laws of the State of Delaware, doing business as "The Orsini" ("Palmer Boston Street I"). Palmer Boston Street I owns fee title to the real property located at 505 N. Figueroa Street, Los Angeles, California 90012, which is improved with a 296-unit apartment community. The apartment community, also known as "Orsini I," is located within the territorial limits of the City and, as such, is subject to the Eviction Moratorium. Numerous tenants occupying the Orsini I community took advantage of the Eviction Moratorium to withhold payment of rent during the course of the pandemic and are continuing to withhold rental payments even today. As of the filing of this Complaint, the rent losses suffered by Palmer Boston Street I total approximately $2,796,000. The total rent losses to be sustained by Palmer Boston Street I are anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace period afforded to tenants under the Eviction Moratorium, expire.

15. Plaintiff PALMER BOSTON STREET PROPERTIES II, LP, is a limited partnership organized and existing under the laws of the State of Delaware, doing business as "The Orsini" ("Palmer Boston Street II"). Palmer Boston Street II owns fee title to the real property located at 550 North Figueroa Street, Los Angeles, California 90012, which is improved with a 566-unit apartment community. The apartment community, also known as "Orsini II," is located within the territorial limits of the City and, as such, is subject to the Eviction

Moratorium. Numerous tenants occupying the Orsini II apartment community took advantage of the Eviction Moratorium to withhold payment of contractual rent during the course of the Pandemic. As of the filing of this Complaint, the rent losses suffered by Palmer/Boston Street II total approximately $2,925,000. The total rent losses to be sustained by Palmer/Boston Street II are anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace period afforded to tenants under the Eviction Moratorium, expire.

16. Plaintiff PALMER BOSTON STREET PROPERTIES III, A CALIFORNIA LIMITED PARTNERSHIP is a limited partnership organized and existing under the laws of the State of California, doing business as "The Orsini" ("Palmer Boston Street III"). Palmer Boston Street III owns fee title to the real property located at 606 North Figueroa Street, Los Angeles, California, which is improved with a 210-unit apartment community. The apartment community, also known as "Orsini III," is located within the territorial limits of the City and, as such, is subject to the Eviction Moratorium. Numerous tenants occupying the Orsini III community have taken advantage of the Eviction Moratorium to withhold payment of contractual rent during the course of the Pandemic. As of the filing of this Complaint, the rent losses suffered by Palmer Boston Street III total approximately $1,421,000. The total rent losses to be sustained by Palmer Boston Street III are anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace period

afforded to tenants under the Eviction Moratorium, expire.

17. Plaintiff BRIDEWELL PROPERTIES, LIMITED, A CALIFORNIA LIMITED PARTNERSHIP is a limited partnership organized and existing under the laws of the State of California, doing business as "Pasadena Park Place" ("Bridewell"). Bridewell owns fee title to the real property located at 101 Bridewell Street, Los Angeles, California 90042, which is improved with a 128-unit apartment community. The apartment community is located within the territorial limits of the City and, as such, is subject to the Eviction Moratorium. Numerous tenants occupying the apartment community have taken advantage of the Eviction Moratorium to withhold payment of contractual rent during the course of the Pandemic. As of the filing of this Complaint, the total rent losses suffered by Bridewell exceeds $74,000. The total rent losses to be sustained by Bridewell is anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace period afforded to tenants under the Eviction Moratorium, expire.

18. Plaintiff PALMER ST. PAUL PROPERTIES, LP, is a limited partnership organized and existing under the laws of the State of Delaware, doing business as "The Piero Apartments" ("Palmer St. Paul"). Palmer St. Paul owns fee title to the real property located at 616 South St. Paul Avenue, Los Angeles, California 90017, which is improved with a 225-unit apartment community. The apartment community, also known as "Piero I," is located within the City and, as such, is subject to the Eviction

Moratorium. Numerous tenants occupying the apartment community have taken advantage of the Eviction Moratorium to withhold payment of rent during the course of the Pandemic. As of the filing of this Complaint, the total rent losses suffered by Palmer St. Paul exceed $1,213,000. The total rent losses to be sustained by the Palmer St. Paul are anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace period afforded to tenants under the Eviction Moratorium, expire.

19. Plaintiff PALMER/SIXTH STREET PROPERTIES, L.P., is a limited partnership organized and existing under the laws of the State of California, doing business as "The Piero Apartments" ("Palmer/Sixth Street"). Palmer/Sixth Street owns fee title to the real property located at 609 St. Paul Avenue, Los Angeles, California 90017, which is improved with a 335-unit apartment community. The apartment community, also known as "Piero II," is located within the City and, as such, is subject to the Eviction Moratorium. Numerous tenants occupying the Piero II community have taken advantage of the Eviction Moratorium to withhold the payment of contractual rent during the course of the Pandemic. As of the filing of this Complaint, the total rent losses suffered by Palmer/Sixth Street exceed $1,432,000. The total rent losses to be sustained by Palmer/Sixth Street are anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace period afforded to tenants under the Eviction Moratorium, expire.

Appendix E

20. Plaintiff FIGTER LIMITED, A CALIFORNIA LIMITED PARTNERSHIP is a limited partnership organized and existing under the laws of the State of California, doing business as "Skyline Terrace Apartments" ("Figter"). Figter owns fee title to the real property located at 930 Figueroa Terrace, Los Angeles, California 90012, which is improved with a 198-unit apartment community. The apartment community, also known as "Skyline Terrace," is located within the City and, as such, is subject to the Eviction Moratorium. As of the filing of this Complaint, the rent losses suffered by Figter total approximately $400,000. The total rent losses to be sustained by Figter are anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace period afforded to tenants under the Eviction Moratorium, expire.

21. Plaintiff WARNER CENTER SUMMIT, LTD., A CALIFORNIA LIMITED PARTNERSHIP is limited partnership organized and existing under the laws of the State of California, doing business as "Summit at Warner Center" ("Summit"). Summit owns fee title to the real property located at 22219 Summit Vue Lane, Woodland Hills, California 91367, which is improved with a 760-unit apartment community. The apartment community, also known as "Summit at Warner Center," is located within the Woodland Hills community in the territorial limits of the City and, as such, is subject to the Eviction Moratorium. Numerous tenants occupying units within the Summit at Warner Center have taken advantage of the Eviction Moratorium to withhold the payment of contractual rent during the course of the Pandemic. As

of the filing of this Complaint, the rent losses suffered by Summit total approximately $3,895,000. The total rent losses to be sustained by Summit are anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace period afforded to tenants under the Eviction Moratorium, expire.

22. Plaintiff PALMER/THIRD STREET PROPERTIES, L.P., is a limited partnership organized and existing under the laws of the State of California, doing business as "The Visconti Apartments" ("Palmer/Third Street"). Palmer/Third Street owns fee title to the real property located at 1221 West 3rd Street, Los Angeles, California 90017, which is improved with a 297-unit apartment community. The apartment community, known as "The Visconti," is located within the City and, as such, is subject to the Eviction Moratorium. Numerous tenants have taken advantage of the Eviction Moratorium to withhold the payment of contractual rent during the course of the Pandemic. As of the filing of this Complaint, the rent losses suffered by Palmer/Third Street total approximately $982,000. The total rent losses to be sustained by the Palmer/Third Street are anticipated to increase significantly by the time the Eviction Moratorium, and the one-year grace period afforded to tenants under the Eviction Moratorium, expire.

The Defendants

23. Defendant City of Los Angeles is a charter city organized and existing under the laws of the State of California.

24. Plaintiffs do not know the true names and capacities of Defendants Does 1 through 25, inclusive, and therefore sues them by their fictitious names. Plaintiffs allege that Defendants Does 1 through 25, inclusive, are jointly, severally and/or concurrently liable and responsible for the injuries set forth herein, acting on their own or as the agents of named Defendants. Plaintiffs will amend this Complaint to insert the true names of the fictitiously-named Defendants when the same are ascertained.

25. Plaintiffs are informed and believe and thereon allege that each Defendant was the agent and/or employee of every other Defendant, and at all times relevant hereto was acting within the course and scope of said agency and/or employment.

JURISDICTION AND VENUE

26. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the action arises under 42 U.S.C. § 1983 in relation to Defendants' deprivation of Plaintiffs' constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

27. The Court has supplemental jurisdiction over Plaintiffs' claims asserted under the Constitution of the State of California pursuant to 28 U.S.C. § 1367(a), because Plaintiffs' state constitutional claims arise from the same nucleus of operative facts as its federal claims and thus form part of the same case or controversy under Article III of the United States Constitution.

28. The Central District of California is the appropriate venue for this action pursuant to 28 U.S.C. § 1391(b) (1) and (2), because it is a District in which Defendants reside, maintain offices, exercise their authority in their official capacities, and have enforced the orders at issue in this case. While the Central District of California is an appropriate venue for this action by statute, given the sweeping breadth of the Eviction Moratorium and the strong likelihood that a significant portion of the jury pool have been personally impacted by the Eviction Moratorium, Plaintiffs have filed this proceeding in the Central District of California, without waiver of their right to apply for a change in venue, if appropriate.

FACTUAL ALLEGATIONS

State and Local Government Response to Pandemic Re Evictions

29. During the early days of the Pandemic, the State and local governments enacted a flurry of executive orders and regulations relating to evictions, as alleged in more detail herein below.

The State's Response

30. On March 4, 2020, Governor Newsom issued a "State of Emergency" Order to address the threat of the spread of the Pandemic throughout California's communities.

31. On March 16, 2020, Governor Newsom issued Executive Order N-28- 20 authorizing local governments

to halt evictions of tenants. In relevant part, the Order suspended provisions of state law that would "preempt or otherwise restrict a local government's exercise of its police power to impose substantive limits on residential or commercial evictions," but only to the extent that "[t]he basis for the eviction is nonpayment of rent . . . arising out of a substantial decrease in household or business income" caused by the Pandemic or the government response thereto. The Order also required that the decrease in income be "documented." The Order initially provided that such protections would only be in effect through May 31, 2020.

32. On March 27, 2020, Governor Newsom issued Executive Order N-37-20 restricting evictions though May 31, 2020, if certain conditions are met, including that the tenant has notified the landlord in writing of their "inability to pay the full amount due to reasons related to COVID-19," within 7 days of the date the rent is due. The Order also required that tenants retain "verifiable documentation" explaining their changed financial circumstances, as an affirmative defense to an unlawful detainer action.

33. On May 29, 2020, Governor Newsom issued Executive Order No. N-66-20, extending the eviction protections for an additional 60 days.

34. On June 30, 2020, Governor Newsom issued Executive Order N-71-20, extending the timeframe for the protections provided by N-28-20 that authorized local governments to halt evictions for renters impacted by

COVID-19 through September 30, 2020.

35. On September 1, 2020, Governor Newsom signed Assembly Bill 3088 ("AB 3088") providing that, among other things, residential tenants who are unable to pay rent between March 1, 2020, and January 31, 2021, due to financial distress related to COVID-19 are protected from eviction, pursuant to certain requirements. AB 3088 provided that landlords could bring unlawful detainer actions against nonpaying tenants as of October 5, 2020, if a tenant failed to deliver a declaration stating their inability to pay due to COVID-19 distress. Furthermore, AB 3088 required that residential tenants must, by January 31, 2021, pay at least 25 percent of rent owed for the months of October 2020 through January 2021. Finally, AB 3088 provided that actions adopted by local governments between August 19, 2020, and January 31, 2021, to protect residential tenants from eviction due to financial hardship related to COVID-19 are temporarily preempted, where such actions would not become effective until February 1, 2021.

36. On January 29, 2021, Governor Newsom signed Senate Bill 91 ("SB 91") into law, which extended AB 3088's eviction protections through June 30, 2021, as well as the temporary preemption of a local jurisdiction's ability to enact new or amend existing eviction protections.

37. On June 28, 2021, Governor Newsom signed Assembly Bill 832 ("AB 832"), further extending the Statewide Moratorium through September 30, 2021.

Appendix E

38. Pursuant to AB 3088, SB 91, and AB 832, tenants taking advantage of the statewide eviction moratorium are required to declare, under penalty of perjury, that they have been financially impacted by the Pandemic to the point where they are unable to pay rent. In addition, tenants must pay, on or before September 30, 2021, 25% of their rental obligations that arose between September 1, 2020 and September 30, 2021.

The City's Response

39. On March 15, 2020, Los Angeles Mayor Eric Garcetti issued a Public Order under the City of Los Angeles's Emergency Authority entitled "New City Measures to Address COVID-19." Among other things, the Mayor's Order mandated that "no landlord shall evict a residential tenant in the City of Los Angeles during this local emergency period if the tenant is able to show an inability to pay rent due to circumstances related to the COVID-19 pandemic." The Mayor's Order additionally provided that such circumstances include "loss of income due to a COVID-19 related workplace closure, child care expenditures due to school closures, health care expenses related to being ill with COVID-19 or caring for a member of the tenant's household who is ill with COVID-19, or reasonable expenditures that stem from government-ordered emergency measures." There were no provisions mandating any sort of documentation be retained by tenants who claim an inability to pay rent due to COVID-19. Nor were there any protections provided for landlords or property owners rightfully attempting to continue collecting rent.

40. On March 27, 2020, the City Council for Defendant City of Los Angeles enacted Ordinance No. 186585 ("City Moratorium") mandating a "temporary"[1] moratorium on evictions for non-payment of rent for tenants who are unable to pay rent due to circumstances related to the COVID-19 pandemic.

41. On March 31, 2020, the City Moratorium was signed by the Mayor on March 31, 2020, but retroactively applied to "non-payment eviction notices, no-fault eviction notices, and unlawful detainer actions based on such notices, served or filed on or after March 4, 2020." The City Moratorium applies to both commercial real property and residential real property, both of which are broadly defined in the ordinance. The City Moratorium is not set to expire until "the end of the Local Emergency period." The Local Emergency period is defined as the period of time from March 4, 2020 to the end of the local emergency as declared by the Mayor.

42. On May 6, 2020, the City enacted Ordinance No. 186606 as an update to the City Moratorium. The update includes a prohibition on the influencing or attempting to influence, "through fraud, intimidation or coercion, a residential tenant to transfer or pay to the Owner any sum received by the tenant as part of any government relief program."

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1. The word "temporary" is somewhat misleading, as the Eviction Moratorium has no specified end date, and extends certain protections an additional 12-months beyond the "end of the Local Emergency."

43. Importantly, when Governor Newsom signed into law the statewide moratorium, as originally adopted in AB 3088 and extended by way of SB 91 and AB 832, the City took the position that the City's Eviction Moratorium would control and that tenants residing in the City were not required to meet the attestation requirements and payment obligations embodied in the statewide moratorium. The City did so on account of the fact that the statewide moratoria did not preempt local moratoria in effect as of August 20, 2020.

The California Courts' Response

44. On April 6, 2020, the California Judicial Council, the policymaking body of the California courts, issued temporary measures, including Rules 1 and 2, which effectively prohibited the bringing of unlawful detainer actions and judicial foreclosures. This independent eviction moratorium expired on September 1, 2020.

The Present State of the City's Eviction Moratorium

45. The Eviction Moratorium at issue here continue to effectively precludes residential evictions, resulting in persistent physical occupation by defaulting tenants, as alleged in more detail herein below.

46. The Eviction Moratorium presently prohibits landlords from terminating tenancies based on (1) non-payment of rent due to COVID-19 related inability to pay (without requiring documentation of such inability); (2) any "no fault" reason for termination; (3) certain lease violations related to unauthorized occupants,

unauthorized pets, and nuisance; and (4) the Ellis Act[2]. The ordinance also allows for an extended repayment schedule–giving tenants up to 12-months after the end of the Local Emergency to repay the delayed rent, without any interest or late penalties having accrued.[3] Further, while it provides that tenants "may" agree to a repayment plan, they are not required to do so. Thus, a tenant who fails to pay rent during the emergency period can refuse to pay ***any*** of that back rent for another full year after the emergency order is lifted, before the landlord has any recourse. Nevertheless, the Eviction Moratorium purports to compel landlords and property owners to continue paying for the tenants' utilities, and to continue maintaining secure and habitable living units pursuant to the terms of the leases. The Eviction Moratorium fails to provide any protection for the property owners who are unable to pay their mortgages, utilities and operating expenses needed to continue providing habitable units to their tenants.

47. While the Eviction Moratorium ostensibly protects tenants who are unable to pay rent due to circumstances related to the COVID-19 pandemic, it arbitrarily shifts the financial burden onto property owners, many of whom were already suffering financial hardship as a result of the Pandemic and have no equivalent remedy at law.

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2. Landlords are prohibited from removing any occupied units from the rental market as would otherwise be allowed by the Ellis Act until 60 days after the end of the Local Emergency period.

3. The ordinance prohibits an owner from charging interest or a late fee on rent not paid under its provisions.

48. Notably, the Eviction Moratorium *does not require* tenants to provide notice of COVID-19-related inability to pay to the landlord or to provide documentation to the landlord. While the City provides an *optional* form tenants can use to notify their landlords of a COVID-19-related inability to pay, the form is not mandatory. The City Moratorium nonetheless prohibits owners from endeavoring to evict any tenant with such an inability, in addition to providing that qualifying inability to pay serves as an affirmative defense to eviction for nonpayment.

49. The Eviction Moratorium fails to provide any tribunal or mechanism by which property owners and landlords may challenge a tenant's claimed "inability to pay," effectively forcing property owners to accept such claims without question. Indeed, the City Council did everything in its power to eliminate all judicial or non-judicial remedies available to property owners.

The City also created a private right of action in favor of tenants only, which allows tenants to sue their landlords for violating the Eviction Moratorium, after providing notice to the landlord and 15-day period to cure the violation. A tenant may bring an action for civil penalties of up to $10,000 per violation (plus up to an additional $5,000 if the tenant is senior citizen or disabled). The private right of action applies from May 12, 2020 forward. Thus, while landlords have been stripped of all remedies and any tribunal to adjudicate grievances, such as a court to protect their rights, tenants are free to go to court to assert monetary claims against their landlords.

Appendix E

The Eviction Moratorium Has Resulted in Severe Hardship to Plaintiffs

50. Plaintiffs own and operate 12 multifamily complexes throughout the City of Los Angeles. As of the date of filing, Plaintiffs' tenants are in arrears to the tune of nearly $20,000,000. Plaintiffs anticipate that this amount will at least triple by the time the City's Eviction Moratoria, and one-year grace period, expire.

51. Plaintiffs contend that the Eviction Moratorium has actually and proximately caused rent losses in the amount of nearly $20 million, to date. Had Plaintiffs retained the ability to institute unlawful detainer proceedings against any tenants that failed to timely pay per their contractual agreements, these losses would be minimal. Plaintiffs would also have been able to replace defaulting tenants with other, paying tenants. Presently, however, Plaintiffs have been required to allow defaulting tenants to accrue millions of dollars in back rents, and have been prevented from physically removing any defaulting tenants and replacing them with paying tenants. In adopting the Eviction Moratoria, the City fully understood that tenants would not have the means to pay all back rent (to the tune of tens of thousands of dollars) by the time the Eviction Moratoria and one-year grace period expired. Indeed, Plaintiffs are informed and believed, and based thereon allege, that the City orchestrated a regulatory regime designed to provide a compulsory and de facto rent forgiveness to be foisted on landlords throughout the City, including Plaintiffs.

52. Each month that the Eviction Moratorium remains operative, Plaintiffs will continue to suffer lost rents as tenants continue to fail to pay, in conjunction with Plaintiffs' inability to physically remove defaulting tenants.

53. In addition to rent losses, Plaintiffs have also suffered on the order of several millions of dollars in lost interest and late fees as a direct result of the Eviction Moratorium.

54. Plaintiffs have also suffered related financial losses attributable to the refusal of lending institutions to finance and/or refinance loans on Plaintiffs' apartment community properties, specifically on account of the Eviction Moratorium.

55. Plaintiffs are informed and believe and on that basis allege that they have suffered several millions of dollars in damages to their properties based on the Eviction Moratorium's compulsory mandate that Plaintiffs allow unauthorized individuals and pets, without limitation, to occupy Plaintiffs' properties against the will of Plaintiffs.

56. The Eviction Moratorium has resulted in a severe diminution in value of Plaintiffs' properties in an amount to be proven at trial.

Appendix E

FIRST CLAIM FOR RELIEF

Uncompensated *Per Se* Physical Taking in Violation of the Fifth Amendment to the United States Constitution – 42 U.S.C. § 1983 (*By Plaintiffs against All Defendants*)

57. Plaintiffs incorporate herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

58. The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." The purpose of the Takings Clause is to "bar [] Government from forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole." *Lingle v. Chevron Corp.*, 544 U.S. 528, 537 (2005) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

59. "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). As the Supreme Court recently reaffirmed, the government commits a physical taking when it either "formally condemn[s] property," "physically takes possession of property without acquiring title to it," or "when it occupies property." *Id.* "These sorts of physical appropriations constitute the clearest sort of

taking, and [courts] assess them using a simple, *per se* rule: The government must pay for what it takes." *Id.* (citations and quotation marks omitted). This rule applies with equal vigor regardless of whether the government "appropriat[es] private property for itself or a third party." *Id.*

60. The Supreme Court has also repeatedly reaffirmed that any "public benefit" derived from a physical taking *is simply not relevant* to a court's takings analysis: "[O]ur cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 435 (1982).

61. The Ordinances here fall squarely within the "physical occupation" line of cases the United States Supreme Court has consistently held to constitute *per se* categorical takings for which the government "must pay for what it takes." *Cedar Point Nursery*, 141 S. Ct. at 2071. The Eviction Moratorium requires that Plaintiffs continue furnishing their properties — indefinitely — to defaulting and nonpaying tenants. Plaintiffs have no effective ability to mitigate losses or oust those in default. By precluding Plaintiffs' historic right to institute unlawful detainer proceedings, Defendants have deprived Plaintiffs of the means to physically remove defaulting tenants from their properties. Defendants have thus stripped from Plaintiffs the fundamental right to exclude — a right that "is 'one of the most treasured' rights of property ownership." *Id.* at 2072 (quoting *Loretto*, 458 U.S. at 435). The Eviction

Moratorium thus constitutes "government-authorized physical invasions . . . requiring just compensation." *Id.* at 2073.

62. While the landlord-tenant relationship has historically been the subject of regulation, property owners have never been subject to regulations requiring persistent and indefinite occupation by defaulting and nonpaying tenants.

63. Separate from the indefinite eviction prohibitions, the Eviction Moratorium has also forced Plaintiffs to accept unauthorized pets and family members into units, even where mutually agreed-upon leases prohibit pets and additional occupants. Such provisions constitute a distinct and independent *per se* physical taking under *Loretto*, 458 U.S. at 434–36. It is irrelevant that unauthorized pets and family members may only be temporary occupants because, under the Takings Clause, "physical appropriation is a taking whether it is permanent or temporary." *Cedar Point Nursery*, 141 S. Ct. at 2074; *see also id.* at 2074–75 (collecting cases).

64. In short, the Eviction Moratorium constitutes the functional equivalent of the Defendants commandeering private property under the purported public purpose of providing housing to tenants affected by the fallout from COVID-19. The Eviction Moratorium and the enforcement thereof have caused a physical taking of Plaintiffs' property without just compensation as required under the Takings Clause of the Fifth Amendment to the U.S. Constitution. This, in turn, has caused proximate and legal harm to Plaintiffs.

65. The United States Supreme Court has repeatedly acknowledged that takings liability under the Fifth Amendment to the United States Constitution may be redressed under 42 U.S.C. § 1983.

66. Under 28 U.S.C. § 2201, Plaintiffs are entitled to declaratory relief determining that the City's Ordinances effect a taking of private property under the Takings Clause of the Fifth Amendment to the United States Constitution.

67. Plaintiffs found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorney's fees and litigation expenses pursuant to 42 U.S.C. § 1988.

SECOND CLAIM FOR RELIEF

Uncompensated Regulatory Taking in Violation of the Fifth Amendment to the United States Constitution – 42 U.S.C. § 1983 (*By Plaintiffs against All Defendants*)

68. Plaintiffs incorporate herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

69. The Eviction Moratorium also constitutes a regulatory taking under the test embodied in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). To determine whether a governmental action effects a taking under *Penn Central*, courts weigh (1)

"the economic impact of the regulation;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the 'character of the governmental action.'" *Lingle*, 544 U.S. at 537 (quoting *Penn Central Transp. Co.*, 438 U.S. at 124). This three-part inquiry is "essentially ad hoc," but "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle*, 544 U.S. at 540.

70. The Eviction Moratorium and the enforcement thereof have caused a regulatory taking of Plaintiffs' property without just compensation in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution.

71. First, the economic impact of the Eviction Moratorium is severe and ruinous to Plaintiffs, who are contractually entitled to receive rent from tenants on a monthly basis and cannot long survive if tenants are permitted to continue occupying the properties rent-free for a sustained and indefinite period of time. Indeed, Plaintiffs' tenants are over $20 million in arrears, to date. The Eviction Moratorium effectively prevents Plaintiffs from bringing unlawful detainer actions to oust nonpaying tenants and mitigate further losses.

72. Second, the Eviction Moratorium has undermined Plaintiffs' "reasonable investment-backed expectations." Plaintiffs developed and/or purchased their properties with the "objectively reasonable" expectation that they would be able to charge rent for units and have legal

recourse if tenants failed to pay rent when contractually due. *See Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 634–35 (9th Cir. 2020) (distinct investment-backed expectations must be "objectively reasonable" and "unilateral expectation[s]'or 'abstract need[s]' cannot form the basis of a claim that the government has interfered with property rights"). In fact, Plaintiffs made these business investments against the backdrop of California's unlawful detainer statutory scheme designed to resolve disputes between owners and defaulting tenants in an orderly, efficient and expeditious manner. *Cf. Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc).

73. Further, while the Eviction Moratorium theoretically allows Plaintiffs to eventually attempt to collect unpaid rents, the ability to actually recover such back rent from cash-strapped tenants is illusory, at best. In addition, the Eviction Moratorium bans Plaintiffs from recovering any interest or late fees on missed rent, thereby depriving Plaintiffs of the constitutional right to the time value of money. *Cf. Fowler v. Geurin*, 899 F.3d 1112, 1118–19 (9th Cir. 2018) ("Because the right to daily interest is deeply ingrained in our common law tradition, this property interest is protected by the Takings Clause[.]").

74. Finally, the "character of governmental action" is tantamount to a physical invasion of private property. *Lingle*, 544 U.S. at 537. The Eviction Moratorium effectively requires that Plaintiffs allow their tenants to continue to occupy their properties free of charge

and requires Plaintiffs to allow their tenants to remain in possession for the foreseeable future. Indeed, courts look to whether a regulation constitutes a "physical invasion" of private property to inform the analysis for this factor. *See Penn Central Transport Co.*, 438 U.S. at 124 (noting that "[a] 'taking' may be more readily found when the interference with property can be characterized as a physical invasion by government"); *see also Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) (opining that the regulation upheld there "d[id] not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them").

75. Furthermore, as both the Central District of California and other courts have recognized in similar contexts, the Eviction Moratorium here, and those like it, are simply unprecedented and extreme by any measure. *See, e.g.*, *Apartment Ass'n of L.A. Cty., Inc. v. City of Los Angeles*, No. CV 20-05193 DDP (JEMx), 500 F.Supp.3d 1088, 1096 (in a separate legal challenge to the City's ordinance, the court noted that "no amount of prior regulation could have led landlords to expect anything like the blanket Moratorium"); *Baptiste*, 490 F.Supp.3d at 384 ("a reasonable landlord would not have anticipated . . . a ban on even initiating eviction actions against tenants who do not pay rent and on replacing them with tenants who do").

76. In sum, the Eviction Moratorium does not merely "adjust[] the benefits and burdens of economic life to promote the common good," *Penn Central Trans. Co.*, 438 U.S. at 124, but instead effect a compensable taking. As

a result, the City's violation of the Takings Clause of the Fifth Amendment has caused proximate and legal harm to Plaintiffs.

77. Plaintiffs are entitled to recover just compensation for the taking of private property, and any and all other damages under 42 U.S.C. § 1983.

78. Plaintiffs found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorney's fees and litigation expenses pursuant to 42 U.S.C. § 1988.

THIRD CLAIM FOR RELIEF

Uncompensated Taking in Violation of Article I, Section 19 of the California Constitution (*By Plaintiffs against All Defendants*)

79. Plaintiffs incorporate herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

80. Like the federal Takings Clause embodied in the Fifth Amendment to the United States Constitution, Article I, § 19 of the California Constitution proscribes the "taking or damaging" of private property for public use unless "just compensation" has "first been paid to, or into court for, the owner."

81. The Takings Clause embodied in Article I, Section 19 of the California Constitution, at least with

respect to the merits of regulatory taking claims, has been interpreted congruently with the Takings Clause embodied in the Fifth Amendment to the United States Constitution. *Cf. San Remo Hotel L.P. v. City and Cty. of San Francisco,* 27 Cal.4th 643, 672–79 (2002) (California Supreme Court relying on physical and regulatory takings decisions interpreting federal takings claims to evaluate takings claim asserted under California Constitution).

82. The Eviction Moratorium constitutes a taking or damaging of private property without just compensation in violation of Article I, Section 19 of the California Constitution.

83. Plaintiffs are entitled to payment of "just compensation" for the taking pursuant to Article I, Section 19 of the California Constitution.

84. Plaintiffs found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of attorney's fees and litigation expenses pursuant to Cal. Code Civ. Proc. § 1036.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for an order and judgment against Defendants, and each of them, as follows as to all causes of action:

1. A determination that Defendants' Eviction Moratorium and related actions effected an uncompensated

taking of private property, entitling Plaintiffs' to an award of "just compensation" in an amount to be determined by jury;

2. Award Plaintiffs damages arising out of their Section 1983 and constitutional claims, and specifically "just compensation" under the Fifth and Fourteenth Amendments to the United States Constitution, and under Article I, section 19 of the California Constitution;

3. Award Plaintiffs their costs and reasonable attorney's fees and litigation expenses incurred in this action pursuant to 42 U.S.C. § 1988 and Cal. Code Civ. Proc. § 1036; and

4. Grant all other such relief to Plaintiffs as the Court may deem proper and just.

Dated: August 4, 2021

RUTAN & TUCKER, LLP
DOUGLAS J. DENNINGTON
JAYSON PARSONS

By: /s/ Douglas J. Dennington
Douglas J. Dennington
Attorneys for Plaintiffs

APPENDIX F — RELEVANT STATUTORY PROVISIONS

ARTICLE 14.6 TEMPORARY PROTECTION OF TENANTS DURING COVID-19 PANDEMIC

(Added by Ord. No. 186,585, Eff. 3/31/20; Amended in Entirety by Ord. No. 186,606, Eff. 5/12/20.)

SEC. 49.99. FINDINGS.

The City of Los Angeles is experiencing an unprecedented public health crisis brought by the Coronavirus, which causes an acute respiratory illness called COVID-19.

On March 4, 2020, the Governor of the State of California declared a State of Emergency in California as result of the COVID-19 pandemic. That same day, the Mayor also declared a local emergency.

Appendix F

On March 16, 2020, the Governor issued Executive Order N-28-20, which authorizes local jurisdictions to suspend certain evictions of renters and homeowners, among other protections. The Executive Order further authorizes the City of Los Angeles to implement additional measures to promote housing security and stability to protect public health and mitigate the economic impacts of the COVID-19 pandemic.

The economic impacts of COVID-19 have been significant and will have lasting repercussions for the residents of the City of Los Angeles. National, county, and city public health authorities issued recommendations, including, but not limited to, social distancing, staying home if sick, canceling or postponing large group events, working from home, and other precautions to protect public health and prevent transmission of this communicable virus. Residents most vulnerable to COVID-19, including those 65 years of age or older, and those with underlying health issues, have been ordered to self-quarantine, self-isolate, or otherwise remain in their homes. Non-essential businesses have been ordered to close. More recent orders from the Governor and the Mayor have ordered people to stay at home and only leave their homes to visit or work in essential businesses. As a result, many residents are experiencing unexpected expenditures or substantial loss of income as a result of business closures, reduced work hours, or lay-offs related to these government-ordered interventions. Those already experiencing homelessness are especially vulnerable during this public health crisis.

Appendix F

The COVID-19 pandemic threatens to undermine housing security and generate unnecessary displacement of City residents and instability of City businesses. Therefore, the City of Los Angeles has taken and must continue to take measures to protect public health, life, and property.

This ordinance temporarily prohibits evictions of residential and commercial tenants for failure to pay rent due to COVID-19, and prohibits evictions of residential tenants during the emergency for no-fault reasons, for unauthorized occupants or pets, and for nuisance related to COVID-19. This ordinance further suspends withdrawals of occupied residential units from the rental market under the Ellis Act, Government Code Section 7060, et seq.

SEC. 49.99.1. DEFINITIONS.

The following words and phrases, whenever used in this article, shall be construed as defined in this section:

A. **Commercial Real Property.** "Commercial real property" is any parcel of real property that is developed and used either in part or in whole for commercial purposes. This does not include commercial real property leased by a multi-national company, a publicly traded company, or a company that employs more than 500 employees.

B. **Endeavor to Evict.** "Endeavor to evict" is conduct where the Owner lacks a good faith basis to

believe that the tenant does not enjoy the benefits of this article and the Owner serves or provides in any way to the tenant: a notice to pay or quit, a notice to perform covenant or quit, a notice of termination, or any other eviction notice.

C. **Local Emergency Period.** "Local emergency period" is the period of time from March 4, 2020, to the end of the local emergency as declared by the Mayor.

D. **No-fault Reason.** "No-fault reason" is any no-fault reason under California Civil Code Section 1946.2(b) or any no-fault reason under the Rent Stabilization Ordinance.

E. **Owner.** "Owner" is any person, acting as principal or through an agent, offering residential or Commercial Real Property for rent, and includes a successor in interest to the owner.

F. **Residential Real Property.** "Residential real property" is any dwelling or unit that is intended or used for human habitation.

SEC. 49.99.2. PROHIBITION ON RESIDENTIAL EVICTIONS.

A. During the Local Emergency Period and for 12 months after its expiration, no Owner shall endeavor to evict or evict a residential tenant for non-payment of rent during the Local Emergency Period if the tenant is

unable to pay rent due to circumstances related to the COVID-19 pandemic. These circumstances include loss of income due to a COVID-19 related workplace closure, child care expenditures due to school closures, health-care expenses related to being ill with COVID-19 or caring for a member of the tenant's household or family who is ill with COVID-19, or reasonable expenditures that stem from government-ordered emergency measures. Tenants shall have up to 12 months following the expiration of the Local Emergency Period to repay any rent deferred during the Local Emergency Period. Nothing in this article eliminates any obligation to pay lawfully charged rent. However, the tenant and Owner may, prior to the expiration of the Local Emergency Period or within 90 days of the first missed rent payment, whichever comes first, mutually agree to a plan for repayment of unpaid rent selected from options promulgated by the Los Angeles Housing Department ("LAHD") for that purpose. **(Amended by Ord. No. 187,122, Eff.** 8/8/21.**)**

B. No Owner shall endeavor to evict or evict a residential tenant for a no-fault reason during the Local Emergency Period.

C. No Owner shall endeavor to evict or evict a residential tenant based on the presence of unauthorized occupants or pets, or for nuisance related to COVID-19 during the Local Emergency Period.

D. No Owner shall charge interest or a late fee on rent not paid under the provisions of this article.

E. An Owner shall: (i) provide written notice to each residential tenant of the protections afforded by this article ("Protections Notice") within 15 days of the effective date of this ordinance; and (ii) provide the Protections Notice during the Local Emergency Period and for 12 months after its termination each time the Owner serves a notice to pay or quit, a notice to terminate a residential tenancy, a notice to perform covenant or quit, or any eviction notice, including any notice required under California Code of Civil Procedure Section 1161 and California Civil Code Section 1946.1. LAHD shall make available the form of the Protections Notice, which must be used, without modification of content or format, by the Owner to comply with this subparagraph. LAHD will produce the form of the Protections Notice in the most commonly used languages in the City, and an Owner must provide the Protections Notice in English and the language predominantly used by each tenant. **(Amended by Ord. No. 187,122, Eff.** 8/8/21.**)**

F. No Owner shall influence or attempt to influence, through fraud, intimidation or coercion, a residential tenant to transfer or pay to the Owner any sum received by the tenant as part of any governmental relief program.

G. Except as otherwise specified in this article, nothing in this section shall prohibit an Owner from seeking to evict a residential tenant for a lawful purpose and through lawful means.

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SEC. 49.99.3. PROHIBITION ON COMMERCIAL EVICTIONS.

During the Local Emergency Period and for three months thereafter, no Owner shall endeavor to evict or evict a tenant of Commercial Real Property for non-payment of rent during the Local Emergency Period if the tenant is unable to pay rent due to circumstances related to the COVID-19 pandemic. These circumstances include loss of business income due to a COVID-19 related workplace closure, child care expenditures due to school closures, health care expenses related to being ill with COVID-19 or caring for a member of the tenant's household or family who is ill with COVID-19, or reasonable expenditures that stem from government-ordered emergency measures. Tenants shall have up to three months following the expiration of the Local Emergency Period to repay any rent deferred during the Local Emergency Period. Nothing in this article eliminates any obligation to pay lawfully charged rent. No Owner shall charge interest or a late fee on rent not paid under the provisions of this article.

SEC. 49.99.4. PROHIBITION ON REMOVAL OF OCCUPIED RESIDENTIAL UNITS.

No Owner may remove occupied Residential Real Property from the rental market under the Ellis Act, Government Code Section 7060, et seq., during the pendency of the Local Emergency Period. Tenancies may not be terminated under the Ellis Act until 60 days after the expiration of the Local Emergency Period.

Appendix F

SEC. 49.99.5. RETROACTIVITY.

This article applies to nonpayment eviction notices, no-fault eviction notices, and unlawful detainer actions based on such notices, served or filed on or after the date on which a local emergency was proclaimed. Nothing in this article eliminates any obligation to pay lawfully charged rent.

SEC. 49.99.6. AFFIRMATIVE DEFENSE.

Tenants may use the protections afforded in this article as an affirmative defense in an unlawful detainer action.

SEC. 49.99.7. PRIVATE RIGHT OF ACTION FOR RESIDENTIAL TENANTS.

If an Owner violates Section 49.99.2, except for 49.99.2(E)(i), an aggrieved residential tenant may institute a civil proceeding for injunctive relief, direct money damages, and any other relief the Court deems appropriate, including, at the discretion of the Court, an award of a civil penalty up to $10,000 per violation depending on the severity of the violation. If the aggrieved residential tenant is older than 65 or disabled, the Court may award an additional civil penalty up to $5,000 per violation depending on the severity of the violation. The Court may award reasonable attorney's fees and costs to a residential tenant who prevails in any such action. The Court may award reasonable attorney's fees and costs to an Owner who prevails in any such action and obtains a

Court determination that the tenant's action was frivolous. A civil proceeding by a residential tenant under this section shall commence only after the tenant provides written notice to the Owner of the alleged violation, and the Owner is provided 15 days from the receipt of the notice to cure the alleged violation. The remedies in this paragraph apply on the effective date of this section, and are not exclusive nor preclude any person from seeking any other remedies, penalties or procedures provided by law.

SEC. 49.99.8. PENALTIES.

Upon the effective date of this section, an Owner who violates this article shall be subject to the issuance of an administrative citation as set forth in Article 1.2 of Chapter I of this Code. Issuance of an administrative citation shall not be deemed a waiver of any other enforcement remedies provided in this Code.

SEC. 49.99.9. SEVERABILITY.

If any provision of this article is found to be unconstitutional or otherwise invalid by any court of competent jurisdiction, that invalidity shall not affect the remaining provisions of this article which can be implemented without the invalid provisions, and to this end, the provisions of this article are declared to be severable. The City Council hereby declares that it would have adopted this article and each provision thereof irrespective of whether any one or more provisions are found invalid, unconstitutional or otherwise unenforceable.

APPENDIX G — COURT ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, FILED APRIL 15, 2022

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
Civil Division
Central District, Spring Street Courthouse,
Department 10

21CHCV00595

GHP MANAGEMENT CORPORATION, A CALIFORNIA CORPORATION, *et al.*,

vs

COUNTY OF LOS ANGELES, *et al.*

Judge: Honorable William F. Highberger	CSR: None
Judicial Assistant: A. Lim	ERM: None
Courtroom Assistant: None	Deputy Sheriff: None

April 15, 2022
4:43 PM

NATURE OF PROCEEDINGS: Ruling on Submitted Matter

The Court, having taken the matter under submission on 02/24/2022 for Hearing on Demurrer - without Motion

to Strike by County of Los Angeles to First Amended Complaint, now rules as follows: April 15, 2022 Ruling on Submitted Matter (submitted Feb. 24, 2022)

Demurrers by County of Los Angeles and State of California to All Causes of Action: Overruled. Defendants to file Answer or other appropriate responsive pleading by May 16, 2022.

I. INTRODUCTORY COMMENTS:

Each defendant filed its own, separate demurrer, but the arguments are the same so they will be addressed jointly. County of Los Angeles is named in all four causes of action and challenges each of them. The State is named in the first, second, and fourth causes of action only and thus only challenges those claims. While the County and State eviction moratoria have had different effective dates—past, present, and future—and different fine-print provisions, the parties on both sides do not tether their respective arguments to any such subtleties. The landlord Plaintiffs say that individually and collectively they have worked an impermissible Taking whereas the government Defendants assert that as a matter of law these regulatory regimes cannot be seen to constitute a physical or regulatory taking.

As a preliminary note, as a state trial court, this Court is bound by published California state Court of Appeal precedents, state Supreme Court precedents, and United States Supreme Court precedents. Decisions by the United States District Courts and Courts of Appeals

are only of persuasive value to the extent that they are seen as persuasive.

Certain cases cited by Defendants are not relevant to the Takings Analysis before the Court on these demurrers. For example, the failed landlord challenge to COVID-19 rent moratoria analyzed in Apartment Association of Los Angeles County, Inc. v. City of Los Angeles (9th Cir. 2021) 10 F.4th 905 , cert. petition pending, was a challenge made under the Contracts Clause provision of the United States Constitution at art. I, § 10, cl. 1. The failed landlord challenges under the Takings Clause to zoning and planning limits on conversion of real property use that gave rise to the decisions in San Remo Hotel v. City & County of San Francisco (2002) 27 Cal.4th 643 and Ballinger v. City of Oakland (Feb. 1, 2022) 24 F.4th 1287, involve a factually different and thus legally dissimilar issue since these Plaintiffs have made no request for approval to change the permitted use of their multi-family rental properties. Rather, these Plaintiffs allege that they have been effectively and permanently denied rental income for many of the tenants due to the operation of the challenged moratoria.

This Court is quite aware of the severe impact of the COVID-19 pandemic on all residents of California, indeed on all humans on the planet Earth, and the importance of public health measures to reduce the extent of death, disability, and economic and non-economic loss caused by the spread of this virus. A basic tenet of Takings Analysis, however, is that worthy public measures which require a taking of a person's property may well be

authorized acts of the government pursuant to police powers, but the costs imposed on the property owner by such a necessary taking are subject to the constitutional requirement (under both the United States and California Constitutions) that reasonable compensation be provided. These demurrers test whether the Takings Claims pled in the First Amended Complaint are viable, but they do not presently test what order of magnitude of compensation might be due to Plaintiffs should they eventually prevail on the merits at the time of trial.

One final preliminary note is that the First Amended Complaint is very specific in alleging how these several Plaintiffs suffered economic loss due to their alleged inability to collect rent in a timely fashion from tenants who remained in possessions of leaseholds while enjoying the utilities and other services provided by the landlords to the tenants not paying rent. Whether the Plaintiffs can prove this factually at time of trial is a question for another day.

II. DISCUSSION

A. Meet and Confer Requirements

California Code of Civil Procedure § 430.41(a) provides that "Before filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer[.]" A demurring party is required to file and serve with the demurrer a declaration stating that no agreement was reached after the parties met and

conferred, or that the filing party failed to respond to the meet and confer request or failed to meet and confer in good faith. (Code Civ. Proc., § 430.41(a)(3).)

The County met and conferred with Plaintiffs by letter prior to amendment of the initial complaint. Plaintiffs' FAC did not address any of the supposed defects claimed by the County. (See Levin Decl., ¶¶ 1-4, Ex. 1.) The State submitted proof of a meet-and-confer on Judicial Council Form CIV-140.

B. As Applied or Facial Challenge

The County argues that Plaintiffs' allegations only amount to a facial challenge of the law, not an as-applied challenge, because they only claim they are harmed by application of the law. An as-applied challenge must plead "specific allegedly impermissible applications of the [challenged] ordinance." (Tobe v. City of Santa Ana (1995) 9 Cal.4th 1069, 1084.) As-applied challenges "contemplate[] analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (Id.)

Plaintiffs have alleged injury proximately caused by rent losses exacerbated by their inability to commence eviction proceedings. (See FAC, ¶ 46.) But they have not pled the specifics, such as losses attributable to specific tenants invoking the protections of the moratoria. The

Court has not been cited any authority suggesting that fraud-level pleading is required to perfect an as-applied challenge. Without clear authority stating the contrary, the absence of specific details should not limit Plaintiffs to a facial attack on the moratoria. They have alleged circumstances where the application of the moratoria has deprived them of their property rights, and the Court will treat their pleading as both a facial and as-applied challenge.

C. Physical Taking

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." (Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 537.) "[W]here government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." (Id. at 538; see also Justice Thurgood Marshall's opinion in Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, 426, 434-35 ("a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve").) Plaintiffs allege the moratoria have stripped their right to exclude defaulting and nonpaying tenants, tantamount to a government-authorized physical invasion of their property. (FAC, ¶ 55.) Courts have held that regulation of the landlord–tenant relationship, including rent control and means of collection of rent and eviction, do not amount to takings. (See Yee v. City of Escondido (1992) 503 U.S. 519, 524-25, 528 (mobile home park rent control).) But a regulation that compels a landowner to suffer continuing

occupancy of its property or to "refrain in perpetuity from terminating a tenancy" might not pass constitutional muster. (Id. at 528.) To avoid implication of the Takings Clause, a regulation must be of use of property—it cannot "authorize an unwanted physical occupation of [Plaintiffs'] property." (Id. at 532.) For purposes of Takings analysis, it does not matter whether the intruder is the government itself or a third party acting under the protection of government authority. (Cedar Point Nursery v. Hassid (2021) 141 S.Ct. 2063, 2071.) Likewise, it does not matter whether the occupation is temporary or permanent if some such occupation has occurred. (Id. at 2074 ("a physical appropriation is a taking whether it is permanent or temporary").) Accord, Heights Apartments, LLC v. Walz, supra, slip op. at 17.

The moratoria here are analogous to the unwanted "permanent physical occupation authorized by government" in Loretto, supra, 458 U.S. at 426. In that case, the petitioner purchased an apartment building that she later discovered had cables installed to provide cable television service to her tenants and the tenants of neighboring buildings. (Id. at 421-22.) Those cables had been installed at the invitation of the prior owner. (Id.) Loretto's efforts to remove the cables failed in the New York state courts, which held that a municipal ordinance mandating installation with nominal compensation did not run afoul of the Takings Clause. (Id. at 423-25.) The U.S. Supreme Court reversed, finding the government-authorized occupation was a taking that entitled Ms. Loretto to just, rather than nominal, compensation. (See id. at 425-26.)

Appendix G

The Supreme Court clarified the limits of its Loretto holding in Federal Communications Comm'n v. Florida Power Corp. (1987) 480 U.S. 245. In that case a cable company leased telephone pole space from a utility to run telecommunication lines at $7.15 per pole. (Id. at 248-52.) A federal law regulating utilities who leased telephone pole space reduced the rent to $1.79 per pole based on the pole owner's actual costs. (Id. at 252) The Court found this was not sufficient to effect a taking, observing that the ruling in Loretto "specifically required landlords to permit permanent occupation of their property[.]" (Id. at 251-53.) By contrast, the telephone pole regulation did not give cable companies "any right to occupy space on utility poles" nor did it "prohibit[] utility companies from refusing to enter into attachment agreements with cable operators." (Id. at 251.) The element of "required acquiescence is at the heart of the concept of occupation[;]" its absence in Florida Power Corp. meant that the price-control statute merely regulated economic relations of landlords and tenants, rather than effected a taking, and there was an "unambiguous distinction between a commercial lessee"—the cable operator in Florida Power Corp.—"and an interloper with a government license"—the cable operator in Loretto. (Id. at 252-53.)

The situation presented here does not square perfectly with Loretto or Florida Power Corp., but it is clearly a closer fit with the former than the latter. Plaintiffs invited their tenants to live on properties they own in exchange for payment of a monthly rent at a fixed amount. The government has allegedly intervened by stripping from Plaintiffs the legal ability to evict tenants who have not

been paying rent due to some effect of the coronavirus pandemic. Because Plaintiffs have lost the right to evict tenants in arrears, the rent those tenants agreed to pay as part of their invitation onto the premises has allegedly been effectively reduced to zero.

Defendants would like to portray this as merely an economic regulation of the landlord–tenant relationship that extends the time to pay rent or initiate an unlawful detainer proceeding. But the moratoria, at least according to the allegations in the First Amended Complaint, do more than control of the price of rent, or when it is due, or when and how a landlord can eject a delinquent tenant from the premises. The extended bar on eviction effectively eliminates rent and is thus tantamount to occupation—the tenants in arrears effectively enjoy a government-mandated right to occupy a landlord-maintained space owned by Plaintiffs for nearly two years. (See Florida Power Corp., supra, 480 U.S. at 251.) The moratoria "require the landlord to suffer the physical occupation of a portion of his building by a third party[.]" (Loretto, supra, 458 U.S. at 440.) There is no right to refuse continued occupancy to these tenants; the "element of required acquiescence [that] is at the heart of the concept of occupation" is clearly present. (Florida Power Corp., supra, 480 U.S. at 252.) Because tenants in arrears are effectively relieved of their obligations to pay rent, they are more like "an interloper with a government license" than a lessee whose tenancy is regulated by the state. (See id. at 252-53.)

Appendix G

Defendants argue that the limited nature of the eviction moratoria defeats Plaintiffs' Takings Clause claims. Defendants rely substantially on Yee. In Yee there was a California state law, enacted in 1978, that regulated the relationship between a mobile home park landlord and a mobile homeowner who was a park tenant. (See Yee, supra, 503 U.S. at 524.) The state law—no doubt recognizing the high cost of moving a mobile home and the fact that such homes were usually sold in place rather than relocated—served to (1) limit the bases on which a landlord could terminate a tenancy at a "pad" in a mobile home park (but allowed nonpayment of rent as a basis for eviction, as well as violation of park rules or a desired change in the use of the land); (2) generally prohibited landlord removal of a mobile home sold by the owner of the personal property while a rental agreement was in effect; and (3) prohibited charging a transfer fee for sale and vetoing a purchaser who had the ability to pay rent. (Id. at 523-24.) The statewide law had no rent control provision; those regulations were left to local governments. Escondido adopted a rent control provision in 1988, ten years after the state law was passed. (Id. at 524.) The Escondido rent control ordinance set rents at 1986 levels and required increases to be approved by the city council. (Id. at 524-25.) Mobile home landlords challenged the local Escondido rent control ordinance. (Id. at 522-23.) The Supreme Court ultimately concluded that, as clarified in Florida Power Corp., "no taking occurs under Loretto when a tenant invited to lease at one rent remains at a lower regulated rent" because such rent control "does not compel a landowner to suffer the physical occupation of his property[.]" (Id. at 539.)

Defendants rely heavily on this language and liken their eviction moratoria to rent control affecting tenants already invited to live on the premises by the landlord Plaintiffs. But an eviction ban is not rent control—it is allegedly the permanent loss of rent otherwise due per contract. The Yee landlords could still evict a tenant for nonpayment of rent or violation of community rules—something Plaintiffs here cannot do or are afraid to do because tenants might invoke the moratorium as protection against eviction. (See id. at 523-24.) The scheme in Yee was vastly different from the moratoria at issue here—it truly was a mere regulation of the relationship between mobile home park landlords and their tenants. The limitations on evicting a mobile home park tenant reflected the nature of the mobile home housing situation and are distinguishable from the rent-free occupation of ordinary residential rental property at issue here. (See id. at 526-32.) The fact that several federal courts have relied on Yee does not mean they have not misapprehended its holding. Yee was about rent control, not the permanent loss of rent otherwise due per contract. Per state law, the Yee landlords were never barred from evicting tenants for nonpayment. (Id. at 523-24.) There is a clear distinction between the mobile home regulatory regime and the government-licensed, rent-free apartment occupations created by these moratoria. The right to bar a trespasser (i.e., a tenant refusing to pay rent) from possession of one's property is the most basic of real property rights. Heights Apartment, LLC v. Walz, supra, slip op. at 10.

Further suggesting that the moratoria create a government-sanctioned occupation proscribed by the

Takings Clause are recent comments by the Supreme Court. The Court, in a per curiam opinion that drew only three dissenting associate justices, found an eviction moratorium imposed by the federal government was invalid because it exceeded the statutory authority of the issuing agency (Centers for Disease Control and Prevention). But the Court also noted that such a moratorium would put landlords "at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery" and that "preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." (Alabama Ass'n of Realtors v. Department of Health & Human Services (2021) 141 S.Ct. 2485, 2489.) This strongly suggests that, were the question of a moratorium's constitutionality under the Fifth Amendment to be placed squarely before the Supreme Court, a six-member majority would find it to be something other than permissible landlord–tenant regulations, like those in Yee or Florida Power Corp., but instead more like the government-authorized intrusion in Loretto. Additionally, the Supreme Court recognized that even a temporary moratorium can inflict "irreparable harm by depriving [landlords] of rent payments[.]" (Alabama Ass'n of Realtors, supra, 141 S.Ct. at 2489.)

Defendants have not demonstrated that any facts pled or judicially noticeable establish that any rent payments not collected due to the moratoria are guaranteed to be recoverable from the tenant or from a government subsidy program. (See id.) Perhaps facts developed in discovery will show that tenant and landlord assistance programs

effectively compensate for any taking effected by the moratoria. Until then, Plaintiffs must be permitted to litigate their cases.

D. Regulatory Taking

The courts have recognized that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster" and that such regulatory takings are compensable under the Fifth Amendment. (Lingle, supra, 544 U.S. at 537.) To determine whether a regulation effects a taking, a court considers three factors: (1) the regulation's economic impact on the claimant; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character of the government action. (Penn Central Transportation Co. v. City of New York (1978) 438 U.S. 104, 124; Colony Cove Properties, LLC v. City of Carson (9th Cir. 2018) 888 F.3d 445, 450.)

There is no "set formula" for determining "how far is too far" when evaluating a regulation's economic impact on a claimant. (Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, 1015.) When a property owner has suffered a physical invasion, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, [the Supreme Court has] required compensation." (Id.) Courts will also categorically require compensation when a regulation "denies all economically beneficial or productive use of land." (Id.) When either of these situations arises, compensation is mandatory.

Otherwise, the court undertakes a "case-specific inquiry into the public interest advanced in support of the restraint." (Id.)

Here, Plaintiffs have sufficiently alleged a physical invasion of their property. No regulatory taking analysis is necessary because Plaintiffs have established categorical entitlement to compensation as alleged in the first, third, and fourth causes of action, making the second cause of action functionally redundant.

Further and specific to the second cause of action, the regulatory taking analysis "necessarily entails complex factual assessments of the purposes and economic effects of government actions" and thus is essentially a factual determination not appropriate for resolution on a pleading challenge. (Yee, supra, 503 U.S. at 523; Barbaccia v. County of Santa Clara (N.D. Cal. 1978) 451 F.Supp. 260, 266.) For this reason, the demurrers to the second cause of action are overruled without prejudice to renewing the argument once a factual record is developed.

E. Other Arguments

Defendants also invoke case law where courts made sweeping statements about deference to local ordinances and other government measures intended to ensure the health and safety of the populace. The favored cite is to Jacobson v. Massachusetts (1905) 197 U.S. 11, wherein the Supreme Court affirmed the constitutionality of a $5 fine imposed by Massachusetts on individuals who failed to comply with a smallpox vaccination requirement.

Constitutional property protections were not implicated by the case. The Court acknowledged health and safety regulations were committed to local authority, but courts should "guard with firmness every right appertaining to life, liberty, or property as secured to the individual by the supreme law of the land[.]" (Id. at 38.) The issue before the Court on these demurrers is not the lawfulness of mandatory COVID-19 vaccination.

Defendants have also suggested that the emergency nature of the coronavirus pandemic justifies any taking that may have been effected by the eviction moratoria. But this "requires an actual emergency with immediate and impending danger to support a necessity defense." (TrinCo Investment Co. v. United States (Fed. Cir. 2013) 722 F.3d 1375, 1379 (wartime order to destroy petroleum in storage in the Philippines in advance of Japanese Army advance not compensable as wartime emergency, but harm to timber owners from allegedly mis-managed wildfire suppression effort survives Rule 12(b)(6) challenge); see also United States v. Caltex (1952) 344 U.S. 149, 151, 156.) Such a scenario usually implicates momentary police action "under pressure of public necessity and to avert impending peril." (Customer Co. v. City of Sacramento (1995) 10 Cal.4th 368, 384 (police use of tear gas to apprehend suspect causing damage to merchant's inventory not compensable).)

The prolonged nature of the moratorium, and its stated purpose to buttress lockdown orders, suggests it may not be amenable to a necessity defense because it served to mitigate a long-term public health hazard rather than "avert impending peril." (See id., see also

Heights Apartment LLC v. Walz, supra, slip op. at 7 discussing factual question of extent to which "Jacobson deference" ceased to apply "after the immediate public health crisis dissipated, and traditional levels of [constitutional] scrutiny are applicable.") In any event, such a determination is not feasible on demurrer. This can be pled as an affirmative defense. Additionally, the invocation by Defendants of the "noncompensable loss doctrine," as such, is not availing because the types of emergencies where a public entity is exempt from liability are narrowly circumscribed to destruction of buildings to prevent the spread of conflagration or destruction of diseased animals, rotten fruit, or infected plants or trees where life or health is jeopardized. (Holtz v. Superior Court (1970) 3 Cal.3d 296, 305 & n.10.) Defendants cite to no carve-out for a long-term effort meant to mitigate a pandemic of an upper respiratory disease.

F. Requests for Judicial Notice

The County seeks judicial notice of three actions taken by its Board of Supervisors. The State seeks judicial notice of four executive orders and information regarding coronavirus statistics available on government-run websites. There are no objections, and all items are proper subjects of judicial notice. (See Evid. Code, § 452(a)-(c), (h).)

FOOTNOTE:

The Eight Circuit recently reached a contrary conclusion on the Contracts Clause issue in Heights Apartments,

Appendix G

LLC v. Walz (April 5, 2022) __ F.4th __, No. 21-1278, slip op. at pg. 11, n. 8.

Further Status Conference is scheduled for 04/29/22 at 01:30 PM in Department 10 at Spring Street Courthouse. Joint Status Report is due on 04/22/22.

A copy of this minute order is uploaded on the Case Anywhere website.