NO. 22-1929

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DARBY DEVELOPMENT COMPANY, INC., *et al.,*

Plaintiffs-Appellants

v.

UNITED STATES,

Defendant-Appellee

Appeal from May 17, 2022, Opinion and Judgment of the United States Court of Federal Claims, Case No. 21-1621 Judge Armando O. Bonilla

CORRECTED BRIEF OF PLAINTIFFS-APPELLANTS

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DATE: March 27, 2023

CERTIFICATE OF INTEREST

As required by Federal Circuit Rule 47.4, the undersigned counsel certifies the following:

1. Represented Entities. Provide the full names of all parties represented by undersigned counsel in this case.

DARBY DEVELOPMENT COMPANY, INC.

MCLEAN INVESTMENTS, LLC

SHANDER INTERNATIONAL, LLC

104WWB, LLC

MICHAEL RAK

MOHAMMAD ZAMANIAN

REGINA TILLMAN

RICHARD AND JOANNE PANEK

INTERCOASTAL YACHT CLUB, LLC

R. JAMES PROPERTIES, INC.

CAPITAL CITY INTERIOR LLC

VERITAS EQUITY MANAGEMENT, L.L.C.

AZURE PARK APARTMENTS, LLC

BAY BRIDGE PROPERTIES LLC

BELLA ESTATES NEVADA, LLC.

CASAS ADOBES PARTNERS V L.L.C.

DECATUR POINT LLC

ENCANTADA APARTMENTS, LLC

GRAND CHANNEL, LLC

HESPERIAN FALLS PARTNERS LLC

LAKE CHARLOTTE, LLC

LAS VEGAS CAMERON APTS LLC

LOGAN VENTURES OF CALIFORNIA PROPERTIES LLC

PARADISE SQUARE, LLC.

REDWOOD GARDEN PROPERTIES, LLC

RIDGE FALLS APARTMENTS, LLC

RIVERBEND VILLAGE PARTNERS LLC

SUNSET TERRACE PARTNERS LLC

TSV CROSSROADS AT ROCHELLE LLC

VILLA MONTEREY PROPERTIES, LLC

VILLA EAST PROPERTIES, LLC

ORION PROPERTIES OF WEST PALM BEACH, LLC

BELHAVEN RESIDENTIAL, LLC

GWR BH HOLDINGS, LTD.

GWR EQUITIES LLC

GWR TEXAS SE PARTNERS, LTD.

GWR TRAILS PARTNERS, LTD.

GG ICON LLC

2. Real Party in Interest. Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

NONE/NOT APPLICABLE.

3. Parent Corporations and Stockholders. Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

NONE/NOT APPLICABLE.

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court.

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be

directly affected by this court's decision in the pending appeal. Do not include the originating case number(s).

NONE/NOT APPLICABLE.

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees).

NONE/NOT APPLICABLE.

Dated: September 6, 2022

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STATEMENT OF RELATED CASES

Plaintiffs are unaware of any related cases under Federal Circuit Rule 47.5.

JURISDICTIONAL STATEMENT

The Court of Federal Claims had subject matter jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491, and the Takings Clause of the Fifth Amendment to the United States Constitution. On May 17, 2022, the Court of Federal Claims granted Defendant's motion to dismiss under RCFC 12(b)(6) and entered judgment dismissing Plaintiffs' case. On June 6, 2022, Plaintiffs timely filed a notice of appeal from the Court of Federal Claims' Opinion and Order dated May 17, 2022, and accompanying Judgment. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

INTRODUCTION

The United States Centers for Disease Control and Prevention ("CDC") responded to the COVID-19 pandemic by issuing a nationwide moratorium on the eviction of tenants of rental properties who failed to pay their rents (the "CDC Order" or "moratorium"). The moratorium followed an Executive Order from the President directing the CDC to take such action. As that moratorium neared its expiration date, Congress acted and extended the moratorium. The CDC then further extended the moratorium. In response to challenges to the CDC's authority to issue the moratorium, the Government repeatedly, consistently, and vigorously argued that the moratorium was within the CDC's statutory authority.

The moratorium remained in effect for nearly a full year. This caused severe economic losses to Plaintiffs-Appellants ("Plaintiffs"), 38 owners of residential rental properties, who could neither evict non-rent-paying tenants and replace them with rent-paying tenants, nor receive rents from existing tenants encouraged by the threat of eviction. Because the Government did not compensate, and had no plans to compensate, rental property owners for the losses resulting from the moratorium, Plaintiffs brought suit under the Takings Clause of the Fifth Amendment to the United States Constitution.

The Government then did a U-turn. After the Supreme Court, without deciding the issue, cast doubt on the CDC's authority to issue the moratorium in *Ala.*

Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021) (*per curiam*), the Government took the position that the moratorium could not constitute an uncompensated taking because it was "unauthorized."

The Court of Federal Claims agreed with the Government, concluding that *Ala. Ass'n of Realtors* compelled the finding that the CDC "lacked the requisite congressional authority to issue the moratorium" and that no claim could therefore arise under the Constitution. Appx008. On this principal basis, the Court of Federal Claims dismissed Plaintiffs' operative First Amended Complaint ("Complaint").

The Court of Federal Claims' decision is erroneous for a number of reasons. Chief among these is the court's conclusion that an action not expressly authorized by Congress cannot give rise to an actionable takings claim. As this Court made plain in *Del-Rio Drilling Programs v. United States*, 146 F.3d 1358 (Fed. Cir. 1998), whether a governmental action may constitute an actionable taking depends not on whether the action was expressly *authorized*, but rather whether Congress had expressly *prohibited* the action or the action was so far outside the scope of the official's duties as to be a rogue *ultra vires* act. The CDC moratorium was the result of a presidential directive; was issued pursuant to a statute enacted by Congress authorizing the agency "to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" (42 U. S. C. § 264(a)); and was extended by express Congressional action.

It can hardly be said to have been expressly prohibited or a rogue act. The Court of Federal Claims' order is contrary to applicable law.

Moreover, the order below leads to an absurdity: under the Court of Federal Claims' logic, while legitimate government action is subject to the Takings Clause, government agencies can avoid any obligation to provide just compensation by deliberately overstepping their authority. To be sure, the courts might eventually step in to declare such actions unauthorized, but, until that happens, the Government can appropriate all kinds of property without paying any compensation. This is precisely what the Framers sought to avoid. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 49 (1960) (the "Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); James Madison, *Property*, *in* James Madison: Writings 515 (Jack Rakove ed., 1999) (as the foundation of a civil society, property, "being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own").

The Court of Federal Claims' dismissal order is contrary to well-established law and effectively turns the Takings Clause on its head. It should be reversed.

STATEMENT OF THE ISSUES

1. Did the Court of Federal Claims err as a matter of law in dismissing Plaintiffs' takings claim? (Yes).

2. Did the Court of Federal Claims err as a matter of law in dismissing Plaintiffs' alternative claim for illegal exaction where the Government compelled Plaintiffs to incur the expense associated with housing people the Government ordered to be housed in violation of their leases? (Yes).

STATEMENT OF THE CASE

A. The CARES Act And The President's Executive Order

As part of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) ("CARES Act"), aimed at addressing the impacts of the COVID-19 pandemic, Congress, on March 27, 2020, enacted a 120-day eviction moratorium that applied to certain types of rental properties that received federal assistance or were subject to federally-backed loans. *See* CARES Act § 4024. This moratorium expired on July 24, 2020. *Id*.

On August 8, 2020, President Trump issued Executive Order 13945, entitled "Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners." 85 Fed. Reg. 49,935 (Aug. 14, 2020). The Executive Order stated that it was "the policy of the United States" to "minimize, to the greatest extent possible, residential evictions" during the COVID-19 pandemic. *Id*. at 49,936. The

Executive Order further directed the Secretary of Health and Human Services and the Director of the CDC to "consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19." *Id*.

B. The CDC Order

In response to this presidential directive, the CDC issued an order, entitled "Temporary Halt in Residential Evictions to Prevent Further Spread of COVID-19" (the "CDC Order"), that imposed a broad nationwide moratorium on residential evictions. 85 Fed. Reg. 55,292 (Sept. 4, 2020). In the CDC Order, the CDC noted the "historic threat to public health" presented by the COVID-19 pandemic, and explained its view that an eviction moratorium "can be an effective public health measure utilized to prevent the spread of communicable disease." *Id*. at 55,292. It concluded that restrictions on eviction were "reasonably necessary" in light of the pandemic. *Id*. at 55,296. The CDC further expressly stated that it was issuing the CDC Order under Section 361 of the Public Health Service Act (42 U.S.C. § 264) and related regulations codified at 42 C.F.R. § 70.2. *Id*. at 55,293. The Public Health Service Act, in part, authorizes the CDC to "to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." 42 U.S.C.

§ 264(a).[1] The CDC made such a judgment in issuing the CDC Order. 85 Fed. Reg. at 55,293.

By its terms, the CDC Order essentially applied to all residential rental properties nationwide, and effectively prohibited residential evictions. 85 Fed. Reg. at 55,292-55,293. It directed that "a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action, shall not evict any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of this Order." *Id*. at 55,293. A covered person included any tenant who signed a declaration asserting economic hardship. *Id*. at 55,292-55,293. The CDC Order provided no process for challenging such a declaration. *Id*.

The penalties for violating the CDC Order were extreme. Under ordinary circumstances, a landlord who was found to have evicted someone contrary to the CDC Order would be subject to one year in jail or a fine up to $100,000 for individuals and up to $200,000 for organizations, or both. 85 Fed. Reg. at 55,296. The CDC Order authorized the U.S. Department of Justice to initiate criminal prosecutions, and further authorized federal and state authorities to enforce the order. *Id*.

[1] Authority was originally designated to the Office of Surgeon General, but now is with the CDC, for reasons not relevant here.

Although the CDC Order nominally applied only to covered persons, the broad prohibitions under the CDC Order and the order's severe criminal and civil penalties rendered this nominal limitation essentially meaningless as a practical matter. Appx034-035 (Complaint, ¶¶ 19-20, 23). The effect of the CDC Order was to preclude all residential evictions. *Id.*

The CDC Order contained no provision for compensating property owners for the losses they incurred as a result of their inability to evict delinquent and non-rent-paying individuals, who were continuing to occupy their property over the owners' objection, and the owners' consequent inability to re-lease that housing to rent-paying individuals. *See generally* 85 Fed. Reg. 55,292. While the CDC Order technically did not relieve tenants from their obligation to pay rent, as a practical matter landlords have little ability to recover past-due rent from non-rent-paying tenants. Appx035-036 (Complaint, ¶ 25). The right of eviction, and related right to replace a tenant who is not paying rent with one who will, is the principal mechanism for property owners to avoid economic losses resulting from a tenant's failure to pay. *Id.* The CDC Order, by compelling occupation of the owners' properties, prohibited owners from exercising those rights. *Id.*

The CDC Order became effective nationwide upon publication in the Federal Register on September 4, 2020. *See* 85 Fed. Reg. 55,292. The CDC Order initially was effective until December 31, 2020. *Id*. at 55,297.

C. Congress Extends The CDC Order.

In December 2020, Congress expressly extended the CDC Order until January 31, 2021, through the Consolidated Appropriations Act. Pub. L. No. 116-260, div. N, tit. V, § 502, 134 Stat. 1182 (2020). In doing so, Congress acknowledged the CDC's authority for the CDC Order, stating:

> The order issued by the Centers for Disease Control and Prevention under section 361 of the Public Health Service Act (42 U.S.C. § 264), entitled Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID–19 (85 Fed. Reg. 55292 (September 4, 2020)) is extended through January 31, 2021, notwithstanding the effective dates specified in such Order.

134 Stat. 1182, 2078-79 (2020).

In the same legislation that extended the CDC Order, Congress also relatedly appropriated $25 billion in "emergency rental assistance" to State and local governments, among others, to "provide financial assistance to eligible households, including the payment of (i) rent [and] (ii) rental arrears." 134 Stat. 1182, 2072-73 (2020). These amounts were intended to be paid either directly to a landlord on behalf of an eligible household or to the eligible household itself for the purpose of making payments to the landlord. *Id*.

D. The CDC Order Extensions And Termination

As the Congressional extension lapsed, the CDC extended the CDC Order through March 31, 2021. *See* 86 Fed. Reg. 8020 (Feb. 3, 2021). The CDC subsequently extended the CDC Order through June 30, 2021, and then again

through July 31, 2021. *See* 86 Fed. Reg. 16,731 (Mar. 31, 2021); 86 Fed. Reg. 34,010 (June 28, 2021). Finally, the CDC extended the CDC Order, in part, through October 3, 2021. *See* 86 Fed. Reg. 43,244 (Aug. 6, 2021).

Following its issuance, numerous interested parties challenged the CDC Order on a variety of grounds, including the assertion that the order exceeded the CDC's statutory authority. Courts split on the question of whether the CDC's broad statutory authority was broad enough to encompass the CDC Order.[2] In one of these cases, a district court found that the CDC had exceeded its authority and vacated the CDC Order, but stayed its judgment pending the Government's appeal. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2487-88. The Supreme Court subsequently vacated that stay. *Id*. at 2486. Thereafter, the Government abandoned its longstanding support for the CDC Order, voluntarily dismissed its appeal in *Ala. Ass'n of Realtors*, and allowed final judgment to be entered against the CDC Order. *See Ala. Ass'n of Realtors v. HHS*, No. 21-5093, 2021 U.S. App. LEXIS 27377 (D.C. Cir. Sep. 3,

[2] *Compare, e.g.*, *Ala. Ass'n of Realtors v. HHS*, No. 21-5093, 2021 U.S. App. LEXIS 16630, at *3 (D.C. Cir. June 2, 2021) (nonprecedential) (holding that the Government had "made a strong showing that it was likely to succeed on the merits" of its argument that the CDC Order was legal); *Chambless Enters., LLC v. Redfield*, 508 F. Supp. 3d 101, 112 (W.D. La. 2020) (holding that the Government was likely to succeed in arguing that the CDC Order was legally effective); *Brown v. Azar*, 497 F. Supp. 3d 1270, 1281 (N.D. Ga. 2020) (same) *with, e.g., Ala. Ass'n of Realtors*, 141 S. Ct. at 2486 (vacating stay and indicating that plaintiffs were likely to succeed on the merits of their argument challenging the legality of the CDC Order); *Tiger Lily, LLC v. United States HUD*, 5 F.4th 666, 669-73 (6th Cir. 2021) (concluding that the CDC Order was not legally issued).

2021) (nonprecedential). As a result, the CDC Order effectively ended in early September 2021, about a month earlier than originally intended by the CDC. It was in place for almost exactly one year.

E. Plaintiffs' Claims

Plaintiffs are owners of residential rental properties. Because of the CDC Order, Plaintiffs' rental units were occupied, over their objection, by individuals who were not paying all rent due and who were in breach of their leases, but who could not be replaced by rent-paying tenants. Appx024-031 (Complaint, ¶ 9). The CDC Order imposed enormous economic consequences on Plaintiffs. *Id.* While continuing to incur all costs of ownership, Plaintiffs were unable to evict non-rent-paying tenants from rental units and thus unable to generate income by leasing those units to rent-paying tenants. Appx022 (Complaint, ¶ 2). Estimated industry-wide financial losses to rental property owners amount to tens of billions of dollars. *Id.*

Plaintiffs state two claims in their Complaint. First, Plaintiffs allege that the CDC Order constituted a compensable taking of their property and property rights without just compensation, in violation of the Fifth Amendment of the United States Constitution. Appx023, Appx037-039 (Complaint, ¶¶ 3, 32-40). More specifically, Plaintiffs allege that the CDC Order constituted a physical taking because it effected a Government-authorized physical invasion, occupation, or appropriation of Plaintiffs' private property, for the Government itself or third parties, contrary to

Plaintiffs' fundamental property rights, including the right to exclude. *Id.* Plaintiffs are not alleging a regulatory takings claim. Second, in the alternative, if the CDC Order is considered to have been illegal, then Plaintiffs allege that the CDC Order constituted an illegal exaction because the CDC's actions resulted in an illegal exaction of Plaintiffs' private property, for which Plaintiffs are entitled to recover. Appx023, Appx039-040 (Complaint, ¶¶ 4, 41-44). Plaintiffs seek just compensation for the deprivation of their property rights and the value of the property taken or illegally exacted by the Government. Appx023, Appx031, Appx038, Appx039-040 (Complaint, ¶¶ 5, 10, 31, 39, 43). This includes, without limitation, the amount of rental income Plaintiffs would have received in the absence of the physical occupation and taking or exaction of their property and property rights, as a direct result of the CDC Order. *Id.*

F. The Motion To Dismiss And Court Of Federal Claims Decision.

The Government filed a motion to dismiss under RCFC 12(b)(1) and RCFC 12(b)(6). The Government's primary argument was that the CDC Order could not effect a taking because it had been "unauthorized." The Government further argued that there was no taking as a matter of law because the CDC Order was the equivalent of a regulation, like rent control, rather than a physical taking; that Plaintiffs had no valid property interests; and that the CDC Order should be considered an exercise of "police power" for which there is no takings remedy.

Finally, the Government argued that Plaintiffs could not state an alternative claim for illegal exaction because the cost of housing non-rent-paying tenants was not paid directly to the Government.

The Court of Federal Claims (the Hon. Armando O. Bonilla) granted the Government's motion and dismissed Plaintiffs' claims in a published opinion. *See* Appx001-013 (Opinion and Order). With respect to the takings claim, the Court of Federal Claims held that no takings claim could be stated as a matter of law because the CDC Order had been unauthorized. Appx006-011. The Court first stated its view that to "assert a viable takings claim against the United States, the government action in issue must be duly authorized by Congress." Appx007. Then, relying on comments in the Supreme Court's opinion in *Ala. Ass'n of Realtors*, 141 S. Ct. 2485, the Court stated that "the CDC lacked the requisite congressional authority to issue" the CDC Order. Appx008. It concluded that "the CDC Order was unauthorized and, thus, *ultra vires*," and, for that reason, held that Plaintiffs could not state a claim. Appx009. The Court further rejected any notion that Congress had ratified or acquiesced in the CDC Order. Appx009-011. The Court did not rule on the Government's various other arguments for dismissal of the takings claim.

With respect to Plaintiffs' alternative claim for illegal exaction, the Court of Federal Claims held that no such claim could be stated because money was not directly paid by Plaintiffs to the Government or to third parties at the direction of the

Government. Appx011-013. The Court stated that Plaintiffs were able to charge rent and that the fact that amounts charged were unpaid and would be uncollectable was not sufficient to state a claim for illegal exaction. Appx012.

Plaintiffs now timely appeal.

SUMMARY OF THE ARGUMENT

Plaintiffs have stated a viable takings claim, or, in the alternative, a claim for illegal exaction. The Government's arguments for dismissal are flawed and contrary to established law, and the decision of the Court of Federal Claims was erroneous.

First, the Court of Federal Claims erred in dismissing Plaintiffs' takings claim on the basis that the CDC Order was "unauthorized." After opposing legal challenges to the CDC Order for a year, and arguing in courts across the country that the CDC Order was a proper use of the CDC's authority and powers,[3] the Government reversed its position in the Court of Federal Claims and argued that there could be no takings claim because the CDC Order had been unauthorized. This tactical attempt to avoid paying just compensation is unsupported by the law. For

[3] *See, e.g., Ala. Ass'n*, 141 S. Ct. at 2488 ("The Government contends that . . . § 361(a) [42 U.S.C. § 264(a)] gives the CDC broad authority to take whatever measures it deems necessary to control the spread of COVID–19, including issuing the moratorium."); *Tiger Lily*, 5 F.4th at 669 ("The government claims that the Public Health Act of 1944, 42 U.S.C. § 264(a), authorizes the CDC's Halt Order."); *Ala. Ass'n of Realtors*, 2021 U.S. App. LEXIS 16630, at *3-5 (agreeing with the Government's argument that the CDC Order likely "falls within the plain text" of § 361(a) of the Public Health Service Act).

purposes of analyzing a takings claim, the issue is not whether the Government action at issue is ultimately determined to have been a lawful exercise of the agency's authority. Rather, the crucial question is whether the invasion of property rights at issue is chargeable to the Government, as opposed to the rogue act of a government agent acting *ultra vires*. A takings claim is precluded only when the Government action was either expressly prohibited by Congress or undertaken outside the general scope of the official's job responsibilities. The CDC Order was neither. To the contrary, the CDC has broad authority to take action to combat communicable diseases, and issued the CDC Order specifically to do just that, at the direction of the President and in express reliance on its good faith understanding of its legal rights and duties. Its actions were not *ultra vires*. Congress's express extension of the CDC Order and appropriation of related funds further supports this conclusion.

Second, the Government's additional arguments for dismissal of Plaintiffs' takings claims, which were not addressed by the Court of Federal Claims, are likewise without merit. These include the Government's argument that Plaintiffs have not stated a physical takings claim, that Plaintiffs do not possess property rights, and that the CDC Order was an exercise of some "police power" for which compensation cannot be awarded. All of these arguments are contrary to settled takings case law, including the most recent pertinent Supreme Court authority.

Finally, Plaintiffs' alternative claim for illegal exaction should not have been dismissed. Plaintiffs were, in effect, compelled by the Government to pay the expenses associated with housing people the Government desired to be housed, in violation of their leases. The circumstances here are economically indistinguishable from other illegal exaction cases. The Court of Federal Claims erred in holding otherwise.

ARGUMENT

A. Standard Of Review

This Court reviews a decision to dismiss a complaint for failure to state a claim *de novo*. *See, e.g.*, *Advanced Cardiovascular Sys. v. SciMed Life Sys*., 988 F.2d 1157, 1160 (Fed. Cir. 1993). In such cases, "no deference is owed to the holding of the trial court." *Id*. In reviewing dismissal for failure to state a claim, the court "must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

B. The Court of Federal Claims Erred In Concluding That Plaintiffs' Takings Claim Is Precluded Because The CDC Order Was "Unauthorized."

1. Takings Claims are Only Precluded Where the Act is *Ultra Vires*.

The Takings Clause provides that private property shall not be taken for public use without just compensation. U.S. CONST. amend. V. Because a takings claim

is against the Government, it requires the Government to have acted; an *ultra vires* act of a government official cannot form the basis for a takings claim.

The Court of Federal Claims held that to state a viable takings claim, the government action in question must be duly authorized by Congress, and that the CDC Order could not form the basis for a takings claim because it believed the CDC Order was beyond the scope of the CDC's statutory authority. The Court of Federal Claims misinterpreted and misapplied pertinent takings law. Whether an act is "authorized" is a term of art in the context of a takings claim, with a meaning subtly different from that used in cases generally analyzing statutory authority. The important distinction for takings purposes is whether the act was undertaken by the Government (regardless of whether the act is later deemed to have been a lawful exercise of authority) or by a rogue government official acting in an *ultra vires* manner. The CDC Order unquestionably falls in the former category.

The leading Federal Circuit case on these issues is *Del-Rio Drilling Programs v. United States*, 146 F.3d 1358 (Fed. Cir. 1998). Although the Court of Federal Claims acknowledged *Del-Rio*, it failed properly to apply the law as set forth in that decision, and in related precedents, to the claims alleged here.

In *Del-Rio*, this Court first explained that the question of whether conduct was "authorized" for takings purposes is really asking "whether the alleged invasion of property rights is chargeable to the government or is an act committed by a

government agent acting *ultra vires*." *Del-Rio*, 146 F.3d at 1362. This Court then explained that where an official has engaged in *ultra vires* conduct, the act is not constitutionally considered an act of the government that could give rise to a takings claim (although it perhaps could give rise to other claims). *Id*. To assess whether conduct is *ultra vires* under takings law, courts must consider whether the conduct was "either explicitly prohibited or was outside the normal scope of the government officials' duties." *Id*. at 1363. Action by officials is "authorized" *for takings purposes* when it falls within the general scope of their duties, meaning within "a natural consequence of Congressionally approved measures or pursuant to the good faith implementation of a Congressional Act." *Id*. at 1362 (quotations omitted).

Acknowledging the potential confusion around the concept of "authorized" conduct, this Court in *Del-Rio* further clarified that there is an "important distinction" between conduct that is considered "unauthorized" under takings law (i.e., *ultra vires*) versus conduct that is considered "authorized" under takings law but that was nonetheless unlawful, illegal, or invalid. *Del-Rio*, 146 F.3d at 1362. As this Court explained: "Merely because a government agent's conduct is unlawful does not mean that it is unauthorized; a government official may act within his authority even if his conduct is later determined to have been contrary to law." *Id*. Accordingly, the mere "conclusion that government agents acted unlawfully" does not defeat a takings claim. *Id*. at 1363. The court must instead ask whether the act

was *ultra vires*. *Id.*; *see also, e.g.*, *United States v. Causby*, 328 U.S. 256, 260-64 (1946) (takings claim stated although agency took action beyond express statutory authorization from Congress); *Great Falls Mfg. Co. v. Att'y Gen.*, 124 U.S. 581, 596-97 (1888) (takings claim stated as to property acquired beyond survey authorized by Congress where the official was honestly undertaking what he understood to be his duties; distinguishing hypothetical situation in which the official had gone rogue and acquired land with no connection to the project, which would not bind the government); *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 891 (Fed Cir. 1983) (rejecting government's "novel proposition" that there was no taking due to lack of authority where multiple agencies were asserting "what they believed were the rights of the United States"); *Americopters, LLC v. United States*, 95 Fed. Cl. 224, 230-31 (2010) (confirming that an action is not *ultra vires* for takings purposes where an agency is acting within the general scope of its duties to interpret the law, even if the interpretation was mistaken); *Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 150-53 (D.C. Cir. 1983), *rev'd on other grounds*, 745 F.2d 1500 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985) (distinguishing specific limitations on an agent's authority by express congressional intent from an agent acting within its ordinary scope of responsibilities but then taking action considered to have been unlawful).

In *Del-Rio*, Interior Department officials required an oil company to obtain rights of way from a tribal nation, which resulted in the company being unable to operate. *Del-Rio*, 146 F.3d at 1358-61. The officials had erred in interpreting the law and had no legal authority to impose this requirement. *Id*. This Court held that the illegality of the action did not preclude a takings claim. *Id*. at 1363. Although the officials may have misinterpreted the law under which they acted, and taken action beyond their statutory authority, their action was not unauthorized for takings purposes (i.e., *ultra vires*), but rather was undertaken within the scope of their normal job responsibilities. *Id.* For that reason, this Court held that the oil company stated an actionable takings claim. *Id*.

The principles in *Del-Rio* and related cases establish that Plaintiffs are not precluded from asserting a takings claim here. While the Government has reversed course and now contends that the CDC Order was unauthorized because questions have been raised about its *legality*, that is not the relevant inquiry for takings purposes. The inquiry is whether the CDC Order was the *ultra vires* act of a rogue official, acting in a way that was expressly prohibited or outside the scope of the official's duties. *Del-Rio*, 146 F.3d at 1363. That is not the situation here.

2. The CDC Order was Within the General Scope of the CDC's Duties.

There is no contention that the CDC Order was expressly prohibited by Congress. Thus, the issue under *Del-Rio* is whether the CDC was acting within the

general scope of its duties. It was. As the Government itself repeatedly explained when arguing for the legality of the CDC Order, the CDC's authority includes expansive powers to address and combat communicable diseases. The CDC issued the CDC Order to combat a communicable disease, and did so in reliance on its good faith understanding of its rights and duties under applicable law. The CDC expressly issued the CDC Order pursuant to the agency's interpretation of Section 361 of the Public Health Service Act, which, in part, authorizes the CDC to "to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases." 42 U.S.C. § 264(a). This language is intentionally broad; when enacting it, Congress indicated that because of the "impossibility of foreseeing what preventative measures may become necessary, the provisions of this subsection are written broadly enough to apply to any disease." H.R. REP. NO. 78-1364, at 24-25 (1944); *cf. Marshall v. United States*, 414 U.S. 417, 427 (1974) (acknowledging that "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation").

The CDC has significant discretion to enact measures to prevent and control disease. It issued the CDC Order in response to one of the worst public health crises in the country's history, because it had concluded, in its judgment, that the order was

necessary to prevent the interstate spread of the disease. That the CDC may have been wrong about its interpretation of applicable law is not a basis for precluding a takings claim. As in *Del-Rio*, there is "no reason to suppose" that the CDC Order "reflected anything but a good faith effort to apply the statutes and regulations as [the CDC] understood them." *Del-Rio*, 146 F.3d at 1363; *see also Ala. Ass'n of Realtors*, 141 S. Ct. at 2492 (Breyer, J., dissenting) ("Given the split among the Circuits, it is at least hard to say that the Government's reading of the statute is demonstrably wrong.") (quotations omitted).

The Court of Federal Claims, relying on comments in the Supreme Court's opinion in *Ala. Ass'n of Realtors* observing that the CDC had never before issued an eviction moratorium and had rarely before invoked the underlying statutory provision, held that the CDC Order was "clearly outside the normal scope of the government official's duties." Appx009 (quotations omitted). The holding of the Court of Federal Claims is wrong and is unsupported by the law. The Supreme Court decision in *Ala. Ass'n of Realtors* did not consider, let alone rule on, the issue presented here. The fact that this particular act was out of the ordinary, as a result of the extraordinary circumstances of the pandemic, does not imply that the CDC was acting outside of its general scope of responsibilities. The CDC is a national public health agency. The normal scope of its duties includes efforts to combat communicable disease and protect the public health. The CDC Order was just such

an effort. Regardless of whether this particular act is ultimately determined to have been lawful, the CDC was not acting outside the normal scope of its public health related duties. A takings claim is therefore not precluded. *Cf. Bailey v. United States*, 78 Fed. Cl. 239, 254 (2007) ("It was, after all, the Army Corps asserting authority over purported wetlands and not, say, the Secretary of Education.").

3. The Supreme Court did not Decide that the CDC Order is *Ultra Vires* Under Takings Law.

In its Opinion, the Court of Federal Claims stated that the "import" of the Supreme Court decision in *Ala. Ass'n of Realtors* was "clear and binding" that "the CDC lacked the requisite congressional authority to issue the nationwide residential eviction moratorium." Appx008. This statement is inaccurate and misguided in the context of this case for at least two reasons.

First, the Supreme Court did *not* rule on the scope of the CDC's authority. The Supreme Court's decision was in the context of an expedited application regarding the *stay* of a district court judgment – a judgment about which other courts disagreed. Courts that considered the merits of the authority issue were split, and the merits were not actually before the Supreme Court. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2494 (Breyer, J., dissenting) ("Applicants raise contested legal questions about an important federal statute on which the lower courts are split and this Court has never actually spoken. These questions call for considered decisionmaking, informed by full briefing and argument."). The Government

thereafter voluntarily abandoned its year-long defense of the CDC Order without any definitive ruling.

Second, even if there had been a definitive ruling that the CDC had acted unlawfully, that would not resolve the question presented here. As discussed above, the question for takings purposes is not whether the agency ultimately is found to have acted lawfully within its authority, but whether the official acted in a way that was *ultra vires*. The Supreme Court did not consider this issue. In circumstances like these, where there has been no determination that the Government's action was *ultra vires* and Plaintiffs are not challenging the agency's authority, the law does not preclude Plaintiffs from asserting a takings claim. *See, e.g., Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 803 (Fed. Cir. 1993) (although the Fourth Circuit had previously concluded that the agency violated the Administrative Procedures Act and did not legally have jurisdiction with respect to plaintiff's property, the agency's action nonetheless could not be considered *ultra vires* for takings purposes).

On this point, the Court of Federal Claims decision in *Laguna Gatuna v. United States*, 50 Fed. Cl. 336 (2001), is instructive. There, the owner of a dry lake bed brought a takings claim asserting that the Environmental Protection Agency ("EPA") had effected a taking by designating the lake bed as waters of the United States. *Id*. at 340-41. While the case was pending, the Supreme Court held that a similar Army Corps of Engineers rule exceeded that agency's authority. *Id*. The

EPA interpreted the decision as undermining its authority to regulate the lake bed at issue. *Id*. As a result, it withdrew its prior action and then took the position that its prior action had been unauthorized and thus could not have been a taking. *Id*. The Court of Federal Claims rejected the Government's maneuver, which is akin to the Government's about-face here. The Court noted that it came "too late for plaintiff's purposes," and held that the plaintiff would have a takings claim for the period the order was in effect, when the agency "had not conceded the invalidity of its actions." *Id*. at 343. The Court further explained, under *Del-Rio*, that the EPA's original action was generally within the scope of the agency's duties and was a good faith interpretation of its authority, and therefore was to be considered authorized for purposes of takings law. *Id*.; *see also*, *e.g*., *Tabb*, 10 F.3d at 803. For all of these reasons, the Supreme Court's comments in *Ala. Ass'n of Realtors* are not dispositive here.

4. Congressional Action Further Supports Plaintiffs' Takings Claim.

In assessing whether the CDC Order should be considered the *ultra vires* act of a rogue official, it is important that *Congress itself supported the CDC Order*. Congress was well aware of the CDC Order and took no action suggesting that it felt that the CDC was acting outside its statutory authority. To the contrary, Congress *expressly acknowledged* that the CDC Order had been issued under 42 U.S.C. § 264 and affirmatively extended the order's duration. 134 Stat. 1182, 2078-79 (2020).

Congress's action supporting and extending the CDC Order militates strongly in favor of the conclusion that the CDC's action was not *ultra vires* for purposes of takings law. *See Del-Rio*, 146 F.3d at 1363; *see also Ala Ass'n of Realtors*, 141 S. Ct. at 2492 (Breyer, J., dissenting) (noting that Congress "did not bristle at the Government's [original] reading of the statute" as supporting the CDC Order, but instead "extended" it).

The Court of Federal Claims held that Congress's action was insufficient to establish that Congress, through ratification, had expressly provided statutory authority for the CDC Order. Appx009-011. The court's holding below conflated two issues. The doctrine of ratification is concerned with whether, through its actions, Congress expressly provided retroactive statutory authorization for an act that was unauthorized at the time it was made. *See, e.g., Schism v. United States*, 316 F.3d 1259, 1289 (Fed. Cir. 2002). As noted above, however, it is unnecessary to find Congressional ratification in order to find that an "invasion of property rights is chargeable to the government." *Del-Rio*, 146 F.3d at 1262. Even in the absence of statutory authority, a takings claim may be stated unless the act at issue was either expressly prohibited or was so far outside the scope of a government official's duties as to be ultra vires. *Id*. at 1363. By conflating ratification analysis with the analysis of whether a rogue government employee's acts were *ultra vires*, the Court of Federal Claims effectively concluded that, in the absence of either express statutory

authority or clear evidence of Congressional ratification, all government actions are *ultra vires*. This conclusion conflicts directly with the law set forth by this Court in *Del-Rio*.

Furthermore, the Court of Federal Claims erred in its analysis of the doctrines of ratification and acquiescence.[4] These doctrines permit Congress to give agency conduct the force of law even if unauthorized when taken. *See, e.g.*, *Schism*, 316 F.3d at 1289, 1294. In general, ratification exists where Congress has "affirmatively acted to demonstrate its approval of an agency action," while acquiescence arises in circumstances where Congress has failed "to act in response to an agency action it might view as previously unauthorized." *Id.* at 1294. Here, Congress both ratified the CDC Order and acquiesced to it.

When presented with the CDC Order, which expressly stated that it had been issued pursuant to the Public Health Service Act, Congress did not vacate the order or dispute the CDC's exercise of authority. Instead, Congress affirmatively extended the CDC Order and appropriated related funds. *See, e.g.*, *Bob Jones Univ.*

[4] Courts split as to whether Congress directly approved the CDC Order. *Compare Ala. Ass'n of Realtors*, 2021 U.S. App. LEXIS 16630, at *5 ("Congress has expressly recognized that the agency had the authority to issue its narrowly crafted moratorium . . . . [R]ather than enact its own moratorium, Congress deliberately chose legislatively to extend the HHS moratorium and, in doing so, specifically to embrace HHS's action under section 361 of the Public Health Service Act (42 U.S.C. 264)." (quotations omitted)) *with Tiger Lily, LLC v. HUD*, 992 F.3d 518, 524 (6th Cir. 2021) (stating that "congressional acquiescence in the CDC's assertion that [the CDC Order] was supported by 42 U.S.C. § 264(a) does not make it so").

v. United States, 461 U.S. 574, 599-602 (1983) (holding that Congress impliedly ratified or acquiesced in IRS rulings when it was aware of the rulings and did not modify them).[5] This supports the conclusion that Congress agreed that the CDC was authorized to issue the CDC Order. *See, e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (explaining that "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction"). At the very least, Congress's action is powerful support for the conclusion that Congress understood and agreed that the CDC was acting within the general scope of its duties (and not in an *ultra vires* manner), which is all that is necessary for takings purposes.

5. The Case Law Cited by the Court of Federal Claims is not to the Contrary.

In reaching its erroneous conclusion that Plaintiffs' takings claim is precluded because the CDC Order was "unauthorized," the Court of Federal Claims misapplied *Del-Rio*, as explained above. Although it referenced other cases, principally those cited within *Del-Rio*, it did not discuss any of them. None of the other cases cited by the court below supports the court's conclusion. Most of the cases address

[5] Congress's appropriation of billions of dollars in rental assistance for landlords in light of the CDC Order further supports that the CDC's action was ratified, or at least not considered *ultra vires*, by Congress. *See, e.g.*, *Fleming v. Mohawk Wrecking & Lumber Co*., 331 U.S. 111, 116 (1947) (holding that where legislation did not authorize a new agency, Congress ratified the President's creation of the new agency when it appropriated funds for the agency).

circumstances in which there had been a specific limitation on the agency's authority or where Congress had explicitly denied the authority – neither of which exists here.[6] Others address only general principles of law or deal with highly distinguishable facts.[7] *Tabb Lakes* strongly supports Plaintiffs' claims. *See Tabb Lakes*, 10 F.3d at 803 (holding that agency's "assertion of jurisdiction was, *prima facie*, within its authority and cannot be considered *ultra vires*," despite a federal appeals court having found that the agency lacked jurisdiction). None of the cited cases supports dismissal.[8]

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[6] *See, e.g.*, *United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330, 334 (1920) (holding that where only the Secretary of War was authorized, takings claim did not accrue based on inferior officer's action until ratified by the Secretary); *Hooe v. United States*, 218 U.S. 322, 334-35 (1910) (holding that landlord could not recover additional rent, in leasing dispute with agency, because Congress had specifically appropriated an amount and prohibited further amounts being paid); *Armijo v. United States*, 663 F.2d 90, 95-97 (Ct. Cl. 1981) (holding that plaintiffs had stated a takings claim, and distinguishing cases where there was a specific limitation on authority); *S. Cal. Fin. Corp. v. United States*, 634 F.2d 521, 523-26 (Ct. Cl. 1980) (no takings claim where the land acquisition at issue required specific congressional consent; explaining that no takings claim will lie "where Congress has refused to authorize such a taking or properly expects that no such taking can occur unless specified procedures involving Congress are followed"); *NBH Land Co. v. United States*, 576 F.2d 317, 318-20 (Ct. Cl. 1978) (rejecting takings claim where Congress had denied authorization and funding for the land purchase at issue).

[7] *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 n. 27 (1949) (explaining that no takings claim existed where there was a breach of express contract remedy in the Court of Claims); *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 898-900 (Fed. Cir. 1986) (holding that the Court of Claims erred in analyzing the validity of the agency's conduct).

[8] In the proceedings below, the Government relied heavily on cases in which the Court of Federal Claims held that the Food and Drug Administration's attempted regulation of tobacco did not give rise to takings liability. *See, e.g.*, *Bd. Mach., Inc.*

C. The Government's Additional Arguments For Dismissal Should Be Rejected.

In their motion to dismiss, the Government made three additional arguments for dismissal of Plaintiffs' takings claim, none of which were addressed by the Court of Federal Claims. Plaintiffs anticipate the Government will make these arguments again on appeal. None provides a basis for dismissing Plaintiffs' takings claim.

1. Plaintiffs have Stated a Physical Takings Claim.

Plaintiffs allege that the CDC Order "appropriated the owners' right to exclude" and constituted a physical taking "because it has effected a Government-authorized physical invasion, occupation, or appropriation of Plaintiffs' private property, for the Government itself or for third parties." Appx022-023, Appx038 (Complaint, ¶¶ 2, 3, 36). Plaintiffs' claim is strongly supported by applicable law, including the Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). There, as detailed below, the Supreme Court clarified its takings jurisprudence and, among other things, confirmed that appropriation of the right to exclude constitutes a physical taking entitled to compensation—specifically including government-authorized temporary physical occupation by others. The

v. United States, 49 Fed. Cl. 325 (2001). These cases are inapposite because there Congress had *expressly denied and disapproved* the agency's claimed authority. *See, e.g.*, *id.* at 329-31 (explaining that an agency is not acting within its normal authority if it acts contrary to "express congressional disapproval," and that the agency's conduct was essentially treated as that of a "rogue" actor, not attributable to the United States).

Supreme Court itself has already specifically acknowledged that the CDC Order infringed such rights. In *Ala. Ass'n of Realtors*, the Supreme Court said of the CDC Order: ***"[P]reventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude***." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (emphasis added). Nonetheless, the Government has argued that Plaintiffs' physical takings claim should be dismissed because it foreclosed by law. The Government is wrong.

a. Plaintiffs have a right to be compensated for the appropriation of their property.

Property owners have fundamental rights to possess, use, and dispose of their private property. *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 435-36 (1982). Inherent in those rights is the related right of owners to exclude occupiers from possession and use of their space. *Id.* According to the Supreme Court, the "right to exclude" others is "universally held to be a fundamental element of the property right" and "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179 (1979); *see also Loretto*, 458 U.S. at 435 (explaining that the "power to exclude" is considered "one of the most treasured strands in an owner's bundle of property rights"). Infringement on the right to exclude "falls within the category of interests that the Government cannot take without compensation." *Kaiser*, 444 U.S. at 179-80.

The CDC Order infringed these rights. The CDC Order prevented Plaintiffs from evicting people who had breached their leases and thus had no legal right to continue occupying Plaintiffs' property. Instead, Plaintiffs were subjected to an ongoing Government-authorized occupation of their property, against Plaintiffs' wishes and existing legal rights. The CDC Order prohibited Plaintiffs from exercising their rights of possession and use of their property, infringed their right to enjoy their property as they wished, and appropriated their right to exclude. The law is clear that even occasional, partial infringements on an owner's right to possess, enjoy, and use their land constitutes a compensable taking. *See Causby*, 328 U.S. at 260-64 (takings claim stated for military aircraft flying at low altitudes over plaintiff's land); *Kaiser*, 444 U.S. at 180 ("[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation.").

In the seminal *Loretto* case, the Supreme Court held that a Government-authorized physical occupation of property, by the Government itself or third parties, is a compensable taking, without regard to the public interests involved or other factors. *Loretto*, 458 U.S. at 425. In subsequent cases, the Supreme Court clarified that the same rule applies even where the invasion is intermittent or temporary in nature, as a "physical appropriation is a taking whether it is permanent or temporary." *Cedar Point*, 141 S. Ct. at 2074. These principles apply here and confirm that the CDC Order constituted a physical taking requiring payment of just

compensation to Plaintiffs.

The Supreme Court has repeatedly confirmed that in all takings cases, the analysis must be driven by the purpose of the Takings Clause, which is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. Here, it is beyond question that the Government forced some people (landlords, including Plaintiffs) to bear public burdens—specifically, burdens associated with efforts to control the pandemic and preserve the public health. In fairness and justice, these burdens were not those of the Plaintiffs alone and should not be borne by Plaintiffs alone, but by the public as a whole. The CDC Order constituted a taking and Plaintiffs have stated a claim to just compensation.

b. *Cedar Point* strongly supports Plaintiffs' claim.

Longstanding Supreme Court authority supports Plaintiffs' physical takings claim. To the extent there was any ambiguity in takings jurisprudence as to whether a Government-authorized appropriation of the right to exclude, such as the one at issue here, would constitute a compensable physical taking, the Supreme Court resolved the issue in *Cedar Point*. *Cedar Point* is powerful further support for Plaintiffs' claims.

In *Cedar Point*, the Supreme Court addressed whether agriculture growers subject to a regulation granting labor organizations a temporary, occasional right to

access the growers' property to solicit for unionization stated a takings claim. *Cedar Point*, 141 S. Ct. at 2069. The question presented was whether this access regulation constituted a physical taking that entitled the plaintiff to compensation (as argued by the landowner plaintiffs), or whether it should be analyzed as a regulatory taking necessitating a multifactor balancing test to determine if compensation was required (as argued by the governmental defendant). *Id*.

In a detailed opinion clarifying takings jurisprudence in ways directly relevant here, the Supreme Court held that the regulation effected a physical taking requiring compensation. The Court first explained that "physical appropriations" of property, whether through formal condemnation, taking possession without any such process, or simple occupation, are treated as the clearest form of taking. *Cedar Point*, 141 S. Ct. at 2071. This form of physical taking exists whenever the Government appropriates private property, whether "for itself or a third party," and is subject to the "simple, *per se* rule" that the Government "must pay for what it takes." *Id.* Such actions contrast with regulations that do not physically appropriate property but merely "restrict an owner's ability to use his own property." *Id.* at 2071-72. Use restrictions are considered under the regulatory takings rubric, subject to the flexible balancing test developed by the Supreme Court in *Penn Central*. *Id.* at 2072. The Court explained that the key distinction "is whether the government has physically taken property for itself or someone else—by whatever means—or has instead

restricted a property owner's ability to use his own property." *Id.* Whenever a regulation "results in a physical appropriation of property, a *per se* taking has occurred and *Penn Central* has no place." *Id.*

Having clarified the distinction between physical and regulatory takings, the Court concluded that the access regulation at issue was a physical taking requiring compensation without any analysis under *Penn Central*. *Cedar Point*, 141 S. Ct. at 2072. As the Court explained, the regulation "appropriates a right to invade the growers' property." *Id.* Further, "[r]ather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude." *Id.* The Court went on to explain that given "the central importance to property ownership of the right to exclude," the Court "has long treated government-authorized physical invasions as takings requiring just compensation." *Id.* at 2073.

After summarizing several of its prior decisions, the Court reiterated the rule that "government-authorized invasions of property," *regardless of their form*, are "physical takings requiring just compensation." *Cedar Point*, 141 S. Ct. at 2074. Because the access regulation at issue there permitted a physical invasion of the growers' property—by authorizing union organizers to have intermittent, temporary access—it constituted a physical taking and the growers had therefore stated a claim for compensation under the Fifth Amendment. *Id.*

The principles articulated in *Cedar Point* make clear that the CDC Order effected a compensable physical taking. Just as with the growers in *Cedar Point*, Plaintiffs here would have had the right to exclude people from their property (breaching tenants), but Government action took that right from them. *See Cedar Point*, 141 S. Ct. at 2076 ("No one disputes that, without the access regulation, the growers would have had the right . . . to exclude union organizers from their property. And no one disputes that the access regulation took that right from them."). The type of taking that occurred here, which permitted third parties to occupy Plaintiffs' property even though they had no legal right to do so, is the type of invasion, occupation, or appropriation that constitutes a physical taking requiring compensation. *Id.* at 2077 ("Our cases establish that appropriations of a right to invade are *per se* physical takings, not use restrictions under *Penn Central*."); *see also Heights Apts., LLC v. Walz*, 30 F.4th 720, 732-33 (8th Cir. 2022) (holding that physical takings claim was stated for state eviction moratorium under *Cedar Point*).

The Government has argued that *Cedar Point* is distinguishable because the CDC Order generally pertains to landlords and tenants, and that regulations of that relationship are often analyzed under *Penn Central*. But the CDC Order was far from an ordinary regulation of the landlord-tenant relationship. The CDC Order precluded Plaintiffs from excluding individuals from their property who *had no legal*

right to be there.[9] By doing so, the CDC Order appropriated Plaintiffs' property for the occupation of such third parties and intruded on the right to exclude, which *Cedar Point* confirms requires just compensation. *Cedar Point*, 141 S. Ct. at 2077 ("We cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary it is a fundamental element of the property right that cannot be balanced away."). If there was any question about whether the CDC Order infringed on the right to exclude, the Supreme Court has already resolved the issue, stating: "[P]reventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488.

c. Pre-*Cedar Point* case law does not foreclose Plaintiffs' claim.

In its motion to dismiss, the Government argued that Plaintiffs' takings claim

[9] The Government has also suggested that there can be no taking because the breaching tenants previously had permission to reside at Plaintiffs' property *prior to their breaches of their leases* and other tenants have rights of occupancy. This is of no moment. For one thing, merely because someone has a right of occupancy at one point does not mean that the person has a right of occupancy in perpetuity. Second, *Cedar Point* makes clear that permissible occupancy by rent-paying tenants does not foreclose the right to exclude non-rent-paying tenants. In *Cedar Point*, the growers' employees had permission to be at the property but that did not give union solicitors any right to be there. Likewise, the fact that some people had permission to occupy the Plaintiffs' property (tenants in compliance with their leases) does not in any way undermine their right to exclude people who did not have such permission (people who have breached their leases).

was foreclosed by Supreme Court cases antedating *Cedar Point*. This argument is without merit.

The Government relied most heavily on *Yee v. City of Escondido*, 503 U.S. 519 (1992). There, the Supreme Court considered a challenge to a city's mobile home rent control ordinance. *Id.* at 522-23. The plaintiffs argued that the rent control ordinance, in light of state laws providing "unique protection[s]" for mobile home owners, amounted to an occupation of their mobile home park. *Id*. The Supreme Court rejected this view and held that the ordinance was not a physical taking. The Court confirmed that a government-authorized physical invasion of property is a compensable taking, but found that the ordinance limiting rents did not subject the mobile home park owners to such an invasion. *Id.* at 528. While acknowledging the continuing importance of the right to exclude, the Court could not find this "right to have been taken" on "the mere face of" the disputed ordinance. *Id.* According to the Court, the plaintiff originally invited the tenants by voluntarily renting the land to mobile home owners, and the regulation did not require the landlord to continue renting the property to tenants or otherwise require "any physical invasion." *Id.* at 528. The Court cited the general rule that regulations of the relationship between a landlord and tenants in good standing are typically considered regulations on the use of property that do not amount to takings. *Id.* at 528-29. Such regulations include reasonable rent controls and the prohibition of

discrimination, which do not require paying compensation. *Id.*

The Government's heavy reliance on *Yee* is misplaced. First, and importantly, the decision in *Yee* was based on unique considerations arising from the "unusual economic relationship between [mobile home] park owners and mobile home owners." *Id.* at 526. The unusual facts that drove the analysis in *Yee* are not at issue here. Plaintiffs are residential apartment landlords, not mobile home park owners. The tenants at issue are not mobile home owners (or owners of any kind) and do not have similar rights; rather, their *only* rights of occupancy arose under leases they had breached. The facts here are very different from those in *Yee.*

Second, the decision in *Yee* acknowledges that it did not involve a situation like the one here, where landlords are compelled to house tenants in breach of their obligations. Even given the additional, unique statutory protections provided to mobile home owners, the mobile park owners in *Yee* could still terminate a mobile home owner's tenancy for violating park rules or *for nonpayment of rent*. *Id.* at 524. The claims here thus do not mirror those in *Yee*.

Finally, the Government's attempt to expand *Yee* to cover the claims here would be inconsistent with language in *Yee* itself and subsequent Supreme Court authority. The Court in *Yee* noted, for example, that a "different case would be presented were the statute, on its face or 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 (emphasis added). Later Supreme Court cases have confirmed that, for takings purposes, there is no material difference between a permanent and temporary physical taking. *Cedar Point*, 141 S. Ct. at 2074 ("[W]e have held that a physical appropriation is a taking whether it is permanent or temporary."); *cf. Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 26, 35 (2012) (confirming that government action that would be considered a taking if permanent would also be a taking if temporary). Further, the Supreme Court has since squarely held in *Cedar Point* that a physical taking exists whenever the government authorizes a third party to occupy property over the owner's objection. *Cedar Point*, 141 S. Ct. at 2075 ("The fact that the regulation grants access only to union organizers and only for a limited time does not transform it from a physical taking into a use restriction."). The decision in *Yee* does not preclude Plaintiffs' claims.

The other Supreme Court cases the Government has cited as requiring dismissal of Plaintiffs' claims, principally including *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), and *FCC v. Fla. Power Corp.*, 480 U.S. 245 (1987), are likewise inapposite and do not undermine the analysis required under *Cedar Point*.

At issue in *Tahoe-Sierra* was a temporary delay of development near Lake Tahoe while the planning agency devised a comprehensive land use plan. *Tahoe-Sierra*, 535 U.S. at 306-312. Acknowledging the ubiquity of land-use regulations,

the Supreme Court held that regulations of this type generally should be evaluated under *Penn Central*. *Id.* at 324, 342. There is nothing similar here.[10]

In *Florida Power*, the Supreme Court reviewed a statute regulating the rental rates of utility pole leases to cable providers, which was intended to combat overcharging by monopolistic utility companies. *Fla. Power*, 480 U.S. at 247-48. The Supreme Court held that the statute did not constitute a *per se* taking. *Id.* The facts here are very different; this is not a case about reasonable rent controls. Notably, the Court in *Florida Power* acknowledged that it was *not* assessing whether a regulation more akin to the CDC Order would constitute a physical taking. *See id.* at 251 n.6 (declining to address the effect of requiring a utility "over objection, to enter into, renew, or refrain from terminating" a lease); *cf. Loretto*, 458 U.S. at 440 (noting that *Penn Central* analysis would generally apply to regulations of landlords "[s]o long as these regulations do not require the landlord to suffer the physical

[10] In fact, *Tahoe-Sierra* supports Plaintiffs' claims. The Supreme Court there confirmed that a "physical appropriation" of property constitutes a taking, while "regulations prohibiting private uses" are generally subject to analysis under *Penn Central*. *Tahoe-Sierra*, 535 U.S. at 323-24. The CDC Order does not merely prohibit *uses* of property; rather, it *compels the occupation* of property by people with no right to be there. Under *Tahoe-Sierra*, such an appropriation is considered a physical taking. *Id.*; *see also, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (explaining that "government appropriation or physical invasion of private property" is a physical taking requiring compensation); *Brown v. Legal Found.*, 538 U.S. 216, 233 (2003) (noting that the Government must pay compensation when it physically takes an interest in property for a public purpose, such as "when a leasehold is taken and the government occupies the property for its own purposes, even though the use is temporary").

occupation of a portion of his building by a third party"). Nothing in the takings cases cited by the Government justifies dismissal of Plaintiffs' claims.

2. The Government's "Inhering in Title" Argument is Baseless.

In its motion to dismiss, the Government also argued that Plaintiffs cannot state a takings claim because they have no cognizable property interests. Specifically, the Government argued that the CDC's authority under the Public Health Service Act was inherent in Plaintiffs' property rights and thus the CDC's exercise of its authority cannot have been a taking. This extraordinary argument is unsupported by law and should be rejected.

It is undisputed that Plaintiffs must have enforceable property rights to assert a takings claim. *See, e.g.*, *Cedar Point*, 141 S. Ct. at 2079. Plaintiffs plainly have such rights. Plaintiffs are owners of the real property that is the subject of this case. In addition to rights of possession, use, and disposition, Plaintiffs have an enforceable property right in the right to exclude others, which "the Government cannot take without compensation." *Kaiser*, 444 U.S. at 179-80; *see also Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (stating that the CDC Order "intrude[d] on one of the most fundamental elements of property ownership—the right to exclude").

It is also undisputed that there are narrow circumstances where "longstanding background limitations on property rights," such as "traditional common law privileges" or a "pre-existing limitation upon [a] land owner's title" can preclude a

takings claim. *Cedar Point*, 141 S. Ct. at 2079 (quotations omitted). Government actions to "enforce the criminal law" or to "abate a nuisance," for example, generally do not result in a taking. *Id.*; *see also, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-30 (1992). But nothing in these principles even remotely suggests that Plaintiffs do not have enforceable rights in their rental properties because of the Public Health Service Act. The CDC's statutory authority is not a traditional common law privilege, nor is it a longstanding background restriction on property rights. *Cedar Point*, 141 S. Ct. at 2079.

None of the various cases cited by the Government supports dismissal of Plaintiffs' claims on this basis. Rather, all involved inapposite situations where the facts showed that the plaintiff did not have any cognizable property interest. *See, e.g.*, *Air Pegasus of D.C. Inc. v. United States*, 424 F.3d 1206, 1208-17 (Fed. Cir. 2005) (rejecting takings claim based on airspace regulations because "it is well established under federal law that the navigable airspace is a public property not subject to private ownership"); *M&J Coal Co. v. United States*, 47 F.3d 1148, 1154-55 (Fed. Cir. 1995) (rejecting takings claim by mining company when regulators brought enforcement action to stop company from endangering public safety).[11]

[11] *See also, e.g.*, *McCutchen v. United States*, 14 F.4th 1355, 1365-66 (Fed. Cir. 2021) (holding that plaintiffs did not have a property right to "bump-stock-type" machine guns where federal law prohibition and congressional implementation authority predated plaintiffs' possession); *Bair v. United States*, 515 F.3d 1323, 1325-31 (Fed. Cir. 2008) (holding that agency's super-priority lien had statutory

These cases bear no resemblance to the facts here.

Moreover, for a restriction to inhere within the property rights at issue, the restriction must have been enacted *before* the property interest was acquired. *See, e.g.*, *A&D Auto Sales Inc. v. United States*, 748 F.3d 1142, 1153 (Fed. Cir. 2014) ("If the challenged restriction was enacted after the plaintiff's property interest was acquired, it cannot be said to 'inhere' in the plaintiff's title."). The CDC Order does not predate Plaintiffs' ownership of the property at issue. *See, e.g.*, *id.* (holding that specific challenged government action did not predate property interests, despite the government's theory that longstanding bankruptcy law permitted the actions); *Piszel v. United States*, 833 F.3d 1366, 1374 (Fed. Cir. 2016) (rejecting government's "inhering" theory because the underlying authorizing regulation did not specifically prohibit the conduct at issue).

According to the Supreme Court, in order for a restriction on property rights to preclude a takings claim, the restriction must amount to a preexisting limitation

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priority, and that other lenders could not assert a takings claim because the statute predated their loans); *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1379-80 (Fed. Cir. 2004) (rejecting takings claim based on revoked fishing permits because the permits had been permissively issued under the government's coastal sovereignty, which did not create any property right); *Mitchell Arms v. United States*, 7 F.3d 212, 216-18 (Fed. Cir. 1993) (holding that no takings claim was stated by rifle importer when the government revoked import permits); *Cal. Housing Secur., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992) (rejecting takings claim by savings and loan association put in receivership because it had "given the government the right to place it into conservatorship or receivership").

on the rights at issue by way of a longstanding background restriction or traditional common law rule. *See, e.g.*, *Cedar Point*, 141 S. Ct. at 2079; *Lucas*, 505 U.S. at 1028-30. There is nothing like that here. If the Government's theory were accepted, it would swallow takings law whole.[12] The theory should be rejected.

3. **The Government's "Police Power" Argument is Baseless.**

The Government's final argument for dismissal of Plaintiffs' takings claims was that the CDC Order could not effect a compensable taking because it was an exercise of "police power." This argument, too, should be rejected.

Modern cases indicate that certain government actions concerning public safety will not be considered takings requiring just compensation. *See, e.g.*, *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1331-33 (Fed. Cir. 2006).[13] The circumstances in which this doctrine applies are narrow and few, and almost exclusively involve the seizure of property to enforce criminal laws or to support law enforcement. *Id.* All of the Federal Circuit cases that the Government cited

[12] The Government argues that when an agency acts with preexisting authority there is no taking because the authority "inheres" in owners' property rights, and that when an agency acts without such authority there is no taking because the action was unauthorized. The logical conclusion of the Government's reasoning is that there are no compensable takings.

[13] The continued use of "police power" terminology in the takings context is questionable in light of recent decisions such as *Cedar Point*, which analyze similar concepts within the framework of background restrictions on property rights. *Cedar Point*, 141 S. Ct. at 2079. Nonetheless, Plaintiffs will address the language used in the Government's motion to dismiss and the authority the Government cited below.

below in support its "police power" argument fall within that limited category. *See Kam-Almaz v. United States*, 682 F.3d 1364, 1371-72 (Fed. Cir. 2012) (U.S. Immigration and Customs Enforcement seizure of laptop during a border search was not a taking); *Amerisource Corp. v. United States*, 525 F.3d 1149, 1153-54 (Fed. Cir. 2008) (U.S. Attorney seizure of goods in support of criminal prosecution was not a taking); *Acadia*, 458 F.3d at 1331-33 (U.S. Customs and Border Protection seizure of goods believed to be counterfeit was not a taking). Here, of course, the Government was not acting in a criminal or law enforcement capacity in imposing the CDC Order. The "police power" cases are inapposite.

The Government also relied heavily on the century-old rent-control decision *Block v. Hirsch*, 256 U.S. 135 (1921). But nothing in *Block* is contrary to Plaintiffs' claims, which are not about rent control. In *Block*, as a result of housing issues arising from World War I, the District of Columbia created a temporary commission to set reasonable rents for two years. *Block*, 256 U.S. at 153-55. The plaintiff was a landlord who disputed the constitutionality of the law and contended that it was an improper taking. *Id.* The primary challenge was that the law permitted tenants to remain in possession if they paid their rent-controlled rent, even if the landlord wanted them to pay a higher rent. *Id.* at 156-57. The Court held that the statute was constitutional and that no taking had occurred. *Id.*

The Government has argued that *Block* precludes a takings claim here because

it refers to exercises of "police power," but that language in *Block* is anachronistic and irrelevant here. *Block*, 256 U.S. at 155. The Court in *Block* did not hold that there is some category of unspecified government power that, if exercised, will not constitute a taking. Rather, the Court used the phrase "police power" to refer generally to the government's ability to regulate society outside of eminent domain. *Id*. The Court was using language of the time to express a distinction, later developed more fully, between eminent domain and other potential takings. The language used in *Block* preceded modern takings jurisprudence, which is generally considered to have begun one year after *Block* in *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). At the time of *Block*, "the Takings Clause was interpreted to provide protection only against a direct appropriation," essentially in the form of eminent domain, whereas the Supreme Court later confirmed that its protections also extend to regulatory takings as they are now understood. *Horne v. Dep't of Agric.*, 576 U.S. 351, 360 (2015); *see also, e.g.*, *McCutchen*, 14 F.4th at 1374 n.1 (Wallach, J., concurring) (describing how the Supreme Court used "police power" terminology in early cases, "prior to the advent of its regulatory takings jurisprudence," to distinguish non-compensable from compensable actions).

Read in its proper historical context, *Block* is of no support to the Government. Indeed, the Supreme Court's modern citations of *Block* confirm that it does not support a "police power" exception, but instead should be interpreted under standard

regulatory takings jurisprudence. *See Brown*, 538 U.S. at 234 (citing *Block* in the context of regulatory takings cases); *Tahoe-Sierra*, 535 U.S. at 322-23 (same). The Government's "police power" argument is not a basis for dismissal.

D. The Court Of Federal Claims Erred In Dismissing Plaintiffs' Illegal Exaction Claim.

Plaintiffs have stated an actionable takings claim. If, however, the Courts were somehow to conclude that no takings claim exists because the CDC Order was *ultra vires*, then Plaintiffs have a viable claim for illegal exaction.

An illegal exaction claim may be maintained when "'the plaintiff has paid money over to the Government, *directly or in effect*, and seeks return of all or part of that sum' that 'was improperly paid, exacted, or *taken from* the claimant in contravention of the Constitution, a statute, or a regulation.'" *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (quoting *Eastport S.S. Co. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)) (emphasis added). An illegal exaction claim does not require direct payments to the government, but rather may arise from what are "in effect" payments to the government, and may involve monies "taken from" the claimant rather than monies "paid" by the claimant. In *Aerolineas Argentinas*, for example, airlines stated an illegal exaction claim for payments made to third parties for hotel rooms, meals, security, and medical expenses. Similarly, in *Camellia Apartments, Inc. v. United States*, 334 F.2d 667, 669 (Ct. Cl. 1964), a

mortgagor asserted a valid illegal exaction claim arising from mortgage premiums paid to a non-governmental mortgagee.

The illegal exaction claim asserted by Plaintiffs here falls squarely within the *Aerolineas Argentinas* construct. Plaintiffs in effect had rent payments taken from them by the Government, which barred Plaintiffs from taking action to collect the rent payments owed them or to replace non-rent-paying individuals with rent-paying tenants. That Plaintiffs did not make payments to the Government is of no consequence; the Government in effect required owners of rental properties to issue credits (or rental deferrals) to tenants for the full amount of rent owed, in furtherance of a governmental public health program. There is no meaningful distinction between the mandate to pay third parties for hotel rooms and meals in *Aerolineas Argentinas* and the CDC Order, which was, in effect, a mandate to issue credits to renters. Similarly, the CDC Order could be considered, in effect, a governmental subsidy of rental payments using funds taken from Plaintiffs. The Government wanted non-rent-paying individuals to continue to be housed in place even though they had no such legal rights, and so the Government ordered it, but instead of paying for that program, the Government imposed the cost of that housing on the Plaintiffs. There is no functional difference between a governmental order allowing rent to go unpaid by preventing evictions and a government program in which the government makes rental payments on behalf of tenants, but pays for the program by charging

property owners the full amount of governmental rental payments received. From an economic perspective, the effect is the same: as a result of governmental fiat, the renters are not required to pay anything, with the owners bearing the full financial burden.

In dismissing the illegal exaction claim, the Court of Federal Claims concluded that no illegal exaction occurred because the CDC Order allowed landlords to charge "'fees, penalties, or interest' for the nonpayment of rent." APP012. This wholly ignores the allegation in the First Amended Complaint that "as a practical matter landlords have little ability to recover past due rent from delinquent or non-rent paying tenants" and that "[t]he right of eviction and related right to replace a tenant who is not current on all rent payments with a new rent-paying tenant is the principal mechanism for property owners to avoid economic losses resulting from a tenant's failure to pay rent." APP035-36 (FAC ¶ 25). Moreover, the Court of Federal Claims' conclusion ignores the fact that the CDC Order precluded Plaintiffs from replacing non-rent-paying tenants with rent-paying tenants and instead required Plaintiffs to house non-rent-paying tenants – and to bear the entire cost of that housing. The Government wanted non-rent-paying tenants to be housed and ordered that it occur. The costs associated with that order are an obligation of the Government and not the landlords. An illegal exaction claim can

be stated when the Plaintiffs have *in effect* paid an obligation of the Government, which is what occurred here.[14]

The Court of Federal Claims also stated that "the federal government is not generally responsible for providing housing to individuals evicted from their private residence due to their failure to pay rent." Appx013. That is true but beside the point. The Government is also generally not in the business of precluding landlords from evicting non-rent-paying tenants and ordering the landlords to house them without compensation. But having issued such an order, the Government cannot be permitted to avoid the associated costs, which are the responsibility of the Government, not the landlords. The Government could have paid for this Government program by paying the rent of those it wanted housed. It did not do so. Forcing the landlords to incur those costs amounts to an illegal exaction.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated above, Plaintiffs respectfully request that this Court reverse the judgment of the Court of Federal Claims and remand the case for further proceedings on Plaintiffs' takings claims and, in the alternative, illegal exaction claims.

[14] The Court of Federal Claims noted that Congress had also appropriated billions of dollars for rental assistance. Appx004. But any partial recovery by Plaintiffs via rental assistance would go to the amount of damages, not whether a claim is stated.

Dated: March 27, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it has been prepared using a proportionally-spaced typeface, has a typeface of 14 points, and includes 12,887 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

Dated: March 27, 2023

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March, 2023, I electronically filed the foregoing CORRECTED BRIEF OF PLAINTIFFS-APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit using the CM/ECF system, which automatically served opposing counsel in this case.

/s/ Creighton R. Magid
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ADDENDUM

In the United States Court of Federal Claims

No. 21-1621L
(Filed: May 17, 2022)

FOR PUBLICATION

DARBY DEVELOPMENT COMPANY, INC., ET AL., *Plaintiffs,* **v.** **UNITED STATES,** *Defendant.*	CDC Eviction Moratorium: Fifth Amendment Takings & Illegal Exaction

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OPINION AND ORDER

BONILLA, Judge.

Contemporaneous with the publication of this decision, the United States reached the once unimaginable and grim milestone of one million deaths due to Coronavirus disease 2019 (COVID-19). During the past three years, the executive and legislative branches of our government (federal and state) as well as the American people in cities and towns across this Nation have engaged in critical debates on the best ways to combat the deadly pandemic as well as address the crippling financial fallout impacting the United States and global economies. Passionate policy debates range from vaccines to mask mandates, social distancing to curfews, shuttering businesses to virtual learning, and emergency financial assistance to states and local municipalities, businesses, and individuals.

Throughout this extraordinary time, the judiciary continues to serve the critical role of ensuring that policy decisions, once reached, are in accord with the United States Constitution and federal and state law. Indeed, the true tests of an enduring democracy and an independent judiciary come not in times of peace, tranquility, and good health, but in times of war, unrest, and disease.

At the heart of this case are the decisions of the executive and legislative branches of the federal government to institute and extend nationwide residential eviction moratoria to combat the spread of COVID-19. These measures aimed to prevent homelessness and cohabitation by necessity by allowing people to remain and isolate or quarantine in their homes, particularly those infected or infectious and members of vulnerable populations at increased risk of contracting the deadly virus. Designated as temporary measures, iterations of the residential eviction moratoria remained in effect for seventeen months (from March 27, 2020 to August 26, 2021). Driven largely by a series of extensions issued by the Centers for Disease Control and Prevention (CDC), the nationwide residential eviction moratorium was ultimately voided by the judiciary upon the ground that the CDC lacked the requisite legal authority to take such drastic action.

In this case, more specifically, thirty-eight landlords and rental property owners (of properties ranging from single-family homes to 3,000+ unit apartment complexes located throughout the country) filed suit in this Court asserting that the nationwide residential eviction moratorium effected either a compensable taking or an illegal exaction under the Fifth Amendment. The plaintiffs aver that the government forced them to continue housing non-rent-paying tenants rather than replace them with rent-paying tenants and subjected them to significant fines and imprisonment if they pursued otherwise lawful evictions. Plaintiffs maintain that they alone should not have been forced to shoulder this burden for the benefit of the Nation. Accordingly, this Court is now called upon to assess not as a matter of public policy or equity, but as a matter of law, whether plaintiffs are entitled to any relief under the Constitution.

Before the Court is defendant's motion to dismiss plaintiffs' First Amended Complaint for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted under Rules 12(b)(1) or 12(b)(6), respectively, of the Rules of the United State Court of Federal Claims (RCFC). For the reasons set forth below, the Court **GRANTS** defendant's motion to dismiss for failure to state a claim upon which relief can be granted.

BACKGROUND

In March 2020, Congress passed, and the President signed into law, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), a $2.2 trillion economic stimulus bill designed to mitigate the devastating financial impacts of the COVID-19 pandemic across the United States and throughout the global economy. *See* Pub. L. No. 116-136, 134 Stat. 281 (2020). Among the myriad relief provisions, Section 4024 of the CARES Act imposed a 120-day moratorium (from March 27 through July 24, 2020) on judicial eviction proceedings for residential rental

units receiving federal assistance or financed through federally backed mortgage loans.[1] *Id.* at § 4024(b)(1) (Temporary Moratorium on Eviction Filings). Congress did not renew the statutory eviction moratorium, which expired by its own terms on July 24, 2020.

Two weeks later, on August 8, 2020, the President issued an Executive Order titled Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners. *See* Exec. Order No. 13,945, 85 Fed. Reg. 49,935 (Aug. 14, 2020). Relevant here, Section 3(a) directed the Secretary of Health and Human Services (HHS) and the CDC Director to "consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary to prevent the further spread of COVID-19 from one State or possession into any other State or possession." *Id.* at 49,936. In response, on September 4, 2020, the CDC issued an order titled Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 (CDC Order). 85 Fed. Reg. 55,292 (Sept. 4, 2020).

Citing Section 361 of the Public Health Service Act, codified at 42 U.S.C. § 264(a), the CDC declared a nationwide moratorium on all residential evictions within jurisdictions not already covered by similar moratoria adopted by states and local municipalities.[2] 85 Fed. Reg. at 55,292, 55,297. The CDC Order differed from the CARES Act residential eviction moratorium in three material respects. First, the agency's eviction moratorium applied to *all* residential properties nationwide without regard to whether the properties received federal program benefits or were financed through federally backed mortgage loans. *Compare id.* at 55,292 to 55,297 *with* CARES Act § 4024. Second, the CDC Order provided for the imposition of criminal penalties (i.e., fines and imprisonment) for violations of the eviction moratorium.[3] *Compare* 85 Fed. Reg. at 55,296 *with* CARES Act § 4024. Third, unlike the CARES Act eviction moratorium, the CDC Order did not prohibit landlords from assessing "fees, penalties, or interest" for the nonpayment of rent. *Compare* 85 Fed. Reg. at 55,292, 55,294 *with* CARES Act § 4024. Neither the statutory nor the regulatory residential eviction moratorium waived or otherwise excused the nonpayment of rent; instead, they focused on temporarily halting the

[1] Unlike the CDC's eviction moratorium, discussed *infra*, the CARES Act eviction moratorium prohibited landlords from assessing "fees, penalties, or other charges to the tenant related to [the] nonpayment of rent." CARES Act § 4024(b)(2).

[2] According to the CDC Order, it "d[id] not apply in any State, local, territorial, or tribal area with a moratorium on residential evictions that provide[d] the same or greater level of public-health protection than the requirements listed in th[e] Order." 85 Fed. Reg. at 55,292, 55,294. American Samoa was also initially excluded due to the fact that the United States territory had no reported COVID-19 cases at that time. *Id.* at 55,292 to 55,294.

[3] The CDC Order provided that violators of the residential eviction moratorium would be subject to fines of up to $100,000 and/or one year in prison unless the violation resulted in a death; in situations involving a related death, the maximum regulatory fine increased to $250,000, and all penalties remained subject to applicable criminal laws. 85 Fed. Reg. at 55,296. The CDC Order also highlighted the potential involvement of the United States Department of Justice. *Id.*

forcible eviction of tenants unable to make timely rent payments due to the pandemic-induced financial crisis.[4] *See* 85 Fed. Reg. at 55,292, 55,294, 55,296; CARES Act § 4024(b)-(c).

To invoke the protections of the CDC Order, tenants were required to certify under penalty of perjury that they: (1) attempted to secure available government assistance; (2) met specified household income caps[5]; (3) were unable to pay their rent in full due to a significant loss of household income, unemployment or underemployment, or extraordinary out-of-pocket medical expenses; (4) continued paying as much rent as they could reasonably afford; and (5) would be homeless or be forced to cohabitate with others if evicted because they have no other available housing options. 85 Fed. Reg. at 55,293, 55,297. The CDC Order was initially intended to be in effect from September 4 through December 31, 2020. *Id.* at 55,292, 55,297.

On December 27, 2020, four days prior to the expiration of the CDC Order, Congress extended the residential eviction moratorium through January 31, 2021, as part of the Consolidated Appropriations Act, 2021. *See* Pub. L. 116-260, § 502, 134 Stat. 2078-79 (2021). In Section 502, titled "Extension of Eviction Moratorium," Congress stated in full:

> The order issued by the Centers for Disease Control and Prevention under section 361 of the Public Health Service Act (42 U.S.C. 264), entitled "Temporary Halt in Residential Eviction To Prevent the Further Spread of COVID-19" (85 Fed. Reg. 55292 (September 4, 2020)[)] is extended through January 31, 2021, notwithstanding the effective dates specified in such Order.

Id. In Section 501, Congress contemporaneously appropriated $25 billion in emergency rental assistance for landlords whose tenants defaulted on rent payments during the COVID-19 pandemic. *Id.* § 501(a)(1) (Emergency Rental Assistance). Congress did not further extend the CDC Order. However, on March 10, 2021, in Section 3201 of the American Rescue Plan Act of 2021, Congress appropriated an additional $21.55 billion in emergency rental assistance. Pub. L. 117-2, § 3201, 135 Stat. 4 (2021).

On January 29, 2021, prior to the expiration of the 31-day congressional extension, the CDC issued a supplemental order extending its regulatory residential eviction moratorium through March 31, 2021. 86 Fed. Reg. 8,020 (Feb. 3, 2021). Thereafter, on March 29, June 24, and August 3, 2021, the CDC further extended its regulatory residential eviction moratorium

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[4] The CDC Order did not prohibit evictions for reasons other than the non-payment of rent (e.g., criminal activity, safety and security threats, property damage, building code and health ordinance violations). 85 Fed. Reg. at 55,294.

[5] The CDC Order limited coverage to individuals earning less than $99,000 and couples earning less than $198,000, individuals "not required to report any income in 2019 to the U.S. Internal Revenue Service," and individuals who "received an Economic Impact Payment (stimulus check) pursuant to Section 2201 of the CARES Act." 85 Fed. Reg. at 55,293.

through October 3, 2021.[6] *See* 86 Fed. Reg. 16,731 (Mar. 31, 2021); 86 Fed. Reg. 34,010 (June 28, 2021); 86 Fed. Reg. 43,244 (Aug. 6, 2021).

In the interim, residential landlords, real estate companies, and trade associations filed a series of lawsuits throughout the United States challenging the legality and propriety of the CDC Order.[7] In the lead case, *Alabama Ass'n of Realtors*, the United States District Court for the District of Columbia held that the CDC Order imposing a nationwide residential eviction moratorium exceeded the federal agency's statutory authority under the Public Health Service Act, 42 U.S.C. § 264(a). 539 F. Supp. 3d at 36-43. The district court's ruling was then twice appealed to the United States Supreme Court on the issue of whether the trial court's decision to vacate the CDC Order should be stayed pending appeal.[8] *See Alabama Ass'n of Realtors*, __ U.S. at __, 141 S. Ct. at 2320; *Alabama Ass'n of Realtors*, __ U.S. at __, 141 S. Ct. at 2485. In the end, the Supreme Court vacated the stay, noting: "careful review of th[e] record makes clear that the [plaintiffs] are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority." *Alabama Ass'n of Realtors*, __ U.S. at __, 141 S. Ct. at 2486; *accord Alabama Ass'n of Realtors*, __ U.S. at __, 141 S. Ct. at 2488 ("The [plaintiffs] not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing."). Accordingly, the CDC Order was terminated effective August 26, 2021.

DISCUSSION

Before the Court is defendant's motion to dismiss plaintiffs' First Amended Complaint for lack of subject matter jurisdiction under RCFC 12(b)(1) or, in the alternative, for failure to state a claim upon which relief can be granted under RCFC 12(b)(6). Where, as here, plaintiffs allege that the government's actions were not *ultra vires* in pleading their takings claim, this Court has jurisdiction to examine issues of statutory authorization and construction.

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[6] There was a three-day gap in the continuous extensions of the CDC Order between the expiration of the June 24, 2021 extension until July 31, 2021, and the August 3, 2021 extension. *Compare* 86 Fed. Reg. 34,010 (June 28, 2021) *with* 86 Fed. Reg. 43,244 (Aug. 6, 2021).

[7] *See, e.g., Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 539 F. Supp. 3d 29 (D.D.C.), *stay granted*, 539 F. Supp. 3d 211 (D.D.C.), *motion to vacate stay denied*, No. 21-5093, 2021 WL 2221646 (D.C. Cir. June 2, 2021), *motion to vacate stay denied*, __ U.S. __, 141 S. Ct. 2320 (2021); *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 557 F. Supp. 3d 1 (D.D.C.) (denying motion to vacate stay), *motion to vacate stay denied*, No. 21-5093, 2021 WL 3721431 (D.C. Cir. Aug. 20, 2021), *stay vacated*, __ U.S. __, 141 S. Ct. 2485 (2021), *appeal dismissed on remand*, No. 21-5093, 2021 WL 4057718 (D.C. Cir. Sept. 3, 2021); *Tiger Lily, LLC v. U.S. Dep't Hous. & Urb. Dev.*, 525 F. Supp. 3d 850 (W.D. Tenn), *stay pending appeal denied*, 992 F.3d 518 (6th Cir.), *aff'd*, 5 F.4th 666 (6th Cir. 2021); *Terkel v. Ctrs. for Disease Control & Prevention*, 521 F. Supp. 3d 662 (E.D. Tex.), *appeal dismissed*, 15 F.4th 683 (5th Cir. 2021); *Brown v. Dep't of Health & Hum. Servs.*, 497 F. Supp. 3d 1270 (N.D. Ga. 2020), *aff'd*, 4 F.4th 1220 (11th Cir.), *vacated*, 20 F.4th 1385 (11th Cir. 2021); *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, 524 F. Supp. 3d 745 (N.D. Ohio), *amended*, 542 F. Supp. 3d 719 (N.D. Ohio), *appeal dismissed*, No. 21-3563, 2021 WL 430587 (6th Cir. Sept. 21, 2021); *Chambless Enters., LLC v. Redfield*, 508 F. Supp. 3d 101 (W.D. La. 2020).

[8] The first appeal to the Supreme Court was largely decided by the fact that the CDC Order was about to expire by its own terms on July 31, 2021. *See Alabama Ass'n of Realtors*, __ U.S. at __, 141 S. Ct. at 2320 (5-4) (Kavanaugh, J., concurring). The CDC's August 3, 2021 decision to renew the nationwide residential eviction moratorium for a period of 60 days, *see* 86 Fed. Reg. at 43,244, prompted the second appeal to the Supreme Court.

See Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin., 525 F.3d 1299, 1309 (Fed. Cir. 2008) ("Appellants' contentions about the lawfulness or authorization of the government's actions, while relevant to whether appellants' takings claims will be successful on their merits, do not affect the jurisdiction of the Court of Federal Claims to consider those claims."); *cf. Straw v. United States*, Nos. 2021-1600 & -1602, 2021 WL 3440773, at *3-4 (Fed. Cir. Aug. 6, 2021) (per curiam) (Court of Federal Claims lacks jurisdiction to consider takings claim where plaintiff fails to concede validity of government's action). Further, this Court possesses jurisdiction to entertain plaintiffs' alternatively pleaded illegal exaction claim. *See Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) (Court of Federal Claims has jurisdiction to examine illegal exaction claim based upon plaintiffs' claim that they '"paid money over to the Government, directly *or in effect*, . . . in contravention of [law].'") (emphasis added) (quoting *Eastport S.C. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). Accordingly, the Court appropriately assesses plaintiffs' takings and illegal exaction claims under RCFC 12(b)(6).

A. Standard of Review

Claims that survive jurisdictional challenges remain subject to dismissal under RCFC 12(b)(6) if they do not provide a basis for the court to grant relief as a matter of law. *See Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002) ("A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle him to a legal remedy."). "To avoid dismissal for failure to state a claim under RCFC 12(b)(6), 'a complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief.'" *Kam-Almaz v. United States*, 682 F.3d 1364, 1367 (Fed. Cir. 2012) (quoting *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007))). A plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). "At the same time, a court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'"" *Kam-Almaz*, 682 F.3d at 1368 (quoting *Twombly*, 550 U.S. at 570 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986))).

B. Takings Clause

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. In this case, plaintiffs assert that the CDC's nationwide residential eviction moratorium effected a physical taking of their property[9]; more specifically, plaintiffs charge that the CDC Order appropriated their right to remove and exclude non-rent-paying tenants and replace them with rent-paying tenants. Plaintiffs seek to recover from the government, among

[9] In their response to the government's motion to dismiss, plaintiffs note that they are not alleging a regulatory taking. *See* ECF 12 at 2 n.1. Accordingly, the Court does not examine the CDC Order under the analytical framework for assessing regulatory takings announced in *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104 (1978).

other forms of relief, the rent tenants failed to pay while continuing to occupy the residences as a consequence of the CDC Order.[10]

As explained by the Federal Circuit:

> A physical taking of land occurs when the government itself occupies the property or *requires* the landowner to submit to physical occupation of its land," *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992), whether by the government or a third party, *see Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (en banc).

Forest Props., Inc. v. United States, 177 F.3d 1360, 1364 (Fed. Cir. 1999) (emphasis in original); *see also, e.g.*, *Cedar Point Nursery v. Hassid*, __ U.S. __, 141 S. Ct. 2063 (2021) (government grant of right of access to labor organizations to solicit support for unionization constituted a *per se* physical taking of agricultural employer's property).

To assert a viable takings claim against the United States, the government action in issue must be duly authorized by Congress. *See Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362-63 (Fed. Cir. 1998) (citing *United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920)); *NBH Land Co. v. United States*, 576 F.2d 317, 319-20 (Ct. Cl. 1978) ("a [T]ucker Act suit does not lie for an executive taking not authorized by Congress, expressly or by implication") (citing *Hooe v. United States*, 218 U.S. 322, 335 (1910)), *quoted in Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 803 (Fed. Cir. 1993). Where, as here, a federal agency's actions are not authorized, the actions "may be enjoinable, but they do not constitute [a] taking effective to vest some kind of title in the government and entitlement to just compensation in the owner or former owner." *Del-Rio*, 146 F.3d at 1362 (quoting *Armijo v. United States*, 663 F.2d 90, 95 (Ct. Cl. 1981)) (citing *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 898 (Fed. Cir. 1986)); *Tabb Lakes*, 10 F.3d at 803 (quoting *Armijo*, 663 F.2d at 95).

1. Statutory Authority

Section 361 of the Public Health Service Act empowers the HHS Secretary or their authorized designee "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession." 42 U.S.C. § 264(a). Relevant here, the ensuing sentence cabins this seemingly broad statutory authority:

> For purposes of carrying out and enforcing such regulations, the [Secretary or their duly authorized designee] may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles

[10] In addition to rent arrears, plaintiffs seek to recover pre- and post-judgment interest as well as attorneys' fees and costs. *See* ECF 10 at 20.

> found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

Id.[11]; *see Alabama Ass'n of Realtors*, __ U.S. at __, 141 S. Ct. at 2488 ("[T]he second sentence [of § 361(a)] informs the grant of authority by illustrating the kinds of measures that could be necessary: inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles."). The HHS Secretary formally delegated these authorities to the CDC Director. *See* 42 C.F.R. § 70.2.

Addressing the CDC's reliance upon the Public Health Service Act to support the nationwide residential eviction moratorium at issue in this case, the Supreme Court characterized the government's arguments as "breathtaking" and "unprecedented," explaining: "It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts." *Alabama Ass'n of Realtors*, __ U.S. at __, 141 S. Ct. at 2486, 2489; *accord Alabama Ass'n of Realtors*, __ U.S. at __, 141 S. Ct. at 2489 ("Section 361(a) is a wafer-thin reed on which to rest such sweeping power."). Vacating the stay of the district court's ruling that the CDC lacked congressional authority to issue the eviction moratorium, the Supreme Court concluded: "If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it." *Alabama Ass'n of Realtors*, __ U.S. at __, 141 S. Ct. at 2491.

In response to the Supreme Court's pronouncements in *Alabama Ass'n of Realtors*, plaintiffs argue that the Supreme Court's opinion was limited to the issue of vacatur of the stay pending appeal and, thus, does not constitute a final decision of the Supreme Court on the merits of the statutory authority issue presented here. Whatever the procedural posture of the *Alabama Ass'n of Realtors* appeal, the import of the Supreme Court's opinion is clear and binding on this Court: the CDC lacked the requisite congressional authority to issue the nationwide residential eviction moratorium at the heart of this case. *See Dellew Corp. v. Unites States*, 855 F.3d 1375, 1382 (Fed. Cir. 2017) ("We reaffirm a well-known principle that the Court of Federal Claims failed to follow here: the Court of Federal Claims must follow relevant decisions of the Supreme Court and the Federal Circuit, not the other way around.") (citing *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1353 (Fed. Cir. 2006)).

Plaintiffs' reliance on the Federal Circuit's decision in *Del-Rio* is similarly unavailing. In *Del-Rio*, officials from the Department of the Interior "required owners of mining leases on federal land to secure special permits before drilling or surveying on the land covered by the leases." 146 F.3d at 1360. Government officials thereafter conditioned the approval of the special permits upon the owners securing easements over the trust lands from the Ute Indian Tribe for whom the United States held the surface estate in trust. *Id.* Distinguishing between an *unauthorized* government act for which a takings claim cannot lie as a matter of law, and an *authorized* government act ultimately *found unlawful* which may constitute a compensable taking, the Federal Circuit explained:

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[11] The statute also provides the Secretary with limited authority to promulgate regulations to temporarily apprehend, detain, examine, or conditionally release "any individual reasonably believed to be infected with a communicable disease" either entering the United States or engaged in interstate travel. *Id.* § 264(b)-(d).

> In a case such as this one, in which the alleged taking consists of regulatory action that deprives a property-holder of the enjoyment of property, government agents have the requisite authorization if they act within the general scope of their duties, *i.e.*, if their actions are a "natural consequence of Congressionally approved measures," or are pursuant to "the good faith implementation of a Congressional Act[.]" The principle underlying this rule is that when a government official engages in *ultra vires* conduct, the official "will not, in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of Congress, cannot create a claim against the Government 'founded upon the Constitution.'"
>
> In holding that *ultra vires* conduct cannot give rise to a Fifth Amendment taking, the courts have drawn an important distinction between conduct that is "unauthorized" and conduct that is authorized but nonetheless unlawful. Merely because a government agent's conduct is unlawful does not mean that it is unauthorized; a government official may act within his authority even if his conduct is later determined to have been contrary to law.

Id. at 1362 (internal citations omitted) (first quoting *NBH Land Co.*, 576 F.2d at 319; then quoting *S. Cal. Fin. Corp. v. United States*, 634 F.2d 521, 525 (Ct. Cl. 1980); and then quoting *Hooe*, 218 U.S. at 322) (citing *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 695 (1949)). Further defining *ultra vires* conduct, the Federal Circuit explained that such government actions must be "either explicitly prohibited *or* . . . outside the normal scope of the government officials' duties." *Id.* at 1363 (emphasis added). The *Del-Rio* court ultimately concluded that the officials within the Department of the Interior "were acting within the scope of their statutorily authorized duties," even if their actions were ultimately deemed unlawful. *Id.* at 1362, 1363.

In this case, in contradistinction, although not "explicitly prohibited" by Congress, the CDC Director's issuance and series of extensions of the nationwide residential eviction moratorium was clearly "outside the normal scope of the government official's duties." Indeed, as noted by the Supreme Court in *Alabama Ass'n of Realtors*:

> Originally passed in 1944, this provision has rarely been invoked—and never before to justify an eviction moratorium. Regulations under this authority have generally been limited to quarantining infected individuals and prohibiting the import or sale of animals known to transmit disease. *See, e.g.*, 40 Fed. Reg. 22,543 (1975) (banning small turtles known to be carriers of salmonella).

__ U.S. at __, 141 S. Ct. at 2487. As such, consistent with the Federal Circuit's decision in *Del-Rio*, the CDC Order was unauthorized and, thus, *ultra vires*.

2. Congressional Ratification

As an initial matter, during oral argument, the Court inquired *sua sponte* whether any of the plaintiffs wished to pursue a takings claim based solely upon Congress' initial 120-day

residential eviction moratorium (from March 27 through July 24, 2020), codified in Section 4024 of the CARES Act, and/or Congress' 31-day extension of the CDC Order (from January 1-31, 2021), codified in Section 502 of the Consolidated Appropriations Act, 2021. *See* Tr. at 52-53 (Apr. 19, 2022) (ECF 22). The Court explained that reliance solely upon congressional action would moot the CDC authority issue. *Id.* at 53. Plaintiffs' counsel declined to pursue an action based solely upon the CARES Act, explaining that none of the plaintiffs' properties were impacted by the legislation because the initial eviction moratorium was limited to rental properties receiving federal program benefits or financed through federally backed mortgage loans. *Id.* at 52. Thereafter, on May 2, 2022, counsel represented to the Court that "plaintiffs will not be pursuing a stand-alone claim based on the Consolidated Appropriations Act of 2021." ECF 25 at 1. Instead, plaintiffs rely upon the acts of Congress in extending the CDC's moratorium in an effort to demonstrate congressional ratification.

Although the Supreme Court did not address congressional ratification in *Alabama Ass'n of Realtors*, both the District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit addressed the issue. *See* 539 F. Supp. 3d at 42-43; 2021 WL 2221646, at *2. The district court and appellate court issued contrary rulings regarding the import of the Consolidated Appropriations Act, and whether Congress' 31-day extension of the CDC Order (from January 1-31, 2021) ratified or confirmed the federal agency's statutory authority under the Public Health Service Act. *Compare* 539 F. Supp. 3d at 42-43 (Congress did not expressly approve the CDC's interpretation of its authority under § 264(a) or provide the agency with additional statutory authority) *with* 2021 WL 2221646, at *2 ("Congress has expressly recognized that the agency had the authority to issue its narrowly crafted moratorium under Section 264"). Suffice it to say, had the Supreme Court agreed with the District of Columbia Circuit's assessment of the CDC's statutory authority, the district court's order would not have been vacated. *See Alabama Ass'n of Realtors*, __ U.S. at __, 141 S. Ct. at 2488 ("The District Court concluded that its stay is no longer justified under the governing four-factor test. We agree.") (internal citation omitted). Nevertheless, the Court will examine the question of ratification under the law of this Circuit.

"Congress may ratify agency conduct 'giv[ing] the force of law to official action unauthorized when taken.'" *Schism v. United States*, 316 F.3d 1259, 1289 (Fed. Cir. 2002) (quoting *Swayne & Hoyt v. United States*, 300 U.S. 297, 302 (1937)). To establish congressional ratification, a party must first demonstrate that Congress was actually aware of the otherwise unauthorized act. *Id.* (first citing *United States v. Beebe*, 180 U.S. 343, 345 (1901); and then citing *Brooks v. Dewar*, 313 U.S. 354, 360–61 (1941)). Such knowledge is readily established here. In Section 502 of the Consolidated Appropriations Act, Congress specifically extended the CDC's residential eviction moratorium for a period of 31 days, acknowledging that the CDC Order was "issued . . . under section 361 of the Public Health Service Act (42 U.S.C. 264)." *See* Pub. L. 116-260, § 502, 134 Stat. 2078-79 (2021).

The second inquiry is a bit more vexing. Where, as here, the alleged congressional ratification is supposedly codified in an appropriation act, "the appropriation must plainly show a purpose to bestow the precise authority which is claimed." *Schism*, 316 F.3d at 1289 (quoting *Ex parte Endo*, 323 U.S. 283, 303 n.24 (1944)); *accord United States v. Heinszen*, 206 U.S. 370, 390 (1907) (congressional ratification requires an explicit declaration). On the one hand, as

detailed above, in extending the CDC Order for an additional 31 days, Congress concomitantly appropriated $25 billion in emergency rental assistance for landlords whose tenants defaulted on rent payments during the COVID-19 pandemic. *See* Pub. L. 116-260, § 501, 134 Stat. 2078-79 (2021). The following month, Congress appropriated an additional $21.55 billion in emergency rental assistance through the American Rescue Plan Act, Pub. L. 117-2, § 3201, 135 Stat. 4 (2021). These fund allocations plausibly support a finding that Congress sanctioned the specific CDC Order. *See Schism*, 316 F.3d at 1289-90 ("[R]atification ordinarily cannot occur in the appropriations context unless the appropriations bill itself expressly allocates funds for a specific agency or activity."). On the other hand, the nearly $50 billion appropriation may equally demonstrate Congress' effort to obviate the need for the nationwide residential eviction moratorium by allocating funds to avoid or repay rent arrearages. A third possibility, posited in *Skyworks*, is that Congress was simply seeking to maintain the status quo during the January 2021 change in presidential administrations in extending the CDC Order. *See* 524 F. Supp. 3d at 761.

At bottom, Congress' single sentence in the Consolidated Appropriations Act stating that the CDC Order "is extended through January 31, 2021," is insufficient to "explicitly" and "plainly show a purpose to bestow" the requisite statutory authority on the CDC to enact a nationwide residential eviction moratorium under the Public Health Service Act. As necessarily implied in the Supreme Court's opinion in *Alabama Ass'n of Realtors*, and consistent with the law of the Federal Circuit, this Court concludes that Congress did not approve, retroactively or prospectively, the CDC's interpretation of 42 U.S.C. § 264(a); nor did Congress provide the CDC with additional statutory authority to enact a nationwide residential eviction moratorium.[12]

C. Illegal Exaction

Plaintiffs alternatively claim that, if the CDC lacked the requisite statutory authority under the Public Health Service Act, 42 U.S.C. § 264(a), to impose a nationwide residential eviction moratorium, the federal agency's action constituted an illegal exaction. More specifically, plaintiffs assert:

> The CDC Order has enriched the Government at Plaintiffs' expense, directly or in effect, by illegally imposing costs and expenses on Plaintiffs that Plaintiffs should not have to bear and that the Government otherwise would bear, including without limitation the cost of housing delinquent or non-rent paying individuals.

ECF 10 at ¶ 42. The Court finds plaintiffs' illegal exaction claim factually and legally infirm.

As explained by the Federal Circuit in *Aerolineas Argentinas*:

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[12] Considering the unprecedented nature and scope of the CDC Order, there is no basis upon which to conclude that the federal agency's nationwide residential eviction moratorium fares any better under the congressional acquiescence doctrine. *See Schism*, 316 F.3d at 1294-99 (discussing limited applicability of congressional acquiescence doctrine even where Congress is aware of an agency's *longstanding* statutory interpretation and practice).

> An illegal exaction claim may be maintained when the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum that was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation. The Tucker Act provides jurisdiction to recover an illegal exaction by government officials when the exaction is based on an asserted statutory power.

77 F.3d at 1572-73 (cleaned up). Accordingly, to assert a viable illegal exaction claim, plaintiffs must show: (1) money was paid to the government at its direction or was paid to a third party "at the direction of the government to meet a governmental obligation"; and (2) the government's payment directive was contrary to law. *Id.* at 1573.

In this case, plaintiffs concede that they did not make any direct payments to the government. *See* ECF 12 at 37 ("That Plaintiffs did not make payments to the Government is of no consequence; the Government in effect required owners of rental properties to issue credits (or rental deferrals) to tenants for the full amount of rent owed in furtherance of a government 'public health' program."). Indeed, as discussed during oral argument, this case does not involve the imposition of a fine or other criminal penalty under the now-vacated CDC Order. *Compare* 85 Fed. Reg. at 55,296 *with* Tr. at 64-65 (Apr. 19, 2022) (ECF 22). Instead, plaintiffs' illegal exaction claim is based upon an assertion that, by operation of the CDC's nationwide residential eviction moratorium, the government "in effect" directed plaintiffs "to issue credits (or rental deferrals)" to their tenants for rent owed to satisfy an obligation otherwise falling upon the government. ECF 12 at 37.

Contrary to plaintiffs' assertion, the government did not direct plaintiffs to waive or defer rental payments otherwise due them. In fact, unlike the CARES Act, the CDC Order specifically allowed landlords to assess and collect "fees, penalties, or interest" for the nonpayment of rent. *Compare* 85 Fed. Reg. at 55,292, 55,294, 55,296, 55,297 *with* CARES Act § 4024. The CDC Order further permitted landlords to initiate and prosecute judicial eviction proceedings. The sole limitation on landlords was the physical removal of tenants in arears following the issuance of a judicially sanctioned eviction order. *See* 85 Fed. Reg. at 55,293 (defining "Evict" and "Eviction" as any act "to remove or cause the removal of a covered person from a residential property.").[13] To be clear, although this limitation does not equate to the exaction or payment of money directed by the government, it is a significant limitation on—and perhaps the most effective enforcement mechanism within—a landlord's leverage to enforce their lease or rental agreement. Nevertheless, the fact that the entry of a monetary judgment for back rent plus interest, fees, and penalties against a tenant following a judicial eviction proceeding may thereafter prove uncollectable does not convert the landlord's account receivable from a current or former tenant into an account payable to the government ab initio.

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[13] In response to Frequently Asked Questions (FAQ) regarding "What does CDC mean by 'eviction'?" the federal agency explained: "The [CDC] Order is not intended to terminate or suspend the operations of any state or local court. Nor is it intended to prevent landlords from starting eviction proceedings, provided that the actual physical removal of a covered person for non-payment of rent does NOT take place during the period of the Order." *See* https://web.archive.org/web/20210726203824/https://www.cdc.gov/coronavirus/2019-ncov/downloads/Eviction-Moratoria-Order-FAQs-02012021-508.pdf (last visited May 16, 2022).

Further, although not dispositive, it is notable that contemporaneous with the passage of the initial residential eviction moratorium through the CARES Act, and thereafter through the American Rescue Plan while the CDC Order remained in effect, Congress appropriated nearly $50 billion in emergency rental assistance for landlords and tenants. *See* Pub. L. 116-260, § 501, 134 Stat. 2078-79 (2021); Pub. L. 117-2, § 3201, 135 Stat. 4 (2021). The allocation of such government funds—targeted to address the monetary claims asserted by plaintiffs in this case—undermines the argument that the government was shifting its purported financial burden to the plaintiffs. Moreover, plaintiffs fail to demonstrate that they were forced to incur a *government* obligation or debt. Put simply, the federal government is not generally responsible for providing housing to individuals evicted from their private residences due to their failure to pay rent.

To these points, *Aerolineas Argentinas* is instructive. In *Aerolineas Argentinas*, the government "required . . . airlines to pay to house, sustain, and guard aliens who, having arrived in the United States on plaintiffs' airlines without entry documents, sought political asylum." 77 F.3d at 1568. This practice continued even after Congress enacted the 1986 User Fee Statute, Pub. L. No. 99–591, § 205, 100 Stat. 3341–53 (1986) (codified as amended at Immigration and Nationality Act (INA) § 286, 8 U.S.C. § 1356), shifting the financial burden from the airlines to the federal government. 77 F.3d at 1568-71. In contrast to *Aerolineas Argentinas*, the landlords in this case were not required to bear costs or expenses imposed by statute on the United States. Because the government does not have '"the citizen's money in its pocket,'" no suit lies in this Court under the Tucker Act to recover the money (illegally) exacted. *See id.* at 1573 (quoting *Clapp v. United States*, 117 F. Supp. 576, 580 (Ct. Cl. 1954)).

CONCLUSION

For the reasons stated above, defendant's motion to dismiss for failure to state a claim upon which relief can be granted under RCFC 12(b)(6) (ECF 11) is **GRANTED**. The Clerk's Office is directed to **ENTER** judgment accordingly. No costs.

IT IS SO ORDERED.

Armando O. Bonilla
Judge

In the United States Court of Federal Claims

No. 21-1621L
(Filed: May 17, 2022)

DARBY DEVELOPMENT COMPANY, INC., et al

Plaintiffs

v **JUDGMENT**

THE UNITED STATES

Defendant

Pursuant to the court's Opinion And Order, filed May 17, 2022, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' case is dismissed for failure to state a claim upon which relief can be granted. No costs.

Lisa L. Reyes
Clerk of Court

By: s/Anthony Curry

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.