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 REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Creighton R. Magid
DORSEY & WHITNEY LLP
1401 New York Avenue, N.W.
Suite 900
Washington, D.C. 20005
Telephone: (202) 442-3555
Email: magid.chip@dorsey.com

DATE: March 13, 2023

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 4

I. THE CDC ORDER WAS GOVERNMENT CONDUCT SUBJECT TO THE TAKINGS CLAUSE. 4

A. A Taking Claim Exists Where the Conduct in Question Was Government Conduct Rather than *Ultra Vires* Conduct by a Government Official..4

B. Supreme Court Precedent Is Not to the Contrary. 9

C. The Government Overstates the Limited Ruling in *Alabama Ass'n of Realtors*. 13

D. Congress's Endorsement of the CDC Order Emphasizes that the CDC Order was Government Action. 14

E. The Government's Arguments Turn the Takings Clause on its Head...16

II. APPELLANTS HAVE STATED PHYSICAL TAKINGS CLAIMS. 19

A. Appellants' Complaint States an Actionable Claim. 19

B. The Government's Attempts to Distinguish *Cedar Point* Are Unavailing. 21

C. The Government's Reliance on *Yee* is Misplaced. 23

D. The Government Has Abandoned Other Arguments Made Below. ...26

III. PLAINTIFFS HAVE STATED AN ACTIONABLE CLAIM FOR ILLEGAL EXACTION. 27

CONCLUSION 29

CERTIFICATE OF COMPLIANCE..31

TABLE OF AUTHORITIES

Cases

Aerolineas Argentinas v. United States, 77 F.3d 1564 (Fed. Cir. 1996) 27

Ala. Ass'n of Realtors v. United States HHS, No. 21-5093, 2021 U.S. App. LEXIS 16630 (D.C. Cir. June 2, 2021) 16

Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021) 13, 14, 16, 20

Allenfield Assocs. v. United States, 40 Fed. Cl. 471 (1998) 22

Americopters, LLC v. United States, 95 Fed. Cl. 224 (2010) 7

Board Mach., Inc. v. United States, 49 Fed. Cl. 325 (2001) 8, 9

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 15

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).. 18, 19, 20, 21, 23, 24, 25, 26

Del-Rio Drilling Programs v. United States, 146 F.3d 1358 (Fed. Cir. 1998) 4, 5, 6, 7, 8, 9, 14, 16

Eyherabide v. United States, 345 F.2d 565 (Ct. Cl. 1965) 7, 22

FCC v. Fla. Power Corp., 480 U.S. 245 (1987)...25

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).........................8

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 17

Goltra v. United States, 91 Ct. Cl. 42 (1940) 13

Goodwyn v. United States, 32 Fed. Cl. 409 (1994) 23

Great Falls Manufacturing Co. v. Attorney General, 124 U.S. 581 (1888) .. 6, 7, 14

Heydt v. United States, 38 Fed. Cl. 286 (1997) 22

Hooe v. United States, 218 U.S. 322 (1910).. 11, 12

Horne v. Dep't of Agric., 576 U.S. 351 (2015) 25

Int'l Paper Co. v. United States, 282 U.S. 399 (1931) 7

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 20

Laguna Gatuna, Inc. v. United States, 50 Fed. Cl. 336 (2001) 7, 18

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).................12

Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419 (1982)...... 19, 23, 25

Mitchell v. United States, 267 U.S. 341 (1925) 12

Osprey Pac. Corp. v. United States, 41 Fed. Cl. 150 (1998)..................................18

Piszel v. United States, 833 F.3d 1366 (Fed. Cir. 2016)..26

Ramirez de Arellano v. Weinberger, 724 F.2d 143 (D.C. Cir. 1983), *rev'd on other grounds*, 745 F.2d 1500 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985)...9, 12

Reunion, Inc. v. United States, 90 Fed. Cl. 576 (2009) 22

Schism v. United States, 316 F.3d 1259 (Fed. Cir. 2002).......................................15

Stromness MPO, LLC v. United States, 134 Fed. Cl. 219 (2017) 22

Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993) 7

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan Agency, 535 U.S. 302 (2002)..25

United States Postal Serv. v. Sunshine Dev., Inc., 674 F. Supp. 2d 619 (M.D. Pa. 2009) 22

United States v. Causby, 328 U.S. 256 (1946) 6, 7

United States v. Goltra, 312 U.S. 203 (1941)...13

United States v. North American Transp. & Trading Co., 253 U.S. 330 (1920) 12

Waverley View Inv'rs, LLC v. United States, 135 Fed. Cl. 750 (2018)...................22

West Virginia v. EPA, 142 S. Ct. 2587 (2022)..14

Westfed Holdings, Inc. v. United States, 52 Fed. Cl. 135 (2002) 27

Yee v. City of Escondido, 503 U.S. 519 (1992) 23, 24, 25

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 10, 11

Yuba Goldfields, Inc. v. United States, 723 F.2d 884 (Fed Cir. 1983) 7

Other Authorities

Restat. 2d of Prop: Landlord & Tenant, §§ 12.1, 13.1 24

William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995) 18

INTRODUCTION

The CDC issued its eviction moratorium based on a presidential directive and under a statute enacted by Congress that gave the CDC expansive authority to fight communicable diseases.[1] It did so after a considered, good faith determination that the CDC Order was a proper exercise of its statutorily authorized powers, and necessary to protect the public health. Two presidential administrations championed the moratorium. Congress specifically extended the moratorium; far from questioning the CDC's authority, it instead expressly recognized the statutory basis for the CDC Order. When the CDC's ability to impose the moratorium was questioned, the Government argued strenuously (and successfully) in courts across the country that the CDC Order was fully authorized by statute and could not be enjoined. As a result, the CDC Order was in place for nearly a year, during which time the Government required Appellants to house non-rent-paying individuals under the threat of criminal penalty (including incarceration). Appellants suffered severe economic harm as a consequence.

Despite the fact that the CDC issued the moratorium pursuant to a valid statute providing the CDC with extensive powers; despite the fact that Congress concurred that the CDC Order had a valid statutory basis and, in fact, specifically extended the

[1] Unless otherwise noted, all capitalized terms were defined in the Opening Brief of Plaintiffs-Appellants.

moratorium; and despite the fact that the Government took the position in courts around the country *for a year* that the CDC Order was firmly rooted in a valid statute, the Court of Federal Claims wrongly concluded – and the Government, in a total reversal of its prior position, now argues – that Appellants are not entitled to recover just compensation under the Fifth Amendment's Takings Clause because the CDC Order was somehow "unauthorized."

There is no merit to the Government's contention, which misconstrues the meaning of authorization under takings law. The fundamental issue in takings jurisprudence is whether the conduct at issue is (a) the conduct of the Government or (b) conduct by a government official that was expressly prohibited or outside the general scope of the official's duties. Here, it cannot seriously be questioned that it was the Government that issued the moratorium. Not only was there no express prohibition of the moratorium, but Congress made clear that it was fully behind the moratorium. (As the Government itself put it before the Supreme Court, "Congress extended the effective date specified in the CDC's original order in legislation that recognized that the order was a valid exercise of the CDC's statutory authority."[2])

[2] Response in Opposition to Applicants' Emergency Application to Vacate the Stay Pending Appeal Issued by the United States District Court for the District of Columbia filed by the United States in *Ala. Ass'n of Realtors v. HHS*, No. 21A23 (https://www.supremecourt.gov/DocketPDF/21/21A23/188251/20210823114141455_21A23%20Response%20in%20Opposition.pdf) at 1.

The fact that the Supreme Court ultimately expressed considerable doubts as to whether the CDC had a valid statutory basis for the moratorium does not, as the Government suggests, change the calculus. Numerous cases have upheld takings claims even when the Government action was later found to have been wrongful or beyond what Congress had intended. A takings remedy remains available so long as the action was not prohibited by Congress or so far outside the official's duties as to be an *ultra vires* act. This interpretation of takings law is crucial, particularly in the expansive modern administrative state, to ensuring that citizens have a remedy when the Government takes private property for a public benefit, consistent with the principles underlying the Takings Clause. The Government's theory, by contrast, turns the Takings Clause on its head, eliminating citizens' rights to recovery for what is clearly Governmental action and, indeed, providing a roadmap for Government agencies to violate citizens' property rights without payment of just compensation by *deliberately* overstepping their authority. The Government's extreme position upends the very purpose of the Takings Clause.

The Government's other arguments fare no better. The Government argues that the CDC Order was not a physical taking, but its arguments seriously misinterpret applicable law. The Government also argues that Appellants should not be able to assert an alternative illegal exaction claim because it required Appellants to bear the cost of the Government's program to house non-rent-paying individuals,

rather than Appellants making payments to the Government for the program. But this is a distinction without economic substance, and a reasonable reading of pertinent case authority supports the viability of an illegal exaction claim under these circumstances.

The order of the Court of Federal Claims should be reversed.

ARGUMENT

I. THE CDC ORDER WAS GOVERNMENT CONDUCT SUBJECT TO THE TAKINGS CLAUSE.

A. A Taking Claim Exists Where the Conduct in Question Was Government Conduct Rather than *Ultra Vires* Conduct by a Government Official.

As detailed in Appellants' Opening Brief, this Circuit's holding in *Del-Rio Drilling Programs v. United States*, 146 F.3d 1358 (Fed. Cir. 1998), makes clear that the pertinent question of "authority" in the takings context is whether the conduct is "chargeable to the government or is an act committed by a government agent acting *ultra vires*." *Id.* at 1362-63. This Court further explained that an act is "unauthorized" for takings purposes if it was "either explicitly prohibited or was outside the normal scope of the government officials' duties." *Id.* at 1363. Action by government officials is "authorized" for takings purposes – even if it was unlawful, illegal, or invalid – when it is undertaken within the general scope of the officials' duties. *Id*. at 1362. An action is considered "within the general scope" of an official's duties if it is the "natural consequence of Congressionally approved

measures" or is "pursuant to the good faith implementation of a Congressional Act." *Id.* (citations omitted).

Under the *Del-Rio* framework, the CDC order was "authorized" Government action. The CDC issued the moratorium pursuant to an act of Congress. The CDC issued the moratorium within the general scope of its expansive duties to fight communicable disease and to protect public health. In the words of this Court, "there is no reason to suppose that [the CDC's] decision reflected anything but a good faith effort to apply the statutes and regulations as [it] understood them." *Del-Rio*, 146 F.3d at 1363. Congress, moreover, endorsed the CDC's action and, in fact, *extended* the moratorium. The Government argued vociferously in courts all over the nation for a year that the moratorium was authorized by statute. It is beyond cavil that the moratorium was a Government action and not an *ultra vires* act outside "the good faith implementation of a Congressional Act." *Id*. at 1362.

The Government argues that *Del-Rio* "addressed a scenario not present here," Response Brief of Defendant-Appellee ("Resp.") at 24, yet there is no functional difference between the circumstances in *Del-Rio* and those here. In *Del-Rio*, the Interior Department had statutory authority to regulate in the area of mining and to enact regulations around permitting, and did so, but it was later determined that it had imposed a requirement that it had no ability to impose. *Id.* at 1360-61. This Court held that the plaintiff could nonetheless pursue a takings remedy because the

Government's action, while illegal, was not *ultra vires*. *Id.* at 1363. Likewise, the CDC had statutory authority to regulate in the area of public health and to enact regulations to fight communicable disease, and it did so, only for the Supreme Court later to suggest (but not decide) that the moratorium exceeded its authorization. As in *Del-Rio*, the later conclusion that the CDC's good faith determination that it had statutory authority to issue the moratorium may have been in error does not in any way suggest that the CDC's action was *ultra vires*.

The Government's attempts to distinguish other cases that support Appellants' claims are similarly flawed. For example, the Government attempts to distinguish *United States v. Causby*, 328 U.S. 256 (1946), by claiming that "there was no question that the military had authority to engage in flights," and *Great Falls Manufacturing Co. v. Attorney General*, 124 U.S. 581 (1888), by claiming that Congress had "provided authority to acquire certain property" but that the Government "mistakenly acquired property beyond the congressional survey." Resp. at 27. The Government's attempt to distinguish the cases misses the point. In both *Causby* and *Great Falls*, the agency had background statutory authority but *took property beyond what was statutorily authorized*, yet takings claims were upheld. The circumstances here are similar. Significant additional authority further

supports a takings claim even when specific congressional authority is found wanting.[3]

Rather than effectively distinguishing *Del-Rio*, *Causby*, and *Great Falls*., Government argues that this case should be analogized to cases in which the Court of Federal Claims concluded that the Food and Drug Administration's attempted regulation of tobacco did not give rise to takings liability. Resp. at 30. The Government overlooks a critical difference: Congress had *clearly proscribed* the very action the FDA sought to take.

---

[3] *See, e.g.*, *Int'l Paper Co. v. United States*, 282 U.S. 399, 406 (1931) (giving "scant consideration" to government's argument that taking was unauthorized when the "Secretary of War in the name of the President, with the power of the country behind him . . . requisitioned what was needed and got it," notwithstanding any "defect of authority"); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 803 (Fed. Cir. 1993) (agency's action could not be considered *ultra vires* for takings purposes even though another court had concluded the agency did not have jurisdiction); *Yuba Goldfields, Inc. v. United States*, 723 F.2d 884, 891 (Fed Cir. 1983) (rejecting government's "novel proposition" that there was no authority where multiple agencies were asserting "what they believed were the rights of the United States"); *Eyherabide v. United States*, 345 F.2d 565, 601-02, 606-07 (Ct. Cl. 1965) (affirming takings claim for incursions onto property where the individuals involved were acting "within the general scope of [their] duties," and "[n]o statute or regulation forbade these activities," even if the actions were "mistaken, imprudent, or wrongful"); *see also, e.g.*, *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 was acting within the general scope of its duties to interpret the law, even if the interpretation was mistaken); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336, 340-43 (2001) (affirming takings claim despite government's belated contention that the agency did not have authority, where its action was generally within the scope of its duties and a good faith interpretation of its authority).

In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Supreme Court held that the FDA did not have jurisdiction to regulate tobacco. It found that the FDA was acting contrary to its own prior acknowledgement that it could not regulate tobacco, as well as *clear congressional action prohibiting it*. *Id.* at 153-56.

With that background, the Court of Federal Claims rejected suits by cigarette vending machine companies arguing that FDA regulations resulted in a taking. The reason the claims failed was not merely that the regulations were unlawful, but that Congress had *expressly disapproved the FDA's claimed authority*. This reasoning is articulated clearly in *Board Mach., Inc. v. United States*, 49 Fed. Cl. 325 (2001). There, the court explained that the FDA's actions could not be considered a natural consequence of its general regulatory capacity under *Del-Rio* because the authority to regulate tobacco "was not only never granted, but was *explicitly denied to the agency*." *Id.* at 331 (emphasis added). An agency is not acting within its normal authority if it acts contrary to "express congressional disapproval;" there, "Congress expressly denied the FDA the authority to promulgate its tobacco regulations." *Id*. at 329-30. Because Congress had expressly denied the FDA authority to regulate cigarettes, the FDA's conduct was *ultra vires* and not attributable to the United States. *Id.* at 331.

The facts here could not be more different. Congress both enacted the initial COVID-19 eviction moratorium through the CARES Act and extended the CDC Order through the Consolidated Appropriations Act, while expressly acknowledging the CDC Order's specific statutory basis. Moreover, the Government repeatedly pointed to statutory authority for the CDC Order while defending it for a year. As this Court explained in *Board Mach.*, a finding of lack of authority for takings purposes should be predicated on a clear preclusion of jurisdiction or failure to follow procedures necessary to secure authority; if the agency is operating within its general scope, authority for takings purposes should be presumed. *Board Mach.*, 49 Fed. Cl. at 334. The CDC Order was plainly Government action, not an *ultra vires* act outside a "good faith effort to apply the statutes and regulations as [the CDC] understood them." *Del-Rio*, 146 F.3d at 1363.

B. Supreme Court Precedent Is Not to the Contrary.

The Government's assertion that Appellants' takings claim is "inconsistent with Supreme Court precedent, Resp. at 2, involves a misreading of a small number of factually inapposite Supreme Court cases from the first half of the last century.[4] None of these cases precludes Appellants' claims.

[4] Several cases cited by the Government are a century or more old and preceded modern takings jurisprudence. Still, a fair reading of these cases in their historical context is consistent with current law. *See Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 150-153 (D.C. Cir. 1983), *rev'd on other grounds*, 745 F.2d 1500 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985).

The Government repeatedly cites *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which it claims "explain[ed] that there could be no taking where the Government official's actions were unlawful." Resp. at 22. That assertion is simply false; there is *no such statement in Youngstown*. *See generally Youngstown*, 343 U.S. at 582-89.

In fact, *Youngstown* was not a takings case at all. In that case, steel companies brought an action to enjoin the President's seizure of the nation's steel mills. *Youngstown*, 343 U.S. at 582-83. The district court entered a preliminary injunction on the basis that the President's action was illegal, and the Supreme Court affirmed. *Id.* As a threshold question, the Supreme Court considered whether the constitutional validity of the President's action was ripe for determination even though the case was only at the preliminary injunction stage. *Id.* at 584-85. The Government argued that the preliminary injunction could be denied – and the constitutional question delayed – on the non-constitutional basis that there was not irreparable harm and the plaintiffs could sue for damages. *Id.* The Supreme Court decided not to delay consideration of the urgent issue presented. The comments quoted by the Government come exclusively from the Supreme Court's discussion of the irreparable harm issue. *Id*. As part of that discussion, the Supreme Court commented that certain of its cases had "cast doubt" about whether the steel companies could recover damages. *Id.* at 585. Contrary to the Government's

assertion, nowhere in the opinion did the Supreme Court "articulate" any "rule" of takings law. *See generally id.*. at 582-89. Moreover, when the Supreme Court turned to authorization, it noted that "the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes," *id*. at 586, making clear that, in the absence of some Constitutional authority, the President had no basis for seizing the plants.

The Government also relies heavily on *Hooe v. United States*, 218 U.S. 322 (1910), but that case, too, is inapposite. *Hooe* arose from a leasing dispute between the plaintiff landlord and the tenant Civil Service Commission. *Id.* at 326-30. The plaintiff claimed that there was an implied contract for additional rent owing because the Commission had been using the basement but not paying extra rent, and alternatively claimed that the use of the basement could be considered a taking. *Id.* at 334-35. The Court rejected all claims given that Congress had specifically appropriated an amount for rent and *prohibited* any further amounts being paid, thus imposing a *specific limitation on any authority* to bind the government to any further amounts. *Id*. No such prohibition exists here.

The Government asserts that Appellants have wrongly "recast" *Hooe* as concerning a specific Congressional limitation on authority. Resp. at 31. Yet the Supreme Court itself describes *Hooe* as concerning a "specific limitation on the

agent's authority." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701 n.24 (1949); *see also Ramirez*, 724 F.2d at 151 (explaining that the "Supreme Court has specifically distinguished *Hooe* from other Tucker Act cases on the ground that it involved specific limitation on the agent's authority") (quotations omitted).

The other Supreme Court cases cited by the Government are similarly inapposite. In *Mitchell v. United States*, 267 U.S. 341 (1925), the issue was whether the government, which had taken land by eminent domain, also had to pay for a farming business that had been on the land. *Id.* at 343-44. The Court held that these were consequential damage that were not recoverable, as the government had taken the land, not the business. *Id.* at 345. In this context, the Court also noted that the statute authorizing the land acquisition did not mention any business. *Id.* The ruling has no applicability here.

In *United States v. North American Transp. & Trading Co.*, 253 U.S. 330 (1920), the issue was whether a takings claim was barred by the statute of limitations. The Court held that where only the Secretary of War was authorized to exercise certain confiscatory power, the takings claim at issue was timely because it arose once the Secretary had approved the confiscation, not upon an inferior officer's initial actions months earlier. *Id.* at 332-34. This case, too, has no bearing on the issues in this case.

Finally, in *United States v. Goltra*, 312 U.S. 203 (1941), the issue was whether the plaintiff could recover interest on a claim against the United States under certain special legislation. The legislation had been enacted to provide the plaintiff a remedy after the Secretary of War had illegally terminated a contract and seized the plaintiff's property, in acts specifically found to have been both "*ultra vires*" and "tortious." *Goltra v. United States*, 91 Ct. Cl. 42, 72 (1940). In that context, the Supreme Court noted that this "tortious" and "unauthorized taking" was not to be considered an exercise of eminent domain. *Goltra*, 312 U.S. at 209-211. This ruling is entirely consistent with Appellants' position here.

Appellants' takings claims are fully consistent with Supreme Court authority, and none of the cases cited by the Government suggests otherwise.

C. The Government Overstates the Limited Ruling in *Alabama Ass'n of Realtors*.

The Government relies heavily on *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021), and asserts that Appellants are "manifestly wrong" in pointing out that the Supreme Court did not rule on the merits of the CDC's authority. Resp. at 33. The Government's assertion is curious, since the Court's ruling, and its procedural context, is plain for all to see.

In *Alabama Ass'n*, the Court reviewed the stay of a preliminary injunction, without full briefing or argument. *It did not decide the merits*, but rather expressed the view that it was "virtually certain" the plaintiffs would ultimately prevail.

Alabama Ass'n, 141 S. Ct. at 2486, 2490. The Government then abandoned its year-long defense of the CDC's authority.[5] It is not coincidental that the Government stopped arguing that the CDC Order was authorized only weeks before it was set to expire anyway, and only weeks after it had been sued in this action. The more important point is that the issue of *whether the CDC's Order was ultra vires for takings purposes was not before the Court, and was not decided by the Court*.

Even if the Government's overbroad interpretation of *Alabama Ass'n* were accepted, a *post hoc* determination that the CDC exceeded its congressional authorization does not bar Appellants' takings claims, as a takings claim is *not* automatically precluded by a finding that an agency overstepped its bounds. *See, e.g.*, *Great Falls*, 124 U.S. at 596-97 (takings claim stated as to property acquired beyond survey authorized by Congress); *Del-Rio*, 146 F.3d at 1363 (takings claim stated although agency did not have authority to impose restriction).

D. Congress's Endorsement of the CDC Order Emphasizes that the CDC Order was Government Action.

In its Response, the Government blithely dismisses the important fact that *Congress itself supported the CDC Order*. Congress was well aware that the CDC had issued the CDC Order under the auspices of the Public Health Service Act, but

[5] Contrary to the Government's suggestion, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), does not elevate *Alabama Ass'n* to a holding on the merits. *West Virginia* was not a takings case, and mentioned *Alabama Ass'n* merely as an example of challenges to administrative authority.

did not vacate the order, dispute the CDC's authority, or otherwise seek to challenge or undermine the CDC's action. Instead, Congress expressly acknowledged that the CDC Order was issued under the Public Health Service Act, extended its application, and appropriated related funds. These facts underscore that the moratorium was a Government action, rather than an *ultra vires* act. Additionally, and separately, Congress's actions constitute Congressional ratification or acquiescence of the CDC Order, as described in Appellants' Opening Brief.[6]

These facts also distinguish this case from the cases cited by the Government, which all lack similar indicia of Congressional support. For example, in contrast to Congress's extension of the CDC Order and affirmation that the CDC Order was undertaken pursuant to statutory authority, the tobacco cases cited by the Government all involved express Congressional *disapproval* of the FDA's authority to regulate cigarettes.

At the very least, Congress's endorsement of the CDC Order and affirmation that it was issued under the Public Health Service Act compels the conclusion that the CDC was acting within the general scope of its duties, and not in a way that was

[6] *See, e.g.*, *Bob Jones Univ. 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); *Schism v. United States*, 316 F.3d 1259, 1294 (Fed. Cir. 2002) (explaining that ratification exists where Congress acts "to demonstrate its approval of an agency action" while acquiescence arises where Congress has failed to "act in response to an agency action it might view as previously unauthorized").

ultra vires. That is all that is required to establish the requisite "authorization" under takings law. *See Del-Rio*, 146 F.3d at 1363.

The Government notes that similar arguments about Congressional support were raised in *Alabama Ass'n*. But, as noted earlier, the Court made no final ruling on the merits of those arguments, and, in fact, the D.C. Circuit's view – as well as the Government's view – was that Congress *had* recognized the CDC's authority to issue the CDC Order. *See Ala. Ass'n of Realtors v. United States HHS*, No. 21-5093, 2021 U.S. App. LEXIS 16630, at *5 (D.C. Cir. June 2, 2021) ("Congress has expressly recognized that the agency had the authority to issue its narrowly crafted moratorium under Section 264."). Moreover, *Alabama Ass'n*, was not a takings case, and the Court did not in any respect weigh in on "authorization" for purposes of takings law.

E. The Government's Arguments Turn the Takings Clause on its Head.

As discussed in Appellants' Opening Brief, the theory of "authorization" urged by the Government defies law, logic, and common sense. It leads to perverse incentives for agencies and the absurd conclusion that Government agencies can avoid an obligation to provide just compensation by deliberately overstepping their authority.

The Government does not deny that citizens would be stripped of any right to compensation under its view of the law, but asserts that citizens have an alternative

remedy in the form of injunctive or declaratory relief. The history of the CDC Order itself underscores the absurdity of this position.

The CDC Order was in place for nearly a year. Throughout that time, Appellants suffered severe economic hardship because they could not use the threat of eviction to encourage payment of rent, because they had to continue to provide services and housing to persons who did not pay rent, and were deprived of any opportunity to rent occupied units to persons who would pay rent. Betraying the illusory nature of an injunctive remedy, the Government fought tooth and nail to oppose efforts to enjoin the CDC Order. Meanwhile, the losses incurred in that year amounted to tens of billions of dollars industry-wide. The Government wishes to have it both ways: it can shift immense financial burdens of governmental actions onto the private sector, then turn around and claim that – surprise! – the actions were "unauthorized," freeing the Government of any obligation to pay just compensation as required by the Fifth Amendment. This Kafkaesque conception of takings law is not supported by the Takings Clause itself or relevant case law, and should be rejected.

The law is clear that injunctive or declaratory relief is not a substitute for just compensation; if the underlying action amounted to a taking, its later injunction or invalidation does not affect the Government's obligation to pay. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 319 (1987)

(holding that invalidation of the challenged ordinance "though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause"); *see also Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021) (confirming that the duration of a physical taking bears only on the *amount* of compensation); *Laguna Gatuna*, 50 Fed. Cl. at 343 (holding that the plaintiff could state a temporary takings claim for the period prior to when the agency decided it did not have authority); *cf. Osprey Pac. Corp. v. United States*, 41 Fed. Cl. 150, 157-58 (1998) (rejecting Government's argument that there was no takings claim because the agency did not have authority for the seizure; noting that "the government's theory that the United States is not liable because GSA acted contrary to law or incorrectly in seizing the boat is without any substantial trace of logic" and that "[i]t would be a bizarre consequence that would allow the government to profit from its own error").

Furthermore, the Government's position, which leaves Appellants without any effective remedy, is antithetical to the very purpose of the Takings Clause. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 855 (1995). The clause is in part intended to provide redress to those that otherwise could not defend themselves from arbitrary government action. *Id.* (the "Takings Clause should be understood as concerned with redressing political process failure."). The Takings Clause was

never, as the Government suggests, meant to serve as a shield for the Government when it acts in an unauthorized fashion. Nor was it intended to protect the Government from monetary remedies for damages caused by government action – far from it. The Takings Clause was drafted to protect the American people from their government, not the other way around.

II. APPELLANTS HAVE STATED PHYSICAL TAKINGS CLAIMS.

A. Appellants' Complaint States an Actionable Claim.

As set forth in their Opening Brief (at 31-38), Appellants have stated viable physical takings claims. The CDC Order appropriated their right to exclude and constituted a physical taking, occupation, or appropriation of their property, for the Government itself or third parties. *See* Appx022-023, 038 (Complaint ¶¶ 2, 3, 36). Supreme Court authority confirms that such allegations state a claim.

In *Cedar Point*, the Supreme Court held that whenever the Government physically appropriates private property, for itself or a third party, even temporarily, it is subject to the "simple, *per se* rule" that it "must pay for what it takes." 141 S. Ct. at 2071-74. The Court further confirmed that this rule directly applies to appropriations of the right to exclude. *Id.*; *see also, e.g.*, *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 425-26, 435-36 (1982) (holding that Government-authorized physical occupation is a compensable physical taking, without regard to the public interests involved or other factors); *Kaiser Aetna v.*

United States, 444 U.S. 164, 176, 179-80 (1979) (holding that the right to exclude is an "essential" property right "that the Government cannot take without compensation," and that physically taking even only an easement of property requires just compensation).

Appellants have alleged just such an appropriation. Notably, in *Alabama Ass'n*, the very case the Government wrongly interprets as barring Appellants' claims, the Supreme Court itself confirmed that ***"preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude."*** 141 S. Ct. at 2489 (emphasis added). While the Government now argues that its intrusion on Appellants' right to exclude should be considered a use restriction and not a physical taking, the Supreme Court has rejected that theory. In language that could hardly be more clear, the Supreme Court held in *Cedar Point* that "appropriations of a right to invade are *per se* physical takings, not use restrictions subject to *Penn Central*." *Cedar Point*, 141 S. Ct. at 2077.

B. The Government's Attempts to Distinguish *Cedar Point* Are Unavailing.

The Government argues that *Cedar Point* is distinguishable and does not support Appellants' claims, but it fails to identify any meaningful distinction.[7] Its entire argument boils down to the contention that *Cedar Point* is inapplicable because "the physical takings claim in *Cedar Point* was not predicated on a physical invasion by individuals who had permission to be there." Resp. at 46. This argument is without merit.

To begin with, the non-rent-paying individuals at issue in this case *did not have* "permission to be there." That is the entire point of Appellants' takings claims. Their sole rights of access had been under leases *they had breached*. They no longer had permission to occupy Appellants' premises, and Appellants had a fundamental property right to exclude them. The CDC Order appropriated that right. That is a taking. *Cedar Point*, 141 S. Ct. at 2073-74.

The Government's argument places enormous weight on the fact that the non-rent-paying individuals Appellants were forced to house under the CDC Order *previously* had rights to access Appellants' property (through leases). But there is no language or reasoning in *Cedar Point* that would even remotely suggest that the

[7] If anything, the CDC Order, which permitted full occupation 24 hours a day for nearly a year, was vastly *more invasive* than the regulation allowing union organizers occasional access at issue in *Cedar Point*.

ruling there would have been different had the growers previously allowed union organizers on their property. Instead, the Supreme Court made clear that any Government intrusion on the right to exclude, for itself or a third party, is a taking. *Cedar Point*, 141 S. Ct. at 2073-74.

Moreover, the Government does not cite any authority for its theory that a physical takings claim cannot be asserted when access had previously been granted, but was no longer permitted, and case law is to the contrary. Courts have consistently held that a takings claim *can* be asserted when there is no longer permission for a Government intrusion that had previously been allowed. *See, e.g.*, *Eyherabide*, 345 F.2d at 567-68 (holding that plaintiff had viable takings claim for physical incursions onto property by government agents after expiration of lease); *Waverley View Inv'rs, LLC v. United States*, 135 Fed. Cl. 750, 797 (2018) (holding that plaintiff was entitled to just compensation when government continued to occupy parts of property after expiration of access agreement); *Stromness MPO, LLC v. United States*, 134 Fed. Cl. 219, 275 (2017) (explaining that when the government holds over after a lease expires, it can be liable under both contractual and takings theories); *Reunion, Inc. v. United States*, 90 Fed. Cl. 576, 581 (2009) (confirming that the government holding over after lease expiration can support takings liability); *Allenfield Assocs. v. United States*, 40 Fed. Cl. 471, 487-88 (1998) (holding that property owner was entitled to just compensation for physical taking

after government continued to occupy property after lease term); *Heydt v. United States*, 38 Fed. Cl. 286, 308 (1997) (affirming takings claim where government delayed removing equipment from property after it no longer had access rights, which was a taking of the owners' "right to exclude"); *see also, e.g.*, *United States Postal Serv. v. Sunshine Dev., Inc.*, 674 F. Supp. 2d 619, 628 (M.D. Pa. 2009) ("When a government lessee physically occupies and uses a property after the expiration of its lease, a taking has occurred."); *cf. Goodwyn v. United States*, 32 Fed. Cl. 409, 416-17 (1994) (affirming takings claim where "although plaintiffs did not have the right to exclude the Government from [plaintiffs' land] for all purposes, they did have the right to exclude the Government beyond its limited rights under the easement").

There is no meaningful distinction between these cases and the circumstances here, as there is no difference between the Government taking property for itself or for a third party. *See, e.g.*, *Cedar Point*, 141 S. Ct. at 2071-72; *Loretto*, 458 U.S. at 440. The fact that the non-rent-paying individuals at issue *previously* had rights of access does not distinguish *Cedar Point* or undermine Appellants' claims.

C. The Government's Reliance on *Yee* is Misplaced.

The Government argues that *Yee v. City of Escondido*, 503 U.S. 519 (1992), "controls this case" and "bars" Appellants' claims. Resp. at 39. The Government is wrong. As detailed in Appellants' Opening Brief (at 39-41), *Yee* is distinguishable

on several grounds. The Government downplays the uniqueness of the facts in *Yee* and argues that the claims here are not materially different. But the circumstances of mobile home owners, who own their homes and receive "unique protection" in light of the unusual problems with mobile home eviction, are starkly different from those who rent apartments. *Yee*, 503 U.S. at 524. Further, *Yee* involved a challenge to a *rent control* ordinance imposing restrictions on rents charged to tenants with rights of occupancy; it did *not* involve the Government mandating housing of people who had breached their leases. *Id.* at 526. The claims here are very different. *See id.* at 532 (explaining that rent control "does not authorize an unwanted physical occupation").[8]

Moreover, in *Yee* itself, the Supreme Court acknowledged that its holding was limited by its facts, and that circumstances more akin to those here would present a "different case." *Yee*, 503 U.S. at 528. Specifically, the Court stated that a "different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from

---

[8] A fundamental fallacy in the Government's position is that individuals who have breached their leases, but could not be evicted due to Government order, should be considered equivalent in legal status to invited tenants in compliance with their leases. Resp. at 41. The law is otherwise. *See generally* Restat. 2d of Prop: Landlord & Tenant, §§ 12.1, 13.1; *cf. Yee*, 503 U.S. at 532 (recognizing the distinction between a "lessee" and an "interloper with a government license") (quotations omitted). This fallacy is further confirmed by the numerous cases holding that government occupation of property after permission expires can be a taking. *See supra* Section A.2 (citing cases).

terminating a tenancy." *Id*. The Government argues that this language in *Yee* is irrelevant because this case does not involve precluding a landlord from terminating a tenancy in perpetuity. But the instant case *does* involve compelling occupation over objection and precluding eviction, and cases subsequent to *Yee* have confirmed that for takings purposes, there is no difference between a permanent ("in perpetuity") taking and a temporary one. *See Cedar Point*, 141 S. Ct. at 2074.

The Government argues that, under *Yee*, Appellants' claims must be analyzed under the *Penn Central* balancing test, and not as physical takings. But nothing in the actual reasoning in *Yee* forecloses a physical takings claim under the facts here, and other Supreme Court authority directly undermines the Government's overbroad interpretation. *See, e.g.*, *Cedar Point*, 141 S. Ct. at 2077 (holding that the right to exclude is a fundamental right that "cannot be balanced away" and is not subject to *Penn Central*); *Loretto*, 458 U.S. at 440 (explaining that general regulations of "housing conditions" and "the landlord-tenant relationship," which are analyzed under *Penn Central*, are factually and analytically distinct from physical takings such as an "occupation of a portion of [the plaintiff's] building by a third party"); *cf. Horne v. Dep't of Agric.*, 576 U.S. 351, 361 (2015) (explaining that despite "reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied").

At its core, the Government's fundamental argument is that the Court should read the unusual, 30-year-old decision in *Yee* extremely expansively, while simultaneously reading the Supreme Court's much more recent and directly applicable decision in *Cedar Point* extremely narrowly. This illogical approach is not supported by the cases and should be rejected.[9]

D. The Government Has Abandoned Other Arguments Made Below.

In the Court of Federal Claims, the Government also argued that Appellants' takings claims should be dismissed because Plaintiffs did not have cognizable property interests or because the CDC Order was a non-compensable exercise of "police power." These alternative arguments are meritless and were not addressed by the Court of Federal Claims. The Government did not make these arguments in its Response, and thus has abandoned them. To the extent this Court considers these arguments, they should be rejected for the reasons detailed in Appellants' Opening Brief.[10]

---

[9] While relying almost entirely on *Yee*, the Government also briefly references *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan Agency*, 535 U.S. 302, 321-23 (2002) and *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987). These cases do not support the Government's position, as detailed in Appellants' Opening Brief (at 41-42). The Government also cites several district court cases arising from state eviction moratoriums. These cases are unprecedential and unpersuasive. Several of the cases preceded *Cedar Point*, and none contains any cogent rationale for dismissing a takings claim based on the CDC Order. Instead, like the Government here, the cases rely on an overbroad misreading of *Yee*.

[10] The Government also mentions in a footnote that Congress appropriated funds for renters and that Plaintiffs need to prove that the CDC Order caused them

III. PLAINTIFFS HAVE STATED AN ACTIONABLE CLAIM FOR ILLEGAL EXACTION.

In the alternative, Appellants have stated a valid claim for illegal exaction. The Court of Federal Claims erred in concluding otherwise.

In its Response, the Government argues that Appellants' illegal exaction claims are contrary to *Piszel v. United States*, 833 F.3d 1366 (Fed. Cir. 2016), and *Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135 (2002). Resp. at 58-59. These cases, however, involved very different circumstances. In *Piszel*, a terminated employee of the Federal Home Loan Mortgage Corporation ("Freddie Mac") asserted that limits on golden parachute payments constituted an illegal exaction. This Court explained that "even after the government's action, Mr. Piszel was left with the right to enforce his contract against Freddie Mac in a breach of contract action." *Piszel*, 833 F.3d at 1377. Because Mr. Piszel suffered no loss, this Court easily concluded that "there was no exaction here because there was no payment." *Id*. at 1382. Similarly inapposite is *Westfed*, in which the purchaser of a financial institution asserted that the government had breached an agreement to forbear from enforcing certain regulatory capital requirements. The court held that plaintiff's vague "contention that 'money was prevented from coming into plaintiff's account'" did not state a claim. *Westfed*, 52 Fed. Cl. at 153.

---

damages. But this bears on the ultimate *amount* of just compensation, not whether a claim has been stated.

By contrast, Appellants' claims are not merely about vague lost opportunities. The CDC Order not only effectively precluded Appellants from collecting rent, it *required* Appellants to house people and to incur the associated costs. Instead of paying for its housing program, the Government effectively required that it be paid by Appellants. As explained in *Aerolineas Argentinas v. United States*, 77 F.3d 1564 (Fed. Cir. 1996), an illegal exaction claim does not require direct payments to the government, but rather may arise from what are "in effect" payments, and may involve monies "taken from" the claimant as well as those "paid" by the claimant. *Aerolineas Argentinas*, 77 F.3d at 1572-73. There is no meaningful difference between the program at issue in *Aerolineas Argentinas*, where the government required the plaintiffs to pay third-parties to provide housing for those the government wanted housed, and the program here, where the government required Appellants to provide effectively rent-free housing. In both cases, the Government required another entity to bear the financial burden of what was fundamentally the Government's obligation.

Finally, the Government argues that because Appellants did not directly pay the Government, Appellants are seeking to "create a new category of claim," which would "transform the Court of Federal Claims into a district court" in violation of its limited jurisdiction. Resp. at 59-60. This argument is baseless. The very cases the Government cites confirm that illegal exaction claims can be based on amounts

paid "directly or in effect." *Id.* Appellants' illegal exaction claims fit squarely within that existing doctrinal framework.

CONCLUSION

For the reasons stated in Appellants' Opening Brief and as set forth above, Appellants respectfully request that this Court reverse the judgment of the Court of Federal Claims.

Dated: January 27, 2023

Respectfully submitted,

/s/ Creighton R. Magid
Creighton R. Magid
DORSEY & WHITNEY LLP
1401 New York Avenue, N.W.
Suite 900
Washington, D.C. 20005
Telephone: (202) 442-3555
Fax: (202) 442-3199
magid.chip@dorsey.com

Shawn J. Larsen-Bright
DORSEY & WHITNEY LLP
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
Telephone: (206) 903-2417
Fax: (206) 903-8820
larsen.bright.shawn@dorsey.com

Attorneys for Appellants

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 6,938 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

Dated: March 13, 2023

/s/ Creighton R. Magid
Creighton R. Magid
DORSEY & WHITNEY LLP
1401 New York Avenue, N.W.
Suite 900
Washington, D.C. 20005
Telephone: (202) 442-3555
Fax: (202) 442-3199
magid.chip@dorsey.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of March, 2023, I electronically filed the foregoing CORRECTED REPLY 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
Creighton R. Magid