2022-1929

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DARBY DEVELOPMENT COMPANY, *et al*.,
Plaintiffs-Appellants,

v.

THE UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in
Case No. 2021-1621, Judge Armando O. Bonilla

CORRECTED RESPONSE BRIEF OF DEFENDANT-APPELLEE

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of the Federal Circuit rules, counsel for defendant-appellee states that he is unaware of any other appeal from this civil action that previously has been before this Court or any other appellate court under the same or similar title. Counsel is also unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

INTRODUCTION

To curb the spread of COVID-19, the Centers for Disease Control and Prevention (CDC) issued a temporary, nationwide moratorium on residential evictions for the nonpayment of rent (the Eviction Moratorium). The Eviction Moratorium, which lasted approximately one year, temporarily prevented landlords from removing certain tenants during the moratorium's duration, but it did not excuse tenants from paying rent or accruing other fees and costs.

Various landlords challenged the Eviction Moratorium and, in August 2021, the Supreme Court in *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021) (*per curiam*) concluded that it was virtually certain that the CDC lacked statutory authority to issue it. Accordingly, the government dismissed its appeal from the adverse final judgment of the district court in that case, which had vacated the Eviction Moratorium on the ground that it was unauthorized by statute.

Plaintiffs—a group of 38 residential property owners in several states—filed this suit in the United States Court of Federal Claims, contending that the Eviction Moratorium effected a physical taking of their alleged right to exclude tenants who did not pay rent, or, alternatively, was an illegal exaction.

The trial court correctly dismissed the complaint for failure to state a claim. As the trial court explained, longstanding Supreme Court precedent forecloses an

attempt to premise a Fifth Amendment takings claim on agency action that was unauthorized by statute. Contrary to plaintiffs' contention, this Court cannot disregard the Supreme Court's reasoning in *Alabama Realtors* and declare that the Eviction Moratorium was authorized by Congress. Plaintiffs' alternative contention—that a takings claim may proceed unless the alleged taking was caused by the "rogue act" of a "rogue government official"—is inconsistent with Supreme Court precedent and rests on a basic misunderstanding of this Court's decision in *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998), which simply recognized that *authorized* agency action may be contrary to law for other reasons that do not preclude a takings claim.

Alternatively, this Court should affirm the trial court's decision because plaintiffs cannot establish that the Eviction Moratorium amounted to a physical invasion of their property. The Supreme Court has long held that when a landlord voluntarily invites tenants onto their property, laws that regulate that relationship do not amount to a physical taking. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527-28 (1992). Instead, such a claim must be analyzed under the multi-factor test announced in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Because plaintiffs made no attempt to satisfy the *Penn Central* standard, any such argument was waived. In any event, such an argument would be meritless under the *Penn Central* test.

Finally, the trial court correctly held that plaintiffs failed to state an illegal exaction claim. It is settled law that an illegal exaction claim can only be maintained when, acting contrary to law, the Government forces a plaintiff to pay money to the Government or to a third party at the Government's direction. The Eviction Moratorium did not require plaintiffs to pay money to the Government or to third parties, so the illegal exaction claim fails as a matter of law.

STATEMENT OF THE ISSUES

1. Whether the trial court correctly dismissed plaintiffs' takings claim given the Supreme Court's conclusion that it is "virtually certain" that the Eviction Moratorium was not authorized by Congress and the longstanding Supreme Court precedent that forecloses an attempt to premise a takings claim on unauthorized agency action.

2. Alternatively, whether Supreme Court precedent forecloses plaintiffs' claim that the regulation of evictions from rental property constitutes a physical taking.

3. Whether plaintiffs waived any regulatory takings claim by failing to argue that they met the standard for a regulatory taking and, if they did not waive the claim, whether plaintiffs fail to state a claim for a regulatory taking under the Supreme Court's *Penn Central* test.

4. Whether the trial court correctly held that plaintiffs failed to state an illegal exaction claim because the Eviction Moratorium did not require them to pay money to the Government or to third parties.

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

I. Nature Of The Case

Plaintiffs seek review of the May 17, 2022 decision of the Court of Federal Claims in *Darby Development Company, Inc., et al. v. United States*, No. 21-1621. Appx001-014.[1] In that decision, the trial court dismissed plaintiffs' takings claim for failure to state a claim because the Eviction Moratorium was unauthorized by Congress, and accordingly, could not be the predicate for a cognizable takings claim. The trial court also dismissed plaintiffs' illegal exaction claim for failure to state a claim because the Eviction Moratorium did not require plaintiffs to make any payments to the Government or to third parties.

II. Statutory Background

In 1944, Congress enacted section 361(a) of the Public Health Service Act, Pub. L. No. 78-410, 58 Stat. 682, 703 (1944) (PHSA), to consolidate and clarify

[1] "Appx __" refers to the joint appendix. "App. Br. __" refers to plaintiffs' opening brief, ECF No. 41, and "NAR Br. __," "NCLA Br. __," and "NAHB Br. __" refer to the amicus briefs filed by the National Association of Realtors, the New Civil Liberties Alliance, and the National Association of Home Builders, respectively, in support of reversal of the trial court's judgment, ECF Nos. 28-29, 44.

various public health laws. The statute, subsequently codified at 42 U.S.C. § 264, authorizes the Secretary of the Department of Health and Human Services (HHS) "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). The PHSA further states that "[f]or purposes of carrying out and enforcing such regulations," the Secretary "may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles 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*.

III. The CDC's Eviction Moratorium

On August 8, 2020, the President issued an Executive Order directing HHS to "consider whether any measures temporarily halting residential evictions of any tenants for failure to pay rent are reasonably necessary" to prevent the spread of COVID-19. Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners, Exec. Order No. 13,945, 85 Fed. Reg. 49,935, 49,936 (Aug. 8, 2020). On September 4, 2020, the CDC issued an order under 42 U.S.C. § 264(a) and 42 C.F.R. § 70.2 temporarily halting residential evictions in the United States

until December 31, 2020. Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292 (Sept. 4, 2020).

The CDC's Eviction Moratorium[2] provided 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 State or U.S. territory . . . that provides a level of public-health protections below the requirements listed in [the CDC's] Order." *Id.* at 55,296. In issuing the Eviction Moratorium, the CDC reasoned that a temporary pause in evictions would help reduce the risk of transmission of COVID-19 by allowing sick persons to self-isolate, by allowing compliance with stay-at-home orders and social distancing measures, by reducing the need for congregate or shared housing, and by helping to prevent homelessness. *Id.* at 55,294-96. The CDC targeted the Eviction Moratorium to apply to only those individuals who would likely become homeless or be forced to live in shared or congregate housing. *Id*. at 55,293.

The CDC expressly limited the terms of the Eviction Moratorium. The Eviction Moratorium did not relieve a tenant of their obligation to pay rent or comply with any other legal obligations under a lease. *Id.* at 55,294. It also did

[2] This brief uses the term "Eviction Moratorium" to refer generally to the initial CDC order halting residential restrictions, the subsequent modifications and extensions of that order by the CDC, and the more limited order issued by the CDC in August 2021.

not prevent the tenant from accruing fees, penalties, or interest for non-payment of rent, nor did it prohibit the eviction of individuals either who did not qualify as "covered persons," or who were being evicted for reasons other than nonpayment of rent, including, for example, engaging in illegal activity. *Id.* at 55,293-94. The Eviction Moratorium did not apply in states or local municipalities with the same level of protection for tenants as the CDC order. *Id*. at 55,294. Moreover, it did not prohibit a landlord from commencing an eviction proceeding in state court as long as the physical removal of the tenant did not occur during the moratorium. *See id*. at 55,293 (defining the term "evict" as meaning "any action" "to remove or cause the removal of a covered person from a residential property").[3]

IV. Extensions Of The Eviction Moratorium And Congress's Appropriations Of Emergency Rental Assistance

With the original Eviction Moratorium set to expire on December 31, 2020, Congress extended it by 30 days through January 31, 2021. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 502, 134 Stat. 1182, 2078-79

[3] *See also* Appx042 ("HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, Frequently Asked Questions," at 1) ("Nor is [the moratorium] intended to prevent landlords from starting eviction proceedings, provided that the actual eviction of a covered person for non-payment of rent does NOT take place during the period of the Order.").

(2020) (2021 Appropriations Act).[4] Following the congressional extension, the CDC extended the Eviction Moratorium, with minor modifications, three additional times. *See* 86 Fed. Reg. 8,020 (Feb. 3, 2021) (extension with modifications through March 31, 2021); 86 Fed. Reg. 16,731 (Mar. 31, 2021) (extension with modifications through June 30, 2021); 86 Fed. Reg. 34,010 (June 28, 2021) (extending original order, as modified by subsequent orders, through July 31, 2021). Then, on August 6, 2021, the CDC extended the Eviction Moratorium, but with a more limited geographic scope, through October 3, 2021, for persons in areas experiencing substantial or high levels of disease transmission. 86 Fed. Reg. 43,244 (Aug. 6, 2021).

While the Eviction Moratorium was in place, Congress made two appropriations—totaling approximately $46.5 billion—for rental assistance for individuals affected by the pandemic. First, in the same legislation in which it extended the Eviction Moratorium, Congress appropriated $25 billion in emergency rental assistance for landlords whose tenants had fallen behind on rent because of the pandemic. *See* 2021 Appropriations Act, § 501, 134 Stat. at 2070-73. Second, in March 2021, Congress appropriated an additional $21.55 billion in

[4] Plaintiffs expressly declined to challenge Congress's 30-day extension of the Eviction Moratorium. *See* Appx010. Likewise, plaintiffs expressly declined to challenge the 120-day eviction moratorium that Congress imposed in Section 4024(b)(1) of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (CARES Act). *See* Appx009-010.

rental assistance. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201(a)(1), 135 Stat. 4, 54 (2021). The Supreme Court later treated these appropriations as a proxy for the Eviction Moratorium's economic impact on landlords. *See Alabama Realtors*, 141 S. Ct. at 2489 ("While the parties dispute the financial burden on landlords, Congress has provided nearly $50 billion in emergency rental assistance—a reasonable proxy of the moratorium's economic impact.").

V. Challenges To The Eviction Moratorium

Various landlords and associations filed actions for injunctive and declaratory relief in Federal district courts, alleging (among other claims) that the Eviction Moratorium exceeded the CDC's statutory authority.[5] In one such case, the United States District Court for the District of Columbia granted plaintiffs summary judgment, ruling that the CDC lacked the statutory authority to issue the Eviction Moratorium. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*,

[5] *See Tiger Lily, LLC v. Dep't of Hous. & Urb. Dev.,* 525 F. Supp. 3d 850 (W.D. Tenn. 2021), *stay pending appeal denied,* 992 F.3d 518 (6th Cir. 2021), *aff'd,* 5 F.4th 666 (6th Cir. 2021); *Terkel v. Ctrs. for Disease Control & Prevention,* 521 F. Supp. 3d 662 (E.D. Tex. 2021), *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. 2021), *vacated,* 20 F.4th 1385 (11th Cir. 2021); *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention,* 524 F. Supp. 3d 745 (N.D. Ohio 2021), *amended,* 542 F. Supp. 3d 719 (N.D. Ohio 2021), *appeal dismissed,* No. 21-3563, 2021 WL 4305879 (6th Cir. Sept. 21, 2021); *Chambless Enters., LLC v. Redfield,* 508 F. Supp. 3d 101 (W.D. La. 2020).

539 F. Supp. 3d 29, 43 (D.D.C. 2021). The district court vacated the Eviction Moratorium nationwide but stayed its judgment pending appeal. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs*., 539 F. Supp. 3d 211, 218 (D.D.C. 2021).

Eventually, the Supreme Court vacated the stay of the district court's judgment. *Alabama Realtors*, 141 S. Ct. at 2486, 2490. The Supreme Court concluded that the landlords were "virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority" and that "it is difficult to imagine them losing." *Id*. at 2486, 2488. The Supreme Court reasoned that "it is a stretch to maintain that §361(a) gives the CDC authority to impose this eviction moratorium," concluding that the moratorium's "downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease that characterizes the measures identified in the statute." *Id*. at 2488.

The Supreme Court acknowledged that "the public has a strong interest in combating the spread of the COVID–19 Delta variant," but stated that it is "up to Congress, not the CDC, to decide whether the public interest merits further action here." *Id.* at 2490. In light of the Supreme Court's conclusion, the Government voluntarily dismissed its appeal to the D.C. Circuit in *Alabama Realtors*, and the district court's judgment vacating the Eviction Moratorium nationwide thus

became final. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21-5093, 2021 WL 4057718, at *1 (D.C. Cir. Sept. 3, 2021).

VI. Procedural History

A. Plaintiffs' Complaint

On October 13, 2021, plaintiffs—38 owners of residential rental properties—filed their amended complaint (complaint) alleging that the Eviction Moratorium effected a *per se* physical taking of their property (Count I) or, alternatively, an illegal exaction (Count II). Appx021-041.

With respect to the takings claim, plaintiffs allege the Eviction Moratorium "constitutes 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." Appx023 (Compl. ¶ 3). More specifically, plaintiffs claim that the CDC's Eviction Moratorium caused rental units in properties they own to be "occupied" over their objection by tenants not paying rent, and precluded them from evicting these tenants and re-leasing the units. Appx024; Appx035-036 (Compl. ¶¶ 9, 23-25, 28).

In Count II, plaintiffs allege in the alternative that the Eviction Moratorium "constitutes an illegal exaction because the CDC exceeded and contravened its statutory and regulatory authority under section 361 of the Public Health Service Act." Appx039 (Compl. ¶ 42). According to plaintiffs, "as a direct result of the

Government's illegal action or improper application of law, the Government has exacted Plaintiffs' private property and property interests," and "enriched the Government at Plaintiffs' expense." *Id*.

B. The Trial Court's Decision

On May 17, 2022, the Court of Federal Claims dismissed plaintiffs' takings and illegal exaction claims for failure to state a claim under RCFC 12(b)(6). Appx001-014.

With respect to Count I, the court explained that to "assert a viable takings claim against the United States, the government action in issue must be duly authorized by Congress." Appx007 (citing *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) (additional citations omitted)). The court further determined that where 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.'" Appx007 (quoting *Del-Rio,* 146 F.3d at 1362 (quoting *Armijo v. United States,* 663 F.2d 90, 95 (Ct. Cl. 1981)) (citations omitted)).

Applying these well-established principles, the court held that the Eviction Moratorium was unauthorized by statute, and therefore could not provide the predicate for plaintiffs' takings claim. Appx007-009. In doing so, the court relied heavily on the Supreme Court's reasoning in *Alabama Realtors*. Appx008. The trial court determined that "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." Appx008.

The trial court further rejected plaintiffs' contention that under this Court's decision in *Del-Rio*, the Eviction Moratorium was authorized for purposes of takings law. Appx007-009. The trial court highlighted *Del-Rio*'s distinction "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." Appx008 (citing *Del-Rio*, 146 F.3d at 1362). The trial court further found that to be an unauthorized act under *Del-Rio*, the Government's actions "must be 'either explicitly prohibited *or* . . . outside the normal scope of the government officials' duties." Appx009 (quoting *Del-Rio*, 146 F.3d at 1363). The Court held that "consistent with" *Del-Rio*, the Eviction Moratorium was unauthorized because "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.'" Appx009; *see* Appx009 (quoting *Alabama Realtors*, 141 S. Ct. at 2487 (explaining that "this provision has rarely been invoked—and never before to justify an eviction moratorium")); Appx005 (quoting *Alabama Realtors*, 141 S. Ct. at 2486 ("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")).

The trial court also rejected plaintiffs' argument that Congress had authorized the Eviction Moratorium through its extension of the moratorium in the 2021 Appropriations Act. Appx009-010. The court noted that the D.C. Circuit had found that the 2021 Appropriations Act had ratified the CDC's statutory authority to issue the Eviction Moratorium. Appx010. The trial court explained that "[s]uffice it to say, had the Supreme Court agreed with the [D.C. Circuit]'s assessment of the CDC's statutory authority, the district court's order would not have been vacated." *Id*. And it found that, "[a]t 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." Appx011 (citations omitted). [6]

Turning to Count II of the complaint, the trial court held that plaintiffs failed to state "viable" illegal exactions claims, which require plaintiffs to show that "(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." Appx011-013 (quoting *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1573 (Fed. Cir. 1996)).

The trial court highlighted plaintiffs' concession that they did not make any payments to the Government. Appx012. Instead, plaintiffs based their illegal exaction claims on the notion that 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 [G]overnment." Appx012. The trial court found that the Eviction Moratorium did not "direct plaintiffs to waive or defer rental payments otherwise due them," but instead specifically allowed landlords to

[6] Because it found that the Government's action was unauthorized, the trial court did not address other reasons why plaintiffs failed to state a takings claim, including: (1) plaintiffs failed to allege a cognizable property interest; (2) the claim was barred by the police power doctrine; and (3) plaintiffs failed to state a cognizable physical takings claim under Supreme Court precedent. In addition, the trial court noted that plaintiffs had disclaimed a regulatory takings claim, and therefore the court did not analyze the Eviction Moratorium as a regulatory taking. Appx006.

assess and collect fees, penalties, or interest for the nonpayment of rent. Appx012. In addition, the court found that plaintiffs failed to establish that they were "forced to incur a *government* obligation or debt," noting that the Federal Government "is not generally responsible for providing housing for individuals evicted from their private residences due to their failure to pay rent." Appx013. The court emphasized that "the landlords in this case were not required to bear costs or expenses imposed by statute on the United States." Appx013. In sum, the trial court reasoned that because the Government "does not have 'the citizen's money in its pocket,' no suit lies in [the Court of Federal Claims] under the Tucker Act to recover the money (illegally) exacted." Appx013 (citation omitted).

SUMMARY OF THE ARGUMENT

The trial court was correct when it dismissed plaintiffs' complaint for failure to state a claim. It is settled law that a necessary element of any Fifth Amendment takings claim is that the Government action at issue be "duly authorized," "either directly by Congress or by the official upon whom Congress conferred the power." *United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920). The trial court correctly applied this long-standing principle, as well as this Court's decision in *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998), in determining that the Eviction Moratorium was unauthorized in light of the Supreme Court's *Alabama Realtors* decision. That is because in *Alabama*

Realtors, the Supreme Court determined that it was "virtually certain" that the Eviction Moratorium was unauthorized, and that it "strains credulity to believe that [the PHSA] grants the CDC the sweeping authority that it asserts."

Plaintiffs contend that the trial court misapplied *Del-Rio* which, they say, limits unauthorized Government actions for takings purposes solely to something constituting a "rogue act" committed by a "rogue government official." This radical reinterpretation of takings law is based on a misreading of *Del-Rio* and disregards applicable Supreme Court precedent. As the trial court recognized, although *Del-Rio* identified a distinction between conduct that is unauthorized, and conduct that is authorized but unlawful for some other reason, that principle is of no help to plaintiffs. The Government action at issue must still be authorized by Congress. Here, as made clear in *Alabama Realtors*, the CDC lacked the statutory power to implement a nationwide eviction moratorium. Accordingly, this is not a case where the government action at issue was authorized but implemented in an unlawful way (such as failing to comply with the notice requirements of the Administrative Procedure Act (APA)).

Alternatively, and although the trial court did not reach the issue, this Court should affirm the trial court's judgment because plaintiffs cannot establish that the Eviction Moratorium amounted to a Government-authorized invasion of their property. The Supreme Court has long held that when a landlord

voluntarily invites tenants on to its property, laws that regulate that relationship do not amount to a physical taking. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527-28 (1992). On this front, plaintiffs argue that this case is controlled by the Supreme Court's recent physical takings decision, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). Plaintiffs are wrong; *Yee* controls here—it has never been overruled, and *Cedar Point* itself demonstrates *Yee*'s continued vitality. Under *Yee*, plaintiffs' takings claim must be analyzed under the multi-factor test announced in *Penn Central*. Because plaintiffs have made no attempt to satisfy the *Penn Central* factors any such argument has been waived and, in any event, lacks merit.

Finally, the trial court's dismissal of plaintiffs' illegal exaction claim was correct. An illegal exaction claim requires that the Government force a plaintiff to pay money over to the Government or to a third party, and the payment must be contrary to law. Plaintiffs cannot allege that the Government required them to make any payment, and accordingly the claim fails as a matter of law. *Piszel v. United States*, 833 F.3d 1366, 1382 (Fed. Cir. 2016). Plaintiffs' suggestion that the payment requirement is met through allegations of fictitious rental credits issued to their tenants stretches illegal exaction law beyond the breaking point.

The trial court's decision should be affirmed.

ARGUMENT

I. Standard Of Review

The question of whether a complaint was properly dismissed for failure to state a claim is reviewed *de novo*. *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009).

II. The Trial Court Properly Dismissed Plaintiffs' Takings Claim Because The Eviction Moratorium Was Not Authorized By Statute

The trial court properly dismissed plaintiffs' takings claim for failure to state a claim based on the Supreme Court's determination that it was "virtually certain" that the Eviction Moratorium was not authorized by Congress. Appx007-011. The Supreme Court has long held that actions not authorized by Congress do not provide takings liability for the United States. The trial court correctly explained that this Court's *Del-Rio* decision recognized that authorized agency actions may be contrary to law even if authorized by statute. The trial court likewise correctly recognized that the Supreme Court's *Alabama Realtors* decision forecloses plaintiffs' contention that Congress ratified the Eviction Moratorium when it enacted the 2021 Appropriations Act.

A. The Supreme Court Has Long Held That Congressional Authority Is A Requirement For A Cognizable Takings Claim

In a line of cases dating back over a century, the Supreme Court has repeatedly held that the United States is not liable for takings claims where the

Government action at issue is not authorized by Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584-89 (1952); *Mitchell v. United States*, 267 U.S. 341, 345 (1925); *N. Am. Transp.*, 253 U.S. at 333; *Hooe v. United States*, 218 U.S. 322, 335 (1910). Instead, the United States is liable only if "the officer who has physically taken possession of the property was duly authorized to do so, either directly by Congress or by the official upon whom Congress conferred the power." *N. Am. Transp. & Trading Co.*, 253 U.S. at 333. If the Government's action is unauthorized, "the acts of defendant's officers may be enjoinable," but they do not entitle the plaintiff to compensation under the Takings Clause. *Armijo v. United States,* 229 Ct. Cl. 34, 40 (1981).

The rationale for this rule is three-fold. First, where a Government officer acts "by virtue alone of his office, and *without the authority of Congress* . . . , he 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.'" *Hooe*, 218 U.S. at 335. Indeed, an exercise of eminent domain and an inverse condemnation action are two sides of the same coin, and an "unauthorized taking" is "in no sense an exercise of the power of eminent domain." *United States v. Goltra*, 312 U.S. 203, 211 (1941). Second, providing compensation to a plaintiff for an unauthorized taking "would strike a blow at the power of the purse," which remains the exclusive sphere of

Congress. *NBH Land Co. v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978). Third, unlike a person subject to an authorized taking, a person subject to an unauthorized taking is entitled to injunctive relief. *See Youngstown*, 343 U.S. at 585-87.

Accordingly, where the Government action at issue is unauthorized by Congress, the Supreme Court has held that a takings claim cannot lie. For example, in *Hooe*, the Civil Service Commission leased an office building, but not the building's basement, from plaintiffs. The Commission paid plaintiffs the money appropriated by Congress for the building's annual rent, but plaintiffs sought additional money, including on a takings theory, based on the Commission's use of the basement. *See Hooe*, 218 U.S. at 327-29. The Supreme Court rejected the takings claim, explaining that "[i]t cannot be said that any claim for a specific amount of money against the United States is founded on the Constitution, unless such claim be either expressly or by necessary implication authorized by some valid enactment of Congress." *Id*. at 335. Because the plaintiffs "received the entire [rent] which Congress appropriated to be paid out of the Treasury on account of rent of buildings or quarters for the Civil Service Commission," the plaintiffs' claims were not "founded upon the Constitution" and they could not "maintain [their] suit against the government." *Id*. at 336 (emphasis omitted).

Similarly, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the President seized, and proceeded to have the Government operate, many of the steel mills in the United States. Finding that the President's actions were not authorized by Congress, the district court enjoined the seizures. *Id*. at 582-584. In opposing the injunction, the Government argued that injunctive relief was unnecessary because "should the seizure ultimately be unlawful, the companies could recover full compensation in the Court of Claims for the unlawful taking." *Id*. at 585. The Supreme Court rejected this argument, explaining that there could be no taking where the Government official's actions were unlawful. *See id*. The Court then analyzed whether the President's actions were authorized by the Constitution, by a "statute that expressly authorizes" them, or by an "act of Congress . . . from which such a power can fairly be implied." *Id*. at 585-87. Finding no such authority, the Court affirmed the district court's judgment enjoining the seizures. *Id*. at 589. The Supreme Court thereby articulated a straight-forward rule—in the absence of authority derived from "an act of Congress or from the Constitution itself," Government action cannot support a takings claim. *See id*. at 585-87.

B. Plaintiffs Misread *Del-Rio,* Which Is Consistent With Supreme Court Precedent

Instead of meaningfully addressing the Supreme Court precedent that bars their takings claim, plaintiffs contend that the trial court erred by misapplying this

Court's decision in *Del-Rio*. App. Br. at 17-30. According to plaintiffs, the only actions that cannot be attributed to the Government for takings purposes are those undertaken by a "rogue official" engaging in "rogue acts," App. Br. at 5, 17-18, 21. Plaintiffs' argument is based on a misunderstanding of *Del-Rio*, and the trial court properly rejected it. *Del-Rio* distinguishes between unauthorized (*ultra vires*) acts, on the one hand, and authorized acts that are unlawfully implemented, on the other hand. As the trial court correctly held, the Eviction Moratorium fits firmly into the former category of conduct for which no takings claim may be asserted because the actions were "outside the normal scope of the [agency's] duties." Appx009 (quoting *Del-Rio*, 146 F.3d at 1363) (internal quotation marks omitted).

As an initial matter, *Del-Rio* did not and could not overturn the longstanding rule that without Congressional authorization, plaintiffs have no "right to recover in the Court of [Federal] Claims." *Youngstown*, 343 U.S. at 585. Indeed, *Del-Rio* reiterated the principles that "[a] compensable taking arises only if the government action in question is authorized," and that the remedy for an unauthorized Government action is injunctive relief, not relief under the Takings Clause. 146 F.3d at 1362. Nor are plaintiffs correct that finding a Government action unauthorized with respect to a takings claim requires a "rogue government official" conducting a "rogue act." App. Br. at 16, 18. If that were the case, then the Supreme Court in *Youngstown Steel* would have acknowledged that the plaintiffs

there had a claim for just compensation in the Claims Court. President Truman was obviously not a rogue government official committing rogue acts.

At bottom, *Del-Rio* addressed a scenario not present here—Government action that was authorized but implemented in an "unlawful" fashion. *Id*. at 1362. In that case, the agency denied drilling permits to mineral lease holders on tribal land because the tribe had not approved rights-of-way over their land. *See* 146 F.3d at 1360-61. The Court of Federal Claims dismissed the lease holders' takings claim on the basis that if the Government's tribal consent requirement was legally erroneous, as plaintiffs alleged, then it could not be a taking. *See id*. at 1361. This Court reversed. Surveying the precedent, the Court explained that "[m]erely 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. This Court held that although the Department of the Interior had Congressional authority to deny drilling permits, it mistakenly interpreted the statute to require tribal consent before a permit could be issued. *See id*. at 1363. Stated differently, in *Del-Rio*, Congress specifically authorized the agency to take the very action alleged to be a taking, "'to regulate the proposed mining'" through the issuance of permits. *Id*. at 1363. The agency's mistaken belief that tribal consent was needed did not

eliminate that statutory authorization. *See id.*[7] Accordingly, under *Del-Rio*, a Government action may be authorized for takings claim purposes where, for example, it is statutorily authorized but is procedurally defective such as by violating the notice provisions of the Administrative Procedure Act. *See Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 803 (Fed. Cir. 1993) (finding that the Government's procedural failure under the APA did not establish that the action was unauthorized). Indeed, the APA itself distinguishes between agency action that is "in excess of statutory … authority," 5 U.S.C. § 706(2)(C), and action that is unlawful for some other reason, including the failure to follow required procedures, *see* 5 U.S.C. § 706(2)(D).

Del-Rio relied on several cases that further reinforce the distinction the *Del-Rio* Court drew between unauthorized conduct, and authorized but otherwise unlawful conduct. For example, *Del-Rio* cites *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), for the basic proposition that "a

[7] This Court has also long recognized that "to the extent that the plaintiff claims it is entitled to prevail *because* the agency acted in violation of statute or regulation, [this Court's precedent] does not give the plaintiff a right to litigate that issue in a takings action . . . ." *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1365-66 (Fed. Cir. 2001); *Washington Federal v. United States*, 26 F.4th 1253, 1263-64 (Fed. Cir. 2022); *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1369-70 (Fed. Cir. 2005). This rule is not implicated here, however, because plaintiffs have alleged that they state a takings claim irrespective of whether the Eviction Moratorium was authorized or lawful.

[G]overnment official may act within his authority even if his conduct is later determined to have been contrary to law." *Del-Rio*, 146 F.3d at 1362. In *Larson*, the Supreme Court determined that sovereign immunity barred an injunction against the United States because even though the Government agent misinterpreted a contract, construing contracts was within the agent's duties. 337 U.S. at 703. In other words, the agent had the authority to interpret contracts, even though he got the interpretation wrong. Thus, neither *Del-Rio* nor the cases on which it relied purported to alter the foundational requirement that the Government must possess the statutory power to engage in the action that is the subject of the takings claim. Rather, they merely preserve the existence of such a claim where the action at issue was authorized but found unlawful in some other respect.

Accordingly, *Del-Rio* does not aid plaintiffs in this case. The Supreme Court in *Alabama Realtors* did not determine, for example, that the CDC had the statutory authority to issue a nationwide eviction moratorium or regulate the rental housing market, but, in doing so, failed to provide proper notice under the Administrative Procedure Act. *See Tabb Lakes*, 10 F.3d at 799, 803. Nor, for example, did the Supreme Court find that the Eviction Moratorium was authorized, but determine that the action violated some other constitutional provision such as by finding that the associated penalties were prohibited by the Eighth Amendment.

Instead, the Supreme Court concluded that the agency did not have the statutory authority to take the actions forming the very basis of the takings claim—issuing a nationwide eviction moratorium. *Alabama Realtors*, 141 S. Ct. at 2486 (holding that it was "virtually certain" that the Eviction Moratorium was unauthorized, and that it "strains credulity to believe that [the PHSA] grants the CDC the sweeping authority it asserts"). That ruling goes to the heart of the agency's power to act, or in the words of *Del-Rio*, whether the action is "outside the normal scope of the [agency's] duties." In this context, there is no difference between unauthorized agency action as found by the Supreme Court in *Alabama Realtors*, and *ultra vires* conduct as that term is used in *Del-Rio*.

None of the decisions on which Plaintiffs rely, App. Br. at 19-20, demonstrate that the trial court misapplied *Del-Rio*. In *United States v. Causby*, 328 U.S. 256, 258-61 (1946), there was no question that the military had authority to engage in flights from the airport at issue. The issue instead was whether repeated intrusions over plaintiff's property below the altitude Congress defined as within the public domain was a taking. In *Great Falls Manufacturing. Co. v. Attorney General*, 124 U.S. 581, 595-97 (1888), Congress had provided authority to acquire certain property, but the Government mistakenly acquired property beyond the congressional survey. *See also Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 153 (D.C. Cir. 1983) (holding that plaintiffs could state a takings

claim even though the U.S. military allegedly acted unlawfully in destroying plaintiffs' property overseas because the military "officials . . . were performing their ordinary responsibilities"), *rev'd* 745 F.2d 1500 (D.C. Cir. 1984) (*en banc*), *vacated on other grounds*, 471 U.S. 1113 (1985). *Americopters, LLC v. United States*, 95 Fed. Cl. 224, 233 (2010), is of little help to plaintiffs because the Court held the Government official acted outside of the scope of his authority and thus there was no taking. Finally, in *Yuba Goldfields v. United States*, this Court found there was "no basis" for the United States' argument that the Government officials acted outside of the scope of their authority. 723 F.2d 884, 891 (Fed. Cir. 1983). In contrast, here the Supreme Court concluded that it was "virtually certain" that the Eviction Moratorium was not authorized and a final, non-appealable district court decision vacated the moratorium on that ground.

Contrary to plaintiffs' assertions, neither *Laguna Gatuna v. United States*, 50 Fed. Cl. 336 (2001), nor *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993), aid their position. App. Br. at 25, 29-30. In *Laguna Gatuna*, the plaintiff claimed that the EPA's cease and desist letter, which said that plaintiff's property was part of the "waters of the United States" as defined by EPA regulation, was a taking. While the case was pending, the Supreme Court held in an unrelated action that the Army Corps of Engineers' definition of "waters of the United States" in a different regulation exceeded the authority Congress granted to the Corps. 50 Fed.

Cl. at 340, 343. The Court of Federal Claims determined that a takings claim could be stated under *Del-Rio* because the EPA had the authority to issue the cease and desist order, the action alleged to be a taking, even if its interpretation of "waters of the United States" was too broad. *See id*. at 343. It also distinguished the Supreme Court case because the Supreme Court interpreted a different regulation administered by a different agency. *Id*. Here, in contrast, the district court and the Supreme Court addressed the same regulation, applied by the same agency, which plaintiffs allege was a taking. Accordingly, the non-binding *Laguna Gatuna* decision neither resembles this case, nor provides any help to plaintiffs in their claim that the trial court misapplied *Del-Rio*.

This Court's decision in *Tabb Lakes* only undermines plaintiffs' position, by reinforcing the distinction highlighted by the trial court and this Court in *Del-Rio* between unauthorized conduct (which cannot be the subject of a takings claim) and authorized but unlawful conduct (which can in certain circumstances). In that case, the Army Corps of Engineers had issued a cease and desist letter preventing the filling of certain wetlands until a permit was obtained, and the Fourth Circuit subsequently affirmed a district court's decision finding that the Corps's interpretation concerning the property was procedurally defective because it violated the notice and comment provisions of the Administrative Procedure Act. 10 F.3d at 798-99. As a threshold matter, this Court specifically noted that the

Government was not raising an unauthorized taking defense. *Id*. at 803. In any event, this Court found that the regulation of the wetlands at issue was within the authority of the agency, and, regardless, a mere violation of the notice and comment provisions of the APA is exactly the type of violation of law that would not trigger a finding of unauthorized conduct.

Indeed, this case is not materially different from the situation where the Supreme Court held in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), that "it is plain that Congress has not given the FDA the authority" to regulate tobacco products as customarily marketed. *Id*. at 161. Following *Brown & Williamson*, the Court of Federal Claims, relying on *Del-Rio*, held in several cases that because the Supreme Court had ruled that the FDA acted without authority in enacting the regulations, plaintiffs could not a state a takings claim based upon that unauthorized action. *See A-1 Cigarette Vending, Inc. v. United States*, 49 Fed. Cl. 345 (2001); *Bd. Mach., Inc. v. United States*, 49 Fed. Cl. 325 (2001); *Brubaker Amusement Co. v. United States*, No. 98-511C, 2001 U.S. Claims LEXIS 89 (Jan. 12, 2001); *A-1 Amusement Co. v. United States*,

48 Fed. Cl. 63 (2000).[8] Plaintiffs suggest that the cigarette vending machine cases are distinguishable because Congress had "expressly denied and disapproved the agency's claimed authority," App. Br. at 30-31 n.8, but that argument misses the mark. As *Del-Rio* recognized, *see* 146 F.3d at 1363, where courts consider specific Congressional denials of authorization or express prohibitions, they do so not because such action is required to show a lack of authorization, but because this evidences a lack of statutory authority.[9] As with the cigarette-vending-machine owners, plaintiffs here are not entitled to just compensation based upon an action

[8] In a fifth related case, *B & G Enterprises, Ltd. v. United States*, 48 Fed. Cl. 866 (2001), the Court of Federal Claims dismissed the plaintiff's claim on the grounds that the regulations were never enforced because they were enjoined before they became effective. *See id*. at 868-69. This Court upheld three of the five decisions, *A-1 Cigarette Vending*, *B & G Enterprises*, and *Brubaker Amusement*, on this alternative ground in *Brubaker Amusement Co. v. United States*, 304 F.3d 1349, 1354-55 (Fed. Cir. 2002). This Court did not reach the lack of authority issue, and the other two decisions, *A-1 Amusement* and *Board Machine*, were not appealed.

[9] Plaintiffs also make a cursory attempt to address the applicable Supreme Court precedent by asserting that "[m]ost of the cases address circumstances in which there had been a specific limitation on the agency's authority or where Congress had explicitly denied the authority." App. Br. at 29-30 n.6. For example, plaintiffs attempt to recast *Hooe v. United States,* 218 U.S. 322 (1910), as involving a congressional prohibition on further amounts of money being paid by the agency. But, in determining whether the Government action was authorized, the Supreme Court did not discuss the express prohibition or the plaintiff's efforts to seek compensation as relevant to its holding that there can be no taking without Congressional authorization. *See id*. at 335-36. Instead, the Court focused solely on whether Congress had provided the agency with authority to occupy the building's basement.

the Supreme Court concluded was "virtually certain" to have been without congressional authorization. Instead, the only path available to the plaintiffs was to seek an injunction or a declaratory judgment in district court to enjoin the unauthorized action. *See S. Cal. Fin. Corp. v. United States* 634 F.2d 521, 526 n.8 (Ct. Cl. 1980) ("Ordinarily, whenever there is no authority for a taking or intrusion, the claimant, although unable to obtain compensation, can seek an injunction or a declaratory judgment against the unauthorized governmental activities.").

C. The Trial Court Correctly Relied On *Alabama Realtors* In Holding That The CDC Was Not Authorized to Issue The Eviction Moratorium

Plaintiffs argue that, even if they are required to show that the Eviction Moratorium was statutorily authorized, this Court may find such authorization notwithstanding the Supreme Court's reasoning in *Alabama Realtors*. App. Br. at 21-26. Plaintiffs' invitation for this Court to adopt its crabbed reading of the Supreme Court's decision should be rejected.

First, plaintiffs argue that the Eviction Moratorium was within the general scope of the CDC's duties because "the CDC's authority includes expansive powers to address and combat communicable diseases," and Congress made the language of the PHSA "intentionally broad." App. Br. at 22. But as plaintiffs acknowledge, App. Br. at 22, these are the same arguments that the Government made to the Supreme Court and that Court rejected. *See Alabama Realtors*, 141 S.

Ct. at 2488-89 (rejecting the Government's argument that section 361(a) "gives the CDC broad authority to take whatever measures it deems necessary to control the spread of COVID-19, including issuing the moratorium," finding that the Government's reading would give the "CDC a breathtaking amount of authority," that is "unprecedented"). Indeed, in the Supreme Court's more recent decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Court reiterated the conclusion that it had reached in *Alabama Realtors*. The *West Virginia* decision explained that, in *Alabama Realtors*, the Court had concluded that the CDC "could not, under its authority to adopt measures 'necessary to prevent the . . . spread of' disease, institute a nationwide eviction moratorium," and that the Court had "found the statute's language a 'wafer-thin reed' on which to rest such a measure." *Id*. at 2608 (citation omitted)).

Plaintiffs are thus manifestly wrong to insist that "the Supreme Court did *not* rule on the scope of the CDC's authority." App. Br. at 24. Although the Court did not have full merits briefing, a six-Justice majority made clear that such an exercise was unnecessary. After "careful review of th[e] record," the Court found it "virtually certain" that Congress did not authorize the Eviction Moratorium, and that it was "difficult to imagine" plaintiffs losing. *Alabama Realtors*, 141 S. Ct. at 2486, 2488.

It is telling that plaintiffs fail to quote the Supreme Court's actual language

from *Alabama Realtors*. The Supreme Court's reasoning did not leave room for the D.C. Circuit (or any other lower court) to reach the opposite conclusion about the CDC's authority. The Government thus dismissed its appeal in that case, and the Eviction Moratorium was vacated nationwide. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21-5093, 2021 WL 4057718, at *1 (D.C. Cir. Sept. 3, 2021); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 539 F. Supp. 3d 29, 43 (D.D.C. 2021).

Accordingly, plaintiffs' suggestion that the United States engaged in a "tactical attempt" to avoid liability by "voluntarily abandon[ing] its year-long defense" of the Eviction Moratorium is baseless. App. Br. at 15, 24-25. After the Supreme Court's and the district court's decisions in *Alabama Realtors*, there could be no serious dispute as to whether other courts would reach the same result concerning the CDC's authority to issue the Eviction Moratorium. Indeed, as noted above, the Supreme Court subsequently confirmed that it had "*concluded*" that the CDC lacked the authority to institute the Eviction Moratorium. *West Virginia*, 142 S. Ct. at 2608 (emphasis added).

Plaintiffs' argument also ignores the specific legal issue facing the Supreme Court in *Alabama Realtors*— the CDC's statutory authority to issue the Eviction Moratorium. *Alabama Realtors* did not involve a preliminary ruling where further factual development might change the ultimate ruling on the merits. *See Alabama*

Realtors, 141 S. Ct. at 2486. Indeed, missing from plaintiffs' argument is any meaningful explanation of how further proceedings would potentially yield a different conclusion with respect to the CDC's statutory authority.

Plaintiffs are similarly incorrect that the Supreme Court failed to consider the issue of whether the Eviction Moratorium was *ultra vires*, but instead only addressed a separate issue of whether it was unlawful. App. Br. at 25. As stated above, although *Del-Rio* instructs that a Government action is not unauthorized simply because it was unlawfully implemented, that principle does not help plaintiffs here, where the Supreme Court was focused on the agency's statutory authority to issue the Eviction Moratorium and found that it "virtually certain" that such authority was lacking

D. The Trial Court Correctly Rejected Plaintiffs' Reliance On Congress' One-Month Extension Of The Eviction Moratorium

Plaintiffs are further mistaken that the trial court erred in its consideration of Congress' one-month extension of the initial Eviction Moratorium in the Consolidated Appropriations Act of 2021. App. Br. at 26-29.

Plaintiffs make two related arguments concerning the Appropriations Act. First, they make a cursory suggestion that Congress "both ratified the CDC Order and acquiesced to it," because "Congress did not vacate the order or dispute the CDC's exercise of authority," but instead "affirmatively extended the CDC Order and appropriated related funds." App. Br. at 28. But in its opinion, Appx009-011,

the trial court comprehensively rejected this argument, and plaintiffs fail to meaningfully address the trial court's findings other than to express their disagreement. App. Br. at 28-29. In any event, the Government made these ratification arguments to the D.C. District Court, the D.C. Circuit, and to the Supreme Court. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 539 F. Supp. 3d 211, 215-16 (D.D.C. 2021) (comparing § 502 of the Consolidated Appropriations Act of 2021 to cases where courts have found ratification and holding that it did not ratify the Moratorium as "it simply acknowledged that the CDC issued its order pursuant to the Public Health Service Act," and "did not expressly approve the agency's interpretation of 42 U.S.C. § 264(a), nor did it provide the agency with any additional statutory authority"); *Alabama Realtors*, 141 S. Ct. at 2490; Resp. in Opposition to Applicants' Emergency Application to Vacate the Stay Pending Appeal Issued by the United States District Court for the District of Columbia, 2021 WL 8939369 at *17-19 (raising the arguments). Although there was a difference of opinion between the district court and the D.C. Circuit, as the trial court found here, "[s]uffice it to say, had the Supreme Court agreed with the [D.C. Circuit's] assessment of the CDC's statutory authority, the district court's order would not have been vacated." Appx010.

Second, plaintiffs complain that the trial court conflated the issues of whether the Eviction Moratorium had been ratified with the issue "of whether a

rogue government employee's acts were *ultra vires*," App. Br. at 27, but this argument fails for the same reasons as its authority argument. The takings inquiry does not turn on whether the Eviction Moratorium was the action of a rogue employee but whether the CDC had the statutory authority to implement it. Because it did not, that is the end of the takings inquiry.

E. The Trial Court's Application Of Supreme Court Precedent Does Not Lead To Absurd Results

Plaintiffs contend that the trial court's decision "leads to an absurdity" where "agencies can avoid any obligation to provide just compensation by deliberately overstepping their authority." App. Br. at 5; *see also* NAR Br. at 4 (claiming that the decision reached a "perverse outcome" which rewarded the Government for taking unauthorized action); NAHB Br. at 12. But as the Supreme Court has long recognized with respect to unauthorized action, property owners have a remedy—they can seek injunctive or declaratory relief. *See Youngstown*, 343 U.S. at 585, 589 (granting an injunction). As noted above, this Court's predecessor recognized the same principle. *See also S. Cal. Fin. Corp. v. United States* 634 F.2d 521, 526 n.8 (Ct. Cl. 1980) ("Ordinarily, whenever there is no authority for a taking or intrusion, the claimant, although unable to obtain compensation, can seek an injunction or a declaratory judgment against the unauthorized governmental activities."). Indeed, *Alabama Realtors* itself was a successful action for prospective relief that resulted in the vacatur of the Eviction Moratorium.

Plaintiffs and the National Association of Realtors as amicus are likewise incorrect, App. Br. at 5, NAR Br. at 4, that the trial court's decision improperly closes the courtroom doors to a swath of takings claims. To the contrary, the longstanding principles underlying the trial court's decision ensure that when the government interferes with an owner's property without proper authority, the owner may enjoin such action and seek the return of his property, but may not saddle taxpayers with the obligation to pay compensation for such unauthorized action.

III. Alternatively, The Trial Court's Decision Should Be Affirmed Because The Eviction Moratorium Did Not Effect A Physical Taking Under Controlling Supreme Court Precedent

Alternatively, if this Court were to hold that the Government's action here was statutorily authorized, the trial court's judgment should still be affirmed because the Eviction Moratorium did not effect a cognizable *per se* physical taking under governing Supreme Court precedent. As set forth below, *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527-28 (1992), precludes plaintiffs' physical takings claim and plaintiffs are incorrect that other Supreme Court cases, including *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), support their claim.

A. *Yee* Controls This Case And Bars Any Physical Takings Claim

Contrary to the contentions of plaintiffs and amici, App. Br. at 31-42, NAR Br. at 7-8, *Yee* controls this case and forecloses plaintiffs' physical takings claim as a matter of law.

The Supreme Court has explained that the "essential question" in determining the line between evaluating a takings claim as a physical or regulatory taking "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." *Cedar Point Nursery*, 141 S. Ct. at 2072 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321-23 (2002)). "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.'" *Yee*, 503 U.S. at 527-28 (quoting *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987)).

Under Supreme Court precedent, the Eviction Moratorium did not effect a physical taking, and instead should be analyzed as a regulatory taking under the factors set forth in *Penn Central*. This is because in *Yee*, the Supreme Court addressed the same circumstances presented here—a takings challenge to a law precluding the ability of property owners to evict their tenants and purportedly

interfering with the landlords' right to exclude—and held that such a claim must be addressed as a regulatory taking.

Yee involved a group of mobile-home park owners who alleged that a California city's rent control ordinance, in conjunction with a state statute that limited their ability to evict tenants, effected a physical taking. 503 U.S. at 526-28. The property owners claimed that the laws allowed tenants a right to occupy their property indefinitely, and therefore constituted a government-authorized physical invasion. *Id*. at 526-27. The *Yee* Court recognized that the "right to exclude" is an important property interest, but held that it had not been taken from the property owners. Instead, the Court held that there was no government-compelled occupation of their property because the property owners had "voluntarily rented" to their tenants. *Id*. at 527-28. "Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government." *Id*. at 528 (citation omitted). The Court further explained that takings claims challenging the regulation of the relationship between a landlord and a tenant "are analyzed by engaging in the 'essentially ad hoc, factual inquiries' necessary to determine whether a regulatory taking has occurred." *Yee*, 503 U.S. at 529 (citation omitted).

The physical takings claims brought by plaintiffs are not materially different from those already considered and rejected by the Supreme Court in *Yee*. Just like

the plaintiffs in *Yee*, plaintiffs here allege that the inability to evict their tenants constitutes a physical taking. Appx023 (Compl. ¶ 3). But as in *Yee*, plaintiffs voluntarily invited tenants onto their property, and the Eviction Moratorium merely regulated that pre-existing landlord-tenant relationship, thereby precluding any physical taking. *See Yee*, 503 U.S. at 527-28.

Plaintiffs' attempts to diminish *Yee*'s significance are unavailing. First, plaintiffs try to distinguish *Yee* on its facts, suggesting that the decision arose from the "unusual economic relationship" between the mobile home owners and the mobile home park owners. App. Br. at 40 (quoting *Yee*, 503 U.S. at 526). However, the principles of *Yee* do not apply only to mobile home owners, nor has its rationale been restricted to some sort of "unique economic relationship" arising in that case. *See Tahoe-Sierra*, 535 U.S. at 321-23 (relying on *Yee* to demarcate the line between physical takings on one hand, and regulatory takings claims on the other). Instead, the underlying principle established by *Yee* and its progeny is that when determining the line between physical and regulatory takings claims, a property owner's invitation to and subsequent legal relationship with a tenant places takings claims with respect to eviction regulations outside the realm of physical takings jurisprudence. *See Yee*, 503 U.S. at 532-33; *Gallo v. Dist. of Columbia*, --F. Supp. 3d--, 2022 WL 2208934, at *8-9 (D.D.C. June 21, 2022)

(relying on *Yee* to dismiss takings claims concerning the District of Columbia's eviction moratorium).

Second, plaintiffs' observation that "the mobile park owners in *Yee* could still terminate a mobile home owner's tenancy for violating park rules or *for nonpayment of rent*," App. Br. at 40, fails to advance plaintiffs' argument. Although it is true that the mobile park owners in *Yee* could seek eviction based on non-payment of rent, the park owners were still precluded from evicting their rent-controlled tenants unless and until the park owners decided to stop renting to tenants altogether. *See Yee*, 503 U.S. at 526-27 ("Because under the California Mobilehome Residency Law the park owner cannot evict a mobile home owner or easily convert the property to other uses, the argument goes, the mobile home owner is effectively a perpetual tenant of the park. . . ."). And even in the circumstance where park owners wanted to stop renting their property to tenants, the owners were unable to exclude such tenants from their property for their own use unless they provided up to 12 months' notice to the tenants, *see Yee*, 503 U.S. at 526-28, approximately the same amount of time that the Eviction Moratorium

was in effect.[10] In other words, the claims here and in *Yee* mirror each other because in both cases (1) the tenants were initially invited onto the property and entered into a legal relationship; and (2) the property owners subsequently wanted to physically remove them from the property, but were precluded by government regulation for a significant amount of time from doing so.

Third, plaintiffs incorrectly suggest that the Government's reading of *Yee* "is inconsistent with language in *Yee* itself and subsequent Supreme Court authority," which, according to plaintiffs, eliminated the distinction between a "permanent and temporary physical taking." App. Br. at 40-41. Specifically, plaintiffs highlight language in *Yee* stating 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*." *Id*. (quoting *Yee*, 503 U.S. at 528). But neither *Yee* nor this case involves a regulation precluding a landlord from terminating a tenancy in perpetuity. Moreover, the implications of plaintiffs' view are striking. Under plaintiffs' theory of the law, every state or Federal

[10] Moreover, that the park owners in *Yee* could evict tenants based on rules violations only further demonstrates the correctness of the comparison because the Eviction Moratorium allowed for evictions based on a tenant's violation of rules, and it did not prohibit a landlord from commencing an eviction proceeding in state court as long as the physical removal of the tenant did not occur during the moratorium. *See* Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292-94 (Sept. 4, 2020).

regulation that immediately precluded a landlord from excluding a tenant would constitute a taking by temporarily interfering with the purported "right to exclude." So, for example, a state or Federal regulation that prevented landlords from engaging in self-help in lieu of the legal eviction process for even one day would constitute a Fifth Amendment taking. Plaintiffs' extreme position lacks any support.

Given *Yee*'s straightforward applicability, several Federal district courts have applied it to preclude physical takings claims related to various recent eviction moratoria enacted because of COVID-19. *See Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199, 220 (D. Conn. 2020) ("The [eviction moratorium] at issue here, also like the state and local laws in *Yee*, 'merely regulate [Plaintiffs'] use of their land by regulating the relationship between landlord and tenant.'" (quoting *Yee*, 503 U.S. at 528)); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353, 388 (D. Mass. 2020) ("As in *Yee*, the Moratorium did not compel plaintiffs to rent their properties. Rather, plaintiffs voluntarily chose to rent to their tenants prior to the Act." (citing *Yee*, 503 U.S. at 528)); *see also Gallo v. Dist. of Columbia*, --F. Supp. 3d--, 2022 WL 2208934, at *8-9 (D.D.C. June 21, 2022) (applying *Yee* to preclude physical takings claim); *Jevons v. Inslee*, 561 F. Supp. 3d 1082, 1106 (E.D. Wash. 2021) (same); *Elmsford Apartment Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148,

163 (S.D.N.Y. 2020) (same), *appeal dismissed as moot sub nom. 36 Apartment Assocs., LLC v. Cuomo*, 860 F. App'x 215 (2d Cir. 2021).

Plaintiffs rely on a single outlier decision, *Heights Apartments, LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022), in which the Eighth Circuit reversed a district court's dismissal of a physical takings claim arising from a state eviction moratorium, finding that *Yee* did not control based on the incorrect suggestion that the plaintiffs in *Yee* "sought to exclude future or incoming tenants *rather than existing tenants*." *Heights Apartments*, 30 F.4th at 733 (emphasis added). But an essential component of the *Yee* plaintiffs' takings claim was that they were also unable to evict current tenants: "According to the complaint, '[t]he rent control law has had the effect of . . .granting to the tenants of mobilehomes *presently* in The Park, as well as the successors in interest of such tenants, the right to physically permanently occupy and use the real property of Plaintiff.'" *Yee*, 503 U.S. at 525, (emphasis added); *see Gallo*, 2022 WL 2208934, at *8-9 (distinguishing *Heights Apartments* and following *Yee*); *see also Heights Apartments, LLC v. Walz*, 39 F.4th 479, 480 (8th Cir. 2022) (Colloton, J., dissenting from denial of rehearing *en banc*) (asserting that *Yee* should have guided the panel's decision and finding that the decision to disregard *Yee* turned on a misinterpretation of the claims in *Yee*). Thus, even if the Court were to find that the CDC's Eviction Moratorium was

authorized (which it was not), plaintiffs still cannot bring a physical takings claim under *Yee*.

B. *Cedar Point* Does Not Support Plaintiffs' Takings Claims

Plaintiffs and amici are also misguided in their reliance on the Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), as supporting plaintiffs' physical takings claim. App. Br. at 34-38; NAR Br. at 6-8.

In *Cedar Point*, the Supreme Court found a physical taking where a California regulation allowed union organizers, who had never been invited onto the landowners' property, access to the property intermittently throughout the year. 141 S. Ct. at 2069-70, 2080. But in its decision, the Court explained that "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." *Id*. at 2077. As plaintiffs acknowledge, in *Cedar Point*, the "growers' employees had permission to be at the growers' property but that did not give the union solicitors any right to be there." App. Br. at 38 n.9. In other words, the physical takings claim in *Cedar Point* was not predicated on a physical invasion by individuals who had permission to be there; instead it was based on the physical presence of the union organizers who otherwise had no right to be on the growers' land. Accordingly, *Cedar Point*'s

analysis of regulations granting a right to invade a property closed to the public does nothing to undermine *Yee*'s analysis of limitations on how a landlord may treat tenants voluntarily invited onto the premises through lease agreements in the first place.

For similar reasons, plaintiffs miss the mark when they rely on cases involving government-imposed easements requiring a landowner to suffer a physical invasion in the first instance. For example, plaintiffs rely on *United States v. Causby,* 328 U.S. 256, 265 (1946), for the proposition that "even occasional, partial infringements" constitute a compensable taking. App. Br. at 33. But *Causby*, a case involving frequent, low-level military overflights that harmed the landowners' chickens, fails to address the salient issue that was answered in *Yee*—the proper takings framework to be applied where, as in the instant case, the landowner invites a tenant onto their property and establishes a legal relationship with that individual. Plaintiffs' reliance on *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), App. Br. at 32-33, is misplaced for the same reasons.[11]

[11] To establish a physical taking, plaintiffs would also need to demonstrate causation, *i.e.*, whether the government action caused the alleged injury, which plaintiffs allege to be the inability to exclude a non-rent paying tenant. *See United States v. Archer*, 241 U.S. 119, 131-32 (1916). This would involve not merely assessing the effect of the temporary postponement on the contractual remedy of eviction, but also an analysis of the effect "of other government actions," including Congress' allocation of billions in rental assistance funds. *See St. Bernard Parish Gov't v. United States*, 887 F.3d 1354, 1363-64 (Fed. Cir. 2018).

Finally, plaintiffs (App. Br. at 32, 38) and amici (NAR Br. at 3) repeatedly cite the Supreme Court's statement in its *per curiam* order in *Alabama Realtors* that "preventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Alabama Realtors*, 141 S. Ct. at 2489 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). While on the one hand plaintiffs suggest that the *per curiam* order in *Alabama Realtors* is insufficient to resolve the statutory-authority issue (an issue actually presented to the Court), on the other hand they assert that *Alabama Realtors* has "already resolved the issue" of whether the Eviction Moratorium is a physical taking through the citation to *Loretto*. App. Br. at 38. In any event, the Supreme Court's single sentence cannot support the weight that plaintiffs and *amici* place on it. The Supreme Court was simply noting the significance of the issue before it when deciding that it "strains credulity to believe that this statute grants the CDC the sweeping authority it asserts." *Alabama Realtors*, 141 S. Ct. at 2486. The district court and the D.C. Circuit in *Alabama Realtors* never addressed any takings claim. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, No. 21-5093, 2021 WL 2221646 (D.C. Cir. June 2, 2021); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 539 F. Supp. 3d 29 (D.D.C. 2021). No takings claim was briefed before the Supreme Court, and the order was not evaluating whether the Eviction Moratorium

constituted a taking. *Alabama Realtors*, 141 S. Ct. at 2486-89.[12] Instead, the issue that the Supreme Court addressed was whether to continue the stay of the injunction pending appeal of the district court's declaratory ruling setting aside the Eviction Moratorium as exceeding the scope of the agency's authority.

IV. Plaintiffs Fail To State A Cognizable Takings Claim Under *Penn Central*

Before the trial court and in their opening brief, plaintiffs rely exclusively on a physical takings theory, and disclaim reliance on a regulatory takings theory. *See* Appx006 n.9. To the extent plaintiffs attempt to resurrect a regulatory takings theory in their reply, they have waived the argument. *See, e.g.*, *SmithKline Beecham Corp. v. Apotex Corp.,* 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("Our law is well established that arguments not raised in the opening brief are waived."); *Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1576 (Fed. Cir. 1991) ("[A]bsent exceptional circumstances, a party cannot raise on appeal legal issues not raised and considered in the trial forum."). Regardless, plaintiffs fail to state a claim for a regulatory taking under the Supreme Court's framework set forth in *Penn Central*.

[12] *See also* Emergency Application to Vacate the Stay Pending Appeal, 2021 WL 8939368 (Aug. 20, 2021), at *17-40 (failing to raise the issue of whether the Eviction Moratorium constitutes a Fifth Amendment taking); Resp. in Opposition to Applicants' Emergency Application to Vacate the Stay Pending Appeal, 2021 WL 8939369 (Aug. 23, 2021) (no discussion of takings issues); Reply in Support of Emergency Application to Vacate the Stay Pending Appeal, 2021 WL 8945067 (Aug. 24, 2021) (same).

In *Penn Central*, the Supreme Court established three factors for assessing a regulatory taking: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action." *Taylor v. United States*, 959 F.3d 1081, 1087 (Fed. Cir. 2020) (quoting *Penn Cent.*, 438 U.S. at 124).

With respect to the first *Penn Central* factor, plaintiffs have not sufficiently pleaded that the Eviction Moratorium had any economic impact on them. The Supreme Court has held "in a wide variety of contexts, that [the] government may execute laws or programs that adversely affect recognized economic values," without effecting a taking. *Penn Cent.*, 438 U.S. at 124-25. To state a valid regulatory-takings claim, the plaintiff must allege sufficient facts to show the but-for impact that the Government's actions had on its property. *See A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1157 (Fed. Cir. 2014) (finding that "there can be no regulatory taking without a showing of but-for decline in value"). The pleaded economic effect must also be sufficiently severe. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1340 (Fed. Cir. 2003) (there "is a

threshold requirement that plaintiffs show 'serious financial loss' from the regulatory imposition in order to merit compensation").

Plaintiffs have not met either requirement. In their complaint, plaintiffs make only conclusory allegations concerning their supposed monetary losses. *See* Appx031 (Compl. ¶ 10) ("Each of the Plaintiffs has suffered financial losses as a direct result of the CDC Order due to the non-payment of due and owing rental payments by tenants who have invoked the protections of the CDC Order, and who would have been subject to eviction but for the CDC Order."); *A & D*, 748 F.3d at 1157-58 (holding that a regulatory-takings complaint is legally insufficient when it does not plead allegations sufficient to establish economic loss). Plaintiffs fail, in particular, to plead any facts regarding the value their property would have had on the date of the claimed taking were it not for the enactment of the Eviction Moratorium. And, plaintiffs do not, and likely could not, allege but-for economic impact because the Eviction Moratorium was temporary. "[A] fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Tahoe-Sierra*, 535 U.S. at 332. The Eviction Moratorium also expressly provided that it had "no effect on the contractual obligations of renters to pay rent and shall not preclude charging or collecting fees, penalties, or interest as a result of the failure to pay rent

or other housing payment on a timely basis, under the terms of any applicable contract." 85 Fed. Reg. at 55,296.

In addition, the economic impact analysis must also consider the offsetting benefits provided to the property owner by the regulation at issue. *See Cienega Gardens v. United States,* 503 F.3d 1266, 1282-83 (Fed. Cir. 2007) (holding that the Court of Federal Claims erred "in its failure to consider the offsetting benefits that the statutory scheme afforded which were specifically designed to ameliorate the impact of the [statutory] restrictions"). In connection with the Eviction Moratorium, Congress made two appropriations totaling $46.5 billion for rental assistance for individuals affected by the pandemic. *See* 2021 Appropriations Act, § 501, 134 Stat. 1182, 2070-73; American Rescue Plan Act, § 3201(a)(1), 135 Stat. 4, 54. The Supreme Court itself treated these appropriations as a proxy for the Eviction Moratorium's economic impact on landlords. *See Alabama Realtors*, 141 S. Ct. at 2489 ("While the parties dispute the financial burden on landlords, Congress has provided nearly $50 billion in emergency rental assistance—a reasonable proxy of the moratorium's economic impact."). The National Association of Realtors contends that, as of June 30, 2021, it was estimated that the total amount of rent in arrears was between $21.3 and $57.5 billion, and that the rental assistance program was "beset by problems and inefficiencies." NAR Br. at 10-11. But such statements are not probative of the economic impact on the

landlords who matter in this case—plaintiffs. Nor does the state of the rental assistance program in July 2021 reflect its status in perpetuity.[13] Here, plaintiffs' failure to address the extent to which they have benefitted from the $46.5 billion in Federal rental assistance further undermines any claim of economic impact. *See Cienega Gardens,* 503 F.3d at 1282-83.[14]

Plaintiffs have also not plausibly established that the reasonable-investment backed expectations prong of *Penn Central* weighs in favor of a taking. No takings claim exists where the restriction "did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant," *Cienega Gardens*, 503 F.3d at 1289 (quoting *Penn Cent.*, 438 U.S. at 125). "It is axiomatic that 'a reasonable investment-backed expectation' must be more than 'a unilateral expectation or an abstract need.'" *Norman v. United States*, 429 F.3d 1081, 1092

[13] As of June 2022, approximately $44 billion in rental assistance has been allocated to states and local governments. *See* "ERA1 & ERA2 Quarterly Demographic Data for Q1 20021 through Q2 2022," available at https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program (last visited Dec. 14. 2022).

[14] To establish economic impact sufficient for a regulatory takings claim, plaintiffs would also need to address a number of other issues specific to the Eviction Moratorium including: (1) the time it would have normally taken to evict a tenant under state law; (2) whether any state or local eviction moratorium applied to individual plaintiffs, because by its express terms the Eviction Moratorium did not apply where states or locales had their own moratoria; and (3) the time it would have taken for plaintiffs to put an alternative, rent-paying tenant in place.

(Fed. Cir. 2005) (quoting *Ruckelshaus v. Monsanto,* 467 U.S. 986, 1005-06 (1984)).

In their complaint, plaintiffs fail to allege facts establishing their investment-backed expectations. Plaintiffs operate in the highly regulated rental housing market, and they should have therefore anticipated that laws may affect a landlord's ability to evict a tenant at the landlord's preferred instance. *See Yee*, 503 U.S. at 528-29; *accord Auracle*, 478 F. Supp. 3d at 222 ("As residential landlords, Plaintiffs' contractual right to collect rent is premised on compliance with a framework of state laws."). In addition, most residential landlords are already subject to Federal laws, such as the Fair Housing Act, which, among other things, prohibits discrimination in providing rental housing. *See* 42 U.S.C. §§ 3601-19. As such, residential landlords' "reasonable investment-backed expectations cannot operate apart from 'public programs adjusting the benefits and burdens of economic life to promote the common good.'" *Auracle*, 478 F. Supp. 3d at 222 (quoting *Penn Cent.*, 438 U.S. at 124). Moreover, although plaintiffs seek just compensation for "the fair rental value of the property taken," Appx038 (Compl. ¶ 39), as previously noted, the Eviction Moratorium did not relieve tenants of their obligation to pay rent and any accumulated late fees and interest. *See* 85 Fed. Reg. at 55,294. Accordingly, the temporary Eviction Moratorium did not interfere with plaintiffs' reasonable-investment backed interest in charging rent for

the use of their property. *See Auracle,* 478 F. Supp. 3d at 223 (no interference with reasonable investment-backed expectations where state temporary eviction moratorium did not preclude landlord from collecting rent and did not relieve tenants of obligation to pay it).

The final factor, the "character of the government action," also weighs heavily against finding a taking here. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent.*, 438 U.S. at 124 (citation omitted). As explained in detail above, the Eviction Moratorium involved no physical invasion or occupation of plaintiffs' property. Instead, it was one component of the Government's attempts to stop the spread of a deadly virus. *See* 85 Fed. Reg. at 55,295. This Court has routinely found that no regulatory taking occurs when the Government adopts temporary measures designed to protect the public from harm. *See Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1283 (Fed. Cir. 2009) ("[T]he law of regulatory takings does not generally compensate property owners when a regulation's economic impact is slight and temporary but the potential for physical harm to the

public is significant."); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1357-58 (Fed. Cir. 2003).

Because all three *Penn Central* factors weigh against a regulatory taking, if not waived, such a claim necessarily fails.

V. The Trial Court Correctly Dismissed Plaintiffs' Illegal Exaction Claim For Failure To State A Claim

Finally, the trial court correctly held that plaintiffs failed to state a cognizable illegal exaction claim. Such a claim requires that the plaintiff "paid money over to the Government, directly or in effect," and that it "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) (internal quotation marks and citation omitted). On appeal, plaintiffs rely almost exclusively on a single phrase from this Court's decision in *Aerolineas*—that a payment to the Government may be "in effect"—to contend that they stated an illegal exaction claim based on "the Government in effect requir[ing] owners of rental properties to issue credits (or rental deferrals) to tenants for the full amount of rent owed." App. Br. at 50. Plaintiffs suggest that they state a claim because the circumstances are "economically indistinguishable" from classic illegal

exaction cases. App. Br. at 17. Plaintiffs' argument is unsupported, and the trial court properly rejected it.

Plaintiffs' contention that their illegal exaction claims fall "squarely within the *Aerolineas Argentinas* construct," App. Br. at 50, is predicated on a fundamental misunderstanding of that decision and the elements of an illegal exaction claim. In *Aerolineas*, this Court held that certain airlines stated a cognizable illegal exaction where, contrary to statute, the Immigration and Naturalization Service had required the airlines to pay third parties for the costs associated with certain aliens who arrived in the United States on the carriers and subsequently requested political asylum. 77 F.3d at 1571-72. This Court reversed the Court of Federal Claims, which had held that an illegal exaction claim was not stated because no direct payment had been made to the government, finding that "such [a] claim may lie if the government required payment to it 'directly or in effect.'" *Id*. at 1573. But this Court went on to specify the showing that must be made under an illegal exaction theory—either (1) "the money was *paid* directly to the government," or (2) the money "was *paid* to others at the direction of the government to meet a governmental obligation." *Id*. (emphasis added). As articulated in *Aerolineas*, both scenarios require an actual payment. Stated differently, this Court's statement that a payment can be "in effect" was meant to

capture the factual scenario in *Aerolineas* where the Government required an actual payment to a third party.

Plaintiffs fail to identify a single decision where this Court has accepted their view of illegal exaction claims as encompassing the circumstance where a plaintiff has neither made a direct payment to the Government nor a payment to a third party at the direction of the Government. Other than *Aerolineas*, the only other decision plaintiffs rely on is *Camellia Apartments, Inc. v. United States*, 167 Ct. Cl. 224 (1964). But in *Camellia*, this Court's predecessor found an illegal exaction where the Federal Housing Administration required mortgagees to act as its agents by illegally collecting prepayment fees from the plaintiffs and then turning the money over to the FHA as a condition to refinancing FHA mortgages. 167 Ct. Cl. at 225-27. Thus, the only two cases plaintiffs rely on involved actual payments to third parties.

Moreover, this Court has already rejected the view that government action preventing a plaintiff from receiving money from a third party may be the basis for an illegal exaction claim. *Piszel v. United States*, 833 F.3d 1366, 1382 (Fed. Cir. 2016). In *Piszel*, the plaintiff brought an illegal exaction claim alleging that the government as conservator for Freddie Mac caused Freddie Mac to withhold severance payments to plaintiff. This Court held that the illegal exaction claim fails because "[n]o facts as alleged in the complaint concern the payment of money

by Mr. Piszel," and accordingly, "there was no exaction here because there was no payment." *Id*. at 1382; *see also Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 153 (2002) ("The doctrine of illegal exaction requires compensation for actual payments of money and has never, to the court's knowledge, been applied to compensate a plaintiff for lost opportunities to make money."). Plaintiffs' acknowledgement, App. Br. at 50, that the Government did not require them to make any payments to the Government or to a third party on the Government's behalf is fatal to plaintiffs' illegal exaction claim. App. Br. at 50.

That an illegal exaction claim must involve a payment aligns with the limited reach of the trial court's jurisdiction. *See Marcum LLP v. United States*, 753 F.3d 1380, 1382-83 (Fed. Cir. 2014) (noting the limited jurisdiction of the trial court). The trial court's authority to grant relief against the United States is defined by the extent to which the United States has waived sovereign immunity. *United States v. Testan*, 424 U.S. 392, 399 (1976). Pursuant to the Tucker Act, this Court possesses jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a)(1). This Court has set forth the jurisdictional foundation for illegal exaction claims in the trial court, explaining that they are one of three general types of claims against the Government in addition to contract and money-mandating-statute claims. *See*

Boeing Co. v. United States, 968 F.3d 1371, 1382 (Fed. Cir. 2020). In particular, this Court has differentiated between illegal exaction claims, where "the plaintiff *has paid money* over to the Government, directly or in effect, and seeks return of all or part of that sum;" and money-mandating-statute claims which are "demands in which money *has not been paid* but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." *Boeing*, 968 F.3d at 1382-83 (emphasis added).

In essence, and contrary to this Court's precedent, plaintiffs are seeking to create a new category of claim in the trial court—one in which no money has been paid, and there is no money-mandating statute or regulation that requires payment by the Government. Plaintiffs' view on illegal exaction claims would transform the Court of Federal Claims into a district court, able to entertain any claim against the Federal Government so long as the purported "economic effect" of the Government action could be analogized to the Government or a third party having plaintiffs' money in its pocket—*i.e.,* that the plaintiff suffered some sort of purported monetary damage. This significant expansion of illegal exaction law lacks any basis in this Court's precedent and would violate the trial court's limited statutory jurisdiction.

Finally, the trial court determined that plaintiff's illegal exaction claims were also flawed because plaintiffs cannot allege (1) that the Government "directed" any

payment; or, (2) that the payment was done to meet a Government obligation. Appx012-013. As the trial court properly found, plaintiffs' "government subsidy" program theory fails because plaintiffs fail to identify any statutory program under which the Government directed plaintiffs to make payments. Appx012. In fact, unlike the CARES Act, by its terms, the Eviction Moratorium did not relieve tenants of their contractual obligations to pay rent or landlords' ability to collect unpaid rent. *See* 85 Fed. Reg. at 55,294. Plaintiffs' arguments to the contrary, App. Br. at 51, are disconnected from the express terms of the Eviction Moratorium. In any event, for the reasons stated above, plaintiffs' illegal exaction claim fails because plaintiffs fail to allege a payment to the Government or to a third party. *Piszel*, 833 F.3d at 1382; *see also Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967) (finding that illegal exaction claims are those in which "the Government has the citizen's money in its pocket"). The trial court correctly dismissed these claims.

CONCLUSION

For these reasons, this Court should affirm the trial court's judgment.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, Respondent-Appellee's counsel certifies that this Brief complies with the Court's type-volume limitation rules. This Brief was printed in Times New Roman font at 14 points. According to the word-count calculated by Microsoft Word, this brief contains a total of 13,320 words, which is within the 14,000 word limit.

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