No. 22-1929

United States Court of Appeals for the Federal Circuit

DARBY DEVELOPMENT COMPANY, INC., ET AL.,

Plaintiffs-Appellants,

– v. –

UNITED STATES,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims (Bonilla, J.)

CORRECTED BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 22-1929

Short Case Caption Darby Development Company, Inc. v. United States

Filing Party/Entity National Association of REALTORS

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 09/13/2022

Signature: /s/ Brett A. Shumate

Name: Brett A. Shumate

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
National Association of REALTORS		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of REALTORS® (NAR) is a national trade association, representing 1.45 million members, including NAR's institutes, societies, and councils involved in all aspects of the residential and commercial real estate industries. Members are residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Members belong to one or more of the approximately 1,200 local and 54 state and territory associations of REALTORS®, and support private property rights, including the right to own, use, and transfer real property. REALTORS® adhere to a strict Code of Ethics, setting them apart from other real estate professionals for their commitment to ethical real estate business practices.

NAR is interested in this case because the nationwide eviction moratorium issued by the Director of the Centers for Disease Control and Prevention (CDC) in September 2020, *Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19*, 85 Fed. Reg. 55,292

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

(Sept. 4, 2020), substantially harmed the nation's rental-property owners, including NAR's members and local associations. The moratorium eviscerated these property owners' right to exclude and therefore effected a *per se* physical taking of private property requiring just compensation under the Takings Clause. Two state REALTOR® associations—the Alabama Association of REALTORS® and the Georgia Association of REALTORS®—were plaintiffs in the lead case challenging the moratorium. *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). NAR has an interest in seeing that rental-property owners receive just compensation from the United States government for this taking.

The plaintiffs in this case are rental-property owners who brought takings claims in the Court of Federal Claims seeking just compensation for losses attributable to the eviction moratorium. But the claims court dismissed the complaint based on a misapplication of this Court's precedent regarding takings claims based on unlawful government action. That decision threatens to close the courthouse doors to all claims of just compensation brought by property owners whose property was taken pursuant to the moratorium, such as NAR's members.

SUMMARY OF ARGUMENT

In addition to holding that the state REALTOR® associations were "virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority" in issuing the eviction moratorium, the Supreme Court observed that by preventing property owners "from evicting tenants who breach their leases," the moratorium "intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489. And just months earlier, the Court had held that "an abrogation of the right to exclude" constitutes "a *per se* taking." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021). Given these two rulings, one would have thought that the takings claim here presented an open-and-shut case, especially as the "CDC's determination that landlords"—as opposed to their tenants—"should bear a significant financial cost of the pandemic" produced a nationwide wealth-transfer likely amounting to billions of dollars. *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489.

The claims court nevertheless dismissed this takings claim. Not because it thought the claim lacked merit; no, the court never even got to that issue. Nor because it tried to evade the holding in *Alabama Association of Realtors*; no, the claims court acknowledged that "the import of the Supreme Court's

opinion is clear." Appx008. Rather, the claims court held that the property owners here could not advance their takings claim precisely *because* the Supreme Court had held that the CDC lacked authority to issue the eviction moratorium.

In reaching that perverse outcome—which *rewards* the government for taking action that is unauthorized—the claims court misapplied this Court's precedent. As this Court has made clear, the fact that a government action is "unauthorized" for purposes of *administrative law* does not mean that it is "unauthorized" for purposes of *takings law*. Rather, the question for takings purposes is whether the government action "was either explicitly prohibited or was outside the normal scope of the government officials' duties." *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363 (Fed. Cir. 1998). Because the eviction moratorium was neither, the claims court must be reversed, especially because to hold otherwise would raise serious constitutional concerns by eliminating a judicial forum for a wide swath of takings claims. *See Webster v. Doe*, 486 U.S. 592, 603 (1988).

ARGUMENT

I. THE EVICTION MORATORIUM CAUSED A *PER SE* TAKING WITH A DEVASTATING EFFECT ON PROPERTY OWNERS.

A. The Moratorium Effected A Physical Taking Of Private Property.

The Constitution's Takings Clause prohibits the taking of private property for public use without just compensation. U.S. Const. amend. V. By doing so, it prevents the "'Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). When the government "physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002). The eviction moratorium fits that description to a tee.

1. A physical taking occurs not only when the government seizes property for itself, but also when it authorizes third parties to occupy property of another. In the latter situation, a physical taking occurs because the government has deprived the property owner of his right to exclude—"one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

The Supreme Court therefore "has long treated government-authorized physical invasions as takings requiring just compensation." *Cedar Point*, 141 S. Ct. at 2073. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), for example, it held that a New York law requiring property owners to allow cable companies to install equipment on their properties effected a physical taking. The Court explained that, where a governmental action results in "a permanent physical occupation of property," it qualifies as "a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 435-36. Because "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights," a *per se* taking occurs where a property owner has "no power to exclude the occupier from possession and use of the space." *Id.* at 435.

Last year, the Court similarly held in *Cedar Point* that a California law granting union organizers the right to physically enter and occupy growers' land for "three hours per day, 120 days per year" constituted a physical taking because it "appropriate[d] for the enjoyment of third parties the owners' right to exclude." 141 S. Ct. at 2072. The Court declined to assess the law as a "use restriction[]" subject to the "fact-intensive" regulatory-takings test. *Id.* at

2077. Instead, the Court emphasized that "appropriations of a right to invade are *per se* physical takings." *Id.* And that is so whether the "physical appropriation … is permanent or temporary." *Id.* at 2074.

2. The CDC's eviction moratorium effected a physical taking in the same way. The moratorium ordered 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"—even those who had "violat[ed]" their "contractual obligation[s]" by failing to provide a "timely payment of rent"—and backed that command with six-figure criminal penalties. 85 Fed. Reg. at 55,294, 55,296. Rental-property owners were therefore required to allow an entire class of tenants to remain in physical possession of the owners' residential properties even if the tenants could not fulfill their contractual obligations—for periods far longer than "three hours per day, 120 days per year." *Cedar Point*, 141 S. Ct. at 2072.

Property owners could not exclude these tenants from their properties in order to find tenants who would pay rent, nor could they make any other use of such properties, such as dwelling in them personally. In other words, the CDC "compel[led]" property owners, "once they have rented their property to tenants, to continue doing so" for as long as the agency saw fit;

even an "owner who wishe[d] to change the use of his land" could not "evict his tenants." *Yee v. City of Escondido*, 503 U.S. 519, 527-28 (1992); *see id.* at 528 (rejecting a physical takings claim against a law providing that a property "owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice"). In doing so, the CDC "*require[d]* the landowner to submit to the physical occupation" of his property. *Id.* at 527.

Accordingly, by "preventing" property owners "from evicting tenants who breach their leases," the eviction moratorium "intrude[d] on one of the most fundamental elements of property ownership—the right to exclude." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489 (citing *Loretto*, 458 U.S. at 435). As such, it is no different than the California access regulation at issue in *Cedar Point*. Indeed, the Eighth Circuit recently held that a similar state eviction moratorium gave rise to "a plausible *per se* physical takings claim under *Cedar Point*" because it "'turned every lease in Minnesota into an indefinite lease, terminable only at the option of the tenant.'" *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 733 (8th Cir. 2022). The CDC's moratorium did the same thing on a nationwide scale. It therefore triggers the "simple, *per se* rule" governing physical appropriations: "The government must pay for what it takes." *Cedar Point*, 141 S. Ct. at 2071.

B. The Moratorium Had A Severe Impact On Property Owners.

While any physical taking harms a property owner, this case in particular should be the last to render "the right to exclude… an empty formality, subject to modification at the government's pleasure." *Id.* at 2077. Although COVID-19 has presented challenges for all Americans, the CDC's eviction moratorium unfairly singled out owners of rental properties to bear the costs of the agency's pandemic response, exacerbating the challenges that these individuals already faced. For nearly a year, the moratorium deprived property owners of the right to evict non-paying tenants. As a result, millions of owners, particularly individual "mom and pop" owners, were denied both the freedom to use their properties for other purposes and the rental income they depend on to pay their mortgages, maintenance costs, and other property-related expenses.

Individuals, as opposed to businesses, own the vast majority of the nation's rental properties. Specifically, individuals own 14.6 million of the nearly 20 million rental properties in the United States—nearly 75 percent. Kristen Broady et al., *An Eviction Moratorium Without Rental Assistance Hurts Smaller Landlords, Too*, BROOKINGS (Sept. 21, 2020), https://brook.gs/3RHrV6n. And roughly a third of these individual owners are from low- to

moderate-income households, and property income constitutes up to 20 percent of their total household income. *Id.* For many of these individual owners, property-related expenses consume more than half of their property income. *Id.* Unlike some of the larger corporate owners, these individual property owners have fewer resources to withstand prolonged periods without income from rent. *Id.* And the effect of the moratorium was particularly acute for certain minority owners, who are more likely to have lower incomes, own fewer rental properties, have mortgages on those properties, and provide housing to less affluent tenants. *See, e.g.*, Laurie Goodman & Jung Hyun Choi, *Black and Hispanic Landlords Are Facing Great Financial Struggles Because of the COVID-19 Pandemic. They Also Support Their Tenants at Higher Rates*, URBAN INST. (Sept. 4, 2020), https://urbn.is/3uAOBsF.

As late as June 30, 2021, 6.5 million renter households were behind in rent. *See* Scholastica (Gay) Cororaton, *Average of Nearly $5,000 Paid Out to Renters Applying for Assistance Under the $25B Emergency Rental Assistance Package*, NAR (Aug. 10, 2021), https://bit.ly/3dE8Jr2. The majority of these households (58.5 percent) lived in small 1-to-4-unit properties, 72 percent of which were owned by "mom-and-pop" property

owners. *Id.* It was estimated the total amount of rent in arrears at this time was between $21.3 billion and $57.5 billion. *Id.*

Although Congress appropriated funds to state and local governments to provide aid to tenants, the rental-assistance program was beset by problems and inefficiencies. Indeed, by the end of July 2021, only 11 percent of the funds had been distributed, and more than 60 precent of vulnerable tenants had not even applied for aid. *See* Glenn Thrush & Alan Rappeport, *About 89% of Rental Assistance Funds Have Not Been Distributed, Figures Show*, N.Y. TIMES (Aug. 25, 2021), https://nyti.ms/3wbYAIE. Consequently, many property owners were unable to recoup much-needed rental income.

For the limited number of individual property owners who actually received any of the aforementioned assistance, this rental assistance often proved too little, too late. The damage was already done. Without a steady stream of rental income, many individual owners could not make ends meet and were forced to sell their properties to large investors. Indeed, many months before the Supreme Court ended the eviction moratorium, 23 percent of small property owners reported plans to sell at least one property due to difficulties caused by eviction bans. Michelle Conlin, *Selling Out: America's Local Landlords. Moving In: Big Investors*, REUTERS (July 29, 2021), https://

reut.rs/3AaMMrw. In one emblematic case, an affordable-housing property owner in Washington, DC stopped receiving rent from a third of his tenants. *Id.* In order to cover the mortgages on his properties, he had to resort first to his savings, then to his credit cards, and then to his retirement fund before finally selling to investors. *Id.* Many similarly-situated property owners were likewise forced to sell their properties at a loss. Mary Ellen Cagnassola, *Landlords, Frustrated With Eviction Moratorium, Sell To Wealthy Investors To Stem Losses*, NEWSWEEK (Aug. 19, 2021), https://bit.ly/3wbm5Sb. If allowed to stand, the decision below will close the courthouse doors, and any potential relief, to property owners like these, thereby forcing them "'alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Arkansas Game & Fish*, 568 U.S. at 31.

II. THE TUCKER ACT PROVIDES RELIEF HERE.

The claims court did not grapple with any of this. Instead, it held that the property owners in this case could not pursue a takings claim under the Tucker Act because the eviction moratorium "was unauthorized" by Congress. Appx009. That topsy-turvy theory—which rewards federal agencies for deliberately pushing the envelope when it comes to their statutory authority—cannot be reconciled with the precedent of the Supreme Court or this Court.

A. The Tucker Act Permits Takings Claims Even For Actions That Are "Unauthorized" For Purposes Of Administrative Law.

The Tucker Act grants the claims court jurisdiction over takings claims "against the United States." 28 U.S.C. § 1491(a)(1). "[W]hen a government official engages in *ultra vires* conduct," however, "the official will not, 'in any legal or constitutional sense, represent the United States,'" and "'what he does'" therefore "'cannot create a claim against the Government'" for purposes of the Tucker Act. *Del-Rio Drilling*, 146 F.3d at 1362 (quoting *Hooe v. United States*, 218 U.S. 322, 335 (1910)). Accordingly, a "compensable taking arises only if the government action in question is authorized." *Id.*

Critically, whether a government action is "authorized" for *Tucker Act* purposes is not the same question as whether it is "authorized" for *administrative law* purposes. If a government officer takes "action … in excess of statutory … authority," courts may vacate that unauthorized action under the Administrative Procedure Act (APA). 5 U.S.C. § 706(2)(C). But that does not mean the officer has taken an "action in excess of statutory … authority" for purposes of the Tucker Act.

As then-Judge Scalia explained for the D.C. Circuit, "the mere fact that a government officer has acted illegally does not mean he has exceeded his

authority for Tucker Act purposes, even though he is not 'authorized' to break the law." *Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 151 (D.C. Cir. 1983). Rather, so long as "a taking occurs while he is acting within the normal scope of his duties (a concept akin to, though not as liberal as, the 'scope of employment' test for application of the doctrine of *respondeat superior* in private law), a Tucker Act remedy normally lies, unless Congress has expressed a positive intent to prevent the taking or to exclude governmental liability." *Id.* (footnote omitted).

Thus, even when "government agents" act "beyond their statutory … authority, " that "does not mean" they have "exceeded [their] authority for Tucker Act purposes." *Id.* Indeed, the Supreme Court drew a similar distinction in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which "assumed that the question of lack of authority for Tucker Act purposes is distinct from that of lack of constitutional authority, since it discussed them entirely separately and resolved only the latter." *Ramirez de Arellano*, 724 F.2d at 153 n.12 (internal citation omitted).

Supreme Court precedent bears this distinction out. In *United States v. Causby*, 328 U.S. 256 (1946), for instance, the Civil Aeronautics Authority approved a glidepath that allowed planes to take off and land 83 feet above the

plaintiffs' property. *Id.* at 258. This action exceeded the agency's statutory authority to take "'navigable air space'"—defined as "'airspace above the minimum safe altitudes of flight prescribed by'" the agency—which at the time was 300 to 1000 feet above ground. *Id.* at 260, 263-64. "Despite this Congressional silence—if not negative implication—the Court concluded that the deprivation of use of the land constituted a compensable taking, for which recovery could be had in the Court of Claims." *Ramirez de Arellano*, 724 F.2d at 152; *see Causby*, 328 U.S. at 264 ("[T]he flights in question were not within the navigable airspace which Congress placed within the public domain."); *id.* at 267 ("[T]he jurisdiction of the Court of Claims in this case is clear."). Evidently, that was because "the government agent was acting within the ordinary scope of responsibilities conferred on him by Congress." *Ramirez de Arellano*, 724 F.2d at 152; *see Causby*, 328 U.S. at 264 ("The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules.").

In *Del-Rio Drilling*, this Court adopted the analysis from *Ramirez de Arellano*, emphasizing that "[n]either the Supreme Court nor this court has held that government conduct is 'unauthorized,' for purposes of takings law, merely because the conduct would have been found legally erroneous if it had been challenged in court." 146 F.3d at 1363. Put differently, "a court's

conclusion that government agents acted unlawfully does not defeat a Tucker Act takings claim." *Id.* Rather, this Court held, a government official's "conduct was *ultra vires*" for purposes of the Tucker Act only if it either (1) was "explicitly prohibited" by Congress or (2) "was outside the normal scope of the government officials' duties." *Id.*[2]

B. The Moratorium Was "Authorized" Under The Tucker Act.

While the claims court acknowledged that the eviction moratorium was "not 'explicitly prohibited' by Congress," it thought the CDC Director's issuance and extensions of that moratorium were "clearly 'outside the normal scope of the government official's duties.'" Appx009. That conclusion conflicts with binding precedent, raises needless constitutional concerns, and creates perverse incentives for government officials.

1. In *Del-Rio Drilling*, this Court held that government officials "act within the general scope of their duties" for Tucker Act purposes "if their actions … are pursuant to 'the good faith implementation of a Congressional Act.'" 146 F.3d at 1362. In that case, the officials' allegedly unlawful denial of

[2] As this Court observed, while "the en banc D.C. Circuit vacated the panel's judgment in the *Ramirez* case"—which in turn was vacated by the Supreme Court on other grounds—it "did not disagree with the panel's analysis of the authorization issue." *Del-Rio Drilling*, 146 F.3d at 1363.

drilling permits was "authorized" because they were "acting within the scope of their statutorily authorized duties." *Id.* at 1363. "It was part of their job to interpret the statutes and regulations governing federal mineral leases, and there is no reason to suppose that their decision reflected anything but a good faith effort to apply the statutes and regulations as they understood them." *Id.* "The issue of authorization" was thus "no impediment to Del-Rio's takings claim." *Id.*

That analysis is consistent with the Supreme Court's longstanding approach. In *Great Falls Manufacturing Co. v. Garland*, 124 U.S. 581 (1888), for instance, the Court rejected the government's argument that a plaintiff could not pursue a takings claim alleging that the Secretary of War had taken land that was not included within a specific survey and map, even though Congress had authorized the Secretary to only "'take possession of the premises embraced in the survey and map.'" *Id.* at 596. Instead, the Court held that "even if it be true that some part of the land actually occupied by the government is not within the survey and map, still the United States are under an obligation imposed by the constitution to make just compensation for all that has been in fact taken." *Id.*

As the Court explained, there was no evidence that the Secretary had "not honestly and reasonably exercise[d] the discretion with which he was invested"; it is not as if he had taken lands that "manifestly" fell outside his statutory authority. *Id.* at 597. The government "consequently" had "a constitutional obligation" to compensate the plaintiff for property taken by the Secretary, "whether it is embraced or described in said survey or map or not." *Id.*; *see Ramirez de Arellano*, 754 F.2d at 153 (discussing *Great Falls Manufacturing*). So even though "there may have been no specific act of Congress directing the appropriation of th[e] property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an appropriation, it is to be treated as the act of the government." *United States v. Lynah*, 188 U.S. 445, 465-66 (1903), *overruled on other grounds by United States v. Chi., M., St. P. & P. R. Co.*, 312 U.S. 592 (1941).

The CDC's moratorium is materially indistinguishable from the drilling-permit denial in *Del-Rio Drilling* or the taking of extra land in *Great Falls Manufacturing*. The claims court understandably never questioned that the CDC officials' issuance and extensions of the moratorium were done "pursuant to 'the good faith implementation of a Congressional Act.'" *Del-Rio Drilling*, 146 F.3d at 1362. After all, "[i]t was part of their job to interpret the statutes

and regulations governing" disease-control measures, "and there is no reason to suppose that their decision reflected anything but a good faith effort to apply the statutes and regulations as they understood them." *Id.* at 1363. "[C]ertainly the government does not argue to the contrary." *Id.*

Indeed, far from the misconduct of a government agent gone rogue, the eviction moratorium was undeniably the action of "the United States." 28 U.S.C. § 1491(a)(1). It was issued pursuant to an Executive Order, personally championed by both President Trump and President Biden, expressly extended by Congress, and repeatedly defended by the Department of Justice (including twice before the Supreme Court). *See Alabama Ass'n of Realtors*, 141 S. Ct. at 2486-88 (discussing history); Appx002-005 (same); *Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners*, Exec. Order No. 13945, § 3(a), 85 Fed. Reg. 49,935, 49,936 (Aug. 8, 2020). And both a unanimous D.C. Circuit panel and three Supreme Court Justices thought the moratorium fell within the CDC's statutory authority (although a Supreme Court majority concluded otherwise). *See Alabama Ass'n of Realtors*, 141 S. Ct. at 2490 (Breyer, J., dissenting); *Alabama Ass'n of Realtors v. HHS*, No. 21-5093, 2021 WL 2221646, at *1-3 (D.C. Cir. June 2, 2021). Given

all that, the notion that the eviction moratorium "'clearly'" fell outside "the normal scope of" the CDC Director's "'duties'" is untenable. Appx009.

The claims court thought otherwise solely because the Supreme Court noted that the statutory provision on which the CDC Director relied, 42 U.S.C. § 264(a), "has rarely been invoked—and never before to justify an eviction moratorium." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2487; *see* Appx009. But that observation, made in the Court's factual statement of the case, at most bore on the application of the "major questions doctrine," as it went to the moratorium's "'unprecedented' nature." *West Virginia v. EPA*, 142 S. Ct. 2587, 2608-09 (2022); *see Alabama Ass'n of Realtors*, 141 S. Ct. at 2489 ("This claim of expansive authority under § 361(a) is unprecedented. Since that provision's enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium."). As such, the Supreme Court's discussion concerned whether the eviction moratorium was "unauthorized" for purposes of *the APA*, not *the Tucker Act*. Otherwise, any time the "'unprecedented nature" of a government action triggered the major questions doctrine, the responsible official could be held to have acted in bad faith. That cannot be the law. *See West Virginia*, 142 S. Ct. at 2608-09 (discussing precedents applying the major questions doctrine).

2. The claims court's interpretation of the Tucker Act also raises serious constitutional concerns. In order "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim," the Supreme Court has insisted that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster*, 486 U.S. at 603. And that clear-statement rule applies with the same force to takings claims as it does to other constitutional causes of action. *See Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 149 (1974) (observing that statutory provisions "might raise serious constitutional questions if a Tucker Act suit were precluded" to "remedy … any taking which might occur as a result of" those provisions). Nothing in the Tucker Act, however, *clearly* forecloses takings claims like the ones here—unlawful but good-faith uses of statutory authority to seize private property. That is yet another strike against the claims court's reading.

3. Finally, the claims court's expansive view of what constitutes an "unauthorized" government action—namely, the novel deployment of statutory authority at the highest levels of government to seize private property for public use—would create perverse incentives. Under the claims

court's regime, senior officials would have every reason to order the taking of private property based on unprecedented and dubious invocations of statutory authority, as they would know that even if the action did not hold up to judicial scrutiny, the government would never have to pay for it.

In fact, something like that appears to have happened with respect to the CDC's August 3, 2021 extension of the eviction moratorium. In discussing that extension, the President observed that "[t]he bulk of the constitutional scholarship" indicated that any further executive action in this area would "not likely … pass constitutional muster." The White House, *Remarks by President Biden on Fighting the COVID-19 Pandemic* (Aug. 3, 2021), https://bit.ly/3dbZX3U. "But," the President explained, extending the moratorium would be "worth the effort" because "by the time it gets litigated, it will probably give some additional time while we're getting that $45 billion out to people who are, in fact, behind in the rent and don't have the money." *Id.*

To reward such gamesmanship with immunity from claims for just compensation would leave the Takings Clause to exist "more in sound than in substance." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). The prospect that the eviction moratorium would likely be vacated as unlawful by the Judiciary evidently did not dissuade government officials from

pursuing it. And the result of "the CDC's determination that landlords should bear a significant financial cost of the pandemic" was that "millions of landlords across the country" were both deprived "of rent payments with no guarantee of eventual recovery" and stripped of "one of the most fundamental elements of property ownership—the right to exclude." *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489; *see supra* Pt. I.B. If that does not warrant application of the Takings Clause, it is hard to see what would.

CONCLUSION

This Court should reverse the judgment below.

Dated: March 17, 2023

Respectfully submitted,

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I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5); the type-style requirements of Fed. R. App. P. 32(a)(6); and the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. Cir. R. 29(b) and 32(b)(1), because it is proportionally spaced, has a typeface of 14-point Century Expanded BT font, and contains 4,800 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

Dated: March 17, 2023 */s/ Brett A. Shumate*

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I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

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