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Liability on Lockdown: Can Landlords Bring Takings Claims Over COVID Eviction Moratoriums?

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In 2020, during the COVID-19 pandemic, the U.S. Congress instituted a 120-day moratorium on commencing eviction proceedings for nonpayment of rent as to certain properties receiving federal assistance. The Centers for Disease Control and Prevention (CDC) then issued an order forbidding landlords from evicting any covered person from any residential property in any State with documented cases of COVID-19, which lasted from until Oct. 3, 2021 (and was stayed by the United States Supreme Court on Aug. 26, 2021).

In New York, the New York Legislature responded to the evolving crisis by passing legislation giving the Governor the power to temporarily suspend statutes or regulations. The Governor then used this power to issue Executive Orders halting residential and commercial evictions in New York. This eviction moratorium was extended several times and codified in the Tenant Safe Harbor Act and others, which extended the eviction moratorium of residential tenants for nearly two years, from March 7, 2020 until Jan. 15, 2022.

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Now, the question of whether COVID-19 eviction moratoriums across the country—preventing landlords from evicting residential tenants from their properties even for the non-payment of all rent—result in a valid Constitutional Takings claim against the government, has finally reached the Supreme Court of the United States. And…(drumroll please), they have declined to hear the case, leaving the Circuits split on the issue, against a well-reasoned dissent by two justices.

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On June 30, 2025, the Supreme Court denied a petition for a writ of certiorari to examine whether the Los Angeles eviction moratorium that "effectively precluded residential evictions," even for the non-payment of rent, stated a claim against the City claiming that the moratorium effects a *per se* physical taking in violation of the Taking Clause's prohibition of government taking "private property…for public use, without just compensation" (*GHP Mgt. Corp. v City of Los Angeles, California*, 145 S Ct 2615 [2025]).

The majority opinion was just nine words ("The petition for a writ of certiorari is denied"), but was followed by the dissent of Justice Clarence Thomas and Justice Neil Gorsuch, who respectfully but poignantly argued that: "This case meets all of our usual criteria for granting certiorari, and it does not contain any impediments that would hamper our review. The Court nevertheless denies certiorari, leaving in place confusion on a significant issue, and leaving petitioners without a chance to obtain the relief to which they are likely entitled" (*id.* at 2617 [dissent]).

In dissent, the justices explained that the question before the court is the subject of a "Circuit split," that was expressly acknowledged by the U.S. Court of Appeals for the Ninth Circuit in the opinion below. Namely, the dissenting justices explained that, "The Eighth and Federal Circuits have held that a bar on evictions for the nonpayment of rent qualifies as a physical taking, while the Ninth Circuit has held that it does not," citing the comparison of *Darby Development Co. v. United States*, 112 F4th 1017, 1034–1035 (CA Fed. 2024), and *Heights Apartments, LLC v. Walz*, 30 F4th 720, 733 (CA8 2022) with the case before them, 2024 WL 2795190, *1 (CA9, May 31, 2024) (*id. at* 2616).

The dissenting justices detailed how the "Circuit split stems from confusion about how to reconcile" two Supreme Court precedents, concluding that "Because we created this confusion, we have an obligation to fix it" (*id*. at 2616).

Going further, the justices revealed that "there is good reason to think that the Nine Circuit erred" in dismissing the takings claim, and argued that the court's obligation to clarify the confusion is "particularly strong here" because "[u]nder our Takings Clause doctrine more generally, an eviction moratorium would plainly seem to interfere with a landlord's right to exclude" (*id*. at 2616-2617).

Justices Thomas and Gorsuch further argued that this issue will only continue to reoccur, and that it is wise to clarify the case law sooner "rather than in the heat of the next national emergency" (*id*. at 2617), noting that some jurisdictions have already issued eviction moratoriums for other emergencies.

The Circuit split derives from courts interpreting and reconciling the Supreme Court's decisions in *Yee v City of Escondido, Cal* (112 S

Ct 1522 [1992]) and *Cedar Point Nursery v Hassid,* (141 S Ct 2063 [2021]). The Ninth Circuit, relying on *Yee* as controlling, held that the Los Angeles eviction moratorium did not "effect a taking" because landlords had already "opened their property to occupation by tenants" (2024 WL 2795190, *1).

The *Yee* court held that a statute which allowed mobile home park owners to evict tenants from their homes only on certain grounds, after an onerous delay, and set rent below market did not effect a physical taking, reasoning that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land," whereas the landlords in *Yee* had voluntarily rented their property to mobile home owners, so the statue at issue only regulated the *use* of their land and the landlord-tenant relationship (112 S Ct 1522).

In contrast, in 2022 and 2024, the Eighth and Federal Circuit, respectively, relied on the Supreme Court's more recent decision in *Cedar Point Nursery*, in which the court held that a law requiring agricultural employers to allow union organizers onto their property constituted a physical taking because it appropriated the property owners' right to exclude for the enjoyment of third parties (141 S Ct 2063).

The Eight and Federal Circuit persuasively reasoned that "at a fundamental level, we cannot reconcile how forcing property owners to occasionally let union organizers on their property infringes their right to exclude, while forcing them to house non-rent-paying tenants (by removing their ability to evict) would not" (*Darby*, 112 F4th at 1035; accord, *Heights Apartments*, 30 F4th at 733).

Justices Thomas and Gorsuch agreed that *Cedar Point* controlled and that an outright eviction moratorium "would plainly seem to interfere with a landlord's right to exclude," while also citing a 2021 *per curiam* opinion in which the Supreme Court held 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 Assn. of Realtors v. Department of Health and Human Servs.*, 141 S Ct 2485 [2021]).

Notably, the court in *Darby* distinguished *Yee* in part because "nonpayment of rent" expressly remained a permissible basis to terminate a tenancy under the statute at issue, which limited the grounds on which the landlord could evict and was effectively a "rent-control ordinance," not "an outright prohibition on evictions for non-payment of rent" (112 F4th at 1035).

In New York, the Circuit Court has not directly addressed this issue, but landlords brought an action in 2020 against the Governor of the State of New York in the Southern District of New York (SDNY) alleging that Governor Andrew Cuomo's Executive Order 202.28 violated landlords' rights under the Takings Clause, among other constitutional claims, in part because it prohibited landlords from commencing eviction proceedings for nonpayment of rent pursuant to Article 7 of the Real Property Actions and Proceedings Law and Article 7 of the Real Property Law if those tenants faced financial hardship due to the COVID-19 pandemic (*Elmsford Apt. Assoc. v Cuomo*, 469 F Supp 3d 148 [SDNY 2020]), *citing* N.Y. Comp. Codes R. & Regs. tit. 9, §8.202.28 [2020]).

On summary judgment, the SDNY held that the executive order at issue did not constitute a physical or regulatory taking of the landlords' property under the U.S. Constitution's Fifth

Amendment Takings Clause, and dismissed the action.

The SDNY relied heavily on *Yee*, finding that "Government action that does not entail a physical occupation but merely affects the use and value of private property, does not result in a physical taking of property" (*id*.).

However, a claim in the Second Circuit may still be viable for New York landlords, for several reasons, despite the Supreme Court's recent denial of a certiorari to decide the Circuit split. Indeed, landlords appealed the SDNY decision in *Elmsford Apt. Assoc.* to the Second Circuit, but the Second Circuit dismissed the appeal as moot under Article III's case-or-controversy requirement because the subject Executive Order only lasted 60 days, the state Legislature had since enacted different eviction moratorium provisions, and most significantly, "at oral argument plaintiffs apparently abandoned their claim for nominal damages, which might otherwise have prevented their appeal from being mooted" (*36 Apt. Assoc., LLC v Cuomo*, 860 Fed Appx 215, 216 [2d Cir 2021]). Thus, the only remaining claim was for an injunction of a statue that expired.

Moreover, the SDNY's dismissal of the takings claim occurred in 2020, but the Supreme Court decided *Cedar Point* (and *Alabama Assn. of Realtors*) in 2021, changing the lay of the land for takings claims, and certainly affecting the reasoning of Justice Thomas, Justice Gorsuch, the Eighth Circuit, and Federal Circuit on these issues.

Perhaps it was actually fruitful for New York landlords that the Second Circuit dismissed the challenge as moot in July 2021, giving the Second Circuit time and reason to consider *Cedar Point* (decided less than a month prior on June 23, 2021), *Darby*, and *Heights Apartments* when the merits of these claims reach the Second Circuit again, particularly after the Eighth and Federal Circuits persuasively relied upon *Cedar Point* in 2024.

These claims are very well ripe for actions by landlords in New York and are distinguishable from the constitutional takings claims previously rejected by the Second Department concerning the Housing Stability and Tenant Protection Act of 2019 (HSTPA), which the court held merely regulated the landlord-tenant relationship, citing *Yee*, (*see Community Hous. Improvement Program v City of New York*, and *74 Pinehurst LLC v New York* 59 F4th 557, 562 [2d Cir 2023]). T

he Second Circuit has not addressed the blanket prohibition of evictions, including for the non-payment of rent, which Justices Thomas and Gorsuch found "would plainly seem to interfere with a landlord's right to exclude."

For now, with Supreme Court denying certiorari despite an acknowledged Circuit Split and staunch dissent, New York landlords will have to appeal to the Second Circuit relying on *Cedar Point*, *Darby*, and *Heights Apartments* or hope that another claim is heard by the Supreme Court and the split is resolved in their favor.