No. 100992-5

SUPREME COURT OF THE STATE OF WASHINGTON

GENE GONZALES; SUSAN GONZALES; HORWATH FAMILY, TWO, LLC; and WASHINGTON LANDLORD ASSOCIATION,

Petitioners,

v.

GOVERNOR JAY INSLEE and STATE OF WASHINGTON,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The COVID-19 pandemic, the deadliest in over a century, created both a public health crisis and an economic crisis. Governor Inslee has issued emergency proclamations to slow COVID-19's spread and mitigate its economic hardships. Recognizing that the pandemic would leave many tenants in financial distress and at risk of eviction, the Governor sought to keep people in their homes during the early stages of this public health emergency. So like the federal government and other states and municipalities, the Governor issued Proclamation 20-19—a moratorium on most residential evictions (the Moratorium). It ended on June 30, 2021, by its own terms and by operation of statute.

The Court of Appeals upheld the Moratorium against Petitioners' state constitutional and statutory challenges and affirmed that venue was mandatory in Thurston County.[1]

[1] Courts have resoundingly rejected constitutional challenges to state and local eviction moratoria during the

This Court should deny review for several reasons, not least of which because Petitioners fail to identify any grounds for review under RAP 13.4(b). There is none. Petitioners do not point to any conflict between the opinion below and this Court's precedents on the scope of the Governor's broad statutory emergency powers, the right to petition, and the application of the public officer venue statute. Additionally, the court below applied relevant U.S. Supreme Court decisions analyzing federal

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COVID-19 pandemic, including the State's Moratorium. *See Jevons v. Inslee*, 561 F. Supp. 3d 1082 (E.D. Wash. 2021); *El Papel LLC v. Durkan*, No. 20-CV-01323-RAJ-JRC, 2021 WL 4272323 (W.D. Wash. Sept. 15, 2021) (report and recommendation); *Apt. Ass'n of Los Angeles Cnty. v. City of Los Angeles*, 10 F.4th 905 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 1699 (2022) (*AALAC*); *Gallo v. District of Columbia*, No. 1:21-CV-03298 (TNM), 2022 WL 2208934 (D.D.C. June 21, 2022); *Farhoud v. Brown*, No. 3:20-CV-2226-JR, 2022 WL 326092 (D. Or. Feb. 3, 2022); *S. Cal. Rental Hous. Ass'n v. County of San Diego*, 550 F. Supp. 3d 853 (S.D. Cal. 2021); *Elmsford Apt. Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148 (S.D.N.Y. 2020), *appeal dismissed sub nom. 36 Apt. Assocs., LLC v. Cuomo*, 860 F. App'x 215 (Mem.) (2d Cir. 2021); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353 (D. Mass. 2020); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337 (E.D. Pa. 2020); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199 (D. Conn. 2020); *but see Heights Apts., LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022).

Contracts Clause and Takings Clause challenges to foreclosure moratoriums and regulations affecting the landlord-tenant relationship. Finally, the Moratorium expired over a year ago and the Legislature has enacted laws and programs affecting tenants and landlords during the public health emergency. The Court need not spend time reviewing issues presented in the Petition, which are not likely to recur.

II. COUNTERSTATEMENT OF THE ISSUES

1. The Moratorium did not define a judicial procedure and merely delayed Petitioners' ability to pursue the remedy of eviction for nonpayment of rent. Did the Court of Appeals correctly hold the Moratorium did not interfere with the judiciary's power and the right to petition?

2. Given the public health risks posed by displaced tenants, the Governor issued the Moratorium as part of his authority "to help preserve and maintain life, health, property or the public peace." RCW 43.06.220(1)(h). Did the Court of

Appeals correctly hold the Moratorium was a valid exercise of the Governor's emergency power?

3. The Moratorium temporarily prohibited certain conduct (eviction and treating unpaid rent as enforceable debt). Did the Court of Appeals correctly decide that the Governor did not waive or suspend statutory obligations or limitations?

4. The Moratorium regulated the landlord-tenant relationship by temporarily adjusting the terms under which landlords could evict tenants. Did the Court of Appeals correctly hold that the Moratorium did not effect a physical taking?

5. There is no fixed rule that eviction moratoria pass constitutional muster only if rent is paid during the period of the moratoria. Did the Court of Appeals correctly decide the Moratorium did not impair contracts?

6. Under the public officer venue statute, claims against the validity of the Proclamations arose where Governor Inslee issued them: Thurston County. Did the Court of Appeals correctly affirm the case's transfer?

7. This case involves issues that are unlikely to recur because the Moratorium expired in June 2021 and the Legislature has enacted new law protecting tenants during the public health emergency. Does a decision addressing moot issues that are unlikely to recur warrant review?

III. COUNTERSTATEMENT OF THE CASE

A. The COVID-19 Pandemic and the State of Emergency

In February 2020, the Governor issued Proclamation 20-05, declaring a state of emergency in Washington State due to COVID-19. With few proven therapeutics and no vaccine at the outset, a primary strategy to slow COVID-19's spread was to minimize interactions outside one's household. CP 548-49. The State's mitigation measures grew stricter as cases and deaths accelerated. *Id.*

B. The Risks and Costs of Mass Evictions

The Governor's Office anticipated that, without countermeasures, the pandemic's economic dislocations would result in mass evictions, exacerbating the housing instability and

homelessness crisis that predated the pandemic. CP 779, 941. Mass evictions would displace people at the very time that it was critical to stay home and also force many into congregate settings like shelters and over-occupied homes, further spreading COVID-19. *Id.*; CP 549. Allowing evictions would also likely flood the state court system with unlawful detainer filings, forcing tenants to risk their health to appear in housing courts that are crowded even in normal times. CP 784-85.

C. The Moratorium

Given the likelihood of mass evictions amidst the pandemic, the Governor issued Proclamation 20-19 on March 18, 2020, temporarily prohibiting most residential evictions. CP 699-701. Correctly predicting COVID-19 to "cause a sustained global economic slowdown," the Governor determined that "the inability to pay rent by these members of our workforce increases the likelihood of eviction from their homes," which in turn would "increas[e] the life, health, and safety risks to a significant percentage of our people from the

COVID-19 pandemic." CP 699. The Moratorium was amended and extended several times as the pandemic and recession persisted, culminating in Proclamation 20-19.6, which expired on June 30, 2021.

In its most recent (and now expired) form, the Moratorium prohibited property owners from pursuing eviction unless: (1) it was "necessary to respond to a significant and immediate risk to the health, safety, or property of others created by the resident"; (2) the landlord intended to "personally occupy the premises as [a] primary residence" (with timely notice to the tenant); or (3) the landlord intended to "sell the property" (also with timely notice). Procl. 20-19.6 at 5.[2] Though it generally prohibited landlords from treating unpaid rent "as an enforceable debt or obligation that is owing or collectable," that prohibition applied only when nonpayment was "a result of the COVID-19 outbreak

[2] The Governor's Proclamations are available at: https://www.governor.wa.gov/office-governor/official-actions/proclamations.

and occurred on or after February 29, 2020." *Id.* at 6. Thus, the Moratorium permitted action other than eviction to collect unpaid rent that predated or was unrelated to the pandemic. The Moratorium also permitted a landlord to collect *any* unpaid rent if a tenant refused or failed to comply with an offered "re-payment plan that was reasonable based on the individual financial, health, and other circumstances of that resident." *Id.* The Moratorium did not forgive any unpaid rent and stressed that tenants "who are not materially affected by COVID-19 should and must continue to pay rent." *Id.* at 2.

D. The Pandemic's Impacts

During the pandemic, at least 18,000 more Washingtonians have had to rely on cash assistance and 160,000 more on food assistance. CP 934-37. Over 1.6 million Washingtonians filed unemployment claims. CP 778, 932.

With the economy's fragility, housing instability remained a significant concern. Census survey data reported that, in February 2021, nearly 10 percent of renters in Washington were

behind on their rent, CP 1138, and 15 percent of Washington renters reported having little or no confidence in their ability to make rent, CP 1140. An analysis found that up to 789,000 Washingtonians would have been at risk of eviction without the Moratorium. CP 975.

The consequences of such mass evictions would have been catastrophic. They would have resulted in up to 59,008 more eviction-attributable COVID-19 cases, 5,623 more hospitalizations, and 621 more deaths in the State. CP 1356.

E. Federal and State Assistance Measures

In March 2020, Congress provided $150 billion in direct assistance for state, territorial, and tribal governments. Pub. L. No. 116-136, 134 Stat. 281 (2020). From this fund, Washington allocated more than $100 million in Eviction Rent Assistance Program (ERAP) grants. CP 782. Congress later enacted legislation giving more than $21 billion in rental assistance. Pub. L. No. 117-2, 135 Stat. 4 (2021).

In February 2021, the Legislature adopted a $2.2 billion COVID relief bill. Engrossed Substitute H.B. 1368, 67th Leg., Reg. Sess. (Wash. 2021), *enacted as* Laws of 2021, ch. 3. The bill provided the Department of Commerce $325 million to administer an emergency rental and utility assistance program, which provides grants to local housing providers. *Id.*, § 3(1). It also sent $40 million toward other housing programs, including grants to local housing providers, *id.*, § 3(2), mortgage assistance for homeowners facing foreclosure, *id.*, § 3(3), and grants to landlords who have lost "rental income from elective nonpayor tenants during the state's eviction moratorium," *id.*, § 3(7). The State's operating budget appropriated $658 million to the Department of Commerce to administer rental and utility assistance. Engrossed Substitute S.B. 5092, 67th Leg., Reg. Sess. (Wash. 2021), *enacted as* Laws of 2021, ch. 334.

In April 2021, the Legislature enacted Engrossed Second Substitute S.B. 5160—to provide durably tenant protections during and after the public health emergency. Under E2SSB

5160, the eviction moratorium instituted through Proclamation 20-19.6 ended on June 30, 2021. E2SSB 5160, 67th Leg., Reg. Sess. (Wash. 2021), *enacted as* Laws of 2021, ch. 115. The law requires that if a tenant has remaining unpaid rent that accrued between March 1, 2020, and the end of the public health emergency, a landlord must offer that tenant a reasonable plan for rent repayment whose monthly payments cannot exceed one-third of the monthly rent during the period of non-payment. *Id.*, § 4. But if that tenant "fails to accept the terms of a reasonable repayment plan within 14 days of the landlord's offer," the landlord may pursue an unlawful detainer action, subject to any requirements of the Eviction Resolution Pilot Program (ERRP). *Id.* If a tenant defaults on rent owed under a repayment plan, the landlord may apply for reimbursement from the Landlord Mitigation Program or proceed with an unlawful detainer action, subject to any requirements of the ERRP. *Id.* The court must consider in the unlawful detainer proceeding the tenant's circumstances, including any decreased income or increased

expenses due to COVID-19, and the repayment plan terms offered. *Id.* The landlord's failure to offer a reasonable repayment plan is a defense to an unlawful detainer action. *Id.*

The law additionally provides that landlords are eligible to file certain reimbursement claims under the Landlord Mitigation Program up to $15,000 for unpaid rent. *Id.*, § 5. It also requires that the Administrative Office of the Courts contract with Dispute Resolution Centers to establish court-based eviction resolution pilot programs. *Id.*, § 7. It also provides for court-appointed counsel for indigent tenants in unlawful detainer proceedings. *Id.*, § 8.

Because the new programs in E2SSB 5160 took time to implement, Governor Inslee issued Proclamation 21-09 as a temporary bridge to meet the emergency and ensure the protections of E2SSB 5160 were respected until it was implemented. Procl. 21-09 at 3-4. Essentially, Proclamation 21-09 instructed landlords to comply with E2SSB 5160, even if

that meant waiting until the law was operationalized by their county. Procl. 21-09 at 4. It expired on October 31, 2021.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

Petitioners do not explain the grounds under RAP 13.4(b) to justify seeking review. None exists, and the Court should deny review.

A. The Decision Below Does Not Conflict with Decisions of the Supreme Court or Published Decisions of the Court of Appeals

1. The Moratorium did not interfere with the judiciary's power and the right to petition

Petitioners' claim that the Proclamation denied access to the courts finds no support in established law and does not merit review. The Moratorium wasn't about access to the courts; it was about temporarily limiting actions that would have interfered with efforts to combat COVID-19.

As this Court has recently explained, the Moratorium did not limit the judicial authority of courts to entertain eviction actions, but prohibited landlords from engaging in the act of

initiating them. *Matter of Recall of Inslee*, __Wn.2d__, 508 P.3d 635, 641 (Wash. 2022) ("Courts generally exercise their power only when a legal action is before them. Proclamation 20-19 does not limit what courts may do when an unlawful detainer action is filed but, rather, temporarily limits the filing of particular unlawful detainer actions in the first instance."). The Moratorium defined neither a judicial procedure nor a substantive cause of action. Rather, it did exactly what RCW 43.06.220(1)(h) authorizes the Governor to do in an emergency: prohibit conduct that would otherwise constrain efforts to combat a global pandemic. The Moratorium did not address, let alone constrain, judicial procedures protected by the any concept of judicial autonomy.

Petitioners only attempt to distinguish controlling cases, but the decision below is consistent with this Court's precedent—not in conflict.

2. The Governor validly exercised his emergency powers in issuing the Moratorium

The Moratorium was a paradigmatic exercise of the Governor's subsection (1) prohibitory authority and entirely within his emergency powers. The Moratorium concerned acts of private parties that the Governor deemed necessary to temporarily prohibit to "help preserve and maintain life, health, property or the public peace." RCW 43.06.220(1)(h). "Governor Inslee issued Proclamation 20-19 [the Moratorium] pursuant to that discretionary authority." *Recall of Inslee*, 508 P.3d at 640; *see* Procl. 20-19.6 at 5 (citing RCW 43.06.220(1)(h)).

Petitioners argue that the Moratorium suspended statutory rights and obligations and that the power to prohibit "activities" in RCW 43.06.220(1)(h) cannot include the power to suspend statutory rights and obligations. Pet. at 23-26. But these arguments are flawed on multiple levels and were rightly rejected by the court below.

First, while the Moratorium temporarily prohibited certain conduct (eviction and treating unpaid rent as enforceable debt),

it did not waive or suspend any statutory "obligations or limitations." RCW 43.06.220(2). The provision of the Residential Landlord Tenant Act (RTLA) allowing landlords to bring unlawful detainer actions, RCW 59.18.160(1), imposes no *obligations* or *limitations*. Landlords may choose to bring an unlawful detainer action based on nonpayment, but no statute obligates them to do so. And the RTLA provision making tenants liable for nonpayment of rent, RCW 59.12.030(3), was not waived or suspended by the Moratorium. As the Court of Appeals explained, "[t]enants still were subject to the statutory obligation to pay rent . . .; they simply could not be evicted for failing to pay rent." Op. at 15.

Second, subsection (2) does not apply to emergency suspension or waiver of any statutory obligations, but only those that fall into either the six enumerated areas or the residual clause. The Moratorium did not fall into any of those. Petitioners' contention that subsections (2) and (4) are rendered "superfluous," Pet. at 26, implies they believe subsection

RCW 43.06.220(2) provides a general authority to waive or suspend statutory obligations regardless of content. But subsection (2) deals explicitly with the "waiver or suspension of statutory obligations or limitations" in specified areas. None of those areas applies here.

Third, even if the Governor somehow could have issued some version of the Moratorium under subsection (2), that would in no way foreclose him from electing instead to issue it under his broader prohibitory powers under subsection (1). Petitioners appear to view the Governor's subsection (2) suspension/waiver powers as somehow limiting his subsection (1) prohibitory powers. Pet. at 24-26. But that crabbed reading overlooks the Legislature's intent to vest the Governor with "broad" emergency powers. Laws of 2019, ch. 472, § 1. It also ignores statutory text and structure, which indicate that the two sets of emergency powers are complementary. They are listed separately in different subsections without any disjunctive,

confirming that they are independent options—not mutually exclusive ones.

For example, subsection (1) expressly authorizes the Governor to prohibit the "sale, purchase or dispensing of alcoholic beverages" while subsection (2) simultaneously empowers him to waive or suspend statutory obligations or limitations concerning "[p]ermits for industrial, business, or medical uses of alcohol." RCW 43.06.220(1)(e), (2)(f). These parallel provisions would make no sense if the Legislature had intended the subsection (2) powers to cabin the Governor's subsection (1) powers. This statutory construction would eviscerate the Governor's express subsection (1) powers, doing violence to the statute's plain meaning and undermining its larger purpose. Even if the Governor could have suspended certain RLTA provisions under his subsection (2) powers, nothing in RCW 43.06.220 prevented him from instead exercising his subsection (1) powers to protect public health and welfare by prohibiting evictions.

RCW 43.06.220(1)(h) plainly authorized the Governor to issue the Proclamations providing for the Moratorium.

3. The emergency powers statute is a valid legislative delegation

Petitioners contend that RCW 43.06.220(1)(h) violates the constitutional prohibition of delegation of legislative authority. Pet. at 27. But, as the Court of Appeals explained, the Proclamation did not suspend any statutory "obligations" or "limitations," and the Governor prohibited certain activities expressly authorized by RCW 43.06.220(1)(h). Op. at 16.

Precedent also forecloses Petitioners' argument. In *Cougar Business Owners Association v. State*, this Court held that the emergency powers statutes—including RCW 43.06.220—"evidence a clear intent by the legislature to delegate requisite police power to the governor in times of emergency," and that "*[t]he necessity for such delegation is readily apparent*." 97 Wn.2d 466, 474, 647 P.2d 481 (1982), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 682 (2020) (emphasis added). Recognizing that

"in times of natural catastrophe or civil disorder, immediate and decisive action by some component of state government is essential," and that "the executive is inherently better able than the legislature to provide this immediate response," this Court observed that "state chief executives have frequently been given substantial discretionary authority in the form of emergency powers to deal with anticipated crises." *Id.* at 474-75 (cleaned up). Since *Cougar*, courts have upheld the Governor's exercise of these emergency powers during the COVID-19 crisis. *See, e.g.*, *Colvin v. Inslee*, 195 Wn.2d 879, 896, 467 P.3d 953 (2020); *Slidewaters LLC v. Dep't of Lab. & Indus.*, 4 F.4th 747, 756 (9th Cir. 2021) ("delegation of power by the legislature to the executive to act in a time of emergency . . . does not present separation of powers concerns[ ]") (citing *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972)). Once again, Petitioner fails to show any conflict with precedent that would justify the Court's review.

In any event, Petitioners' delegation argument fails under this Court's delegation standard because (1) "'the legislature has provided standards or guidelines which define in general terms what is to be done'" and has identified the official "'or administrative body . . . to accomplish it'"; and (2) "'procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.'" *Auto. United Trades Org. v. State*, 183 Wn.2d 842, 859-60, 357 P.3d 615 (2015) (quoting *Barry*, 81 Wn.2d at 159).

Under *Barry*'s first requirement, RCW 43.06.220 specifies the relevant governmental actor: the Governor. And it sets forth what is to be done—prohibit activities—based on "standards or guidelines" framed in "general terms." *Barry*, 81 Wn.2d at 159. This is a generous standard because "one of the legislative powers granted by [the state and federal constitutions] is the power to determine the amount of discretion an [executive actor] should exercise in carrying out the duties granted to it by the [L]egislature." *Id.* at 162.

Turning to the second *Barry* requirement, procedural safeguards exist to constrain the Governor's RCW 43.06.220 powers. First, a person prosecuted under RCW 43.06.220(5) for violating an emergency proclamation may challenge its validity, with all the "statutory and common-law procedural safeguards which are normally afforded a defendant in a criminal prosecution." *State v. Crown Zellerbach Corp.*, 92 Wn.2d 894, 901, 602 P.2d 1172 (1979). Second, a party with standing may file a declaratory judgment action challenging a proclamation pre-enforcement—just as the Petitioners did here. RCW 7.24.010.

Petitioners' contention that the Governor's proclamations must be subject to rulemaking procedures, including notice and comment, is not supported by precedent. The Court "repeatedly ha[s] found adequate procedural safeguards" in the availability of "judicial review of an agency's decision[.]" *McDonald v. Hogness*, 92 Wn.2d 431, 446, 598 P.2d 707 (1979) (citing cases). Practically, imposing administrative rulemaking requirements

would be absurd in the context of emergency proclamations and would hinder the Governor from promptly acting where "immediate and decisive action by some component of state government is essential[.]" *Cougar*, 97 Wn.2d at 474.

The emergency powers statute does not violate the separation of powers doctrine. To the contrary, for a court to "dictate how the executive branch must exercise these discretionary powers" would "usurp the authority of the coordinate branches of government." *Colvin*, 195 Wn.2d at 898 (cleaned up). The Court of Appeals correctly decided the delegation claim.

4. The public officer venue statute mandated venue in Thurston County

Nor does this case merit review based on the argument that the court below erred in affirming the transfer of venue from Lewis County to Thurston County. The Court of Appeals followed this Court's resolution of the public officer venue question at issue here. *Johnson v. Inslee*, 198 Wn.2d 492, 496-97, 496 P.3d 1191 (2021).

Petitioners argue that venue should be permissible in Lewis County, as the county where the Petitioners' rental properties are located. Pet. at 33. They derive this argument from RCW 4.92.010(3), as "[t]he county in which the real property that is the subject of the action is situated." But the now-expired Moratorium is the subject of this action—not real property.

B. The Decision Below Followed Analogous U.S. Supreme Court Precedent

1. The Moratorium did not effect an unconstitutional taking

The decision below is consistent with state and federal law on physical takings—the only kind of taking argued by Petitioners. The Proclamation temporarily restricted Petitioners' *use* of their property, preventing them from evicting—in the midst of a deadly pandemic—the tenants whom they had *voluntarily invited*. This kind of regulation on voluntary relationships cannot constitute a physical taking.

The key here is that Petitioners voluntarily invited their tenants onto their property, subjecting the use of their property to

tenancy and regulation of its use. Petitioners did not suffer any trespass and were not forced to accept tenants, but they argue that their tenants' "nonpayment of rent" resulted in an "unwanted physical occupation." Pet. at 19. *Yee*, however, confirms the maxim earlier established by *Florida Power*: "it is the invitation, not the rent, that makes the difference," *Yee v. City of Escondido*, 503 U.S. 519, 532 (1992); *see FCC v. Fla. Power Corp.*, 480 U.S. 245 (1987).

Petitioners too narrowly paint *Yee* as a rent control case. *Yee* involved a combination of state and municipal law that restricted evictions as well. Namely, the state law "limit[ed] the bases upon which a park owner may terminate a mobile home owner's tenancy," which, together with the municipal ordinance, prevented park owners from evicting owners of mobile homes to secure higher-paying tenants. *Yee*, 503 U.S. at 524; *see Gallo*, 2022 WL 2208934, at *9 ("the plaintiffs in *Yee* also alleged they were unable to evict current tenants"). Here too, the Proclamation temporarily prevented Petitioners from replacing

their tenants to obtain more rent. In both situations, the government regulated the terms on which property owners could terminate the relationships they had voluntarily started with their tenants. That is not a physical taking.

True, the park owners in *Yee* could pursue eviction for nonpayment of rent. But as long as the park owners wished to rent out their property, they could not evict their rent-controlled tenants. And the fact that a park owner in *Yee* could evict a mobile home owner for other reasons—such as the "owner's desire to change the use of his land"—likens that case to this one, as Petitioners here were likewise free to evict their tenants for that reason. *Yee*, 503 U.S. at 524.

The Court of Appeals did not "miss[]" or "ignore[]" the fact that *Yee* involved rent control or that park owners had a limited right to evict. Pet. at 17-19. The Court of Appeals carefully and accurately recounted the facts at issue in *Yee*, recognizing that the municipal ordinance "dictated the rent the mobile park owners could charge" and that the state statute

required park owners "to continue renting to a mobile home purchaser as long as the purchaser had the ability to pay rent." Op. at 21. It was this combination that led the park owners to argue that "the right to physically occupy their property—at submarket rent—essentially had been transferred indefinitely to the mobile home owners and their successors." *Id.* The Court of Appeals correctly read *Yee*'s emphasis on the importance of the voluntary invitation that initiates the landlord-tenant relationship. *See* Op. at 22.

Yee remains good law for that essential point: landlords who voluntarily accept tenants cannot maintain takings claims based on a theory that the occupation of the tenants they invited amounts to a physical occupation. Numerous other courts have read *Yee* this way and have rejected similar takings claims. *See supra* note 1.

Petitioners overstate their arguments: the Moratorium—now ended—did not establish a "once invited, you can stay forever" rule. Pet. at 20. The Moratorium restricted eviction only

temporarily, and it provided escape valves, permitting eviction if landlords wished to sell or occupy their property or if tenants threatened the health or safety of others. Op. at 3-4. The notion that the Moratorium extended Petitioners' invitations "forever" is overt hyperbole, as the Moratorium expired at the end of June 2021. Op. at 1. It is doubtful Petitioners have suffered a taking in any sense, because under the Moratorium they were able to pursue unpaid rent (which continued to accrue) and evict tenants under certain circumstances.

The Takings Clause simply does not require the State to compensate property owners for every regulation on the use of their property. Such regulations are more commonly challenged as regulatory takings, a theory not pled here. *Yee* and *Florida Power* establish that Petitioners' physical taking theory is unviable because the physical occupation began with the Landlord's voluntary invitation, not with any action by the State. The Court of Appeals thus correctly held that the Proclamation effected no taking.

2. The Moratorium comported with the Contracts Clause

The appellate court held that the Moratorium did not unconstitutionally impair Petitioners' contractual relationships with their tenants. But Petitioners wrongly argue that this decision is "out of step with federal law" because the Moratorium should have required tenants to pay rental compensation during its interim.[3] Pet. at 31.

None of the cases Petitioners cite requires this inflexible rent payment rule. In *Blaisdell*, the U.S. Supreme Court upheld a moratorium on foreclosures in part because it "secure[d] to the mortgagee the rental value of the property." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 432 (1934). But as the Court later explained, *Blaisdell* identified several factors that supported that moratorium's constitutionality: The law contained a declaration of emergency, "protect[ed] a basic societal interest," was "appropriately tailored," and imposed "reasonable"

[3] Petitioners made this argument for the first time in their motion for reconsideration.

conditions "limited to the duration of the emergency." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242 (1978); *see Blaisdell*, 290 U.S. at 444-47. *Blaisdell* specifically rejected the notion that Contracts Clause analysis should proceed with a "literal exactness like a mathematical formula." 290 U.S. at 428. Instead, "[e]very case must be determined upon its own circumstances." *Id.* at 430. For this reason, the Ninth Circuit rejected the same argument made by Petitioners here, holding that "there is no apparent ironclad constitutional rule that eviction moratoria pass Contracts Clause scrutiny only if rent is paid during the period of the moratoria. Instead, each of the cases [plaintiff] cites turned on its own facts and circumstances." *AALAC*, 10 F.4th at 915; *id.* ("Nothing in *Blaisdell* suggests that a 'reasonable rent' requirement was dispositive.").

The Court of Appeals opinion follows federal case law; there is no reason for this Court's review.

C. The Issues in the Petition Are Moot

Petitioners seek review of the Moratorium, which expired on its own terms and by the terms of E2SSB 5160 on June 30, 2021. *See* Procl. 20-19.6; E2SSB 5160, § 4(1).[4]

That the Legislature has subsequently acted to protect tenants from evictions further underscores this point. The Moratorium under Proclamation 20-19, as amended—the subject of this Petition—ended over a year ago. If Petitioners are aggrieved by E2SSB 5160, they can challenge it directly in a new lawsuit. The Court should not use its bandwidth on reviewing a challenge to an expired proclamation.

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[4] The substantial and continuing public interest exception to mootness does not apply because there is no reasonable expectation that Governor Inslee will issue the same Moratorium in the future. *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004). The Governor did not extend the Moratorium past its expiration date in June 2021 even amidst the surges of the Delta and Omicron variants, and the Legislature ended it by statute. *Cf. Brach v. Newsom*, __F.4th__, 2022 WL 2145391, at *5 (9th Cir. June 15, 2022) (en banc) (challenged COVID-19-related measure unlikely to recur).

V. CONCLUSION

The Court of Appeals decision does not warrant further review under RAP 13.4(b). The Court should deny review.

This document contains 5,000 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 5th day of July 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed in the Washington State Supreme Court and electronically served according to the Court's protocols for electronic filing and service upon the following:

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DATED this 5th day of July 2022, at Tacoma, Washington.

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