

No. 23-1148

In the
Supreme Court of the United States

G-MAX MANAGEMENT, INC., *et al.*,
Petitioners,

v.

STATE OF NEW YORK, *et al.*,
Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

**SUPPLEMENTAL BRIEF
FOR PETITIONERS**

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September 10, 2024

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SUPPLEMENTAL BRIEF

Pursuant to Rule 15(8), Petitioners file this brief of supplemental authority to apprise the Court of two recent developments relevant to their pending petition for a writ of certiorari. First, on August 7, 2024, the U.S. Court of Appeals for the Federal Circuit issued a precedential decision that further deepens the circuit split over the important constitutional question of when restrictions on a landlord’s right to evict tenants effect a physical taking. Second, on August 13, 2024, the Supreme Court of the State of New York issued an order staying the state-court case brought by Petitioners Ordway and Guerrieri pending this Court’s review.

1. As the petition explained, the Second Circuit’s decision in this case deepened a clear division in the lower courts over how to reconcile this Court’s precedents in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), and *Yee v. City of Escondido*, 503 U.S. 519 (1992). *See* Pet. 13–15. The Federal Circuit’s decision in *Darby Development Co. v. United States*, 2024 WL 3682385 (Fed. Cir. Aug. 7, 2024), further entrenches that conflict over an “important and pressing” question of constitutional law that only this Court can resolve. *74 Pinehurst LLC v. New York*, 2024 WL 674658, at *1 (U.S. Feb. 20, 2024) (Thomas, J., statement respecting denials of certiorari).

In *Darby*, owners of residential rental properties challenged an eviction moratorium issued by the Centers for Disease Control and Prevention in September 2020. 2024 WL 3682385, at *1. That moratorium temporarily halted evictions for nonpayment of rent, but “did not prevent evictions for

certain reasons unrelated to rent,” *id.* at *1 & n.2, including tenant misconduct such as engaging in criminal activity, violating any applicable building code, or violating any contractual obligation other than the timely payment of rent, *see* 85 Fed. Reg. 55,292, 55,294 (Sept. 4, 2020). The landlords argued that the moratorium deprived them of their “fundamental right to exclude” and thus constituted a physical taking under *Cedar Point. Darby*, 2024 WL 3682385, at *2, *12 (quotation marks omitted). The federal government, in turn, relied on the same untenably expansive reading of *Yee* advocated by Respondents and embraced by the Second and Ninth Circuits, asserting that “the Order could not constitute a physical taking because it merely regulated the landlord-tenant relationship.” *Id.* at *3, *12.

Noting that “[t]he parties’ dispute over whether the complaint stated a physical-taking claim centers largely on two Supreme Court cases,” *id.* at *12—*Cedar Point* and *Yee*—the Federal Circuit applied *Cedar Point* and distinguished *Yee*. “[A]t a fundamental level,” the court explained, “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.” *Id.* at *13. At the same time, the Federal Circuit squarely rejected the government’s expansive interpretation of *Yee*, holding that “*Yee* ... does not control here.” *Id.*

Like Respondents and the Second Circuit here, the government sought to invoke *Yee*, and distinguish

Cedar Point, on the ground that the “tenant had been voluntarily ‘invited’ onto” the landlord’s property. *Id.* at *14. The Federal Circuit debunked that fallacy, explaining that “[i]f a previous voluntary invitation (by itself) controlled the analysis, that would essentially mean that *all* government actions implicating the landlord-tenant relationship are immune from being treated as physical takings.” *Id.* That tenants “were at one point ‘invited’” could not justify “their continued, government-compelled occupation.” *Id.* Like Petitioners here, the Federal Circuit also distinguished *Yee* on the ground that “the laws at issue in *Yee* expressly *permitted* eviction” after a period of notice to tenants. *Id.* at *13. And despite the potential routes to an eviction left open by the moratorium, the Federal Circuit concluded that the landlords “stated a physical-taking claim requiring just compensation.” *Id.* at *14.

2. Petitioners’ reply brief, addressing a purported vehicle concern raised by Respondents, explained that a separate state-court case brought by Petitioners Ordway and Guerrieri does not present any obstacle to this Court’s review. *See* Reply 1, 7–8. Petitioners also noted that “[i]n any event, Petitioners anticipate that the state-court case will be stayed pending this Court’s review,” *id.* at 1, pursuant to an agreement with the other state-court party, *id.* at 8. The state court has now issued an order approving the parties’ joint stipulation and staying the case pending this Court’s decision on the petition for certiorari and, if certiorari is granted, this Court’s decision on the merits. *See* Supp.App.1–2. The state court’s entrance of the anticipated stay further puts to rest any

purported vehicle concerns related to the existence of the separate state-court action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 10, 2024

SUPPLEMENTAL APPENDIX

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Appendix A

Stipulation Staying Action of the
Supreme Court of the State of New York
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Appendix A

**SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF KINGS**

Index No. 502855/22

JANE ORDDAY and DEXTER GUERRIERI,

Plaintiffs,

-against-

WILLIAM CARLIN,

Defendant.

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NYSCEF Doc. No. 12

Index No. 502855/2022

Received NYSCEF: 07/15/2024; 08/19/2024

NYSCEF Doc. No. 13

STIPULATION STAYING ACTION

The parties herein, and their respective counsel, stipulate and agree as follows:

1. The parties agree that discovery is complete.
2. The New York State Legislature passed the Housing Stability and Tenant Protection Act of 2019 (the “HSTPA”) — New York’s 2019 amendments to the State’s Rent Stabilization Law, including to the Owner/Occupancy Provision.

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3. The constitutionality of the changes to the Owner/Occupancy Provision set forth in the HSTPA is being challenged in the pending proceeding before the Supreme Court of the United States, *G-Max Management Inc., et al., v, New York, et al.*, Case No. 21-2448 (“G-Max”). Defendant disputes that the outcome of G-Max will affect this action. Plaintiff believes that the outcome of G-Max will affect this action.

4. The parties agree to stay this action pending a decision by the Supreme Court of the United States on whether to grant *certiorari*.

5. If *certiorari* is denied, then the parties agree as follows:

a. Plaintiff will file a Note of Issue within thirty (30) days after a decision is issued denying *certiorari*.

b. The parties will simultaneously file their respective motions for summary judgment within one hundred and twenty (120) days after the note of issue is filed with opposition to be filed twenty-one (21) days after the motions are filed and reply to be filed within thirty (30) days after the motions are filed.

6. If *certiorari* is granted, the parties agree to further stay this action pending a decision by the United States Supreme Court on the merits of the constitutional challenge.

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Dated:
New York, New York
July 10, 2024

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Dated:
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DATED: 8/13/24

SO ORDERED: KAL

HON. KATHERINE A LEVINE
JUSTICE SUPREME COURT

HON. KATHERINE A LEVINE
JUSTICE SUPREME COURT

KINGS COUNTY CLERK
FILED

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