No. 23-1148

IN THE

Supreme Court of the United States

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

Petitioners,

v.

NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION OF RESPONDENTS N.Y. TENANTS AND NEIGHBORS AND COMMUNITY VOICES HEARD

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INTRODUCTION

Pursuant to Rule 15.8, Intervenor Respondents N.Y. Tenants and Neighbors and Community Voices Heard respectfully submit this supplemental brief in response to the supplemental brief filed by Petitioners on September 10, 2024. Petitioners argue that the Federal Circuit's decision in *Darby Development Co., Inc. v. United States*, 112 F.4th 1017 (Fed. Cir. 2024), and the New York Supreme Court's stay of proceedings in Petitioners Ordway and Guerrieri's action against their tenant, support their arguments for review of the decision below. Petitioners are wrong.

ARGUMENT

I. *Darby* Does Not Create or Contribute to Any Circuit Split on Physical Takings

The Federal Circuit's decision in *Darby* does not, as Petitioners contend, "deepen[]" any "division in the lower courts" over the application of this Court's physical-takings jurisprudence in the landlord-tenant context. Pet'rs.' Suppl. Br. 2. As Respondents have explained, the decision below did not conflict with those of any other circuits at the time it was issued. *See* Intervenor Resps.' Br. 19–21; State Resps.' Br. 22–23. *Darby* does not create any such split, as the Federal Circuit itself acknowledged in the opinion.

Darby concerned a nationwide order issued by the Centers for Disease Control and Prevention ("CDC") in September 2020 "temporarily halting residential

evictions," including for nonpayment of rent. 112 F.4th at 1020. The eviction moratorium remained in place until October 2021. *Id.* at 1021. Residential landlords sued the government and alleged that, "by preventing them from evicting non-rent-paying tenants," the order "constituted a physical taking." *Id.* at 1022. The district court dismissed the complaint on the ground that "a takings claim cannot be premised on government action that was unauthorized," reasoning that this Court's decision in *Alabama Association of Realtors v. Department of Health and Human Services*, 594 U.S. 758 (2021), "essentially confirmed that the [o]rder was unauthorized." *Darby*, 112 F.4th at 1022.

On appeal, the Federal Circuit reversed, holding that the CDC's order "was 'authorized' in the way takings law contemplates," *id.* at 1027, and further held that the "complaint stated a claim for a physical taking by the government," *id.* at 1033. With respect to the latter holding, the court reasoned that the plaintiffs had adequately pled that the CDC order "resulted in government-authorized physical invasion … by removing [landlords'] ability to evict non-rent-paying tenants." *Id.*at 1034. The court found that "forcing [landlords] to house non-rent-paying tenants (by removing their ability to evict)" was comparable to "forcing property owners to occasionally let union organizers on their property," *id.* at 1035, which this Court found to constitute a physical taking in *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). The Federal Circuit distinguished *Yee v. City of Escondido*, 503

U.S. 519 (1992), on the ground that "the laws at issue in *Yee*," unlike the CDC's order but like the Rent Stabilization Law at issue here, "expressly *permitted* eviction for nonpayment of rent." *Darby*, 112 F.4th at 1035 (emphasis in original).

In reaching its conclusion, the Federal Circuit itself noted that it was creating no split in authority with the Second Circuit. The Federal Circuit expressly noted the narrow implications of its decision given the "highly unusual" and "unprecedented" nature of the CDC's order, which "outright prevented evictions for nonpayment of rent." *Id.* at 1036–37. The court contrasted the CDC's order with "run-of-the-mill law[s] implicating the landlord-tenant relationship" and quoted another Second Circuit opinion upholding the Rent Stabilization Law against a taking challenge for the "well settled" rule "that limitations on the termination of a tenancy do not effect a [physical] taking *so long as there is a possible route to an eviction*." *Id.* at 1037 (quoting *Cmty. Hous. Improvement Program v. City of New York*, 59 F.4th 540, 552 (2d Cir.) (emphasis added by the Federal Circuit), *cert. denied*, 144 S. Ct. 264 (2023)).

Because *Community Housing* largely controlled the physical-taking aspect of the decision below, *see* Pet. App. 5, the Federal Circuit's reference to *Community Housing* as concerning a "run-of-the-mill law implicating the landlord-tenant relationship," 112 F.4th at 1037, applies equally to the decision below. Like "the laws at issue in *Yee*," and unlike the CDC order, the Rent Stabilization Law "expressly *permit*[*s*]

eviction for nonpayment of rent." *Id.* at 1035. Given the material differences between the CDC's order and the Rent Stabilization Law's eviction regulations, which the Federal Circuit recognized but Petitioners carefully avoid mentioning, there is no split between *Darby* and the decision below.

II. The Stay of Petitioners Ordway and Guerrieri's State-Court Action Exacerbates Existing Vehicle Problems

Petitioners repeat their argument, made in reply, that Petitioners Ordway and Guerrieri's pending state-court action against their last remaining rent-stabilized tenant, *Ordway v. Carlin*, Index No. 502855/2022 (N.Y. Sup. Ct.), is not an "obstacle to this Court's review," and they further argue that the stay of those proceedings should put the vehicle concerns raised by Respondents "to rest." *See* Pet'rs.' Suppl. Br. 3–4; Intervenor Resps.' Br. 36–37; State Resps.' Br. 14–15. Petitioners are mistaken.

Ordway and Guerrieri commenced their state-court action in January 2022, in the midst of appellate briefing below. *See* Intervenor Resps.' Br. 36. In that pending action, Ordway and Guerrieri contend that the 2019 restrictions on evictions for personal use—the sole basis for their physical-taking claim, *see* Pet. 9–10, 11–12, 16, 26—do not apply to them, and they seek relief permitting them to recommence eviction proceedings that they had voluntarily discontinued in

2019.[1] Even though the Petition expressly references the 2019 discontinuance, *see* Pet. 10, Petitioners have not explained, in either their reply or supplemental brief, why the Petition carefully omitted any mention of the pending action, or why they chose to wait two and a half years after commencing it, three months after filing their Petition, and a week after filing their reply to finally seek a stay from the state court, *see* Pet. Suppl. App. 1.

In any event, Ordway and Guerrieri's claim in state court that the 2019 amendments do not apply to them defeats their standing to pursue their physical-taking claim in this case, which is based entirely on the 2019 amendments. *See* Pet. 16 ("Before the 2019 Act, [Ordway and Guerrieri] were entitled to recover a unit for their own personal use …."). "By requiring the plaintiff to show an injury in fact, Article III standing screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 386 (2024) (holding that unregulated plaintiffs lacked standing to pursue their claims).

Even if Ordway and Guerrieri had standing, their physical-taking claims are premature because they may still obtain the relief they seek—eviction of their last remaining rent-stabilized tenant—through their

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[1] *See* State Appellees' Fed. R. App. P. 28(j) letter, *G-Max Mgmt., Inc. v. New York*, No. 21-2448 (2d Cir. May 3, 2022), ECF No. 105 Ex. A (state-court complaint).

pending state action. It is "particularly important in takings cases to adhere to [this Court's] admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (quoting *Hodel v. Va. Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 294–95 (1981)). In *Hodel* and *Pennell*, this Court deemed takings challenges premature because the property owners had not followed the available processes for relief from the restrictions they were challenging. *Id.* The same is true here.

Petitioners argue "that 'exhaustion of state remedies is not a prerequisite to an action under ... § 1983,'" Reply 7 (quoting *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 479 (2021) (per curiam)), but they ignore the conditional nature of that rule: "administrative 'exhaustion of state remedies' is not a prerequisite for a takings claim *when the government has reached a conclusive position*," *Pakdel*, 594 U.S. at 480 (emphasis added) (citation omitted). Here, the state has not reached any position on Ordway and Guerrieri's arguments that they are not bound by the personal-use restrictions on eviction enacted in 2019, may recommence eviction proceedings, and are entitled to compensation from the tenant for his use and occupancy during the pendency of litigation.[2]

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[2] *See id.* at 8–12.

Petitioners also err in arguing that prevailing in the state-court action "would not fully redress [Ordway and Guerrieri's] constitutional injury" based on "the years the government has forced them to accommodate the unwanted tenant at below-market rents." Reply 8. In their state-court complaint, however, Ordway and Guerrieri seek declarations nullifying both their November 17, 2019 lease renewal and their November 19, 2019 stipulation of discontinuance as to their eviction proceedings on the ground that the eviction restrictions enacted in 2019 cannot be applied to them.[3] Should they prevail and obtain such relief, they cannot contend that those same restrictions compelled any occupation in the first place.[4]

Far from putting these serious vehicle problems to rest, the stay of proceedings in state court exacerbates them. If the Petition is granted, this Court will necessarily be deprived of the opportunity to examine a factual application of challenged laws at the core of Petitioners' claims. The Court would also expend valuable time and resources opining on the sufficiency of pleadings challenging laws that will not apply to some

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[3] *See id.* at 9–11.

[4] Petitioners contend that "Respondents do not argue that the state-court suit could *moot* Ordway and Guerrieri's takings claim." Reply 8. Not so. Intervenor Respondents argued that the possible favorable outcome of Ordway and Guerrieri's claims in state court deprive them of standing, *see* Intervenor Resps.' Br. 37, and mootness is generally "described as standing set in a time frame," *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (cleaned up).

Petitioners and seeking relief that will not be available to them should they ultimately prevail in their pending state suit once the stay is lifted.[5] As in *Pennell*, this case "does not present a sufficiently concrete factual setting for the adjudication of the takings claim [Petitioners] raise." 485 U.S. at 10.

Granting the Petition would also raise federalism concerns.

> In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary? When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question.

Arizonans, 520 U.S. at 75 (footnote omitted). "Abstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976). Here, Petitioners Ordway and Guerrieri's state-court action, if successful, might moot their federal physical taking claim by rendering the 2019 amendments'

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[5] Ordway and Guerrieri's tenant thus correctly "disputes that the outcome of [this case] will affect [the state-court] action." Pet. Suppl. App. 2 ¶ 2.

eviction restrictions inapplicable to them. Considering the merits of their federal claim—even as to the sufficiency of the pleadings—while the state-court action is pending would disrespect the state court's authority to determine the applicability of the challenged law in the first instance and unnecessarily threaten liability against state and local government actors based on a law that may not even apply to the challengers.

* * *

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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