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

SUPPLEMENTAL BRIEF IN OPPOSITION FOR STATE RESPONDENTS

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SUPPLEMENTAL BRIEF IN OPPOSITION FOR STATE RESPONDENTS

State Respondents[1] submit this brief in response to petitioners' September 10, 2024, supplemental brief. Neither of the two developments presented by petitioners supports certiorari. First, the Federal Circuit's decision in *Darby Development Co. v. United States*, 112 F.4th 1017 (Fed. Cir. 2024), does not conflict with the decision below. Second, the state court's decision to grant the request of petitioners Ordway and Guerrieri to stay their parallel state-court action does not resolve the insuperable vehicle problem posed by that ongoing litigation.

1. In *Darby*, several landlords challenged the federal government's COVID-19 eviction moratorium, which barred evictions for nonpayment of rent, as a physical taking requiring just compensation under the Takings Clause. *Id.* at 1022. The Federal Circuit determined that the landlords stated a physical takings claim because "forcing them to house non-rent-paying tenants" could be deemed an infringement on their right to exclude. *Id.* at 1035. The court thus distinguished *Yee v. City of Escondido*, 503 U.S. 519 (1992), which rejected a physical takings challenge to a law that limited the available bases for terminating a tenancy yet "expressly *permitted* eviction for nonpayment of rent." *Darby*, 112 F.4th at 1035. While *Yee* "was fundamentally a rent-control case" that implicated the State's broad authority to regulate the economic relationship between landlords

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[1] State Respondents include State of New York, New York Attorney General Letitia James, Division of Housing and Community Renewal (DHCR) Commissioner RuthAnne Visnauskas, and DHCR Deputy Commissioner Woody Pascal.

and tenants, *Darby* involved "an outright prohibition on evictions for nonpayment of rent." *Id.*

The eviction moratorium at issue in *Darby* is nothing like New York's Rent Stabilization Law (RSL), which allows landlords to exclude lease violators, including for nonpayment of rent. *See* 9 N.Y.C.R.R. §§ 2524.1-2524.3; N.Y. Real Prop. Acts & Proceedings Law § 711. As respondents have explained, the RSL gives landlords substantial eviction powers and further ensures that they can receive a reasonable return. See Br. in Opp'n for State Resp'ts ("State BIO") 6-7, 20. In contrast to the "unusual" and "unprecedented" nature of the regulation at issue in *Darby*, 112 F.4th at 1036, the RSL lies comfortably within the State's "'broad power to regulate housing conditions in general and the landlord-tenant relationship in particular,'" *see Yee*, 503 U.S. at 528-29 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).[2]

Darby itself made clear that it was not creating a circuit split. The Federal Circuit expressly distinguished the Second Circuit's rejection of physical takings challenges to the RSL on the ground that the RSL, while placing limitations on the termination of a tenancy, preserves landlords' eviction rights. *See Darby*, 112 F.4th at 1037 (citing *Community Housing Improvement Program v. City of New York*, 59 F.4th 540 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 264 (2023)).

Despite petitioners' contrary refrain (*e.g.*, Supp. Br. 2-3), respondents have never argued that regulations of

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[2] As respondents previously explained, petitioners similarly failed to demonstrate a conflict with *Heights Apartments LLC v. Walz*, 30 F.4th 720 (8th Cir. 2022)—another COVID-19-related eviction-moratorium case arising under facts similar to *Darby*. See State BIO 22-23.

the landlord-tenant relationship are categorically immune from being treated as physical takings, nor did the decision below embrace such a rule (see State BIO 17). Instead, the Second Circuit correctly recognized that the availability of exits from the rental market will foreclose a facial physical takings claim and that, to succeed on an as-applied claim, a landlord must demonstrate that the challenged law prevented them from "evicting actual tenants," *74 Pinehurst v. New York*, No. 22-1130, 2024 WL 674658, at *1 (U.S. Feb. 20, 2024) (statement of Thomas, J.). (*See* Pet. App. 6-8.) In *Darby*, it was undisputed that the eviction mortarium, while in effect, prevented landlords from evicting actual tenants. *See* 112 F.4th at 1020-21 & n.2. Petitioners failed to make such a showing here. (Pet. App. 8.)

2. The stay of the parallel state-court action obtained by petitioners Ordway and Guerrieri does not "put[] to rest" (Supp. Br. 3) the vehicle problems posed by that ongoing litigation. The state-court action concerns legal issues antecedent to petitioners' federal takings claims, and the fact that petitioners have voluntarily *delayed* resolution of these issues by successfully seeking a stay only underscores that their claims are unripe.

In 2018, Ordway and Guerrieri commenced a state-court holdover proceeding against a tenant occupying a unit they wished to reclaim for personal use. (Pet. App. 191.) In 2019, the New York Legislature enacted the Housing Stability and Tenant Protection Act (HSTPA), which adjusted the relevant standard for personal-use reclamations. Ch. 36, pt. I, § 2, 2019 N.Y. Laws 134, 147. A few months later, Ordway and Guerrieri voluntarily discontinued the state-court holdover proceeding, apparently believing that they could not prevail under the new standard. (CA2 ECF No. 105, Ex. A (Verified Compl.)

¶¶ 22-27). They subsequently initiated this federal action, alleging in relevant part that the HSTPA effected a taking of their property by preventing them from recovering the disputed unit. (Pet. App. 192-193.)

After the district court dismissed this federal action—and while petitioners' appeal was pending in the Second Circuit—Ordway and Guerrieri filed a second state-court action seeking to revive the discontinued holdover proceeding and to annul their tenant's renewal lease. In the second state-court action, Ordway and Guerrieri argued that intervening New York case law foreclosed the retroactive application of the HSTPA to their holdover proceeding, initially commenced prior to the HSTPA's enactment. Accordingly, Ordway and Guerrieri argued, the more lenient pre-HSTPA legal standard should apply. (CA2 ECF No. 105, Ex. A (Verified Compl.) ¶¶ 30-57.) After litigating the second state-court action through discovery, Ordway and Guerrieri last month stipulated to stay that action until the disposition of this petition for certiorari. (Supp. App. 1-3.)

The stay does not aid petitioners. Should Ordway and Guerrieri obtain a state-court ruling that the HSTPA does not apply to them, their challenge to the HSTPA's personal-use provision is moot: The HSTPA cannot have effected a taking of petitioners' property if it never applied in the first place. In the state-court action, Ordway and Guerrieri seek a declaration that they should be allowed to recover the disputed unit under the pre-HSTPA framework—which they do not challenge in this case. Thus, the problem is not that petitioners have failed to exhaust state-court remedies for a completed taking (*see* Reply Br. 7), but rather that the challenged statute has yet to be applied to peti-

tioners' property at all.[3] Under these circumstances, Ordway and Guerrieri's claims are unripe. *See Yee*, 503 U.S. at 528; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296-97 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] In addition, if Ordway and Guerrieri lose their state-court bid to proceed under the pre-HSTPA legal framework, their claims would still be unripe because they never attempted to utilize the HSTPA's personal-use provision. See State BIO 14.