No. 11-496

IN THE

Supreme Court of the United States

JAMES D. HARMON, JR. and JEANNE HARMON,

Petitioners,

v.

JONATHAN L. KIMMEL, in his official capacity as MEMBER AND CHAIR OF THE NEW YORK CITY RENT GUIDELINES BOARD, CITY OF NEW YORK; DARRYL C. TOWNS, in his official capacity as COMMISSIONER, NEW YORK STATE HOMES AND COMMUNITY RENEWAL,

Respondents.

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

REPLY BRIEF

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MISCELLANEOUS

Respondents[1] confuse the issues with their scattershot assertions that rent stabilization concerns merely "landlord tenant relations," "economic regulation," "price controls" and "economic liberties," and is just a matter of political and legislative policy. They disregard controlling precedent of this Court and seemingly concede that the Court of Appeals was mistaken. They also each acknowledge the existence of the "different case" standard set forth in *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992). However, despite having argued otherwise to this Court and to the Court of Appeals in prior litigation, the State now argues that rent stabilization does not present the elements of the "different case" standard. The conflicts with decisions of this Court and the circuit split, and the reserved issue in *Yee* remain crystal clear notwithstanding the smoke of respondents' arguments.

The fundamental question presented is whether New York's possessory rent regulation scheme as applied to the Harmons is unconstitutional. A law that enables uninvited tenants and their successors to occupy the Harmons' home over their objection, for as long as they please, could never pass constitutional muster. Permanent dispossession is nine-tenths of this law. For the Harmons, there is no way out; not for their own family use, not by demolition, not by withdrawal from the market and not by any other use.

Justice Alito asked recently in another case, "...if you related the facts of this case as they come to us to an ordinary homeowner, don't you think most ordinary homeowners would say this kind of thing can't happen in

1. We will refer to the State Respondent Darryl C. Townes as the State and to the City Respondent Jonathan L. Kimmel as the City.

the United States?"[2] The Harmons respectfully request this Court to grant their petition to say that it cannot.[3]

I. Judicial Review Is Appropriate Because this Court's Post-World War I Decisions Requiring an Emergency Remain Controlling Authority

Judicial review is necessary and appropriate. In *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924), which respondents completely ignore, this Court stressed the need for continued judicial vigilance to examine possessory rent regulation schemes to assure that such laws do not extend past the duration of a real emergency.

> [A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. (citation omitted)... A law depending upon the existence of an emergency... to uphold it may cease to operate if the emergency ceases... even though valid when passed.

Id. at 547-548.[4] The truth matters.[5]

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2. Transcript of oral argument, *Sackett v. EPA*, docket no. 10-1062 (January 9, 2012).

3. Certiorari may be granted upon a summary order. *See*, *Boyle v. United States*, 556 U.S. 938 (2009).

4. Following the directive in *Chastleton*, Washington, D.C.'s rent control law was found unconstutional because "there was no constitutional basis for the legislation, the Supreme Court having declared the emergency at an end... ." *Peck v. Fink*, 2 F.2d 912 (D.C. Cir. 1924).

5. The City concedes that "one of [rent stabilization's] key objectives," City Br. at p. 13, was to drive the Harmons' rents 59%

This Court does not have to look very far to see some truth. The very enactment and text of the latest NYC local law admits the failure of rent stabilization to achieve the objectives first declared over 40 years ago. App. C-26a - 39a. The stated and unmet objectives of new apartment construction and transition to the free market are specific and quantifiable. The general need for judicial deference to legislative judgments, City Br. at p. 12, State Br. at p. 11, does not demand blind acceptance of known failure.

Respondents reject this Court's continuum of police power cases led by *Block v. Hirsh*, 256 U.S. 135 (1921) as a relic from the "1920's," State Br. at p. 9, and not a "modern" view. City Br. at p. 8-10. These decisions stand as firm today as they did when rendered. They have not been overruled or abrogated.

Block, *supra*, *Marcus Brown v. Feldman*, *Pennsylvania Coal v. Mahon*, and *Chastleton*, *supra* directly control whether an emergency of limited duration is required to sustain the exercise of the police power in this case of possessory rent regulation. The City even concedes that the government's emergency powers extend only to "short term emergencies." City Br. at p. 9. Controlling precedent may not be overruled by implication as the Second Circuit and the highest courts of three states have done.

> If a precedent of this Court has direct application in a case...the Court of Appeals should follow the case which directly controls.

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below-market, a "disproportion [so] acute, [that] small annually-authorized increases... do not come close to covering increased costs." *Casado v. Markus*, 16 N.Y.3d 329, 334 (2011).

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

Further, courts have continued to favorably cite these cases. For example, this unanimous Court relied on *Block* in positing the "different case" standard for a *per se* taking in *Yee*, 503 U.S. at 528. *See also*, *Resolution Trust Corporation v. Diamond*, 18 F.3d 111, 124-125 (2d Cir. 1994), *vacated and remanded sub nomine*, *Solomon v. Resolution Trust Corp.*, 513 U.S. 801 (1994) (citing *Loretto v. Teleprompter*, 458 U.S. 419 (1982) and *Block v. Hirsh*, 256 U.S. 135 (1921), stating that "the temporary nature of the rent control laws is needed to insulate them from constitutional challenge."); *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875, 878 (1983) (Rehnquist, J., dissenting) ("[T]he very fact that there is no foreseeable end to the emergency takes this case outside the Court's holding in *Block v. Hirsh*").[6]

The permanence of New York's possessory rent regulation scheme under the pretext of an emergency in derogation of controlling precedent warrants this Court's review for the first time in over ninety years.

6. It is impossible to know the basis of the dismissal of the appeal in *Fresh Pond* from this Court's one line order which is "not entitled to full precedential weight." *Boggs v. Boggs*, 520 U.S. 833, 849 (1997). What is important in *Fresh Pond* is that Chief Justice Rehnquist stated that this Court had yet to decide how the permanent alleged exercise of emergency powers transgressed the Constitution in the context of possessory rent regulation.

II. The City and State Do Not Contest That the Court of Appeals Erred on the Substantive Due Process Question or that the Decision Created a Circuit Split

Respondents do not argue that the decision of the Court of Appeals was correct. The State concedes that the Court of Appeals was mistaken in holding that the Takings Clause precluded the Harmons' due process claim. State Br. at p. 12. The City acknowledges that the rent stabilization law "may be so arbitrary or irrational that it runs afoul of the Due Process Clause." City Br. at pp. 11-12. This should not be the end of the matter.

Due process is essential to freedom itself. "[T]he right to own and hold property is necessary to the exercise and preservation of freedom." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2614 (2010) (Kennedy and Sotomayor, JJ, concurring in part and concurring in the judgment). Loss of freedom and liberty is the Harmons' "real complaint." State Br. at p. 19.

Moreover, the Second Circuit held that the Fifth Amendment prevented it from reaching the merits of the substantive due process claim, even though it was fully briefed and reviewed on petition for rehearing, and the takings claim was found to be without merit. This deprived the Harmons of an avenue of relief from arbitrary and irrational rent regulation independent of takings jurisprudence. The Court of Appeals ruling also denied the Harmons the opportunity to demonstrate that, with the wisdom of hindsight, irrational means (rent stabilization) are used to achieve stated objectives (new construction and a free market) as explained in the petition and alleged in the complaint.

In light of the undisputed post-*Lingle* inconsistency in the circuits, courts need to know how the Takings Clause and the Due Process Clause work in harmony in the context of a claimed taking. In the interest of freedom, this Court should decide that issue, not simply to correct the error, but to insure that it does not happen again.[7]

III. This Case Presents the Reserved Question of Whether the "Different Case" Standard for a *per se* Taking Should Be Adopted in the Harmons' As Applied Challenge to Rent Stabilization

Respondents admit that this Court unanimously "reserved in *Yee*" the "different case" standard, i.e., compulsion and perpetual leaseholds. State Br. at p. 16; City Br. at p. 6.

The State's prior inconsistent positions on rent stabilization alone should convince this Court to grant certiorari on this question presented. In two prior petitions for certiorari, the State argued to this Court that a rent stabilized tenant's "occupancy of the apartment after his lease expired was... by virtue of a *compulsion* exerted on the landlord by the local emergency rent law...."[8]

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7. Respondents spend much time arguing that rational basis is the standard by which to gauge the constitutionality of rent stabilization. Strict scrutiny is the appropriate standard since rent stabilization impacts fundamental constitutional rights and must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); U.S. Const. amend. V; U.S. Const. amend. XIV.

8. Petition for a Writ of Certiorari of the Attorney General of New York in *Solomon et al. v. Resolution Trust Corp.*, docket no. 94-1564 dated May 4, 1994, p. 14; Petition for a Writ of Certiorari of

In that same case, the State further argued in the Court of Appeals, as the Harmons argue now, that "New York law makes the leasehold *perpetual*." *Diamond*, *supra*, 18 F.3d at 123 (emphasis added). It also argued that rent stabilized tenancies are "tenancies of unlimited duration" and that stabilized tenants' "[l]easehold interests are property interests... ."[9] The State thereby conceded that the elements of the "different case" standard, i.e., compulsion and perpetual leasehold, apply to rent stabilization.[10]

The City's position that "once a tenant leaves an apartment [nothing] compels an owner to continue renting that apartment" is, at best, a misunderstanding of the law. City Br. at p. 6. The Harmons' tenants never left, and each "... rent-stabilized tenant... enjoys occupancy for so long as he wishes." *Diamond*, *supra*, 18 F.3d at 114. Moreover, the apartments remain rent stabilized upon vacancy and must

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the Attorney General of New York in *Pattullo et al. v. Resolution Trust Corp.*, docket no. 93-1757 dated May 4, 1994, p. 13 (emphasis added) (citing cases).

9. Brief for Appellees Attorney General of New York et al. in *Resolution Trust Corporation v. Diamond*, docket no. 92-6244 (2d Cir.) dated September 30, 1993, pp. 23, 44.

10. The issue is not whether "ordinary rent-control statutes ... effect *per se* takings," State Br. at p. 19, but whether New York's *possessory* rent regulation law does so as applied to the Harmons. *Pennell v. City of San Jose*, 485 U.S. 1 (1988) was a facial challenge to the constitutionality of one provision of an "ordinary rent-control" law where the due process and equal protection questions decided are not those presented here. *Pennell* is inapposite, except for Justice Scalia's recognition that rent control is an "off budget... welfare program privately funded... ." 485 U.S. at 22 (Scalia, J., concurring in part and dissenting in part.).

remain on the market. In contrast with New York's rent stabilization law, nothing in the Escondido law compelled owners "once they have rented their property to tenants, to continue doing so." *Yee*, 503 U.S. at 527-528.

Respondents represent to this Court that the Harmons can escape rent stabilization. Although not germane to this petition, the Harmons address the issue so that this Court is not under the false impression that they have any way out of rent stabilization. We address *seriatim* the illusory proposed escape routes. City Br. at p. 6; State Br. at pp. 3-4, 17:

- The State concedes that withdrawal is available only for use in "another business," State Br. at p. 3, 17. The Harmons' home is zoned for residential use only and cannot be used for business purposes.

- Resort to demolition would cause the Harmons to destroy their entire home to stop the City and State from taking part of it. Moreover, the Harmons' "New York brownstone...[is an] important and irreplaceable" component of the the City's identity,[11] and is a national, state and city landmark. Demolition also would force the Harmons to do the impossible on top of the unthinkable, i.e., find the displaced tenants an equivalent rent stabilized apartment nearby at the same rent.[12]

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11. Brief of the State of New York *amicus curiae* in *Penn Central v. New York*, docket no. 77-444 dated February 28, 1978, p. 3.

12. "As any New Yorker could tell you, there are no one-bedroom apartments—rent regulated or otherwise—available for $1,000 a month in Harmon's ... neighborhood..." Damon W.

- Any attempt to "retake"[13] rent stabilized apartments 2R and 3F, occupied by tenants over the age of 62, one owning a Southampton home, would also require the Harmons to do the impossible. They must provide those tenants a rent stabilized apartment "at the same or lower regulated rent in a closely proximate area." *See* State Br. at p 3. The requirement is absolute. http://www.nycourts.gov/reporter/3dseries/2012/2012_22034.htm. The Harmons' would be unable to satisfy the law's relocation requirements if their "very life depended on it."[14]

- The "anti-warehousing" prohibitions of the rent stabilization law, N.Y. Comp. Codes R. & Regs. tit. 9 NYCRR 2524.5(a)(1)(i-ii), prevent the Harmons from withdrawing a rent stabilized apartment from the market even were one to become vacant, contrary to the City's assertion otherwise. City Br. at p. 5-6.

- The Harmons have unsuccessfully run a two year "gauntlet," euphemistically called a summary proceeding, to "retake" apartment 4F so their granddaughter could live with them.[15] The case was

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Root, The Case Against Rent Control (March 13, 2012) *available at* http://reason.com/archives/2012/03/13/the-case-against-rent-control.

13. "Retake" is the State's term. For the Harmons to "retake" their property, the property was necessarily taken from them.

14. Damon W. Root, The Case Against Rent Control.

15. So-called "owner's use" cases are always lengthy and often unsuccessful. *See, e.g.*, *Nestor v Britt*, 16 Misc. 3d 368 (Civ. Ct., New York County 2007) (25 years; unsuccessful); *Pultz v. Economakis*, 10 N.Y.2d 542 (2008)(10 years; successful).

> dismissed because the Harmons' granddaughter was "no longer able to live there [for] health reasons," http://www.nycourts.gov/reporter/3dseries/2012/2012_50134.htm, not due to a "change in theory." City Br. at p. 7; State Br. at p. 7. It made no difference that "unforeseen, and very unfortunate circumstances"arose regarding their granddaughter's health, nor that her brother would take his sister's place living with the Harmons. This experience demonstrates the falsity of the City's assurance to this Court in a prior matter that an "essential function of [rent stabilization]... is the preservation of family life in the home."[16]

For the Harmons, there is no realistic avenue to "retake" the rent stabilized apartments.

This case presents the occasion for this Court to decide the long anticipated issue embodied in the *Yee* "different case" standard to define the constitutional limitations of forced tenancies and perpetually compelled lease renewals in the setting of urban possessory rent regulation.[17]

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16. Brief *amicus curiae* of the City of New York in Support of the Petition for a Writ of Certiorari of the Attorney General of New York in *Pattullo et al. v. Resolution Trust Corp.*, docket no. 93-1757 dated June 21, 1994, p. 13.

17. Unlike the State, the City does not invoke this Court's discretion under the ripeness doctrine of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). City Br. at 2 n. 2. The State argues that this Court is precluded from reaching the third question presented because the Harmons have not sought just compensation in state court. State Br. at pp. 20-21. *Williamson* ripeness is a prudential doctrine, not a jurisdictional requirement. *Stop the Beach*, *supra*, 130 S.Ct. at 2610. *Williamson* has no application because: a) the complaint

IV. The Court of Appeals' Decision that Due Process Does Not Require Notice and an Opportunity to Be Heard Conflicts with Controlling Supreme Court Precedent

Lack of notice with no opportunity to be heard paved the way for possessory rent regulation of the Harmons' home. Respondents do not contest that rent stabilization directly and substantially affects the Harmons' legally protected property interests. They argue that the Harmons have no right to procedural due process because the City Council's action was a matter of "legislation" and "public policy." State Br. at pp. 22-23; City Br. at pp. 15-16. Yet, the City acknowledges that the action of the City Council was the "final agency decision" that subjected the Harmons' property to rent stabilization. Brief of Appellee Marvin Markus, *Harmon v. Markus*, No. 10-1126 (2d Cir.) at p. 8, implicitly admitting that notice and an opportunity to be heard were necessary.

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seeks injunctive relief, not compensation; b) New York does not recognize inverse condemnation, *see*, *Trippe et al. v. Port of New York Authority, et al.*, 14 N.Y.2d 119 (1964); and c) the Harmons challenge the constitutionality of rent stabilization. There is no reason to waste everyone's time chasing a compensation remedy that is unsought and does not exist, which is itself a *per se* violation of the 5th Amendment just compensation requirement. *City of Monterey v. Del Monte Dunes at Monterrey, LTD.*, 526 U.S. 687, 717 (1999).

The cases cited by respondents each hold that a statutory notice and hearing procedure must come at a meaningful time, either pre- or post-determination. The rent stabilization law provides no such opportunity to be heard on rent stabilized designation, thereby rendering it constitutionally deficient.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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