No. _____

In the
Supreme Court of the United States

STAHL YORK AVENUE CO., LLC,

Petitioner,

v.

THE CITY OF NEW YORK, THE NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, AND MEENAKSHI SRINIVASAN, in her capacity as Chair of the New York City Landmarks Preservation Commission,

Respondents.

On Petition for Writ of Certiorari to the Appellate Division of the Supreme Court of New York, First Judicial Department

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a property owner suing an administrative agency for violating the Takings Clause of the Fifth Amendment is entitled to develop the facts supporting the claim in court, rather than being bound by fact-findings the agency itself made in the very proceeding in which it is alleged to have taken the property without just compensation.

CORPORATE DISCLOSURE

All parties to the proceeding are in the caption. There are no parent corporations or publicly held companies in this case.

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PETITION FOR WRIT OF CERTIORARI

Stahl York Avenue Co., LLC ("Stahl") petitions for a writ of certiorari to review the judgment of the Appellate Division of the Supreme Court of New York, First Judicial Department ("First Department").

OPINIONS BELOW

The decision below of the First Department is reported at 162 A.D.3d 103 (2018). It is reprinted at App.3-23.

The decision of the New York Supreme Court, New York County, is not published in an official or regional reporter, but is available at 2016 WL 104502. It is reprinted at App.24-68.

The order of the New York Court of Appeals dismissing Stahl's notice of appeal as of right and denying leave to appeal is reported at 32 N.Y.3d 1090 (2018). It is reprinted at App.1-2.

JURISDICTION

The decision of the First Department sought to be reviewed was issued on May 22, 2018. App.3. On December 13, 2018, the New York Court of Appeals denied further review. App.1. On February 21, 2019, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 12, 2019. On April 5, 2019, Justice Ginsburg further extended the time within which to file a petition to and including May 10, 2019. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part, that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the Constitution provides, in relevant part, that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1.

INTRODUCTION

This case raises important questions that have divided state courts concerning property owners' rights to independent judicial review of Takings Clause claims. When presented with a typical takings claim against a land-use agency, a court should not be bound by that agency's own administrative record. Instead, due process requires the court to independently assess the facts relevant to the takings claim. For starters, the agency's own decision is what leads to the alleged taking. The property owner asserting the claim therefore has no ability to present all the evidence supporting the takings claim to the agency, which is merely making some limited determination under a local or state law. Accordingly, the owner should be afforded an opportunity to develop the facts supporting its takings claim, and to independent fact-finding, in court. Otherwise the owner would *never* be allowed to take discovery and present evidence in support of its takings claim, in violation of basic procedural due process rights.

Additionally, much of the "evidence" in the typical administrative proceeding giving rise to a takings claim falls well below the standard for reliability required in a court of law. That is because the typical land-use administrative proceeding is neither adjudicative nor adversarial. Such proceedings generally lack cross-examination of adversarial witnesses, testimony offered under oath, and/or evidentiary rules, among other essential procedural safeguards. Nor could the agency be expected to render a fair and balanced assessment of the facts where its own decision is the alleged taking—a

problem exacerbated by pro-regulatory biases that often plague agency decision-makers and make their fact-finding even less reliable. Due process requires an independent adjudicator to develop the facts and assess the validity of the allegations under circumstances yielding comprehensive and trustworthy evidence.

Most state courts that have addressed this issue agree that it is for courts, and not administrative agencies, to assess whether such agencies' conduct violates the Takings Clause. As appellate courts in some states have confirmed, "the plaintiff is entitled to a de novo review of the factual issues underlying its [constitutional] claim, unfettered by the [agency's] previous resolution of any factual issues." *Cumberland Farms, Inc. v. Town of Groton*, 808 A.2d 1107, 1123 (Conn. 2002); *accord, e.g., Hensler v. City of Glendale*, 8 Cal. 4th 1, 15 (1994). But the decision below reached the opposite conclusion and concurred with a minority of state courts that improperly defer to administrative fact-finding when adjudicating takings claims.

Landmark disputes like the one here frequently give rise to claims under the Takings Clause. This case involves two run-down, low-rise, aesthetically and historically insignificant tenement buildings in Manhattan, which contain tiny apartments—many of them outdated and uninhabitable. Stahl owns the buildings and loses money on them every year. Accordingly, it seeks to tear them down and replace them with modern high-rise apartment buildings that include affordable housing units. However, its efforts have repeatedly been thwarted by Respondents, the

City of New York and its Landmarks Preservation Commission ("LPC"). First, upon learning of Stahl's renovation plans, Respondents designated the buildings a "landmark." Stahl then applied under local law to redevelop despite the landmark designation, but Respondents denied this "hardship" application even though the designation ensured that the dilapidated buildings would lose money. The LPC's proceedings lack basic procedural safeguards typically afforded in judicial proceedings or similar quasi-judicial agency adjudications.

Stahl challenged the denial of its hardship application in a state-court lawsuit in which it asserted a Takings Clause claim and simultaneously challenged the LPC's decision as arbitrary and capricious. Individual claims within this type of hybrid action are governed by different standards of review. The administrative challenge is assessed under local law, and as is typical for such administrative review, deference is accorded to the factual findings of the administrative agency. Yet here, the New York courts also deferred to the LPC's fact-finding when resolving the takings claim, and improperly resolved that claim based solely on the administrative record, without affording Stahl discovery and judicial fact-finding as to the constitutional issue, in conflict with other state courts.

This Court should grant certiorari to resolve the split among the state courts and confirm that agency deference under these circumstances violates the Due Process Clause. The question presented is exceedingly important, because property owners in

the minority of state courts that defer to agency fact-finding lack virtually any ability to marshal evidence and present key facts in support of their Takings Clause claims. Many takings claims arise from agency proceedings that, as in this case, are resolved without adjudication, using unreliable procedures that yield biased and incomplete evidence. This Court's intervention is needed to ensure that takings plaintiffs are afforded due process, and that the Takings Clause is uniformly applied.

STATEMENT OF THE CASE

A. Factual Background

1. This case relates to two six-story walkup apartment buildings on East 64th Street near York Avenue in Manhattan (the "Buildings"). Stahl owns the Buildings, which were constructed in the early 1900s as tenement housing. First Department Appendix ("N.Y.App.") 76-77. They are architecturally and aesthetically insignificant and unremarkable, as the photograph below illustrates:

The Buildings sit on a city block with 13 other buildings on or near First Avenue that Stahl also owns. N.Y.App.76-77. The 15 buildings on this full block are referred to as the "First Avenue Estate." N.Y.App.77.

The Buildings contain 190 poorly designed apartments whose condition and layout render them unfit for modern tenants. The apartments average 370 square feet of leasable space and lack basic modern amenities, appliances, and fixtures. Many units contain bedrooms too small to hold even a queen-sized bed. The Buildings also have obsolete electrical, mechanical, and ventilation systems—deficiencies made worse by age and decay—and are not handicap accessible. *Id.* The exterior is similarly unattractive, and the Buildings are less safe than the surrounding ones because they can be entered only through an interior courtyard that is invisible from the street. N.Y.App.823-24, 910-11. Most of the apartments are vacant, and many could not legally be

rented without substantial and costly renovations and lead paint abatement needed to make them habitable. N.Y.App.511-12, 1043-44.

The First Avenue Estate was constructed in the early 20th century by the City and Suburban Home Company ("CSHC"). N.Y.App.119. The oldest 13 buildings in the Estate were constructed in 1906 and are the oldest surviving example of CSHC's model tenement projects. N.Y.App.172. They were built on a single plot of land purchased by CSHC in 1896 and were designed by the renowned architect James Ware. N.Y.App.172-73, 176. That plot of land did not include the land on which the Buildings sit. N.Y.App.173-74. It was purchased from a different seller in 1913, seven years after CSHC had completed the Ware project. N.Y.App.173. The Buildings were designed by an undistinguished architect employed by CSHC, Philip Ohm, and thus have different physical characteristics from the 13 original buildings. N.Y.App.78-79, 172, 176-77.

2. The purpose of the New York City Landmarks Law is to protect distinctive property that has a "special character or a special historical or aesthetic interest or value." N.Y.C. Admin. Code §25-301(a). Designation of a building as a landmark substantially restricts the owner's ability to "alter, reconstruct or demolish" the landmark or to "construct any improvement" on the landmark site. *Id*. §25-305(a)(1).

Nearly 30 years ago, the City of New York (the "City") decided to designate the older buildings on the First Avenue Estate as a landmark, but it excluded

the Buildings at issue in order to permit Stahl to redevelop them in the future. Specifically, on April 24, 1990, the LPC voted to designate the entire First Avenue Estate as a landmark. N.Y.App.119, 142-43. The LPC justified this designation based on the special historic and architectural aspects of the original 13 buildings, including the distinguished architect who designed them. In its decision explaining the landmark designation, the LPC largely ignored the Buildings at issue here. N.Y.App.79. Although the Buildings were built years later, were designed by a different and less distinguished architect, and are in many other respects substantially different from the other 13 buildings in the First Avenue Estate, the LPC nevertheless initially included them in the landmark. N.Y.App.78-79.

However, in August 1990, the New York City Board of Estimate ("BOE"), which then had authority to modify landmark designations, overturned the LPC's decision to include the Buildings in the First Avenue Estate landmark. N.Y.App.80. The BOE removed the two Buildings from the landmark in order to avoid designating an entire city block and "to allow for" at least some "development" there. *Id.* Because it retained the right to develop the two Buildings, Stahl elected not to challenge the designation of the other 13 buildings. *Id.* Community groups filed a lawsuit challenging the BOE's decision to remove the Buildings from the landmark, but the City opposed them. The New York Supreme Court, New York County, dismissed their claim because the BOE's compromise was "inherently reasonable." N.Y.App.321.

3. Following the BOE's decision to allow development of the Buildings, the City's acquiescence to it, and the state court ruling upholding it, Stahl reasonably believed that it was entitled to develop the Buildings. N.Y.App.80. Stahl thus began preparing to demolish the Buildings and replace them with a modern condominium tower that included affordable housing units. N.Y.App.81. In the 2000s, Stahl devoted substantial time, effort, and internal resources to these plans, and hired architectural and legal professionals who laid the groundwork for the redevelopment. *Id.* Because its ability to vacate apartments in the Buildings was restricted by rent control and rent stabilization laws, Stahl left many apartments unleased as they became vacant. *Id.* Stahl also refrained from undertaking the substantial renovations and capital improvements needed to render some vacant apartments legally habitable, because it could not have earned a reasonable return from renting those apartments even after making what would have been extremely costly improvements. *Id.*

In 2006, just when Stahl was ready to begin the process of redevelopment in earnest, at the behest of local community groups who complained about the possibility of a condominium tower blocking their views, the LPC revisited the 16-year-old decision not to landmark the Buildings. *Id.* Under the Landmarks Law, decisions about whether to designate property as a landmark are required to be based solely on the property's "historical or aesthetic…value." N.Y.C. Admin. Code §§25-301(a), 25-304(a). But the LPC ignored these factors and, in violation of the Landmarks Law, focused almost

entirely upon the concerns of politically influential local residents who sought to block development to preserve their own special interests. N.Y.App.82-83. These residents complained about how the development would impact "their own apartments" and the number of "people [who] live in the neighborhood." *Id*. The LPC readily "acknowledged that it was relying on factors that were outside the scope of its authority." N.Y.App.83.

This left Stahl in a predicament. Before the landmark designation, the Buildings were worth at least $100 million and perhaps closer to $200 million, but only because of the prospect of building a modern high-rise tower. N.Y.App.82. But the designation barred redevelopment, and there was no other way to make the Buildings profitable, because the apartments were outdated and many could not legally be rented without substantial and costly renovations. N.Y.App.81.

4. Stahl filed a petition under New York law to set aside the LPC's decision as arbitrary and capricious, which was denied by the New York state courts. N.Y.App.84. In 2010, the New York Court of Appeals denied Stahl's motion for leave to appeal. *Id*.

Accordingly, in 2010, Stahl sought relief under the "hardship" provisions of the Landmarks Law, which allow a landowner to seek relief from the economic impact of a landmark designation if the landmarked property is "not capable of earning a reasonable

return." N.Y.App.85.[1] The Landmarks Law evaluates whether the property is capable of earning such a return according to a strict, detailed formula by which the LPC is to evaluate a claim of hardship. N.Y.C. Admin. Code §25-302(v). The formula divides a statutorily defined "net annual return" for the relevant tax lot by the lot's "assessed valuation." *Id.* §25-302(j), (v). The property owner is only eligible for hardship relief if the quotient is less than 6%. *Id.* The formula's use of "assessed" instead of market value impedes the owner's ability to make this showing, because assessed value is only 45% of market value. N.Y.App.86. This means that the owner of a landmarked building is not entitled to hardship relief even if the real-world rate of return is as low as 2.7%.

Stahl's hardship application was narrowly tailored to meet the statutory criteria. It submitted two economic feasibility studies with data supporting Stahl's argument that Stahl would earn a negative "annual return." N.Y.App.339-41.

The LPC's hardship review process is not a judicial-like proceeding. As the New York Court of Appeals has recognized, "[t]he public hearing provided for in the Landmarks Law is not the sort of

[1] Where, as here, a state provides a "procedure for seeking just compensation, the property owner cannot" pursue the same compensation under the Takings Clause "until it has used the [state] procedure and been denied just compensation." *Williamson Cty. Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985). At the time, Stahl therefore was required to and did exhaust the hardship process before commencing this action under the Takings Clause. This Court is presently reviewing whether to reconsider the *Williamson* exhaustion requirement. *See Knick v. Township of Scott, Pennsylvania*, No. 17-647 (reargued Jan. 16, 2019).

adversary hearing involving cross-examination and the making of a record." *Lutheran Church In Am. v. City of N.Y.*, 35 N.Y.2d 121, 128 n.2 (1974). Stahl therefore had no right to confront or cross-examine adverse witnesses. Testimony was not offered under oath, and there were no formal evidentiary rules governing the admissibility of testimony or documentary evidence. The LPC instead relied upon an assortment of unreliable evidence that would be inadmissible in court, such as hearsay statements by anonymous declarants, N.Y.App.1248, 1292, and the opinions of nearby residents, N.Y.App.913; *see also* N.Y.App.1265; N.Y.C. Admin. Code §25-313(b) (LPC may allow "the expression of views by [members of the public] desiring to be heard").

The transcripts of the public hearings further demonstrate that the LPC had prejudged Stahl's application and had every intention of denying it regardless of what the evidence showed. N.Y.App.87. One Commissioner viewed doing so as the LPC's "job." *Id.* Another characterized the LPC's role as that of an "advocate[]" for preservation. *Id.* Moreover, the Commissioners openly relied on, as fact, patently unreliable opinions of friends and acquaintances who lacked any knowledge of the evidence or of Stahl's presentations. One Commissioner expressed her belief that the poor condition of the vacant apartments—which she conceded was documented in photographs—could be "ameliorate[d]" because current tenants in occupied apartments have filled them "with art, ingenious built-ins, furnishings, personality and pride of place." N.Y.App.88. Another relied on the opinions of a friend in the fashion

industry as evidence that the Buildings would be marketable to prospective tenants. *Id.*

On May 20, 2014, the LPC denied Stahl's hardship application. *Id.* The decision did not address the Takings Clause, because Stahl had not (and could not have) raised its takings claim before the LPC. Indeed, the takings claim did not mature until the LPC denied Stahl's hardship application. For this reason, Stahl had no reason to, and did not, submit key evidence supporting that claim to the LPC. Indeed, the takings inquiry is quite different from the substance of the matter before the LPC. The resolution of a regulatory takings claim "depends largely upon the particular circumstances" of a case, including the "economic impact of the regulation" on the property, whether the regulation frustrates the property owner's "investment-backed expectations," and the "character of the governmental action." *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978). Ultimately such a claim requires courts to compare "the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). The hardship process only addresses the latter—the value that remains—and there would have been no point in Stahl submitting evidence to the LPC on what value its designation had taken from the Buildings and why.

Another "critical question[]" in a takings claim involves "how to define the unit of property" at issue. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017). In defining the relevant parcel, courts "must consider" "[1] how [the land] is bounded or divided, under state

and local law"; "[2] the physical characteristics of the landowner's property"; and "[3] the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings." *Id*. at 1945-46. Here, Stahl submitted evidence concerning the first factor (relating to the relevant tax lot), because it bore on the local-law statutory hardship analysis related to the application, N.Y.App.337, but not the other two factors, because they had no bearing on the local-law issue the LPC was assessing.

B. Proceedings Below

On September 22, 2014, Stahl filed a lawsuit in New York State court challenging the denial of its hardship application as arbitrary and capricious under Article 78 of the New York Civil Practice Law and Rules ("CPLR") and alleging that the landmark designation together with the denial of the hardship application constituted an unconstitutional taking without just compensation. In support of its Takings Clause claim, Stahl alleged that "[a]bsent the [landmark] designation" the Buildings were worth at least "$100 million" and "up to $200 million," but the "designation has gutted the value of the properties, leaving Stahl with…a negative return." N.Y.App.72, 82. This allegation and others supplied the "value that has been taken from the property" which Stahl had not previously advanced. *Keystone*, 480 U.S. at 497. The complaint also pled additional facts concerning the physical characteristics of the Buildings, explaining how they were designed by "a different and undistinguished architect" and are in visibly worse condition than the other buildings.

N.Y.App.78-79. The complaint alleged that Stahl "reasonab[ly] expect[ed]" the Buildings to be treated separately; managed them separately; and spent 15 years preparing the Buildings (and only the Buildings) for redevelopment, based upon their numerous distinguishing characteristics and a judicially approved compromise endorsed by the City. N.Y.App.80-81, 89.

The City opposed Stahl's Article 78 petition and moved to dismiss the takings claim. Although properly joined in one action, the two claims are governed by completely different substantive laws and procedural rules. An Article 78 petition is reviewed under the familiar standard governing challenges to administrative action, whereby the court is limited to the "administrative record" and must affirm unless the agency was "arbitrary and capricious." *Koch v. Sheehan*, 21 N.Y.3d 697, 703-04 (2013).

The Takings Clause claim, by contrast, is a plenary action governed by the ordinary procedural rules applicable to civil actions in New York state court. Accordingly, in response to the City's motion to dismiss, Stahl argued, *inter alia*, that the takings claim could not be "resolved solely on the administrative record" and that Stahl was instead "entitled to have its constitutional takings claim resolved *de novo*, after discovery and the presentation of additional evidence to th[e] Court." App.70. Stahl reasoned, *inter alia*, that its "takings claim will necessar[ily] implicate additional facts not presented before the LPC," and that the LPC's procedures were inadequate to protect Stahl's rights. App.70-71.

On January 28, 2016, the New York Supreme Court entered a Decision, Order and Judgment denying Stahl's Article 78 petition and granting the City's motion to dismiss the takings claim. App.24. Stahl appealed to the First Department, contending, among other things, that the takings claim should not have been dismissed because the Complaint stated a claim under the Takings Clause. As it had below, Stahl argued on appeal that the state court could not resolve the takings claim by deferring to the factual findings of the administrative agency. App.76-77. Stahl contended that such "[d]eference…would defeat the constitutional rights of property owners without any legitimate process" because its takings claim was not before the LPC, Stahl "had no opportunity to present evidence" related to that claim at the administrative stage, and "[t]he LPC administrative proceedings offered none of the protections afforded by a judicial proceeding." App.74, 77. Stahl expressly relied upon the case law from other states precluding deference to the agency record in assessing Takings Clause claims. *See* App.75 (citing, *e.g.*, *Cumberland Farms, Inc.*, 808 A.2d at 1123; *Hensler*, 8 Cal. 4th at 15; *Bencin v. Bd. of Bldg. & Zoning Appeals*, No. 92991, 2009 WL 3387695, at *2 (Ohio Ct. App. Oct. 22, 2009) (holding that an "administrative agency…cannot determine whether an ordinance is unconstitutional as applied to a particular parcel" and that such "constitutional claim[s] must be tried originally in the court of common pleas, with the court permitting the parties to offer additional evidence")).

The First Department, however, ignored all of this and, like the trial court, drew upon the administrative record in affirming the dismissal of the takings claim.

The court analyzed the takings claim under this Court's jurisprudence, including *Penn Central's* investment-backed expectations test and the *Murr* "relevant parcel" inquiry. App.17-22. However, in so doing the court deferred to the "LPC['s] determin[ations]" about Stahl's purported "expectations" for the Buildings. App.22. Rather than making its own determination about the landmark designation's impact on the property based upon the allegations in Stahl's complaint, the First Department adopted wholesale the LPC's determination that the Buildings "are capable of earning a reasonable return, limiting the designation's economic impact on [Stahl]." *Id.* The First Department also erroneously deferred to the LPC's fact-finding when identifying the relevant parcel of land under the *Murr* test for Takings Clause claims. It found that the City supposedly "has placed all…lots" in the First Avenue Estate "within one tax block," and thus treated the entire Estate as "one parcel for taking analysis purposes." App.20-21. This erroneous assumption was based upon an LPC finding calculating Stahl's return under a provision in the Landmarks Law unrelated to the Takings Clause. The court ignored the Complaint's allegation—based upon the City's own tax records, which the City itself did not dispute—that "[t]he Buildings…comprise a single tax lot (Lot 22) while the [other buildings] comprise three distinct tax lots (Lots 1, 10, and 30)." N.Y.App.86.

The First Department therefore did not independently analyze the Takings Clause issue based on the allegations in the complaint as to the takings claim. It simply deferred to the LPC's factual

findings, even though Stahl had neither a reason nor an opportunity to develop the factual basis for its takings claim before the agency, which had no authority to adjudicate that claim.

Stahl then filed a notice of appeal with the New York Court of Appeals invoking CPLR §5601(b)(1), which allows an appeal as of right from an order "finally determin[ing] an action where there is directly involved the construction of the constitution of the state or of the United States." Stahl argued that its Takings Clause claim involved a construction of the U.S. Constitution, including this Court's decision in *Murr* addressing how to determine the "relevant parcel for the regulatory taking inquiry." 137 S. Ct. at 1944. In the alternative, Stahl sought leave to appeal pursuant to CPLR §5602(a)(1)(i). Its leave application raised two questions: (1) "How to determine the relevant parcel for purposes of Takings Clause analysis, including whether and how to apply the factors in *Murr v. Wisconsin*"; and (2) "Whether a court adjudicating a hybrid Article 78 and plenary action may rely entirely on an administrative agency's fact-findings and record, and ignore the plenary complaint's allegations, when resolving a constitutional claim that is distinct from the issues before the agency and challenges the agency's conduct." App.82.

On December 13, 2018, the New York Court of Appeals entered an order dismissing the notice of appeal and denying leave to appeal.[2] App.1.

REASONS FOR GRANTING THE WRIT

The Due Process Clause of the Fourteenth Amendment guarantees property owners the right to a neutral decisionmaker and unbiased adjudicatory procedures to protect against the wrongful deprivation of their property. *See Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970). This means that state courts must independently assess the facts underlying a Takings Clause claim, at least where agency procedures do not allow property owners to fully and fairly litigate the takings claim before the agency. But state high courts have not applied this principle consistently. Some courts have deferred to the agency, while others (a majority) engage in independent fact-finding. The courts that defer to the agency, including the New York state courts in this case, violate due process in several ways. They deprive property owners of *any* forum for presenting much of the evidence relevant to their takings claims, because those claims typically are not before, and cannot be resolved by, the agency where the record was made. Furthermore, the agency making the decision that gives rise to the takings claim is often biased, and the process leading up to the decision is generally (as here) non-adversarial and lacks the

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[2] Because the New York Court of Appeals denied discretionary review, this appeal is from the judgment of the intermediate state appellate court—here, the First Department. *See Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968).

hallmarks of an adjudicative process, such as the ability to cross-examine witnesses, evidentiary rules, and other procedural protections. Accordingly, whatever record does exist can be significantly skewed against the claimant. The judgment of biased city and state officials is not a constitutional substitute for that of an independent state court. This Court's intervention is needed to resolve the state high court split and to guarantee property owners their due process right to independent judicial review of Takings Clause claims against state and local administrative agencies.

This case is an excellent vehicle to resolve the issue: it presents a challenge to a decision by a biased agency, under a local law process that provided Stahl no opportunity to develop evidence of the constitutional violation, which did not occur until after the agency denied Stahl's hardship application. Stahl alleged facts supporting its takings claim in the complaint. Yet the state courts nonetheless relied on agency fact-finding on local-law issues to dismiss the takings claim, without even affording Stahl the opportunity to develop the evidentiary record in support of its constitutional claim.

I. Whether Due Process Guarantees Property Owners Asserting Takings Claims Independent Judicial Fact-finding Is An Exceedingly Important Issue That Has Divided Lower Courts

A. The Issue Is Important Because Agency Proceedings Fail To Provide Property Owners The Minimum Protections Required By Due Process

Where a person asserts a regulatory taking by a state agency following a cursory administrative proceeding lacking basic procedural safeguards, the Due Process Clause requires the state to "provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts." *Ohio Valley Water Co. v. Borough of Ben Avon*, 253 U.S. 287, 289 (1920); *see also Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 368-69 (1936) ("The due process clause assures a full hearing" when plaintiff "appropriately invokes the just compensation clause" to contest agency action). Courts adjudicating constitutional claims may not rely solely on an administrative record created in a proceeding that failed to afford the claimant a "full opportunity" before the agency "to develop the facts and arguments" concerning its takings claim. *R.R. Comm'n of Tex. v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 572 (1941).

There are compelling reasons why the record in this type of Takings Clause case must be developed in court, and why the court cannot rotely defer to the administrative record from a state or local land use

proceeding such as the one held here. First, the takings claim ordinarily is not even before the agency—indeed, the takings claim does not even arise until the agency issues its decision denying the property owner's application. Consequently, property owners suing the agency for violation of the Takings Clause have had no prior opportunity to develop and present evidence showing that the agency's actions constituted a taking. This case is illustrative. While some of the factual issues the LPC had to address to analyze the hardship application were superficially similar to the issues presented by Stahl's takings case, virtually none of the key constitutional issues were before, or could have been resolved by, the LPC. For instance, Stahl had no occasion to raise "critical questions" related to the takings analysis concerning "how to define the unit of property" like the property's "physical characteristics" and its impact on "the value of [Stahl's] other holdings." *Murr*, 137 S. Ct. at 1944-46. The same is true with respect to "the value that [was] taken from the property." *Keystone*, 480 U.S. at 497.

These issues formed the cornerstone of Stahl's takings claim, but Stahl had no reason or ability to litigate them before the LPC, let alone exhaustively develop the record there, because the LPC could only decide whether Stahl had established a hardship under the governing local-law statutory formula—which as noted *supra* (at 12), substantially understates the true economic value of property. To defer to the administrative record would be tantamount to depriving Stahl of any "opportunity for rebuttal," and "due process." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34, 537 (2004).

The due process problems inherent in permitting a trial court to defer to administrative fact-findings when resolving a takings claim will arise in many land use contexts, not only those related to landmark designations. State and local agencies make rulings in a host of administrative proceedings that affect real property, and when these rulings are adverse to landowners' interests, the owners frequently bring lawsuits challenging these decisions as regulatory takings. Many of these administrative proceedings, like the LPC's proceeding here, are perfunctory, non-adjudicative, and lack the typical hallmarks of reliability characterized by judicial proceedings.

For example, as in the LPC proceeding here, a party seeking a variance from a zoning ordinance generally must establish undue hardship. This involves a "reasonable use" test focused on "well established" factors like whether the hardship is "related to the property itself," whether it is "based on unique conditions of the property," whether it is "self-created" and whether it is "contrary to the public interest." 2 Patricia E. Salkin, *American Law of Zoning* §13:10 (5th ed. 2018). These factors have nothing to do with what a party must prove in order to establish an unconstitutional taking without just compensation. *See, e.g.*, *Murr*, 137 S. Ct. at 1945-46; *Keystone*, 480 U.S. at 497.

The same is true for takings claims arising from the denial of permit applications. For example, in deciding whether to grant a wetland development permit, most jurisdictions merely require the government to consider the public interest and any

plan to mitigate damage to the surrounding lands. *See* 1 Linda A. Malone, *Environmental Regulation of Land Use*, §4:31 (Oct. 2018 update). Awards for permits for development of floodplains are based upon equally irrelevant factors—"damage," "danger" and the "importance of the proposed use to the community," not diminution of value or investment backed expectations. *See* Arden H. Rathkopf *et al.*, *Rathkopf's The Law of Zoning and Planning* §7:12 (4th ed. 2019).

Each of these types of regulatory actions can constitute a taking. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 379-82, 396 (1994) (variance); *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1119 (Fed. Cir. 2015) (denial of permit). There are numerous other examples as well. *See, e.g.*, *McKay v. United States*, 199 F.3d 1376, 1382-83 (Fed. Cir. 1999) (triable issue of fact regarding whether federal involvement in county agency's decision to modify plaintiff's mining permit constituted regulatory taking); *Lockary v. Kayfetz*, 908 F.2d 543, 547 (9th Cir. 1990) (triable issue of fact regarding whether water utility district's denial of water hookups constituted regulatory taking); *Fla. Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 42-43 (Fed. Cl. 1999) (denial of permit to mine limestone was compensable partial regulatory taking); *Bormann v. Bd. of Supervisors In and For Kossuth Cty.*, 584 N.W.2d 309, 321 (Iowa 1998) (Board's agricultural area zoning designation constituted regulatory taking). But in order to satisfy the requirements for establishing such takings claims, property owners must have an opportunity to develop facts supporting those claims. That would be impossible if they were limited to the

barebones administrative record and afforded no chance to present takings-related evidence to the court in which the takings claim is pursued.

Potential agency bias exacerbates these problems. This Court has consistently held that the right to a "neutral[]" decisionmaker is a bedrock due process principle. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). It "applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). Deference to agency fact-finding will often substitute a biased administrative decisionmaker for a neutral and independent state court judge, in violation of due process. *Cf. Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906-07 (2016) ("due process" violated where factfinder may have "interest in the outcome"); *In re Murchison*, 349 U.S. 133, 139 (1955) (same). Agencies like the LPC are designed to be biased in favor of one side or the other. Landmark commissions are notoriously pro-landmark, which explains the well-documented trend toward over-designation of landmarked properties over the past several decades. A full 27% of Manhattan's lots are designated as a landmark, and the highest-income neighborhoods have preservation rates of 30 to 70%. Ingrid Gould Ellen *et al.*, *Fifty Years of Historic Preservation in New York City*, 22 (2016), *available at* http://bit.ly/2930m6y; Real Estate Board of New York, *An Analysis of Landmarked Properties in Manhattan* 4 (2013), *available at* https://bit.ly/2Mj9dPX. The law under which the LPC operates encourages this trend. *See, e.g.*, N.Y.C. Admin. Code §25-301(b) (explaining that the purpose of the Landmarks Law is to "promote the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education,

pleasure and welfare of the people of the city"). The LPC is, of course, the same agency that Stahl alleges took its property without just compensation. It is a defendant in this very case. If its factual findings in a hardship application proceeding were dispositive in resolving a takings claim, that would create a perverse incentive for the LPC to rule in a manner that would insulate itself from constitutional liability.

Another reason property owners asserting federal takings claims should be afforded *de novo* fact-finding in a court of law is that administrative proceedings rarely offer the same procedural protections, giving rise to the risk that "property" will "be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall*, 446 U.S. at 242. For example, land-use administrative proceedings like the one here typically lack testimony under oath, cross-examination of adversarial witnesses, disinterested factfinders, and reliable evidentiary standards, just like the LPC's adjudication of Stahl's claims. *See, e.g.*, 73 C.J.S. Public Administrative Law and Procedure §187 (2019) ("[A]dministrative proceedings are not governed or restricted by the technical and formal rules that govern judicial procedure."); *Cumberland Farms, Inc.*, 808 A.2d at 1119-21; *Hensler*, 8 Cal. 4th at 16.

Proceedings like these are not remotely sufficient to satisfy due process. This Court has "frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process." *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969). Indeed, the Court has stressed that "[i]n almost every setting where important

decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269. Likewise, "erroneous evidentiary rulings" can also "rise to the level of a due process violation." *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996); *accord Boumediene v. Bush*, 553 U.S. 723, 784 (2008) (risk of due process violation where "there [were] in effect no limits on the admission of hearsay evidence"); *Hamdi*, 542 U.S. at 527, 533-37 (due process violated where hearsay statements were "presumed correct" under a "very deferential" standard and party lacked "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").

Because the state-agency proceedings giving rise to regulatory takings claims do not satisfy due process, property holders have a right to an independent judicial determination of the validity of their takings claims. This necessarily requires that a judge or jury decide the factual disputes that must be resolved to assess the validity of the takings claim. As noted, this Court has repeatedly held that a takings claim requires an "essentially ad hoc, factual inquir[y]," *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 349 (1986), that necessarily turns "upon the particular circumstances" of a case, *Penn Cent.*, 438 U.S. at 124. The Court has expressly "eschewed 'any "set formula" for determining'" a regulatory taking. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001). And this Court's precedent precludes the takings claimant from asserting its claim until the administrative proceeding has concluded. *Williamson Cty. Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985). To allow

deference to the agency record, where there has been no opportunity for the property owner to take discovery and present evidence under the fact-intensive regulatory takings inquiry, would foreclose any possibility of obtaining relief under the Takings Clause.

B. The Lower Courts Are Divided

The majority of state high courts that have addressed the issue require *de novo* development and review of the facts underlying a federal Takings Clause claim. *See, e.g.*, *Cumberland Farms, Inc.*, 808 A.2d at 1123 ("the plaintiff is entitled to a de novo review of the factual issues underlying its inverse condemnation claim, unfettered by the [agency's] previous resolution of any factual issues"); *Cioffoletti v. Planning & Zoning Comm'n of Town of Ridgefield*, 552 A.2d 796, 800 (Conn. 1989) ("[T]he trial court should decide the taking issue de novo in the light of all the evidence properly presented to it, including, but not limited to, the administrative record"); *Hensler*, 8 Cal. 4th at 15 ("A property owner is, of course, entitled to a judicial determination of whether the agency action constitutes a taking"); *Halaco Eng'g Co. v. S. Cent. Coast Reg'l Comm'n*, 720 P.2d 15, 21-23 (Cal. 1986) (en banc) (applying independent judgment to direct judicial review of whether wetlands permit decision constitutes a taking); *Buettner v. City of St. Cloud*, 277 N.W.2d 199, 203 (Minn. 1979) (decision on takings claim "must be based upon independent consideration of all the evidence," because "the trial court cannot abrogate its duty to uphold constitutional safeguards and defer to the judgment of the taxing authority").

These courts have adopted a *de novo* standard of review precisely because of concerns about biased administrative officials and the fact that evidentiary rules at the agency level limit property owners' ability to challenge the agency's own factual assertions. *E.g.*, *Hensler*, 8 Cal. 4th at 15-16; *Buettner*, 277 N.W.2d at 204. In addition, these courts also question the fairness of deferring to the findings of agencies that are themselves alleged to have committed the unconstitutional taking. For instance, the Connecticut Supreme Court refused a deferential approach that would "vest the board with the responsibility of deciding the facts underlying the plaintiff's constitutional claim" because "*the board's decision itself is the action that gives rise to the constitutional claim*." *Cumberland Farms*, 808 A.2d at 1119-20 (emphasis in original). Likewise, the California Supreme Court has held that "an administrative agency is not competent to decide whether its own action constitutes a taking." *Hensler*, 8 Cal. 4th at 15-16.

The courts requiring independent judicial fact-finding also recognized that the non-adjudicatory nature of administrative procedures makes agency fact-finding less reliable. For instance, the California Supreme Court requires independent judicial review because administrative proceedings often do not provide the landowner with "a full and fair opportunity to present evidence relevant to the taking issue." *Hensler*, 8 Cal. 4th at 16. Because witnesses are not sworn and cross-examination is not permitted, "the administrative record is not an adequate basis on which to determine if the challenged action constitutes a taking." *Id.* Instead, the administrative

record often includes unreliable and unrebutted testimony from random members of the public. *See, e.g.*, *Cumberland Farms, Inc.*, 808 A.2d at 1120 (contrasting strict trial court procedures with more liberal zoning board procedures that "encourage input by members of the general public with an interest in the outcome of the board's deliberations"). That procedural flaw, when combined with decisionmaker bias, compelled courts in a number of states to require independent review of takings clause claims by state trial court judges.

Likewise, the Court of Federal Claims, which has jurisdiction over takings claims against the federal government, adjudicates these claims like any other civil action in federal district court. At the motion to dismiss stage, the court assumes the truth of the plausible facts alleged in the plaintiff's complaint, without regard to agency fact-findings. *See Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015) (accepting "as true" plaintiffs' "well-pleaded factual allegations" in regulatory takings case). If the plaintiff survives the motion to dismiss stage, she is entitled to full discovery on the takings claim, regardless of the existence or scope of any underlying administrative record. *See, e.g.*, *Palm Beach Isles Assocs. v. United States*, 58 Fed. Cl. 657, 660, 664 (Fed. Cl. 2003) (taking discovery and holding hearing on government's defense to takings claim that it denied petitioner's permit for navigational reasons). Although the Court of Federal Claims permits motions for judgment on the administrative record, *see* RCFC 52.1(c), that procedure does not apply to constitutional claims. It is limited to claims challenging administrative action under the APA or

other federal regulations. *See, e.g.*, *Martinez v. United States*, 260 F. App'x 298, 300 (Fed. Cir. 2008); *Flowers v. United States*, 321 F. App'x 928, 930 (Fed. Cir. 2008); *West v. United States*, 103 Fed. Cl. 55, 60 (Fed. Cl. 2012).

Contrary to the approach of the vast majority of federal and state courts, New York and the District of Columbia defer to the administrative agency when resolving takings claims filed against that very agency. As explained, the trial court dismissed Stahl's takings claim based entirely on the LPC's fact-findings. Likewise, in affirming the dismissal, the First Department repeatedly deferred to the "LPC['s] determin[ations]," including its findings about Stahl's expected use of the Buildings and its assumptions about how the Buildings were taxed. App.21-22. Thus, Stahl's takings claim was dismissed based entirely upon the administrative record, and it was deprived of any opportunity to present evidence relevant to its constitutional claim.

The D.C. Court of Appeals applied a similar rule in *MB Associates v. D.C. Department of Licenses, Investigation & Inspection*, 456 A.2d 344 (D.C. 1982). The plaintiff alleged that the local landmark commission's designation of a building it owned constituted a taking. *Id.* at 344-45. Like the First Department, the D.C. Court of Appeals deferred to the agency's fact-finding. *Id.* at 346. It rejected the takings claim because it found that the agency finding was supported by "substantial evidence," *id.*, which mirrors the deferential standard under the federal Administrative Procedures Act. *Compare* D.C. Code §2-510(a)(3)(E) *with* 5 U.S.C. §706(2)(E).

C. This Is An Excellent Vehicle

This case is an excellent vehicle for determining whether state court deference to agency fact-finding in land-use administrative proceedings that give rise to Takings Clause claims violates due process. The state courts' deference to the LPC's factual findings deprived Stahl of an adequate forum to prove that the LPC itself had taken its property without just compensation. As explained (at 22-23), Stahl had virtually no ability to develop facts related to its takings claim before the LPC. Stahl had no right to cross-examine those witnesses, even though some of their testimony formed the basis for the LPC's fact-finding. N.Y.App.913, 1248, 1292. Indeed, the LPC was not even required to limit its decision to "the facts, views, testimony or evidence submitted at such hearing." N.Y.C. Admin. Code §25-313(b).

Nor could Stahl have asserted its takings claim before the LPC, because the LPC was the agency that took Stahl's property without just compensation in the first place. The agency's bias also was manifest because its Commissioners admitted to having anti-development views and harboring a preference for preservation, which further skewed the proceedings against Stahl.

Finally, as explained, the First Department ignored the complaint's allegations and relied upon falsehoods drawn from the administrative record. (*Supra* at 18-19). For example, its conclusion that the City supposedly "has placed all…lots" in the First Avenue Estate "within one tax block," App.21, is totally false; the complaint alleges, and the City itself

has always conceded, that the Buildings occupy a separate tax lot from the Estate's other buildings, N.Y.App.86. And the First Department shirked this Court's requirement that, in a takings case, courts must undertake a fact-intensive assessment of the landmark designation's impact on the relevant parcel's value. *See, e.g.*, *Murr*, 137 S. Ct. at 1942-43; *Palazzolo*, 533 U.S. at 633; *Penn Cent.*, 438 U.S. at 124. Instead it rotely accepted the LPC's determination that the Buildings "are capable of earning a reasonable return" and found that this "limit[ed] the designation's economic impact on [Stahl]." App.22. But the conclusion does not follow from the premise. Even assuming the Buildings could earn a "reasonable return," that says nothing about whether the LPC's refusal to grant the hardship application caused Stahl the massive loss alleged in the complaint. And, as explained (at 12), the statutory equation that is used to determine whether Stahl could earn a reasonable return is divorced from economic reality; it ignores the property's market value and relies instead upon a vastly understated definition of "value" that prevents property owners like Stahl, who actually suffer hardship from the landmark designation, from obtaining the relief they deserve.

The First Department affirmed the New York Supreme Court's decision granting the City's motion to dismiss Stahl's complaint. Both decisions expressly deferred to the administrative record. App.21-22, 42-43, 51-53, 62, 65. If this Court agrees that such deference is unconstitutional, that would require reversal and remand so that the matter can proceed to discovery and resolution on the merits,

based on an independent evidentiary record in the trial court. Accordingly, this case is an excellent vehicle for this Court to confirm that state court deference to the agency record violates the Due Process Clause where a plaintiff claims that the agency itself took property using biased and unreliable procedures.

CONCLUSION

For the foregoing reasons, Stahl's petition for a writ of certiorari should be granted.

Respectfully submitted,

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