No. 18-____

In the Supreme Court of the United States

JAMES H. BRADY,

Petitioner,

–v–

ERIC T. SCHNEIDERMAN,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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JULY 24, 2018

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QUESTIONS PRESENTED

Petitioner went to Federal Court seeking a mandatory injunction to compel New York State Attorney General Eric Schneiderman to protect the Offering Plan contract description of Petitioner's Manhattan commercial co-op "12th Floor and Roof Unit" apartment as it was promised and described in the Amended Offering Plan registered in the Office of the Attorney General in 1980. This request for a mandatory injunction in Federal Court was necessary because the Attorney General refused to investigate or even take a report after Appellate Division, First Department judges and the Justices of the New York State Court of Appeals permitted a lower court judge to unlawfully rewrite Petitioner's Offering Plan contract and a higher Court decision in order to void the $70-90 million dollars worth of air rights the parties to the contract agreed were contractually appurtenant to Petitioner's apartment persuant to these pieces of material evidence. The District Court dismissed the complaint stating that Petitioner had no constitutional standing and the Court of Appeals affirmed rehearing and *En Banc* review was denied.

Does the Fourteenth Amendment guarantee of equal protection under the law give Petitioner standing for the protection of his contract by the Attorney General after it was shown in black and white that every one of the 40 words of the contract that defined his rights were unlawfully replaced by a New York State Court judge with 70 different words that voided the $70-90 million dollars worth of air rights that were appurtenant and promised contractually to be appurtenant to his 12th Floor and Roof Unit Apartment?

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OPINIONS BELOW

The instant appeal arises from the Southern District of New York Court's Opinion and Order dated July 13, 2016 in the matter of *James H. Brady v. Eric Schneiderman, Attorney General of the State of New York*, No. 15-cv-9141 (RA), the Honorable Justice Ronnie Abrams presiding. (App.4a). The Order appealed from granted Defendant-Respondent's pre-Answer motion to dismiss with prejducie and without leave to replead on the single ground that Petitioner had no standing.

The Second Circuit Court of Appeals affirmed the District Court decision in a Summary Order dated March 1, 2018. (App.1a). Request for panel rehearing was denied *En Banc* on April 25, 2018. (App.12a).

The Court should take judicial notice that the present case and two other related cases, *James H. Brady v. Associated Press*, et al, No.17-0268(cv), and *James H. Brady v. John Goldman*, et al., No. 17-268-cv, were also dismissed by the same panel of judges on the same date in summary order. Leave to appeal to the Supreme Court is being sought in both.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The appeal is from a final judgment that disposes of all of Petitioner-Petitioner's claims in this action.

CONSTITUTIONAL PROVISIONS

- **U.S. Const. amend. V**

  No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

- **U.S. Const. amend. XIV, § 1**

  All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Case Against the Co-Op Board of Directors

1. Petitioner's Offering Plan Contract Was Re-written by the New York State Courts for the Benefit of Politically-Connected Real Estate Developers

Petitioner is the owner of a commerical co-op apartment located at 450 West 31st Street, 12th Floor and Roof Unit, New York, NY 10001. The Second Amendment to the Schedule of Units of the Offering Plan contract, which was a condition precedent to making the Offering Plan effective, expressly and exclusively conveys the any permissible development rights that may from time to time be given to the premises to the 12th Floor and Roof Unit for its exclusive utilization.

The Seventh Paragraph Footnote to the Schedule of Units of the Amended Offering Plan, which reads as follows:

> "[Seventh Paragraph–New] The 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law."

Applicable law changed in 2005 pursuant to a rezoning of the area and the creation of the Hudson Yards District of Manhattan. Suddenly, the premise was permitted to construct of extend up to 190,000

square feet of additional development rights on its parcel of land. In 2006, the Co-op corporation had these rights appraised at $44 million dollars.

In 2007, the Co-op Board of Directors attempted to the sell the premise's development rights to Extell Development Corp. At that time, Extell offered Petitioner $2.5 million to waive our rights to the development rights in light of the Seventh Paragraph Footnote.

During May 6, 2008 court ordered settlement talks, Justice Friedman had Extell withdraw that offer and replace it with a $500,000 offer from the co-op corporation to waive his rights under the threat that she would make Petitioner "sorry" if he did not accept the offer. Petitioner and his wife refused to be intimidated by the threat and did not waive their rights.

During the July 1, 2008 phone conference with the Court and attorneys, Justice Friedman said in essence that she was going to rewrite the contract since the Bradys had refused to waive their rights. As a result, Petitioner's then attorney, Margaret Dale of Proskeur Rose, wrote Justice Friedman a letter the following day, July 2, 2008:

> "No authority, whether statutory or precedential, allows a court to ignore or overrule clear and unambiguous terms in an offering plan. In this case, the Court cannot ignore that the new 7th paragraph of the Second Amendment further describes what is included as part of the 12th Floor and Roof Unit. The Court cannot ignore that all of the rights to the space above the Building's roof belong to, and is part of, the 12th Floor and

> Roof Unit. The rights to all of the space above the Building's roof has been conveyed to the 12th Floor and Roof Unit to the extent that is 'permitted by applicable law'—not just the 25,000 square feet that the Defendant Cooperative Corp. reserved for itself. Such language was inserted into the Offering Plan for a reason, and none of the Defendants presents any alternative meaning to the plain language. No authority, whether statutory or precedential, allows a co-op to seize part of a shareholder's unit without consent. No authority, whether statutory or precedential, allows a court to completely disregard multiple experts' undisputed testimony that states that the proposed sale to Extell violates and destroys Plaintiff's rights."

Notwithstanding the absence of any legal authority or rationale, Justice Friedman on July 2, 2008 issued the first Supreme Court decision rewriting Petitioner's contract:

> "the court finds that paragraph 7 is not ambiguous, and that it gives plaintiffs the right to build structures on or above the roof but does not convey air rights to plaintiffs."

This decision shows that after ruling the contract was not ambiguous, the contract removed the words from the contract that said "to the extent that may from time to time be permitted under applicable law," and unlawfully replaced those words with "but does not convey air rights to plaintiffs."

In March 13, 2009 reargument decision, Justice Friedman put all her judicial powers into an ORDER-

ED, ADJUDGED and DECLARATION that again rewrote the contract by surrounding it with judicially-constructed limitations:

> "pursuant to paragraph 7, plaintiffs, have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be given under applicable law. Provided that: Nothing herein shall be construed as holding that plaintiffs have the right to use all or any part of the TDRs in connection with such construction or extension."

Justice Friedman's decision caused the Co-op to return the deposit on the adjoining lot and abandon the deal. Thus, Petitioner was successful in the first round of litigation in preventing the sale of the air rights, which had been his goal.

The Appellate Division removed the unlawful provision added to the end of the contract. The First Department's February 11, 2010 decision included a clear and unequivocal conveyance of the utilization of the premise's development rights:

> "that plaintiffs have the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law, unanimously affirmed, without costs."

This decision clarified that the contract provision did not convey ownership of the air rights to Petitioner's block of shares (which was never in dispute) but rather confirmed Petitioner's right to the utilization of the

air rights to the extent that may from time to time be permitted under applicable law.

2. The Co-Op's Second Attempt to Sell the Premise's Air Rights

In 2012, the Co-op Corporation again sought to enter into a zoning lot and merger transaction that entailed selling the air rights appurtenant to Petitioner's apartment, along with placing light and air easements over Petitioner's apartment for the benefit of the developer. All attorneys involved with the transaction fully understood that based on the February 11, 2010 decision, they would need a Waiver of Petitioner's rights.

i. The Co-op and Sherwood Equities Asked Petitioner to Sign a Waiver of the Rights Granted in the February 11, 2010 Decision

The April 2012 "Waiver, Consent and Release" states that the Bradys are being asked to relinquish their rights "For good and valuable consideration, the receipt and sufficiently of which is hereby acknowledged." The only consideration 450 Owners Corp. and Sherwood offered Petitioner was the threat of costly litigation against multi-million dollar companies: the letter stated "your choice not to sign the requested waiver may result in further costly litigation involving 450 West, the purchaser, and you. The purchaser of the development rights would prefer that you sign a waiver with respect to any issues regarding the ownership, control or the right to dispose of 450 West's excess development rights."

3. The Parties to the Contract Perfectly Understood What the Contract Means

Sherwood's request of a Waiver was also supported by the attorneys who had represented Extell and the Co-op in the first round of litigation. Stanley Kaufman, the Co-op's litigation attorney, stated in "Defendant's Reply Memorandum of Law," April 14, 2008, p.5:

> "The clear intent was to grant the 12th floor unit owner some latitude in adding additional space, or structures, so long as in doing so, the owner did not violate the local building code, zoning regulations, or other ordinances."

And further:

> "The clear and logical meaning of the added footnote number 7 of the Second Amendment was to grant 12th floor owner some latitude in adding additional structures, so long as in doing so, the owner did not endanger anyone else's health or safety or violate the building Code, zoning laws or any other laws or ordinances." (*Ibid.* p.28).

And further, Franklin Snitow, Extell's litigation counsel, stated in his "Affirmation for Defendants Extell Dev. Corp.", et al., March 18, 2008, p.2 ¶ 3:

> "The intent is evidenced in the decision of the original owner of the 12th floor unit to build an 1,800 square foot penthouse on the roof. Thus, the intent of the Amendment is clear on its face." (R: 310).

4. The Sponsor of the Co-op Offering Plan, Arthur Greene, Confirmed the Meaning of the Seventh Paragraph Footonote

Petitioner obtained the deposition testimony on August 15, 2016 of the sponsor, who proved Petitioner's underlying claims, further showing that the judges and other public officials that argued that his "intent" of the Seventh Paragraph Footnote to the Schedule of Units was to convey permissible air rights to the 12th Floor and Roof Unit (A.347):

Q. Getting right to it, could you tell me about the second amendment to the offering plan? It's the seventh paragraph footnote to the scheduling units, where it says: That the 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures on the roof or above the roof to the extent that may from time to time be permitted under applicable law.

Can you tell me what you meant by that footnote?

A. Could you read that again?

Q. Yes. It's the seventh paragraph. It's a new paragraph seven footnote to the schedule of units. And it says: The 12th floor and roof unit shall have, in addition to the utilization of the roof, the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law.

Now, to refresh your memory, this footnote change was a modification that was made in this second and final amendment to the offering plan. It states that it was a final term in which you agreed to declare the foregoing plan effective.

Petitioner can show you the second paragraph footnote to the schedule of units, because you made two other changes at the time. So if you were to interpret the whole communication that would be great.

This is the second amendment, and these are the amended footnotes found on page 2.

(Witness peruses document.)

A. Petitioner believe at the time there was a limitation on what you could add to the building. The building had reached its maximum limit for construction. Probably the intent was to, if you could build more than– if they approved, you can build more than– you still have to go through co-op to get approval to build, but you can add on if the co-op will give it to you.

Q. Does it say here anything permitting under applicable law is reserved for the 12th floor and roof unit, was that your intent?

A. In the existing space, yes.

Q. And the purpose of reserving this floor area was so that, just to be clear, any permissible development rights or zoning changes or for other purposes that is permitted it was for

the exclusive use of that particular 12th floor which Petitioner believe you reserved for yourself; is that true?

A. Yes.

(Transcript p.4:19–6:16).

Petitioner paid for a right, as Commercial Division judge Justice Kornreich stated at a March 18, 2014 Oral Arguments in an underlying case: "The contract is the contract. It wasn't changed when he bought it. He bought that right." (Full Citation *Infra*).

5. The Argument that Petitioner Lost the Prior Litigation Collapsed at the March 18, 2014 Oral Arguments

Joseph Augustine, attorney for the Co-op Board

THE COURT: —which means you're going to have to commit the coop board to tell me: What does Paragraph 7 mean?

MR. AUGUSTINE: It means he has the right to build structures once he submits a plan. And if those structures are permissible by law, such as Department of Buildings, and those plans do not pose a structural risk or any other risk to the building in order to— for him to service the space that he has there, then the board would be inclined to approve it.

[. . .]

THE COURT: But what Petitioner's saying is he does have that right, though, under paragraph 7.

MR. AUGUSTINE: He has—our understanding he has a right to build structures. That's what it says. No one disagrees. The courts all said the same thing, he has a right to build structures.

THE COURT: How would you deal with the decision of the Court and say he has no development rights, he has no air rights, yet he has the right to build? What does that mean? (Transcript, p.9:17-20).

THE COURT: The courts said that he has no air rights, but he has the right. But Petitioner think, perhaps, the courts didn't understand that air rights, FAR, all of that is probably the same things, development rights, so—(Transcript, p.12:9-13).

THE COURT: Petitioner don't know what you said. Nor do Petitioner know what the Court said. (Transcript, p.14:12-13).

THE COURT: But Petitioner's asking you because Petitioner have to in this action decide what the contract means, and Petitioner's like your—you to weigh in on that. (Transcript, p.15:25-p.16:2).

THE COURT: The decisions don't—don't address this, because, at least in this Court's mind, Petitioner don't see how you can build and build up without going into air rights or—you know, so Petitioner don't understand the decisions. Petitioner's asking you for guidance. (Transcript, p.17:18-22).

THE COURT: And the Appellate Division and lower court doesn't say, "You can only build to a certain height," they said "Yeah, he has the right to build up and out but he can't use the air rights," which is really an enigma. (Transcript, p.27:3-29:3).

THE COURT: Petitioner don't understand how you can build a structure on a roof if you have no air rights. (Transcript, p.28:4-5).

Mr. BRADY: So the correct reading it's an inconsistent decision. Please square the two, Your Honor. Square—

THE COURT: Petitioner don't know how. (Transcript, p.53:17-19).

THE COURT: —it was the sponsor who put this in, it was the sponsor who owned the penthouse and roof. Perhaps that was his intent. (Tr. p.54:11-20).

6. In Her July 15, 2014 Decision, Justice Kornreich Completely Departed from the Admissions She Made at Oral Arguments and Handed Down a Decision Filled with *Ad Hominem* Attacks and Divorced from the Facts She Herself had Acknowledged

"It is clear from the papers and the transaction's history that Brady acted in bad faith in bringing the instant cases." (p.21).

"His misinterpretation of prior judgment, his feigned ignorance or the origin or the meaning of the phrase 'transferable development rights,' and his argument that a deci-

> sion, which he appealed to no avail, is not binding are but a few examples of the frivolous arguments made in the instant actions." (p.21).
>
> "In short, Brady has dragged more than twenty parties into court to litigate matters that have already been determined and claims that lack any substance." (p.22).
>
> "The trial court and the appellate court courts in the Prior Action have denied him such control. Undeterred, he has ignored these courts' rulings and brought these meritless actions, abusing the judicial process." (p.23).
>
> "This is a near perfect example of frivolous conduct that warrants defendants request for the imposition of sanctions." (p.23).

In the July 15, 2014 decision, the Court further made the following admissions, which prove that she knew all along that Petitioner's claims were correct and that the co-op had violated Petitioner's rights and tortiously interferred with Petitioner's contract when it sold the air rights without a Waiver from Petitioner and his wife:

> "Strictly speaking, Brady is correct that the question of whether such an easement interferes with his right to build structures on the roof or otherwise permitted by applicable law has never been determined and so is not barred." (July 15, 2014 decision, p.15).
>
> "Brady correctly notes that the issue of whether the sale to Extell violated his rights was never reached, and that the issue of

whether the sale of the air rights by 450 Owners Corp. to Sherwood violated Brady's rights could not have been reached in the prior actions." (July 15, 2014 decision, p.19).

7. In a July 15, 2014 Decision, Justice Kornreich Acknowledged that Sherwood Equities and the Co-op Tortiously Interfered with Petitioner's Contract–Yet She Dismissed Those Causes of Action and Sanctioned Petitioner

Initially, the Co-op and Sherwood sought to obtain a waiver from the Bradys regarding the air rights. However, when Brady refused to sign the waiver as presented, the Co-op and Sherwood proceeded without his consent. (July 15, 2014 Decision, page 5)

> "That the Co-op or Sherwood initially sought a waiver from Brady does not constitute an 'admission' that the ZLDEA interfered with any of Brady's rights. Indeed, according to Brady, he was specifically told by the Co-op that 'the transaction will be consummated with or without your waiver.'"

The elements for a tortious interference with contract claim are defined in New York state as: (1) the existence of a valid contract between the parties; (2) the defendant must have had knowledge of the contractual agreement; (3) the alleged interference must have caused a breach of the contract; (4) the interference must be both intentional and improper; and (5) plaintiffs must establish they suffered damages as a result of the alleged contractual interference. *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 (1st Dep't 2009).

It is clear that Justice Kornreich understood that the transaction between Sherwood and the Co-op violated Petitioner's rights under the Offering Plan and the Appellate Division decision. In order to rule against Petitioner in light of her numerous admissions, she literally rewrote the contract.

8. The Transcript of the September 10, 2014 Hearing on the OSC Shows that Justice Kornreich did not Deny that She Falsified the Prior Decision

THE COURT: So, Petitioner have read your papers, and let me say that Petitioner stand by Petitioner's decision. Petitioner think Petitioner's decision is legally required.

The same request, the same legal request, really, was made in another action in front of another judge, and Petitioner am bound by that decision. It went all the way up to the Court of Appeals, so Petitioner stand by Petitioner's previous decision.

Petitioner am not going to stay enforcement of the sanctions. Petitioner believe, Petitioner really believe that bringing the action over and over and over again both wastes the court's time, counsel's time, and your time, and it is frivolous. (Transcript p.4:16-26).

THE COURT: So, Petitioner don't believe that there is any reason for me to recuse myself. Petitioner don't believe that any decision Petitioner made previously was tainted in any way. Petitioner believe this case is over

at this point, so Petitioner am denying your application—

BRADY: It figures.

THE COURT:—for your order to show cause.

BRADY: That figures, your Honor.

THE COURT: Pardon?

BRADY: Petitioner said that figures. Of course you would do that. So why don't we address the fact that it's undisputed that you falsified the prior decisions.

THE COURT: That Petitioner falsified?

BRADY: You falsified the prior decisions.

THE COURT: Sir, at this point Petitioner would admonish you.

BRADY: Petitioner's like it to be on the record, you took out the part, your Honor, that said that "pursuant to paragraph 7, plaintiff has, in addition to the utilization of the roof, the right to construct or extend structures on the roof or above the roof to the extent that may from time to time be permitted under applicable law." This Court took that out of its decision to square it against me.

THE COURT: Sir, you can say whatever you wish to say at this point. You've said it. At this point the record is closed. Your application is denied. Please step back.

BRADY: Thank you, your Honor. More evidence.

(Transcript 5:1-6).

B. Petitioner's Suits Against the New York Attorney General

Petitioner filed a Complaint in the New York Court of Claims on June 9, 2015 before Hon. Judge Thomas Scuccimarra against the Attorney General, Governor Cuomo and the State of New York sought compensatory relief for 1) gross negligence; 2) willfull misconduct; 3) *prima facie* tort; 4) negligent infliction of emotional distress; and 5) violation of the Equal Protection Clause of the Fourteenth Amendment.

The Court of Claims and the Appellate Division, First Department ruled, as NYAG argued in their motion papers, that Eric Schneiderman and his Office are immune from any liability because of government and/or prosecutorial immunity.

The Court stated: "The Attorney General's office enjoys immunity from civil suit as well, for official acts performed, including a determination not to prosecute. *Schanbarger v. Kellogg*, 35 A.D.2d 902 (1970)."

This is an incorrect application of law. First, the Office of the Attorney General has agreed to waive its government and answer for torts in the Court of Claims:

> "Section 8. Waiver of immunity from liability.
>
> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations,

> provided the claimant complies with the limitations of this article. (Court of Claims Act § 9[2])."

Secondly and more importantly, the level of action undertaken by the NYAG does not rise to the capacity that is protected by prosecutorial immunity. As the Southern District stated in *Deskovic v. City of Peekskill*, 894 F.Supp.2d 443 (S.D.N.Y. 2009):

> "However, not every action performed by a prosecutor is 'absolutely immune merely because it was performed by a prosecutor.' *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). Rather, a prosecutor's entitlement to absolute immunity turns on the capacity in which the prosecutor acts at the time of the alleged misconduct . . . courts must apply a functional approach, which looks to the nature of the function performed by the prosecutor."

In the present case, the Attorney General has acknowledged that his Office took no action regarding the crime that Petitioner presented to them. Defendants did not conduct an investigation and did not follow their own protocol, which, as shown below, would have resulted in a recommendation which Petitioner or the parties alleged of misconduct could have challenged in an Article 78 Proceeding.

New York law is clear that the Attorney General is only protected by prosecutorial immunity when he engages in activity related to prosecuting a case, or legal and strategic decisions he makes after an investigation. The distinction between the Attorney General working as a prosecutor pursuing a case (for which he has immunity), and the other functions NYAG engages

in (which are not protected by prosecutorial immunity) is perfectly recognized in New York law:

> "In contrast, 'when a prosecutor functions outside his role as an advocate for the People, the shield of absolute immunity is absent.' *Id.* Specifically, 'when a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" *Ying Jing Gan v. City of New York*, 996 F.2d 522-Court of Appeals, 2nd Circuit 1993.

The NYAG's collusion with the State of New York judicial employees who rewrote the contract description of Petitioner's apartment in order to seize its rights for the benefit of real estate developers was not made in a judicial capacity, and thus not subject to any kind of immunity.

Qualified immunity from suit is appropriate if a prosecutor's conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known. With respect to acts that are 'administrative' or 'investigative,' qualified immunity is the most protection from suit Rettler could obtain. In evaluating the circumstances, the inquiry is one of objective reasonableness. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

1. **Petitioner's Claims Are Self-Evident, He Was the Victim of Crime, and NYAG's Failure to Even Investigate the Crime Is Evidence of Collusion and Corruption**

The Seventh Paragraph Footnote to the Schedule of Units reads as follows:

> "Seventh Paragraph-NEW-The 12th Floor and Roof Unit Shall have, in addition to the utilization of the roof, the right to construct or extend structures on the roof or above the same, to the extent that may from time to time be permitted under applicable law."

The Appellate Division, First Department, February 11, 2010 Decision ended with the following words.

> "Pursuant to paragraph 7, that plaintiffs have the right to construct or extend structures upon the roof or above the same to the extent that may from time to time be permitted under applicable law, unanimously affirmed, without costs."

Justice Kornreich's Supreme Court July 15, 2014 Decision rewrites the above to read:

> "It has already been adjudged that while the owners of the unit may have the right to erect additional structures on the roof, that right does not entitle them to use any floor area in doing so (Prior Action, decision and order, Mar 13, 2009 at *2 & *4-*5 ['Nothing herein shall be construed as holding that plaintiffs have the right to use all or any part of the TDRs in connection with such construction or extension'] *Brady v. 450 W.*

> *31st St. Owner's Corp.*, 70 A.D.3d 469, 470 (1st Dept 2010) [holding that the offering plan 'reserves for plaintiffs the right. . . . to construct or extend structures on the roof that may be built without the use of the building's development rights.']"

All 40 words from the higher court determination was taken out and replaced by Judge Kornreich's own 70 words. Under the Appellate Division decision, I have the right to the utilization of the premise's development rights. Under judge Kornreich's rewording, Petitioner have nothing at all.

2. The Attorney General Failed to Follow Protocol and Prepare a Recommendation that Could be Challenged in Court through an Article 78 Proceeding

Ample case law shows, the Attorney General routinely investigates and then prosecutes claims against parties failing to enforce real estate contracts. His office meets with consumers, prepares recommendations, and then takes legal actions if the offending party challenges those findings.

For example, comparing the NYAG's handling of a group of shareholders whose offering plan contract was not being enforced by Extell Development Corp. *CRP/Extell Parcel Petitioner v. Andrew Cuomo*, NY Slip Op 50073(U), January 19, 2012, Supreme Court, New York County. In that case, as in many others, a New York State court reviewed the administrative determination of the NYAG and ruled on those findings.

> "Even if adequate grounds exist for the administrative determination, the determi-

> nation will be annulled if the grounds upon which it rests are inadequate or improper, or were not the actual grounds relied upon. Judicial review of administrative determinations is limited to the grounds invoked by the administrative body at the time of the decision." *In re AVJ Realty Corp.*, 8 A.D.3d 14 (1st Dep't 2004); *Mtr. of Stone Landing Corp. v. Bd. of Appeals*, 5 A.D.3d 496 (2d. Dep't 2004).

It is well-settled New York law that a state agency such as the NYAG may not reach a different conclusion in a determination based on similar facts and law without explaining the reason for the inconsistent decisions. It is per se arbitrary and capricious for an agency to reach different results on substantially similar facts and law without explaining on the record the reason for same. *In re Charles A Field Delivery Services Inc.*, 66 N.Y.2d 516, 520 (1985).

Furthermore, "When an agency determines to alter its prior stated course it must set forth its reasons for doing so. Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary." *See also Mtr. of Richardson v. Comm'r of N.Y. City Dep't of Soc. Servs*, 88 N.Y.2d 35 (1996); *In re 2084-2086 BPE Assocs.*, 15 A.D.3d 288 (1st Dep't 2005). *See also Mtr. of Civic Ass'n. of the Setaukets v. Trotta*, 8 A.D.3d 482 (2d. Dep't 2004); and *Mtr. of Klein v. Levin*, 305 A.D.2d 316, 317-20 (1st Dep't 2003) providing reasons for the change in determination obviates the defect.

> "Pursuant to CPLR 7803(3), this Court must determine 'whether a determination was

> made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. . . ."' *CRP/Extell Parcel Petitioner v. Andrew Cuomo*, NY Slip Op 50073(U), January 19, 2012, Supreme Court, New York County.

3. Justice Abrams' July 13, 2016 Decision Should Not Have Been Affirmed by the Second Circuit Court of Appeals

Justice Abram's decision is completely silent on addressing the fact that the contract description of Petitioner's Manhattan apartment was unlawfully rewritten to void the $70-90 million worth of air rights that were contractually appurtenant to his apartment. Instead of addressing this fact, the decision shows *ad hominem* attacks against Petitioner and reciting a false case history.

Justice Abrams' decision advances as true the false claims made by Supreme Court Judge Shirley Kornreich, calling Petitioner's suit:

> "a near perfect example of frivolous conduct in that he ignored the various court rulings from his 2007 lawsuits and instead brought these meriltless actions, abusing the judicial process. On this basis, the court imposed sanctions against Plaintiff by awarding attorneys' fees to all the defendants Plaintiff sued. Plaintiff asserts these fees amount to almost $400,000."

It was not accurate or just to call Petitioner a serial litigant when all Petitioner did was fight

seeking justice and compensation from those who seized and sold his affirmed rights.

Justice Abrams acknowledges that Petitioner sought relief under civil rights statute 42 U.S.C. § 1983 and "alleges that by not investigating his claims, Defendant has violated his rights pursuant to the Equal Protection Clause of the Fourteenth Amendment."

In the decision, however, Justice Abrams treats Petitioner's claims as asking for the prosecution of certain individuals. "It is well established that 'a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."

Petitioner never sought the prosecution of anyone. No one needs to be prosecuted for the Attorney General to insist that the courts leave the contract as written and registered in his office. The "no standing" excuse cannot be used as an excuse to block a citizen's guaranteed right to equal protection under the law.

The Court's argument that Petitioner was repeatedly arguing that he "owned" the premise's development rights was wrong. The Court's decision stated:

> "Plaintiff filed his first lawsuit in state Court in 2007, alleging that he owned the air rights to his commercial co-op apartment by virtue of the contract whereby he acquired the top-floor unit of the building."

This is untrue and flatly contradicted by the very first decision in these cases. In her July 2, 2008 decision, Justice Marcy Friedman stated the following:

> "Indeed, plaintiffs themselves do not take the position that they are the owners of the air

> rights. They clarify that they 'do not contend that the 12th Floor and Roof Unit can sell or transfer these [TDR] rights to adjoining landowners, but that the Cooperative Corporation cannot sell or transfer these rights to anyone without plaintiff's consent.'" *James & Jane Brady v. 450 West 31st Owners Corp.*, Index No. 603741/07, July 2, 2008.

That was eight years ago. Not once since that time have Petitioner or any attorney representing him argued that Petitioner "own" the premise's development rights.

If Petitioner had lost the 2008 litigation, the Co-op would not have asked for a waiver; AND Justice Kornreich would not have had to rewrite the February 11, 2010 decision to void what it said on its face.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. IT IS OF NATIONAL IMPORTANCE THAT CONTRACTS BE ENFORCED AS WRITTEN

Practically every American adult has numerous contracts with multiple companies in the course of everyday life. The economy and the functioning of society depend on the inviolability of contracts and the right of private citizens to enter into contracts that represent the intention of the parties, and are then enforced by the courts as written. As this case shown, New York State courts as well as law enforcement officials, are ignoring their duty to enforce con-

tracts as written and are allowing courts to rewrite contracts for the benefit of political donors and powerful developers. This Court cannot sanction what is occurring in New York State, where real estate contracts in particular represent huge, multi-billion dollar investments from around the world.

One of the most basic principles of New York contract interpretation is that "a court is not free to alter the contract to reflect its personal notions of fairness and equity." As the Court of Appeals held in *Greenfield v. Philles Records*, 780 N.E.2d 166 (N.Y.: Court of Appeals (2002), a contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 355 [1978], *rearg denied* 46 N.Y.2d 940 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v. Community Hosp. of W. Suffolk*, 87 N.Y.2d 514, 520 (1996); *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 N.Y.2d 630 (2008).

New York State contract law is very clear that judges cannot add or remove words from an unambiguous contract. The binding law and authority on contract law in New York State is as follows:

> "'When parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms.' *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157,

> 162 (1990). And 'Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.' 'In the absence of any ambiguity, we look solely to the language used by the parties to discern the contract's meaning.'" *Vermont Teddy Bear v. 538 Madison Realty Co.*, 308 A.D.2d 33 (2004).

Making a new contract between the parties is precisely what Justice Kornreich did in her July 15, 2014 decision. The Attorney General had a duty to protect Petitioner and the Offering Plan contract as promised and registered in his office in 1980. He will not do that without a Mandatory Injunction from this Court requiring him to.

II. EXCUSES CANNOT BE USED TO DISCARD THE FOURTEENTH AMENDMENT

The Attorney General's failure to investigate Petitioner's claim and failure to prepare or submit any report or internal documentation of any investigation is not standard procedure for the NYAG's Office. As ample case law shows, the Attorney General routinely investigates and then prosecutes claims against parties failing to enforce real estate contracts. His office meets with consumers, prepares recommendations, and then takes legal actions if the offending party challenges those findings.

In the present case there was corruption from the very beginning to keep the case from being investigated. Petitioner could not challenge the Attorney General's findings and recommendation in an Article

78 Proceeding because Mr. Schneiderman's office made no findings. In fact, one of the NYAG's responses to Petitioner's legal claim is to admit they took no action and did nothing when shown certain judges had defrauded me of the rights in Petitioner's Offering Plan contract.

The Attorney General is duty-bound to enforce the 5th and 14th Amendments. The Attorney General and Justice Abrams saw that Petitioner's contract was unlawfully rewritten to void his contractual property rights. There would be no purpose of having a 5th and 14th Amendment if the Attorney General or other law enforcement officials could simply say they refused to give someone equal protection under the law and turn their backs on them without explanation.

The Second Circuit Court of Appeals affirmed Justice Abrams' decision *En Banc*.

A. Petitioner's Constitutional Equal Protection Before the Law was Violated by the Attorney General

In his Complaint, Petitioner was alleging and proved an ongoing violation of federal law in the form of the equal protection clause of the Constitution. Only a federal court can rule on Petitioner's equal protection claim, and only a federal court can provide the relief to enjoin the Attorney General to perform his duty.

A review of Mr. Berg's Memorandum of Law proves conclusively that rather than give Petitioner equal protection before the law, the Attorney General and his office have acted and continue to act as desperate

adversaries wildly fighting to avoid having to give Petitioner equal protection before the law.

In their Memorandum of Law, Defendants assert that Petitioner has suffered no violation of equal protection before the law. "Although Petitioner labels his claims as a federal equal protection claim, it is essentially a plea for relief in the nature of a writ of mandamus to compel action by a New York State official." (p.14).

And further Mr. Berg argues: "The Complaint does not allege any of the elements of an equal protection violation. Petitioner does not claim that he is a member of a protected or suspect class of that the Attorney General intentionally discriminated against him on the basis of membership in such a class. Nor does Petitioner allege an equal protection claim on a 'class-of-one' or 'selective enforcement' theory.'" (p.15).

The rights that belonged to Petitioner were seized. In order to dismiss Petitioner's claims for damages, the lower court rewrote the higher court decision to void its rights. This is shown in black and white. Yet the Attorney General is making every excuse in the book to not protect Petitioner's equal protection of the law.

III. THE ATTORNEY GENERAL MADE BLATANTLY DELIBERATELY DECEPTIVE STATEMENTS PERTAINING TO FACTS

In order for the Court to grant Defendant's motion to dismiss, he would have to provide a file explaining how he arrived at the decision that Plaintiff's rights have not been violated. As no such files exist, he engages in deception and makes false statements: "The

New York State Courts squarely and repeatedly rejected Plaintiff's claim, and after he brought successive cases raising essentially the same claim, sanctioned him for engaging in "a near perfect example of frivolous conduct." (NYAG Memo in Support of Motion to Dismiss, p.5). The Attorney General knows these statements are false yet passes them along to the Court as if they facts.

On page 3 of his Opposition Mr. Berg states the following:

> "Plaintiff cites the August 15, 2016 deposition testimony of the co-op sponsor, Arthur Greene, concerning the meaning of the contractual term concerning the alleged development rights. These questions of contract interpretation were resolved in Plaintiff's prior state court litigation. *See, e.g., Brady v. 450 West 31st Street Owners Corp.*, 70 A.D.3d 469 (1st Dep't 2010)."

IV. PETITIONER MEETS THE CRITERIA FOR A MANDATORY INJUNCTION

In Defendant NYAG's memorandum of law before Justice Abrams, Mr. Berg states that: "Mandamus to compel is an extraordinary remedy, *see Silverman v. Lobal*, 163 A.D.2d 62 (1st Dept. 1990), and is available only "to enforce a clear right where a public official has failed to perform a duty enjoined by law." The present case is precisely the fact pattern for which such a writ should be issued. The Attorney General's Office has proved conclusively that they will not perform their duties under the law. Petitioner has had his real property rights seized by a judge who issued

an unlawful opinion, yet the Attorney General is arguing that they have no right, standing or duty to do anything about it.

"A mandatory preliminary injunction should issue only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief. *Cacchillo v. Insmed, Inc.*, 638 F.3d 401 (2nd Cir. 2011)." The Attorney General argues that it was within his discretion to ignore the crime Petitioner suffered. The Attorney General has the authority and duty to investigate corruption anywhere in the state. It is specifically his duty to investigate corruption when practiced by state judges.

V. PETITIONER HAS ARTICLE III STANDING AND JURISDICTION

Contrary to the NYAG's assertions, Petitioner satisfies the criteria for Article III standing. First, Petitioner did suffer an "injury-in-fact." Petitioner has been robbed of the use of $70-90 million worth of development rights stipulated in his Offering Plan contract and in the February 11, 2010 Appellate Division decision.

Secondly, Petitioner's injuries were more than "fairly traceable" to the Attorney General. NYAG's actions were actually a *sine qua non* for Petitioner's injuries: the courts could rely on the Attorney General the judges needed the NYAG to go along with the corruption. Thirdly, Petitioner's claims can be redressed by a favorable decision from that Court.

The dismissive portrayal of Petitioner by Respondent Eric Schneiderman shows that the Attorney

General has treated James H. Brady and his family as adversaries rather than victims of a crime, and has litigated against them rather than meet with them and investigate a crime, as his Office does routinely when made aware of a crime.

The Southern District Court of Appeals noted in its decision that Justice Abrams dismissed Petitioner's case "with prejudice, a caveat not applicable to dismissals for lack of federal jurisdiction." This further shows that this was a fraud scheme that had no basis in law. If Justice Abrams really believed that Petitioner lacked standing to bring the suit, she would not have ruled "with prejudice" and would not have weighed in on the merits of Petitioner's claims.

This appeal below was dismissed with pre-Answer motions to dismiss, with prejudice, without a single affidavit from anyone with first-hand knowledge, and all three were dismissed after having Oral Arguments canceled to deny Petitioner the opportunity to build a record and be heard in court.

Petitioner's experience with the NYS Courts and the District Court show that the Fifth Amendment is not being enforced in New York State, as if the 14th Amendment did not exist, as judges literally transfer property from citizens to politically-connected donors and real estate developers. What has occurred to me proves that in the New York State Courts and Second District Appellate Court is that the 14th Amendment is being applied arbitrarily and capriciously by the judges, and that the most fundamental constitutional protections can be denied for the benefit of the politically-connected and deep-pocketed contributors.

The Second District Court of Appeals is the primary court from which Justices to the Supreme Court are chosen.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari. The Supreme Court must be the moral compass of the United States of America. Not one single other state or federal judge has acknowledged seeing any wrong doing or acknowledgment that the contract was rewritten to void what it said on its face. Under the 5th and 14th Amendments petitioner certainly had standing to have the contract description of his Manhattan Apartment protected by the Attorney General as it was described and promised in the amended Offering Plan that was registered in the Office of the Attorney General in 1980.

Respectfully submitted,

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