No. 19-554

IN THE

Supreme Court of the United States

50 MURRAY STREET ACQUISITION LLC,

Petitioner,

v.

JOHN KUZMICH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The federal question on which petitioner seeks this Court's review was neither presented to nor decided by the New York Court of Appeals, which only decided a question of state law interpretation, which this Court lacks jurisdiction to review. Properly characterized, the petition ("Petition") presents the following question:

> Does the "notwithstanding" clause of Section 421-g(6) of New York Real Property Law, which says that rent regulation shall be applicable to certain apartments "[n]otwithstanding the provisions of any local law for the stabilization of rents or the emergency tenant protection act of nineteen seventy-four", prevent the deregulation of those apartments under the high-rent decontrol provisions of that local law and statute?

STATEMENT OF THE CASE

The Petition here concerns the New York Court of Appeals' interpretation of a New York statute governing the stabilization of rents in New York City apartments and the application of that statute to claims that do not implicate federal law, *i.e.*, whether Petitioner, a landlord, was permitted to charge rents for its apartments that are inconsistent with New York rent stabilization laws. The New York Court of Appeals construed the New York statute at issue—New York Real Property Tax Law ("NY RPTL") § 421-g—to mean that any landlord, like Petitioner, that received tax benefits from the State under NY RPTL § 421-g was required by the statute to subject its apartments to New York's rent stabilization laws.

While the Petitioner may disagree with that interpretation, the Petition should be denied because it does not involve any "important question of federal law" that is either unsettled or that conflicts with decisions of this Court, federal Circuit Courts, or state courts of last resort. Nor does the Petition implicate any other suggested basis for granting the Petition, as contemplated by Rule 10 of the United States Supreme Court Rules. Perhaps more important, no federal question was presented to or considered by the New York Court of Appeals. This Court does not have jurisdiction to overrule the New York Court of Appeals' interpretation of a New York statute.

REASONS FOR DENYING THE PETITION

Respondents do not believe that an extensive opposition to the Petition is necessary, and they make this short submission primarily to clarify a single point:

no federal question was raised below or addressed by the New York Court of Appeals, and no federal question is properly raised by the Petition.

The only issue raised by the Petitioner below and decided by the New York Court of Appeals was one of statutory construction: namely, the meaning of NY RPTL § 421-g, as that section was adopted pursuant to New York's Lower Manhattan Revitalization Project, Chapter 4 of the Laws of 1995. Petitioner's question presented below was limited to:

> Does Real Property Tax Law §421-g preempt any provision in the local law for the stabilization of rents that is inconsistent with the regulation of covered dwelling units' rents, and in particular the luxury deregulation provision of Rent Stabilization §26-504.2, despite countervailing indicia in the statutory scheme, including the existence of enumerated exceptions to luxury deregulation in §26-504.2 that do not include §421-g, and despite the history of §421-g and related statutes?

The Petition here and Petitioner's motion for reargument below both acknowledge that this was a matter of interpreting New York's statute. *See, e.g.*, Petition 13 ("In July 2017, the trial court awarded summary judgment to Respondents, determining that they were 'entitled to a declaration' that the luxury-decontrol provisions [of New York's rent stabilization laws] do not apply to their Section 421-g apartments."); *id* at 13-14 (noting that the intermediate appeals court, "criticized the trial court for overlooking basic principles of statutory construction");

Petition App. 56a ("Upon finding the statute unambiguous, the [New York Court of Appeals] majority opinion proceeded to reject any 'attempt by defendants and the dissent to a contextually use [sic] legislative history to "muddy clear statutory language," and concluded that § 421-g can be read only to subject properties to the pro-regulatory, but not deregulatory, provisions of the rent stabilization laws.'"). Other than in its procedurally flawed motion for reargument to the Court of Appeals (discussed below), Petitioner did not argue—either to the New York Court of Appeals or in any New York trial or intermediate appellate court—that the interpretation and enforcement of RPTL § 421-g would violate Petitioner's constitutional rights, or that application of the New York statute in this case would be unconstitutional.

Because the only federal issue now advanced by Petitioner was neither properly raised in nor addressed by the court below, this Court lacks jurisdiction. This Court may review state judgments only when "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution" or "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." 28 U.S.C. 1257. No federal constitutional issues have been drawn into question or specially set up by the New York Court of Appeals decision because Petitioner did not present any. When reviewing state-court judgments under Section 1257, this Court (with rare exceptions not applicable here) will "not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*). This Court may not disrupt the New York Court of Appeal's interpretation of

a New York statute. *See, e.g.*, *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of [State] law by the highest court of the State.").

Petitioner argues that it properly raised a federal question below when—after the New York Court of Appeals had already issued its decision—Petitioner filed a motion for reargument which raised, for the first time, the argument that Petitioner seeks to make here. According to Petitioner, this was the "first logical opportunity" to raise this argument. Petition 37. This is incorrect. One, Petitioner's attempt to inject a federal question into this dispute on a motion for reargument was procedurally flawed under New York law, as Respondents made clear in their opposition to the motion for reargument below. *See* App. 11a-12a ("[A] motion for reargument must be limited to fact or law overlooked in respect of arguments previously made. It is well-established that 'reargument is not available where the movant seeks only to argue "a new theory of liability not previously advanced."'") (citing New York state law cases). Two, the decision by the New York Court of Appeals—which Petitioner now claims constitutes a "taking"—was substantively identical to a decision of the New York trial court in 2017, which awarded summary judgment to Respondents regarding the meaning and applicability of RPTL § 421-g. *See* Petition 13. On appeal of that decision, however, Petitioner did not make any constitutional "takings" argument, nor did it preserve that argument (or any other argument implicating a federal question) for appeal.

Petitioner also argues that, notwithstanding its failure to raise a federal question below, the New York

Court of Appeals' interpretation of a New York state statute can constitute a judicial taking under *Save the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010). Respondents addressed Petitioner's *Save the Beach* argument in their Opposition to Petition's Motion for Reargument to the New York Court of Appeals, and Respondents' briefing on that point is included in the appendix and Respondents incorporate it here. *See* App. 13a ("The majority's Opinion here did not 'take away' or 'deprive' 50 Murray of any right. Rather, it corrected 50 Murray's misinterpretation of RPTL § 421-g and clarified that 50 Murray *never had a right in the first place* to luxury rent decontrol apartments in a building receiving an RPTL § 421-g tax abatement.") (emphasis in original).

CONCLUSION

Respondents respectfully request that this Court deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX — OPPOSITION TO MOTION FOR REARGUMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, DATED AUGUST 12, 2019

COURT OF APPEALS OF THE
STATE OF NEW YORK

New York County Clerk's Index No. 155266/16

Appellate Division–Second Department
Docket No. 00078/18

JOHN KUZMICH, SANDRA MAY, JOSHUA SOCOLOW, IGNATIUS NAVASCUES, KENDTRICK CROASMUN, RISHI KHANNA, CAITLAN SENSKE, JAMIE AXFORD, JONATHAN GAZDAK, SUZY HEIMAN, MICHAEL GORZYNSKI, NIKESH DESAI, HEIDI BURKHART, BEN DRYLIE-PERKINS, KEIRON McCAMMON, LISA ATWAN, JENNIFER SENSKE RYAN, BRAD LANGSTON, ALEJANDRA GARCIA, LISA CHU, SCOTT REALE, DAN SLIVJANOVSKI, SHIVA PEJMAN, LAURIE KARR, ADAM SEIFER, ANAND SUBRAMANIAN, DARCY JENSEN, ELIN THOMASIAN, HAZEL LYONS, DAVID DRUCKER, HOWARD PULCHIN, JIN SUP LEE, JENN WOOD, NICHOLAS APOSTOLATOS, ALEX KELLEHER, BRIAN KNAPP, JEFF RIVES, JASON LEWIS, LAURA FIESELER HICKMAN, FRANKLIN YAP AND STEVEN GREENES,

Plaintiffs-Appellants,

Appendix

– against –

50 MURRAY STREET ACQUISITION LLC,

Defendant-Respondent.

OPPOSITION TO MOTION FOR REARGUMENT

[TABLES INTENTIONALLY OMITTED]

PRELIMINARY STATEMENT

In this appeal, the Court was asked to interpret Real Property Tax Law ("RPTL") § 421-g and to determine whether apartments located in buildings receiving tax benefits pursuant to that section are eligible for luxury rent decontrol under the Rent Stabilization Law ("RSL"). In relevant part, RPTL § 421-g says,

> Notwithstanding the provisions of any local law for the stabilization of rents in multiple dwellings or the emergency tenant protection act of nineteen seventy-four, the rents of each dwelling unit in an eligible multiple dwelling shall be fully subject to control under such local law, unless exempt under such local law from control by reason of the cooperative or condominium status of the dwelling unit, for the entire period for which the eligible multiple dwelling is receiving benefits pursuant to this section . . . .

After considering RPTL § 421-g's text, the statute's legislative history in the Assembly and Senate, nine briefs from the parties and *amici curiae*, nearly forty-five minutes of oral argument, and an 18-page dissent by Chief Judge Fiore, six Judges of this Court agreed that apartments in buildings receiving the RPTL § 421-g tax abatement are not subject to luxury deregulation ("Opinion").

Now, Defendant-Appellant 50 Murray Street Acquisition LLC ("50 Murray") seeks to reargue the issues the Court has already considered and decided. Reargument is appropriate only where a court "overlooked or misapprehended" controlling law or relevant facts. *See* NY CPLR § 2221(d). And, although 50 Murray disagrees with the majority's interpretation of RPTL § 421-g, none of 50 Murray's three arguments in support of its motion for reargument identify any binding precedent or relevant facts that the Court overlooked or misapprehended.

First, 50 Murray asserts that RPTL § 421-g's legislative history renders the majority's interpretation of the statute "unsustainable." But, 50 Murray cannot dispute that RPTL § 421-g's legislative history was a primary focus of the nine briefs submitted to the Court, that it was discussed at length during oral argument and in the dissent, and that it is expressly addressed by the Opinion—indeed, 50 Murray's own Reargument Brief quotes the majority's rejection of 50 Murray's argument regarding RPTL § 421-g's legislative history. The law is well-settled that reargument is not "a vehicle to permit the unsuccessful party to argue once again the very questions

previously decided." *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 971 (1st Dep't 1984). That principle applies here, and the Court should not permit 50 Murray to rehash arguments regarding the legislative history of RPTL § 421-g which have already been made and rejected.

Second, 50 Murray claims that reargument is appropriate because the Court misinterpreted the words "subject to control under" as used in RPTL § 421-g. As with the statute's legislative history, RPTL§ 421-g's text was front and center in the parties' briefing, at oral argument, and in the dissent, and is examined in detail in the Opinion. 50 Murray identifies no controlling precedent or relevant facts overlooked by the Court.

Third, 50 Murray argues *for the first time* in its Reargument Brief that the Court's interpretation of RPTL § 421-g "raises serious constitutional problems" under the United States Constitution's Takings and Due Process Clauses. Even putting aside that 50 Murray cannot raise new arguments for the first time on appeal (much less on a motion for reargument of an appeal), this argument is completely without merit. The United States Supreme Court has made clear that imposing limits on the rents a landlord may charge for an apartment is not a "taking" of the landlord's property rights under the Takings Clause. *See, e.g.*, *Yee v. City Of Escondido*, 503 U.S. 519 (1992). And, this Court's interpretation of RPTL § 421-g did not "take" or deprive 50 Murray of any right; it only clarified that 50 Murray never had any right in the first place to luxury decontrol apartments in a building receiving an RPTL § 421-g tax subsidy.

For these reasons, and the reasons discussed below, reargument is inappropriate and 50 Murray's attempt to relitigate issues already decided should be rejected.

ARGUMENT

I.
50 MURRAY HAS NOT MET THE STANDARD FOR REARGUMENT

Under CPLR § 2221(d), reargument is permissible only where a movant demonstrates that the court "overlooked or misapprehended" some binding precedent or relevant fact, and a motion for reargument "shall not include any matters not offered on the prior motion." *See* CPLR § 2221(d). Thus, a motion for reargument cannot be used by an "unsuccessful party to argue once again the very questions previously decided" or to "advance arguments different from those tendered on the original application." *Foley v. Roche*, 68 A.D.2d 558, 567-68 (1st Dep't 1979); *see also William P. Pahl Equip. Corp. v. Kassis, et al.*, 182 A.D.2d 22, 27, 32 (1st Dep't 1992) ("Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . ."); *N. Am. Van Lines, Inc. v. Am. Int'l Co.*, 11 Misc.3d 1076(A), 2006 WL 908653, at **2-3 (N.Y. Sup. Ct. 2006) (Fried, J.) (plaintiffs' arguments in support of their motion for reargument were "completely devoid of merit" because they were not raised in the original motion). Yet, that is precisely what 50 Murray seeks to do here. Unable to identify any controlling law or relevant facts that the Court overlooked, 50 Murray simply repeats two

arguments that it previously made and which the Court rejected, and offers one new "constitutional argument" that 50 Murray has never made to any court and which is not appropriately considered for the first time on this motion.

This Court has already thoroughly considered the issues in this case and there is no reason for it to do so again.

A. The Court Has Already Considered and Rejected 50 Murray's Arguments Regarding RPTL § 421-g's Legislative History

Relying on many of the same facts and much of the same case law that it previously cited in its brief on appeal, 50 Murray argues that reargument is appropriate because the majority gave "short shrift to the legislative history and context here." (Reargument Br. at 7.) However, the Court did not overlook any controlling precedent or relevant facts regarding RPTL § 421-g's legislative history. In fact, the Opinion details RPTL § 421-g's legislative history in both houses of the Legislature, and acknowledges the dissent's point that "aspects of the legislative history can be read to demonstrate" the Legislature's intention that apartments in RPTL § 421-g not be eligible for luxury rent decontrol, "including a memorandum in support of the bill from the Mayor's Director of State Legislative affairs that pre-dated the bill's passage in the Assembly." (Opinion at 10.) And after considering that legislative history, and the dissent's examination and analysis of it, the Court rejected 50 Murray's argument that RPTL § 421-g's legislative history determines the statute's meaning.

The Court reached this conclusion only after extensive discussion of RPTL § 421-g's legislative history at oral argument. (*See* 6/4/2019 H'rg Trans. at 28:14-15 ("JUDGE STEIN: What about the supporters' memorandum? . . . What about the memorandum in support of the bill? . . . That doesn't say anything?"); *id.* at 27:18-20 ("JUDGE WILSON: What is the rock crushing part of the Assembly legislative history that supports your position?"); *id.* at 29:17-18 ("JUDGE RIVERA: [Mayor Giuliani's] own official says these properties will be subject to rent stabilization."); *id.* at 26:20-24 ("JUDGE STEIN: Well, I mean we understand . . . about the letters and who said what and – and all of that. But the fact of the matter is, is that the bill was not amended, was not changed, did – did not clarify anything. . . . So it seems to me that maybe they thought they had something they didn't have."); *id.* at 19:22-20:2 ("CHIEF JUDGE DIFIORE: So the purpose [of RPTL § 421-g] is revitalization? MR. MCGUIRE: Yes, right of this ghost town. . . . JUDGE RIVERA: But – but it is possible that that's not the only purpose, correct?").[1] The Court even asked 50 Murray whether legislative history should trump a statute's clear text, and 50 Murray agreed that it should not:

1. The Court posed similar questions regarding RPTL § 421-g's legislative history to the Plaintiffs-Appellants' counsel. *See, e.g.*, *id.* at 13:3-7, 14:2-3 ("JUDGE FAHEY: More compelling to me is, what did the sponsors say? I mean, what – what were the committee reports from the legislative body? Those kind of – that kind of legislative history seems to me is – is relatively more authentic. . . . So we take to the next phase then, What about the agency interpretations?").

> JUDGE RIVERA: If the legislative history is completely at odds with the text, and the only sensical reading of the text, which do we choose between?
>
> . . .
>
> MR. MCGUIRE: Go with the text. You go with the text.

(*Id.* at 31:13-25.)

To the extent 50 Murray is arguing that the Court was required to consider RPTL § 421-g's legislative history in determining the statute's meaning, the Court clearly did so. Nothing was overlooked. 50 Murray may disagree with the majority's reading of that legislative history, but its contention that the Court should have affirmed the Appellate Division on the basis of RPTL § 421-g's legislative history was considered and discussed at length at oral argument and in the Opinion. Moreover, the very same arguments 50 Murray makes in its Reargument Brief regarding RPTL§ 421-g's legislative history were previously made in 50 Murray's brief in opposition to this appeal. (50 Murray's Opposition Br. at 4-11, 20-21, 41-51.) Reargument is not a means for a party to relitigate arguments already made and rejected, *Pro Brokerage,* 99 A.D.2d at 971, and the Court should reject 50 Murray's attempt to do that here.

B. The Court Has Already Considered and Rejected 50 Murray's Interpretation of the Words "Subject to Control"

Next, 50 Murray argues that reargument is appropriate because the Court improperly assumed that "the word 'control' in the phrase 'subject to control' cannot refer to 'the antithetical concept of decontrol.'" (Reargument Br. at 11.) Again, however, 50 Murray identifies no binding precedent or relevant facts overlooked by the Court. Nor can it. As noted above, the Court's interpretation of RPTL § 421-g was a matter of first impression for the Court of Appeals and no precedent bound the Court.

The entirety of 50 Murray's argument rests on its analogy to certain statutes that, 50 Murray says, use the phrase "subject to control under" a chapter to mean subject to all provisions of the chapter. This is neither controlling precedent nor overlooked facts, and is no basis for reargument. More fundamentally, 50 Murray's argument entirely misunderstands the Court's Opinion. The Court determined that the "legislature's intention, as reflected in the language of the statute at issue here, is clear and unescapable" because of the Legislature's use of a "*notwithstanding* clause" to precede the reference to "control under" the rent stabilization laws:

> The statute does not say that eligible units shall be fully subject to "the provisions" any local law for the stabilization of rents. Put differently, the notwithstanding clause of the statute evinces the legislature's intent that any "local law for

> the stabilizations of rents" that would exempt the unit from "control under such local law" does not apply to buildings receiving RPTL § 421-g benefits, with the sole exception being for cooperatives and condominiums.

(Opinion at 6.) As it did in its opposition brief, 50 Murray simply ignores the importance of the notwithstanding clause in RPTL § 421-g. The statutes to which 50 Murray refers in its Reargument Brief do not use a notwithstanding clause to modify the phrase "subject to control under."

As important, the Court previously considered extensive briefing from 50 Murray, as well as from another landlord in a companion case (*West v. 90 West, et al.*), and *amicus curiae* the Real Estate Board of New York, each of which made the same argument that 50 Murray makes in its Reargument Brief—*i.e.* that the phrase "subject to control" as used in RPTL § 421-g was intended to subject apartments in RPTL § 421-g buildings to the rent control *and* decontrol provisions of the rent stabilization laws. After considering these arguments, the Court rejected them, saying, "if accepted defendants' proffered construction would simultaneously render superfluous the entire notwithstanding clause and the exception for cooperatives and condominiums. We reject defendants' suggestion that we read those provisions out of the statute."[2] (Opinion at 6-7.)

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2. As with RPTL § 421-g's legislative history, the meaning of the phrase "subject to control" was discussed repeatedly during oral argument. *See, e.g.*, 6/4/2019 H'rg Trans. at 6:13-15 ("JUDGE

C. 50 Murray's New "Takings" Argument Is Both Procedurally Improper and Meritless

Finally, 50 Murray's Reargument Brief asserts a new argument, which it did not make to Supreme Court, the Appellate Division, or in its brief or arguments on this appeal. Relying heavily on the United States Supreme Court's decision in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702 (2010), 50 Murray contends that the majority's interpretation of RPTL § 421-g may deprive 50 Murray of "due process" and constitute a "taking" under the U.S. Constitution. For several reasons, this argument should be rejected.

To start, a motion for reargument must be limited to fact or law overlooked in respect of arguments previously made. It is well-established that "[r]eargument is not

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FEINMAN: Well, what about the argument that subject to control, control means govern, as opposed to, you know, rent control or rent stabilization?"); *id.* at 18:1-11 ("JUDGE RIVERA: It's a compelling use of language that [appellant's] counsel makes when he says control . . . doesn't mean decontrol. MR. MCGUIRE: I'm certainly not saying there are no text-based arguments on – on behalf of the position that my adversaries make."); *id.* at 21:5-21 ("JUDGE GARCIA: Counsel, why put that provision in at all . . . I mean, they had an idea about putting that provision in – it seems fairly clear from the statute – that in exchange for this benefit, there was going to be some type of control over these apartments."); *id.* at 32:14-15 ("JUDGE FEINMAN: Why would they be talking about decontrol, if its not controlled in the first place?"). Given this background, it is difficult to understand 50 Murray's argument that the Court somehow overlooked any facts in respect of the meaning of "subject to control" as used in RPTL § 421-g.

available where the movant seeks only to argue 'a new theory of liability not previously advanced.'" *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715, 718 (1st Dep't 2005); *see also William P. Pahl Equip.*, 182 A.D.2d at 27 ("reargument is not designed to afford the unsuccessful party . . . opportunities . . . to present arguments different from those originally asserted"); *Simpson v. Loehmann*, 21 N.Y.2d 990, 990 (1968) ("A motion for reargument is not an appropriate vehicle for raising new questions."). The fact that 50 Murray's "takings" and "due process" argument is being made for the first time in its Reargument Brief is a sufficient basis to reject it.[3]

The substance of the argument is also simply wrong. The United States Supreme Court has held that the imposition of rent control or stabilization, like the requirements imposed by RPTL § 421-g, are not a "taking" of any property or right of the owners of the affected apartments. *See Yee v. City Of Escondido*, 503 U.S. 519 (1992) ("When a landowner decides to rent his land to tenants, the government may place ceilings

3. Citing 22 N.Y.C.R.R. § 500.24(d)—which permits a party to raise a new legal argument on a motion for reargument only for "extraordinary and compelling reasons"—50 Murray argues that "special circumstances" warrant consideration of its constitutional argument, despite that it has never before raised this argument. (Reargument Br. at 16 n.1.) Not so. The Court's Opinion, and its correct interpretation of RPTL § 421-g, does not impose some irreparable harm or injustice on 50 Murray, and 50 Murray's failure to raise a meritless constitutional argument at any stage of this action is neither extraordinary nor compelling.

on the rents the landowner can charge or require the landowner to accept tenants he does not like without automatically having to pay compensation.") (internal citations omitted); *see also Pennell v. City of San Jose*, 485 U.S. 1 (1988). The *Stop the Beach Renourishment* decision is not to the contrary; in fact, that case stands only for the limited proposition that decisions of a state judiciary (like those of other state actors) may be subject to the Takings Clause. Moreover, the Supreme Court in that case *rejected* property owners' argument that a state court's decision upholding municipality rights to repair beachfront property constituted an impermissible taking.

The majority's Opinion here did not "take away" or "deprive" 50 Murray of any right. Rather, it corrected 50 Murray's misinterpretation of RPTL § 421-g and clarified that 50 Murray *never had a right in the first place* to luxury rent decontrol apartments in a building receiving an RPTL § 421-g tax abatement. Moreover, 50 Murray *chose* to subject its apartments to rent stabilization in exchange for a substantial tax abatement. Thus, no right existed that the Court might "take" or as to which 50 Murray was owed greater due process than it received in this proceeding.

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CONCLUSION

For the reasons stated above, Defendant-Appellant 50 Murray Street Acquisition LLC's Motion for Reargument should be denied.

Dated: New York, New York
August 12, 2019

Respectfully submitted,

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