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 Writ of Certiorari to the New York Court of Appeals

BRIEF FOR THE REAL ESTATE BOARD OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Real Estate Board of New York submits this brief as *amicus curiae* in support of petitioner.[1]

Founded in 1896 as the first real estate trade association in the State of New York, the Real Estate Board of New York (REBNY) is New York City's leading real estate trade association. The organization works on behalf of the mutual interests of its members by promoting public and industry policies. REBNY frequently speaks before government bodies with the primary goals of expanding New York's economy, encouraging the development and renovation of commercial and residential property, enhancing New York City's appeal to investors and residents, and facilitating property management.

REBNY's membership consists of more than 17,000 commercial, residential, and institutional property owners, builders, managers, investors, brokers, and salespeople; banks, financial service companies, utilities, attorneys, architects, and contractors; and other associations, organizations, institutions, corporations, co-partnerships, and individuals professionally interested and engaged in business allied to New York City real estate.

The organization engages its members and the public at large in discussion about current policy and legal issues in real estate. For more than a century

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. All parties were given timely notice of the *amicus*'s intent to file this brief and have consented to its filing.

REBNY has advocated for its members' interests in litigation involving important real estate matters.

The New York Court of Appeals in this case took petitioner's property for public use without just compensation. It did so by adopting a new interpretation of New York law—an interpretation contrary to long-held understanding—holding that building owners who received tax benefits pursuant to Real Property Tax Law (RPTL) § 421-g gave up the right to remove rental units from New York rent stabilization pursuant to that program's luxury deregulation provisions. Many building owners, including members of REBNY, are situated similarly to petitioner and face the same threat of massive devaluation and loss of control of their properties.

The New York Court of Appeals refused to address on rehearing whether its interpretation of Section 421-g effected a taking. This Court's fractured decision in *Stop the Beach Renourishment, Inc.* v. *Florida Department of Environmental Protection*, 560 U.S. 702 (2010), left unresolved the important question whether judicial action can result in a taking. The Court should grant the petition and hold that courts can effect a taking—to ensure that petitioner, and those many property owners who are similarly situated, are not left without a remedy for government destruction of their private property.

SUMMARY OF ARGUMENT

This Court's inconclusive decision in *Stop the Beach* has resulted in widespread confusion in the lower courts regarding whether the prohibition against taking private property for public use without compensation extends to judicial action and, if so, how to determine whether a judicial taking has oc-

curred. The Court should grant certiorari and hold that judicial decisions like that of the New York Court of Appeals here, which diminish or destroy well-settled property rights, can effect a compensable taking of private property under the Fifth and Fourteenth Amendments as readily as legislative or executive action, as the plurality opinion in *Stop the Beach* explained.

The protection of private property embodied in the Takings Clause represents a core value at the very center of American constitutional theory and jurisprudence. Given the central importance of property rights to our polity, the uncertainty surrounding whether the Takings Clause applies at all against one of the three branches of government is especially troubling. This Court has held that judicial action can be set aside for violating other constitutional provisions, such as the First Amendment and the Contracts Clause. It is time to accord the Takings Clause the equal status with those provisions that it deserves.

The need to address this important issue is heightened by the disarray in the lower courts since *Stop the Beach*. Federal courts disagree over whether to recognize a takings claim based upon judicial action. And those courts that have chosen to recognize such a claim cannot agree on the standards governing such a claim. State courts also frequently face the same issue, and they mirror their federal counterparts in their degree of disagreement.

The need for an authoritative resolution of these issues is critical because, in the nine years since *Stop the Beach*, there has been a dramatic increase in the number of cases raising judicial takings claims. There is no reason to expect the lower courts to be

able to reach a consensus on how to address the issue; indeed, many courts simply note that this Court has not recognized a federal judicial takings claim and end their inquiry there.

For these reasons, the Court should grant certiorari to review the decision of the New York Court of Appeals. This case arises in the same procedural posture as *Stop the Beach* and presents a clean vehicle to address the viability of and substantive standards governing a judicial takings claim. Clarification of the Constitution's protection for this important constitutional right is urgently needed.

Certainly if any judicial decision may amount to a taking, the New York Court of Appeals' decision here will qualify. Section 421-g induced real estate professionals to invest in disused and underused commercial buildings in lower Manhattan and convert them into a thriving residential community—based significantly on the settled understanding that New York's onerous Rent Stabilization Law (RSL) would not apply to any units for which rents or tenant income exceeded the threshold for deregulation. Years of consistent administrative statements and practice confirmed that *all* of the RSL applies to Section 421-g properties, including the RSL's provisions for this "luxury decontrol."

The Court of Appeals' contrary interpretation of Section 421-g retroactively strips building owners like petitioner of their settled property rights, denying them the ability to charge market rents that was the basis for their investments, destroying a large part of the value of their property, and potentially saddling them with huge claims for rent refunds by tenants that the RSL guarantees lifetime (and beyond) tenure at now below-market rents. Under any

takings test, that reinterpretation of the law easily qualifies.

ARGUMENT

I. The Protection Of Private Property Rights From Government Intrusion Is A Central Tenet Of The Constitution.

Claims that the government has acted to take private property have a special significance in our constitutional jurisprudence. Unquestionably, the protection of individual property rights was a core concern of the Framers of the Constitution and the Bill of Rights.

The Framers regarded it as "the first object of government." THE FEDERALIST PAPERS NO. 10 at 78 (James Madison) (Clinton Rossiter ed., 1961). Intended to preserve those rights, the Takings Clause lies at the very heart of the constitutional design. See Jennifer Nedelsky, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISIONIAN FRAMEWORK AND ITS LEGACY 9 (1990) (private property supplied "the clear, compelling, even defining instance of the limits that private rights place on legitimate government"); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 270 (1988) ("protection of private property was a nearly unanimous intention among the founding generation").

This Court has repeatedly recognized the importance of the protection of private property rights in American law. It long ago explained that "[t]he fundamental maxims of a free government" require "that the rights of personal liberty and private prop-

erty should be held sacred." *Wilkinson* v. *Leland*, 27 U.S. 627, 657 (1829). Accordingly, "[d]ue protection of the rights of property has been regarded as a vital principle of republican institutions." *Chicago, B. & Q. R. Co.* v. *City of Chicago*, 166 U.S. 226, 235-236 (1897). Indeed, "the right to own and hold property is necessary to the exercise and preservation of freedom." *Stop the Beach*, 560 U.S. at 734 (Kennedy, J., concurring).

Petitioner's judicial takings claim squarely implicates these foundational concerns in a manner warranting this Court's attention. While the importance of protecting private property rights cannot be questioned, a majority of this Court has never determined whether the Takings Clause applies to the judicial branch of government, nor has it articulated the parameters of a judicial takings claim. This case presents an ideal vehicle to do just that.

II. This Court Should Hold That Judicial Decisions May Give Rise To A Takings Claim Just As Courts Can Violate Other Constitutional Rights.

Last term this Court overturned more than 30 years of precedent that had required a plaintiff seeking to obtain just compensation for a taking by a state actor to bring that claim in state court before the plaintiff could assert its constitutional claim in federal court. *Knick* v. *Township of Scott*, 139 S. Ct. 2162 (2019), overruling *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985). But that process of ripening the claim by litigating in state courts, combined with ordinary rules of full faith and credit and preclusion, made the state court's resolution of the federal claim binding on the federal court. The taking plaintiff therefore was de-

nied federal court resolution of its federal constitutional claim. *San Remo Hotel, L.P.* v. *City & County of San Francisco*, 545 U.S. 323 (2005).

In rejecting this Catch-22 created by its precedents, the Court pointed out that the vindication of other federal constitutional rights is *not* subject to a state-litigation requirement to ripen the claim for federal court decision. To the contrary, the "'general rule'" is that Section 1983 claims alleging violation of federal constitutional rights may be brought in the first instance in federal court. *Knick*, 139 S. Ct. at 2172-2173. This Court overruled *Williamson County* in large part because its "state-litigation requirement" impermissibly "relegate[d] the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights." *Id.* at 2169, quoting *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994).

The same principal requires that judicial takings be recognized, just as it is well-established that state courts may violate other constitutional rights.

In *Bouie* v. *City of Columbia*, 378 U.S. 347, 362 (1964), for example, the South Carolina Supreme Court upheld convictions for criminal trespass based on its new interpretation of state trespass law. This Court held that this change in the law by judicial fiat violated petitioners' due process rights: "If a state legislature is barred by the Ex Post Facto Clause" from making such a retroactive change in the law, "it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id.* at 353-354. See also, *e.g.*, *NAACP* v. *State of Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958) (striking down a state court order enjoining NAACP operations in Alabama; "it is not of moment that the State has here

acted solely through its judicial branch"); *Rogers* v. *Tennessee*, 532 U.S. 451, 456 (2001).

More generally, the protections of the Fourteenth Amendment—through which the Takings Clause applies to the States, see *Chicago, B. & Q. R. Co.*, 166 U.S. 226—constrain courts just as much as it constrains other state actors. As this Court pointed out in *Shelley* v. *Kraemer*, 334 U.S. 1, 18 (1948), "from the time of the adoption of the Fourteenth Amendment" it "has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes actions of state courts and state judicial officials." See also *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 680 (1930) (due process); *Village of Willowbrook* v. *Olech*, 528 U.S. 562 (2000) (equal protection).

State courts therefore can violate the First Amendment. *E.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964) (striking down Alabama courts' imposition of monetary penalties for the exercise of journalistic speech); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971) (striking down state court orders enjoining speech). They can violate the Contracts Clause of Article I, Section 10. *E.g.*, *Muhlker* v. *New York & Harlem R.R.*, 197 U.S. 544 (1905). And they can violate the Eighth Amendment's bar on cruel and unusual punishment. *E.g.*, *Solem* v. *Helm*, 463 U.S. 277, 290-291 (1983).

In *Knick*, this Court set out to "restor[e] takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights." 139 S. Ct. at 2170. This Court can take another step to ensure that takings claims rest on an equal footing with other constitutional protections by granting cer-

tiorari and holding that the actions of the judicial branch are subject to the takings clause.

III. The Lower Courts' Confusion Regarding Judicial Takings Claims Has Intensified Since *Stop The Beach*.

Judicial decisions can have profound effects on property rights—and it therefore is not surprising that property owners increasingly have turned to the promise offered by the judicial takings doctrine as an important constitutional remedy. But this area of the law is in disarray.

In the wake of this Court's fractured decision in *Stop the Beach*, both federal and state courts have struggled with the question of whether a judicial taking is a cognizable claim at all, as well as with the standards governing such a claim. In the near decade since that decision, there have been dozens of cases—in both federal and state courts—in which a judicial takings claim has been raised, and those courts have relied on different parts of the *Stop the Beach* opinions to decline to address the claim or, alternatively, to fashion a governing rule. As one court bluntly observed in the aftermath of *Stop the Beach*, "[t]here exist varied treatments of judicial takings claims by different courts." *Straw* v. *United States*, 2017 WL 6045984, at *8 (Fed. Cl. Dec. 6, 2017).

Some federal courts have held that a judicial takings claim is cognizable under *Stop the Beach*, although they do not apply consistent standards in analyzing such claims.

The Third Circuit entertained a claim that a bankruptcy court order constituted a taking. *In re Lazy Days' RV Ctr., Inc.*, 724 F.3d 418, 425 (3d Cir. 2013). The court ultimately rejected the claim on the

ground that, in its view, a judicial taking can only occur when a court changes settled rights and that an "adjudication of disputed and competing claims" therefore "cannot be a taking." *Ibid.*, citing *Stop the Beach*, 560 U.S. at 732.

The Eighth Circuit also recognized a judicial takings claim after *Stop the Beach*, but framed the standard governing such a claim differently than the Third Circuit. The Eighth Circuit relied on the *Stop the Beach* plurality opinion for the rule that there can be a taking when there has been an adjudication of competing rights, but not "where 'courts merely clarify and elaborate property entitlements that were previously unclear.'" *PPW Royalty Trust by and through Petrie* v. *Barton*, 841 F.3d 746, 756 (8th Cir. 2016), quoting *Stop the Beach*, 560 U.S. at 727.

The Ninth Circuit takes the position that "any branch of state government could, in theory, effect a taking." *Vandevere* v. *Lloyd*, 644 F.3d 957, 963 n.4 (9th Cir. 2011), citing *Stop the Beach*, 560 U.S. at 713-716. It ruled that a taking may occur as part of an adjudication of a claim, such as when a state court defines property rights in a manner that "remove[s] a pre-existing, state-recognized property right." *Ibid.*; see also *Stuart* v. *Ryan*, 2018 WL 3453970, at *1 (S.D. Fla. June 26, 2018), citing *Stop the Beach*, 560 U.S. at 733 ("The judicial taking theory recognized by the Supreme Court in *Stop the Beach*" was "that a judicial taking would not be found absent a judicial decision contravening a plaintiff's established property rights").

While these courts recognized a cognizable judicial takings claim, they relied on different parts of *Stop the Beach* to arrive at different legal standards.

Other federal courts have relied on *Stop the Beach* to hold that property owners may never assert a judicial takings claim. For instance, the Seventh Circuit "readily reject[ed]" a judicial takings claim because "there is no binding precedent" establishing such a claim. *Gibson* v. *American Cyanamid Co.*, 760 F.3d 600, 625-626 & n.10 (7th Cir. 2014) (discussing *Stop the Beach* and *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998)).

A district court has observed that after *Stop the Beach*, "no clear standard exists for what constitutes a 'judicial taking, or indeed whether such a thing as a judicial taking even exists.'" *Republic of Argentina* v. *BG Group PLC*, 764 F. Supp. 2d 21, 39 (D.D.C. 2011), quoting *Stop the Beach*, 560 U.S. at 719 (Scalia, J., plurality opinion). As another district court concluded, "[t]he contours and viability of the theory of so-called 'judicial takings'—where a court decision may be deemed to have effectively taken property rights from an individual—are unclear even in the courts of this country." *Eliahu* v. *State of Israel*, 2015 WL 981517, at *5 n.5 (N.D. Cal. Mar. 3, 2015); see *Bridge Aina Le'a, LLC* v. *Hawaii Land Use Comm'n*, 2018 WL 3149489, at *5 (D. Haw. June 27, 2018) (same).

The Federal Circuit has been of two minds on the subject. In *Smith* v. *United States*, the court stated that *Stop the Beach* "recognized that a takings claim can be based on the action of a court." 709 F.3d 1114, 1116 (Fed. Cir. 2013), citing *Stop the Beach*, 560 U.S. at 715. The court reasoned that "it was recognized prior to *Stop the Beach* that judicial action could constitute a taking of property," and "[t]he Court in *Stop the Beach* did not create this law, but applied it." 709 F.3d at 1116-1117.

Later, however, the court apparently backtracked from *Smith*, stating that "the Court's decision in *Stop the Beach* that a cause of action for a judicial taking exists is a plurality decision, and therefore not a binding judgment." *Petro-Hunt, L.L.C.* v. *United States*, 862 F.3d 1370, 1386 n.6 (Fed. Cir. 2017). The court of appeals declined to address "the general viability of a judicial takings claim." *Id.* at 1386. At least one district court has relied on the Federal Circuit's latter position to find that *Stop the Beach* does not establish the existence of a cognizable claim for a judicial taking. See *Raab* v. *Borough of Avalon*, 2013 WL 6983381, at *8 (D.N.J. Dec. 30, 2013).

State courts similarly struggle with judicial takings claims.

The Supreme Court of Indiana held that the *Stop the Beach* plurality announced the legal standard for determining whether there has been an actionable judicial taking. *Town of Ellettsville* v. *DeSpirito*, 111 N.E.3d 987, 995-996 (Ind. 2018). The court used the prospect of a judicial taking as a reason to retain Indiana's common-law rule that once an easement appurtenant's location is fixed, the location cannot be changed unilaterally. *Id.* at 991-992. Otherwise, the court would have to determine whether abandoning the common law rule in favor of a different approach "so fundamentally alters a property right" that it "amounts to a taking of that right." *Id.* at 996.

By contrast, the Supreme Court of Kansas described *Stop the Beach* as "a plurality opinion with no precedential value." *Northern Nat. Gas Co.* v. *ONEOK Field Servs. Co.*, 296 P.3d 1106, 1127 (Kan. 2013). Similarly, the Washington appellate court declined to draw a rule from the *Stop the Beach* plurali-

ty decision and instead concluded that there is "no federally recognized judicial takings doctrine." *Matter of Domestic P'ship of Walsh & Reynolds*, 2019 WL 2597785, at *13 (Wash. Ct. App. June 25, 2019).

A California appellate court explained that "[t]he lesson we take from *Stop the Beach* is that where it has been determined that a court action eliminates an established property right and would be considered a taking if done by the legislative or executive branches of government, it must be invalidated as unconstitutional, whether under the taking or due process clauses." *Surfrider Found.* v. *Martins Beach 1, LLC*, 221 Cal. Rptr. 3d 382, 403 (Ct. App. 2017). The *Surfrider* court adopted both the *Stop the Beach* plurality's test as well as the standard Justice Kennedy set forth in his concurrence. *Ibid*.

The Missouri appellate court found that "[j]udicial takings * * * jurisprudence existed prior to 2010 and *Stop the Beach*," and acknowledged the different approaches set forth by the plurality on the one hand and Justice Kennedy on the other. Having done so, it left open the question of which test (or both or neither) established the governing standard. *Willits* v. *Peabody Coal Co., LLC*, 400 S.W.3d 442, 451 (Mo. Ct. App. 2013).

As all these cases illustrate, federal and state courts are frequently asked to address judicial takings claims after *Stop the Beach*. But sharp divisions have developed as to whether there is a cognizable judicial takings claim at all, as well as regarding the scope of such a claim. That confusion will persist as courts continue to try to distill rules from *Stop the Beach*'s fractured decision—an inquiry that only this Court can resolve authoritatively.

IV. The Petition Squarely Presents This Important Federal Question.

Unable to deny that the question left open in *Stop the Beach* is an important one that this Court needs to resolve, respondents instead rest in their brief in opposition on the contention that the petition does not present a federal question. Respondents observe that the New York Court of Appeals decided only a question of state statutory interpretation, and then refused petitioner's rehearing request to resolve whether that interpretation took petitioner's property for public use without just compensation.

In fact, that sequence of events squarely presents the federal takings question for this Court's review.

Indisputably, "[t]here are situations where raising the federal question for the first time in the petition for rehearing is timely even though the state court says nothing in denying the petition." S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, SUPREME COURT PRACTICE 3-61 (11th ed. 2019). And prime among those situations is when "the [federal] question is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question," and therefore "the petition for rehearing constitutes the first and probably only chance to present the matter to the court." *Ibid.* That is exactly what happened here.

Until the New York Court of Appeals interpreted Section 421-g in such a way as to destroy a large part of the established use and value of petitioner's property, the question whether judicial takings are actionable did not arise. Once the issue did arise, petitioner asked the Court of Appeals to resolve it in a

petition for rehearing. That was enough to preserve the question for this Court's review, "even though," as here, "the petition for rehearing is summarily denied without reference to the federal question." SUPREME COURT PRACTICE at 3-61.

Indeed, this Court granted certiorari to address the judicial takings question *in exactly the same procedural posture* in *Stop the Beach*. 560 U.S. at 713 n.4; see also SUPREME COURT PRACTICE at 3-61 nn.67 & 68 (citing many other cases which the Court has resolved issues in a similar posture). There is no reason why it should not do so again here.

The extreme facts of this case make it a particularly appropriate case in which to resolve the judicial takings question. Petitioner and many other similarly situated property owners have revitalized lower Manhattan, transforming a bleak area of vacant commercial buildings into a vibrant residential community. They did so by investing billions upon billions of dollars, induced by the promise of Section 421-g that they would receive tax incentives, while also recognizing that their rental units would be subject to the RSL.

What came with that deal, they understood, was not only the burden of offering apartments at rent stabilized rates when the RSL so required, but also the promise that when the RSL's conditions for ending a unit's rent stabilized status were satisfied, they could rent out that unit at market rates. That promise—that owners could convert to market rents those units that met the RSL's high-rent or high-income "luxury decontrol" requirements—was confirmed numerous times by regulators and other city and State officials (see Pet. 9-11), as well as being the obvious plain language of Section 421-g and the RSL.

The New York Court of Appeals revoked that settled deal, affecting thousands of apartments in New York City. Its decision has destroyed a significant portion of the value of investors' real estate; deprived them of future market rents, apparently in perpetuity; subjected them to actions for rent refunds; and forced them to physically host tenants on their property at owner-subsidized rents, when many of those tenants are quite capable of paying market rents. That is a physical and regulatory taking under the Fifth and Fourteenth Amendments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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