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 OF PROFESSOR RICHARD A. EPSTEIN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

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He has a strong academic and pedagogical interest in the issues raised in this case, having taught courses in property, land use planning, contracts, and constitutional law, and having authored numerous books that deal with these issues, including Takings: Private Property and the Power of Eminent Domain (1985), Bargaining with the State (1993), and The Classical Liberal Constitution: The Uncertain Quest for Limited Government (2014).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question of how far the constitutional guarantees afforded under the Takings Clause extend remains one of the most unsettled issues of our time. The question is particularly vexing when a purported taking arises not with respect to a preexisting common-law property interest that the government seeks to condemn or regulate, but with respect to a promise

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[1] Pursuant to this Court's Rule 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and no one other than amicus, its members, and its counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2(a), all parties received timely notice of this filing and have provided consent.

of some public benefit that induces a private party to change its position—only to sustain substantial losses when the promised benefit is revoked, either by legislative action or by judicial interpretation. Where, as here, that private party has done everything in its power to confirm the availability of the public benefit before acting in reliance on it, and where the government has repeatedly assured the party that it will provide the benefit, must the government pay just compensation for the losses sustained?

This important question, fully worthy of review by this Court, is squarely presented in this case. Nearly a quarter-century ago, the New York State Legislature enacted the Lower Manhattan Revitalization Plan, which, among other things, added Section 421-g to the New York Real Property Tax Law (RPTL). That section offers tax benefits to property owners who convert qualifying commercial space located in downtown Manhattan into residential units. Since its passage, state and local agencies have uniformly concluded that property owners who accept Section 421-g benefits remain eligible to take advantage of the luxury decontrol provision of New York's Rent Stabilization Law (RSL).

Indeed, the New York City Department of Housing Preservation and Development issued certificates of eligibility establishing that the properties at issue here were eligible for both Section 421-g benefits and luxury decontrol. A certificate of eligibility must issue upon the satisfaction of specified conditions, and a party that secures a certificate of eligibility is entitled to Section 421-g benefits as a matter of right. As no further, individualized authorization is required to claim entitlement to these benefits, a property owner's

right to them is perfected when a certificate of eligibility issues. In reasonable reliance on these certificates, as well as the express assurances of numerous state agencies in response to inquiries from Petitioner, Petitioner acquired these properties for *more than half a billion dollars*—a sum that would make no financial sense if the properties were not eligible for both Section 421-g benefits and luxury decontrol.

Notwithstanding this long-established interpretation of the RPTL and RSL, the New York Court of Appeals held in the decision below that property owners who accept Section 421-g benefits *cannot* take advantage of luxury decontrol. As a result, any property that benefits from Section 421-g will be subject to rent control during the entire time it receives such benefits. What's more, these properties must *remain* under rent control even after Section 421-g benefits terminate, unless the property owner included specific terms in every lease that it issued since it began accepting those benefits. Many property owners, including Petitioner, chose not to observe these conditions in reliance on the government's repeated assurances that there was no need to do so because luxury decontrol was freely available to Section 421-g beneficiaries. These parties now find themselves permanently—and unwittingly—deprived of the luxury decontrol benefit.

Crucially for this petition, New York's Court of Appeals never once considered whether, irrespective of its novel reading of the RPTL and RSL, Petitioner had already acquired a property interest in the luxury decontrol right that had been promised (and conferred) for 15 years. The answer to that question is indisput-

ably, "yes." And the Court of Appeals' decision eliminating that right constitutes a taking compensable under the Fifth and Fourteenth Amendments.

One way to think about this case is through the lens of regulatory takings. The Court of Appeals' decision interfered with Petitioner's legitimate "investment-backed expectations" in its real property—which are protected under this Court's seminal decision in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978)—without offering any public justification for doing so. *See* Pet. 33–34. After all, the government's interests in this issue are entirely financial and thus do not implicate any of the traditional police power concerns with the physical relationships of the property to its immediate environment, as did the landmark preservation scheme at issue in *Penn Central*. *Id*. at 123–29.

But another way of thinking about this case is to focus less on Petitioner's property right in the physical building and more on its interest in the public benefits conferred under the RPTL and RSL—namely, Section 421-g benefits and luxury decontrol. New York law recognizes a "vested" property right in a public benefit (typically a building permit or a nonconforming use) whenever the government has promised that benefit and the property owner has incurred substantial detriment in reliance on that promise. Even where these conditions are not satisfied, a property right in a government benefit may still arise under New York law where a party has a "legitimate claim of entitlement" to that benefit.

The facts of this case clearly establish that Petitioner acquired a property interest in the luxury decontrol benefit available under the RSL. The agencies responsible for administering New York's rent control laws repeatedly assured Petitioner that the subject properties were eligible for both Section 421-g benefits and luxury decontrol, and the New York City Department of Housing Preservation and Development issued "certificates of eligibility" for the properties—the functional equivalent of a permit—confirming this fact. These promises induced Petitioner to expend approximately $540 million to purchase the properties. At minimum, Petitioner had a legitimate claim of entitlement to luxury decontrol given the established practice of allowing property owners who met the standards articulated in the RSL to take advantage of luxury decontrol irrespective of whether they also accepted benefits under Section 421-g.

When the Court of Appeals issued its decision, it completely extinguished Petitioner's property interest in the RSL's luxury decontrol benefit—not just during the time Petitioner accepted Section 421-g benefits, but in perpetuity. The gravity of this decision cannot be understated, as rent-controlled properties are not only subject to caps on rent, but also limits on the ability to evict tenants and market to new tenants. This total destruction of Petitioner's property right, even when done solely by judicial decision, may be countenanced only upon payment of just compensation.

ARGUMENT

I. NEW YORK LAW RECOGNIZES A PROPERTY RIGHT IN A GOVERNMENT BENEFIT WHERE A PARTY HAS A LEGITIMATE CLAIM OF ENTITLEMENT TO THAT BENEFIT.

Although the U.S. Constitution provides that "private property [shall not] be taken for public use without just compensation," U.S. Const., amend. V, "[p]roperty interests . . . are not created by the Constitution," *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.*; *see also Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, 560 U.S. 702, 707 (2010) ("Generally speaking, state law defines property interests.").

The scope of property under state law can be quite sweeping, however. As this Court has recognized, "'property' interests . . . are not limited by a few rigid, technical forms," but rather include "a broad range of interests that are secured by 'existing rules or understandings.'" *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). These interests include not only traditional forms of property recognized at common law, but also interests in government benefits. *See Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (noting that "[m]uch of the wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property," yet it is still sensible to treat these "entitlements as more like 'property' than a 'gratuity'").

"In order to establish a protectable property interest" in a government benefit under New York law, a party "must show more than a mere expectation or hope" of receiving the benefit, but instead "must show that pursuant to State or local law, [it] had a 'legitimate claim of entitlement'" to it. *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 52 (1996). As relevant here, New York law recognizes two forms of property, based on the source of the claim of entitlement and the extent to which a party has relied on that claim. But while the distinction between these forms of property matters in determining whether and to what extent general regulations may restrict a party's enjoyment of its property, the distinction does not matter where the government has entirely extinguished the property right in question.

First, a property owner may establish a "vested" property right in a government benefit by incurring substantial expenses in reliance on the promise of such a benefit—expenses that cannot be recouped if the benefit is withdrawn. This form of property right typically arises with respect to a building permit that is subsequently revoked or a property use that was permitted but which later becomes impermissible. In these circumstances, the building permit or prior zoning law grounds the "legitimate claim or expectation." And where the property owner has begun to build or improve a property in reasonable reliance on this claim, it will be deemed to have a vested property right that the government may not impinge, even in the form of otherwise reasonable regulations. *See People v. Miller*, 304 N.Y. 105, 108 (1952) ("The decisions are sometimes put on the ground that the owner has secured a 'vested right' in the particular use—which

is but another way of saying that the property interest affected by the particular ordinance is too substantial to justify its deprivation in light of the objectives to be achieved by enforcement of the provision.").

In *Town of Orangetown*, for example, a Building Inspector issued a permit authorizing the construction of an industrial building. 88 N.Y.2d at 46. After the property owners had spent more than $4 million to develop the land, the Building Inspector revoked the permit in response to local political pressure. *Id.* The Court of Appeals held that the property owners had "establish[ed] a protectable property interest in the building permit" by showing "that the right to develop their land had become vested under State law." *Id.* at 52. As the court explained, "[i]n New York, a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development." *Id.* at 47. Accordingly, the court ordered "reinstatement of the building permit." *Id.* at 48.

Second, even without the issuance of a permit, New York law recognizes an ordinary property right whenever there is a "'certainty or a very strong likelihood' that" the benefit will be conferred. *Bower Associates v. Town of Pleasant Valley*, 2 N.Y.3d 617, 628 (2004). "[W]hat is central to the analysis is whether the law accords discretion to the authority: property interests do not arise in benefits that are wholly discretionary." *Matter of Daxor Corp. v. State of New York Dep't of Health*, 90 N.Y.2d 89, 98 (1997). *A fortiori*, where the government has surrendered all discretion to deny eligibility for a benefit upon satisfaction of

specified conditions—for example, undertaking conduct deemed to be in the public interest—a party who has satisfied those conditions acquires a property right in the benefit.

Walz v. Town of Smithtown, 46 F.3d 162 (2d Cir. 1995), shows the reach of property rights in government benefits under New York law. There, a property owner sued after the town's highway department declined to grant a permit for certain excavation work necessary to connect his property to the town's water system. *Id.* at 164–65. The Second Circuit observed that under the town's ordinances, "[s]o long as an application form [for an excavation permit] states 'the nature, location, extent and purpose of the proposed excavations,' the Superintendent of Highways has no discretion to decline to issue the permit" because "[t]he Smithtown Code states, 'a permit shall be issued.'" *Id.* at 168. As a result, the court concluded that the property owners "had a property right in an excavation permit." *Id.* at 167; *see also Acquest Wehrle, LLC v. Town of Amherst*, 129 A.D.3d 1644, 1647 (2015).

For present purposes, the distinction between "vested" and "ordinary" property rights is immaterial where the government does everything in its power to assure a private party of its right to a government benefit and induces that party to expend millions of dollars in reliance on these assurances. This gave rise to a cognizable property interest under New York law, and the Takings Clause draws no distinctions between the form of property interest; if the government takes property, no matter the nature of that property, the aggrieved party has a claim under the Takings Clause. Consequently, so long as Petitioner has a property interest in the right to luxury decontrol under the RSL

under any of the grounds articulated above, a takings claim should lie.

II. PETITIONER HERE HAD A LEGITIMATE CLAIM OF ENTITLEMENT TO LUXURY DECONTROL UNDER THE RSL.

In the decision below, the New York Court of Appeals interpreted Section 421-g as prohibiting property owners who accepted tax benefits under that provision from claiming luxury decontrol under the RSL. Whether this is correct as a matter of statutory interpretation is not at issue. Rather, the question is only whether, *before* the Court of Appeals issued its decision, Petitioner had a legitimate claim of entitlement to eligibility for luxury decontrol so as to establish a property right in that government benefit, or, in the alternative, a legitimate investment-backed expectation of its availability under *Penn Central*. Under the circumstances presented here, that question must be answered in the affirmative.

First, Petitioner acquired a vested property right in the availability of luxury decontrol because it incurred substantial expenses in reliance on state and local agencies' express promises that it would be eligible for luxury decontrol even if it accepted Section 421-g benefits. Since 2003, Petitioner and its predecessors-in-interest have, as part of a wide-ranging set of promises made in exchange for their investment in lower Manhattan's real estate market, received "certificates of eligibility" from the New York City Department of Housing Preservation and Development confirming the subject properties' eligibility for both Section 421-g benefits and luxury decontrol. Pet. App. 134a–35a. Because these certificates of eligibility,

once issued, establish a nondiscretionary right to the promised benefit, they are fully analogous to a building permit and its nondiscretionary right, once issued, to engage in the authorized construction project. Moreover, the Department issued these certificates of eligibility with full awareness that Petitioner and its predecessors-in-interest were renting the units at market rates under the luxury decontrol provision. *Id.* In doing so, the Department has confirmed that receipt of Section 421-g benefits includes the continued right to luxury decontrol.

Based on these assurances, Petitioner incurred substantial expense in detrimental reliance on these (and other) governmental promises. Petitioner purchased the subject properties in 2014 for $540 million—a sum that incorporated the significant costs that had been incurred by its predecessors-in-interest converting the properties to residential use under the Lower Manhattan Revitalization Plan. This purchase would not have made financial sense if the units could not have been rented at market rates. *Id.* at 132a. And when that right was lost, Petitioner received nothing at all in exchange.

Second, regardless of whether the government's promises were sufficient to give rise to a vested property right in luxury decontrol, Petitioner had an ordinary property right in the benefit because it had a legitimate claim of entitlement to luxury decontrol. The RSL affords no discretion in determining whether a property that meets the statutory qualifications for luxury decontrol is eligible for the benefit. And while the Court of Appeals concluded that these non-discretionary provisions delineating eligibility for luxury de-

control cut *against* Petitioner, that does not undermine the legitimacy of Petitioner's claim of entitlement. The state and local government agencies responsible for administering New York's rent control laws had, for decades, uniformly agreed that Section 421-g benefits and luxury decontrol go hand-in-hand. And before purchasing the subject properties, Petitioner specifically inquired into the properties' eligibility for both Section 421-g benefits and luxury control—and was repeatedly assured by these government agencies that they were.

In short, Petitioner did everything in its power to ascertain the properties' eligibility for luxury decontrol and received the same answer every step of the way. This is surely enough to give rise to a legitimate claim of expectation, even if the Court of Appeals ultimately reached a different conclusion. Indeed, even if the Court of Appeals' conclusion were correct solely as a matter of statutory interpretation, the longstanding practice of the state and local agencies responsible for administering New York's rent control laws—repeatedly reaching the exact *opposite* conclusion—was sufficient for Petitioner to have a legitimate claim of entitlement to luxury decontrol.

This Court's opinion in *Perry* is on all fours. There, a teacher in Texas's state college system claimed that he was denied due process when the state declined to renew his teaching contract after he became involved in public disagreements with the Board of Regents. 408 U.S. at 595. Although the teacher's interest in renewal of his contract was "not secured by a formal contractual tenure provision," *id.* at 599, the Court stressed that "absence of such an explicit contractual provision may not always foreclose the possibility that

a teacher has a 'property' interest in reemployment," *id.* at 601. This conclusion was borne out of a recognition that, irrespective of the written law, "there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure." *Id.* at 602. In *Perry*, such a common law was likely to exist because the college's faculty guide stated that "'[t]he Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude,'" and "guidelines promulgated by the Coordinating Board of the Texas College and University System . . . provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more ha[d] some form of job tenure." *Id.* at 600.

As in *Perry*, here there was a well-established "common law" practice that recipients of Section 421-g benefits would remain eligible for luxury decontrol regardless of whether a right to luxury decontrol formally existed under statutory law. And as in *Perry*, this common law right was established by longstanding agency practice. The New York City Department of Housing Preservation and Development promulgated regulations confirming that buildings receiving Section 421-g benefits would remain eligible for luxury decontrol. Pet. App. 28a. And the New York State Division of Housing and Community Renewal has issued numerous advisory letters reaching the same conclusion. *See, e.g.*, 145a–47a, 148a–49a, 150a–51a. As Chief Judge DiFiore acknowledged in dissent from the decision below, "it is clear from HPD's promulgated rules and forms, as well as DHCR's informal

guidance, that the agencies most closely involved in the implementation of the section 421-g program and the property owners subject to that program . . . shared a common understanding—that the entirety of the RSL applied to section 421-g buildings, including its luxury decontrol provisions." *Id.* at 29a. This understanding supports Petitioner's legitimate claim of entitlement to luxury decontrol.

As a result, Petitioner had a property interest in eligibility for exemption from rent control under the luxury decontrol provision notwithstanding its acceptance of Section 421-g benefits. The only remaining question is whether the Court of Appeals effected a taking of that property interest when it issued the decision below.

III. THE NEW YORK COURT OF APPEALS' DECISION ABROGATING PETITIONER'S PROPERTY INTEREST IN LUXURY DECONTROL CONSTITUTES A TAKING.

Although "the 'classi[c] taking' [is one] in which the government directly appropriates private property for its own use," *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002), this Court has long recognized that the Takings Clause is not limited to such classic cases. For example, this Court has acknowledged that "data cognizable as a trade-secret property right under [state] law . . . is protected by the Takings Clause of the Fifth Amendment," *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1003–04 (1984), and that governmental acts that regulate, rather than appropriate, personal property "will be recognized as a taking" if they "go[] too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Indeed, whether the government acquires the

private party's property interest is irrelevant to that takings analysis, for it is "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign [that] constitutes the taking." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). "Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." *Id.*; *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020 (1992) (adopting a categorical rule that "[w]hen the owner of real property has been called upon to sacrifice *all* beneficial uses in the name of the common good . . . , he has suffered a taking").

The Court of Appeals' decision in this case effected a taking by completely extinguishing Petitioner's right to luxury decontrol. Indeed, Petitioner will now *never* be able to claim luxury decontrol, even after it has ceased accepting Section 421-g benefits. This is because the RPTL provides that, following termination of those benefits, "such rents shall continue to be subject to rent control, except that such rents that would not have been subject to such control but for this subdivision, shall be decontrolled *if* the landlord has included in each lease and renewal thereof for such unit for the tenant in residence at the time of such decontrol a notice in at least twelve point type informing such tenant that the unit shall become subject to such decontrol upon the expiration of benefits pursuant to this section." RPTL 421-g(6) (emphasis added). In reliance on the government's repeated promises that acceptance of Section 421-g benefits would not affect eligibility for luxury decontrol, Petitioner—like many other Section 421-g beneficiaries—

never included this notice in their leases. *See* Pet. 34 n.10.

By extinguishing Petitioner's interest in luxury decontrol, the Court of Appeals' decision has also seriously undermined the value of Petitioner's interest in the subject properties themselves. Not only will Petitioner have to rent its units at a price far below market rates (and repay millions of dollars in supposed rent overcharges), but it will also be obligated to permit Respondents to continue residing in the units at controlled rates for as long as they wish—and also to *transfer* that right to family members and others who can show a sufficient attachment to Petitioner's properties.

These infringements on Petitioner's property rights are especially egregious considering that they result from Petitioner's good-faith reliance on the government's promises—promises made in order to induce property owners to expend their own funds to achieve the government's goal of revitalizing lower Manhattan. Section 421-g benefits were one inducement, but they were not enough to convince property owners that the substantial risk of investing millions of dollars converting dilapidated commercial properties into residential units in this blighted neighborhood was worthwhile. And so the government promised developers that they could also charge market rents under the RSL's luxury decontrol provision to recoup their substantial investments.

Now that the government has achieved its goal of revitalizing lower Manhattan on the backs of property owners like Petitioner, it is changing the rules of the game and leaving these private parties holding the

bag. This is not simply the "adjust[ment] [of] the benefits and burdens of economic life to promote the common good." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). On the contrary, the government here has substantially "interfered with distinct investment-back expectations," *id.*, to such an extent that, if the decision below stands, Petitioner's will be unable to cover even the mortgage payments on their properties. Such a profound alteration of property owners' expectations cannot be effected without, at minimum, just compensation for the affected parties.

CONCLUSION

For the reasons stated above, this Court should grant certiorari and vacate or reverse the judgment of the New York Court of Appeals.

Respectfully submitted.

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