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 New York Court of Appeals

REPLY BRIEF FOR PETITIONER

Jonathan M. Sperling
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 100018

Jack Boeglin
COVINGTON & BURLING LLP
265 Strand
London WC2R 1BH

Mark W. Mosier
Counsel of Record
Kevin F. King
Brendan Duffy
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
mmosier@cov.com
(202) 662-6000

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement contained in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION, STATUTES & REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Respondents do not dispute that the fractured decision in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), has left the judicial-takings doctrine in a state of disarray and spawned significant disagreement among lower courts regarding how to handle such claims. Nor do they deny that bringing clarity to the judicial-takings doctrine is a task worthy of this Court's attention.

Respondents instead contend that the Court lacks jurisdiction to review the questions presented because Petitioner first raised the takings issue in a petition for reargument. But that argument is foreclosed by *Stop the Beach*, where the Court reached the common-sense conclusion that when a "state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar [this Court's] review." *Id.* at 712 n.4. Any other rule would require a party to anticipate a potential taking and assert a takings claim before the taking even occurs.

Respondents also contend that no taking occurred here. Those arguments are unpersuasive and only underscore the need for this Court's review. Respondents' chief argument—that the New York Court of Appeals' ruling does not constitute a taking because rent regulation *never* violates the Takings Clause—fundamentally misapprehends both this Court's precedents and the practical effects of the Court of Appeals' decision on Petitioner's property rights. As

Chief Judge DiFiore explained in her dissent below, Petitioner and other investors "rel[ied] on a common sense reading of" Section 421-g and "the representations of implementing agencies," but none of that "protected them … from the [Court of Appeals'] retroactive reading of statutory text that dramatically change[d] the terms of the bargain long after the Legislature's goals [were] achieved." App. 31a. Such a dramatic and retroactive deprivation of property rights is the hallmark of a judicial taking. *See Stop the Beach*, 560 U.S. at 715 (plurality opinion).

The petition should be granted.

I. THIS COURT HAS JURISDICTION TO REVIEW THE QUESTIONS PRESENTED.

Respondents contend that the Court lacks jurisdiction because Petitioner first raised its judicial-takings claim in a motion for reargument in the New York Court of Appeals. *See* Br. in Opp. 3-5. That argument is incorrect. This Court has jurisdiction so long as the federal issue is "properly presented to[] the state court," *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*), and this Court has held that a federal claim is properly presented in a motion for rehearing when the court's decision itself is alleged to violate federal law.

A. Respondents rely on the general rule that a federal issue should be raised in state court before a rehearing motion. But this Court's precedents dictate that a petitioner need only raise a judicial-takings claim *after* the decision effecting the taking is issued.

This Court has long held that a federal claim is properly presented to a state court in a rehearing motion when the court's decision itself is alleged to violate federal law. *See, e.g.*, *Brinkerhoff–Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930) (federal claim first raised in petition for rehearing "was timely, since it was raised at the first opportunity"); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85–86 n.9 (1980) ("[T]his Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation."). As the leading treatise on practice before this Court explains, "[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 et al., Supreme Court Practice 3-61 (11th ed. 2019); *see also id.* (Court has jurisdiction when "the petition for rehearing constitutes the first and probably only chance to present the matter to the court"); Brief of Amicus Curiae Real Estate Board of New York, at 14-15.

In *Stop the Beach*, the Court removed any doubt about whether a judicial-takings claim is properly raised in a rehearing motion. The petitioners there first raised their judicial-takings claim in a motion for rehearing in the Florida Supreme Court. *See* 560 U.S. at 712 ("Petitioner sought rehearing on the ground that the Florida Supreme Court's decision itself effected a taking of … littoral rights contrary to the Fifth and Fourteenth Amendments to the Federal Constitution."). Writing for a unanimous Court on this issue, Justice Scalia explained that the Court had

jurisdiction to consider the judicial-takings claim even though the Florida Supreme Court declined to address it:

> We ordinarily do not consider an issue first presented to a state court in a petition for rehearing if the state court did not address it. *See Adams v. Robertson*, 520 U.S. 83, 89 n. 3 (1997) (per curiam). But where the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review.

Id. at 712 n.4.[1]

That is what happened here. Petitioner's claim is that the New York Court of Appeals' decision itself upended decades of settled law and practice in applying Section 421-g of New York's Real Property Tax Law. *See* Pet. 30-35. Petitioner asserted that claim at the first opportunity after the New York Court of Appeals issued its ruling, by including it in a motion for reargument (the New York equivalent of a rehearing petition). *See* App. 67a-71a. Accordingly, this case comes before the Court in the identical posture as *Stop*

---

[1] This holding comes from Part I of Justice Scalia's *Stop the Beach* opinion, in which all eight participating Justices joined, and thus is authoritative on the jurisdictional question. *See* 560 U.S. at 733 (Kennedy, J., concurring in part and concurring in judgment) (joining Parts I, IV, and V of lead opinion), 742 (Breyer, J., concurring in part and concurring in judgment) (same).

the Beach—in both instances the petitioner raised its judicial-takings claim at the same time, through the same procedural mechanism.

B. Respondents suggest that Petitioner forfeited its argument that the Court of Appeals' decision amounted to a judicial taking by failing to argue earlier in the litigation that the state *trial court*'s decision awarding summary judgment to Respondents amounted to a taking. *See Kuzmich v. 50 Murray Street Acquisition LLC*, No. 155266/16, 2017 WL 2840391 (N.Y. Sup. Ct. July 3, 2017). That argument fails.

Respondents identify no authority indicating that Petitioner would have had a viable takings claim at that stage of the litigation. Whether a trial-court ruling can constitute a judicial taking is far from clear where, as here, the ruling is appealable by right and thus arguably not "final" in the sense of conclusively fixing the parties' rights and obligations. *See Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2169 (2019). Here, Petitioner reasonably exercised its appeal rights and continued to litigate the proper interpretation of Section 421-g, rather than asserting that a trial-court ruling could give rise to a taking.

Even if a trial-court ruling could result in a judicial taking, the purported taking here was mooted when the New York Appellate Division unanimously reversed the trial court's ruling. *See* App. 33a-36a. Petitioner thus could not present a judicial-takings claim to the New York Court of Appeals until that court issued a decision that constituted a taking.

C. Respondents contend that this Court lacks jurisdiction because Petitioner's assertion of its judicial-takings claim in its motion for reargument was "procedurally flawed under New York law," because litigants in New York are generally prohibited from seeking reargument on "a new theory of liability not previously advanced." Br. in Opp. 4. This argument fails as well.

This Court does not decide whether a federal claim is "properly presented" to a state court simply by referring to state rules of procedure. If it did, the Court would have lacked jurisdiction in *Stop the Beach*, because the Florida Rules of Appellate Procedure then in force similarly provided that a motion for rehearing "shall not present issues not previously raised in the proceeding." Fla. R. App. P. 9.330 (2008). The scope of this Court's jurisdiction is a matter of federal constitutional and statutory law—not of state law—and the Court has made clear that it has jurisdiction over federal questions first raised on rehearing when the federal question relates to the state-court decision itself. *See* pp. 2-5 *supra*.[2]

In short, this Court has jurisdiction to decide the questions presented because Petitioner timely raised its takings claim in a motion for reargument,

---

[2] In any event, Respondents are mistaken that Petitioner's judicial-takings claim was improperly raised as a matter of state law. While reargument in New York is generally limited to claims already raised, this rule does not apply where there are "extraordinary and compelling" reasons for raising a new claim. 22 N.Y.C.R.R. § 500.24(d). It is hard to imagine a more compelling reason for reconsideration than an argument that the court's ruling violates the U.S. Constitution.

the first opportunity following the decision that constituted the judicial taking. Respondents' arguments to the contrary are foreclosed by *Stop the Beach*, 560 U.S. at 712 n.4.

II. THE NEW YORK COURT OF APPEALS' DECISION CONSTITUTES A TAKING.

Respondents also assert that the New York Court of Appeals' ruling does not constitute a judicial taking. *See* Br. in Opp. 5.[3] But even if these arguments had merit—which they do not—they offer no reason why the Court should deny certiorari. Regardless of whether this Court might ultimately decide that the decision in this case did not constitute a taking, the Court should still settle the antecedent question whether and under what circumstances judicial-takings claims are cognizable.

Respondents primarily contend that Petitioner's judicial-takings claim is foreclosed by *Yee v. City of Escondido*, 503 U.S. 519 (1992). In Respondents' view, *Yee* held 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." Br. in Opp. App. 4a.

Yee held no such thing. In *Yee*, this Court addressed a facial challenge to a city ordinance that

---

[3] Respondents do not present any argument to support this assertion, but instead purport to incorporate arguments made in the state court. This incorporation-by-reference approach is procedurally improper, *see, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 n.24 (2004), but these arguments fail even if they are properly presented.

limited mobile home park owners' ability to evict and refuse rental to mobile home owners. The Court concluded that, in the particular facts of that case, the "unusual economic relationship between [mobile home] park owners and mobile home owners" did not amount to a *physical* taking of the park owners' property. 503 U.S. at 526. But far from adopting a categorical rule that rent control measures may *never* constitute a taking, the *Yee* Court clarified that, "while property may be regulated to a certain extent, if regulation goes too far it *will* be recognized as a taking." *Id*. at 529 (cleaned up). The Court further explained that it was not even considering whether the ordinance amounted to a regulatory taking. *Id.* at 538 ("We leave the regulatory taking issue for the California courts to address in the first instance.").

Furthermore, whatever *Yee* may or may not have signaled about the constitutionality of rent control and stabilization laws in general, that decision certainly does not control here. Unlike in *Yee*, where this Court upheld a law currently in effect, the Court of Appeals here upended settled law and accorded that change retroactive effect. *See* Pet. 30-35; *see also* App. 31a (DiFiore, C.J., dissenting).

As a result, the Court of Appeals effected a taking by "declar[ing] that what was once an established right of private property no longer exists." *Stop the Beach*, 560 U.S. at 715 (plurality opinion). In particular, the Court of Appeals ruling trenches on Petitioner's property rights by:

- subjecting Petitioner to indefinite—potentially permanent—physical occupation of its property

by granting Respondents and other tenants nearly unlimited renewal and succession rights that together amount in effect to transferrable, rent-stabilized life estates;

- substantially diminishing the value of Petitioner's Section 421-g properties, in violation of its reasonable investment-backed expectations; and

- casting doubt on the lawfulness of the market rents Petitioner charged in the past, threatening Petitioner's entitlement to retain past rent collected.

See Pet. 33-35; *see also* Brief of Amicus Curiae Professor Richard Epstein, at 14-17; Brief of Amicus Curiae Real Estate Board of New York, at 4. Neither *Yee* nor any other decision of this Court holds to the contrary.

Equally unavailing is Respondents' assertion that the Court of Appeals' opinion "did not take [away] or deprive 50 Murray of any right," because that opinion instead "clarified" that Petitioner "never had a right in the first place to luxury [rent] decontrol." Br. in Opp. 4a. As the *Stop the Beach* plurality recognized, judicial takings will often be characterized as clarifications, rather than takings, of property rights. *See* 560 U.S. at 726. This Court must then determine whether "a judicial decision that purports merely to clarify property rights has instead taken them." *Id.* The Court of Appeals' decision here upended decades of settled law and practice in interpreting Section 421-

g; it cannot reasonably be characterized as a *clarification* of Section 421-g property owners' rights. *See* Pet. 30-35.

Likewise meritless is Respondents' conclusory argument that the Court of Appeals' decision is not a taking because Petitioner "chose to subject its apartments to rent stabilization in exchange for a substantial tax abatement." Br. in Opp. App. 13a. This Court has rejected the illogical proposition that a property owner implicitly agrees to any and all new encumbrances on their property rights by virtue of engaging in a regulated activity. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2430 (2015) (rejecting the argument that there was "not a taking because raisin growers voluntarily choose to participate in the raisin market"). While Petitioner voluntarily purchased buildings that had obtained Section 421-g benefits, it did so with the understanding—based on "a common sense reading of [the] legislation … and the representation of implementing agencies," App. 31a (DiFiore, C.J., dissenting)—that it could charge market rents for apartments that were subject to the Rent Stabilization Law's "decontrol" provisions. The Court of Appeals' ruling "retroactive[ly]" and "dramatically change[d] the terms of th[at] bargain," long after Petitioner made its significant investment in the apartment buildings in question and "the Legislature's goals [were] achieved." *Id.* As a result, the Court of Appeals' ruling effected an uncompensated taking of Petitioner's property rights. *See* Pet. 30-35.

III. THIS COURT'S REVIEW IS WARRANTED.

Respondents offer no reason beyond a meritless jurisdictional argument for denying certiorari. No good reason exists. The Court should grant the petition given the widespread and growing split of authority regarding whether judicial-takings claims are cognizable. *See* Pet. 15-30; Brief of Amicus Curiae Professor Richard Epstein, at 6-10. Several circuits have recognized judicial-takings claims and adopted the *Stop the Beach* plurality's test, while at least one circuit has categorically rejected the judicial-takings doctrine's existence. *See* Pet. 23-25. Federal district courts and state courts are likewise divided on that threshold question. And at every level, courts that do recognize judicial-takings claims are divided regarding the proper test to apply. *See id.* at 25-27. Experience in the nearly ten years since *Stop the Beach* was decided confirms that intervention by this Court is the only means of bringing order to this state of doctrinal disarray.

The Court should resolve this uncertainty by holding that courts, no less than other branches of government, are capable of taking property in a way that requires just compensation—just as it has held that judicial decisions may violate the Contracts Clause, the First Amendment, and the Eighth Amendment. *See* Brief of Amicus Curiae Real Estate Board of New York, at 8. The uncertainty resulting from *Stop the Beach* "relegates the Takings Clause 'to the status of a poor relation' among" the Constitution's guarantees in this regard. *Knick*, 139 S. Ct. at 2169 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)). Granting review would provide the Court

with an opportunity to right that wrong and "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." *Id.* at 2170.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

Jonathan M. Sperling
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 100018

Jack Boeglin
COVINGTON & BURLING LLP
265 Strand
London WC2R 1BH

Mark W. Mosier
Counsel of Record
Kevin F. King
Brendan Duffy
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001
mmosier@cov.com
(202) 662-6000

Counsel for Petitioner

December 9, 2019