No. _____

In The

Supreme Court of the United States

PACIFIC CARLTON DEVELOPMENT CORP.
and 535 CARLTON AVENUE REALTY CORP.,

Petitioners,

v.

NEW YORK STATE URBAN
DEVELOPMENT CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The New York Supreme Court:
Appellate Division-Second Department

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A New York State redevelopment agency seized, via eminent domain, a large tract of real estate occupied by an existing building in downtown Brooklyn for redevelopment. The building, partially used for office space, included a useable basement of over 13,000 square feet, which had a government-issued certificate of occupancy. During eminent domain proceedings, the lower court ignored the certificate of occupancy's determination of a usable basement as a valued property interest.

The question presented is:

1. Are government-issued attributes of private property (e.g., certificates of occupancy, building permits, business permits) entitled to constitutional protection under the Fifth Amendment when they are seized under the government's eminent domain power, just as they are presently entitled to constitutional due process protection under the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioners Pacific Carlton Development Corp. and 535 Carlton Avenue Realty Corp. are two related entities both wholly controlled by Henry P. Weinstein (collectively, "Weinstein"). Weinstein was the condemnee in the trial court, and the appellant before the New York Supreme Court, Appellate Division, Second Department ("Second Department").

Respondent is the New York State Development Corporation d/b/a Empire State Development Corporation ("ESDC"). ESDC is a government redevelopment agency organized under the laws of New York. ESDC was the condemner in the trial court and Respondent before the Second Department.

CORPORATE DISCLOSURE STATEMENT

Pacific Carlton Development Corp. and 535 Carlton Avenue Realty Corp. are both corporations wholly owned by Henry P. Weinstein of New York. Neither company has any parent company nor subsidiary.

RELATED CASES

N.Y. State Urban Development Corp. v. Pacific Carlton Development Corp. and 535 Carlton Ave. Realty Corp., Index No. 1693-12, New York Supreme Court, County of Kings. Amended judgment entered January 31, 2019.

RELATED CASES – Continued

Pacific Carlton Development Corp. and 535 Carlton Ave. Realty Corp. v. N.Y. State Urban Development Corp., Nos. 2018-03325, 2019-04529, New York Supreme Court, Appellate Division – Second Judicial Department. Judgment entered on June 22, 2022.

Pacific Carlton Development Corp. and 535 Carlton Ave. Realty Corp. v. N.Y. State Urban Development Corp., No. 2022-577, New York Court of Appeals. Review denied on January 5, 2023.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the New York Supreme Court, Appellate Division – Second Judicial Department. The New York Court of Appeals denied review.

OPINIONS BELOW

The denial of review by the New York Court of Appeals, dated January 5, 2023, is not published and is reproduced in the Appendix ("App.") at 33. The decision of the New York Supreme Court, Appellate Division – Second Judicial Department is published at: *Pac. Carlton Dev. Corp. v. New York State Urb. Dev. Corp.*, 206 A.D.3d 931, 171 N.Y.S.3d 522 (2022), *leave to appeal denied*, 39 N.Y.3d 905, 200 N.E.3d 1025 (2023). This opinion is also reproduced at App. 1-11. The decision of the New York Supreme Court of Kings County is not reported and is reproduced at App. 12–32.

JURISDICTION

The New York Court of Appeals denied review of the New York Supreme Court Appellate Division – Second Judicial Department decision on January 5, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution states that private property shall not be taken for public use without just compensation paid.

STATEMENT OF THE CASE

In this eminent domain proceeding, the trial court ignored the Certificate of Occupancy that stated that the Existing Building's lowest level was a usable basement (a 13,000 square foot, partially above-grade basement at that).[1] Issued certificates of occupancy are a constitutionally protectable property interest. See *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972) (a benefit becomes a constitutionally protectable *property interest* when the owner has a "legitimate claim of entitlement," to it, something that applies to previously issued certificate of occupancy). See also *Walz v. Town of Smithtown*, 46 F.3d 162, 168 (2d Cir. 1995) ("the Walzes had a property right in receiving an excavation permit. . . ."); *City of Eastlake v. Forest City Enterprises, Inc*., 426 U.S. 668, 683, 96 S. Ct. 2358, 2366, 49 L. Ed. 2d 132 (1976) (Stevens, J., with whom Brennan, J., joins, dissenting) ("the opportunity to apply for [a zoning amendment] is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment."); *Brady v. Town of Colchester*, 863 F.2d

[1] See N.Y. City Zoning Resolution § 12-10 (definitions of "basement" and "cellar").

205, 212 (2d Cir. 1988) (once a building is completed in compliance with requisite standards, owner acquires a property right in the building permit).

As this Court has noted, property interests are not created by the Constitution. "Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577, 92 S. Ct. at 2709. Nevertheless, some government-issued incidents of property ownership are so universal that they are recognized as protectable interests across many, if not all of the states. See *Zahra v. Town of Southold*, 48 F.3d 674, 681 (2d Cir. 1995) (noting as constitutionally protectable property interests "a building permit, certificate of occupancy, zoning variance, excavation permit or business license. . . .").

Weinstein's certificate of occupancy was such a constitutionally protected property right, as noted in *Roth, Walz*, etc. As is significant to petitioner's just compensation claim, the CO reflected the lowest level as a basement. As stated, under New York law, a basement is usable for the same uses as other floors, thus giving it significant value.[2] This is no small matter in this case. The lower level is undisputedly 13,815

[2] There is some nuance to this under New York City zoning. However, this nuance does not change the constitutional question as to whether a certificate of occupancy or similar government-created property right is protectable under the Fifth Amendment.

square feet. The trial court concluded value of the Existing Building was $210 per square foot. App. at 17. Omission of the basement thus results in a loss of just compensation of approximately $2,901,150.[3] This Court should hold that an award of compensation cannot be "just" under the Constitution where the court flat out ignores vested, constitutionally protected, government-created property rights.

A. Facts and procedural history.

The "Atlantic Yards" project was a quasi-public redevelopment project centered on the Atlantic Terminal near downtown Brooklyn, New York. The Second Circuit characterized the project thusly:

> The Atlantic Yards Arena and Redevelopment Project (the "Atlantic Yards Project" or the "Project") is a publicly subsidized development project set to cover twenty-two acres in and around the Metropolitan Transit Authority's Vanderbilt Yards, an area in the heart of downtown Brooklyn, New York. The plan for the Project, which will be designed in part by the architect Frank Gehry, includes the construction of a sports arena that will play home to the National Basketball Association franchise currently known as the New Jersey Nets, no fewer than sixteen high-rise apartment towers, and several office towers. The

[3] This Court does not have to determine the exact loss in value. Instead, the Court should address the narrow issue of whether government-created property rights are protectable under the Fifth Amendment.

> Project site is bounded generally by Dean Street, Atlantic Avenue, Fourth Avenue, and Vanderbilt Avenue.

Goldstein v. Pataki, 516 F.3d 50, 53 (2d Cir. 2008). The main beneficiary of this project was the private developer, Forest City Ratner.

On March 1, 2010, in Index No. 32741-09, the Supreme Court of the State of New York, County of Kings, entered an order transferring title of various properties (the "Vesting Order") to the New York Urban Development Corporation (doing business as ESDC). Through two wholly controlled entities, Weinstein owned four properties subject to the Vesting Order, Lots 4, 5, 6, and 13. Lot 13 contained the Existing Building.

Weinstein had not challenged the government's right to take the property (although other landowners did, and lost).[4] Weinstein filed a claim to contest the amount of just compensation the ESDC owed him. Weinstein's case was ultimately assigned its own matter, Index No. 1693-12.

The Existing Building was originally constructed as a warehouse with six fully above-grade stories, and one partially above-grade story. The Existing Building had historically been used as a warehouse. Before the Vesting Order, however, Weinstein had started a full remodel of the Existing Building. As of the date of the Vesting Order, the Existing Building had been taken

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[4] *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008).

down to a shell condition on floors one through four (and the basement), with mechanical upgrades to allow modern redevelopment. Floors five and six had already been remodeled to high-end office use.

After a trial before the court[5] on the issue of constitutionally owed just compensation, the trial court issued an award that did not include any amounts of square footage attributable to the Existing Building's basement. Believing this was a mere oversight by the trial court, Weinstein moved for an amended judgment to include the lower level, based both on the physical characteristics of the lower level, and the fact that the Existing Building had a certificate of occupancy ("CO") since its construction denoting the lowest level as a usable "basement."

Instead of accepting the designation of the lower level as a "basement" in the CO, the trial court used its own measurements to determine the lower level was not a basement, and instead was an unusable cellar. Rather than accepting the CO as it had existed for decades, the trial court evaluated the CO to see if its designations were proper (an "as a matter of law" analysis). The trial court did not address Weinstein's argument about the CO's designation of a basement being dispositive of the issue.

Weinstein appealed to the Second Department. On June 22, 2022, the Second Department rendered its decision. The Second Department held that the

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[5] In New York, unfortunately, all eminent domain trials are non-jury. N.Y. Em. Dom. Proc. Law § 512(b).

designation as a basement in the CO "need not be relied upon where, as here, the condemned property has no residential use as of the vesting date."

The Second Department's casual cast off of Weinstein's constitutionally protectable property right cannot withstand scrutiny. The Existing Building's CO, from the time of its construction, designated the lower level as a basement. The Existing Building was not used for residential purposes when it was constructed, nor on the Vesting Order date. This fact does not remove Weinstein's property right in the CO, nor its vested basement determination, and the Second Department did not explain why it would.

The Second Department's holding was also nonsensical because the trial court did not value the Existing Building as if it were residential, instead valuing it consistent with an office highest and best use. It is unclear why the Second Department believed the CO might be operative if the building was used (and valued) as residential (when the building was never residential), but inoperative if the building were used (and valued) for office or redevelopment. Plainly, New York required the CO irrespective of residential use because the Existing Building, designed and formerly operated as a warehouse, has one. The Second Department gave no reason why a non-residential CO can be ignored when it is part of the bundle of rights seized under eminent domain (and thus ostensibly protected by the Fifth Amendment).

Regardless of present definitions of a basement (which it also meets) the CO should be dispositive of the basement issue as a "grandfathered" property right. The Second Department's holding sets the precedent that COs and other constitutionally protected property rights can be ignored for reasons unknown.

To support its nonsensical holding, the Second Department relied on New York's "Multiple Dwelling Law § 301[5] . . . *P.O.K. RSA v. Village of New Paltz*, 157 AD2d 15, 19, [and] *Sextone v. City of Rochester*, 32 AD2d 737, 737." App. at 8. None of these citations make sense. The issue is whether the market (and thus the courts) must *rely* on the CO as a valid pronouncement of the government's determination of proper uses of the property, thus a property right. Plainly, any market participant would rely on a valid CO that states the lowest level can be used as a basement.

The Multiple Dwelling Law, while not directly applicable (because the Existing Building was not residential on the Vesting date), gives legal support for this reliance. Multiple Dwelling Law § 301[5] ("A certificate . . . may be relied upon by every person who in good faith purchases a multiple dwelling. . . .").

The Second Department's reliance on *P.O.K.* is misplaced. First, any holding from *P.O.K.* addressing COs is entirely dicta. *P.O.K.* addressed a municipal law that required developers to obtain a new CO when converting apartments into condominiums ("Local Law No. 21"). New York's Third Department held that, in enacting Local Law No. 21, the Village went "beyond

the Village's enabling authorization and therefore the local law is ultra vires and void." *P.O.K. RSA, Inc. v. Vill. of New Paltz*, 157 A.D.2d 15, 20, 555 N.Y.S.2d 476, 479 (3d Dep't 1990). The Third Department's commentary on the propriety of a law that a municipality had no right to create is purely academic dicta that does not persuasively support the Second Department's holding in this case. See *Aquilino v. United States*, 10 N.Y.2d 271, 278, 176 N.E.2d 826, 830 (1961) (a federal court's "reliance on . . . dicta" that was "besides the point" was not persuasive); *Matter of Robert S.*, 52 N.Y.2d 1046, 1051, 420 N.E.2d 390, 394 (1981) (reliance on dicta was "hardly a basis" to extend the law); *People v. Valencia*, 58 A.D.3d 879, 880, 873 N.Y.S.2d 97, 98 (2d Dep't 2009), *aff'd*, 14 N.Y.3d 927, 932 N.E.2d 871 (2010) (dissenting judge's reliance on dicta was "unpersuasive").

Moreover, *P.O.K.* does not hold that COs may be ignored. Instead, it commented (in dicta) that it was appropriate, in the Village's authority to protect the wellness of its citizens, to require a new CO (along with necessary code changes) when a building changes to condominiums. So, even if Local Law No. 21 were valid, a purchaser in the Village *could* rely on the CO as the building exists. The buyer *may* have to bring the building up to code, assuming there were code violations, and assuming the buyer is changing the use (slightly).

The Second Department's reliance on *Sexstone* is also misplaced. The entirety of *Sexstone*'s holding is that cities may be held negligent for issuing COs to buildings with obvious code violations because cities

know that buyers *rely* on issued COs. *Sexstone v. City of Rochester*, 32 A.D.2d 737, 737, 301 N.Y.S.2d 887, 888 (4th Dep't 1969). To the extent this holding is relevant, it supports Weinstein by showing the widely known (and legally enforceable) marketplace reliance on COs and that owners obtain protectable property rights in issued COs.

REASONS FOR GRANTING THE PETITION

I. The Question Presented warrants this Court's review.

A. The Court should hold that property interests that are protectable under the Fourteenth Amendment are also protected by the Fifth Amendment's Takings Clause and its requirement of just compensation.

This Court has recognized that "property" that is protected by the Fifth Amendment's Takings Clause is more than just the dirt; it is a set of rights inhering in a "thing," with those sets of rights defined not in the Takings Clause, but under state laws. *Murr v. Wisconsin*, 582 U.S. 383, 137 S. Ct. 1933, 1951, 198 L. Ed. 2d 497 (2017) (C.J. Roberts, dissenting). The power of eminent domain, meanwhile, is "drastic." *Huie v. Campbell*, 281 A.D. 275, 277, 121 N.Y.S.2d 86, 87 (App. Div. 1953). In fact, the power of eminent domain has been called the most "drastic source of interference with property rights. . . ." James W. Ely, Jr., *The Guardian*

of Every Other Right: A Constitutional History of Property Rights 6 (3d ed. 2008).

"The founding generation stressed the significance of property ownership as a safeguard for political liberty against arbitrary government as well as the economic utility of private property." Ely, *supra*, at xi. "Due 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, 235-36, 17 S. Ct. 581, 584, 41 L. Ed. 979 (1897). Private property rights have been described as "fundamental, natural, inherent, inalienable, not derived from the legislature and as preexisting even constitutions." *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977). John Locke deemed the preservation of property rights "[t]he great and chief end" of government. John Locke, *Second Treatise of Government*, Ch. IX § 124 (C.B. McPherson ed., Hackett Publishing Co. 1980) (1690). The Supreme Court of Texas has stated that "economic dynamism – and more fundamentally, freedom itself – . . . demand strong protection for individual property rights." *Texas Rice Land Partners, Ltd. v. Danbury Green Pipeline-Texas, LLC*, 363 S.W.2d 192, 204 (2012). The Supreme Court of Florida has described eminent domain proceedings thusly:

> As concepts of democracy have grown, greater emphasis has been placed on the rights of the citizen, among which has been the inalienable right or privilege of acquiring, possessing and protecting property. The power of eminent domain is circumscribed by the Constitution and

> statutes in order that cherished rights of the Individual may be safeguarded. It is one of the most harsh [*sic*] proceedings known to the law.

Pinellas County v. Carlson, 242 So. 2d 714, 716 (Fla. 1970).

As noted above, this Court has held that certain government-issued permissions attain the level of a constitutionally protectable property right when they are granted or legitimately expected. *Roth*, 408 U.S. at 577, 92 S. Ct. at 2709. The Court's holdings, however, have generally come under the protection of the Fourteenth Amendment, where property owners are denied (or allege they are denied) due process when the government interferes with bona fide property rights by revoking or refusing to issue documents to which the property owner should be entitled as a property right. E.g., *Walz*, 46 F.3d 162.

This Court has not, however, explicitly extended this constitutional protection to the Fifth Amendment. If an owner has a property right protected by the Fourteenth Amendment when due process concerns are implicated, surely that property right is similarly protected by the Fifth Amendment, when the nature of the proceeding is not just the right to due process, but when the government is *taking* private property rights against an owner's will.

CONCLUSION

The issue is narrow but vital. The vast majority of eminent domain cases occur in state court. The Second Department opinion is a road map for other courts to erode property rights protected by the Fifth Amendment.

The Court should issue nationwide protection of these government-created property rights to ensure that just compensation is paid when the state takes vested, constitutionally protectable property rights.

Weinstein respectfully asks this Court to grant review.

Respectfully submitted,

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