No. 22-1149

IN THE

# Supreme Court of the United States

PACIFIC CARLTON DEVELOPMENT CORP., *et al.*,

*Petitioners,*

*v.*

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, DBA EMPIRE STATE DEVELOPMENT CORPORATION,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Does the Court have jurisdiction over Petitioners' claim where such claim was not presented to or addressed by the state courts below?

2. Does the Fifth Amendment require a court to award compensation for a partially below-grade floor where the highest and best use of the property as determined by the court is inconsistent with the use of that floor as specified in the certificate of occupancy and where no evidence of the floor's value was provided at trial?

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## INTRODUCTION

This case concerns the valuation of New York property by New York courts applying New York law. There are no federal issues, and none were raised below. Petitioners assert for the first time before this Court that, in alleged violation of the Just Compensation Clause of the Fifth Amendment, the state courts below improperly disregarded and thereby failed to value a certificate of occupancy indicating that a partially below-grade floor of the building on the property was a basement for factory use, notwithstanding the facts that (i) the highest and best use of the building as determined by the trial court and affirmed by the Appellate Division, Second Department, was for office use which would require a new certificate of occupancy, (ii) there was no evidence offered at trial of the value of the partially below-grade floor for office use, and (iii) in fact, the below-grade floor is considered a cellar under New York state law, not a basement, and therefore properly not included in the valuation of the building.

Simply put, there is no compelling reason for this Court to grant the Petition even if Petitioners properly had raised Fifth Amendment issues below. At its essence, the appeal involves a factual valuation determination, made after due consideration by the trial court in its role as fact finder under the unique facts of this case. That valuation determination has no nationwide significance, does not involve an important question of federal law on which the U.S. courts of appeal or state courts of last resort are in conflict, nor is there any other compelling reason for this Court to review this case.

## STATEMENT OF THE CASE

By order of acquisition, dated March 1, 2010 ("Vesting Date"), Respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESD" or "Respondent") acquired the fee simple interest in Petitioners' property located at 750-754 Pacific Street and 543-547 Carlton Avenue, Brooklyn, New York (a/k/a Kings County Block 1129, Lots 4, 5, 6 and 13) ("Property") for the Atlantic Yards Project. The Property is comprised of four contiguous parcels. Lot 13 is the largest parcel with a land area of 17,118 square feet. It was improved with a 6-story building built in 1930 and a 1-story building on the east side of the lot. App. 3. As of the Vesting Date, the building had been partially converted from a factory/warehouse into an office building. The fifth and sixth floors were completed, but the remaining floors were unfinished. A 1942 certificate of occupancy indicated that the partially below-grade floor was a basement for factory and shipping use. R. 4814.[1]

Thereafter, Petitioners filed a claim, and the case proceeded to trial for a determination of the Property's value as of the Vesting Date. The trial was held on June 6-24, 2016 and October 18-20, 2016. R. 5. ESD's appraiser valued the Property at $16,247,000 under the existing zoning based on a highest and best use consisting of the conversion of the existing building on Lot 13 from a factory use to an office use. Petitioners claimed that the Property's value was $57 million based on the reasonable probability of a significant upzoning and expansion of the building into a mixed-use residential development.

1. Citations to "R.__" are to the record on appeal before the Appellate Division, Second Department.

At trial, ESD's surveyor, architect and structural engineer unequivocally identified the partially below grade floor as a cellar. R. 4272-4273, 4538-4540, 4569. Petitioners cross-examined these experts, and never challenged the cellar designation. This determination was not disputed by any of Petitioners' witnesses. At no time during the trial did Petitioners argue that the certificate of occupancy represented an inviolable permanent property interest the taking of which entitled Petitioners to additional compensation under the Fifth Amendment separate and distinct from the just compensation to be determined for the Property as a whole.

In a decision dated November 15, 2017 ("Trial Decision"),[2] the trial court found that the highest and best use of Lot 13 was the existing building to be converted into office use. R. 28. Based in part on that finding, the Trial Decision concluded that the Property's value was $21,935,000 as of the Vesting Date. R. 44.

Petitioners moved pursuant to CPLR 4404 for amended findings. Petitioners argued, among other things, that the trial court erred in finding that the value of the existing building on Lot 13 as redeveloped as a mixed-use building including residential was less than the value of the building in its current use as an office building as a result of the trial court's failure to value the partially below grade basement space. Significantly, Petitioners did <u>not</u> rely on the certificate of occupancy in their post-trial motion nor did they make a Fifth Amendment claim. Petitioners merely argued that the floor height rendered the floor a basement, not a cellar.

2. The Trial Decision is not included in the Appendix, but can be found at R. 5-45.

In a 14-page decision, dated March 19, 2018 ("Amended Trial Decision"), the trial court modified the award increasing the value to $22,206,000 due to a calculation error made in the Trial Decision, but otherwise rejected Petitioners' arguments. On the issue of the partially below-grade floor, the trial court found that the floor was a cellar and not a basement based on the elevation of the floor as indicated by ESD's land survey in evidence and the terms of the NYC Zoning Resolution. App. 18-19. The trial court also found that there was no evidence in the record regarding the value of the partially below-grade floor. The trial court pointed out that although Petitioners' appraiser had submitted a rebuttal report in which he criticized some of the ESD's appraiser's conclusions, Petitioners' appraiser never contested the fact that the partially below-grade floor did not add value to the Property.[3] App. 20.

Petitioners appealed to the Appellate Division, Second Department. Petitioners' appellate brief asserted two independent bases for reversal on the issue of the partially below-grade floor. Petitioners argued for the first time that, under New York law, market participants are entitled to rely on an existing certificate of occupancy when purchasing a building, and therefore New York law

3. Notably, Petitioners do not challenge these factual findings, but merely seek to avoid the first one by arguing that a 1942 certificate of occupancy for a factory use requires that the partially below-grade floor be classified as a basement even though the judicially-determined highest and best use as of 2010 is as an office building. Petitioners do not in any way challenge the trial court's finding that Petitioners failed to meet their burden of presenting any evidence regarding the valuation of the floor assuming it was considered to be a basement.

required the trial court to value the partially below-grade floor as if it could be occupied because a certificate of occupancy existed for the building.[4] Second, Petitioners argued that the facts in the record (*i.e.*, the floor height) proved that the partially below-grade floor was a basement whose square footage should be included in the building's valuation and not a cellar whose square footage would be excluded.

In a unanimous decision and order entered June 22, 2022 ("Appellate Decision"), the Appellate Division rejected Petitioners' arguments, holding in relevant part:

> The Supreme Court also properly excluded the square footage of the subterranean level of the existing structure on Lot 13 from its calculation of damages upon its determination that it was a cellar and not a basement. Although the certificate of occupancy for the existing structure designated the subterranean level as a "basement," this designation need not be relied upon where, as here, the condemned property had no residential uses as of the vesting date (*see* Multiple Dwelling Law § 301[5]; *see also P.O.K. RSA v Village of New Paltz*, 157 AD2d 15, 19, *Sextone v City of Rochester*, 32 AD2d 737, 737). Moreover, the court properly measured the mean curb height along Lot 13's Pacific Street frontage alone in

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4. Petitioners cited to *P.O.K. RSA, Inc. v. Vill. Of New Paltz*, 157 A.D.2d 15, 19 (3d Dep't 1990), *Sexstone v. City of Rochester*, 32 A.D.2d 737 (4th Dep't 1969), N.Y. Multiple Resid. Law § 302A, and N.Y. Multiple Dwelling Law § 301 in support of this argument.

> concluding that the subterranean level was a cellar rather than a basement (*see* NY City Zoning Resolution § 12-10 ["Basement"; "Base plane"; "Cellar"; "Curb level"; "Lot, corner"; "Lot, interior"]). App. 8-9.

Claimants then sought leave to appeal to the New York Court of Appeals and included the issue of the partially below-grade floor as one of the issues it sought to raise before that court. The New York Court of Appeals denied leave to appeal.

## THE PETITION SHOULD BE DENIED

### A. This Court Lacks Jurisdiction Because No Substantial Federal Question Was Raised in the State Courts

Petitioners purport to pose a single Fifth Amendment challenge to the Trial Decision, Amended Trial Decision and the Appellate Decision. Petition For Writ of Certiorari ("Pet."), at i. However, neither the trial court nor the Appellate Division was presented with the issue of whether the certificate of occupancy was entitled to Fifth Amendment protection. And accordingly, neither the Trial Decision nor the Amended Trial Decision nor the Appellate Decision addressed any Fifth Amendment issues or even mentioned the Fifth Amendment at all. Petitioners' statement that "the court flat out ignores vested, constitutionally protected, government-created property rights", Pet. at 4, is disingenuous as the issue was never presented by Petitioners before the courts below, as evidenced by the fact that the decisions below make no reference to the Fifth Amendment. Accordingly,

Petitioner must overcome the presumption that those arguments were not properly presented below, which it has not done and indeed cannot. *See Street v. New York,* 394 U.S. 576, 582 (1969) ("when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts").

Petitioners' only assertion of the Fifth Amendment in its papers submitted to the Appellate Division was by reference to cases regarding the question of whether the measurements of the partially below-grade floor rendered it a basement or cellar under the New York City Zoning Resolution.[5] Petitioners did not raise this issue in their Petition.

Because Petitioners failed to raise its Fifth Amendment claim below, it is not permitted to raise it for the first time in a petition for writ of certiorari, and, accordingly, the Petition should be denied. *See Cardinale v. Louisiana,* 394 U.S. 437 (1969) (petition for writ of certiorari dismissed for failure to raise federal claim below).

### B. The Decision Is Based Upon Independent and Adequate State Grounds and Involves Factual Issues

This Court unwaveringly adheres to the principle that it will not review state court decisions that rest on

5. Petitioners cited to *U.S. v. Virginia Elec. & Power Co.*, 365 U.S. 624, 645 (1961), in their appellate brief for the principle that "just compensation" must be liberally construed in favor of the condemnee.

adequate and independent state grounds. *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983). "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide" such cases. *Id.,* at 1040.

Here, the New York courts below determined the value of the Property solely on the basis of well-settled principles of state eminent domain law. The courts below did not rely on federal law in determining the value of the Property. As such, the Petition should be denied because the decisions below are based upon independent and adequate state grounds. *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 566 (1977) ("If the judgment rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted").

The Petition should also be denied because the valuation of an individual parcel of property in its unique development stage as of a specific valuation date is a factual question. *See CSX Transp., Inc. v. Georgia State Bd. of Equalization,* 552 U.S. 9, 19 (2007) ("Valuation of property, though admittedly complex, is at bottom just 'an issue of fact about possible market prices'") *quoting Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 741 (1997). It is thus not appropriate for this Court's review. *See* Sup. Ct. R. 10; *Tacon v. Arizona,* 410 U.S. 351, 352 (1973) ("Since this is primarily a factual issue which does not, by itself, justify the exercise of our certiorari jurisdiction, the writ of certiorari is dismissed as improvidently granted"); *Aetna Life Ins. Co. v. Dunken,* 266 U.S. 389, 394 (1924) ("The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry here").

The factual question posed in this case is what value, if any, should be assigned to a certificate of occupancy for a partially below grade floor where the highest and best use of the building as determined by the trial court, *i.e.*, office use, is inconsistent with the use permitted by the certificate of occupancy, *i.e.*, factory use, and where no evidence of the floor's value for office use was admitted at trial. Petitioners wrongly argue that, once issued, a certificate of occupancy is forever. But clearly a certificate of occupancy is not permanent for all uses but is rather issued for specific uses; in this case, for factory uses. Thus, under the trial court's highest and best use of the building for office, a new certificate of occupancy would have to be obtained and therefore there is no value in the existing certificate of occupancy.[6] *See* NYC Admin. Code § 28-118.3.1 & § 28-118.3.2 (older Certificates of Occupancy are insufficient once alterations are made that change the use of building); *see also Touro College v. City of New York Environmental Control Bd.*, 139 A.D.3d 495, 496 (1st Dep't 2016) (upheld violation because "use of the cellar for a laundry room, workshop and recreation area was unauthorized since such uses were not noted in the most recent certificate of occupancy").

In this connection, the certificate of occupancy was only relevant to the extent it would be considered by the willing buyer, *i.e.*, how much would a willing buyer pay for the fee interest as a potential office development considering the existence of the 1942 certificate of occupancy for a

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6. Even Petitioners' proposed highest and best use of a mixed-use residential building would require a new certificate of occupancy because it represents a change from the 1942 factory use.

factory use. *See In re Islip*, 49 N.Y.2d 354, 360 (1980) (just compensation has been held to be "the price a willing buyer would pay a willing seller"). The trial court was well within its discretion as fact finder to determine that the willing buyer would not assign additional value for the partially below-grade floor given the fact that a proper analysis of the floor's dimensions, as undertaken by the trial court, demonstrates that it is a cellar under the NYC Zoning Resolution, not a basement, and therefore would not be useable for offices. This was further buttressed by the fact that Petitioners' own appraiser never attributed any value to the partially below-grade floor if the building were used for an office use.

In any event, this factual question of value is one governed by New York state law, and thus inappropriate for this Court to review.

### C. The Decisions Below Do Not Have Nationwide Significance Nor Do They Conflict With Decisions of This Court or Other Courts

At its core, the Petition is about a former property owner's dissatisfaction with the amount of a condemnation award. This case is a factual dispute involving a unique set of facts, not a legal one. Because this dispute is specific to this particular case (*i.e.*, the Property's value on the Vesting Date), this case does not raise any national issues. Petitioner asserts that this case concerns whether "government-issued permissions attain the level of a constitutionally protectable property right," Pet. at 12. This is not true. The question here is whether a property owner is entitled to additional value for a certificate of occupancy attached to a parcel of land appropriated in

fee where it adds no value to the property because it is inconsistent with the property's highest and best use. The decisions by a Brooklyn court about the value of a floor of a particular Brooklyn building could possibly affect the Brooklyn real estate market but will have no ramifications outside of New York City. This case is therefore not appropriate for this Court's review.

Further, Petitioners do not identify any conflicts between the state court decisions below and decisions of this Court or any other court.

## CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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