No. 25-464

IN THE
Supreme Court of the United States

PHILIP G. POTTER,
Petitioner,

v.

INCORPORATED VILLAGE OF OCEAN BEACH, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

This case squarely presents an entrenched, two-to-five circuit split over a question of enormous significance to property owners nationwide: When does the limitations clock start running on procedural due process claims asserted in the land-use context? The Second and Third Circuits, applying the accrual rule for *takings* claims, hold that the clock starts running as soon as the government deprives the plaintiff of their property. The Fifth, Sixth, Seventh, Ninth, and Tenth Circuits, applying ordinary ripeness principles, hold that the clock does not start running until the government fails to provide due process for a deprivation—something that might not happen until long after the deprivation itself. The conflict is untenable, and this case is the ideal vehicle to resolve it.

Respondents do not dispute the circuit split. Nor do they dispute the issue's importance. Instead, respondents assert (Br. in Opp. 3) that the court of appeals' *holding* was "dicta." No. The Second Circuit affirmed dismissal of petitioner's procedural due process claim on the sole ground that respondents took "a final position" on the decision to revoke his certificate of occupancy more than three years before he filed suit. Pet. App. 7a. That conclusion, the court explained, was compelled by Circuit precedent, holding that "'procedural due process claims in the land-use context'" are subject to the accrual rule for takings claims, which ripen as soon as the government deprives the plaintiff of his property. *Id.* at 6a-7a n.1.

Respondents urge that petitioner's claim would have been untimely "regardless of the rationale" because he became "aware of the finality" of their decision more than three years before he filed suit. Br. in Opp. 3. But that just restates the *Second Circuit's* rationale. Had this suit arisen in the Fifth, Sixth, Seventh, Ninth, or Tenth Circuits, petitioner's claims would have been subject to a *different* rule. Those courts apply "'general ripeness principles'" to claims like petitioner's—not the special rule for takings claims. *Bowlby* v. *City of Aberdeen*, 681 F.3d 215, 223 (5th Cir. 2012); see Pet. 14-18. Under those principles, this Court recently reiterated, "a procedural due process claim 'is *not* complete when the deprivation occurs.'" *Reed* v. *Goertz*, 598 U.S. 230, 236 (2023) (emphasis added). The clock starts running "only when 'the State fails to provide due process.'" *Ibid.* By that measure, petitioner's claim would have been timely or—at worst—too *early*, entitling him to dismissal without prejudice and a chance to refile. See Pet. 24. Respondents have no answer.

Respondents spend the rest of their brief relitigating the appeal, addressing claims that are no longer in the

case and arguments never considered by the courts below. None has any bearing on the question presented or the need for this Court's review. That need is urgent.

As amicus the New Civil Liberties Alliance ("NCLA") explains, the question presented here is all the more important now that this Court has held that takings claims accrue as soon as the government effects a *de facto* deprivation of property. See NCLA Br. 15-17. That threatens perverse results in circuits that apply that same rule to procedural due process claims in the land-use context. A *de facto* deprivation might be complete long before the property owner has experienced—or even has any reason to expect—a deprivation of due process. *Id.* at 17. To preserve their rights, property owners may be forced to "continue to pursue relief in the state system and simultaneously file a protective federal § 1983 suit challenging that ongoing state process." *Reed*, 598 U.S. at 237. That is exactly the result this Court warned "would 'run counter to core principles of federalism, comity, consistency, and judicial economy.'" *Ibid.* Again, respondents have no answer.

The petition should be granted.

ARGUMENT

I. THE SPLIT IS UNDISPUTED

Respondents do not dispute that there is a clear, acknowledged circuit conflict on the question presented. Five circuits—the Fifth, Sixth, Seventh, Ninth, and Tenth—analyze the accrual of procedural due process claims by focusing on the specific rights at issue. See Pet. 14-18. Those courts apply the takings rule only to claims that actually seek relief for a taking. Two other Circuits—the Second and Third—take a one-size-fits-all approach, applying the takings rule to *all* procedural due

process claims asserted in the land-use context, whether those claims seek relief for a taking or not. See *id.* at 18-20. There is no reason to think that conflict will resolve on its own. The NCLA agrees: the split is "sharp and entrenched." NCLA Br. 9.

Respondents contend that the Second Circuit's discussion of the accrual rule was "dicta" in a "footnote." Br. in Opp. 3. But that footnote stated the rule the court of appeals applied to affirm dismissal of petitioner's claim and explained why that rule was dispositive. Pet. App. 6a-7a n.1. When a court "relies on a legal rule or principle to decide a case, that principle is a '*holding*' of the [c]ourt," not dicta. *Andrew* v. *White*, 604 U.S. 86, 92 (2025) (emphasis added); accord *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 66 (1996) (court's "rationale" is not "dicta"); *Burnham* v. *Superior Ct.*, 495 U.S. 604, 613 (1990) (exclusive basis of a judgment is not dicta) (plurality).[1]

Respondents protest that the Second Circuit applied "settled law." Br. in Opp. 3. But that *supports* review, demonstrating that the court's position on the question presented is entrenched. See Pet. App. 6a-7a n.1 (invoking circuit decisions from 2002 and 1992). Only this Court can resolve the disagreement and bring uniformity to this important area of federal law.

II. THE DECISION BELOW IS INCORRECT

Respondents do not defend the rule the Second Circuit applied in this case. They do not explain how indiscrimi-

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[1] This Court has granted review of cases disposed of by the Second Circuit with far less analysis than the discussion here. See, *e.g.*, *United States* v. *Boyle*, 283 F. App'x 825, 826 (2d Cir. 2007) (resolving subject of the question presented without discussion); *John Wiley & Sons, Inc.* v. *Kirtsaeng*, 605 F. App'x 48, 49 (2d Cir. 2015) (applying Circuit precedent with limited discussion).

nately applying the accrual rule for *takings* claims to procedural due process claims "'in the land-use context,'" Pet. App. 6a-7a n.1, squares with this Court's admonition that any "accrual analysis" must start by "identifying 'the *specific constitutional right*' alleged to have been infringed," *McDonough* v. *Smith*, 588 U.S. 109, 115 (2019) (emphasis added); see Pet. 20-21. They do not attempt to square the Second Circuit's approach with this Court's holding that "a procedural due process claim 'is not complete when the deprivation occurs'" but "is 'complete' only when 'the State fails to provide due process.'" *Reed*, 598 U.S. at 236. And they do not dispute that the Second Circuit's rule risks exactly the kind of "parallel" state and federal litigation this Court has said runs "'counter to the core principles of federalism, comity, consistency, and judicial economy.'" *Id.* at 237; see Pet. 21-22; NCLA Br. 11-12.

Respondents urge (Br. in Opp. 4-10) that the Second Circuit reached the right result in this case. But they do not dispute that the result would have been *different* in the circuits that reject the Second Circuit's one-size-fits-all approach. Respondents argue that petitioner should have known the Village had taken a final decision to revoke his certificate of occupancy. But that would not have been dispositive in the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits. See Pet. 14-18. Rather, the question in those courts would have been at what point "'the State fail[ed] to provide'" petitioner "'due process.'" *Reed*, 598 U.S. at 236. By that standard, petitioner's claim could not have been dismissed as untimely. See Pet. 24; NCLA Br. 18-19. Respondents have waived any argument to the contrary. S. Ct. R. 15.2.

III. The Question Presented Is Exceptionally Important, And This Case Is An Ideal Vehicle To Resolve It

Respondents do not dispute that the question presented is important. Respondents assert that "vehicle problems" would prevent the Court from "cleanly resolving" it. Br. in Opp. 4. But they do not actually identify any vehicle problems. There are none.

1. Respondents concede that the only claim left in this case is petitioner's as-applied procedural due process challenge arising from the revocation of his certificate of occupancy. See Br. in Opp. 4; Pet. App. 2a; S. Ct. R. 15.2.[2] That issue was resolved on the pleadings, leaving no factual disputes that might impede review.

Respondents assert that this case would have come out the same way "regardless of the rationale." Br. in Opp. 3. But they do not dispute that the court of appeals affirmed dismissal based solely on its view that petitioner's claim accrued as soon as he became aware that his certificate of occupancy had been *de facto* revoked. See Pet. App. 6a-7a. Again, respondents do not dispute that the dispositive question in five other circuits would instead have been when petitioner was denied due process. Br. in Opp. 3. And respondents do not dispute that petitioner's claim could *not* have been dismissed as untimely under that rule. See Pet. 24; NCLA Br. 18-19. At a minimum, in those

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[2] Respondents argue that petitioner's "procedural due process, substantive due process, and *Monell* liability" claims are untimely. Br. in Opp. 4. But as respondents admit, "[p]etitioner has dropped all claims except the procedural due process claims." *Ibid.* Respondents' arguments about the denial of rental permits for petitioner's home, the frivolous criminal complaints the Village filed against him, and the applicability of the continuing violations doctrine and equitable estoppel likewise address issues that are no longer in the case.

circuits, petitioner would be entitled to a remand for a determination of "when, if ever, the Village indicated to him that it would not be providing a hearing on the revocation." NCLA Br. 19. And even if that resulted in dismissal of petitioner's claim *without* prejudice as unripe, that change from with- to without-prejudice dismissal would be meaningful relief, supporting review. Pet. 24 n.7.

2. Rehashing arguments they made below, respondents contend (Br. in Opp. 10-17) there are alternative grounds supporting the judgment. But neither the district court nor the court of appeals considered those arguments—let alone suggested that they offered alternative grounds for dismissal. They do not.

a. Respondents argue first (Br. in Opp. 10-15) that there is no cognizable property interest in the issuance of a certificate of occupancy. But this case is not about the failure to *issue* a certificate. Petitioner was issued a certificate of occupancy fifteen years ago. See C.A. App. 221 ¶40. The complaint amply alleges that petitioner had a protectible property interest in that certificate.

Under Second Circuit precedent, a New York property owner acquires a protectible property interest in a previously issued land-use permit by "'demonstrat[ing] a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further'" that purpose. *Cine SK8, Inc.* v. *Town of Henrietta*, 507 F.3d 778, 784 (2d Cir. 2007). That is exactly what petitioner alleges happened here. Petitioner built a home on his property—an extensive project that required mortgage financing. C.A. App. 214, 219-221 ¶¶1, 32-41. Petitioner incurred that expense to further the purpose for which he was granted a certificate of occupancy—namely, occupying, selling, or renting his home. See C.A. App. 234 ¶107. By purporting to revoke

that certificate, respondents rendered petitioner's investment "'essentially valueless.'" *Cine SK8*, 507 F.3d at 784. That is more than sufficient to allege a protectible interest. See *id.* at 785 (evidence that plaintiff made $2.3 million investment in reliance on issued special use permit sufficient to survive summary judgment).[3]

b. Respondents also argue (Br. in Opp. 15-17) that New York provides a facially adequate *post*-deprivation procedure for land-use decisions—an Article 78 proceeding. That is no barrier to review, either. For one thing, respondents' argument assumes the Village was not required to afford petitioner a *pre*-deprivation hearing. See NCLA Br. 12-14.[4] Here, a state court twice concluded that the Village was required to do just that. C.A. App. 372; C.A. App. 494. And given petitioner's allegations that the purported revocation was unlawful, the Second Circuit might well have agreed if it had reached the issue. See *McDarby* v. *Dinkins*, 907 F.2d 1334, 1338 n.4 (2d Cir. 1990); C.A. App. 214 ¶2. For another, this is not a *facial* challenge to New York's procedures. Here, the Village's inconsistent litigating positions and its refusal to hold a revocation hearing—facts respondents do not dispute—have interfered with petitioner's ability to secure effective post-deprivation relief. The Second Circuit recognizes those

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[3] Respondents assert that petitioner "admitted" in his complaint that he had not complied with applicable laws. Br. in Opp. 13. In fact, the complaint says the opposite. See C.A. App. 223 ¶51. The allegation respondents invoke quotes *the Village building inspector*. C.A. App. 222 ¶46. Unsurprisingly, the complaint alleges the inspector was "incorrect[ ]." C.A. App. 222 ¶45.

[4] Petitioner's claim is timely if a pre-deprivation hearing is required. The Village did not make clear it would not hold a revocation hearing until well within the limitations period. See NCLA Br. 18-19; see also C.A. App. 230-231 ¶¶88-91 (alleging the Village notified petitioner it revoked certificate without a hearing in January 2024).

types of as-applied challenges to facially adequate procedures. *E.g.*, *Tsirelman* v. *Daines*, 794 F.3d 310, 317 (2d Cir. 2015). Petitioner should have the chance to make those arguments.

* * *

The Second Circuit held petitioner's procedural due process claim untimely based on the accrual rule for takings claims. If petitioner's home were in Long Beach, California, instead of on Long Island, New York, it is undisputed that the rule—and the result—would have been different. That inconsistency, on an important question of federal law, requires this Court's review.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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