No. 14-102

In the Supreme Court of the United States

WEST CHELSEA BUILDINGS, LLC, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
SAM HIRSCH
Acting Assistant Attorney General
DAVID C. SHILTON
VIVIAN H.W. WANG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals was required to certify a particular question of contract interpretation to the New York Court of Appeals, when petitioners suggested certification as an option for the first time at oral argument.

2. Whether the unconstitutional-exaction doctrine that this Court has applied in the context of conditions on land-use permits is applicable to petitioners' contractual waiver of their right to sue the United States, made outside the context of a land-use permit and in exchange for valuable consideration.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rule:

Miscellaneous:

In the Supreme Court of the United States

No. 14-102

WEST CHELSEA BUILDINGS, LLC, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals' order of summary affirmance (Pet. App. 3a-4a) is not reported. The opinion of the Court of Federal Claims (Pet. App. 5a-59a) is published at 109 Fed. Cl. 5 (2013).

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2014. A petition for rehearing was denied on May 1, 2014 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on July 27, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are entities that owned property underlying the High Line, a former elevated railway in the West Chelsea neighborhood of Manhattan. Pet.

App. 8a. Beginning in the early 1990s, petitioners and others applied to have the Interstate Commerce Commission, and then its successor the Surface Transportation Board (STB), find the High Line to be abandoned and allow for its demolition. *Id.* at 9a-10a; see 49 U.S.C. 10903. The agency conditionally granted the group's application, but the group was ultimately unable to meet the conditions the agency had imposed, and no certificate permitting consummation of the abandonment was issued. Pet. App. 10a.

In 2002, petitioners' group tried again to secure such a certificate. Pet. App. 10a. A community-based nonprofit group participated in the STB proceedings to oppose abandonment of the High Line and to have the High Line preserved for public use as an interim recreational trail under the National Trails System Act Amendments of 1983, 16 U.S.C. 1247(d). Pet. App. 11a; see *id.* at 6a. The City of New York, which supported the nonprofit group, entered into negotiations —in which petitioners were represented by counsel— with the railroad company and petitioners' group, seeking to resolve the situation by mutual agreement. *Id.* at 11a-12a. The negotiations culminated in written agreements under which the City approved a special zoning plan that gave petitioners certain transferable development rights worth millions of dollars and made available to petitioners certain tax benefits; petitioners, in turn, agreed to withdraw their objections to the STB's authorization of the public use, donate some public-use easements, and sign a covenant agreeing not to bring certain lawsuits, including suits against the United States relating to the High Line conversion. *Id.* at 11a-22a, 62a-80a.

After petitioners formally withdrew their opposition, the STB, which was made aware of the outcome of the negotiations, issued a Certificate of Interim Trail Use, which allowed the City and the railroad company to negotiate a railbanking and interim trail use agreement. Pet. App. 14a, 19a. Petitioners and the City then signed final versions of their agreements. *Id.* at 15a. Each of those final agreements stated, in a section entitled "Release and Waiver," that the signatory petitioner "for itself and its successors, * * * for good and valuable consideration, the receipt and adequacy whereof is hereby acknowledged, hereby * * * *agrees not to sue or join any action seeking compensation from* * * * the City or *The United States of America or any of its departments or agencies* with respect to the Highline" conversion. *Id.* at 16a (emphasis altered). The City's counsel explained that at the time of negotiations, "[t]he City was aware of the potential for litigation against the United States" and "[i]n keeping with the City's desire to settle all matters related to the [High Line conversion], the owners of the properties [along the High Line] agreed not to sue the United States of America for compensation in connection with" the matter. *Id.* at 17a (citation omitted).

2. Petitioners subsequently sued the United States in the Court of Federal Claims (CFC), alleging that in issuing the Certificate of Interim Trail Use, the STB had taken their property without just compensation, in violation of the Fifth Amendment's Just Compensation Clause. Pet. App. 23a. The court granted the government's motion for summary judgment. *Id.* at 5a-59a.

a. The CFC reviewed New York law and concluded that the government was entitled to enforce, as a third-party beneficiary, petitioners' agreements not to sue the United States. Pet. App. 28a-50a. Relying on a decision of the New York Court of Appeals, the CFC explained that "New York courts follow section 302 of the Restatement (Second) of Contracts" in determining whether third-party-beneficiary status is warranted. *Id.* at 30a (citing *Fourth Ocean Putnam Corp.* v. *Interstate Wrecking Co.*, 485 N.E.2d 208, 212-213 (N.Y. 1985)). Under Section 302, "'a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intent of the parties' and * * * 'the circumstances indicate the promisee intends to give the beneficiary the benefit of the promised performance.'" *Id.* at 30a-31a (quoting 2 Restatement (Second) Contracts § 302(1), at 439-440 (1982) (Restatement)). "The Restatement further states that 'if the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary.'" *Ibid.* (quoting Restatement § 302 cmt. d at 442).

Applying that rule to the circumstances of this case, the CFC determined that "the plain language of and undisputed circumstances surrounding the Covenant Not to Sue Agreements indicate that the parties intended to directly benefit the United States." Pet. App. 44a. The court explained that the express language of petitioners' agreements—which required them "not to sue or join any action seeking compensation from * * * The United States of America or any of its departments or agencies with respect to the Highline" conversion, *id.* at 45a (citation omitted)—

"demonstrates that the parties intended to directly benefit the United States and that the United States would 'be reasonable in relying on [this] promise' not to sue," *id.* at 45a-46a (brackets in original) (quoting Restatement § 302 cmt. d at 442). The court found that petitioners had "provided no evidence that the covenant not to sue clause * * * was included in the Agreements for a purpose different from that expressed by the clear language of that provision." *Id.* at 48a.

The court reasoned that the circumstances of this case were "distinguishable from" the circumstances of the New York intermediate-appellate-court case on which petitioners primarily relied, *Chavis* v. *Klock*, 846 N.Y.S.2d 490 (App. Div. 2007). Pet. App. 48a. In *Chavis*, "the New York appellate court found that the particular language of the covenant not to sue at issue * * * was intended to benefit the employer, not to bestow third party beneficiary status on a customer." *Ibid.* In this case, however, petitioners had "provide[d] no evidence" that the City's purpose was solely "to protect itself from any indemnification liability." *Id.* at 47a.

b. The CFC additionally rejected petitioners' argument that enforcement of their agreement not to sue would violate the Just Compensation Clause's prohibition against a governmental taking of property without just compensation. Pet. App. 55a-59a.

Petitioners contended that their agreements "violate[d] the 'doctrine of unconstitutional conditions,' as applied by the Supreme Court to government land use exactions in" *Nollan* v. *California Coast Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). Pet. App. 55a. The CFC recognized

that, under the unconstitutional-conditions doctrine, "the government may not require a person to give up a constitutional right," such as the right to receive just compensation for a taking of property, "in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Ibid.* (quoting *Dolan*, 512 U.S. at 385). The CFC reasoned, however, that the doctrine "does not apply" in a case like this, where petitioners "voluntarily waived their constitutional rights as part of a voluntary agreement." *Id.* at 57a. The court emphasized that unlike *Nollan* and *Dolan*, which involved "land use conditions demanded by governments in exchange for permits," the agreements here "were voluntarily executed as part of an overall deal in which benefits were given in exchange for certain obligations by all parties." *Id.* at 58a. The court noted that its reasoning on this issue accorded with the Ninth Circuit's. *Ibid.* (citing *Leroy Land Dev.* v. *Tahoe Reg'l Planning Agency*, 939 F.2d 696, 698 (9th Cir. 1991), and *McClung* v. *City of Sumner*, 548 F.3d 1219, 1230 (9th Cir. 2008), cert. denied, 556 U.S. 1282 (2009)).

3. Petitioners appealed. Pet. App. 3a-4a. At oral argument before the court of appeals, petitioners mentioned for the first time that the court could, "if it's so inclined," certify the contract-law question decided by the CFC to the New York Court of Appeals. Oral Argument at 29:38 (No. 13-5066), http://www.cafc.uscourts.gov/oral-argument-recordings/all/west-chelsea.html (Feb. 7, 2014). The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 3a-4a.

ARGUMENT

The court of appeals' unpublished per curiam decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners primarily contend (Pet. 16-32) that the court of appeals should have certified to the New York Court of Appeals the question whether the United States was a third-party beneficiary entitled to enforce petitioners' agreement not to sue the United States in connection with the High Line conversion. That contention lacks merit.

To begin with, petitioners forfeited the certification issue by failing properly to raise it in the court of appeals. As petitioners appear to acknowledge (Pet. 6), they did not request certification in their merits briefing to the court of appeals and mentioned the possibility of certification for the first time at oral argument. The "law is well established" in the Federal Circuit "that arguments not raised in the opening brief are waived." *SmithKline Beecham Corp.* v. *Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006); see, *e.g.*, *SSL Servs., LLC* v. *Citrix Sys., Inc.*, 769 F.3d 1073, 1085 (Fed. Cir. 2014). It is therefore likely that the court's summary affirmance reflects (in relevant part) its determination that it was not required to address a certification request that had not been properly preserved. At a minimum, petitioners' forfeiture provides an independent basis, separate from the first question presented, for affirming the court of appeals' judgment with respect to this issue. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed on below," *United States* v.

Williams, 504 U.S. 36, 41 (1992) (citation omitted), and petitioners provide no reason for disregarding that rule here.

In any event, even assuming the certification issue had been properly preserved, the court of appeals did not err in affirming the CFC's judgment without certifying the contract-interpretation question to the New York Court of Appeals. This Court has previously declined to "suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 390-391 (1974). Although the certification procedure can "save time, energy and resources" and "help[] build a cooperative judicial federalism," its "use in a given case rests in the sound discretion of the federal court." *Ibid.*; see *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 237 n.4 (1991). It would be infeasible for federal courts to certify to state courts every question of state law not directly resolved by an on-point state-court precedent, and state courts are free to decline a certification. See, *e.g.*, Rules of N.Y. Ct. App. § 500.27(d) (New York Court of Appeals must determine "whether to accept [a] certification"). Federal courts therefore can, and sometimes must, decide state-law questions in the course of exercising their jurisdiction, including in the context of claims under the Just Compensation Clause. See *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envt'l Prot.*, 560 U.S. 702, 727 (2010) (plurality opinion) ("A constitutional provision that forbids the uncompensated taking of property is quite simply insusceptible of enforcement by federal courts unless they have the power to decide what property rights exist under state law."); cf. *Wisconsin Dep't of*

Corr. v. *Schacht*, 524 U.S. 381, 387 (1998) ("Supplemental jurisdiction allows federal courts to hear and decide state-law claims" in certain circumstances.).

Even assuming *arguendo* that a court of appeals' decision not to certify a particular question to a state court is subject to abuse-of-discretion review, such review would not be warranted in this case. Petitioners frame the state-law question in this case as "whether a non-party to a contract can enforce a covenant-not-to-sue as an intended third-party-beneficiary." Pet. 23. They do not suggest that this question, or questions like it, arise with any frequency in the federal courts. They are, moreover, incorrect in characterizing (Pet. 17-18) the question as an "unprecedented" and "novel" issue that might justify requesting the view of the New York Court of Appeals. As the CFC correctly recognized, the New York Court of Appeals has made clear that New York follows the third-party-beneficiary rule set forth in the Restatement (Second) of Contracts. Pet. App. 30a (citing *Fourth Ocean Putnam Corp.* v. *Interstate Wrecking Co.*, 485 N.E.2d 208, 212-213 (N.Y. 1985)). A New York intermediate appellate court has applied the third-party beneficiary doctrine in the specific context of an agreement not to sue. *Chavis* v. *Klock*, 846 N.Y.S.2d 490 (App. Div. 2007). Although that court found the doctrine's requirements not to be satisfied on the facts of that particular case, it did not hold that those requirements cannot be met when an agreement not to sue is at issue. *Id.* at 491-492. The CFC correctly concluded that the facts of this case, unlike the facts of that case, support the doctrine's application. Pet. App. 44a-50a. The court of appeals was not required to ask the New York Court of Appeals to reexamine the CFC's appli-

cation of black-letter law to the particular agreements petitioners signed.

As petitioners recognize (Pet. 28), the Federal Circuit is aware of, and uses, the certification procedure when it deems that procedure appropriate. The decisions of other courts of appeals cited by petitioners (Pet. 28-31) do not demonstrate that another court of appeals would have handled this case differently (even assuming the certification issue had been properly preserved). The circumstances of those decisions are not analogous to this one. In three of the decisions, plaintiffs had challenged the constitutionality of a state statute, and the courts referred statutory-interpretation (and related) questions to the state courts before deciding whether the challenged state law operated in a manner that infringed constitutional rights. See *American Booksellers Found. for Free Expression* v. *Strickland*, 560 F.3d 443, 444, 447 (6th Cir. 2009); *Planned Parenthood Cincinnati Region* v. *Strickland*, 531 F.3d 406, 407-408, 412 (6th Cir. 2008); *Allstate Ins. Co.* v. *Serio*, 261 F.3d 143, 144-145 (2d Cir. 2001). The fourth decision also involved a constitutional challenge to a state statute, and the court certified a state constitutional question "dispositive of [the court's] very ability to hear [the] case"—namely, whether proponents of the ballot initiative that gave rise to the challenged law were authorized to represent the State in defending that law. *Perry* v. *Schwarzenegger*, 628 F.3d 1191, 1192-1193, 1195-1200 (9th Cir. 2011). This case, in contrast, does not involve a request to hold an indeterminate state law unconstitutional, or a request that a federal court exercise jurisdiction premised on an indeterminate state-law

right, but instead presents a run-of-the-mill issue of contract interpretation.

2. Petitioners contend (Pet. 32-35) that their agreements not to sue, if enforceable by the United States, violate the Just Compensation Clause under the "unconstitutional conditions" doctrine applied in *Nollan* v. *California Coast Commission*, 483 U.S. 825 (1987); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); and *Koontz* v. *St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). That contention is without merit.

The unconstitutional-conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 133 S. Ct. at 2594. *Nollan* and *Dolan* "'involve a special application' of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Ibid.* (quoting *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005)). The "decisions in those cases reflect," in part, the view that "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take" as a condition of granting the permit. *Ibid.* This Court's decision in *Koontz* likewise applied the unconstitutional-conditions doctrine in the context of an application for a land-use permit. *Id.* at 2591.

The coercion that the Court has sometimes thought to be present in the context of land-use-permit applications is absent here. Petitioners' agreements not to sue the United States were not extracted as a condi-

tion of granting a land-use application, but were instead voluntarily entered into in the course of settling a dispute involving proceedings before the STB. The agreements here, under which petitioners received valuable consideration (Pet. App. 22a), are thus akin to a standard settlement agreement. Such agreements typically include provisions that preclude one or more of the parties from pursuing litigation that would reopen the issues that the agreement resolves. See *id.* at 17a (city counsel's representation that "[i]n keeping with the City's desire to settle all matters related to the [High Line conversion], the owners of the properties [along the High Line] agreed not to sue the United States of America for compensation in connection with the" High Line conversion) (first set of brackets in original; citation omitted). Indeed, covenants not to sue are the very point of settlement agreements.

Petitioners were free to decline the settlement agreements, continue to pursue their arguments before the STB, and bring a suit for just compensation if they believed that the STB's resolution of the matter resulted in a taking of their property without just compensation. Petitioners' voluntary decision instead to sign the agreements, including the covenant not to sue the United States, does not itself constitute a violation of the Just Compensation Clause. Petitioners do not dispute that the right to sue the United States for a perceived violation of the Just Compensation Clause may be voluntarily relinquished. See Pet. App. 57a (citing cases involving waivers of constitutional rights). They identify no circuit that would find the enforcement of their voluntary waiver here to be unconstitutional. In fact, they cite no decision of any

court that supports their position. There is accordingly no sound reason for this Court to review petitioners' novel claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
SAM HIRSCH
Acting Assistant Attorney General
DAVID C. SHILTON
VIVIAN H.W. WANG
Attorneys

DECEMBER 2014