IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2023-0095

Gustavo Bojorquez, etc., et al.,

Petitioners,

vs.

L.T. Case Nos.
2D20-3326;
2D20-3432;
2019-CA-006391

State of Florida, et al.,

Respondents.

/

ON DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONERS

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ARGUMENT

The State fights the statutory and constitutional text. It does not cite any case where a legislature has so unequivocally granted *private property*—the exact words in the 2012 act and the Takings Clause—along with the rights to transfer and devise.

To resist that text, the State invokes the "unmistakability" doctrine. AB16-23, § I.A. But that doctrine does not apply because the 2012 legislature's grant of private property did not block any future legislature from exercising a sovereign power. *Infra* § 2, at 4–14. Regardless, the 2012 act unmistakably granted private property protected by the Takings Clause. *Infra* § 3, at 14–20. *Contra* AB23-54, § I.B. And the State's no-taking argument (AB54-56, § II) mischaracterizes Petitioners' private property. *Infra* § 4, at 20–21. But, first, we must correct flawed assumptions that infect the entire answer brief. *Infra* § 1, at 1-3.

1. The answer brief rests on incorrect assumptions about the 2001 act's reservation of power and the basis of the taking claims.

The answer brief erroneously assumes that the 2012 act's creation of property was subject to an "express condition that the Legislature could 'dissolve' the [Commission's] *medallion scheme*

entirely. [Ch. 2001-299,] § 17." AB5 (emphasis added) (alteration omitted). The provision cited by the State—section 17 of the 2001 act—does not say this. Instead, it states: "The *district* may be dissolved …." Ch. 2001-299, § 17 (emphasis added). The "district" is the Commission. *Id.* § 3(11). Thus, the 2001 act did *not* reserve a power to dissolve the medallion system or abolish the medallions.

That the 2001 act reserved the legislature's power to dissolve the Commission does not matter. As the State argued below, the Commission's dissolution merely transferred to a different state entity (the County) the power to regulate taxicabs. *See* 20-3326 AR458–60; § 125.01(1)(n), Fla. Stat. (2017). That dissolution was authorized by *section 3* of the 2017 act. Ch. 2017-198, § 3, Laws of Fla. Petitioners' taking claims do *not* arise from section 3 or the dissolution.

Instead, their claims arise from *section 2* of the 2017 act. That section alone expressly "repealed" the 2012 act that had created Petitioners' private property. As the initial brief explained: "The 2017 legislature repealed the 2012 act that had created the medallions as property and that had granted the right to transfer. *See* Ch. 2017-198, § 2, Laws of Fla. The 2017 legislature thus directly revoked,

rescinded, devested, and destroyed Petitioner[s'] property rights ...." IB53; *see also* IB50 ("[B]y repealing the 2012 act, the 2017 legislature repealed, rescinded, revoked, divested, and destroyed the property ...."); IB55 ("The taking occurred when the 2017 legislature repealed the 2012 act ...."). By contrast, section 3 and the Commission's dissolution neither repealed the 2012 act nor abolished Petitioners' medallions.

The State's flawed assumptions—on the power reserved by the 2001 act and the basis of Petitioners' claims—render inapposite the State's cases where, unlike here, legislatures "expressly reserved" the "right to alter, amend, or repeal *any provision* of the Act." *Cf., e.g.,* AB25 (emphasis added) (alteration omitted) (quoting *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 51–52 (1986)); AB26-27 (citing *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466–67 (1985) and other cases). In sum, these mistaken assumptions taint the whole answer brief.

2. The unmistakability doctrine, if applicable in Florida, does not apply to this case because the 2012 legislature's grant of private property did not block any future legislature from exercising a sovereign power.

The State concedes that a legislature may create compensable property. AB19 n.10. But, it says, these statutory creations are "rare," AB19, and to limit them, it relies on the unmistakability doctrine—which never has been previously applied in Florida.

In the federal courts, the unmistakability doctrine applies primarily to cases on government contracts. *See generally* Jay M. Zitter, *Construction and Application of Unmistakability Doctrine,* 16 A.L.R. 7th Art. 1 (2016). The State does not explain how this Court's adoption of the unmistakability doctrine would affect existing Florida caselaw on government contracts. *See generally* 48A *Fla. Jur 2d State of Florida* § 342 (Dec. 2023). In the wake of *United States v. Winstar Corp.*, 518 U.S. 839 (1996), federal courts have struggled to define the doctrine. *See DBSI/TRI IV Ltd. P'ship v. United States*, 465 F.3d 1031, 1040 n.6 (9th Cir. 2006). Assuming the doctrine applies in Florida, it does not apply to this case because the 2012 legislature's grant of private property did not block any future legislature from exercising a sovereign power.

"The application of the [unmistakability] doctrine … turns on whether enforcement of the contractual obligation alleged would block the *exercise of* a *sovereign power* of the Government." *Winstar*, 518 U.S. at 879 (plurality op.) (emphasis added); *see also infra* at 8 & n. 1. Thus, a government invoking the doctrine must identify a particular sovereign power that would be impeded if the private party's property or contract interest is enforced.

The State does not precisely identify which sovereign power would be blocked by honoring the 2012 legislature's grant of private property. Sometimes, the State claims a sovereign power to "abolish the medallions." *See, e.g.*, AB14 ("[N]othing in the 2012 act 'clearly and unequivocally' promised never to abolish the medallions."); AB28 (Heading I.B.2). Other times, the State invokes sovereign powers to police and regulate the operation of taxicabs (AB3, 4, 42) and "to dissolve the regulatory system" (AB23).

The former power can be justified only if the medallions are mere privileges or licenses—and not private property as the 2012 act plainly states. This is so because the eminent domain power to abolish private property historically has been limited by constitutions requiring that any such abolishment be accompanied by

compensation. *See, e.g.,* John Moncrieff, 26 C.J. *Franchises* § 33, at 1022-23 & n.23 (1921) (a franchise "cannot be … destroyed or arbitrarily interfered with by subsequent legislation" "except on payment of due compensation"); IB19–23. By contrast, the latter powers—to regulate public transportation and dissolve regulatory systems—historically have not been subjected to such a constitutional limit. *See, e.g.*, Henry E. Mills and Augustus L. Abbott, *Mills on the Law of Eminent Domain* § 43, at 137-38 (2d ed. 1888); *infra* at 12–13.

The State's imprecision in identifying the sovereign power at issue is problematic because the unmistakability doctrine's application "differ[s] according to the different kinds of obligations the Government may assume and the consequences of enforcing them." *Winstar*, 518 U.S. at 880 (plurality op.) To fully explain why this imprecision is problematic, we begin with the doctrine's first principles.

The unmistakability "doctrine marks the point of intersection between two fundamental constitutional concepts" that have "always lived in some tension" with one another. *Id.* at 872, 873. One concept, "traceable to the theory of parliamentary sovereignty made familiar

by Blackstone," recognizes the "centuries-old concept that one legislature may not bind the legislative authority of its successors." *Id.* at 872. "In England, … Parliament was historically supreme in the sense that no 'higher law' limited the scope of legislative action or provided mechanisms for placing legally enforceable limits upon it in specific instances." *Id.*

This English concept contrasts with the second concept that "legislative power may be limited" and "subject to the overriding dictates of the Constitution and the obligations that it authorizes." *Id.* This second concept is of a more recent vintage, as it "became familiar to Americans through their experience under the colonial charters." *Id.*; *see also James v. Campbell*, 104 U.S. 356, 357–58 (1881) (unlike the "sovereigns of England," the United States must pay "just compensation" when it "appropriate[s] or use[s]" a patented invention because its power is "subject to the Constitution").

These two concepts first butted heads in *Fletcher v. Peck*, 6 Cranch 87 (1810). *See* IB41–47. Although *Fletcher* "made it possible for state legislatures to bind their successors by entering into contracts, it soon became apparent that such contracts could become a threat to the sovereign responsibilities of state governments."

Winstar, 518 U.S. at 874 (plurality op.). Thus, post-*Fletcher*, the Supreme Court "developed" doctrines "to protect state regulatory powers" and to limit "contractual restraints upon legislative freedom of action." *Id.* One such doctrine—the unmistakability doctrine—"was a canon of construction disfavoring implied governmental obligations in public contracts." *Id.*

Summarizing two centuries of caselaw, the *Winstar* plurality explained that the unmistakability doctrine applies "when the Government is subject either to a claim that its contract has surrendered a sovereign power (*e.g.,* to tax or control navigation), or to a claim that cannot be recognized without creating an exemption from the exercise of such a power (*e.g.,* the equivalent of exemption from Social Security obligations)." *Id.* at 878–79.[1]

[1] Four justices joined this part of the plurality opinion. All the justices, however, acknowledged the unmistakability doctrine protects against the surrender of sovereign power. *See Winstar*, 518 U.S. at 920 (Scalia, J., concurring) (doctrine applies "where a sovereign act is claimed to deprive a party of the benefits of a prior bargain with the government."); *id.* at 924 (Rehnquist, C.J., dissenting) ("The principal opinion properly recognizes that the unmistakability doctrine … provides … a 'canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms.'").

In the "early unmistakability cases,"[2] a state or local government "had made a contract granting a private party some concession (such as a tax exemption or a monopoly), and a subsequent governmental action had abrogated the contractual commitment." *Id.* at 874–75. In these early cases, "the private party was suing to invalidate the abrogating legislation under the Contract Clause." *Id.* at 875. In the later cases,[3] the doctrine was applied to national and tribal sovereigns, and to takings and damages claims. *See id.* at 876-78. Despite constitutional differences amongst these various sovereigns and types of claims,[4] the later cases "announce[d] no new rule distinct from the canon of construction adopted in [the early cases]." *Id.* at 878.

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[2] *E.g., Providence Bank v. Billings*, 29 U.S. 514 (1830); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837).

[3] *E.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Bowen*, 477 U.S. at 41; *United States v. Cherokee Nation of Okla.*, 480 U.S. 700 (1987).

[4] For example, the Contract Clause constrains only state and local governments. Nevertheless, contrary to Blackstone's concept of parliamentary supremacy, the national government may "make agreements binding future Congresses by creating vested rights." *Winstar*, 518 U.S. at 875–76 (plurality op.).

The "criterion" for applying the doctrine "looks to the *effect* of a contract's enforcement." *id.* at 879 (emphasis added). Consistent with the early cases, the doctrine applies to claims that seek to enjoin enforcement of a subsequent statute. *See id.* Consistent with the later cases, the doctrine applies to claims for damages that block the exercise of sovereign power or when the award of damages would be the "equivalent of [an] exemption from the terms of the subsequent statute." *Id.* at 879–80 (discussing *Bowen*, 477 U.S. at 41). The doctrine applies, for example, to "a claim for rebate under an agreement for a tax exemption" because "[g]ranting a rebate, like enjoining enforcement, would simply block the exercise of the [sovereign] taxing power." *Id.* at 880.

But the unmistakability doctrine does not apply where, as here, enforcement of the private right does not prevent a legislature from "enacting regulatory measures," or from "exercis[ing] … any other sovereign power," and where awarding damages "would [not] be tantamount to any such limitation." *Id.* at 881. Here, Petitioners do not seek to enjoin either the 2017 act or the enactment or enforcement of any regulatory measure (expressly, impliedly, or effectively). They do not seek: to block the Commission's dissolution;

to impede any safety or other regulations; or to compel the State to issue them new certificates and permits authorizing them to operate taxicabs.

Petitioners merely seek damages—full compensation—for their medallions that were abolished by the 2017 act. How will paying that compensation block the legislature's exercise of any sovereign power? The State never answers this question. The State's answer cannot be that it is blocked from abolishing private property (i.e., the medallions) *without paying compensation*. Since the Founding, American sovereigns have lacked the power to abolish property without paying compensation. *See* IB14-15; 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1784, at 661 (1833) ("[T]hat private property shall not be taken for public use without just compensation … is an affirmance of a great doctrine established by the common law for the protection of private property.").

Rather than precisely identify the sovereign power purportedly at risk, the State conflates its regulatory power to *prohibit commerce* with its eminent domain power to *abolish property*. *See* AB31, 34 (legislature may "prohibit the sale of liquor entirely" without paying

compensation). While the State, for example, may *prohibit* the sale of liquor or citrus, or the operation of taxicabs, *without* compensation, it may not *abolish* tangible property (liquor, citrus, taxicabs, etc.) *unless* it pays compensation. *Cf. Dep't of Agric. & Consumer Servs. v. Bogorff*, 35 So. 3d 84, 90 (Fla. 4th DCA 2010) (destroying healthy citrus trees was a taking). This same principle applies to *intangible* property like the medallions. *See* IB19-23. Thus, while the 2017 legislature could have *prohibited* the operation of taxicabs or the sale of medallions (which it did not do) *without* compensation, it lacked the sovereign power to *abolish* the taxicabs or the medallions *unless* it paid compensation.

A treatise illustrates the distinction between the State's purported power to abolish the medallions without compensation (which it does not possess) and its police power to regulate taxicabs (which it does possess). *See* Mills and Abbott, *supra* § 43, at 137-38. A corporation's use of its property "is subject to the regulation of the legislature, and such regulation is not a taking of the property for the use of others." *Id.* at 138. For example, in the context of railroad companies, "[t]he legislature may regulate the enjoyment of the[ir] franchise[s] by providing for connecting railroads together, and may

prescribe by whom, in what manner, and under whose supervision the work should be accomplished, and in what proportion … the expenses shall be met by the railroads themselves; and *this without compensation* ….” *Id.* (emphasis added).

But what if the legislature were to “repeal[]” a railroad company’s “act of incorporation” and “create[]” in its place “a new corporation … with similar powers?” *See id.* That repeal would fall under the “exercise of the right of eminent domain” and would be constitutional only “if compensation for the property of the extinct corporation is provided.” *Id.* at 138 & n.3; *see Greenwood v. Freight Co.*, 105 U.S. 13, 22 (1881) (“The property of corporations, even including their franchises, … may be taken for public use under the power of eminent domain, on making due compensation.”).

The 2017 legislature’s repeal of the 2012 act is like a repeal of an act of incorporation. An act of incorporation and the 2012 act both created private property, and the repeals of both acts abolished that property. Thus, both repeals are authorized by the power of *eminent domain*, not the power to *regulate* public transportation. The State’s payment of compensation does not block it from exercising its eminent domain power; it merely requires the State to exercise that

power subject to the constitution. Accordingly, because the State cannot show that the enforcement of Petitioners' property rights would block an exercise of a sovereign power, the unmistakability doctrine does not apply.

3. The 2012 act unmistakably granted private property protected by the Takings Clause.

The *Winstar* plurality illustrates why the unmistakability doctrine does not apply here. *Supra* § 2, at 5–11. On the other hand, Justice Scalia's *Winstar* concurrence illustrates that—even if the doctrine applies—the result is the same: The State must compensate Petitioners for the medallions, as the 2012 act unmistakably granted private property protected by the Takings Clause.

In *Winstar*, Justice Scalia, joined by Justices Kennedy and Thomas, reached the same result as the plurality—the private contracts were enforceable—but with different reasoning. 518 U.S. at 919 (Scalia, J., concurring). Unlike the plurality, he concluded the unmistakability doctrine applied because the private parties' contract claims were based on a "sovereign act of government"—statutes "regarding treatment of regulatory capital." *Id.* at 920.

Yet, according to Justice Scalia, "the doctrine ha[d] little if any independent legal force beyond what would be dictated by normal principles of contract interpretation." *Id.* Though normally "contract law imposes upon a party to a contract liability for any impossibility of performance that is attributable to that party's own actions," that presumption is reversed for a government party. *Id.* at 920–21. Because "[g]overnments do not ordinarily agree to curtail their sovereign or legislative powers," one must presume that a government "does *not* promise that none of its multifarious sovereign acts … will incidentally disable it … from performing one of the promised acts." *Id.* at 921.

Justice Scalia concluded that the private parties had "overcome this reverse presumption" because "the Government quite plainly *promised* to regulate them in a particular fashion." *Id.* He also agreed that "an essential part of the *quid pro quo"* was the government regulation and that, "unless the Government [was] bound *as to that regulation,*" then the Government's promise would have been "illusory." *Id.* To Justice Scalia, it was "unmistakably clear that the promise to accord favorable regulatory treatment must be understood as … a *promise* to accord favorable regulatory treatment,"

and he rejected the premise "that [the] unmistakability [doctrine] demands that there be a *further* promise not to go back on the promise to accord favorable regulatory treatment." *Id.*

Justice Scalia's reasoning (like that of the *Winstar* plurality) requires the State here to precisely identify which of its "multifarious sovereign acts" "incidentally disable[d]" it from honoring the 2012 legislature's promise that the medallions were private property. *Cf. id.* As discussed above, *supra* § 2, at 5–6, the only plausible, applicable sovereign act is the alleged power to abolish the medallions without compensation. Because the medallions were purportedly "revocable privileges," AB11, the State argues that the legislature had the sovereign power to "abolish" the medallions without compensation, *cf.* AB17, 27, 28, 49.

But just as the government in *Winstar* unmistakably promised to regulate in a particular fashion, 518 U.S. at 921 (Scalia, J., concurring), the 2012 legislature here unmistakably promised that medallions were *private property*—not mere licenses or privileges, *see* IB25-32. And as in *Winstar*, the 2012 legislature was not required to have *further* promised not to abolish that private property without compensation. To the contrary, the unmistakability doctrine requires

that a legislative promise "be interpreted in a commonsense way" consistent with the "background understanding." *Winstar*, 518 U.S. at 921 (Scalia, J., concurring). A naked promise to grant private property—without compensation for a taking of the property—defies common sense and contradicts the background understanding rooted in our country's history and laws. *See* IB14–24. It would be illusory.

To undo the 2012 legislature's unmistakable promise to grant private property, the State cites distinguishable cases where, unlike here, the written laws expressly disavowed any property right or denied a right to transfer. *Cf., e.g.,* AB50 (citing *United States v. Fuller*, 409 U.S. 488, 489 (1973) ("The Act provides … that its provisions 'shall not create any right, title, interest, or estate in or to the lands.'"); *Conti v. United States*, 291 F.3d 1334, 1341 (Fed. Cir. 2002) (regulation prohibited the permit holder from "assign[ing], sell[ing], or otherwise transfer[ring] the permit"—"[t]he rights" that "are traditional hallmarks of property")).

The State's liquor-license cases fare no better. AB29–30, 34–35. These cases neither addressed a statute that expressly stated the right was private property nor decided whether a license was *private*

property under a takings clause. For instance, when this Court said "a license is not property in a constitutional sense," *State ex rel. First Presbyterian Church of Miami v. Fuller (Fuller II)*, 187 So. 148, 150 (Fla. 1939) (citing *State ex rel. First Presbyterian Church of Miami v. Fuller (Fuller I)*, 182 So. 888 (Fla. 1938)), it was deciding whether licensees had "a right to be heard before [their licenses] are revoked," *Fuller I*, 182 So. at 890; *see also Kline v. State Beverage Dep't of Fla.*, 77 So. 2d 872, 874 (Fla. 1955) (repudiating *Fuller I*; holding that due process "entitled [licensees] to notice and an opportunity to be heard" before their licenses could be revoked).

Also unpersuasive are the State's "label" cases. For instance, in *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) (Posner, J.) (quoted at AB29), the state law expressly said that the license "shall not constitute property" and that it could not be "sold or bequeathed." *Id.* at 948. Despite this unequivocal wording, the *Reed* court "look[ed] behind labels" to determine whether the license was "'property' in a functional sense." *Id.* Unlike the *Reed* court, this Court follows the supremacy-of-the-text principle. *E.g., Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. 2020). The text here unmistakably says that the medallions were *private*

property that could be sold and bequeathed; there is no need to engage in a "functional sense" analysis.

The State also draws the wrong conclusion from a pre-2012 case holding "that taxicab medallions were … 'mere privileges' even when the medallion holder had a right to transfer." AB36 (internal alterations omitted) (citing *Yellow Cab Co. v. Ingalls*, 104 So. 2d 844, 847 (Fla. 2d DCA 1958)). Indeed, because a court previously had ruled taxi medallions were "mere privileges," the most reasonable conclusion is that 2012 legislature here used the words *private property* to unmistakably signify that the medallions were *not* merely privileges.

The word limit precludes this brief from addressing all the State's cases. None of them, however, are persuasive for one reason: The written laws at issue in the State's cases are worded differently than the statutes at issue here. *Cf.* Bryan A. Garner et. al., *The Law of Judicial Precedent* § 38, at 343 (2016) ("[S]tare decisis doesn't apply to statutory interpretation unless the statute being interpreted is the same one that was being interpreted in the earlier case."). The 2012 act's text is unique insofar as it unmistakably granted private property with the rights to transfer and devise.

4. The State's no-taking argument mischaracterizes Petitioners' private property.

The State asserts, "*At most*, Petitioners' medallions granted them a right to drive taxicabs." AB54 (emphasis added). Based on that erroneous premise, the State reasons the 2017 act "caused no taking" because it "did not eliminate [Petitioners'] right to drive a taxi." AB54–55. In fact, the 2012 act granted—and 2017 act abolished—so much more than a mere "right to drive taxicabs." The medallions were imbued with "the traditional bundle of property rights: the rights to use, exclude, and transfer." IB39.

The lone amicus brief refutes the State's attempt to minimize the property rights granted by the 2012 act. *See* Fla. Taxicab Assoc. Br. 3–5, 8-14. Unlike other public transportation businesses regulated by the Commission, Petitioners could: "obtain financing for their businesses;" "establish long-term investment and strategic plans for transfers of their businesses;" "use the [m]edallions as security for private and commercial loans;" "transfer [the medallions] for fair market value;" and "prepare[] wills and other estate planning documents to pass [the medallions] to their heirs." *Id.* at 3–4.

The 2017 legislature's repeal of these property rights—not the dissolution of the Commission—was the taking. Petitioners' existing rights to apply to the County for certificates and permits to operate taxicabs are no substitute for the private property abolished by the 2017 act.

CONCLUSION

This Court should quash the Second District's decision. IB57.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the word count limitation of Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 3,975 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

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I HEREBY CERTIFY that a true and correct copy of the foregoing brief was filed with the Clerk of Court on January 12, 2024, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record:

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