SC23-95

In the Supreme Court of Florida

GUSTAVO BOJORQUEZ, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Petition for Discretionary Review from
the Second District Court of Appeal
DCA No. 2D20-3432

STATE OF FLORIDA'S BRIEF ON JURISDICTION

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STATEMENT OF THE ISSUES

Should the Court grant review, the State does not intend to raise issues apart from those identified by Petitioners.

INTRODUCTION AND STATEMENT OF THE CASE

Taxicabs are common carriers that pose serious safety risks to passengers and the public. *See New Deal Cab Co. v. Meyer*, 139 So. 2d 189, 192 (Fla. 1st DCA 1962); *Riley v. Lawson*, 143 So. 619, 621–22 (Fla. 1932). For that reason, they are extensively regulated under the State's police power. *Yellow Cab Co. of Dade Cnty. v. Dade Cnty.*, 412 So. 2d 395, 397 (Fla. 3d DCA 1982) (citing *State ex rel. Hosack v. Yocum*, 186 So. 448, 451 (Fla. 1939)). This appeal arises out of Petitioners' unsuccessful attempt to turn a legislative development in that regulatory area into a compensable taking of private property under the Florida Constitution.

1. Historically, the Legislature has delegated regulatory authority over taxicabs to the State's counties, empowering them to "[l]icense and regulate taxis" operating within their borders. § 125.01(1)(n), Fla. Stat. Until 2017, Hillsborough County was an exception—the State delegated the regulation of taxicabs in Hillsborough to a special, independent district called the Public Transportation Commission (PTC). *See* Ch. 83-423, Laws of Fla. (1983); Ch.

2001-299, Laws of Fla. (2001). The PTC had sweeping regulatory authority over the taxicab industry, including the power to regulate all "matters affecting the relationship between" taxicabs and "the traveling public," Ch. 2001-299, § 5(1)(a), Laws of Fla. The PTC could also issue licenses to operate taxicabs, commonly called "medallions," *id.* § 3(5), (20); *id.* § 5(1)(i), could refuse to issue or renew those medallions, *id.* § 5(2)(dd), and could suspend medallions or even force their forfeiture, *id.*; R.123.

In 2012, the Legislature amended the PTC's enacting legislation to empower owners to "transfer" their medallions to third parties. Ch. 2012-247, § 1(3), Laws of Fla. (2012). In doing so, the Legislature used the phrase "private property" in referring to the medallions, *id.* § 1(2), even though, as a substantive matter, the medallions remained subject to the PTC's plenary control. Under the Amendment, owners could transfer medallions only to those eligible under the PTC's rules, and transfers were subject to the PTC's "procedure[s]" and "approv[al]." *Id.* § 1(3); A.9–11.

In 2017, the Legislature dissolved the PTC and transferred its regulatory authority to Hillsborough County, bringing Hillsborough

in line with all other counties in the State. Ch. 2017-198, Laws of Fla. (2017). The legislation was silent about the medallions already issued by the PTC, leaving that issue to the County. A.11–12. The County in turn established a taxicab licensing regime that "did not recognize or grandfather in medallions issued by the PTC," A.12, but allowed PTC medallion holders to apply for new medallions and to continue operating taxicabs while their applications were pending, *see* Hillsborough County, Fla., Ordinance 17-22 §§ 7(A), 16.[1]

2. Petitioners sued the State and the County in Hillsborough County Circuit Court alleging that the legislative dissolution of the PTC and the County's subsequent actions rendered their medallions "worthless." A.13–14. Petitioners sought compensation for their medallions under the Takings Clause of the Florida Constitution. They did not claim, however, that they "were no longer operating in Hillsborough County or that any of them had been deprived of that opportunity either under the new County ordinance." A.14.

The County moved for summary judgment, "arguing that it

[1] *Available at* https://www.hillstax.org/other-services/vehicle-for-hire/ordinance-information/.

could not be liable for any alleged taking because it neither granted nor removed any property rights" in the PTC medallions. A.14. The State moved to dismiss, "arguing that [Petitioners] had no cognizable property rights in the old medallions," *id.*, that no taking occurred, R.44–48, and that, if a taking occurred, "the County was responsible," A.14.

In one order, the circuit court granted the County's motion and denied the State's. A.15. The court ruled that the County could not have taken the medallions because the State "abolished" them when it dissolved the PTC. R.154–55. In the court's view, there were no medallions for the County to invalidate, because "they had, in essence, vanished" when the State dissolved the PTC. R.155. The court did not address the State's argument that there was no taking. *See id.*

Both Petitioners and the State appealed to the Second District, which consolidated their appeals. A.7. After reviewing eight merits briefs and hearing more than an hour of oral argument, the District Court agreed with the State that Petitioners' medallions were not compensable property under the Takings Clause. A.17–41. The court

thus affirmed the grant of summary judgment for the County and reversed the denial of the State's motion to dismiss. A.41. Judge Lucas dissented. A.42.

Neither the majority nor the dissent addressed whether, assuming Petitioners' medallions were compensable property, the dissolution of the PTC effected a "taking" under the Florida Constitution.

ARGUMENT

I. THE COURT SHOULD DENY REVIEW.

The Court lacks jurisdiction because the Second District did not expressly construe the Florida Constitution. Should the Court disagree on that score, it should nevertheless deny review because (1) the Second District correctly held that Petitioners' medallions were not compensable property, (2) in any event, the Second District must be affirmed on the alternative ground that dissolving the PTC caused no taking, and (3) the compensable-property issue is unlikely to recur because it arises from anomalous legislation that uses the label "private property" to refer to licenses that substantively lack the core attributes of property.

A. The Court lacks jurisdiction because the decision below did not expressly construe a constitutional provision.

Petitioners (at 7–9) invoke this Court's discretionary jurisdiction over decisions that "expressly construe[] a provision of" the Florida Constitution. Art. V, § 3(b)(3), Fla. Const. They contend that the Second District misinterpreted Florida's Takings Clause, which provides that "private property shall [not] be taken" except "with full compensation." Art. X, § 6(a), Fla. Const.[2] Petitioners are incorrect.

An opinion "expressly construes" a constitutional provision only when it "explains, defines or overtly expresses a view which eliminates some existing doubt as to" the provision's meaning. *Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973). The opinion, in other words, must tread new ground. Resolving a constitutional claim by resort to settled precedent is insufficient, as "[a]pplying [a provision] is not synonymous with [c]onstruing [it]." *Id.* Otherwise, the Court would have jurisdiction in every case involving a constitutional claim, no

[2] In their notice, Petitioners also based jurisdiction on an express-and-direct conflict with other decisions. But they abandoned that ground by not advancing it in their jurisdictional brief. *See Mallet v. State*, 280 So. 3d 1091, 1092 (Fla. 2019).

matter how it was resolved below.

Nothing in the Second District's opinion "expressly construes" the Takings Clause. Petitioners (at 7–8) make much of a comment that it was necessary to "construe the word 'property' as it is used in" the Takings Clause. A.30. In context, however, the court was simply explaining that, in a takings case, there are two questions: "(1) what the *constitution* means when *it* uses the term 'property,'" and (2) "whether the interest created [by the Legislature] falls within that meaning." A.29–30. Petitioners, said the court, had wrongly focused on the meaning of the phrase "private property" "in the 2012 [Amendment]," when the controlling phrase was "private property" "*for purposes of the Takings Clause*." A.30 (quotation marks omitted; emphasis added). But there was no need to "eliminate[] some existing doubt" about that provision to resolve the case. *Rojas*, 288 So. 2d at 236. The court simply applied precedent holding that, in general, "[p]rivileges and licenses are not constitutionally protected property interests for purposes of the Takings Clause." A.18.

In *Carmazi v. Board of County Commissioners*, this Court concluded that a lower court opinion does not "expressly construe[]" the

Takings Clause when it merely "determine[s] whether a private property right existed" under settled law. 104 So. 2d 727, 729 (Fla. 1958). The plaintiffs in *Carmazi* asserted that the government had taken their property interest in accessing a bay through a navigable river. An equity court dismissed the claim because the plaintiffs "did not have a property right" in accessing the bay. *Id.* The equity court did not "construe[] or interpret" the Takings Clause in dismissing the claim, because what the Takings Clause required was undisputed: If the plaintiffs "had a property right that was being invaded, then admittedly" compensation was due. *Id.* The equity court simply "determine[d] whether a private property right existed" under settled law, so it did not construe the Takings Clause. *Id.*

Petitioners (at 8–9) seize on choice language in *Carmazi* to suggest that the equity court addressed a mere timing issue—that a property right had not yet "vested." Petitioners are mistaken. The issue was whether the plaintiffs were "vested with a property right *that would require payment of damages*"—*i.e.*, "whether a property right" to access the bay in fact "existed" for purposes of the Takings Clause. 104 So. 2d at 728–29 (emphasis added); *see also id.* at 729 ("[T]he

Chancellor was required merely to determine whether a private property right existed.").

This Court lacks jurisdiction for the same reason: The court below merely "determine[d] whether a private property right existed"; it was not "called upon to construe[] or interpret the Constitution itself." *Id.*

B. Even if the Court has jurisdiction, it should deny review.

Even if the Court has discretionary jurisdiction, it should decline to exercise its discretion for three reasons.

First, the Second District correctly held that Petitioners lacked a cognizable property interest in their medallions.

Whether a citizen has a "property interest" protected by the Takings Clause turns on "the nature of the citizen's relationship to the alleged property" under "the law that creates the interest." *Members of Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1330–31 (Fed. Cir. 2005). The medallions here were "subject to pervasive Government control" and could be "alter[ed] or extinguish[ed]" as the government saw fit. *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 272–74 (5th Cir. 2012) (cleaned up); *see also* A.20–24. The

PTC could "[r]efuse to issue or renew" medallions and, once issued, they remained subject to suspension or compelled forfeiture by the PTC. Ch. 2001-299, § 5(2)(dd); *see* R.123. Nor could Petitioners freely transfer their medallions; any transfer was subject to the PTC's "procedure[s]" and "approv[al]," which the PTC could deny in its discretion. *See* Ch. 2012-247, § 1(3). Petitioners thus had no property right in their licenses because they never had the unencumbered "right to transfer" the license and "exclude" others—core strands in the traditional bundle of property rights. *Members of Peanut Quota Holders Ass'n*, 421 F.3d at 1331.

Petitioners' argument hinges on the fact that, in the same breath in which the Legislature retained plenary governmental power over the medallions, the Legislature also referred to them as "private property." The argument fails because this Court has consistently "reject[ed] the overly simplistic notion that a label should be dispositive in deciding constitutional cases." *FDLE v. Real Prop.*, 588 So. 2d 957, 964 n.15 (Fla. 1991). "When determining the existence of a property interest . . . we must look behind labels," *145 Fisk, LLC v. Nicklas*, 986 F.3d 759, 770 (7th Cir. 2021) (cleaned up), as the Takings

Clause is concerned with whether the citizen has an *actual* property right, not something *called* a property right, *cf. Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (property interests under the Due Process Clause do not turn on "rigid, technical forms"). And for the reasons discussed above, Petitioners lacked core strands in the bundle that, together, comprise such a right.

Second, the compensable-property issue does not warrant this Court's review because, in any event, the Second District's decision must be affirmed on alternative grounds: Even if Petitioners had a cognizable property interest, there was no taking.

Below, Petitioners argued that dissolving the PTC effected a per se taking under *Lucas v. South Carolina Coastal Council*, which held that when the government "denies all economically beneficial or productive use of land," a taking occurs. 505 U.S. 1003, 1015 (1992). But *Lucas*, by "its own terms," is limited to takings of *land*; it does not apply to personal property like a taxi medallion. *Holliday Amusement Co. of Charleston v. South Carolina*, 493 F.3d 404, 411 n.2 (4th Cir. 2007); *see also Hawkeye Commodity Promotions, Inc. v. Vilsack*,

486 F.3d 430, 441 (8th Cir. 2007).

Petitioners also argued that dissolving the PTC worked an as-applied taking under the tripartite test set forth in *Penn Central Transportation Co. v. City of New York*, which turns on (1) the character of the government's action, (2) the plaintiff's reasonable investment-backed expectations, and (3) the plaintiff's economic loss. 438 U.S. 104, 124–25 (1978). But none of those factors favors Petitioners. The "character of the government's action"—a legislative development in the regulation of common carriers—falls squarely within the State's police power, thus favoring the State. *Yellow Cab*, 412 So. 2d at 396–97 (citing *Yocum*, 186 So. at 451).[3] And given the highly regulated nature of common carriers generally—let alone the specific, extensive regulatory authority the PTC retained over Petitioners' medallions after the 2012 Amendment—any expectation that Petitioners' medallions would be immune to future regulation was unreasonable. *E.g.*, *Bos. Taxi Owners Ass'n, Inc. v. City of Bos.*, 84 F. Supp. 3d

[3] *See also Scott v. Galaxy Fireworks, Inc.*, 111 So. 3d 898, 900 (Fla. 2d DCA 2012) (no taking when government exercised police power to regulate fireworks); *Holliday Amusement*, 493 F.3d at 410 (same with gambling).

72, 79 (D. Mass. 2015) ("[A]ny 'reasonable investment-backed expectations' held by plaintiffs in their medallions must be significantly tempered in light of the decades-long, highly regulated nature of the taxicab industry."); *Joe Sanfelippo Cabs Inc. v. City of Milwaukee*, 148 F. Supp. 3d 808, 812, 814 (E.D. Wis. 2015) (similar).[4] Nor can Petitioners make a significant showing of economic impact; they do not claim that they have ceased operating taxicabs in Hillsborough County or that they were denied medallions under the new County ordinance. A.14; *see also Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986).

Finally, the compensable-property issue does not warrant this Court's review because it is unlikely to recur. The issue arises from anomalous legislation that refers to certain licenses as "private property" while, as a substantive matter, retaining plenary regulatory authority over them. We know of no other licensing scheme with that drafting feature, and Petitioners have identified none. Even taking a

[4] *See also Holliday Amusement*, 493 F.3d at 411 n.2 (plaintiffs' alleged property existed as part of "a traditionally regulated industry," which "greatly diminishe[d] the weight of [their] alleged investment-backed expectations"); *Galaxy Fireworks*, 111 So. 3d at 900–01 (similar for fireworks business).

broader view of the issue, there is no need for review because, as discussed above, it is well-settled that a regulation's form may not overtake its substance for purposes of the Takings Clause.

CONCLUSION

For the reasons discussed above, the Court should deny review.

Date: April 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal to counsel for all parties of record on this **twentieth** day of April 2023.

/s/ David M. Costello
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE

I certify that this document complies with all applicable font and word-count requirements. It was prepared in 14-point Bookman font and contains 2,487 words.

/s/ David M. Costello
Deputy Solicitor General