RCB

No. 23-159

ORIGINAL

In the Supreme Court of the United States

ANTONIO PEREZ,

Petitioner,

v.

CITY OF MIAMI, FLORIDA, CODE ENFORCEMENT BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITION FOR REHEARING

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REASONS FOR GRANTING REHEARING

I. OTHER SUBSTANTIAL GROUNDS

1.- *Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S.___(2023), (Gorsuch, J., concurring, slip op.12) also supports QP1:

> "Agencies like the SEC and FTC combine the functions of investigator, prosecutor, and judge under one roof.... The numbers reveal just how tilted this game is."

A tilted game is the obvious manifestation of widespread violation of evidentiary standard protections. Adjudicating people's homes is not an executive duty protected by *National League of Cities v. Usery*, 426 U.S. 833 (1976). Evidentiary standard protections apply to States (*Addington v. Texas*, 441 U.S. 418 (1979)).

QP1 is the big follow-up question to *Axon* in all its glory: State and Federal. It is as important as reviewing *Chevron*[1]. There might be little logic in reviewing *Chevron* without addressing QP1; if the executive is not allowed to become the legislator, it certainly should not be allowed to become the judge

[1] *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)

of facts. If the Court intends to address executive adjudication in *Loper Bright Enters., Inc. v. Raimondo*, 143 S.Ct. 2429 (2023), then this Petition should at least be held for *Loper*.

2.- This Petition should at least be summarily reversed based on *Addington*. This DCA encompasses roughly 1% of the US population. No less than 1% of the US population is under unconstitutional burden of proof.

3.- This Petition should at least be summarily reversed based on *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). At least 1% of the US population is under unconstitutional due process. Incidentally, QP5 seems to address many of the concerns of Justice Scalia and other dissenters in *Caperton*. Justice Thurgood Marshall risked his life as an NAACP attorney and was able to enforce *Plessy v. Ferguson*, 163 U.S. 537 (1896) to win numerous cases. *Caperton* and *Addington* are the law, were preserved, and need to be enforced.

4.- No reason to DIG this case: There should be no doubt that DCA is the Floridian court of last resort and that 28 U.S.C.§1257(a) is fully complied with. See *Wells v. State*, 132 So. 3d 1110, 1113 (Fla. 2014): (emphasis added)

> ...it is clear that we have explicitly held that this Court [Florida Supreme Court] lacks

> discretionary review jurisdiction over the following four types of cases:... (4) a per curiam or **other unelaborated denial of relief with a citation**...

5.- QP1 is supported by Blackstone, as quoted in *Ratification*, Pauline Maier, 2010, p 112-113:

> It was "a duty every man owes his country, his friends, his prosperity, himself... to guard with the utmost jealous circumspection against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty"

Similar statements are present in Framer's debates. Petitioner preserved this question and presented it squarely. It should be the duty of any citizen to present QP1 to this Court.

Justice Gorsuch's and Justice Thomas' opinions in *Axon* are of great assistance to anyone who suffers this kind of adjudication. Justice Blackmun's papers show that rehearing petitions receive thoughtful memos, which is praiseworthy. The additional work of Justice Alito's and Justice Gorsuch's chambers reviewing all petitions should also be appreciated by the public.

The executive (Federal, State, and local) was not shy to usurp the role of the judiciary. The Judiciary should not be timid or unenergetic in its response. See "Distinguished Lawyers", Theophilus Parsons, Albany Law Journal, 1870, pp.126–127 (emphasis added):

> It is probably more to his early poverty than to anything else that he owed those habits of indomitable energy... When a case was argued, and it was for the judges to decide it, after thinking for some time, he would write down his decision, and, handing it to Judge Story, say: "There, Story; that is the law of this case; now go and find the authorities;" and probably there was no one more able to do this than Story.
>
> Story once said: "When I wish to reach a point in the law, I have to grope timidly from headland to headland, and feel satisfied if I at last remotely reach it But Marshall, in adventuresome and bold manner, puts right out to sea, and without difficulty approaches it."
>
> One of the earliest of the great cases which have immortalized the name of Marshall is the case of *Marbury v. Madison*, 1 Cranch, 137. In an able opinion he laid down the true principles which underlie the foundation of our government. He **draws a sharp line between the powers of the different departments**. For this he had

> been abundantly preparing himself in the Virginia legislature, when the constitution was before that body for adoption.

Chief Justice Marshall had solid reasons to be straightforward. Paul Clement acknowledged that Justice Gorsuch was also straightforward in *Axon* (oral argument transcript, p.35).

All QPs are sharp lines of separation of powers. Justices Thomas and Gorsuch were not timid in *Axon*. This Court is not shy to review *Chevron*.

6.- Justice Cardozo noted that legal doctrines extend their reach to applications beyond their initial purpose. The appellate review model is no different. The creators of the FTC legislation included Justice Brandais [before he became a Justice]. Brandais was a great student of Jefferson. Thomas Jefferson was not always perfect; he advocated for a rural union and a profound distrust of corporate power. Justice Scalia explained how, on this issue, Jefferson was an outlier. *Citizens United v. FEC*, 558 U.S. 310, 388 (2010) (Scalia, J., concurring). Justice Brandais certainly did not intend that executive adjudication would expand to most homes in America.

A $200 traffic ticket often enjoys much better due process and separation of powers than someone's home in a code enforcement case. With a traffic

ticket, if there is no settlement [paying a reduced amount], the facts often are adjudicated by a judge.

A State vehicle cures the entire contagion; it is better than an FTC vehicle. The federal appellate review model should be rejected and the contagion to States should be cured. Florida has one of the most extreme appellate review models; the court of first instance cannot reweigh evidence. New evidence cannot be presented to the courts either. The executive can also win a case simply by not allowing enough time for discovery in the administrative hearing.

A portion of the five-hour long "Speech against writs of assistance", James Ottis, 1761;

> One of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle.

John Locke was the inspiration. However, under the appellate review model, only local executive officers have this protection.

7.- Petitioner uses the expression "substantive due process". An alternative would be just to write "due process" or to reverse *Packing Company Cases*, 105 U.S. 566 (1881) and reinstate the Privileges and

Immunities clause. Anything that Petitioner labeled "substantive due process" should fit in the Privileges and Immunities clause.

8.- Justice Kagan showed apparent interest in broader arguments to *Axon* (oral argument transcript, 7-8). There is no Paul Clement here, but the Court can name a friend of the Court, or require Petitioner to engage a member of this Court's bar. It is easy to find top-quality representation when a blue brief is due. This has always been a Court of reason, regardless of the name on the cover.

9.- Judge Friendly, a mentor of Chief Justice Roberts, might have liked QP1[2]:

> ...Judge Henry J. Friendly told Mr. Justice Frankfurter of certain of his professional experiences that indicated the federal administrative agencies "did not combine the celerity of Mercury, the wisdom of Minerva, and the purity of Diana" to quite the extent Professor Frankfurter had taught him.

10.- Justice Blackmun's Papers Pool Memo No.93-639[3] raised QP2's topic *sua sponte*. Unfortunately,

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[2] Book Reviews: The Federal Administrative Agencies. Keeffe. Catholic University Law Review, 1963, p.68

[3] http://blackmun.wustl.edu/BlackmunMemos/1993/Granted-pdf/93-639.pdf

QP2 was not presented. The author of the memo, who graduated from college [computer science] at age 15, wrote:

> "Incidentally, it seems troublesome that the court of appeals affirmed an extremely weak decision, involving constitutional issues, with no opinion, published or not. I've heard speculation that some lower courts may be using unpublished decisions either to avoid facing the hard issues or to insulate themselves from review. Though I'm not sure this is so, the possibility of this happening is disturbing. Cf. *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2702, n.3 (1993); *County of Los Angeles v. Kling*, 474 U.S. 936, 938, and n.1 (1985) (Stevens, J., dissenting)".

QP2 is squarely presented. All five dispositions had no opinion. The City acknowledged that the case was well briefed (see STATEMENT). Petitioner loses part of his way of life. Elderly disabled tenants have to abandon the property where they raised their children, without a single line on the merits written by the courts, not even in first review by right. A written opinion favoring the City would not write well. The problem affects many parts of the Country. Judge Posner is pretty smart, and he denounced this practice.

Justice Stevens was asked what he learned in his 1947 clerkship[4] with Justice Wiley Rutledge:

> I learned to take the time to write your own draft to make sure you understand the case... I learned that every case is important, not just where there is a lot of money involved or an important public issue.

11.- Petitioner presents a hypothetical where this Court's Justices have to run for reelection, where the Office of the Attorney General is a prime source of challengers, and where the General influences who to run against. Under these assumptions [which are the reality in States like Florida], members of this Court would rightfully fear that they are going to lose their jobs if they rule against the Government. Justice Kennedy's description should be cause for reflection[5]: (emphasis added)

> When the Iron Curtain fell and we begin seeing more Russian judges, they could not quite believe that the White House did not give us a call to tell us how this case should come out. We said, no, no, no, that's not the way it works, there is separation of power. And then they thought, well, there may be so, but **there is some cultural mechanism where we try to see, get a signal**

[4] Justice Stevens, C-Span interview, 2009
[5] Justice Kennedy, C-Span interview, 2009

> **from somebody what to do**... Number one, the Government is just like any other litigant, and number two, the government has to argue before us... The idea that the government cannot... convict your client without proof beyond reasonable doubt is so impressive...

II. INTERVENING CIRCUMSTANCES OF SUBSTANTIAL EFFECT

1.- This September, one of the three Hispanic commissioners in Miami was arrested. Charges included illegal financing of a judicial candidate. The Governor issued Florida Executive Order 23-184 to suspend this commissioner [this commissioner is Republican]. The Code Enforcement Board member nominated by this commissioner never voted in favor of a homeowner [including homeowners who provided solid exonerating evidence] in the year prior. This commissioner was released on bail, is still running for reelection, and is expected to win and recover his job. The appellate review model and elective judicial offices are tools at his disposal.

2.- In August, this Court decided *Grace, Inc., et al. v. City of Miami*, 598 U.S.___ No.23A116 (2023) (application denied), an application about racial redistricting. The ACLU missed the real motivation for redistricting. The most significant map change was the inclusion of a small, oddly shaped, and

traditionally white portion of the city into the district of another one of the three Hispanic commissioners. The old map was already racially gerrymandered; there was no need to change it for racial reasons. The commissioner is now exposed to a small portion of affluent well-informed white voters who will not blindly support a candidate of Cuban descent. But his district as a whole is still mostly of Cuban descent. The reason for the phenomenal legal fight paid by taxpayers is that this politician owns a house in the white section. The Miami New Times reported[6]: "A curiously shaped carve-out on Miami's redistricting proposal nudges Carollo's spacious home into his district." This house is worth several million dollars. The commissioner did not live there because he needs to live inside the district to keep his job. Redistricting allows this politician to move back into this home and protect his main financial asset [homesteads are protected in Florida]. This coincides with a Federal section 1983 lawsuit[7] jury ordering this politician to pay $63 million for using code enforcement [and the appellate review model, which yields him 100% success rate in convictions] as a weapon to punish several small business owners that publicly supported a competing candidate. The Governor has no legal ability to suspend this

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[6] https://www.miaminewtimes.com/news/new-miami-redistricting-proposal-moves-joe-carollos-coconut-grove-house-into-his-district-14018218

[7] *Fuller v. Carollo*, No. 21-11746 (11th Cir. Feb. 4, 2022), and its sister cases.

commissioner for civil charges. This commissioner is expected to win reelection, and the appellate review model is still one of his main weapons against opposers.

The Federal judge in charge of the §1983 lawsuit saw the need to make public[8] the testimony of the City Manager[9]:

> ...I received a call from the --from the City Attorney and she told me that she had literally just finished the status hearing and that Mr. Fuller's attorneys had made it a point to tell Judge M[ore]no that they planned on calling me as a witness and she told me that Commissioner Carollo was visibly upset and that that was not good and that I should go to grave lengths to make them happy. The Spanish version is "pasar la mano", which is like stroke. "Pasar la mano", make them happy. I said there's nothing to make happy about. If I am called to testify, I'll testify, I'll give the truth, and then she reiterated that he was visibly upset that I would be testifying and that it was in my best interest to "pasar la mano."

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[8] https://www.wlrn.org/news/2022-11-18/former-miami-city-manager-testifies-that-the-city-was-targeting-certain-little-havana-businesses

[9]drive.google.com/file/d/1FLP8SbGwJ2QnZPiuAdwb81mjQoGJ8Zd3/view

> ...And, in fact, we would have that conversation with the City Attorney because she was very interested at that time in wanting to close these businesses, and deputy manager Napoli and myself were adamant saying we are not in the business of closing down businesses....
>
> ...And there was instances that I can recall where she [the City Attorney] gave us a list of properties to research and we went back to her and said these are all Fuller's properties and then she came back the next day or a couple days later with more properties and said, here, I threw in some non-Fuller properties so it doesn't look like were piling on.

Petitioner's home is near these small businesses and was prosecuted around this time. Record shows that Petitioner's surrounding neighbors oppose this code enforcement case. Coincidentally, Petitioner's city block has been moved to a different commissioner with the new map.

The executive may be so confortable investigating opponents' homes that this commissioner had no restraint in complaining about the location of the Federal judge's home, as reported in WLRN[10], "Miami Commissioner Joe Carollo blasts Federal

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[10] https://www.wlrn.org/government-politics/2023-08-03/miami-joe-carollo-federal-judge-tv

judge on Spanish-language TV", August 2023. Fortunately, the Judge's residence is outside city limits and the Constitution provides life tenure.

The commissioner was able to protect his home through redistricting and clever use of the legal system, which gives him *de facto* immunity from §1983 convictions. Framers intended to ensure the security of every home, not just the executive officer's.

Better odds than ever before are now available to dubious code enforcement prosecutions because a member of the panel of three Florida judges that reviews all administrative appeals is a former city employee who collects a city pension, and sits with the City without recusal. This Judge is of Cuban descent, is apparent friend of the City attorney, and is expected to win reelection. Unlike two decades ago, the DCA now seems to avoid writing opinions in these cases.

3.- The Petition mentioned *Hernandez v. City of Miami Code Enforcement Board*, Case No. 2021-10-AP-01 (Fla. Cir. Ct. Sept. 27, 2022). The husband of Ms. Hernandez is Mr. David Winker, a white attorney who represented some of the political opponents of the Hispanic commissioner mentioned above. His Miami home was convicted shortly after. The charges included working from home [writing

legal documents in his kitchen] during the pandemic and declaring a portion of the home illegal [despite City documents clearly showing the contrary]. The Board is composed of members chosen by the commissioners, who rarely vote in favor of homeowners. The court of first instance could not reweight the evidence and its opinion was written by a judge who collects a City pension. On September 20, 2023 the DCA ruled in favor of the City [case no. 2023-1870]. The decision is unelaborated (only contains a few citations). The Florida Supreme Court has no jurisdiction.

4.- Local news recently reported[11] that the husband the city attorney allegedly buys houses convicted in code enforcement cases. In the complaint there is a description of how this individual is able to eliminate all fines:

> "Somebody said we had the Santa Claus suit on. So, I will keep it in on your motion for $0," a board member said during the meeting, according to a transcript included in Alvarez's lawsuit.

Convictions of homes under the appellate review model can be willful, because Board members have a direct line with the executives who hire and fire them. This model creates an incentive for

[11] https://www.wlrn.org/local-news/2023-03-01/miami-city-attorney-husband-sued-for-alleged-real-estate-fraud

government officials to prey on the homes of the elderly and the vulnerable. It also creates a tyrannic weapon against political opponents. Courts receive facts that have already been adjudicated.

5.- Mr. Winker's home would have never been convicted by an average judicial jury. Many local business owners [who did not have the resources or energy to go to court] would have not lost their businesses in the last two decades either. Petitioner mentioned his only connection to Cuba [his grandmother lived there in the 1930s] but it did not make any difference.

CONCLUSION

Petitioner respectfully requests rehearing of October 2, 2023 Order denying certiorari.

Respectfully submitted,

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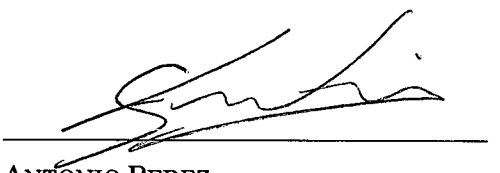
October, 2023

CERTIFICATION BY PARTY

Antonio Perez hereby certifies that this petition for rehearing is restricted to the grounds specified in Sup.Ct.R. 44.2 and has been presented in good faith and not for delay.

Respectfully submitted,



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