No. _____

In The
Supreme Court of the United States

ANI CREATION, INC. D/B/A RASTA; ANI CREATION, INC. D/B/A WACKY T'S; BLUE SMOKE, LLC D/B/A DOCTOR VAPE; BLUE SMOKE, LLC D/B/A BLUE SMOKE VAPE SHOP; ABNME, LLC D/B/A BEST FOR LESS; KORETZKY, LLC D/B/A GRASSHOPPER; RED HOT SHOPPE, INC.; E.T. SPORTSWEAR, INC. D/B/A PACIFIC BEACHWEAR; MYRTLE BEACH GENERAL STORE, LLC; I AM IT, INC. D/B/A T-SHIRT KING; AND BLUE BAY RETAIL, INC. D/B/A SURF'S UP,

Petitioners,

v.

CITY OF MYRTLE BEACH BOARD OF ZONING APPEALS AND KEN MAY, ZONING ADMINISTRATOR FOR CITY OF MYRTLE BEACH,

Respondents.

On Petition For Writ Of Certiorari To The South Carolina Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City of Myrtle Beach enacted a new zoning Ordinance in 2018 which outlawed the sale of legal consumer goods being sold by Petitioners for the past thirty years. The Ordinance gives the offending businesses a little more than four months to comply or be subject to criminal or civil penalties. South Carolina law requires all challenges to zoning Ordinances to appear before the Board of Zoning Appeals. Further, South Carolina law does not allow the Board of Zoning Appeals to hear constitutional arguments.

The questions are as follows:

1. When a city adopts a new zoning Ordinance that prohibits an existing business from selling its legal products, is it a taking?

2. May a court deny an existing business the right to a hearing consistent with *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978) and the Due Process Clause when South Carolina law (S.C. Code § 6-29-800) prohibits the Board of Zoning Appeals from considering constitutional claims?

3. Can the government, consistent with the Takings and Due Process Clauses, require a business to stop selling legal consumer goods which it has sold for over thirty years within a four-month amortization period?

PARTIES TO THE PROCEEDING

Petitioners were the appellants in a proceeding before the South Carolina circuit court and the appellants before The South Carolina Supreme Court. They are: Ani Creation, Inc. d/b/a Rasta; Ani Creation, Inc. d/b/a Wacky T's; Blue Smoke, LLC d/b/a Doctor Vape; Blue Smoke, LLC d/b/a Blue Smoke Vape Shop; AB-NME, LLC d/b/a Best for Less; Koretzky, LLC d/b/a Grasshopper; Red Hot Shoppe, Inc.; E.T. Sportswear, Inc. d/b/a Pacific Beachwear; Myrtle Beach General Store, LLC; I Am It, Inc. d/b/a T-Shirt King; and Blue Bay Retail, Inc. d/b/a Surf's Up.

Respondents were the respondents in the circuit court and appellees before The South Carolina Supreme Court. They are: City of Myrtle Beach Board of Zoning Appeals and Ken May, Zoning Administrator for City of Myrtle Beach.

CORPORATE DISCLOSURE STATEMENTS

STATEMENT FOR ANI CREATION, INC. D/B/A RASTA; ANI CREATION, INC. D/B/A WACKY T'S; RED HOT SHOPPE, INC.; E.T. SPORTSWEAR, INC. D/B/A PACIFIC BEACHWEAR; I AM IT, INC. D/B/A T-SHIRT KING; AND BLUE BAY RETAIL, INC. D/B/A SURF'S UP

Pursuant to Supreme Court Rule 29.6 Petitioners Ani Creation, Inc. d/b/a Rasta; Ani Creation, Inc. d/b/a Wacky T's; Red Hot Shoppe, Inc.; E.T. Sportswear, Inc.

CORPORATE DISCLOSURE STATEMENTS – Continued

d/b/a Pacific Beachwear; I Am It, Inc. d/b/a T-Shirt King; and Blue Bay Retail, Inc. d/b/a Surf's Up hereby state that they are South Carolina corporations and as such have no parent corporations, nor are there any publicly held corporations that hold ten percent or more of their stock.

STATEMENT FOR BLUE SMOKE, LLC D/B/A DOCTOR VAPE; BLUE SMOKE, LLC D/B/A BLUE SMOKE VAPE SHOP; ABNME, LLC D/B/A BEST FOR LESS; KORETZKY, LLC D/B/A GRASSHOPPER; AND MYRTLE BEACH GENERAL STORE, LLC

Pursuant to Supreme Court Rule 29.6 Petitioners Blue Smoke, LLC d/b/a Doctor Vape; Blue Smoke, LLC d/b/a Blue Smoke Vape Shop; ABNME, LLC d/b/a Best for Less; Koretzky, LLC d/b/a Grasshopper; and Myrtle Beach General Store, LLC hereby state that they are South Carolina limited liability corporations and as such have no parent corporations, nor are there any publicly held corporations that hold ten percent or more of their stock.

RELATED CASES

Ani Creation, Inc., et al. v. City of Myrtle Beach Board of Zoning Appeals, et al., Appellate Case No. 2021-001074, South Carolina Supreme Court, filed April 19, 2023, re-filed June 28, 2023.

RELATED CASES – Continued

Ani Creation, Inc., et al. v. City of Myrtle Beach Board of Zoning Appeals, et al., Case No. 2020CP2600785, Horry County Court of Common Pleas, filed April 22, 2021.

Ani Creation, Inc., et al. v. Ken May, Zoning Administrator for the City of Myrtle Beach, Board of Zoning Appeals for the City of Myrtle Beach, filed January 16, 2020.

Ani Creation, Inc., et al. v. City of Myrtle Beach, et al., Case No. 4:18-cv-03517, United States District Court, District of South Carolina, Florence Division, Order filed Jan. 15, 2019; Order filed Aug. 17, 2020).

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OPINIONS BELOW

The South Carolina Supreme Court opinion is reported as *Ani Creation, Inc. d/b/a Rasta; Ani Creation, Inc. d/b/a Wacky T's; Blue Smoke, LLC d/b/a Doctor Vape; Blue Smoke, LLC d/b/a Blue Smoke Vape Shop; ABNME, LLC d/b/a Best for Less; Koretzky, LLC d/b/a Grasshopper; Red Hot Shoppe, Inc.; E.T. Sportswear, Inc. d/b/a Pacific Beachwear; Myrtle Beach General Store, LLC; I Am It, Inc. d/b/a T-Shirt King; and Blue Bay Retail, Inc. d/b/a Surf's Up v. City of Myrtle Beach Board of Zoning Appeals and Ken May, Zoning Administrator for City of Myrtle Beach*, Opinion No. 28151. (App. 30). The South Carolina Supreme Court granted Ani Creation, Inc.'s Petition for Rehearing, dispensed with further briefing, and issued an amended Opinion on June 28, 2023. (App. 1).

JURISDICTION

The South Carolina Supreme Court issued its opinion on April 9, 2023. Petitioners' request for rehearing was granted and an amended final opinion was filed by the South Carolina Supreme Court on June 28, 2023. Petitioners filed a petition for writ of certiorari within ninety (90) days from the filing of the lower court judgment. This Court may exercise jurisdiction under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments of the United States Constitution. The pertinent portion of the Fifth Amendment is: "Nor be deprived of life, liberty or property without due process of law." Further, the Takings Clause of the Fifth Amendment reads: "Nor shall private property be taken for public use without just compensation."

INTRODUCTION AND STATEMENT OF THE CASE

This case involves a matter of first impression. May the government enact a zoning law whereby an existing business of over thirty years is almost immediately prohibited from selling legal consumer goods which are available throughout the city and indeed the state of South Carolina? A second issue is whether or

not the business owner who is prohibited from selling the legal consumer goods is entitled to a hearing before the Board of Zoning Appeals or circuit court concerning whether the government's conduct is a taking under the Fifth and Fourteenth Amendments of the Constitution. The South Carolina Supreme Court is the first court in the United States to find that the government can enact a zoning Ordinance to outlaw the sale of legal products by an existing business and have an amortization period of approximately four months. City of Myrtle Beach Ordinance 2017-23: Ordinance to Amend Appendix A, Zoning, By Enacting Article 18, Section 1806 to Enact and Establish the Ocean Boulevard Entertainment Overlay District (hereinafter OBEOD) to Establish a Family Friendly Entertainment and Retail Land Use (2018).

Here, the South Carolina Supreme Court without allowing a hearing by Petitioners to assert their takings claim found that the zoning Ordinance at issue was not a taking of a portion of Petitioners' existing businesses. This ruling by the South Carolina Supreme Court violates the Due Process Clause and the Takings Clause of the United States Constitution. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

The City of Myrtle Beach enacted a zoning law outlawing the sale of legal consumer goods by existing businesses. The Zoning Administrator then served all the Petitioners with a Summons. The Petitioners were

then required by law to appear before the Board of Zoning Appeals pursuant to S.C. Code § 6-29-800(A)(1)(2)(3)(4) but were not allowed to present constitutional claims because South Carolina law did not allow such claims to be heard in that forum. Petitioners were then required to appeal the decision of the Board of Zoning Appeals to the circuit court which was prohibited by law from taking or considering additional evidence. This case involves matters of substantial public importance and fundamental fairness since zoning Ordinances are in force throughout the United States. The ruling in this case by the South Carolina Supreme Court is the first of its kind and it allows any governmental entity to close a business by simply declaring a business cannot sell certain legal products which the business has sold for years without allowing them to make a constitutional claim.

The Petitioners are retail store owners and property owners who operate legitimate legal businesses in the City of Myrtle Beach, South Carolina on Ocean Boulevard between 16th Avenue North and 6th Avenue South. The Petitioners sell a variety of legal consumer goods including cigarettes, cigars, pipes, tobacco, chewing tobacco, rolling papers, e-cigarettes, vape products, CBD oil, t-shirts, hats, novelty merchandise, food and general grocery items. The Petitioners have been in business at the same locations selling this same type of merchandise for over thirty years and all have current business licenses and have complied with all City rules and regulations in operating their businesses. Many of the Petitioners own the real

property where their businesses are located in the OBEOD. A new zoning restriction on the Petitioners who own real property will affect the resale value of that property.

On August 14, 2018, the City of Myrtle Beach adopted Ordinance 2017-23: Ordinance to Amend Appendix A, Zoning, By Enacting Article 18, Section 1806 to Enact and Establish the Ocean Boulevard Entertainment Overlay District (hereinafter OBEOD) to Establish a Family Friendly Entertainment and Retail Land Use area.[1] The OBEOD Ordinance for the first time listed legal consumer products that could not now be sold by Petitioners in the OBEOD. Further, the OBEOD Ordinance banned as of December 31, 2018 the sale of cigarettes (of more than an incidental nature), cigars, pipes, tobacco, chewing tobacco, rolling papers, e-cigarettes, tobacco paraphernalia, vape products, CBD oil, and sexually explicit t-shirts, hats, and novelty merchandise. Thus, as of December 31, 2018, it became illegal for Petitioners to sell the legal consumer goods they had sold in their stores for over thirty years. Further, the City of Myrtle Beach did not ban the sale of those same products throughout the City and other businesses contiguous to the OBEOD were allowed to continue to sell those same products.[2] Petitioners were

[1] The term "family friendly" is not defined in the OBEOD Ordinance. See Section 1807(A)(8) Ocean Boulevard Entertainment Overlay District.

[2] As an example, the same items are sold at Walmart and Spencer's Gifts (which is in business at a local mall) in the City. In fact, contiguous businesses to Petitioners sell the same products which Petitioners cannot sell in their stores.

given a little more than four months to comply with the Ordinance. Myrtle Beach Ordinance 2017-23, Section 1807 E (2018). Violations of the Ordinance subjected the Petitioners to civil and criminal penalties including loss of their business license. See Myrtle Beach Ordinance 2017-23, Section 1807.F (2018).

Immediately after the OBEOD Ordinance was passed, Petitioners filed suit in the United States District Court, Florence, South Carolina. The Petitioners in the United States District Court requested an order restraining the City of Myrtle Beach from enforcing Section 1807 which provided for both civil and criminal penalties for the sale of legal consumer products in the OBEOD. United States District Court Judge Bryan Harwell entered an Order with the consent of the City of Myrtle Beach on January 15, 2019 in which he stayed enforcement of any violation of the Ordinance pending these proceedings.[3] Judge Harwell's Order stated:

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[3] Significantly, the violation of Myrtle Beach Zoning Ordinance 2017-23 subjects the Petitioners to criminal prosecution. Myrtle Beach Ordinance 1-9(a) provides: "any act prohibited by rule, regulation or order is declared to be unlawful or an offense or a misdemeanor, such violation of the ordinance, resolution, rule, regulation shall be punished by a fine not exceeding $500.00 or imprisonment by a term not exceeding 30 days or both." (See Myrtle Beach Code of Ordinances, Section 1-9(a) (1980)). Further, the Myrtle Beach Zoning Ordinances, specifically Section 110, provides a criminal penalty for violation of a zoning ordinance and declares any violation to be a misdemeanor under the laws of the State and any conviction thereof, an offender shall be liable to a penalty as set forth in City Ordinance Section 1-9. See Zoning

> NOTE THIS ENFORCEMENT COMMITMENT APPLIES ONLY TO THE OBEOD ORDINANCE AND ANY AMENDMENTS TO THAT ORDINANCE. ALL OTHER LAWS OR STATUTES REGULATING THE SALE OF CBD PRODUCTS, DRUG PARAPHERNALIA, OR OTHER CRIMINAL OFFENSES WILL BE ENFORCED IN ACCORDANCE WITH THE TERMS OF THOSE LAWS OR STATUTES. (App. 110).

In light of the District Court's Order, it is baffling that the South Carolina Supreme Court held the "ordinance does not criminalize the sale of legal products." In fact, the Order of the District Court required the City of Myrtle Beach to halt criminal enforcement against the Petitioners pending the outcome of this case.

A second Order from the District Court, dated August 17, 2020, ordered Petitioners to exercise their state law remedies and concluded "the takings claim is not ripe for adjudication by this court."[4] See Footnote 11 of that Order which states:

> The South Carolina constitutional claims contain scant factual allegations, but they seem to mirror the equal protection and free speech claims asserted with respect to the

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Ordinance of the City of Myrtle Beach, SC, Section 110 (January 22, 2019).

[4] Petitioners note that the law was changed by this Court. See *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019) which now allows a litigant to proceed in federal court and not exhaust state law remedies.

> U.S. Constitution. This court has supplemental jurisdiction over the claims in accordance with 28 U.S.C. § 1367(a). Because the court concludes that *Burford* does not apply to Plaintiffs' equal protection and free speech claims under the U.S. Constitution, and it is retaining jurisdiction over the federal claims, it is staying the corresponding state law claims. (App.105).

The state law remedy in this case (S.C. Code § 6-29-800) required the Petitioners to appear at a hearing before the City of Myrtle Beach Board of Zoning Appeals. Petitioners appeared before the Board on October 10, 2019 and it denied any relief to the Petitioners and refused to address Petitioners' constitutional claims in an Order dated January 16, 2020. (App. 57). Thereafter, pursuant to South Carolina law, the Petitioners appealed the Board of Zoning Appeals Order to the Horry County Court of Common Pleas on January 31, 2020.

Pursuant to South Carolina law, the circuit court held a hearing March 1, 2021 without taking additional evidence or testimony which is prohibited by statute. S.C. Code § 6-29-800, *et seq*. On April 22, 2021, the Court of Common Pleas affirmed the City of Myrtle Beach Board of Zoning Appeals decision. (App. 57). Petitioners then moved for reconsideration and the circuit court denied Petitioners' motion for reconsideration on September 16, 2021. In the hearing before the Myrtle Beach Board of Zoning Appeals and in the hearing before the Horry County Court of Common Pleas,

Petitioners were prohibited by South Carolina law from presenting evidence or testimony of their constitutional claims. Petitioners appealed to the South Carolina Supreme Court which affirmed the rulings of the Board of Zoning Appeals and the Horry County Court of Common Pleas.[5] This Petition for Certiorari follows.

The issue of a constitutional remedy for an existing business owner whose business is taken by a new zoning Ordinance is of great importance and affects all operating businesses throughout the United States. Petitioners reference *Horne v. Dept. of Agriculture*, 569 U.S. 513 (2013); *Horne v. Dept. of Agriculture*, 576 U.S. 351 (2015); and *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998), which holds a state court cannot "sidestep the Takings Clause by disavowing traditional property interests" in assets it wishes to appropriate. In this case the Ordinance prohibits Petitioners from making constitutional claims before the Board of Zoning Appeals – a Board they must appeal to under South Carolina law. See also, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Hall v. Meisner*, 51 F. 4th 185, 190 (6th Cir. 2022) (Kethledge, J., for the Court) ("[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take.").

[5] The South Carolina Supreme Court's opinion affects all the Petitioners' businesses by restricting sales. In one instance, the zoning ordinance will put Petitioner Blue Smoke, LLC, a tobacco store, completely out of business.

REASONS FOR GRANTING THE PETITION

I. THE SOUTH CAROLINA SUPREME COURT FAILED TO GRANT A HEARING ON THE TAKINGS ISSUE AND THUS VIOLATED DUE PROCESS.

The Supreme Court of South Carolina in its Order of June 28, 2023 granted Petitioners' petition for rehearing, dispensed with further briefing and made only one minor addition to its original opinion. (App. 1). The June 28, 2023 substituted opinion again denied Petitioners' claim that the City of Myrtle Beach took their property without just compensation.[6] The South Carolina Supreme Court stated:

> Appellants, however, have not developed any of the facts necessary to support a takings claim. For example, they do not quantify the economic impact of the ordinance on their properties – the first *Penn Central* factor. *See Penn Cent.*, 438 U.S. at 124. Rather, appellants merely claim the impact is a "significant amount" that is "dire" and "severe."
>
> We are left to speculate about the facts necessary to support appellants' takings claim. (App. 26).

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[6] The substituted opinion mirrored the original opinion except it added Footnote 11 in which the Court attempted to distinguish its prior decisions holding business owners had vested property rights. Ironically, one opinion, *James v. City of Greenville*, 227 S.C. 565, 88 S.E.2d 661 (1955), cited the United States Constitution in denying the City of Greenville the right to discontinue a nonconforming use within one year.

In fact, Petitioners were legally prohibited by State law (S.C. Code § 6-29-840(B)) from presenting a takings claim to the Board of Zoning Appeals. In South Carolina, the state law remedy for challenging a zoning law required that a petitioner present its case to the City Board of Zoning Appeals. Under South Carolina law, the Board of Zoning Appeals does not have legal authority to consider constitutional issues. See S.C. Code § 6-29-800(A)(1)(2) (The Board of Zoning Appeals will hear variances and appeals when there is error by an administrative official enforcing a zoning Ordinance.). See also S.C. Code § 6-29-800(A)(1)(2)(3)(4) (The powers of the Board of Zoning Appeals does not extend to a constitutional taking.). See also S.C. Code § 6-29-840(B) (Nothing in this subsection prohibits a property owner from subsequently electing to assert a pre-existing right to trial by jury on any issue beyond the subject matter jurisdiction of the board of appeals, such as, but not limited to, a determination of the amount of damages due to an unconstitutional taking.).

Despite these statutes and Petitioners' limitations in presenting a constitutional claim in a zoning appeal hearing, the South Carolina Supreme Court held that the Petitioners had not presented a valid takings claim and thus denied that claim. The South Carolina Supreme Court did not address the fact that Petitioners were prohibited from presenting constitutional claims in a Board of Zoning Appeals hearing or on appeal to the circuit court. The South Carolina Supreme Court's decision rejected the Petitioners' unconstitutional

takings claim without allowing Petitioners to present any evidence and testimony either before the Board of Zoning Appeals or in any other forum. The South Carolina Supreme Court's opinion violates South Carolina's own statutes which allow Petitioners to assert a claim for an unconstitutional taking; however, those same statutes do not reference how a litigant protects those rights. (See S.C. Code § 6-29-840(B)). Thus, the opinion of the South Carolina Supreme Court violates Petitioners' due process rights because it ruled on the takings claim without allowing Petitioners to ever present any such claim in any forum.

Further evidence that the South Carolina Supreme Court opinion violates due process can be found in the opinion itself. The South Carolina Supreme Court cites as authority for denying Petitioners' claims the case of *Helena Sand and Gravel, Inc. v. Lewis & Clark Cnty. Plan. & Zoning Comm'n*, 290 P. 3d 691, 699-700 (Mont. 2012), cert. denied, 569 U.S. 1017, 133 S.Ct. 2768 (2013). In that case, the Montana Supreme Court considered a county zoning case which is factually similar to this case, but remanded the case to the lower court so it could examine the takings claims under the *Penn Central* analysis. The South Carolina Supreme Court, rather than remanding the case for a hearing on the takings claim, held that the Petitioners had no takings claim without allowing Petitioners to present evidence. Petitioners addressed this issue at oral argument and in their Petition for Rehearing, but it was rejected by the lower court.

The *Helena Sand* case cited an opinion of this Court, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 2457 (2001) which held: "Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including a regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment expectations and the character of the government action."

Palazzolo makes clear that *Penn Central* requires an "ad hoc," fact-specific inquiry where the property retains economic value but, "when its diminished economic value is considered in connection with other factors, the property effectively has been taken from its owner." The South Carolina Supreme Court refused to follow the direction of either *Palazzolo* or *Helena Sand* in ordering such a hearing. Instead, the Petitioner was prohibited from presenting evidence before the Board of Zoning Appeals about their takings claims, because South Carolina law prohibited it. This ruling by the South Carolina Supreme Court violated Petitioners' due process rights in that under South Carolina law they could not present a takings claim before the Board of Zoning Appeals or the Court of Common Pleas. The only remedy to protect Petitioners due process rights would have been to remand this case to the trial court with instructions that it hear evidence regarding the *Penn Central* factors especially since the United States District Court retained jurisdiction of the federal claims.

Procedural due process requires that a litigant have an opportunity to be heard and to present reasons why the proposed government action should not be taken. It includes the right to present evidence, to call witnesses, to cross-examine witnesses, and to know the evidence. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In this case, South Carolina law (S.C. Code § 6-29-800(A)(1)) does not allow the Board of Zoning Appeals to hear any constitutional claims. Further, an appeal from the Board of Zoning Appeals to the circuit court does not allow the circuit court to take additional evidence or testimony. In fact, South Carolina law allowed those constitutional claims to be preserved, but no remedy or procedure is found in South Carolina law and Petitioners are left to guess what the procedural remedy is in this case. (See S.C. Code § 6-29-840(B)). Instead, the Supreme Court of South Carolina ruled that Petitioners had not proven a taking claim which foreclosed Petitioners right to litigate their constitutional claims. Such a finding violates due process since Petitioners have never been able to present such a claim to any court and ironically are now prohibited from doing so after the fact. See *Matthew v. Eldridge*, 424 U.S. 319, 333 (1976) (parties whose rights are to be affected are entitled to be heard). *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (The general rule of this Court is that individuals must receive notice and an opportunity to be heard before the government deprives them of property.).

In sum, the South Carolina Supreme Court violated Petitioners' procedural due process rights since Petitioners were prohibited from presenting evidence of a constitutional claim before the Myrtle Beach Board of Zoning Appeals or the Court of Common Pleas. S.C. Code § 6-29-800, *et seq*. violates the Petitioners' due process rights and leaves Petitioners with no remedy in a zoning appeal which results in a de facto taking without recourse. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 2457 (2001).

II. THE SOUTH CAROLINA SUPREME COURT OPINION FAILS TO COMPLY WITH *HORNE V. DEPT. OF AGRICULTURE*, 576 U.S. 351 (2015).

The South Carolina Supreme Court in summarily denying Petitioners' takings claim fails to address *Horne v. Dept. of Agriculture*, 576 U.S. 351 (2015). In *Horne I*, 569 U.S. 513 (2013), this Court held that the plaintiff had standing to sue for violation of the United States Constitution when a farmer challenged a rule that required the farmers to keep a portion of their crops off the market. In *Horne II*, 576 U.S. 351 (2015), this Court held that the National Raisin Reserve was an unconstitutional violation of the Takings Clause. This case is similar to *Horne* in that the Petitioners had been in business in the OBEOD for over thirty years selling the same type of consumer goods that became illegal within four months of the enactment of the OBEOD Ordinance. These same legal goods are sold throughout the City of Myrtle Beach and indeed

throughout South Carolina but could not be sold by the Petitioners in their stores without fear of civil and criminal penalties. The City of Myrtle Beach in enacting the OBEOD Ordinance has taken part of Petitioners' business similar to what this Court held was illegal in *Horne II*. In a little over four months, goods which the Petitioners had sold for over thirty years were no longer lawful to be sold despite the fact that the same goods could be sold outside the OBEOD and also subjects them to criminal prosecution. Indeed the exact same consumer goods are sold everywhere in South Carolina except in the OBEOD zoning district – including directly across the street!

III. THE OBEOD VIOLATES EQUAL PROTECTION AND IS A TAKING.

Petitioners presented the only precedent which could be found with similar facts in *Walgreen Co. v. City and County of San Francisco*, 185 Cal. App. 4th 424, 419-436, 498 (Cal. Ct. App. 2010).[7] The California Court of Appeals considered whether the trial court properly dismissed an equal protection challenge to a San Francisco law prohibiting certain pharmacies in San Francisco from obtaining licenses to sell tobacco

[7] Petitioners acknowledge this case is factually similar to *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019). In *Knick*, the petitioners had owned a farm since 1970 on which was allegedly a cemetery. The Town of Scott retroactively enacted a law in 2012 requiring any landowner which had a cemetery to be open to the public. In *Knick*, this Court remanded the case to the lower court and held the taking case was ripe for litigation in federal court.

products. The Ordinance prohibited standalone pharmacies from obtaining licenses to sell tobacco but not grocery stores or big box stores containing licensed pharmacies. The California Court of Appeals found the law treated the two categories of pharmacies differently. The California Court of Appeals found no basis for the differential treatment and remanded the case to the trial court. A similar situation exists here in that the same legal products which the Petitioners can no longer sell in the OBEOD zoning district can be sold elsewhere in the City and throughout South Carolina. Of further note, the OBEOD Ordinance lists as a reason for the ban "in the interest of public health." OBEOD 1807 (Section 10). It is curious that if public health was the reason, why does the City not ban the same products throughout the city rather than a small area? The South Carolina Supreme Court makes no mention in its opinion of the similar factual pattern decided by the California Court of Appeals, nor does it mention the case of *Safeway v. City and County of San Francisco*, 797 F. Supp. 2d 964, 971-973 (N.D. Cal. 2011). In that case, San Francisco amended the Ordinance to prohibit the sale of tobacco by <u>any store</u> within San Francisco that contained a pharmacy. The District Court stated: "In prohibiting the sale of tobacco products in pharmacies the amended ordinance accomplishes its purpose by ending an inference that tobacco products may not be harmful because they are sold by a major participant in the healthcare delivery system." The *Safeway* Court found the new amended law did not violate the Equal Protection Clause.

The California cases are the only known cases which are similar to the facts in this case. Here, Petitioners are unable to sell CBD oil, cigarettes, novelty items and other banned products in their stores while directly across the street and throughout the City of Myrtle Beach those same products can be sold in stores. Petitioners are treated differently, while across the street from the OBEOD, literally within feet of Petitioners' businesses, other stores sell exactly the same products without fear of civil or criminal prosecution. The South Carolina Supreme Court did not address this issue, nor did it address the cases cited by the Petitioners. Petitioners request this Court hold an equal protection violation exists when they cannot sell the same consumer goods they have sold for years while other businesses may sell those same goods across the street or in any other place in the city. This is especially egregious because the zoning Ordinance is based on making the OBEOD "family friendly." It is irrational to argue the OBEOD area must be "family friendly" and protect public health and not allow Petitioners to sell the offending products while the rest of the City's businesses can sell the same products without fear of prosecution.

IV. SUBSTANTIVE DUE PROCESS IS VIOLATED IF A ZONING ORDINANCE IS RETROACTIVE ON AN EXISTING BUSINESS IN A SHORT PERIOD OF TIME.

The City of Myrtle Beach enacted the subject zoning Ordinance on August 14, 2018. The Ordinance

required that businesses which were selling pipes, e-cigarettes, CBD oil, vape products, and other general merchandise including tobacco products of more than an incidental nature would be prohibited from selling those products after December 31, 2018. Myrtle Beach Ordinance 2017-23 provided for civil and criminal penalties if an existing business did not comply by December 31, 2018. The Petitioners, as has been stated above, have been selling these items in their stores for over thirty years prior to the new zoning Ordinance becoming law. This is the only reported case in which a city has zoned out the sale of legal consumer goods in a portion of the city while allowing those same legal goods to be sold throughout the rest of the city – all in less than five months.

Petitioners assert that the OBEOD Zoning Ordinance is illegal retroactive legislation. As this Court said in *General Motors Corp. v. Romein*, 503 U.S. 181, 192 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."). Here, Petitioners "settled expectations" are shocked since they have sold the affected goods for over thirty years in the same location and now must divest themselves of their stock within a short period of time.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998), this Court specifically viewed retroactive legislation as a problem of due process. In that case, the petitioner challenged a federal law that established a

mechanism for funding healthcare benefits for coal industry retirees and their dependents. Under the law, the government assigned Eastern the obligation to pay premiums for workers who had worked for the company prior to 1966. Eastern sued claiming that the law was a taking and that it violated substantive due process. 524 U.S. at 498-499. This Court held that the law was a taking and that the legislation was unconstitutional as a taking because "it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." 524 U.S. at 537-538. The same situation exists here in that Petitioners could never have anticipated their legal businesses would subject them to civil and criminal penalties and require them to quit selling legal products in four months or risk prosecution.

In *Eastern Enterprises*, Justice Kennedy, concurring in the judgment argued: "The government ought not to have the capacity to give itself immunity from a takings claim by the device of requiring the transfer of property from one private owner directly to another." 524 U.S. at 544. A description that aptly summarizes the use of a zoning amortization schedule of four months employed by the City of Myrtle Beach Zoning Ordinance.

Justice Kennedy, after listing numerous cases in the opinion, concluded:

> If retroactive laws changed the legal consequences of transactions long closed, the

> change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity.
> 524 U.S. 548-549.

Here, the City of Myrtle Beach Ordinance 2017-23, Section 1807(A-F) (2018) violates due process because of its retroactivity which makes part of the Petitioners' ongoing businesses illegal, i.e., the sale of certain legal products, and required them to divest themselves of these same products by December 31, 2018. The actions of the government in enacting the zoning Ordinance to provide for civil and criminal penalties for the sale of goods Petitioners have sold for over thirty years is severe in nature with criminal consequences. See Zoning Ordinance of the City of Myrtle Beach, SC, Section 110 (January 22, 2019) and Myrtle Beach Ordinance, Section 1-9 (1980). Petitioners can no longer sell pipes, e-cigarettes, CBD oil, vape products, and other general merchandise including tobacco products of more than an incidental nature because their businesses are within the OBEOD. However, other businesses immediately adjacent to the Petitioners can sell those same products, and indeed those same products are legal throughout the city. The OBEOD is illegal retroactive zoning and has a devastating effect on Petitioners' businesses which are in a very small section of the city. The Myrtle Beach Ordinance only allows Petitioners a little more than four months to comply and places severe sanctions such as criminal

penalties and the loss of their business licenses. (See Myrtle Beach Zoning Ordinance 2017-23, Section 1807(E) (2018)).

In sum, this Court has found that retroactive civil legislation violates due process if it "is particularly harsh and oppressive or arbitrational and irrational." See *Pension Benefit Guaranty Corp. v. R.A. Gray and Company*, 467 U.S. 717, 729 (1984). This case qualifies for that description in that the Petitioners can be sued or criminally prosecuted for the sale of goods which had been legal for over thirty years if they dare place them on their shelves after December 31, 2018. Such a law violates Petitioners' settled expectations and vested rights over the last thirty years of what they can sell and results in an unconstitutional taking of their business which violates the Constitution.

CONCLUSION

In conclusion, the City of Myrtle Beach, through its zoning Ordinance, impermissibly takes Petitioners' businesses without just compensation. Further as if to pour salt on the wound, the City Board of Zoning Appeals pursuant to state law must hear all zoning appeals but is prohibited from deciding constitutional claims as is the circuit court on appeal. The Petitioners are in an untenable situation as there is no forum to present their constitutional claims. The error is compounded by the South Carolina Supreme Court which ruled on Petitioners' constitutional claims in spite of

the fact the Petitioners were prohibited by law from presenting those claims to the lower court.

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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September 26, 2023 *Attorneys for Petitioners*