No. 23-330

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

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

CITY OF MYRTLE BEACH BOARD OF ZONING APPEALS AND KEN MAY ZONING ADMINISTRATOR FOR THE CITY OF MYRTLE BEACH are not publicly held corporations.

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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.

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JURISDICTIONAL STATEMENT

Respondents do not dispute this Court's jurisdiction over this case pursuant to 28 U.S.C. § 1254(1) but deny that the case satisfies the standard set forth in Supreme Court Rule 10. Petitioner filed his Petition for Writ of Certiorari on September 28, 2023.

COUNTERSTATEMENT OF THE CASE

The case does not involve a matter of first impression. The exclusionary zoning issues and amortization zoning issues in the present case have been addressed by the courts. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926); *Bugsy's, Inc. v. City of Myrtle Beach*, 340 S.C. 87, 530 S.E.2d 890 (2000); and *Centaur, Inc. v. Richland Cnty.*, 301 S.C. 374, 392 S.E.2d 165 (1990). Petitioners have misinterpreted South Carolina statutes and the City of Myrtle Beach's ordinances in connection with their zoning laws and procedures. The case does not conflict with the decision of another state court of last resort or of a United States Court of Appeals. The cases cited by Petitioners are inapposite or may be distinguished on their facts.

The present case arises from Petitioners' appeal to the City's board of zoning appeals (BZA) of a determination made by the City's zoning administrator that Petitioners' use of their stores to sell drug paraphernalia, CBD consumables, and sexually oriented merchandise in the City's Ocean Boulevard Entertainment Overlay District (OBEOD) violated a city zoning ordinance. The BZA's jurisdiction is limited to granting variances and to correcting factual or legal errors made by the zoning administrator. The BZA does not have the authority to determine the constitutionality of City ordinances. When Petitioners attacked the validity of the City's ordinance on constitutional grounds, the BZA did permit Petitioners and their attorney to proffer any evidence they had in support of their

claims that the ordinance violated Petitioners' constitutional rights. Petitioners made their proffer on the record through documents and the testimony of witnesses. Petitioners' proffer also included the deposition and cross examination of the zoning administrator.

After the BZA hearing adjourned, the BZA affirmed the zoning administrator and determined they did not have jurisdiction to determine the constitutionality of City ordinances. Petitioners then chose to appeal the BZA's order directly to the South Carolina Circuit Court. Petitioners' proffer was made part of Petitioners' record on appeal.

Petitioners could have attacked the zoning administrator's determination by attacking the zoning ordinance directly in the circuit court pursuant to S.C. Code Ann. § 6-29-840(B). That statute permits Petitioners to have a jury trial to assert any pre-existing right to trial by jury of any issue beyond the subject matter jurisdiction of the board of appeals. Such a trial could have included a hearing consistent with the takings tests set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). Instead of seeking such a trial, Petitioners chose the path of an appeal from the BZA order without seeking a *Penn Central* hearing. After the Circuit Court affirmed the BZA's order, Petitioners appealed that decision to the S.C. Supreme Court.

In their appeal to the S.C. Supreme Court Petitioners did raise a takings claim in a petition for rehearing. The Court examined the evidence proffered

by Petitioners at the BZA hearing and found the evidence was insufficient to establish a takings claim. See *Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, 440 S.C. 266, 890 S.E.2d 748 (2023).

Prior to the BZA appeal, Petitioners had filed a separate takings claim in a federal district court action when the zoning ordinance in question was enacted. However, the federal takings claim was dismissed without prejudice on the ground that the claim was not ripe. See *Ani Creation et al. v City of Myrtle Beach, et al.*, C/A No. 4:2018-cv-03517-SAL ECF #41. The district court cited *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) as part of its authority. *Williamson* has now been overruled by *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019). Respondents contend that if the U.S. district court erred in dismissing Petitioners' takings claim, Petitioners' remedy is in federal district court.

Petitioners claim the zoning ordinance's amortization period was unreasonable. Petitioners' amortization claim is moot. In the present case Petitioners had nearly five years to come into compliance with the ordinance but failed to do so. The S.C. Supreme Court found that the amortization period in the zoning ordinance was reasonable. See *Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, 440 S.C. 266, 890 S.E.2d 748 (2023).

REASONS FOR DENYING THE PETITION

I. PETITIONERS' DUE PROCESS RIGHTS WERE NOT VIOLATED.

The present case originated on an appeal of an order from the City's BZA. Petitioners chose to appeal the City zoning administrator's determination of Petitioners' zoning violation directly to the City's BZA. Petitioners could have challenged the zoning administrator's determination by challenging constitutional validity of the ordinance in circuit court. § 6-29-840(B). The City's BZA does not have the jurisdiction to declare the ordinance enacted by a city council unconstitutional. Even though the BZA did not have jurisdiction to decide Petitioners' takings claims, it permitted Petitioners to make for the appellate record a proffer of their evidence in support of their takings claims. After considering Petitioners' takings claim in a Petition for a Rehearing, the South Carolina Supreme Court examined Petitioners' claim in the light of the tests in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). The Court determined that the evidence was not sufficient to establish a takings claim. *Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, 440 S.C. 266, 890 S.E.2d 748 (2023).

Petitioners claim South Carolina law prohibits Petitioners from presenting a constitutional takings claim before the City's BZA. Petitioners' claim is incorrect and misses the point. Petitioners did present their takings claim to the BZA and they were permitted to

proffer evidence to support their claim to create a record on appeal to the circuit court. However, the BZA only functions to grant variances and to correct errors made by the zoning administrator in applying the City's zoning ordinances. The BZA cannot create new ordinances and it cannot nullify existing ordinances. The BZA found that it did not have jurisdiction to decide Petitioners' constitutional claims. Petitioners' proffer was preserved for Petitioners' appeals to the law courts.

Petitioners did attack the OBEOD ordinance on constitutional grounds in circuit court. However, Petitioners did not request a separate hearing to examine whether the application of the OBEOD ordinance to Petitioners constituted a taking under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). Instead, Petitioners claimed the circuit court ignored the evidence on constitutional issues that they presented to the BZA.

II. *HORNE V. DEP'T OF AGRIC.*, IS INAPPOSITE TO THE PRESENT CASE.

In *Horne v. Dep't of Agric.*, 576 U.S. 350, 352, 135 S. Ct. 2419, 2422, 192 L. Ed. 2d 388 (2015) the Court found that a clear physical taking occurred by the reserve requirement imposed by the Raisin Committee of the Department of Agriculture. When there has been a physical appropriation, the courts do not ask whether it deprives the owner of all economically valuable use of the item taken. *Tahoe-Sierra*

Preservation Council, 535 U.S., at 323, 122 S. Ct. 1465; see *id.*, at 322, 122 S. Ct. 1465. When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. *Id.*

In the present case Petitioners claim the ordinance effected a regulatory taking of their property without just compensation, specifically citing the three-factor test set forth by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (explaining that, in regulatory takings cases, courts should examine (1) the economic impact of the regulation on the affected property; (2) the extent to which the regulation interfered with the property owner's investment-backed expectations; and (3) the character of the government action).

Regulatory takings claims are "essentially ad hoc, factual inquiries" that "depend largely upon the particular circumstances in that case." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322, 336, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (cleaned up); see also *Dunes W. Golf Club, L.L.C. v. Town of Mt. Pleasant*, 401 S.C. 280, 314, 737 S.E.2d 601, 619 (2013) (explaining the question of whether a taking has occurred is a question of law that this Court must review de novo). After reviewing Petitioners' proffer, the Court found Petitioners had not proffered any of the facts necessary to support a takings claim.

For example, Petitioners did not quantify the economic impact of the ordinance on their properties—the first *Penn Central* factor. See *Penn Central*, 438 U.S. at 124, 98 S. Ct. 2646. Rather, Petitioners merely claimed the impact is a "significant amount" that is "dire" and "severe."

The S.C. Supreme Court was left to speculate about the facts necessary to support Petitioners' takings claim. The Court rejected Petitioners' claim that the ordinance took their property without just compensation in violation of the Fifth Amendment to the United States Constitution. *Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, 440 S.C. 266, 289–90, 890 S.E.2d 748, 760 (2023). The Court's analysis and decision in connection with Petitioners' takings claim was correct. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601 (2013).

Petitioners cite *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 support of their claim that the S.C. Supreme Court should have remanded the case to the circuit court for a takings claim. Respondents contend *Helena Sand* can be distinguished because it did not involve a proffer of evidence in support of a takings claim and a finding by the Montana Supreme Court that the proffered evidence did not support a takings claim.

III. THE OBEOD DOES NOT VIOLATE EQUAL PROTECTION AND IS NOT A TAKING.

Petitioners claim the ordinance violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Specifically, Petitioners claim the creation of the OBEOD was unfair to them because they cannot sell certain merchandise that similar stores can continue selling in other areas of the city. Petitioners claim the creation of the OBEOD was arbitrary and capricious because it treated them differently from other, similarly situated businesses throughout the city. *Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, 440 S.C. 266, 281, 890 S.E.2d 748, 755–56 (2023). The S.C. Supreme analyzed Petitioners' claims in depth and found Petitioners failed to demonstrate the ordinance violated their right to equal protection and affirmed the circuit court's decision on this basis. Respondents adopt the Court's findings as their response to Petitioners' claims.

Petitioners cite the cases of *Walgreens Co. v. City & Cty. of San Francisco*, 185 Cal. App. 4th 424, 110 Cal. Rptr. 3d 498 (2010) as authority for their equal protection claim. Respondents contend that the case is distinguishable on its facts. In *Walgreens*, the City & County of San Francisco enacted an ordinance that prohibited businesses such as Walgreens that were licensed as pharmacies with accessory sales from selling tobacco products throughout the city. However, the ordinance exempted from the tobacco prohibition "big

box" stores such as Costco or supermarkets such as Safeway.

Both Costco and Safeway contained licensed pharmacies in their stores. In the appeal, the City & County of San Francisco admitted that businesses such as Walgreens that were licensed as pharmacies and "big box" stores such as Costco or supermarkets such as Safeway that contained licensed pharmacies were similarly situated. The California Court of Appeals indicated that the different treatment of licensed pharmacies and general stores which contained licensed pharmacies could be found to be a distinction without a difference.

Petitioners in the OBEOD are not similarly situated to other businesses in other zones. Unlike the ordinance in *Walgreens* which may have impacted similar businesses throughout the city, the present case involves one different overlay zoning district. The city contends the OBEOD area is different from other areas in the city because the historic family friendly amenities and pedestrian activities that exist in the OBEOD make the OBEOD a distinguishable asset for the City's tourism economy.

Petitioners also cite *Safeway Inc. v. City & Cty. of San Francisco*, 797 F. Supp. 2d 964 (N.D. Cal. 2011). However, that case holds that San Francisco's zoning ordinance did not violate equal protection or the 14th Amendment due process clause. Respondents contend the case supports their position that the OBEOD zoning ordinance is constitutional.

IV. PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS CLAIM THAT THE OBEOD ZONING ORDINANCE IS HARSH, OPPRESSIVE, ARBITRARY, OR IRRATIONAL RETROACTIVE LEGISLATION IS INCORRECT.

The retroactive aspects of economic legislation, as well as the prospective aspects, must meet the test of due process: a legitimate legislative purpose furthered by rational means. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191, 112 S. Ct. 1105, 1112, 117 L. Ed. 2d 328 (1992). The S.C. Supreme Court examined in depth the City of Myrtle Beach's legislative purpose and the rationality of how the OBEOD ordinance furthered that purpose. The Court found that the OBEOD ordinance met the tests of due process. *Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, 440 S.C. 266, 281, 890 S.E.2d 748, 755–56 (2023).

The S.C. Supreme Court found that the OBEOD zoning ordinance was not harsh, oppressive, arbitrary, or irrational. The Court examined the Purpose and Intent stated by City in enacting the OBEOD ordinance. The Court found that in creating the OBEOD, the ordinance extensively set forth its purpose and intent, emphasizing, among other things, the importance of fostering more family tourism and discouraging things that were "repulsive" to families, including "unhealthy tobacco use, crudity and the stigma of drug use and paraphernalia." § 1807 Code of Ordinances of City of Myrtle Beach. As a result, the city council found the displacement of smoke shops and tobacco stores from the historic downtown area was "in the interests of the public health, safety, and general welfare." *Id.*

Likewise, the city council stated the presence of smoke shops and tobacco stores heightened the risk of "negative aesthetic impacts, blight, and loss of property values of residential neighborhoods and businesses in close proximity to such uses." *Id.* Finally, the city council noted that despite the creation of the OBEOD, there were numerous other locations throughout the city available for the continued operation of smoke shops and tobacco stores. *Id.* The Court found that Petitioners had not met their burden of proof showing that the ordinance was enacted for an illegitimate legislative purpose furthered by irrational means.

CONCLUSION

Respondents request that Petitioners' Petition for Certiorari be denied.

Respectively submitted,

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November 9, 2023 *Attorneys for Respondents*