IN THE SUPREME COURT OF FLORIDA

CASE NO. SC2023-0095

Gustavo Bojorquez, etc., et al.,

Petitioners,

vs.

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

State of Florida, et al.,

Respondents.

ON DISCRETIONARY REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

Florida's Takings Clause permits the government to take "private property" only if it pays full compensation. Art. X, § 6(a), Fla. Const. In 2012, the legislature declared certain taxicab medallions to be "private property" that could be "transfer[red] to another person" either "by pledge, sale, assignment, sublease, devise, or other means." Ch. 2012-247, § 1(2)–(3), Laws of Fla. Five years later, the legislature repealed that law. Ch. 2017-198, § 2, Laws of Fla. The Second District held—over a 22-page dissent—that the medallion owners had "no property interest in the medallions cognizable under the Takings Clause." AR663 (No. 20-3432).

This Court granted jurisdiction to consider this question:

> Is a taxicab medallion "private property" under the Takings Clause when the legislature expressly declares the medallion is "private property" that "may [be] transfer[red] … by pledge, sale, assignment, sublease, devise, or other means"?

If the Court answers "yes," it also should decide whether Petitioners' medallions were "taken."

a. Statement of facts

Before 1976, three municipalities in Hillsborough County (Tampa, Plant City, and Temple Terrace) "had separate taxicab ordinances, resulting in duplication and jurisdictional problems." Fla. H.R. Comm. on Cmty & Mil. Affs., CS/HB 891 (2012), Final Bill Analysis 2 (May 9, 2012). To solve this problem, the legislature in 1976 created a commission to "regulate the operation of taxicabs upon the public highways of Hillsborough County and each municipality." *See* Ch. 76-383, § 2(1) Laws of Fla; AR630.[1] In 1983, the legislature created a successor commission, the Hillsborough County Public Transportation Commission (the Commission). *See* Ch. 83-423, §§ 1, 14, Laws of Fla; AR630. In 2001, the legislature passed another act governing the Commission. *See* Ch. 2001-299, Laws of Fla; A630–31. The 1983 and 2001 acts did not substantially change the powers granted to the 1976 commission. AR630-31 & n.3.

In 2012, the legislature enacted a special act: "Any certificate of public convenience and necessity for taxicabs or any taxicab permit

[1] Unless otherwise noted, "AR" refers to the appellate record in the Second District's case numbered 20-3432, which the Second District consolidated with case number 20-3326. AR157.

previously or hereafter issued by the [Commission] … is the private property of the holder of such certificate or permit." Ch. 2012-247, § 1(2), Laws of Fla.; AR631–32. Further, the act provided that the holders of the certificates or permits—also known as medallions (AR632)—"may transfer the certificate or permit by pledge, sale, assignment, sublease, devise, or other means of transfer to another person." Ch. 2012-247, § 1(3).

The Commission, "by rule," could "specify the procedure by which the transfer may occur," and it had to approve "in advance" any transfer "[e]xcept for a transfer by devise or intestate succession." *Id.* The proposed transferee had to "qualify … under commission rules." *Id.* When the transfer was by devise or intestate succession, the transferee had to "conditionally qualify," generally "within 120 days after the transfer." *Id.* "The conditional nature of the qualification shall be removed upon the probate court's final adjudication that the proposed transferee is actually entitled to the *ownership* of the transferred [medallion]." *Id.* (emphasis added).

The 2012 act expressly "incorporated" the "existing and authorized population cap and limits for taxicab permits." *Id.* § 1(4). The act recognized the Driver Ownership Program, which was

"created pursuant to commission rules to promote taxicab ownership by eligible taxicab drivers." *id.* § 1(5)(b). This program could "reserve up to one-third of the additional permits authorized due to an increase in the population cap for 7 years after the effective date of [the 2012 act] for distribution to eligible taxicab drivers under commission rules." *Id.*

The 2012 act "granted medallion holders property rights in their medallions so that they could transfer their medallions to otherwise qualifying individuals who wanted to compete in the closed market." AR633. This "grant of property rights resulted in a secondary market in which medallion holders could transfer their medallions for value to other persons approved by the [Commission]." *Id.*

In 2017, the legislature expressly repealed the 2012 act and dissolved the Commission. Ch. 2017-198, §§ 2, 3, Laws of Fla.; AR633–35. Taxicab regulation was transferred to Hillsborough County's governing body (the County). *See* § 125.01(1)(n), Fla. Stat. (2017); AR634. The 2017 act neither "direct[ed] the County to adopt any specific regulatory scheme" nor "address[ed] whether the County must compensate medallion holders for any loss of property rights." AR633–34. The County enacted an ordinance that "did not recognize

or grandfather" the medallions issued by the Commission. AR634; TR31[2] ¶¶ 14-17; AR344–57 (20-3326).

Petitioners held medallions issued by the Commission. AR634; TR30 ¶ 11. After the 2017 act and ordinance, the medallions no longer permitted a person to operate a taxi. AR635; TR31 ¶16. Deeming their medallions "worthless" (TR226), Petitioners sued for inverse condemnation, claiming that "the State and the County had taken their medallions without compensation." AR635; TR28–34.

b. Proceedings in the lower courts

In the same order, the trial court granted summary judgment for the County and denied the State's motion to dismiss. A637; TR150–52. The court reasoned that the medallions had "vanished" because the legislature abolished the Commission and repealed the 2012 act. AR637; TR151 ¶¶6-7. Further, the court reasoned, the County "had no power to do anything as to th[e] medallions and, in fact, did nothing." AR637 (brackets altered); TR151 ¶6. Instead, the court explained, "the State had been 'acting within its power' when it

[2] "TR" refers to the trial record filed in the Second District's case numbered 20-3432. Both appellate cases (20-3432 and 20-3326) arose from the same trial case (19-CA-6391, 13th Jud. Cir.).

'caused the demise of the [Commission] and, thus, its medallions.'" A637; TR151 ¶7.

The trial court considered the medallions to be property. *See* TR151 ¶ 6 ("[T]he plaintiffs here had a property interest in those Certificates. When Florida abolished the [Commission], it abolished that property."). The State acknowledged that the medallions were "recognized" to be "property rights." *See* TR35 (noting the 2012 act "in part recognized that taxicab medallions in Hillsborough County are property rights of the licensees"); TR222 (blaming the County for its "unilateral decision not to recognize property rights comparable to those previously recognized by the State"). And the County agreed. *See* TR22("[T]he Legislature granted Plaintiffs a property right in their taxicab medallions through the enactment of [the 2012 act] ….).

Petitioners appealed the judgment in favor of the County, and the State appealed the order denying its motion to dismiss. AR629-30; TR460–62, 534-35. The Second District consolidated the two appeals (Nos. 20-3326 and 20-3432). AR157, 610, 629 n.1. The panel unanimously decided that: (i) it had jurisdiction to review the order denying the State's motion to dismiss and (ii) the trial court's judgment for the County should be affirmed. AR630, 663, 664, 686.

Petitioners do not contest these unanimous determinations.

The panel divided on whether the medallions constituted *private property* under the Takings Clause. *See* Art. X, § 6(a), Fla. Const. The majority decided that Petitioners "have no property interest in the medallions cognizable under the Takings Clause," and it thus reversed the order denying the State's motion to dismiss. AR663. By contrast, the dissent opined that: (i) the medallions "were what the legislature decreed them to be: private property" and (ii) "the State's abrogation of this property was potentially a taking for which [Petitioners] could be entitled to full compensation." A664.

As the dissenting judge recognized, he and the majority parted ways on the proper role of positive law[3] in determining what constitutes "private property" under the Takings Clause:

> [I]n the Lockean tradition, property transcends positive law altogether as a natural right …. But positive law, such as legislation, has a role to play in discerning this natural right. In a sense, ascribing the proper role of positive law to the right of property may be what the majority and I find ourselves in disagreement over.

AR670-71 n.7 (internal citations omitted).

[3] "Positive law typically consists of enacted law—the codes, statutes, and regulations that are applied and enforced in the courts." *Positive Law*, *Black's Law Dictionary* (11th ed. 2019).

Indeed, according to the majority, the Takings Clause protected only property that existed in nature (i.e., before the positive law), and it did not protect rights or property granted or created by positive law:

> While language in … Takings Clause precedent describes property rights or interests for purposes of the Takings Clause as being created, defined, or determined by state law, the *property itself* is not created by or derived from state law. Rather, the property itself preexisted the regulations and laws defining a person's property interest in that thing.
>
> ….
>
> In regulatory takings cases, the property owners typically have had a *preexisting* property interest that predated the regulation at issue, and the regulation erodes or eliminates that property's value or beneficial use. In other words, the plaintiffs already owned something that the government regulated in such a way as to diminish or destroy its value. State law might very well acknowledge, recognize, or even define the boundaries of such property interest, but the *thing* being taken is *property that itself exists independent of the law that regulates it.*
>
> Here, the property interest in the medallions did not exist prior to the regulation of the taxicab industry; rather, the 2012 special legislation created an interest that would not otherwise exist without it. As such, there was no property interest for subsequent regulation to take.

AR653, 656 (internal citation omitted) (last emphasis added); *see also* AR655 (majority distinguishing a case because the "property at issue" in that case "was not created by the government regulation").

The dissent, on the other hand, opined that property interests "are created and their dimensions are defined by existing rules or

understandings that stem from an independent source such as state law." AR667 (cleaned up). The dissent listed property rights protected by the Takings Clause that were "intangible and incorporeal" (AR669)—such as franchises, trade secrets, liens, contracts, choses in action, and patent rights. AR667-70, 678-79 n.10. In the dissent's view, "all that is necessary to create a protected property right under the [Takings Clause] are 'mutually reinforcing understandings that are sufficiently well grounded' in state law." AR671-72 (quoting *Nixon v. United States*, 978 F.2d 1269, 1275 (D.C. Cir. 1992)).

The majority also opined, based on caselaw, that "[p]rivileges and licenses are not constitutionally protected property interests for purposes of the Takings Clause," AR640. In response, the dissent described the majority's premise as an "overstatement" that went "too far," as a "closer reading" of the caselaw revealed a "more nuanced consideration of licenses and privileges under the [Takings Clause]." AR673–74, 678. The dissent also criticized the majority for "relegating" the 2012 act "to an exercise of labeling." AR680–81 & n.12. In its view, the majority "le[ft] us with a rather conspicuous quandary":

> [W]hat do we do with Ch. 2012-247's declaration that the medallions were private property? There were other state statutes that already furnished the ingredients to foster and encourage a secondary market for these medallions; the aspects of intangible property rights were already "on the books," so to speak, before chapter 2012-247 was enacted. What, then, did chapter 2012-247 accomplish?

AR679–80.

The majority, however, reasoned that "the legislature always retained the power to change or abolish the regulatory framework that created the Taxicab Companies' medallions." AR646. Thus, it explained, "by simply pronouncing that a government license or benefit is 'private property,' a legislature does not thereby create compensable property …." *Id.* Though acknowledging a future legislature had to honor a prior legislature's contract, the majority asserted: "The legislature did not make a promise or a contract with the medallion holders by enacting the 2012 special legislation. Instead, the legislature was regulating the taxicab industry." AR647.

Though the dissent agreed that "a legislature cannot bind the hands of a future legislature when it regulates," that principle did "not confer authority on any legislature to abolish a constitutionally protected right."AR682. The dissent was right, as we argue next.

SUMMARY OF ARGUMENT

"I can't imagine positive law could be any plainer in its intent to acknowledge a cognizable property right without hitting the reader on the nose." AR672–73 (dissent). The dissent was right. The 2012 legislation unequivocally declared the medallions to be "private property" that could be "transfer[red] to another person" either "by pledge, sale, assignment, sublease, devise, or other means." Ch. 2012-247, § 1(2)–(3), Laws of Fla.

The majority and the dissent agreed "that statutory language must be given its plain and ordinary meaning." AR649,673. How then did the majority, unlike the dissent, conclude that—despite the 2012 act's plain wording—Petitioners had "no property interest in the medallions cognizable under the Takings Clause?" AR663. The majority's conclusion rested on the premise that property created by positive law is not protected by the Takings Clause. *Supra* at 8.

The majority's premise was wrong. Throughout our country's history, legislatures have enacted positive law that created and granted rights tied to public transportation modes—rivers, roads, bridges, wharfs, etc.—that have been deemed private property protected by constitutional takings clauses. *Infra* § I.A, at 14. Once

the majority's flawed premise is exposed, the plain language of the 2012 act and the medallions' attributes prove that the medallions were *private property* under the Takings Clause. *Infra* § I.B, at 25. Moreover, an English legal principle on which the majority relied—one legislature cannot bind a subsequent one—does not permit a subsequent legislature in the United States to effectuate an uncompensated taking of property. *Infra* § I.C, at 41.

If this Court concludes that the medallions are *private property* under the Takings Clause, then it also may—and should—decide whether the State took the medallions. *Infra* § II.A, at 48. This case fits comfortably under the rubric of a "classic" taking, or its equivalent, based on the Takings Clause's original meaning. When a legislative enactment directly repeals, revokes, rescinds, devests, or otherwise destroys an owner's property right, the legislature has *taken* property. That is precisely what the 2017 legislature did here. *Infra* § II.B, at 49. The State is thus responsible for the taking, and it cannot avoid that responsibility because of the County's failure to honor the medallions. *Infra* § II.C, at 54.

Accordingly, this Court should reverse and remand.

ARGUMENT

Standard of review. This Court reviews *de novo* questions of constitutional interpretation and an order ruling on a motion to dismiss. *Israel v. DeSantis*, 269 So. 3d 491, 494 (Fla. 2019); *Mlinar v. United Parcel Serv., Inc.*, 186 So. 3d 997, 1004 (Fla. 2016).

Merits.

Part I of our argument addresses the issue on which this Court granted review: Were Petitioners' medallions *private property* under the Takings Clause? They were. If the Court agrees, it should also address the following question: Has the State *taken* the Petitioners' property? It has for the reasons argued in Part II.

I. Petitioners' taxicab medallions were *private property* under the Takings Clause.

The medallions were *private property* under the Takings Clause for three primary reasons: (A) historically, such legislative grants have been considered private property protected by takings clauses, even though they did not exist independent of the law that created them; (B) the 2012 legislature expressly created the medallions as private property; and (C) the majority misapplied an English legal principle without recognizing its American limitation.

A. Historically, legislative grants to private persons to operate, and profit from, modes of public transportation have been protected, compensable property rights, even though such rights did not exist independent of the positive law that created them.

"No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner …." Art. X, § 6(a), Fla. Const. The federal constitution has a similar provision: "nor shall private property be taken for public use, without just compensation." Amend. V, U.S. Const. This Court interprets the federal and state takings clauses "coextensively." *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1226 (Fla. 2011), *rev'd on other grounds*, 570 U.S. 595 (2013). History is often used "to inform the meaning of constitutional text." *E.g., N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111, 2130 (2022). This principle applies when interpreting the Takings Clause. *See Horne v. Dep't of Agric.*, 576 U.S. 350, 358-60 (2015).

The current Takings Clause was part of the 1968 constitution. But "[t]he principle reflected in the Clause goes back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings." *Horne*, 576 U.S. at 358. The American colonies, the first American states, and the federal republic all

adopted laws to protect against the uncompensated taking of property. *See id.* at 358–59. Florida was no different: Every one of its constitutions has included a clause to protect against uncompensated takings of private property.[4]

An earlier commenter on American law, Chancellor Kent, defined "hereditaments" as "property" and as "any thing capable of being inherited, be it corporeal, incorporeal, real, personal, or mixed." 3 James Kent, *Commentaries on American Law* *401 (3d ed. 1836). He identified six incorporeal (i.e., intangible) hereditaments: "1. Commons; 2. Ways, easements, and aquatic rights; 3. Offices; 4. Franchises; 5. Annuities; and 6. Rents." *Id.* at *403.

The fourth type, franchises, are akin to Petitioners' medallions, and they predate the American Revolution. Blackstone defined a franchise as "a royal privilege … subsisting in the hands of a subject." 2 William Blackstone, *Commentaries* *37. Franchises were

[4] *See* Art. I, § 14, Fla. Const. (1838, 1861) ("That private property shall not be taken or applied to public use, unless just compensation be made therefor."); Art. I, § 14, Fla. Const. (1865) (substantially the same); Declaration of Rights, § 8, Fla. Const. (1868) ("nor shall private property be taken without just compensation."); Declaration of Rights, § 12, Fla. Const. (1885) (same); Art. XVI, § 29, Fla. Const. (1885) ("No private property … shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner ….").

necessarily "derived from the crown," and they arose "from the king's grant." *Id.* One example of a franchise was "the right of taking toll" at "public places, as at bridges, wharfs, or the like." *Id.* at *38.

For our country, Chancellor Kent swapped out "the king" for "the government":

> Franchises are certain privileges conferred by grant from government, and vested in individuals. … They contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the conditions and duties prescribed in the grant.

Kent, *Commentaries*, *supra*, at *458.

Examples of early American franchises included "[t]he privilege of making a road, or establishing a ferry, and taking tolls for the use of the same." *Id.* According to Chancellor Kent, "[a]n estate in … a franchise, and an estate in land, rest upon the same principle, being equally grants of a right or privilege for an adequate consideration." *Id.* at *458–59.

Chief Justice Marshall also discussed "incorporeal hereditaments" and "franchises," including the "right[s] … to hold a ferry … [and] to erect a turnpike, bank or bridge." *Trs. of Dartmouth College v. Woodward*, 17 U.S. 518, 699–700 (1819). Even if these rights had "no exchangeable value to the owners" and were

"worthless in the market," they were "deemed valuable in law" because "[t]he owners [had] a legal estate and property in them, and legal remedies to support and recover them, in case of any injury, obstruction or disseisin of them." *Id* at 699.

Historically, American governments often granted franchises to private individuals for the purpose of promoting public transportation. *See* Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. Pa. L. Rev. 1429, 1463-64 & nn.203-211 (2021). Government-granted franchises allowed private individuals to: (i) operate bridges, ferries, and other modes of public transportation, and (ii) to profit from operating such modes of public transportation. *See id.* at 1463-64; *see also* John Greil, *The Unfranchised Competitor Doctrine*, 66 Vill. L. Rev. 357, 360 nn. 4, 6-10) (2021) ("The public franchise is a vested private right … [and has] been a common way that state and local governments have promoted the creation and operation of ferries, toll bridges, railroads, and water and electric utilities.").

As this Court described in a 1910 case involving a wharf franchise granted by the legislature, a franchise was not "absolute property," but it nonetheless was a "property right subject to

alienation," an "incorporeal hereditament," and an "intangible" property right. *Leonard v. Baylen St. Wharf Co.*, 52 So. 718, 718, 719 (Fla. 1910) (citing *Gibbs v. Drew*, 16 Fla. 147 (1877); *Sullivan v. Lear*, 2 So. 846 (Fla. 1887)). The Court elaborated that "[a] franchise is a special privilege conferred upon individuals or corporations by governmental authority to do something that cannot be done of common right," and that franchises "are permitted to be used for the good of the public, usually for the purpose of rendering an adequate service without unjust discrimination, and for a reasonable compensation." *Id.* at 718. Further, the Court explained, a franchise "passes to [the grantee's] heirs …. as general assets for the payment of all debts." *Id.* at 719.

During the nineteenth and twentieth centuries, a franchise "was … widely regarded as private property (despite having been granted for the convenience of the public)." Nelson, *supra* at 1464 & nn.209-211. *accord* Joseph Asbury Joyce, *Treatise on Franchises* § 26, at 80 & n. 36 (1909) ("[F]ranchises are property, and are almost universally classed as real property or incorporeal hereditaments.") (citing cases from 23 jurisdictions, including this Court's decision in *Gibbs*); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36

U.S. 420, 434 (1837) ("The toll, or right to demand and receive money for the use and enjoyment of these franchises, of which the toll is part and parcel, is recognised as property, and protected as property ...."); *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 60 (1845) (noting a franchise: is "derived from the grant of the legislature;" "is an incorporeal hereditament, known as a species of property;" and may be bought, sold, and devised); *W. Coast Disposal Serv., Inc. v. Smith,* 143 So. 2d 352, 354 (Fla. 2d DCA 1962) (noting a franchise to collect garbage was "a property right ... even though the involvement of public interest necessarily subjects it to governmental oversight and control.").

As with any property, a government "could use its power of eminent domain to take the franchise (along with other types of property) for public use," but "[w]hen the government used that power ... it was liable to pay just compensation." Nelson, *supra* at 1467 & nn. 222-223 (citing *W. River Bridge Co. v. Dix*, 47 U.S. 507, 534 (1848); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893)); *accord* John Moncrieff, 26 C.J. *Franchises* § 33, at 1022-23 (1921) ("A franchise is entitled as property to protection under constitutional guarantees, and cannot be taken from the

holder except on payment of due compensation, or destroyed or arbitrarily interfered with by subsequent legislation."); Joyce, *supra* § 33, at 94 (noting it was "settled law" that "when in pursuance of proper legislative authority a grant is made of a valid franchise … and the grantee, relying upon such grant, expends money in prosecuting the enterprise he thereby acquires the property interest or right of which he cannot be deprived except under the power of eminent domain and upon compensation therefor"); *City of Los Angeles v. Los Angeles Gas & Elec. Corp.,* 251 U.S. 32, 39 (1919) (observing a municipal franchise could not be "taken without … the payment of compensation"); *Smith v. City of Osceola*, 159 N.W. 648, 651 (Iowa 1916) ("[A] franchise … cannot be taken away from [the grantee] without compensation."); *Cent. Waterworks, Inc. v. Town of Century*, 754 So. 2d 814, 816 (Fla. 1st DCA 2000) ("[T]he franchisee's right can be alienated only by its consent unless full compensation is paid."); *see also* 1 Philip Nichols, *Law of Eminent Domain* § 20, at 67-68 & n. 66 (1917) (franchises subject to eminent domain).

For instance, the New Hampshire legislature in 1794 granted the plaintiffs a franchise to collect tolls on a bridge. *Proprietors of Piscataqua Bridge v. New Hampshire Bridge,* 7 N.H. 35, 37 (1834).

The court concluded the legislature could authorize the defendants to erect a bridge "within [the plaintiffs'] limits, even without their consent," provided that "due compensation" was paid to the plaintiffs:

> That franchise … is property. "No part of a man's property shall be taken from him or applied to public uses, without his own consent, or that of the representative body of the people." N. H. Bill of Rights, Art. 12.
>
> This has always been understood necessarily to include, as a matter of right … the further limitation, that *in case his property is taken without his consent, due compensation must be provided*.
>
> ….
>
> No distinction is made in the constitution between property of one description and that of another; and if a franchise is property, we do not discover upon what ground it claims an exemption from the same liabilities to which other property is subjected.

Id. at 66–67 (emphasis added); *see also State ex rel. Landis v. Fla. Ferry Co.*, 175 So. 811, 816, 819 (Fla. 1937) (finding this allegation to be "sufficient": "[The State's] attempt to forfeit [the defendant's ferry] franchise … is an invasion of its property rights, and seeks … to take its property without just compensation").

As another example, when the government in 1888 condemned a lock and dam on a river, it was required to compensate the owner for *both* the *physical property* and the *franchise* because the

government's action "destroy[ed] both the right of the company to have its property … and the franchise to take tolls." *Monongahela Navigation*, 148 U.S. at 312, 327, 341; *see also Pembroke v. Peninsular Terminal Co.*, 146 So. 249, 262–63 (Fla. 1933) (summarizing *Monongahela Navigation*). Likewise, in 1892, a state high court held that even though the plaintiff had no ownership interest in the city's wharfs, he was entitled to compensation for the destruction of the value of his wharfage rights (i.e., the right to load and unload ships). *Langdon v. Mayor of City of New York*, 31 N.E. 98, 100 (N.Y. 1892).

Historically, a franchise's property right was separate from, and independent of, any associated real or tangible property right. As a 1909 treatise explained:

> A franchise does not involve an interest in land—it is not real estate, but a privilege which may be owned without the acquisition of real property at all. The use of a franchise may require the occupancy, or even the ownership, of land, but that circumstance does not make the franchise itself an interest in land.

Joyce, *supra* § 34, at 98. Similarly, in 1861, the U.S. Supreme Court noted that a franchise right to operate a ferry did not require the franchise owner to also own the waters over which the ferry traveled.

Conway v. Taylor's Ex'r, 66 U.S. 603, 616 (1861).

Over time, the use of franchises expanded to new modes of public transportation. In 1941, for example, New York's high court ruled that "[t]he grant of a bus franchise constitutes a grant of property" that was "protected both by the State and Federal Constitutions against a substantial curtailment or destruction by the government without payment of fair compensation." *Eighth Ave. Coach Corp. v. City of New York*, 35 N.E.2d 907, 913 (N.Y. 1941). As the plaintiff had "purchased and paid for" a franchise to operate bus routes, the city could either "negotiate with the plaintiff as to fair terms for curtailing the bus routes," or "condemn the franchise … with the right to have just compensation for the taking fixed by the courts." *Id.* But the city could not use a "traffic regulation" to "abrogate and cancel" the bus routes granted by the franchise. *See id.* at 908.

Finally, during the early twentieth century, the courts recognized that government-granted franchises authorizing the transportation of passengers were property even if they were not exclusive in every sense. *See Memphis St. Ry. Co. v. Rapid Transit Co.*, 179 S.W. 635, 638 (Tenn. 1915) (concluding a nonexclusive franchise

to operate a streetcar railway was a "property right"); *Puget Sound Traction, Light & Power Co. v. Grassmeyer*, 173 P. 504, 506–07 (Wash. 1918) (concluding a franchise "authorizing [the franchisee] to carry passengers for hire on the streets of the city" was "property" even though it was "not exclusive" in every sense); *see also* Moncrieff, *supra*, § 76 at 1034 & n.22 ("Although a franchise may be exclusive, it is not essential to a franchise in its legal sense that it shall in all cases be exclusive."); *Green v. Ivey*, 33 So. 711, 714 (Fla. 1903) (discussed *infra* at 37–38). Even if a franchise was not "exclusive so as to prevent competition," the franchise owner was "entitled to compensation for such interference with his right" if the owner's property was "taken and the exercise of the franchise [was] thus prevented." Moncrieff, *supra*, § 77 at 1035 & n.32.

In sum, unlike real or tangible property, legislatively granted, intangible property rights in public transportation neither exist in nature nor preexist the positive law that creates and regulates those rights. Yet, historically, such rights have been recognized to be property and to be protected by constitutional takings clauses. The Second District majority erred in concluding otherwise. *See supra* at 8; AR653, 656.

B. The medallions were private property because the legislature expressly created them to be private property, and the contrary arguments to override that legislative direction are unpersuasive.

The legislature declared the medallions to be "private property" that the holder could "transfer … to another person" either "by pledge, sale, assignment, sublease, devise, or other means." Ch. 2012-247, § 1(2)–(3), Laws of Fla. The courts may not re-write the legislature's 2012 act. *See, e.g.*, *Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993).

1. The 2012 act—which provides the "existing rules or understandings"—plainly established the medallions as private property.

What constitutes "private property" under the Takings Clause "is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (citation omitted). Where, as here, "the asserted property interest is created entirely by state statutory law, then it follows that the scope of the right would be gleaned from the statute itself." *Checker Cab Operators, Inc. v. Miami-Dade Cnty.*, 899 F.3d 908, 917 (11th Cir. 2018); *see also Garcia Rubiera v. Calderon*, 570 F.3d 443, 452 (1st Cir. 2009)

(examining Puerto Rican positive law to conclude that "duplicate premiums" were a property interest under the federal takings clause).

In this case, the state law that frames the "existing rules or understandings" is the 2012 act. That law declared Plaintiffs' medallions to be "private property." Ch. 2012-247, § 1(2), Laws of Fla. These words, *private property*, are of "paramount concern." *E.g., Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. 2020). *Private property* is the same term used in the Taking Clause. Art. X, § 6(a), Fla. Const. When the legislature enacts language taken from a constitutional provision that "has a settled and well-known meaning, sanctioned by judicial decision," then it "is presumed to be used in that sense by the legislative body." *Kepner v. United States*, 195 U.S. 100, 124 (1904).

The settled legal meaning of *private property* under the Takings Clause includes "all property …, both real and personal, tangible and *intangible*." *Palm Beach Cnty. v. Cove Club Invs. Ltd.*, 734 So. 2d 379, 382 (Fla. 1999) (emphasis added). In the ordinary sense, "all [persons] understand that property consists of certain rights in things which are secured by law." 1 John Lewis, *Law of Eminent Domain* § 64, at 55 (3d ed. 1909). The term *private property* "should

be given a meaning which, while in accord with the sense in which it is practically used and understood by the people, will also secure to the individual the largest degree of protection against the exercise of the power intended to be restricted." *Id.* Accordingly, the medallions can be—and constitutionally should be—protected by the Takings Clause like any other private property. *See Piscataqua Bridge*, 7 N.H. at 67 ("No distinction is made in the constitution between property of one description and that of another.")

Of course, words also must be interpreted "in their context." *E.g., Ham*, 308 So. 3d at 946. The context of the 2012 act only reinforces that the medallions are *private property* protected by the Takings Clause. The 2012 act expressly authorized holders to "transfer" their medallions "to another person" either "by pledge, sale, assignment, sublease, devise, or other means." Ch. 2012-247, § 1 (3), Laws of Fla. That grant of a right to transfer the medallions by any means (even after death) reflects a core property right. *See, e.g., Ownership*, *Black's Law Dictionary* (11th ed. 2019) ("The bundle of rights allowing one to use, manage, and enjoy property … include[es] *the right to convey it to others*.") (emphasis added).

"Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law. These rights are the right of user, the right of exclusion and *the right of disposition*." 1 Lewis, *supra* § 63, at 52 (emphasis added); *accord United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 & n.4 (1945) (citing Lewis treatise); *Vill. of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 668 (Fla. 1979) ("[P]roperty … means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects.") (cleaned up); *Tatum Bros. Real Est. & Inv. Co. v. Watson*, 109 So. 623, 626 (Fla. 1926) (identifying as property rights the "right to [the property's] use, enjoyment, and disposition").

Notably, the 2012 act's right to transfer included a right to "transfer [the medallions] by *devise or intestate succession*." Ch. 2012-247, § 1(3) (emphasis added). And the act contemplated that a "probate court" would adjudicate the "ownership" of a medallion upon the holder's death. *Id.* These attributes long have been associated with private property, as Blackstone explained:

> [T]he universal law of almost every nation … has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he

> neglects to dispose of it … the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased….

2 Blackstone, *supra* *10–11.

The right to transfer the medallions renders inapt the labels used by the majority and the State, such as "mere privilege" (AR641) and "mere license[]" (AR640 (emphasis omitted)); *see* AR322, 323 n.6, 324. Mere privileges and licenses lack the right of disposition; they cannot be "transfer[red] … to another person" either "by pledge, sale, assignment, sublease, devise, or other means." *See* Ch. 2012-247, § 1(2)–(3), Laws of Fla. For example, "you cannot sell your state bar license, and your child cannot inherit it." Greil, *supra*, 66 Vill. L. Rev. at 392; *see also Rowe v. Colpoys*, 137 F.2d 249, 251 (D.C. Cir. 1943) (concluding that: (i) occupational licenses are not property because they are not transferrable and (ii) licenses that can be transferred—even if subject to the control of a legal authority—are property rights).

The Washington Supreme Court recognized that a statutory right to transfer distinguishes private property from a mere license. *See generally Deggender v. Seattle Brewing & Malting Co.*, 83 P. 898, 899 (Wash. 1906). In *Deggender*, the appellants argued that a liquor license was "a personal privilege conferred by the city upon the

licensee, and [was] not such property as is subject to debts of the licensee, and … that the license [was] merely an intangible privilege." *Id.* The Washington court acknowledged that a "number of the state courts [had] held in accord with" the appellants' argument. *Id.* (citing cases). Moreover, the Washington court agreed that these other courts were "undoubtedly correct," but only "[u]nder *statutes which do not permit transfers of the license from one person to another*, and where the right is a personal privilege only." *Id.* (emphasis added).

However, the Washington court noted, "where *the statute recognizes the right of transfer from one to another*, and where the right is a valuable right, capable of being surrendered and reduced to money, … the license or right to do business becomes a valuable *property right*, subject to barter and sale. *It is property* with value and quality." *Id.* (emphasis added). The Washington court concluded: "If a license to sell liquors is transferable, valuable, and is subject to sale, it is certainly not merely a personal privilege, but it has all the attributes of property, except tangibility, and must be treated as property." *Id.*; *accord Jubitz v. Gress*, 187 P. 1111, 1113 (Or. 1920) ("[The ordinance … made express provisions for the transfer and assignment of [the liquor] licenses, thereby making such permits a

species of property…."); *State by Mattson v. Saugen*, 169 N.W.2d 37, 41 (Minn. 1969) (holding that, because a liquor license was "assignable and transferable" under state statutes, it "can be construed as a property right" and "cannot be taken away without just compensation"); *Rushmore State Bank v. Kurylas, Inc.*, 424 N.W.2d 649, 654 (S.D. 1988) (holding that because the code "recognizes the existence of a valuable property right in the [liquor] license as between the licensee and third party creditors … it clearly can become a general intangible subject to a security interest").

Moving from liquor to taxicab licenses, a statutory right to transfer was dispositive for a New Jersey court that had to decide whether a taxicab license was property subject to levy and execution. *See McCray v. Chrucky*, 173 A.2d 39, 39–43 (N.J. Essex Cnty. Ct. 1961). In *McCray*, "[t]he [taxicab] license [was] expressly made transferable by the terms of the municipal ordinance." *Id.* at 43. Summing up the reasoning of multiple courts, the New Jersey court explained why the existence of a statutory right to transfer was critical in determining whether a license was a mere privilege or property:

> The general principle … seems to be that where a license is related to personal character or skill and is not transferable, it is regarded as a mere privilege and, as such, is not subject to levy and execution. Where, however, a license, although related to personal character or skill, is transferable and it creates an exclusive valuable right to engage in a trade or business not available generally to citizens in common, the courts have held that the license is a property right and is subject to levy and execution.

Id. at 42; *see also* Greil, *supra*, 66 Vill. L. Rev. at 399 ("The transferability of the medallion can distinguish it from [a] 'mere license' …. [W]here medallions *are* transferable, the government has made a conscious decision to vest a valuable property right."); *cf. Boonstra v. City of Chicago*, 574 N.E.2d 689, 691, 694–95 (Ill. Ct. App. 1991) (holding that a taxicab license that, by ordinance, was assignable (even after death) was protected by a takings clause).

In sum, Petitioners' medallions were *private property* under the Takings Clause because the 2012 act's text could not have been any plainer in creating a property right. AR672–73 (dissent). Further, the act's express grant of a right to transfer buttresses the plain textual meaning.

2. The majority's and the State's reasons for disregarding the 2012 act's plain text lack merit.

The majority and the State advanced several reasons for overriding the 2012 act's plain text and for excluding the medallions from the Taking Clause's protection for *private property*. None are persuasive.

i. *The medallions do not lose their status as protected property merely because the State created them.*

The majority reasoned: "The government often creates privileges. However, with the power to create comes the power to modify and destroy." AR658. Similarly, the State argued that the medallions were "mere privileges, subject to suspension, revocation, and even elimination." AR322. This reasoning is *déjà vu* of reasoning rejected 43 years ago. *See generally Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

In *Webb*, a Florida statute authorized a court clerk to invest deposited funds and to keep the interest. *Id.* at 156 & n.1. This Court concluded that interest was not compensable private property because "the statute takes only what it creates." *Id.* at 158–59, 163. The U.S. Supreme Court rejected that reasoning and reversed. *Id.* at 163–65.

The government may not just take whatever property it creates. The majority's contrary proposition has no limits because, in a sense, the government through law creates all property. *Cf.* 1 Lewis, *supra* § 63, at 52 & n. 6 (quoting 3 *Benthan's Works* 182 (1843)) ("Property is entirely the creature of the law.").

A Second Circuit case teaches that the government may not take property it creates. *1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 261–63 (2d Cir. 2014). In *Calloway*, the Second Circuit had to decide whether a judgment lien—created by state statutes—was property under the federal takings clause. The state high court had concluded those "statutory rights can be superseded at will by the Legislature" because they had been "created by statute." *Id.* at 262–63. While it accepted the state high court's construction of the statute, the Second Circuit reasoned, "like other common property interests, a judgment lien can be freely bought, sold, and assigned." *Id.* at 263. Thus, though a judgment lienholder's legal rights are "far fewer than those of an owner in fee simple," the court concluded such a lien was private property under the federal takings clause. *Id.* Because here a medallion can likewise be bought, sold, and assigned, it too should be *private property* under the Takings Clause.

ii. *The medallions retain their status as property despite being subject to transfer and safety regulations.*

The State argued below that the medallions "lacked … the right to transfer" because "any transfer was subject to the [Commission's] procedure, eligibility rules, and approval." AR443 (No. 20-3326) (cleaned up); AR585. The Commission had this power, the State argued, because "[t]he taxicab industry poses serious risks to the 'safety' of passengers and other members of the public." AR584.

Subjecting the medallions to transfer and safety regulations does not remove them from the definition of *private property* under the Takings Clause. As an eminent domain commentator noted more than a century ago, property "rights are not possessed in an absolute degree, but are limited," and "the right of disposition" (i.e., transfer) is "limited by those regulations which are enacted for the general good and by those restraints which are imposed by the common law under the maxim *sic utere tuo ut alienum non laedas*."[5] 1 Lewis, *supra* § 63, at 52–54 & n.7.

[5] "Use your own property in such a way that you do not injure other people's." *Oxford Reference*, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100504563 (last visited Sept. 22, 2023).

The State's argument lacks any limiting principle. Would lawful pharmaceutical products subject to comprehensive transfer and safety regulations no longer be private property? How about intellectual property that is subject to transfer and export restrictions for national security purposes? There are numerous properties subject to transfer and safety regulations. The State's argument, if accepted, would mean that virtually no property is protected by the Taking Clause.

iii. *The medallions have a right to exclude and are exclusive, but exclusivity is not a necessary element of property.*

The State argued that the medallions lacked the rights "of exclusivity" and "to exclude." AR434, 443 (No. 20-3326). *Exclusivity* and the *right to exclude* are related but different concepts. *Exclusivity* has broader implications, as it means "excluding *all others*." *Exclusive*, *Webster's New Universal Unabridged Dictionary* 638 (Deluxe 2d ed. 1983) (emphasis added). Exclusivity is <u>not</u> an essential ingredient to property, but the right to exclude is. *Cf.* Lewis, *supra* § 63, at 52. For example, when the government condemns land, it must compensate holders of *nonexclusive* easements. *See MH New Invs., LLC v. Dep't of Transp.*, 76 So. 3d 1071, 1072 (Fla. 5th DCA

2011); *see also* Jon W. Bruce et.al., *The Law of Easements and Licenses in Land* § 8:34 & n.1 (Aug. 2023) ("An easement is a nonexclusive interest in land.").

Licensed operators of public transportation—like Petitioners here—do enjoy a right to exclude unlicensed and unauthorized operators, even if their license is nonexclusive. This Court held this 120 years ago. *Green*, 33 So. at 714. In *Green*, two individuals (J.A. and R.A. Ivey) obtained licenses from two counties (Suwanee and Lafayette) to operate a river ferry. *Id.* at 713. Those two individuals later "transferred and assigned" their "rights" and "interest" in the "ferry" and the "franchise" to the appellee (F.C. Ivey). *Id.* The appellant, Noah H. Green, obtained a license from one county (Suwanee) to operate a ferry and began operating his ferry and charging tolls before he obtained a license from the second county (Lafayette). *Id.*

This Court affirmed an injunction enjoining Green from operating a ferry without a license: "[T]he complainant [Ivey] was entitled to an injunction to prevent an infringement upon his ferry rights by any person or persons not legally licensed to operate a ferry." *Id.* at 714. The Court acknowledged foreign cases not allowing

an injunction "unless the right of complainant is *exclusive*." *Id.* (emphasis added). But the Court rejected those cases: "A party may have a franchise, *though it be not in its terms exclusive of the right of the state to grant another*; and, having it, no reason is apparent why *he should not have it protected against infringement by another who has no franchise*." *Id.* (emphasis added). Yet, because Ivey's license was nonexclusive, the Court partially reversed insofar as the injunction enjoined Green "from attempting to perfect a license to operate a ferry." *Id.*

Thus, under this Court's *Green* decision, a holder of a nonexclusive license or franchise to operate a mode of public transportation has a right to exclude *unauthorized* operators; however, the holder may not prevent competition by *authorized* operators. *See id.*; *see also* Greil, *supra*, 66 Vill. L. Rev. at 363 ("[W]ith a non-exclusive franchise, multiple operators are granted the right to operate, to the exclusion of everyone else."); *Wichita Transp. Co. v. People's Taxicab Co.*, 34 P.2d 550, 551–52 (Kan. 1934) ("Although that franchise right is not exclusive against other grants authorized by the Legislature, it is exclusive against one conducting competition … without a franchise or license and contrary to law.").

Although exclusivity is not a necessary element of property, the medallions are exclusive in a sense. As the dissent explained: "Chapter 2012-247 [§ 1](4) capped the number of taxi medallions as a function of the county's population. Instead of retaining discretion over the number of medallions available, the Florida legislature enacted a level of scarcity …." AR676. The majority conceded that this cap provided "a market advantage caused by … scarcity." AR649. The majority, however, reasoned that the cap did not make the medallions compensable property because, in its view, that "exclusivity" was caused by "the regulatory framework … in which participants have no expectation of the maintenance of the status quo." AR649.

The majority missed the forest for the trees. The medallions' degree of exclusivity may impact their value and the amount of damages to which Petitioners are entitled. But the medallions' status as property does not hinge on their exclusive nature. The medallions are property because the legislature said they were property and because it created them with the traditional bundle of property rights: the rights to use, exclude, and transfer. *See* 1 Lewis, *supra* § 63, at 52.

iv. *The caselaw on which the majority relied is not persuasive.*

Dennis Melancon, Inc. v. City of New Orleans, 703 F. 3d 262 (5th Cir. 2012) was the primary case on which the majority relied. AR642–46, 649, 657, 659–60, 663. As the dissent correctly noted in response (AR674–76), the enacted law in *Dennis Melancon* expressly declared the taxi certificates there were mere "privileges." 703 F. 3d at 273. By contrast, here, the enacted law expressly declared the medallions were "private property." AR675. Moreover, in *Dennis Melancon*, the regulator had the discretion to adjust the number of certificates, 703 F. 3d at 272, whereas here the 2012 act capped the number of medallions based on the county's population (AR675-76).

The majority cited a plethora of other cases. The dissent correctly explained that these cases were inapplicable:

> [N]ot one of the cases cited in the majority's opinion confront the question we have here: whether an express legislative recognition of a long-standing, limited-supply licensing regime constitutes "private property." And none of those cases can be interpreted for the broad sweep the majority has employed: that intangible rights in governmental licensures cannot be deemed worthy of protection under the Takings Clause.

AR677–78.

C. The principle that one legislature cannot bind a subsequent one does not permit a subsequent legislature to enact an unconstitutional taking of property.

"One legislature cannot bind a subsequent one." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 45, at 278 (2012) (cleaned up). This principle originated in England. *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality op.) (cited with approval at Scalia and Garner, *supra* § 45, at 278-79 n.7)(citing 1 W. Blackstone, *Commentaries on the Laws of England* 90 (1765)). "Parliament was historically supreme in the sense that no 'higher law' limited the scope of legislative action." *Id.* (plurality op.) But "the power of American legislative bodies" was different, as they were, and still are, "subject to the overriding dictates of the Constitution and the obligations that it authorizes." *Id.* (plurality op.)

Thus, the English principle—one legislature cannot bind a subsequent one—has been applied differently in the United States. It "has always lived in some tension with the constitutionally created potential for a legislature, under certain circumstances, to place effective limits on its successors." *Id.* at 873 (plurality op.) One of the earliest appearances of the American constitutional exception to the English principle was *Fletcher v. Peck*, 6 Cranch 87 (1810).

In *Fletcher*, the Court "barred the State of Georgia's effort to rescind land grants made by a prior state legislature." *Winstar*, 518 U.S. at 873 (plurality op.) (discussing *Fletcher*). Chief Justice Marshall acknowledged that "one legislature cannot abridge the powers of a succeeding legislature." *Id.* (plurality op.) (quoting *Fletcher*, 6 Cranch at 135). But he qualified the principle: "[I]f an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power." *Id.* (plurality op.) (quoting *Fletcher*, 6 Cranch at 135).

Chief Justice Marshall gave two reasons for limiting the English principle. *See id.* First, "the intrusion on vested rights by the Georgia Legislature's Act of repeal might well have gone beyond the limits of 'the legislative power.'" *Id.* at 873–74. (plurality op.). Second, " Georgia's legislative sovereignty was limited by the Federal Constitution's bar against laws impairing the obligation of contracts." *Id.* (plurality op.) (quoting *Fletcher*, 6 Cranch at 135–36).

Fletcher was not a takings case, as the federal takings clause did not apply to the States before the Fourteenth Amendment's ratification. *See, e.g., Renthorp v. Bourg*, 4 Mart.(o.s.) 97, 131 (La. 1816). But the limits that *Fletcher* placed on the English principle

were not confined to impairment-of-contract cases. Under *Fletcher*, a legislature's acts may create vested rights protected by a constitution, and under those circumstances, a succeeding legislature may modify or negate the vested rights *only as permitted by the constitution*.

Minnesota's territorial supreme court applied *Fletcher*'s limitation in a takings case. *See United States v. Minnesota & N.W.R. Co.*, 1 Minn. 127, 131–33 (1854). By way of a territorial legislative act and a congressional act of June 29, 1854, a railroad company acquired a "present interest in the lands" "to aid in the construction of a railroad." *Id.* at 130. Five weeks later, however, Congress repealed that act. *Id.* Citing the Fifth Amendment, the court decided that Congress's repeal of its earlier act was "clearly in conflict with the constitution of the United States" because "[p]rivate property can only be taken … upon compensation being given." *Id.* at 132.

The Minnesota court concluded that Congress "had not such a right" because a "legislature cannot recall its grant [of property], nor destroy it":

> An interest in, or right to, lands, franchises, &c., once vested, cannot be divested by any act of the grantor, unless by agreement of the parties to the grant. "Every grant of a

> franchise, (says Judge Story,) is necessarily exclusive, so far as the grant extends, and cannot be resumed or interfered with. *The legislature cannot recall its grant, nor destroy it.* In this respect, the grant of a franchise does not differ from a grant of lands. In each case the particular franchise, or particular land, is withdrawn from legislative operation, and the subject matter has passed from the hands of the government."[6]

Id. at 131–32 (emphasis added).

Relying on *Fletcher*, the Minnesota court concluded that the subsequent "repealing act is invalid":

> If the property of an individual may be seized without compensation, our security for life, liberty, and property is not as great as we have generally supposed. A claim to such a right is of a startling character. Chief Justice Marshall says, *Peck v. Fletcher* [sic], 6 Cranch, 87: *"If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power."* It is not pretended that one legislature can, in the legitimate and ordinary course of legislation, bind a succeeding legislature; *but an act not expressly permitted by the constitution, which impairs or takes away rights vested under pre-existing laws, which are in the nature of contracts, is unjust, unauthorized and void.*

Id. at 132–33 (emphasis added); *see also Moore v. Harper*, 143 S. Ct. 2065, 2083–84 (2023) ("[The] Framers[] underst[ood] that when legislatures make laws, they are bound by the provisions of the very

[6] The quotation attributed to Justice Story is materially the same as a passage in *Proprietors of Charles River Bridge*, 36 U.S. at 603–04 (Story, J., dissenting).

documents that [gave] them life" and that "'all their acts must be conformable to [the constitution], or else they will be void.'") (quoting *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 308 (C.C.D. Pa. 1795)).

The New Hampshire Supreme Court also has explained (albeit in *dicta*) how *Fletcher*'s limitation applies to property rights protected by a takings clause:

> We have already settled that the legislature may grant an exclusive right to erect and maintain a bridge within certain limits, and to take tolls; and the grant was considered as a contract, which the legislature could not annul or impair.…*[B]y no means [do we] indicate[] an opinion that the legislature have a right to rescind or abrogate grants of land and franchises, or contracts lawfully entered into by a preceding legislature.* The doctrine is well settled, that legislatures may make grants, of some kinds, which come properly within the denomination of contracts; and such contracts, when made, are as inviolable as the contracts of an individual. Such contracts cannot be abrogated or impaired; *nor can the property in them be taken for public use, without a provision for compensation*. Where an individual holds lands by the immediate grant of the legislature, *it is no more in the power of a succeeding legislature to abrogate and annul such grant*, than it is in the power of an individual grantor to rescind his grant.

Brewster v. Hough, 10 N.H. 138, 146–47 (1839) (emphasis added).

In this case, the majority employed the English principle to conclude that the 2012 legislature could not grant property to the medallion holders. *E.g.,* AR662. Such a grant, the majority opined,

would impermissibly restrict the 2017 legislature's power to regulate the taxicab industry: "If governing entities did have prospective power over their successors to create such 'property' that if abolished or altered by a future legislature would give rise to a Takings Clause claim, the government would be required to 'regulate by *purchase*.'" AR647. But the English principle does not grant a subsequent legislature the power to take property *without compensation;* instead, it merely preserves a subsequent legislature's eminent domain power to take property *by purchasing it*. *See In re Middletown & Harrisburg Tpk. Rd.*, 1903 WL 2552, at *3 (Pa. Quar. Sess. 1903) ("The power of eminent domain is one of the essential incidents of sovereignty, and one legislature cannot contract with a corporation that its property shall not be taken by the exercise of eminent domain. Such provision has no binding force upon a subsequent legislature.")

The majority misapplied the English principle and overlooked *Fletcher*'s limitation. The dissent, on the other hand, did not. Consistent with Chief Justice Marshall's reasoning, the dissent correctly recognized that the English principle must yield to the constitutional limitations that restrict the power of every legislature (past, present, or future):

> The fact that a future legislature may amend or abolish what a prior legislature enacted does not confer authority on any legislature to abolish a constitutionally protected right. And if we interpret what an earlier legislature enacted as an express acknowledgement of an extant constitutionally protected property right (which, in this case, I think we must) *then no subsequent legislature could abolish that property right without complying with the constitutional requirement to compensate for its value*.

AR681, 682 (emphasis added). And, the dissent noted, "[j]ust because a property interest happens to be memorialized within state statutes does not mean it merits less constitutional dignity." AR683 n.14.

The dissent was right. The medallions were *private property* under the Takings Clause. If this Court agrees, then it should decide an issue that the Second District did not decide: Did the State take the medallions? We next turn to that issue.

II. The State took the medallions.

This argument has three parts: (A) the Court may and should consider the takings issue; (B) the 2017 legislature's repeal of the 2012 act and the property rights granted thereunder was a classic taking or its equivalent; and (C) the State may not shift responsibility for the taking to the County.

A. This Court may—and should—consider the issue of whether a taking occurred.

The Court may address "other issues properly raised and argued," even if they are not the basis of the Court's jurisdiction. *E.g., Price v. State*, 995 So. 2d 401, 406 (Fla. 2008). Admittedly, this Court often declines to decide issues that "the district court did not specifically address." *E.g., Chames v. DeMayo*, 972 So. 2d 850, 853 n.2 (Fla. 2007). Here, however, this Court should address the secondary issue, which was thoroughly argued below. AR325–35, 496–528, 588–99.

The secondary *taking* issue is closely related to the primary *private property* issue. The Court's resolution of both issues together will not involve significant additional judicial labor, will substantially streamline this litigation, and will avoid an inevitable return trip to this Court. If the medallions created by the 2012 legislature were *private property* under the Takings Clause, how could the 2017 legislature's repeal of those property rights be anything other than a *taking* under the same Clause? This Court should answer that question in the present proceeding.

B. The 2017 legislature's repeal of the 2012 act—which had granted property to Petitioners—was a classic taking or its equivalent.

A "paradigmatic" or "classic" taking occurs, for example, when the "government directly appropriates private property or ousts the owner from his domain," or there is "physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 539 (2005). A century ago, however, Justice Holmes recognized that a government may take property by means other than the "classic" means. *See id.* at 537 (discussing *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922)). Ever since then, the U.S. Supreme Court has fashioned various formulations (*per se*, regulatory, etc.) "to identify [government] actions that are functionally equivalent to the classic taking." *Id.* at 539. Petitioners "can establish a taking, regardless of how the taking is labeled." AR499; *see also* AR497–99 (Case No. 20-3432, Petitioner's 2d DCA answer brief, part I.A).

In every takings case, the "essential question" is "whether the government has physically taken property for itself or someone else—*by whatever means*—or has instead restricted a property owner's ability to use his own property." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (emphasis added). The former action is a

taking; the latter is not. The *means* used—condemnation, repeal of a prior legislative act, a regulation, etc.—is inconsequential. It is the *impact* to the owner that matters. *See* John Martinez, *Government Takings* § 2:9 (Oct. 2020 ed.) ("[I]it makes no difference to the property owner whether government *conduct* is physical or through regulation; it is the *impact* on the owner that is of concern.").

The 2017 legislature's act did not merely restrict the medallion holders' use of their property rights. Instead, by repealing the 2012 act, the 2017 legislature repealed, rescinded, revoked, divested, and destroyed the property that the predecessor legislature had granted to Petitioners. This legislative action was not merely the *equivalent* of a classic taking—it *was* a classic taking.

To understand why, first consider again the Minnesota case. *See Minnesota & N.W.R. Co.*, 1 Minn. at 131–33 (*supra* at 43–44). The court there determined that the railroad company had "acquired all [its] right and interest … under the [congressional] act of June 29." *Id.* at 131. Congress, however, later repealed that act. *Id.* at 130.

The question then for the court was whether Congress had "the right to *revoke* the grant, made by the act of June 29, 1854." *Id.* at 131 (emphasis added). The court decided that Congress did not have

that right under the federal takings clause:

> The legislature cannot recall its grant [of property], nor destroy it.…The [August 4, 1854 congressional] *act of revocation* is clearly in conflict with the constitution of the United States. (Amendments to the Const., art. 5.) Private property can only be taken for public use, and then only upon compensation being given. Neither can any one be divested of his property but by due course of law; that is, according to the practice of courts of justice.

Id. at 132 (emphasis added) (internal quotations omitted) (citing *VanHorne's Lessee*, 2 Dall. at 304); *cf. Proprietors of Charles River Bridge*, 36 U.S. at 604 (Story, J., dissenting) ("The legislature could not recall its grant [of a franchise], or destroy it. It is a contract, whose obligation cannot be constitutionally impaired. In this respect, it does not differ from a grant of lands.")

To reach its decision, the 1854 Minnesota court drew on a jury instruction given at a 1795 Pennsylvania federal trial by Justice Paterson,[7] a signer of the federal constitution. *See VanHorne's Lessee*, 2 Dall. at 304.[8] In that case, there were competing claims to land. The plaintiff's claim was based on a grant traceable to King

[7] Some reporters spell Justice Paterson's name with two t's (Patterson).

[8] Modern jurists have relied on *VanHorne's Lessee*. *E.g., Kelo v. City of New London, Conn.*, 545 U.S. 469, 511 (2005) (Thomas, J., dissenting).

Charles II; the defendants' claim was based on a later grant by a 1787 act of the Pennsylvania legislature. *Id.* at 304-05, 317.

In instructing the jury, Justice Paterson discussed the provisions of the Pennsylvania constitution that protected property.[9] *Id.* at 310. He acknowledged these "rights of private property are regulated, protected, and governed by general, known, and established laws; and decided upon, by general, known, and established tribunals." *Id.* at 312. But, at bottom, Justice Paterson instructed the jury: "The legislature … had *no authority to make an act devesting one citizen of his freehold*, and vesting it in another, *without a just compensation*." *Id.* at 310 (emphasis added).

The upshot of Justice Paterson's instruction, and the Minnesota case that relied upon it, is this: When a legislative enactment directly repeals, revokes, rescinds, devests, or otherwise destroys an owner's property right, the legislature has *taken* property—in the most classic sense—and it must provide compensation to the owner. That is the original meaning of the Takings Clause.

[9] *See, e.g.,* Pa. Const., Ch. 1, § 8 (1776) ("But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent ….").

Though modern takings doctrines support Petitioners' claims,[10] this Court need not employ those doctrines to find that the 2017 legislature took Petitioners' medallions. It can find a classic taking, or its equivalent, under the Taking Clause's original meaning. The 2017 legislature repealed the 2012 act that had created the medallions as property and that had granted the right to transfer. *See* Ch. 2017-198, § 2, Laws of Fla. The 2017 legislature thus directly revoked, rescinded, devested, and destroyed Petitioner's property rights—just as the 1854 Congress did to the property rights of the Minnesota railroad company and just as the 1787 Pennsylvania legislature did to the property rights of the plaintiff.

Accordingly, the 2017 legislature took the medallions when it repealed the 2012 act. In response, the State may attempt to blame the County for the taking of Petitioners' medallions. That is the final point that we address in this brief.

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[10] *See, e.g., Dep't of Agric. & Consumer Servs. v. Mid-Fla. Growers, Inc.*, 521 So. 2d 101, 103 (Fla. 1988) ("A taking of private property … may consist of an entirely negative act, such as destruction."); *Gen. Motors Corp.*, 323 U.S. at 378 ("Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.").

C. The State is responsible for the taking of Petitioners' medallions, irrespective of the County's failure to honor them.

Any attempt by the State to shift responsibility to the County for the taking of the medallions should be rejected for three reasons.

First, the State is collaterally estopped. In the courts below, the State argued that "if a taking occurred at all, it was caused by the County's decision not to honor the medallions." *E.g.,* AR322. The trial court disagreed, concluding that the "County had no power to do anything as to those [medallions]." TR151, ¶6; AR637. It thus granted summary judgment in the County's favor. TR150, ¶2; AR637. The Second District affirmed that decision. AR663, 664. If the State was inclined to challenge that decision, it was required to raise the issue in its jurisdictional brief,[11] which it did not do. Accordingly, the State may not argue that the County's failure to honor the medallions caused the taking. *Cf. Stogniew v. McQueen*, 656 So. 2d 917, 919

[11] *See* Fla. R. App. P. 9.120(f) ("[I]f the … respondent intends to raise issues for review in the supreme court independent of those on which jurisdiction is based, the … respondent *must* identify those issues in the statement of the issues included in their brief on jurisdiction.")(emphasis added); Fla. R. App. P. 9.210(f) ("Respondent, in its statement of the issues, *shall* clearly identify any affirmative issues, independent of those on which jurisdiction is invoked and independent of those raised by petitioner in its statement of the issues, that respondent intends to raise on cross-review if the court grants review.") (emphasis added).

(Fla. 1995) (collateral estoppel bars "relitigation of an issue which has already been determined by a valid judgment."); *Holton v. H.J. Wilson Co.*, 482 So. 2d 341, 342 (Fla. 1986) (a codefendant must "timely appeal an adverse ruling exonerating" another defendant if that exoneration "will also determine [the other defendant's] liability to the codefendant for either contribution or indemnity.").

Second, the trial court concluded that when the 2017 legislature "pitched the duty to [the County] from [the Commission] to regulate taxi cab business within … Hillsborough County, there were no [medallions] for [the County] to take because they had, in essence, vanished." TR151¶6. The trial court was correct. The taking occurred when the 2017 legislature repealed the 2012 act, as that repeal revoked Petitioners' property rights. The possibility that the County later might have, or could have, honored the medallions would be relevant only to determining the amount of full compensation due to Petitioners. *Cf. Broward Cnty. v. Patel*, 641 So. 2d 40, 43 n.6 (Fla. 1994) (noting that the "sole[]" concern is "the value of the property as it existed on the day of the taking," though "[f]uture contingencies … are inherently factored into the equation" to determine the compensation). Regardless of what the County later

could have done, the taking occurred when the 2017 legislature repealed the 2012 act.

Third, insofar as the County's failure to honor the medallions contributed to the taking, the State would still bear responsibility under a collective-taking theory. *See Lost Tree Vill. Corp v. City of Vero Beach,* 838 So. 2d 561, 568–69 (Fla. 4th DCA 2002) ("Multi-government action, of which the combined effect deprives a landowner, constitutes a taking ...."). When one sovereign entity "puts into play a series of events which result in a taking of private property," the entity is "not absolve[d] ... from the responsibility, and the consequences, of its actions" merely because the entity acted in tandem with another sovereign entity. *Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996) (en banc) (plurality opinion); *see also Town of De Funiak Springs v. Perdue*, 68 So. 234, 236 (Fla. 1915) ("[W]here two causes combine to produce injuries, a person is not relieved from liability because he is responsible for only one of them.").

In sum, the State is responsible for the taking of Petitioners' medallions, and County's failure to honor the medallions does not absolve the State of that responsibility.

CONCLUSION

This Court should quash the Second District's decision insofar as it directed the trial court to grant the State's motion to dismiss, *see* AR663-64, and remand the case for further proceedings.

This Court should hold that: (i) certificates or permits held by Petitioners pursuant to Ch. 2012-247, Laws of Fla. are *private property* under the Takings Clause, Art. X, § 6(a), Fla. Const.; (ii) the State took those certificates and permits when the 2017 legislature repealed Ch. 2012-247, Laws of Fla.; and (iii) because of that taking, Petitioners are entitled to *full compensation* under the Takings Clause in an amount to be determined on remand.

This Court should quash the Second District's order denying Petitioners' motion for appellate attorney's fees. *See* AR688. It should hold that Petitioners are entitled to such fees incurred in this Court and the Second District in an amount to be determined on remand.[12] *See* Art. X, § 6(a), Fla. Const.; §§ 73.091, 73.092, and 73.131, Fla. Stat. (2023).

[12] Contemporaneously, Petitioners are filing a motion for appellate attorney's fees. *See* Fla. R. App. P. 9.400(b).

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the word count limitation of Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 11,927 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was filed with the Clerk of Court on September 22, 2023 via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record:

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