NO. 20-2056

In The

United States Court of Appeals

For The Fourth Circuit

Joseph Blackburn, Jr. and Linda Blackburn,
on behalf of all other similarly situated,

Plaintiffs/Appellants

v.

Dare County, the Towns of Duck, Southern Shores, Kitty Hawk, Kill Devil Hills, Nags Head, and Manteo, North Carolina

Defendants/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Appellee briefed certain issues which were not thoroughly discussed in the Trial Court Order. Specifically, that the County acted pursuant to its valid police power in a matter of health and safety and is, therefore, exempt from the takings clause of the Fifth Amendment. The Trial Court primarily focused on the factors enumerated in *Penn Central*. However, based upon Appellees assertions it is necessary for the Appellant to address herein the argument presented by Appellee.

THE APPELLEE DARE COUNTY IMPROPERLY ASSERTS THAT ITS ACTIONS DO NOT CONSITUTE A TAKING AS IT IS A VALID EXERCISE OF ITS POLICE POWER

The Appellee, Dare County, argues a "taking" has not occurred. It asserts that the compensation requirements of the Fifth Amendment are not triggered when a government uses its police power to institute a land use ordinance aimed at protecting the health and safety of the community. In essence, so long as the ends justify the means, or specifically the ordinance "substantially advances a legitimate public purpose", a "compensable taking" has not occurred. *Agins v. City of Tiburon,* 447 U.S. 255, 100 S.Ct. 2138 (1980). This argument is a misconstruction of current Fifth Amendment jurisprudence.

The Fifth Amendment "Takings" clause, "operates as a conditional limitation, permitting the government to do what it wants as long as it pays the charge." *Eastern*

Enterprises v. Apfel, 524 US 498 at 545, 118 S.Ct. 2131 at 2157 (1998) (*quoting* Justice Kennedy concurring). The United States Supreme Court has established three categories that constitute what a compensable taking is:

1. Where government requires an owner to suffer a permanent physical invasion of property; *Lorretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 102 S.Ct. 3164 (1982);
2. A regulation that completely deprives an owner of "all economically beneficial use [of property]; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992);
3. A regulatory taking analysis under the test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2446 (1978).

There has been a great deal of confusion over the last century as to which category should apply and what, if any, effect the police power granted to the "State" has on this determination.

In *Lucas*, Justice Scalia, details the historic nexus of "police power" and the Fifth Amendment Takings Clause. Initially, the Courts couched the idea of police power, in the language of "harmful and noxious uses" of property. Justice Scalia, reasoned "the prevention of harmful use' was merely the early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value the previous language used in the context of takings

cases." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026, 112 S.Ct. 2886, at 2888-2889 (1992). This transformed into the "substantial advances" language used in *Agins v. City of Tiburon,* 447 U.S. 255, 100 S.Ct. 2138 (1980). However, the Court in *Lucas,* expressly rejected this approach holding that "noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *id.* This stands in unity with the Court's prior holding that the "permanent physical occupation" of property will not be done without compensation, no matter how "weighty the 'public interests' involved…." *Lucas,* 505 U.S. at 1028, 112 S.C.t at 2900 *quoting Lorreto v. Teleprompter Manhattan CATV Corp*, 458 U.S. at 426, 102 S. Ct. at 3171.

This position was further clarified in *Lingle v. Chevron U.S.A. Inc.*, there Justice O'Conner, stated that any inquiry into whether a regulation "substantially advances a legitimate public purpose", is a due process inquiry, not an inquiry into the compensability of a Fifth Amendment taking. *Lingle v. Chevron U.S.A. Inc*, 544 U.S. 528, 542-544, 125 S.Ct. 2074, 2083-2084 (2005). The proper examination for the purposes of the Fifth Amendment taking claims is to evaluate the claim under one of the three tests set forth in *Lucas, Lorreto,* or *Penn Central*.

The Eastern District of North Carolina, recognized this distinction in *Town of Nags Head v. Toloczko,* rejecting the, "Town's argument that it is insulated from takings liability because it was attempting, in good faith, to act pursuant to its police

power." Citing *Lingle*, the court held, "whether a government action is valid is ***conceptually distinct from whether that action works a compensable taking*** . . . the Takings Clause presupposed that the government has acted in pursuit of a valid public purpose . . . [and] the Constitution measures a taking of property not by what the State says, or by what it intends, but by what it does." *Town of Nags Head v. Toloczko*, 2014 WL 4219516 at 15 (2014) [emphasis added].

The Appellee cites several cases decided prior to *Lingle* and *Lucas*, to bolster its reliance on an expansive interpretation of police power. The Appellee fails to acknowledge the critical differences in the prior holdings versus current "takings" litigation. In both *Jacobson* and *Miller*, the Court was asked to determine whether the statutes/ordinances in question were constitutional on their face. see *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, (1905); *Miller v. Schoene,* 276 U.S. 272 (1928). As outlined in *Penn Central, Lingle,* and *Lucas,* this type of inquiry requires a due process examination which is separate and apart from the determination of whether the act then serves as a compensable taking. The question is not whether the ordinance instituted by the Appellee was constitutional but whether it constitutes a compensable taking under the Fifth Amendment. This is the distinction that the Appellee fails to recognize.

The Appellee relies heavily upon the decision in *Juragua Iron Co. v. United States,* 212 U.S. 297 302 (1909), asserting that the Court has previously held

destruction of property to prevent spread of yellow fever was a non-compensable taking. While the Court did find the taking non-compensable, the facts of said case and its holding are not germane to the matter at hand. This case dealt with the destruction of property in Cuba during the Spanish American War. The Court held that the Plaintiff had no ***implied contract*** with the United States government, and as the destruction of the property took place on land possessed by the enemy during wartime no valid takings claim could be asserted. *Juragua Iron Co. v. United States,* 212 U.S. 297 302 (1909). This is a very different legal analysis than the one set forth in *Lingle* and not appropriate in this case.

Here, the Appellee haphazardly set forth a declaration making it a crime to access and enter one's own real property based upon an arbitrary distinction between residents and non-residents. The arbitrary nature of this distinction can be found in the fact that the County did not prohibit residents from leaving and reentering Dare County as they pleased, and further allowed workers and persons from the surrounding counties to enter as well. If the purpose of the prohibition was to prevent spread of Covid-19 by banning ingress and egress into the County, the alleged purpose and reasoning was defeated from the outset with the exceptions listed herein. Such an arbitrary condition prohibiting a certain group of property owners from use of their property is constitutionally tenuous at best. Appellee asks this Court to hold that this decision be left up to the elected officials and not interfere.

This is exactly the type of reasoning that Justice O'Conner advises against in *Lingle* as a reason for the Court's ruling.

> Finally, the 'substantially advances' formula is not only doctrinally untenable as a takings test-its application as such would also present serious practical difficulties. The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations- a task for which courts are not well suited. Moreover, it would empower-and might-often require-courts to substitute their predictive judgment for those of elected legislatures and expert agencies.

Lingle v. Chevron U.S.A. Inc, 544 U.S. 528, 544, 125 S.Ct. 2074, 2085 (2005).

CONCLUSION

The Appellee's, Dare County, emergency ordinance constituted a taking of the Appellants' real property pursuant to the Fifth Amendment of the United States Constitution.

This the 30th day of December 2020.

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