No. 081151 MAR 13 2009

In The Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,

Respondents.

On Petition for Writ of Certiorari to the Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

Petitioner

Stop the Beach Renourishment, Incorporated is the sole Petitioner and is not publicly traded.

Respondents

Florida Department of Environmental Protection; The Board of Trustees of the Internal Improvement Trust Fund; Walton County, Florida; and the City of Destin, Florida.

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The Order of Florida Supreme Court Denying Motion for Rehearing, *Walton County v. Stop the Beach Renourishment, Inc.*, Nos. SC06-1447 and SC06-1449, 998 So. 2d 1102, *entered* Dec. 18, 2008, is reprinted in the Appendix at App. 136.

The unpublished order granting certification of the Florida First District Court of Appeal, *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, No. 1D05-4086, 31 Fla. L. Weekly D1811, 2006 WL 1112700 (Sept. 29, 2006), *entered* July 3, 2006, is reprinted in the Appendix at App. 59.

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3261, DEP No. 04-1370, *entered* July 27, 2005, is reprinted in the Appendix at App. 88.

The unpublished Recommended Order of the Florida Division of Administrative Hearings, *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*, Nos. 04-2960 and 04-3261, 2005 WL 1543209, 05:194 Envtl. & Land Use Admin. L. Rep. 3 (Jan. 1, 2006), *entered* June 30, 2005, is reprinted in the Appendix at App. 101.

JURISDICTION

This Court has jurisdiction to review the Opinion of the Florida Supreme Court on a Petition for Writ of Certiorari pursuant to 28 U.S.C. Section 1257. The Florida Supreme Court's Opinion was entered on September 29, 2008. On December 18, 2008, the Florida Supreme Court denied Petitioner Stop the Beach Renourishment, Inc.'s Motion for Rehearing. This Petition for Writ of Certiorari is timely filed within 90 days from that date. Sup. Ct. R. 13.

This Petition presents two bases for certiorari review under Supreme Court Rule 10. Initially, the Florida Supreme Court's decision conflicts with the Ninth Circuit's decision in *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. (Haw.) 1985), *rev'd on procedural grounds*, *Ariyoshi v. Robinson*, 477 U.S. 902 (1986). *See* Sup. Ct. R. 10(b). This case also presents "an important question of federal law that has not been, but should be, settled by this Court." *See* Sup. Ct. R. 10(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The remaining citations to state statutes are lengthy and their text is set forth in the Appendix.

STATEMENT OF THE CASE

For 100 years it has been a bedrock principle of Florida law that owners of littoral property had constitutionally protected property rights in the direct access to the ocean and the right to accretion.[1] Over this 100 year period, Florida law has required landowners to own to the Mean High Water Line ("MHWL") to be a littoral owner and possess such rights.[2]

Now, in its rush to restore "critically eroded" beaches, the legislative and executive branches of the State of Florida have decided to sever an oceanfront property owner's contact with the ocean by unilaterally altering and replacing the MHWL as the property boundary for a 6.9 mile stretch of beach with a fixed "Erosion Control Line" ("ECL"). This 6.9

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[1] The term "riparian" technically refers to property adjacent to a river or stream, and the term "littoral" refers to property adjacent to an ocean, sea, or lake. However, Florida courts have generally used the term "riparian" to describe all uplands adjacent to any navigable water. *See Board of Trustees v. Sand Key Assoc., Ltd.* (*Sand Key*), 512 So. 2d 934, 936 (Fla. 1987). While the courts below have used both of these terms to discuss the rights involved in this case, Stop the Beach Renourishment, Inc. ("STBR") will attempt to use the term littoral throughout this Petition when possible.

[2] Not one Florida Supreme Court case in 100 years – until now – has ever questioned or called this law into doubt. *See, e.g.*, *Sand Key*, 512 So. 2d at 936; *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649, 652 (Fla. 1985); *State v. Fla. Nat'l Prop., Inc.*, 338 So. 2d 13, 17 (Fla. 1976); *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919); *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1917); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909).

mile property boundary modification was accomplished through the simple recording of a single survey (affecting 453 individual properties, 5 of which belong to Petitioner's members)[3] with no judicial approval required. The scheme of the Beach and Shore Preservation Act, Chapter 161 of the Florida Statutes (2003) (hereinafter "Act"),[4] further results in a complete elimination of some of the 100 year old littoral property rights and replaces them with statutory rights without any judicial proceeding or compensation.

The Florida Supreme Court has blessed this scheme by simply announcing that those ancient littoral rights never existed so the State does not have to pay compensation. The Florida Supreme Court further failed to require the commencement of eminent domain proceedings as a result of a 6.9 mile property boundary change (that modified 5 deeds and likely 448 more) as expressly required by the Act. Fla. Stat. § 161.141 (2003).

This case began in 2003, when the City of Destin ("City") and Walton County ("County")[5]

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[3] App. 84, 215.

[4] The original petition for administrative hearing filed in this case challenged the Act and implementing regulations as such existed in 2003, and all citations in this petition will be to the 2003 versions; however, neither the statute nor the regulations have been subsequently amended in a manner relevant to this petition. *See generally* Fla. Stat. ch. 161 (2008); Fla. Admin. Code Ann. ch. 18-21 (2008).

[5] The City and County may hereafter be referred to collectively as the "Applicants."

sought approval to restore 6.9 miles of beach and dunes after several hurricanes "eroded" the beaches in the City and County. The City and County applied for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands (collectively "JCP") from the Florida Department of Environmental Protection ("DEP") to place sand landward and seaward of the MHWL as authorized by the Act.

Pursuant to the Act, once an applicant decides to move forward with a beach restoration project contemplated by DEP's beach management plan, the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") is required to conduct a survey of the beach in order to locate the ECL.[6] Following a "public hearing" regarding the proposed location of the ECL,[7] the Board of Trustees is required to approve an ECL for a project.[8]

The Act further requires recordation of the survey of the ECL in the official records of the appropriate county.[9] In addition, and most importantly, the Act provides that upon recording of the survey and ECL:

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[6] Fla. Stat. § 161.161(3) (2003).

[7] Members of the public are only allowed "to submit their views concerning the precise location of the proposed erosion control line." *Id.* at § 161.161(4).

[8] *Id.* The resolutions approving the ECL for the City and the County were adopted on December 30, 2004, and June 25, 2004, respectively. *See* App. 112.

[9] *See generally* Fla. Stat. § 161.181.

> **title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty**, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the erosion control line or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.[10]

The legislative/executive establishment and recording of the ECL survey thus changes the property boundary of all 453 landowners within this project without a quiet title action or even judicial approval, much less compensation. App. 84. This boundary change separates oceanfront property from the ocean.

By doing so, the establishment of the ECL divests the upland riparian property owner of **all** common law littoral rights.[11] Specifically, with respect to the littoral right to accretion, the Act states that once the ECL is established "the common law shall no longer operate to increase or decrease the proportions of any upland property lying

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[10] *Id.* at § 161.191(1) (emphasis added).

[11] *Id.* at § 161.191(2).

landward of such line, either by accretion or erosion or by any other natural or artificial process . . . ."[12]

As discussed in Section I.A., *infra*, it has always been an essential element of Florida property law that the owners of littoral property have the exclusive right to directly access navigable water from their property as well as the title to any accreted land – meaning that the littoral owner has always maintained access to the ocean regardless of any accretion or erosion.[13] By changing the property boundary to a fixed ECL, rather than the flexible MHWL, littoral owners have been divested of their rights to exclusive access and accretion, among other littoral rights.

After providing that the ECL severs all littoral rights from the uplands, the Act attempts to replace these constitutional property rights with **similar but inferior** (*i.e.*, lacking constitutional protection) statutory rights.[14] Moreover, the Act,

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[12] *Id.*

[13] *Board of Trustees v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. 2d DCA 1973) (holding beachfront owners "have the exclusive right of access over their own property to the water.").

[14] Section 161.201 of the Florida Statutes states in part:

> Any upland owner or lessee who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in s. 161.191(2), including

acknowledging that establishing an ECL in connection with a beach restoration project can result in a taking of constitutionally protected littoral property rights, expressly provides that "[i]f an authorized beach restoration . . . project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings."[15] This provision, however, relies upon a court for enforcement. In this case, the Florida Supreme Court not only sanctioned an uncompensated taking but created one as a result its invocation of "nonexistent rules of substantive state law."

Given the effect of the Act on its members' property rights, Stop the Beach Renourishment, Inc. ("STBR")[16] filed an administrative petition challenging DEP's Notice of Intent to Issue the JCP and adoption of the ECL. App. 63. The administrative challenge centered on whether littoral rights were "unreasonably infringed" by the JCP and ECL such that the Applicants would have to provide "sufficient evidence of upland interest" to be entitled to a JCP.[17]

> but not limited to rights of ingress, egress, view, boating, bathing, and fishing.

[15] Fla. Stat. § 161.141 (2003).

[16] Stop the Beach Renourishment, Inc., is a Florida not for profit corporation with six members who all own riparian property within the proposed project.

[17] *See generally* Fla. Admin. Code Ann. r. 18-21.004(3)(b) (2003).

The determination of whether littoral rights were infringed necessarily included a determination of whether littoral rights were eliminated and taken by the Act. Thus, STBR also challenged whether the JCP and ECL would: 1) deny upland owners their legitimate and constitutional use and enjoyment of their properties; and 2) result in a taking. *Id.* While these two issues were not (and could not be) decided in the administrative hearing by the Administrative Law Judge ("ALJ") or DEP, the First District Court of Appeal did decide these issues.

A unanimous panel of the First District Court of Appeal found the case relatively simple – given well-established Florida law – and held that the adoption of the ECL resulted in an uncompensated taking of littoral rights and invalidated the ECL. *Id.* at 85-87.

While the Florida Supreme Court's majority opinion recognizes that "Florida case law has clearly defined littoral rights as constitutionally protected private property rights," it then states that "the exact nature of these rights rarely has been described in detail." *Id.* at 18. The majority then "redefines" the littoral rights to accretion and access (which necessarily includes the right to maintain contact with the MHWL) in such "detail" to conclude that the rights never existed in the first instance.[18]

[18] As noted below, the Act and the majority's opinion allow for the complete elimination of **all** littoral rights and replacement with inferior statutory rights, which is a wholesale violation of the United States Constitution. *See infra*.

Specifically, the majority redefined the littoral right to accretion as "a *contingent, future interest* that only becomes possessory if and when land is added to the upland by accretion or reliction." *Id.* at 20 (emphasis added). With this "new" definition, the majority concludes that the littoral right of accretion is not "implicated" or "applicable." *Id.* at 33-35. The majority further attempted to justify the elimination of the right to accretion stating the need for the right no longer exists because the Act statutorily solves the same problem that the rights of accretion and reliction were created to solve. *Id.* at 35.

Regarding the littoral right to have the upland remain in contact with the water (or MHWL), the majority stated "[w]e have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water." *Id.* at 36. The majority then holds for the first time, contravening a century of common law, that the constitutional right to have upland property remain in contact with the MHWL is "ancillary" to and a subset of the right of access, and that "under Florida common law, there is no independent right of contact with the water." *Id.*

The dissent found this holding especially troublesome and plainly disingenuous because the entire body of Florida law – common, statutory, and constitutional – unequivocally states that the right to have one's property remain in contact with the MHWL is a condition precedent for a landowner to have littoral rights. *Id.* at 43-47.

The majority does not discuss in detail the elimination of other littoral rights, but conclusively finds that the Act on its face does not result in a taking of littoral rights under the Florida Constitution or the United States Constitution.[19] The majority does not explain how a statutory right can replace a constitutional right.

The majority also failed to address the constitutionality of the Act's provisions that allow the boundary of a private property to be unilaterally changed by an executive branch agency recording an ECL survey.[20] The majority merely found it was a "reasonable" solution to a public policy problem.[21] *Id.* at 12.

One dissenting Justice, however, did not mince words in explaining what the majority had done in this case:

> I cannot join the majority because of the manner in which it has "butchered"

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[19] In its Motion for Rehearing, STBR argued that the legislative substitution of statutory rights for constitutional rights violates the United States Constitution. App. 141-42, 155-58.

[20] The Amicus Brief filed by Pacific Legal Foundation thoroughly argued and explained how the setting of the ECL, in and of itself, was a physical taking under the United States Constitution. *Id.* at 191-202.

[21] The First District Court of Appeal found that to the extent the legislative alteration of a private property owner's boundary was contrary to the owner's deed effected an unconstitutional taking and invalidated the ECL to any such properties. *Id.* at 81-84, 86-87.

> Florida law in its attempted search for equitable answers to several issues arising in the context of beach restoration in Florida. In attempting to answer these questions, the majority has, in my view, unnecessarily created dangerous precedent constructed upon a manipulation of the question actually certified. Additionally, I fear that the majority's construction of the Beach and Shore Preservation Act is based upon infirm, tortured logic and a rescission from existing precedent under a hollow claim that existing law does not apply or is not relevant here. Today, the majority has simply erased well-established Florida law without proper analysis . . . .

Id. at 41-42.

Following the Florida Supreme Court's ruling, STBR filed a Motion for Rehearing arguing that the majority's decision itself violates the United States Constitution. Specifically, STBR argued that the Opinion and its effective reversal of 100 years of state common law constitute a taking under the United States Constitution. App. 140-148. STBR further argued that the wholesale elimination of all common law littoral rights by a changing of the property boundary from the MHWL to the ECL by the Act as authorized in the majority's opinion and the substitution of statutory rights violates the United States Constitution. *Id.* at 141.

The Florida Court denied STBR's Motion for Rehearing on December 18, 2008. *Id.* at 136.

REASONS FOR GRANTING THE WRIT

I. In invoking "nonexistent rules of state substantive law", the Florida Supreme Court reversed 100 years of uniform holdings that littoral rights are constitutionally protected common law property rights, and thus caused a "judicial" taking proscribed by the Fifth and Fourteenth Amendments to the United States Constitution

This case presents a unique opportunity for this Court to address an ever-increasing and important constitutional question as to whether a state court's ruling that eliminates long established common law property rights by declaring such rights "never existed" under state property law solely to avoid a takings claim is a "judicial taking."

A. The Florida Supreme Court's creation of "nonexistent rules of state substantive law"

The Florida Supreme Court, with its desired result in mind, overhauled 100 years of Florida common law in an attempt to analytically justify its holding. One need only read the first two paragraphs to see that the majority creatively reengineered the case so it could reach the desired result. Perhaps the most appalling "fiction" in the majority opinion, as discussed *infra*, is that the Act

can change the boundary of a littoral upland owner's property from the MHWL to the ECL, which change – according to the majority – has no legal significance or impact upon the landowner's constitutional rights.

Florida law regarding littoral rights, prior to this case was undisputed for 100 years. Even the majority recognized that "Florida case law has clearly defined littoral rights as constitutionally protected private property rights . . . ." App. 18. These well-recognized common law littoral rights possessed by upland owners include:

> (1) the right of access to the water, including the right to have the property's contact with the water remain intact; (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property.

Sand Key, 512 So. 2d at 936.

Instead of expressly deciding whether the Board of Trustees's action in recording an ECL under the Act that eliminates **all** constitutional littoral rights and substituting statutory rights for some of them is constitutional, the majority focused only on "redefining" the two littoral rights that the First District Court of Appeal expressly found were eliminated and taken.

Laying the foundation for this change of state law to achieve the desired result[22] and admitting 100 years of precedential cases have held that littoral rights are constitutionally protected, the majority states that "the exact nature of these rights rarely has been described in detail." *Id.* at 18. The majority seeks an end run around the law by redefining littoral rights in detail. After this exercise, the majority concludes that the two littoral rights, which the First District Court of Appeal determined were taken, were not true littoral rights in the first place.

1. The Redefined and Changed Littoral Right to Accretion

The majority redefines the littoral right to accretion by distinguishing it from other littoral rights so as to isolate it: "[t]he right to accretion and reliction is a *contingent, future interest* that only becomes a possessory interest if and when land is added to the upland by accretion or reliction." *Id.* at 20. Having defined the right to accretion as a "future" right, the majority then goes on to conclude that it is not "implicated" or "applicable," presumably because accretion will never happen in the future because the State will be under a

[22] Recognizing the state of the law would not allow the State to proceed with the beach restoration project (in this case or any other project throughout the state) without a blatant taking of private property, the majority had to change the state of the law to reach its desired result, and did so – all while pretending it did not.

statutory duty to continually maintain the beach such that erosion or accretion does not occur.

The majority's emphasis on this newly "detailed" aspect (*i.e.*, "contingent future right") of the right to accretion is perplexing given its prior unequivocal holding in *State v. Florida National Properties, Inc.*, 338 So. 2d 13, 17 (Fla. 1976). In that case, – a case indistinguishable from the instant case – the Florida Supreme Court held a statute that attempted to permanently fix the boundary between upland and sovereign submerged lands (eliminating the Ordinary High Water Line as the boundary) unconstitutional because the fixed boundary took the riparian right to accretion without providing just compensation. *Id.* at 18-19 ("An inflexible meander demarcation line would not comply with the spirit or letter of our Federal or State Constitutions . . . .").

In *Florida National Properties, Inc.*, the Florida Supreme Court expressly recognized the nature of the littoral right to accretion was a future right: "the State, through the Trustees, claims not only the lands to which Plaintiff has already gained title through the operation of accretion and reliction, **but also seeks to deny to Plaintiff the right to acquire additional property in the future through the process of accretion and reliction.**" *Id.* at 17 (emphasis added). Not only did the Florida Supreme Court recognize that the littoral right to accretion was a "future" right and a constitutionally protected right under the State and Federal constitutions, it held:

> By requiring the establishment of a fixed boundary line between sovereignty bottom lands and Plaintiff's riparian lands, Fla.Stat. s 253.151 . . . constitutes a taking of Plaintiff's property, **including its riparian rights to future alluvion or accretion**, without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of . . . the Florida Constitution.

Id. (emphasis added).

Notwithstanding the wholesale failure to address this prior precedent, the majority fails to reconcile how a right that is expressly terminated by the Act is not "implicated." Left unanswered by the majority is what happens to the landowner's right to accretion, where it goes and who possesses this "future contingent right."[23]

The majority further attempted to justify the elimination of the right to accretion, stating there is no longer a "need" for the right because the Act statutorily solves the same problem that the common

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[23] The majority's rationale is even more surprising given that no party below argued this "not implicated" theory. Even the Board of Trustees admitted that the right to accretion was eliminated by the Act. The Board of Trustees argued that the taking should be analyzed under the regulatory taking test (as opposed to a physical taking test) and advocated that the right to accretion was worthless (thus no compensation was due).

law doctrines of accretion and reliction were created to solve. The "need" for a constitutional property right, however, does not support or justify its "elimination" by callously saying it is not "implicated."

For the majority to now suggest that the right to accretion has not been defined "in detail" is simply disingenuous and a sham,[24] as is its failure to acknowledge or overrule *Florida National Properties, Inc.*[25] As the dissent noted, prior case law is merely "an inconvenient detail of Florida legal precedent" to the majority. App. 45. It is this type of brazen disrespect for prior precedent and blatant rejection of 100 years of Florida property law to accomplish the majority's desired result that is repugnant not only to the senses but to the fundamental notions of justice, due process, and the sanctity of the United States Constitution. Accordingly, this Court should grant certiorari to firmly establish that a state court cannot by *ipse dixit* proclaim 100 years of property rights never really existed.

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[24] *See McCreary County, Ky. v. American Civil Liberties Union*, 545 U.S. 844, 865 (2005) (refusing to accept a governmental statement of purpose when it is "an apparent sham").

[25] *See Fla. Nat'l Prop., Inc.*, 338 So. 2d at 17 (holding that "the establishment of a fixed boundary line between sovereignty bottom lands and Plaintiff's riparian lands . . . constitutes a taking of Plaintiff's . . . **riparian rights to future alluvion or accretion**, without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution . . . ." (emphasis added)).

2. The Redefined and Changed Littoral Right of Contact with the MHWL

Regarding the littoral right to have the upland remain in contact with the water (or MHWL), the majority claims, "[w]e have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water." *Id.* at 36. The majority then holds for the first time that the constitutional right to have upland property remain in contact with the MHWL is "ancillary," and a subset of the right of access, and that "under Florida common law, there is no independent right of contact with the water." *Id.*

The dissent found this holding especially troublesome and plainly disingenuous as the entire body of Florida law unequivocally holds that the right to have the property remain in contact with the MHWL is a condition precedent for a landowner to have littoral rights. *Id.* at 43-47. As noted by the dissent, a landowner's property must extend to the MHWL in order for common law littoral rights to even exist:[26]

> By essential, inherent definition, riparian and littoral property is that which is contiguous to, abuts, borders, adjoins, or touches water. In this State,

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[26] *See also Sand Key*, 512 So. 2d at 936 ("This Court has expressly adopted the common law rule that a riparian or littoral owner owns to the line of the ordinary high water mark on navigable waters.").

> the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no protection under Florida law and is merely some "ancillary" concept that is subsumed by the right of access. In other words, the land must touch the water as a condition precedent to all other riparian or littoral rights and, in the case of littoral property, this touching must occur at the MHWL.

Id. at 43-44 (footnotes and citations omitted).[27]

The majority does not dispute this contention; rather it simply ignores this fundamental condition of contact with the water that is precedent to the existence of ALL littoral rights.[28] If the upland

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[27] The dissenting opinion provides the following citations as authority for its position: "Brickell v. Trammel, 82 So. 221, 229-30 (Fla. 1919) (explaining that under Spanish civil law and English common law, private littoral ownership extended to the high-water mark); Miller v. Bay-to-Gulf, Inc., 193 So. 425, 427 (Fla. 1940) ("[I]t is essential that [the property owners] show the ordinary high water mark or ordinary high tide of the Gulf of Mexico extended to their westerly boundary in order for them to be entitled to any sort of [littoral] rights . . . ." (emphasis supplied)); Thiesen v. Gulf, Fla. & Ala. Ry. Co., 78 So. 491, 500 (Fla. 1918) ("At common law lands which were bounded by and extended to the high-water mark of waters in which the tide ebbed and flowed were riparian or littoral to such waters." (emphasis supplied))." App. 44 (emphasis in original).

[28] Even the Act itself acknowledges this principle in the very section the majority identifies as the saving grace of the Act:

property is separated from the MHWL, then the entire property is no longer littoral and the property is divested of **all** littoral rights.

While the majority states that the right to have the property remain in contact with the water is not an "independent" littoral right and is part of the littoral right to access, it does not explain whether the elimination of the littoral right of access (or a portion thereof) is an unconstitutional taking. Instead, the majority ignores that the littoral right of access has been completely eliminated and swapped with a statutory right of access concluding this swapping of rights is acceptable because "[d]irect access to the water is preserved under the Act." *Id.* at 38.

> Preservation of common-law rights.--Any upland owner or lessee *who by operation of ss. 161.141-161.211 ceases to be a holder of title to the mean high-water line* shall, nonetheless, continue to be entitled to all common-law riparian rights except [the right to accretion], including but not limited to rights of ingress, egress, view, boating, bathing, and fishing.

Fla. Stat. § 161.201, Florida Statutes (2003) (emphasis added); *see also* App. 36-40.

B. The Florida Supreme Court's Opinion is a "Judicial Taking"

The issue presented in this case, commonly referred to by scholars and courts as a "judicial taking," is not new to this Court. This principle was first identified by this Court as far back as 1897:

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the high court of the state is a denial by that state of a right secured to the owner by that instrument.

Chicago Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897).

Despite this clear holding, some later cases addressing this issue seem to contain language inconsistent with this holding and imply that state judiciaries are not limited by the takings or due process clauses of the United States Constitution. *See Great N. R.R. Co. v. Sunburst Co.*, 287 U.S. 358, 366-67 (1932); *Tidal Oil Co. v. Flanagan,* 263 U.S.

444, 450-51 (1924); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680-81 & n.8 (1930).[29]

Thereafter, state courts began to rewrite or change long established state common law rules that defined property. When faced with public policy issues pitting public rights against private rights, state courts would conveniently change these background principles of state law and declare that the property rights being taken never existed; thus, no compensation was due to the landowner.[30] This creative legal exercise – which is epitomized by the Florida Supreme Court's decision in this case – is nothing more than a fiction used by activist courts to avoid takings claims.

Perhaps the most well known example of state courts using this fiction to resolve public policy concerns is *Hughes v. Washington*, 389 U.S. 290 (1967). In *Hughes*, Justice Stewart, in an concurring opinion, noted his fundamental concerns with state court rulings that suddenly change state property law decreeing no property exists only to avoid a taking for which the state must pay compensation. *Id.* at 295-97. After recognizing that a state "is free to make changes, either legislative or judicial, in its

[29] None of these cases address or discuss the *Chicago Burlington* decision.

[30] *See, e.g., Hughes v. Washington*, 389 U.S. 290 (1967); *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994); *State ex rel. Thornton v. Hay,* 462 P.2d 671 (1969); *Sotomura v. County of Hawaii*, 460 F.Supp. 473 (D.C. Haw. 1978); *Ultimate Sportsbar, Inc. v. United States*, 48 Fed. Cl. 540 (Fed. Cl. 2001); *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. (Haw.) 1985).

general rules of real property law, including the rules governing the property rights of riparian owners," Justice Stewart concluded that a state cannot "take [property] without just compensation." *Id.* at 295.

Justice Stewart opined that whether a "sudden change in state law, unpredictable in terms of the relevant precedents" could constitute a taking "inevitably presents a federal question" for determination by this Court. *Id.* at 296-97. In determining whether such a sudden change in law has occurred, Justice Stewart stated:

> For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Id.

Despite the Washington Supreme Court's attempt to finesse its way around prior precedent claiming it was distinguishable and that is decision was "not startling," Justice Stewart stated "I can only conclude, as did the dissenting judge below, that the state court's most recent construction of Article 17 [of its constitution] effected an unforeseeable change in Washington property law as

expounded by the State Supreme Court." *Id.* at 297.[31]

In finding the Washington Supreme Court's decision to change state property law to be a taking under the Due Process Clause of the Fourteenth Amendment, Justice Stewart eloquently stated the rationale:

> There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared

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[31] The dissenting justices of the Washington Supreme Court in *Hughes* – like Florida Supreme Court Justice Lewis in this case – could see the thinly disguised attempt to reach a desired public policy result:

> I find myself lost in admiration at the scholarship and erudition manifested in the majority opinion. However, all the legal signposts that I can read And [sic] understand point in the opposite direction, so I am compelled to dissent.
>
> * * *
>
> If this seems a ridiculously short and simple solution of the apparently complex problem with which the majority opinion deals, I can only say that it is the result dictated by common law . . . . It is [sic] plain and well-traveled legal path. To arrive at the result the state desires (and the majority approves), a new, circuitous and rather devious route, rarely explored, must be followed.

Hughes v. State, 410 P.2d 20, 30 (Wash. 1966) (Hill, J., dissenting).

> by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. . . . But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property-without paying for the privilege of doing so. *Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.*

Hughes, 389 U.S. at 297-298 (emphasis added). *See, e.g., Chicago Burlington & Quincy R.R. Co.,* 166 U.S. at 233-34, 241. ("But it must be observed that the prohibition of the [Fourteenth] amendment refer to all the instrumentalities of the state,- to its legislative, executive, and judicial authorities,- and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.'" (internal citation omitted)); *see also Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544, 570-

71 (1905) (holding that the state judiciary has no more power to violate the Contracts Clause and deprive a litigant of property with impunity than does any other state actor).

Thereafter in 1980, this Court reversed the Florida Supreme Court based on this very notion and a unanimous court held:

> Neither the Florida Legislature by statute, **nor the Florida courts by judicial decree**, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court.
>
> To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) (emphasis added).

More recently, Justice Scalia has voiced grave concerns over a state court's continued use of this property "fiction" to take private property. In the

dissenting opinion of *Stevens v. City of Cannon Beach*, Justice Scalia stated:

> just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate "background law"- regardless of whether it is really such- could eliminate property rights.

Stevens v. City of Cannon Beach, 510 U.S. 1207, 1207 (1994) (Scalia, J., and O'Connor, J., dissenting from denial of the petition for writ of certiorari) (citation omitted).

After citing with approval Justice Stewart in *Hughes* and the *Webb Fabulous Pharmacies* case, Justice Scalia concluded:

> Since opening private property to public use constitutes a taking, if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.

> To say that this case raises a serious Fifth Amendment takings issue is an understatement.

Id. (citations omitted).

Since *Stevens*, this Court has not discussed the judicial takings issue. During that time, state courts have become more aggressive in "invoking non-existent rules of substantive law" to deprive landowners of property. Since 1994, this Court has been presented with no less than 15 petitions for writs of certiorari asserting a judicial taking.[32] This violation of property owners' federally guaranteed rights is an ever-increasing problem that this Court will continue to face as the state courts become more brash.

Several federal courts have found judicial takings when a state court has suddenly and unexpectedly changed state common law to deprive landowners of property rights. In *Robinson v. Ariyoshi*,[33] the Ninth Circuit faced the question "Can the state, by a judicial decision which creates a major change in property law, divest property interests?" 753 F.2d at 1471. The Ninth Circuit concluded that the "short answer is no." *Id.* at 1473. In so holding, the Ninth Circuit recognized that a state may change it laws by judicial or legislative

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[32] The citations of these 15 petitions for certiorari are set forth in the Appendix on page 225-226.

[33] *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. (Haw.) 1985), *rev'd on procedural grounds*, 477 U.S. 902 (1986).

action. The Ninth Circuit even recognized that it is within the Hawaii Supreme Court's authority to declare "after more than century of a different law, that the common law doctrine of riparian ownership was the law of Hawaii." *Id.* at 1473.

The Ninth Circuit, however, noted that application of this judicial change retroactively was a judicial taking under *Hughes*, 389 U.S. at 295, and a violation of the United States Constitution. *Robinson*, 753 F.2d at 1474. Accordingly, the Ninth Circuit held that the plaintiffs could not be divested of their vested rights without the payment of compensation. *Id.*[34] The Florida Supreme Court's refusal to find a taking, and indeed its actions that have created a direct taking, expressly conflict with the admonition of the Ninth Circuit creating a conflict under Supreme Court Rule 10(b).

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[34] *Accord Ultimate Sportsbar, Inc. v. United States*, 48 Fed. Cl. 540, 550 (Fed. Cl. 2001) (finding a "judicial taking occurs where a court's decision that does not even 'arguably conform[ ] to reasonable expectations' in terms of relevant law of property rights effects a 'retroactive transformation of private into public property.'" (alteration in original)); *Sotomura v. County of Hawaii*, 460 F.Supp. 473, 481 (D.C. Haw. 1978) ("The [Hawaii Supreme Court's] decision in Sotomura was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation. The Fourteenth Amendment to the Constitution forbids it.").

Judicial takings cases raise serious constitutional issues that have been seeking resolution by this Court since *Hughes*. This case presents the judicial taking issue in much narrower terms than the issue in *Hughes* or *Stevens*. In addition, this case provides a far better procedural vehicle to address the issues because *Stevens* had an inadequate factual record and involved a change to state law that occurred prior the filing of that case.[35] Here the factual record is complete and the state court modified the relevant state law principles in the course of this case for the purpose of depriving landowners any right to compensation. To say that the majority's manipulation of the relevant principles of state law is blatant is an understatement.

This Court should grant certiorari to halt the ever-increasing judicial nullification of private property rights by state courts (and especially the Florida Supreme Court) that "redefine" property rights to not exist under "background principles of state law" solely to accomplish public policy objectives that have no other purpose but to circumvent the Takings Clause of the United States Constitution. If a state court is free to "redefine" property interests so as to not exist, the Takings Clause no longer has a purpose or meaning. This case presents the perfect vehicle for the Court to address judicial takings.

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[35] *Stevens*, 510 U.S. at 1207.

II. The Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution

The majority concluded that the Act can convert an oceanfront property with constitutionally protected littoral rights into an ocean-view property with statutory rights that mimic constitutional littoral rights and that this can be accomplished without effecting a taking. The majority's sole justification for the elimination of constitutionally protected littoral rights is Section 161.201 of the Florida Statutes, which provides statutory "replacement" rights. The majority simply concludes without any detailed analysis that a swapping of constitutional rights for statutory rights is "reasonable" and, thus, not unconstitutional. *See* App. 39-40.

It is impossible for a statute to "preserve" constitutional rights. Constitutional rights exist as a matter of constitutional law – not statutory law – and are protected by the Constitution itself. *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958) (holding constitutional rights cannot be nullified by action of state legislator, executive, or judicial officer); *Department of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994) ("[N]either the common law nor a state statute can supersede a provision of the federal or state constitutions."); *Austin v. Christian*, 310 So. 2d 289, 293 (Fla. 1975) ("A statute enacted by the Legislature may not constrict a right

granted under the ultimate authority of the Constitution.").

This Court has previously articulated the basic principle that a legislature cannot eliminate a citizen's constitutional right and replace it with a statutory right. *Cooper*, 358 U.S. at 18-19 ("It is necessary only to recall some basic constitutional propositions which are settled doctrine" which includes that the Constitution is the supreme law of the land.). This principle equally applies to other constitutional rights such as the right to free speech, equal protection, the right to due process, the right to privacy, etc.

The Florida Supreme Court ignored this fundamental principle solely to accomplish its desired policy result. The state's attempt to strip a littoral property of **all** littoral rights, and replace those rights with statutory rights – which can be modified at the whim of the legislature and lack any protections – without compensation is patently unconstitutional. *See Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1913) ("Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."). Such an attempt is unconstitutional and a violation of the state and federal constitutions. *Cooper*, 358 U.S. 1; *Florida Nat'l Prop.*, 338 So. 2d at 17.

Unlike a littoral owners' ability to enforce its constitutional rights, the Act fails to provide any cause of action for the State's violation of any of the

limitations in Section 161.201 of the Florida Statutes, much less a cause of action that provides for just compensation if these replacement statutory rights are eliminated or reduced.

III. The Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution

The ECL adopted by the Board of Trustees and recorded in this case extends along a 6.9 mile stretch of beach and crosses more than 453 individual properties. App. 215. Record evidence confirms that the STBR members' properties extended to mean high water line, *id.* at 84, (and presumably many of the other 448 properties as well).

As noted by the First District Court of Appeal – and not disputed by the Florida Supreme Court – the ECL will alter and change a littoral owner's property boundary from the MHWL to the ECL. *Id.* at 84. The First District Court of Appeal found this alteration patently unconstitutional. The Amicus Brief of the Florida Home Builders Association discussed the severe repercussions of allowing a single ECL survey recorded in the public records to alter the boundary lines of 6.9 miles of property resulting in unmarketable titles. *Id.* at 221-223.

The Florida Supreme Court simply ignored this serious due process concern conclusively stating that the Act and the fixing of the ECL was a "reasonable balance" between private and public rights. *Id.* at 40.

In so doing, the Florida Supreme Court overruled Florida's statutory and common law that has long held that constitutionally protected littoral rights cannot be severed from the littoral property. *See* Fla. Stat § 253.141(1) (2003) ("Riparian rights are those incident to land bordering upon navigable waters. . . . **They are appurtenant to and are inseparable from the riparian land.**" (emphasis added)); *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649, 651 (Fla. 1985) ("[R]iparian rights are appurtenant to and inseparable from the riparian land." (citation omitted)). This long hailed rule stems from the fundamental definition of littoral rights that these rights only attach to upland property that borders the MHWL.[36] Accordingly, littoral rights cannot exist separate from the littoral upland.

Surprisingly, the Florida Supreme Court turned a blind eye toward the executive (and legislative) branch's 6.9 mile property boundary change.[37] Like

[36] *Miller v. Bay-to-Gulf, Inc.*, 193 So. 425, 427 (Fla. 1940) ("[I]t is essential that [the property owners] show the ordinary high water mark or ordinary high tide of the Gulf of Mexico extended to their westerly boundary in order for them to be entitled to any sort of [littoral] rights . . . .").

[37] As such, all three branches of government of Florida have acted in concert – either directly or complicity – to deprive STBR's members' of their constitutional rights without just compensation.

the landowner in *Stevens*, STBR's members were not provided due process before their property boundary was unilaterally changed by the legislature and executive branch. The Board of Trustees did not file an action in the circuit court to quiet title to any property, and thus, no notice or hearing was provided to the landowners before their property boundaries were unilaterally altered as were their recorded deeds. In his dissent in *Stevens*, Justice Scalia concluded that the Supreme Court of Oregon's holding that the doctrine of customary use applied to Steven's property (modifying the ownership interest therein) as determined in a prior case to which Stevens was not a party violated fundamental due process:

> whether the Oregon Supreme Court chooses to treat it as having established a "custom" applicable to Cannon Beach alone, or one applicable to all "dry-sand" beach in the State, *petitioners must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is pretextual*.

Stevens, 510 U.S. at 1207 (Scalia, J., and O'Connor, J., dissenting) (emphasis added).

In this case, deeds of the five members of STBR were altered, not by a judicial decree in which each member was a party, but by a survey filed by an executive agency. If this process is constitutional, there is nothing to stop the legislature from modifying eminent domain proceedings so as to no longer require

judicial oversight or approval.[38] To say that a due process violation has occurred is a serious understatement as due process would mean nothing under such an interpretation.

CONCLUSION

Perhaps the dissenting opinion of Justice Wells, provides the most succinct analysis of the case:

> It appears to me that this Court's precedent controlling this case is in State v. Florida National Properties, Inc., 338 So. 2d 13 (Fla. 1976); Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd., 512 So. 2d 934 (Fla. 1987); and Belvedere Development Corp. v. Department of Transportation, 476 So. 2d 649 (Fla. 1985).
>
> There can be no doubt that beach restoration is of critical and vital interest in Florida. **However, the legislative setting of this erosion control line does eliminate valuable property rights which have been recognized by this Court.** Thus, the act can be

[38] *Wilkinson v. Leland*, 27 U.S. 627, 657-58 (1829) ("We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.").

> saved by the payment of just compensation but cannot be constitutionally applied without it.

App. 41 (emphasis added).

While it is obvious that the Florida Supreme Court did not intend to create a taking, it is equally obvious that the majority intended to "redefine" the law in an attempt to avoid a taking. Regardless of the intent, the effect of the Florida Supreme Court's decision is the same: an uncompensated taking. As Justice Stewart noted, no matter what a court "says" in its opinion about what the court is doing or how it attempts to justify the result, a taking is measured by what the opinion **does**.[39] The Florida Supreme Court's opinion effects a "sudden change in state law, unpredictable in terms of the relevant precedents" in violation of the Due Process Clause of the Fourteenth Amendment.

It is further apparent from the Florida Supreme Court's opinion that it is greatly concerned with ensuring the State's beach restoration program remains intact. While such a goal is noble, the Florida Supreme Court's duty is to strictly interpret the law and uphold constitutional rights against infringements. In the unfortunate event that a worthwhile regulatory program infringes on such constitutional rights, it is the Legislature's duty to solve the problem, not a state court's duty to "redefine" constitutional rights.

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[39] *Hughes v. Washington*, 389 U.S. 290, 297-98 (1967).

The United States Constitution forbids the State's action in this case. Accordingly, this Court should grant certiorari and reverse the Florida Supreme Court's decision.

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