No. 08-1151

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 Writ of Certiorari to the Florida Supreme Court

BRIEF OF PETITIONER

D. Kent Safriet*
Richard S. Brightman
HOPPING GREEN & SAMS, PA
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
(850) 222-7500
**Counsel of Record for Petitioner*

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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 U.S. Constitution?

Is the Florida Supreme Court's approval of a scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the Due Process and Takings Clauses of the Fifth and Fourteenth Amendment to the U.S. Constitution?

Is the Florida Supreme Court's approval of a scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without notice, a judicial hearing, or the payment of just compensation a violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. 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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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 Court granted certiorari on June 15, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the U.S. Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be

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taken for public use, without just compensation.

The Fourteenth Amendment of the U.S. Constitution provides, in pertinent part:

> SECTION 1. * * * 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.

Florida Statutes Section 161.141 provides:

> **Property rights of state and private upland owners in beach restoration project areas.**--The Legislature declares that it is the public policy of the state to cause to be fixed and determined, pursuant to beach restoration, beach nourishment, and erosion control projects, the boundary line between sovereignty lands of the state bordering on the Atlantic Ocean, the Gulf of Mexico, or the Straits of Florida, and the bays, lagoons, and other tidal reaches thereof, and the upland properties adjacent thereto; except that such boundary line shall not be fixed for beach restoration projects that result from inlet or navigation channel maintenance dredging projects

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unless such projects involve the construction of authorized beach restoration projects. However, prior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored; and any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner subject to all governmental regulations and are not to be used to justify increased density or the relocation of the coastal construction control line as may be in effect for such upland property. The resulting additions to upland property are also subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project. It is further declared that there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property. If an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting

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authority by eminent domain proceedings.

The remaining citations to state statutes are set forth in the Appendix to Petitioner's Petition for Writ of Certiorari.

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STATEMENT OF THE CASE

The mental picture often conjured by a beach nourishment project is one of relentless waves of water lapping menacingly against or under beach-front structures, which, without the beach nourishment, face imminent collapse into the sea. Nothing could be further from the facts in this case. Prior to the nourishment, Petitioner's members' homes sat on an accreting beach more than 200 feet of dry sand and dunes from the Mean High Water Line ("MHWL"). App. 252, 261.[1]

Notwithstanding such an expanse of beach, Respondents pursued their singular goal of replacing a private beach with a public beach without paying compensation by creating an additional 75-foot wide public beach seaward of the MHWL surveyed on September 7, 2003. App. 261. Stop the Beach Renourishment, Inc.'s ("STBR" or "Petitioner") members objected to this massive sand pumping exercise to create this new public beach because they did not want or need the additional sand. App. 276-77.

Respondents will, no doubt, attempt to claim a nobler goal, asserting that the beaches in question were designated as a "critically eroded shoreline,"[2]

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[1] In this Brief, citations to the Joint Appendix are denoted "App." with the relevant page number(s), and citations to the Appendix to Petitioner's Petition for Writ of Certiorari are denoted "Pet. App." with the relevant page number(s).

[2] *See* Fla. Admin. Code R. 62B-36.002(4). Unless noted, this Brief cites the 2003 version of Florida Statutes and administrative regulations as they existed when this case

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which condition threatened upland development, recreational interests, wildlife habitat or important cultural resources. Such assertions are, however, belied by Respondents' own survey of the beach. App. 261. Moreover, the critically eroded label is merely a unilateral determination by the Florida Department of Environmental Protection ("DEP") that is a prerequisite to state funding. App. 76.

Respondents' scheme, however, conflicts with 100 years of Florida's background property law, which provides that the littoral rights attendant to ocean front property are constitutionally protected property rights. These background principles of Florida property law include direct and exclusive access to the ocean and the right to accretions or alluvion.[3]

Over the last 100 years, background principles of Florida property law have steadfastly required that property owners own to the MHWL in order to be littoral owners and possess littoral rights. During this century, Florida has uniformly held these rights to be constitutionally protected from

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began. Since 2003, no relevant changes to the statutes or regulations have been made. *See generally* Fla. Stat. ch. 161 (2008); Fla. Admin. Code ch. 18-21 (2008).

[3] Florida courts use the terms "littoral" and "riparian" interchangeably; the term "riparian" technically refers to property abutting a river or stream, and the term "littoral" refers to property abutting an ocean, sea, or lake. *See Board of Trustees v. Sand Key Assocs., Ltd.* (*Sand Key*), 512 So. 2d 934, 936 (Fla. 1987). STBR will attempt to use the term "littoral" throughout this Brief, whenever possible.

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governmental appropriation without due process and fair compensation.[4]

The Florida Legislature, by enacting the Beach and Shore Preservation Act, Florida Statutes chapter 161 ("Act"), altered this well-established law to allow severance of an oceanfront property owner's contact with the MHWL by a beach nourishment project. The Florida Legislature failed to include proper procedural due process provisions in the Act which, instead, directs the executive branch to unilaterally alter and replace a property owner's boundary line (i.e., the MHWL) for a 6.9 mile stretch of beach with a fixed "Erosion Control Line" ("ECL"). App. 28.

The Florida Legislature, aware that this scheme could result in a taking of littoral property, provided that: "If an authorized . . . beach nourishment . . . project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings." Fla. Stat. § 161.141. Despite the Florida Legislature's recognition that it was changing common law littoral rights, the executive branch (DEP and the Board of

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[4] In *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909), and *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1917), the Florida Supreme Court held riparian rights are property rights that cannot be taken without just compensation, which principle has been applied unchanged by the Court in *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.* (*Florida National*), 338 So. 2d 13, 17 (Fla. 1976); *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919).

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Trustees of the Internal Improvement Trust Fund) interpreted and applied the Act in a manner that did not require the requesting authority (i.e., City of Destin and Walton County) to take the littoral rights by eminent domain proceedings as contemplated by Florida Statutes section 161.141. App. 176-78.

This application and interpretation of the Act required STBR to challenge the constitutionality of the Act as applied by the executive branch. In upholding the application of the Act, the Florida Supreme Court sided with the executive branch and decided that no taking of property or due process violation occurred. Pet. App. 40. In so doing, however, the Florida Supreme Court suddenly and dramatically changed 100 years of state property law to achieve its desired outcome. Pet. App. 40.

In 2003, the City of Destin ("City") and Walton County ("County") sought approval from DEP and the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") to restore 6.9 miles of beach in the City and County after several hurricanes washed sand away from the beaches in the City and County. App. 28, 30. The City and County applied for a Joint Coastal Permit and Authorization to Use Sovereign Submerged Lands (collectively "JCP") from DEP to place sand landward and seaward of the MHWL as authorized by the Act. App. 27.[5]

Once an applicant decides to move forward with a beach nourishment project the Act requires

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

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the Board of Trustees to conduct a survey of the beach in order to establish the ECL. Fla. Stat. § 161.161(3). The import of the required adoption and recording of the ECL survey is a change of property boundaries:

> **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.

Fla. Stat. § 161.191(1) (emphasis added).

The Act lacks any predeprivation procedural protections to the landowner before the Board of Trustees unilaterally changes the property boundary. To the contrary, the Act's procedural provisions are a facade. The Act only provides for interested persons to "submit their views" at a public hearing. Fla. Stat. § 161.161(4).

Following this "public hearing," the Board of Trustees is required to approve (or disapprove) the proposed ECL for a project, after which the Act requires the ECL survey to be recorded in the official records of the county.[6] Fla. Stat. § 161.181. In this

[6] The resolutions approving the ECL for the City and County were adopted on December 30, 2004, and June 25,

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case, the Respondents modified 6.9 miles of property boundaries through the simple recording of two surveys (affecting up to 453 individual properties, five of which belong to STBR's members)[7] without any judicial approval. App. 191-92, 201.[8]

The engineering requirements of a beach nourishment project require sand to be placed both seaward and landward of the ECL. Sheet 7 of Petioners' Exhibit 4 is a color coded survey of the beach that presents a pictorial view of the beach and the limits of construction and placement of sand landward and seaward of the ECL. App. 261. Typically, a local government conducting the restoration has to obtain written permission or "construction easements" for its contractor to enter the private property landward of the ECL to place tons of sand on such private property. App. 276-77.

During the pendency of the various appeals, the City and the County completed the beach nourishment project notwithstanding the potential invalidation of their permit. App. 277-78. Numerous oceanfront landowners refused to execute "construction easements" and forbade the County and its contractor from trespassing onto their

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2004, respectively. Pet. App. 112; App. 49-51; *see also* Walton County, Fla., Official Records, Book 2686, Page 2233; Okaloosa County, Fla., Official Records, Book 2658, Page 4124.

[7] App. 207, 211; Pet. App. 84-85.

[8] *See* App. 261. These two ECL surveys have been recorded in the official records of the appropriate counties. Walton County, Fla., Plat Book, Book 17, Page 1; Okaloosa County, Fla., Plat Book, Book 22, Page 53.

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property and dumping tons of sand, changing the character of their property. App. 276. The County Commission demanded that its contractor enter private property to place sand as required by the engineering specifications notwithstanding the lack of permission from the landowners. App. 277-82.[9]

Once the ECL is recorded, the Act provides that "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process . . . ." Fla. Stat. § 161.191(2).[10] While this provision of the Act specifically eliminates the 100 year old constitutionally protected littoral right to accretion, the recording of the ECL also eliminates all other littoral rights since the property boundary no longer touches the ambulatory MHWL. *Id.*

After severing all littoral rights from the uplands, the Act attempts to replace some of these constitutional property rights with **similar but inferior** statutory rights (i.e., lacking constitutional protection).[11] The Act acknowledges that

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[9] It should be noted that the County's contractor trespassed upon the property of two STBR members but not the other three. App. 277-78.

[10] The Amicus Brief filed by Pacific Legal Foundation before the Florida Supreme Court thoroughly argued and explained how the setting of the ECL, in and of itself, was a physical taking under the U.S. Constitution. Pet. App. 191-202.

[11] Florida Statutes section 161.201 states in part:

> Any upland owner or lessee who by [establishment of an ECL] ceases to be a holder of title to the mean high-

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establishing an ECL in connection with a beach restoration project can result in a taking of constitutionally protected littoral property rights by expressly providing that all property rights necessary for the nourishment project be acquired by eminent domain. Fla. Stat. § 161.141. This provision, however, relies upon a court for enforcement. In this case, the Florida Supreme Court not only sanctioned an uncompensated taking by not enforcing this provision, but created an uncompensated taking by going one step further and invoking "nonexistent rules of substantive state law" to redefine property out of existence so that it could not be taken.

Given the effect of the Act on its members' property rights, STBR[12] filed an administrative petition challenging DEP's Notice of Intent to Issue the JCP and adoption of the ECL. App. 27-48. 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. Fla. Admin. Code R. 18-21.004(3)(b).

Whether littoral rights were infringed included a determination of whether littoral rights

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> 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.

[12] STBR is a Florida not-for-profit corporation with six members who all own riparian property within the proposed project. App. 210-11.

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were eliminated by the Act. STBR asserted that 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. App. 61. While these two issues were not (and could not be) decided in the administrative hearing by the Administrative Law Judge ("ALJ") or DEP, the Florida First District Court of Appeal did decide these issues on direct appeal. Pet. App. 77-87.

A unanimous panel of the First District Court of Appeal found the case simple given well-established Florida law, holding that the adoption of the ECL resulted in an uncompensated taking of littoral rights and invalidating the ECL. Pet. App. 85-87.[13]

The Florida Supreme Court reversed in a result driven opinion that suddenly and dramatically changed 100 years of background property law in Florida. Specifically, and as discussed in detail below in Part I(B), the Florida Supreme Court's majority redefined two littoral rights (right to have the property remain in contact with the MHWL and the right to accretion) to no longer exist. Pet. App. 40. The majority then concluded, not surprisingly, that such littoral rights were not taken. Pet. App. 33-35.

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

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In a candid dissent, Justice Lewis did not mince words in explaining what the majority did:

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

Pet. App. 41-42.

STBR then filed a Motion for Rehearing arguing, inter alia, that the majority's decision itself violates the U.S. Constitution. Pet. App. 140-48. The Florida Supreme Court denied STBR's Motion for Rehearing on December 18, 2008, and in so doing suddenly, dramatically, and radically changed 100 years of Florida law by invoking non-existent rules of state law. On June 15, 2009, this Court granted STBR's Petition for Writ of Certiorari.

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SUMMARY OF THE ARGUMENT

In an effort to avoid paying compensation for taking private property, State courts sometimes "redefine" well-established property rights by declaring that they never existed so that nothing was taken. In so doing, state courts claim to be invoking background principles of state law as a justification for the elimination of once well-established property rights.

For a century, the Florida Supreme Court has held that littoral rights "are property rights that may be regulated by law, but may not be taken without just compensation and due process of law." *Broward*, 50 So. at 830. In a result driven opinion upholding the application of the State's beach nourishment program, the Florida Supreme Court invoked nonexistent rules of state substantive law, finding that no property rights have been taken because none existed.

The Florida Supreme Court ignored 100 years of Florida law that requires a property to contact the MHWL to possess littoral rights. The Florida Supreme Court conveniently concluded that "under Florida common law, there is no independent [littoral] right of contact with the [MHWL]." Pet. App. 36. The Florida Supreme Court also held for the first time that the littoral right to accretion was a "contingent future interest" rather than a presently vested right to future accretions, in direct contradiction of its holding in *Florida National*, 338 So. 2d at 17. Pet. App. 20, 34. The Florida Supreme Court further completely ignored its holding in *Florida National* that the setting of a permanent

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boundary line between riparian upland property and sovereign submerged lands was a violation of the Florida and U.S. constitutions.

The Florida Supreme Court also created a hitherto unknown constitutional duty for the State to "protect beaches" presumably as a counterbalance to the takings clause of the Florida Constitution. Pet. App. 16. Finally, the Florida Supreme Court tried to camouflage its change in state law with the common law doctrine of avulsion. Pet. App. 29-33, 40. If dry land suddenly and violently washes away as a result of a natural event (such as a hurricane), this doctrine, allows an owner of the upland to "reclaim" previously dry–but now submerged–land. But the State, not owning any washed away dry land, has lost nothing and thus cannot reclaim anything under this doctrine.

This Court's prior cases provide a sound doctrinal basis for adopting a judicial takings doctrine. Specifically, this Court should adopt the judicial takings test articulated by Justice Stewart in *Hughes* that a state judicial decision effects a taking under the U.S. Constitution when it "constitutes a sudden change in state law, unpredictable in terms of relevant precedents." *See Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

This Court has expressly held that the Equal Protection and the Due Process Clauses apply to state judiciaries. The Takings Clause should apply to state courts as well. Without such a doctrine, a state is free to clothe one of its agents with the

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power to violate the U.S. Constitution. *Ex Parte Virginia*, 100 U.S. 339, 346 (1879).

The Florida Supreme Court's blessing of the application of the Act (and its redefining of property rights) to eliminate constitutionally protected littoral rights and replace them with statutory rights without requiring eminent domain proceedings as required in Florida Statutes section 161.141 is an unconstitutional taking. Lost in this exchange of rights are STBR's members' ability to own, possess, and exclude persons from the beach between their homes and the MHWL. Rather, after the recording of the ECL and the beach nourishment, commercial vendors are allowed on the beach between the ECL and the new MHWL in front of STBR's members' homes.

The Board of Trustees' changing of the property boundary from the MHWL to the ECL is a physical taking. The Act and the Board of Trustees' recording of the ECL change the legal descriptions in STBR's members' deeds and physically divests them of all littoral rights. Because of the way the Act was applied with full sanction of the Florida Supreme Court, the Board of Trustees now holds what STBR's members once held: property to the MHWL and its attendant constitutionally protected littoral rights. No longer do STBR's members possess, use, or have the ability to dispose of littoral property or littoral rights. The state has severed each strand in STBR's members' bundle of property rights. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982). But the state paid no compensation for the privilege of owning STBR's members' property.

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The Act's provisions violate the procedural due process protections of the U.S. Constitution. The State's recording of the ECL changing the boundaries of STBR's members' real property deprives them of a property right. The Act's procedural provisions do not provide any meaningful opportunity to be heard prior to the deprivation. Rather, they allow the Board of Trustees (through an agent) to unilaterally record a survey changing property boundaries without any judicial oversight or approval.

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's Decision Is a Judicial Taking Because It Is a Sudden and Dramatic Change in State Law Unpredictable in Terms of Relevant Precedents.

The concept that a state court's ruling that suddenly and dramatically eliminates long established common law property rights is proscribed by the Takings Clause of the Fifth Amendment is not new. It has existed since this Court held the Fifth Amendment was applicable to States through the Fourteenth Amendment in *Chicago Burlington & Quincy Railroad Co. v. Chicago* (*Chicago Burlington*), 166 U.S. 226, 241 (1897).

A state court's use of its power to redefine property to no longer exist in order to avoid a taking has become a significant problem. This problem was recognized by Professor Thompson in his seminal law review article on judicial takings: "Faced by

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growing environmental, conservationist, and recreational demands, . . . state courts have recently begun redefining a variety of property interests to increase public or governmental rights, concomitantly shrinking the sphere of private dominion." Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1451 (1990) ("Indeed, while paying lip service to stare decisis, the courts on numerous occasions have reshaped property law in ways that sharply constrict previously recognized private interests.").

STBR respectfully requests that this Court expressly recognize the doctrine of judicial takings and adopt the judicial takings test articulated by Justice Stewart in his concurring opinion in *Hughes*, 389 U.S. 290. This test provides that a state judicial decision effects a taking under the U.S. Constitution when it "constitutes a sudden change in state law, unpredictable in terms of relevant precedents . . . ." *Id.* at 296.

A. Relevant precedents in Florida law.

In 1909, the Florida Supreme Court announced that littoral rights are "incident to the [littoral] holdings, and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law." *Broward*, 50 So. at 830. Since then the Florida Supreme Court has expressly reaffirmed this holding no less than six times. *See Thiesen,* 78 So. at 507; *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957); *Brickell*, 82 So. at 227; *Florida National*, 338 So. 2d at 17; *Belvedere Dev. Corp.*, 476 So. 2d at 652; *Sand Key*, 512 So. 2d at 936 (noting that the court had

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recently reaffirmed this holding in *Florida National*). These littoral rights include the right to exclude others from the littoral property. *Board of Trustees v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. 2d DCA 1973) (beachfront owners "have the exclusive right of access over their own property to the water.").

These 100 years of consistent jurisprudence, which will be discussed in more detail in Parts I(B)(1)-(2) below, establish beyond debate the background principle of Florida law that "littoral rights are property rights that . . . may not be taken without just compensation and due process of law," *Brickell*, 82 So. at 227, and that an attempt to establish an inflexible property boundary between sovereign submerged lands and riparian uplands is a violation of the Florida and U.S. constitutions. *Florida National*, 338 So. 2d at 17.[14]

B. The invocation of "nonexistent rules of state substantive law" that effect a sudden and dramatic change in state law constitutes a judicial taking.

In reaching its desired outcome, the Florida Supreme Court invoked "nonexistent rules of state substantive law," *Stevens v. City of Cannon Beach*,

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[14] The most simplistic summary of Florida law regarding littoral rights is found in *Dep't of Transp. v. Suit City of Aventura*, 774 So. 2d 9, 13 (Fla. 3d DCA 2000), stating "The distinction between riparian and non-riparian rights is a clear one. Lost riparian rights always entitle the owner to relief . . . ."

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510 U.S. 1207, 1207 (1994) (Scalia, J., and O'Connor, J., dissenting from denial of the petition for writ of certiorari), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), in an attempt to camouflage its breathtaking change of 100 years of law.

Ironically, DEP and the Board of Trustees now argue that the common law has not changed, while the City and the County acknowledge that the Act and the Florida Supreme Court have modified state common law property rights–just not in an unconstitutional fashion.[15]

There can be little doubt about the effect of the Florida Supreme Court's decision upholding the application of the Act without requiring compensation. Before the Florida Supreme Court's

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[15] Respondent Florida Department of Environmental Protection's Brief in Opposition at 11-13, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Protection*, No. 08-1151 (Apr. 30, 2009); Respondents Walton County and City of Destin's Brief in Opposition to Petition for Writ of Certiorari at 15-16, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Protection*, No. 08-1151 (Apr. 30, 2009).

DEP and the Board of Trustees' current position is inconsistent to say the least with its position in its Final Order:

> Whether or not correct under the common law, it is certainly the case under Sections 161.141-161.211, F.S. that the right to future accretion and the right to have riparian land to touch the water have both been statutorily eliminated by act of the Legislature. . . . It is the establishment of the ECL and the process set forth in Sections 161.141-161.211, F.S., [and not the issuance of the JCP permit,] which might arguably be asserted as infringing on the common law rights of riparian owners.

Pet. App. 93-94.

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decision STBR's members' rights under a century of common law included at least the following littoral rights:

- Right to future accretion or reliction;
- Right to have property remain in contact with the MHWL;
- Right to an unobstructed view; and
- Right to exclusive access over the upland portion of their property to the water.

After the Florida Supreme Court's decision, their modified rights include:

- No right to accretion or reliction;
- No right to have property remain in contact with the MHWL, only a right to own to the ECL;
- Statutory right to a view; and
- Statutory nonexclusive right to access to the water across the new public beach like every other citizen.

As Justice Stewart noted in his judicial takings test, the "Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." *Hughes*, 389 U.S. at 298. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (*First English*), 482 U.S. 304, 335 n.11 (1987) (Stevens, J., dissenting) (quoting this language with approval). In this case, what the State has done is obvious. The Florida Supreme Court's strained rationale and judicial reengineering of the case and the law only highlight its motive to reach a predetermined

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outcome while pretending that no littoral rights are implicated, infringed, or eliminated.

Laying the foundation for this sudden and radical change of state law to achieve the desired result and admitting 100 years of precedent have held that littoral rights are constitutionally protected, the majority suddenly declares, "the exact nature of these rights rarely has been described in detail." Pet. App. 18. The majority focused only on "redefining" the two littoral rights that the First District Court of Appeal expressly found were eliminated and taken. The majority also created a new constitutional duty and invoked the inapplicable doctrine of avulsion as an alleged background principle of law to try to camouflage its dramatic change in state law. These issues will be discussed in turn.

1. The redefined and changed littoral right of contact with the MHWL.

It is beyond argument that Florida law has always required a property to touch or border the MHWL in order to be a littoral property with attendant littoral rights.[16] Justice Lewis, in his dissent, concisely chronicled the historical Florida law:

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[16] *See Sand Key*, 512 So. 2d at 936 ("[The Florida Supreme 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.").

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

Pet. App. 43-44 (footnotes and citations omitted) (emphasis in original).[17]

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[17] 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)).

Pet. App. 44 (emphasis in original).

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The majority does not dispute this contention; it simply ignores this fundamental condition of contact with the MHWL that is precedent to the existence of **all** littoral rights.[18] If the upland property is separated from the MHWL, then the entire property is no longer littoral in character, and all littoral rights are lost.

The majority attempted to sidestep this background law by simply claiming, "We have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water." Pet. App. 36. The majority then invokes the following "non-existent rule of state substantive law" to find no taking of littoral rights occurs when a property's boundary is severed from the MHWL: "under Florida common law, there is no independent right of contact with the water [or MHWL]. Instead contact is ancillary to the littoral right of access to the water." Pet. App. 36.

Not surprisingly, the majority fails to cite a single case to support this previously non-existent background principle of state law. To the contrary, it silently overrules its previous holding in *Sand Key*, 512 So. 2d at 936, that "littoral property rights . . . include the following **vested** rights: (1) the right of access to the water, **including the right to have**

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[18] Even the Act itself acknowledges this principle. Fla. Stat. § 161.201 ("Preservation of common-law rights.--Any upland owner or lessee who by [establishment of an ECL] ceases to be a holder of title to the mean high-water line . . . ."); Pet. App. 36-40.

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the property's contact with the water remain intact . . . ." (emphasis added).

The majority does not acknowledge this overruling because doing so would be an obvious admission that it has created a new background principle of state law, which eliminates littoral rights. This new rule of law is at odds with all other Florida precedent. Never before has the Florida Supreme Court suggested, much less held, that a littoral property does not have to touch the MHWL for the littoral owner to have a constitutionally protected littoral right of access. Such holding directly contradicts the Florida Supreme Court's previous holdings, and is thus completely unpredictable in the context of relevant precedents.

Even assuming that the right to have the property remain in contact with the water is part of the littoral right to access, the majority does not explain why the elimination of this part of the heretofore constitutionally protected littoral right of access is not an uncompensated taking. Instead, the majority ignores the fact that the littoral right of **exclusive** access has been completely eliminated by the Act, and replaced with a statutory right of **nonexclusive** access, concluding that this exchange is acceptable because "[d]irect access to the water is preserved under the Act." Pet. App. 38.

Regardless of the majority's semantics, the outcome is clear: the law in Florida has been radically altered because touching the MHWL is no longer a condition precedent to possessing littoral rights.

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2. The redefined and changed littoral right to accretion.

For 100 years it has been well-established law in Florida that the littoral right to accretion is a vested present property right. *Sand Key*, 512 So. 2d at 936 ("littoral property rights include the following **vested** rights: . . . (4) the right to receive accretions and relictions to the property."). In *Florida National*, 338 So. 2d at 17,–a case indistinguishable from the instant case–the court held unconstitutional a statute that attempted to permanently fix the boundary between upland and sovereign submerged lands (eliminating the Ordinary High Water Line as the boundary) 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 . . . .").[19]

In *Florida National*, the Florida Supreme Court expressly recognized that the littoral right to accretion is a present right to acquire future property by holding "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

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[19] Ironically, in *Florida National*, the "State concede[d] the invalidity of the boundary-setting provisions" but refuses to do so in this case. 338 So. 2d at 19 (England, J., concurring in part).

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added). Not only did the Florida Supreme Court recognize that the littoral right to accretion was a present and a constitutionally protected right under the Florida and U.S. 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).[20]

In the face of this direct explanation of the nature of the present right to future accretions, the Florida Supreme Court now turns a blind eye and invokes non-existent rules of state substantive law to conclude the right to accretion "is a *contingent, future interest* that only becomes a possessory interest if and when land is added to the upland by accretion or reliction." Pet. App. 20. Notably, the Florida Supreme Court does not and cannot cite a single precedent in Florida law for the proposition that the right to accretion is a "contingent" or "future" right as opposed to a current right to future

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[20] This language is actually part of the trial court's ruling that the Florida Supreme Court quoted with approval.

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accretions as it held in *Florida National*, 338 So. 2d at 17.

Having redefined the right to accretion as a "contingent future right," the majority then summarily concludes that it is not "implicated" or "applicable," presumably because accretion will never happen in the future because the State will be under a statutory duty to continually maintain the beach such that erosion or accretion does not occur. This is at odds even with the legislative scheme, which recognized that the present right to accretion was held in such high esteem that it had to be expressly eliminated to carry out its purpose. Fla. Stat. § 161.191(2).

This Court–135 years ago–recognized this right with comparable esteem:

> The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one.

County of St. Clair v. Lovingston, 90 U.S. 46, 68-69 (1874).

The Florida Supreme Court further attempted to justify the redefinition of the right to accretion, stating there is no longer a "need" for the right because the Act statutorily solves the same problem

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that the common law doctrine of accretion was created to solve. Again, the majority fails to cite any "background principle of state law" that supports a conclusion that it is permissible to eliminate a constitutionally protected property right if it is no longer "needed."

It is telling that the majority did not expressly overrule its prior century of precedents. Instead, it decided to ignore those precedents and pretend the law has always been something different. As the dissent noted, prior case law is merely "an inconvenient detail of Florida legal precedent" to the majority. Pet. App. 45.

The sole purpose for the majority's creation of this result-oriented law is to allow the State's beach nourishment program to continue without having to pay for property taken. The Florida Supreme Court's decision is nothing short of a sudden, dramatic, and radical change in the law necessary to accomplish its desired policy result, unsupported by any background principle of Florida law.[21]

3. The creation of a counterbalancing constitutional duty to protect the beaches.

In an apparent attempt to create a counterbalance to the constitutional right to compensation when property is taken, the Florida

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

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Supreme Court creates–from whole cloth–"a constitutional duty to protect Florida's beaches." *Id.* at 16. The Florida Supreme Court does so by citing to the traditional public trust doctrine in the Florida Constitution, which states only that the state owns lands below the MHWL. Fla. Const. art. X, § 11. This provision creates no duty to "protect" beaches (much less private beaches that are landward of the MHWL) and has never before been interpreted to create such a duty.

The Florida Supreme Court also cites to the Florida Constitution as creating "an obligation to conserve and protect Florida's beaches as important natural resources." *Id.* at 16. This section provides:

> It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.

Fla. Const. art. II, § 7(a).

The Florida Supreme Court's sweeping interpretation of this provision is original and no less suspect given the specific references in this section to pollution abatement. Additionally, the Florida Supreme Court does not–and cannot–explain how a non-natural beach nourishment altering the effects of natural processes conserves and protects "natural" resources.

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Even if, for the sake of argument only, these two state constitutional provisions create a duty to protect Florida's beaches, neither provision gives the State the right to enter private property to preserve or alter private beaches, much less take private property without due process and compensation.

4. The common law doctrine of avulsion is not applicable to the facts of this case.

The Florida Supreme Court tries to invoke the common law doctrine of avulsion as a "background principle" of state law that justifies the taking of private property in the name of a beach nourishment project. *See Lucas*, 505 U.S. at 1029. The analysis of the doctrine of avulsion, however, misses the mark and undermines the Florida Supreme Court's own conclusion.

As the Florida Supreme Court notes, an avulsive event that causes a retreat of the beach does not change the boundary line and the upland owner does not lose title to the land submerged by the event.[22] Pet. App. 24 (citing *Bryant v. Peppe*, 238 So. 2d 836, 838 (Fla. 1970)). Instead, the upland owner continues to own to the pre-avulsive event MHWL, which would include land that is physically submerged after the event. Pet. App. 24.

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[22] Avulsion is defined as the sudden or perceptible loss or addition to land by natural forces, such as hurricanes. *See Sand Key*, 512 So. 2d at 936 ("by action of the water"); *Siesta Properties, Inc. v. Hart*, 122 So. 2d 218, 224 (Fla. 2d DCA 1960) (by "action of the elements").

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The common law allows an owner to "reclaim" its post-event submerged land. Pet. App. 31. The flaw in the Florida Supreme Court's logic is that in such an event, the State does not lose any land because it only owns submerged lands (i.e., those below the pre-event MHWL) and does not own any pre-event dry lands. Thus, only the upland owner has the right under the common law to place sand on the beach out to the pre-avulsive event MHWL and reclaim the dry land lost by the avulsive event. Because no public beaches were in existence when the avulsive events occurred, the Florida Supreme Court's attempt to find sanctuary by holding that "the Act authorizes actions to reclaim public beaches that are also authorized under the common law after an avulsive event" is unavailing, and has no application as a background principle of state law. Pet. App. 40.

C. This Court should expressly recognize the doctrine of "judicial takings."

If a state, through its legislative or executive branches, cannot violate the Fifth Amendment by taking property without paying compensation, why should the judicial branch be allowed to do so? While a majority of this Court has never squarely addressed this question, several historical and recent decisions provide the doctrinal basis for concluding that a decision of state court that violates the Fifth Amendment's Takings Clause should be treated as a taking just as if the act was undertaken by the legislative or executive branch. It follows that this Court should hold that a state court decision

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that suddenly and dramatically changes the definition of property under state law, which decision is unpredictable in terms of relevant precedents, is a taking of property subject to the Fifth Amendment's compensation requirements. *See Hughes*, 389 U.S. at 296-97 (Stewart, J. concurring).

1. This Court's prior cases provide the doctrinal foundation for judicial takings.

As early as 1879, this Court recognized that the actions of a state court judge could violate a person's right to equal protection under the Fourteenth Amendment. In *Ex Parte Virginia*, 100 U.S. 339 (1879), an act of Congress made it a misdemeanor for any person selecting jurors to prohibit an otherwise eligible person from serving based solely on race. *Id.* at 344. A state court judge was arrested for violating this act, and challenged its constitutionality. In denying the state judge's petition for writ of habeas corpus, this Court found the act constitutional because it implemented the prohibitions of the Fourteenth Amendment. *Id.* at 349. In so doing, this Court stated:

> We have said the prohibitions of the Fourteenth Amendment are addressed to the States. . . . A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. . . . Whoever, by virtue of public position under a State government, deprives another of **property**, life, or

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> liberty, without due process of law, or denies or takes away the equal protection of the laws, 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. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

Id. at 346-47. (emphasis added).

This Court's decision in the equal protection case of *Neal v. Delaware*, 103 U.S. 370, 389-90 (1880),–which cited *Ex Parte Virginia* with approval– held that the state recognizes "an amendment of the Federal Constitution, from the time of its adoption, as binding on . . . every department of its government . . . ." These early cases stand for the proposition that the Equal Protection Clause of the Fourteenth Amendment applies to a state's judicial branch in just as it applies to the state's legislative and executive branches.

Thereafter, in *Scott v. McNeal*, 154 U.S. 34 (1894), this Court held that a judgment of a state probate court violated due process of law when it transferred property of a person believed to be deceased when he was, in fact, alive. This Court stated that the Fourteenth Amendment's due process of law "prohibitions extend to **all acts** of the state, whether through its legislative, its executive, **or its judicial authorities**." *Id.* at 45 (emphasis added); *accord Brinkerhoff-Faris Trust & Savs. Co.*

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v. Hill (*Brinkerhoff-Faris*), 281 U.S. 673, 680 (1930) (basing its decision on procedural due process, holding "the federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government").

A few years later this Court, in *Chicago Burlington*, 166 U.S. 226, addressed the applicability of the Fifth Amendment's Taking Clause to the states. This Court has repeatedly recognized this case as applying the Fifth Amendment to the States through the Fourteenth Amendment. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith* (*Webb's*), 449 U.S. 155, 160 (1980); *First English,* 482 U.S. at 310 n.4; *Dolan v. City of Tigard*, 512 U.S. 374, 383-84 (1994); *Palazzolo v. R.I.*, 533 U.S. 606, 617 (2001).

This Court's holding in *Chicago Burlington* certainly seems to apply the Takings Clause to state court actions:

> 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.

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Chicago Burlington, 166 U.S. at 241.

In 1905, a plurality of this court in *Muhkler v. New York & Harlem Railroad Co.*, 197 U.S. 544 (1905), analyzing a state court's change in property law and divergence from a prior decision under the Contracts Clause of the U.S. Constitution, found the change so unsupported in logic that it had the effect of impairing prior contracts.

In some later cases, Justice Holmes seemed to imply, in dicta or otherwise, that state judiciaries are generally free to change state law without running afoul of the Due Process Clause of the U.S. Constitution. *See Patterson v. Colo.*, 205 U.S. 454, 461 (1907); *O'Neil v. N. Colo. Irrigation Co.*, 242 U.S. 20, 26-27 (1916).[23] "Justice Holmes recognized in *Mahon*, however, that if the protection against the physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by the constitutional limits." *Lucas*, 505 U.S. at 1014 (citing *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 414-16 (1922)).

One conclusion that appears to be settled by this Court is that the "the government does not have unlimited power to redefine property rights." *Loretto*, 458 U.S. at 439. In *Loretto*, this Court rejected an argument that the state statute authorizing a physical occupation of a portion of a building for cable installation created a new property right in the tenant

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[23] These cases do not address or discuss the *Chicago Burlington* decision.

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such that the occupation was not an unconstitutional taking. *Id.*

In *Loretto,* this Court relied upon its unanimous opinion in *Webb's*, 449 U.S. at 164. In *Webb's*, a Florida statute provided that the interest on monies deposited in an interpleader fund with the clerk of court was income of the clerk. The statute could have been interpreted in manner that only the income on the clerk's fee belonged to the clerk and the interest on the remainder belonged to the successful litigant. *Id.* at 160. The Florida Supreme Court, however, interpreted the statute as providing all income belonged to the clerk and found its interpretation was not a taking under the Florida or U.S. constitutions as the deposited money was "public" not "private" money. *Id.*

Upon review, this Court unanimously 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

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> as a shield against the arbitrary use of governmental power.

Id. at 164. (emphasis added).

The proposition that a court cannot redefine property any more than a legislature and avoid the Takings Clause of the U.S. Constitution, most clearly arises from Justice Stewart's concurring opinion in *Hughes*, 389 U.S. 290. In *Hughes*, Justice Stewart noted his fundamental concern with state court rulings that suddenly change state property law, decreeing no property existed 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 general rules of real property law, including the rules governing the property rights of riparian owners," Justice Stewart concluded that a state court 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 of this Court. *Id.* at 296-97. In determining whether such a sudden change in law has occurred, Justice Stewart stated that "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.*

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Justice Stewart clearly noted that a state court cannot rely upon such a fiction to evade a constitutional limitation. Accordingly, Justice Stewart–disregarding the state court's majority conclusion that its change in state law was "not startling"–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.[24]

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 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

[24] While this Court typically defers to a state court's decision on matters of state law as final, such is not the case where it is asserted that the state court seeks to evade the U.S. Constitution. *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 655 (1927); *O'Neil*, 242 U.S. at 26.

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> 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).

Other members of this Court have expressed grave concerns over a state court's continued use of this property "fiction" to take private property. In the dissent from denial of the petition for writ of certiorari, 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, 510 U.S. 1207, 1207 (Scalia, J., and O'Connor, J., dissenting) (citation omitted).

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After citing Justice Stewart in *Hughes* and the *Webb's* case with approval, 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).

More recently, Justice Kennedy writing for the Court in *Palazzolo*, 533 U.S. 606, recognized that redefining property rights cannot deprive an owner of such rights. This Court rejected the argument that since property rights are created by the state "by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations," such that subsequent owners acquire a property with lesser rights and have no taking claim. *Id.* at 626.

This Court held that the "State may not put so potent a Hobbesian stick into the Lockean bundle" as it "would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation." *Id.* at 627. Justice Kennedy relied on *Webb's* in concluding that

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the "State may not by this means secure a windfall for itself." *Id.*

2. Reasons why this Court should expressly recognize a judicial takings doctrine.

In recognizing a judicial takings doctrine this Court must decide whether it is constitutionally acceptable for a state court to take property by allowing a physical invasion of the property when it is not constitutional for the legislative and executive branch to do so. Stated differently, should this Court "clothe[] [a judge as a state] agent with the power to annul or evade [the U.S. Constitution]?" *Ex Parte Virginia*, 100 U.S. at 347.

Given this Court's steadfast application of other constitutional provisions to the state judiciary (i.e., equal protection, due process, etc.) there are no doctrinal reasons why the Takings Clause should not also apply to the state judiciary. In fact, all doctrinal reasons would support the express application of the Takings Clause to the state judiciary.[25]

First, nothing in the text of the Fifth Amendment suggests that it applies to one branch of government and not others. *See Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 451 (1924) (noting the Contract Clause–which provides "No state shall * * * *pass any* * * * *law*"–is applicable only to the legislative branch (alteration in original)).

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[25] *See generally* Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990).

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Second, the Takings Clause is founded upon basic notions of fairness and justice. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). Adopting a judicial takings doctrine would: 1) promote fairness and justice as it places prudent limits on state courts regarding dramatic changes in property law; 2) provide some remedy to a property owner who lost an interest that she had every right to believe was hers, through no fault of her own; and 3) prevent a state court (many of which have elected judges) from imposing a great burden on a large class of property owners with a single ruling.[26]

Third, this Court's takings jurisprudence provides no basis for distinguishing between action of a state's court and those of its legislative or executive branches. In *Brinkerhoff-Faris*, 281 U.S. at 679-80 this Court stated:

> If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative,

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[26] J. Nicholas Bunch, Note, *Takings, Judicial Takings, and Patent Law*, 83 Tex. L. Rev. 1747, 1767 (2005).

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> executive, or administrative branch of government.

(footnotes and citations omitted); *see also supra* Part I(C)(1).

Fourth, if state courts are free to reorder property rights insulated from the Takings Clause's requirement to pay compensation, then the legislative and executive branches will no longer change the law themselves (and pay for it); rather they will encourage the judiciary to make the change so that the state does not have to pay compensation. Thompson, *Judicial Takings*, 76 Va. L. Rev. at 1507. Professor Thompson provides several examples where state legislatures refused to change property rights but enacted legislation urging the judiciary to do so. *Id.* The courts should not be used by the other two branches of government as a shelter from the Takings Clause's compensation requirement.

Fifth, the stability of property rights is the foundation for a healthy economy. *See* Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 Sup. Ct. Econ. Rev. 1, 22 (2003) ("The documented effect of increasing rule of law values on economic growth is robust. Individuals are more willing to invest in economic growth where property rights are stable . . . ."); *E. Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in judgment) (noting that a drastic retroactive change in the law "can destroy the reasonable certainty and security which are the very objects of property ownership"); *Colo. v. N.M.*, 467 U.S. 310, 316 (1984) (recognizing "society's competing interests in increasing the stability of property rights and in

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putting resources to their most efficient uses . . . .").
If property rights are subject to sudden and dramatic changes then they become less stable. This instability injects considerable uncertainty into the financial markets and negatively affects the economy. *See id.*

Most academic objectors to a judicial takings theory suggest state courts need the ability to "adjust the common law to changing circumstances." Thompson, *Judicial Takings*, 76 Va. L. Rev. at 1499. Such an objection ignores that the proposed judicial takings test would only apply to sudden, dramatic, and radical changes to state law, not gradual and minor changes that could be anticipated by prior precedents. One scholar has analogized the common law to a sea anchor:[27]

> "Common law is jurisprudentially bound by precedent, which extends behind us like a giant sea anchor on the end of an ever-lengthening line. Statutory law is changeable only by legislatures who seemingly sail with the winds of popular opinion." Like the sea anchor, background principles do not prevent gradual change, but do keep individual rights from being capsized by

[27] "A 'sea anchor' is a conical-shaped canvas bag that keeps the boat head facing raging seas." Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law"*, 42 N.Y.L. Sch. L. Rev. 345, 399 n.337 (1998).

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> squalls of legislative [or judicial] passion.[28]

It is understood that common law systems need flexibility and the proposed test allows that flexibility while simultaneously preventing state courts from circumventing constitutional protections.

Despite suggestions to the contrary, a judicial takings doctrine based on Justice Stewart's test is workable and will not result in a flood of litigation. Lower courts have had little trouble recognizing a sudden and dramatic change in property law. *See Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985) (holding state supreme court could overrule a century of law governing water rights, but could not divest vested water rights without just compensation), *rev'd on procedural grounds*, 477 U.S. 902 (1986); *Sotomura v. County of Hawaii*, 460 F.Supp. 473, 482-83 (D.C. Haw. 1978) (holding state supreme court's change of seaward property boundary was a radical departure from state law that constituted a taking). Moreover, the proposed ad-hoc test can be applied easily just like other ad-hoc tests this Court has developed. *See, e.g., Penn Cent. Trans. Co. v. City of New York*, 438 U.S. 104 (1978).

One of the last remaining arguments against a judicial takings doctrine is based on federalism. This argument posits that to the extent federal

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[28] *Id.* (citation omitted) (quoting Richard Lowell Nygaard, *Freewill, Determinism, Penology, and the Human Genome: Where's a New Liebniz When We Really Need Him?*, 3 U. Chi. L. Sch. Roundtable 417 (1996)).

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courts review a state court's change in property law (which is a state concern), federal courts will be federalizing that law. This argument, however, ignores the fact that this Court and other federal courts constantly review state actions on all types of issues to ensure those actions do not run afoul of the U.S. Constitution. *See Stevens*, 510 U.S. at 1207; *Agins v. City of Tiburon*, 447 U.S. 255, 257 (1980) (executive taking); *Lucas*, 505 U.S. 1003 (legislative taking). There is no reason why there should be a different rule for property rights and the Takings Clause.[29]

This Court should adopt Justice Stewart's judicial takings doctrine to curb state courts from redefining property out of existence in an effort to manipulate this Court's holding in *Lucas* that the "redefined" property rights never existed under "background principles of state law." *See Stevens*, 510 U.S. at 1207 (a "State may not deny rights protected under the Federal Constitution . . . by

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[29] Another unavailing argument made against judicial takings is that a court cannot "take" property because it does not have funds with which to pay compensation. This argument, however, should equally apply to the executive branch, as it does not control the state's purse strings. *See generally* Bunch, *supra* note 26, at 1771. Rather, an act of one state actor makes the state (not any individual branch) liable. *Ex Parte Virginia*, 100 U.S. at 347 (one acting "in the name and for the State, and is clothed with the State's power, his act is that of the State.").

Moreover, to the extent the judiciary desires to change the law in a manner that requires compensation, there are some potential creative ways in which a court could condition such a change. *See* Thompson, *supra* note 25, at 1513 (describing two approaches: "automatic compensation" and "legislative choice").

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invoking nonexistent rules of state substantive law."); W. David Saratt, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487, 1493 (2004) (describing this situation as the "Lucas loophole"). This Court currently holds state courts responsible for violations of equal protection, due process, and other constitutional violations. *See supra* Part I(C)(1). There are no doctrinal reasons that should prevent this Court from expressly extending that practice to the Takings Clause of the Fifth Amendment.

Accordingly, STBR requests that this Court hold that a state court decision which suddenly and dramatically changes what constitutes property under state property law, in a manner that is unpredictable in terms of relevant precedents, is a taking of property subject to the Fifth Amendment's compensation requirements. Further, this Court should hold that the Florida Supreme Court's Opinion below effects a taking in violation of the U.S. Constitution because it suddenly and dramatically changed STBR's members' property in a manner that was unpredictable in terms of relevant precedents.

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II. The Florida Supreme Court's Approval of a Scheme That Eliminates Constitutionally Protected Littoral Rights and Replaces Them with Statutory Rights Violates the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment of the U.S. Constitution.

This Court's Takings Clause jurisprudence generally falls into two distinct classes: physical and regulatory. *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). A physical taking is one "where the government authorizes a physical occupation of property (or actually takes title) . . . ." *Id.* A regulatory taking occurs when a government regulation limiting the use of the property "goes too far" as determined by the ad hoc factual inquires described in *Penn Central*, 438 U.S. 104.

In a physical takings case, "the government . . . has a categorical duty to compensate the former owner," *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002), "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner . . . ." *Loretto*, 458 U.S. at 451.

This Court has repeatedly held that a physical invasion of property without the payment of compensation will not be condoned. *See Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979) (the government's imposition of a public right of access to the waters of a private

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pond is a physical taking); *Loretto,* 458 U.S. 419 (government appropriation of a small portion of rooftop in order to provide cable TV access for apartment tenants is a physical taking); *U.S. v. Causby,* 328 U.S. 256 (1946) ("Government planes using private airspace to approach a government airport is a physical taking."); *U.S. v. Pewee Coal Co.,* 341 U.S. 114 (1951) (government's seizure and operation of a coal mine to prevent a strike by coal miners constituted a physical taking).

The physical occupation mandated by the Act and approved by the Florida Supreme Court is no different and no less intrusive than any of the above cases. By changing the boundary line and replacing littoral rights with statutory rights, the Act, with the blessing of the Florida Supreme Court, effects a physical taking of STBR's members' property.

The effect of the Act as applied to the rights of STBR's members in this case is not in dispute. Prior to Respondents' application of the Act, STBR's members' title and legal description included ownership of the upland extending to the dynamic MHWL. App. 207, 211. As a result of natural law and over a century of state common law, STBR's members possessed constitutionally protected littoral property rights by virtue of their boundary being the MHWL. *See supra* Parts I(A) & (B)(1)-(2).

The Florida Supreme Court concluded that it is constitutionally permissible for the Act (and itself by redefining property rights) to instantaneously convert what had for a century been oceanfront property, with the full panoply of constitutionally protected littoral rights, into ocean view property

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with no common law littoral rights at all. The Act provides:

> Once the erosion control line along any segment of the shoreline has been established . . . , the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or any other natural or artificial process, except as provided in s. 161.211(2) and (3).[30]

Fla. Stat. § 161.191(2). Not only is the upland property owner's littoral right to receive accretions specifically eradicated, once the sand is placed seaward of the ECL, the upland property no longer touches the MHWL, so all other littoral rights are lost as well.[31]

The Florida Supreme Court was apparently unconcerned, however, because "the Act expressly preserves the upland owners' rights to access, use, and view, including the rights of ingress and egress. See § 161.201." Pet. App. 26. Far from preserving the upland owner's constitutionally protected littoral rights, Florida Statutes section 161.201 merely

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[30] Florida Statutes sections 161.211 (2) and (3) allow, but do not require, the erosion control line to be vacated under certain very limited circumstances.

[31] In its Final Order, DEP admits that the Act, and its application thereof, eliminates littoral rights. Pet. App. 93-94; *see also supra* note 15.

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provides inferior and more limited statutory replacement rights.[32]

The Act's claimed "preservation" of all other littoral rights by granting statutory rights is an oxymoron. Constitutional rights exist as a matter of constitutional law–not statutory law–and are protected by the U.S. 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). A statute does not and cannot create or eliminate constitutional rights. *Id.*

Of course, a constitutionally protected property right may be taken for a public purpose with the payment of just compensation as allowed by the U.S. Constitution itself. As applied in this case, however, the Act (with the Florida Supreme Court's blessing) takes all littoral rights, gives them to the State, and "replaces" them with inferior statutory rights without paying compensation as contemplated by Florida Statutes section 161.141.

This replacement of littoral rights is a physical taking. All things littoral that STBR's members formally owned was taken from them and given to the Board of Trustees. The Board of Trustees now owns the property landward of the MHWL and is thus the littoral owner with all littoral rights. In exchange, the State (via the Act) gives STBR members a license to use the new public beach just the same as any other public citizen. What the Act fails to give STBR's members is the right to exclude persons from the dry stand beach in front of their homes to the post-

[32] *See supra* note 11.

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nourishment MHWL–a right they once enjoyed, which is "universally held to be a fundamental element of the property right . . . ." *Kaiser Aetna,* 444 U.S. at 179-80.

In fact, once the new public beach is established, commercial vendors can apply for a permit from Walton County to operate "water based activities" from the public beach that include "ocean kayak rentals, water trampolines, climbing walls, inflatable boat rides, personal watercraft rentals, and parasail operations." Walton County, Fla., Land Dev. Code § 22-51.[33] The County also permits a vendor to sell, rent, or solicit "any merchandise, services, goods, or property of any kind or character" on the new public beach so long as they purchase a vendor permit. *Id.* § 22-60.

The pre and post beach nourishment property rights are starkly different. Before the beach nourishment, STBR members owned and controlled the right to exclude all vendors from the beach between their homes and the MHWL. After the beach nourishment, a daily water-based activity park could exist on the new beach between STBR's members homes and the MHWL. Stated simply, STBR's members have lost the right to exclude the general public from the waterfront littoral property for which they paid a premium when they purchased their land.[34]

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[33] The County's Code is published online at www.municode.com.

[34] Land being riparian "is often the most valuable feature" of the property. *Hughes*, 389 U.S. at 293; *accord Thiesen*, 78 So. at 507 ("The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability";

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Following the Respondents' application of the Act and recording of the ECL, STBR's members' title extends only to the ECL as the property boundary. There is no natural law or common law significance to owning property bordering the ECL.[35] No littoral rights attach thereto.

The changing of the legal description in a deed from the MHWL to the ECL changes the physical extent of the property. Only a court can alter or reform the legal description of property in a deed as it is a private contract.[36] Any attempt to change the description contained in a deed by a state legislature or state executive agency, **without the payment of compensation**, would be prohibited by the Contracts Clause of the U.S. Constitution. U.S. Const. art. 1, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

As noted in *Loretto*, a physical "appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, the

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further, "riparian rights incident to the ownership of the land were the principal, if not sole, inducement leading to its purchase . . . .").

[35] It should be noted that this case was litigated assuming that the ECL was placed directly on top of the MHWL existing on September 7, 2003. As noted in Part I(B)(4), there may be additional issues concerning whether the September 7, 2003 MHWL survey is correct given the numerous preceding avulsive events. This issue, however, is irrelevant to whether or not the replacement of the MHWL with the ECL, in and of itself, is a taking.

[36] *See, e.g.*, William R. Anson, *Principles of the Law of Contract with a Chapter on the Law of Agency* 82 (Arthur L. Corbin ed., 3d Am. Ed. 1919) ("The only formal contract of English law is the *contract under seal*, sometimes also called a deed . . . .").

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government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto,* 458 U.S. at 435 (citations omitted). In this case, by converting waterfront (i.e., littoral) property to water view (i.e., non-littoral) property the State has done just that–sliced through every strand of the bundle of property rights previously enjoyed by STBR's members.

"Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto,* 458 U.S. at 435 (quoting *U.S. v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)). When a "government permanently occupies physical property, it effectively destroys *each* of these rights." *Id.* (emphasis in original). The U.S. Constitution makes no distinction in the size of property physically taken. *Id.* at 436 ("[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.").

In this case, the Board of Trustees has confiscated the littoral rights associated with the property owned by STBR's members. STBR members have no right to possess land touching the MHWL or littoral rights inherent in such ownership and have been deprived of the right to exclude others from accessing the beach in front of their property down to the MHWL. *Id.* at 435 (noting that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights"). The Board of Trustees' occupation of the upland touching the post-nourishment MHWL denies STBR's members' "any power to control the use

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of the property" or to make a profit therefrom. *Id.* In addition, STBR's members cannot dispose of or sell what was their property, including upland touching the MHWL and littoral rights, as they no longer possess the same. *Id.*

The Board of Trustees now physically holds what STBR's members once held: littoral property. The conciliatory statutory rights provided by the Act are hardly an equal trade and are simply an attempt by the Board of Trustees to achieve its "desire by a shorter cut than the constitutional way of paying for the change." *Mahon*, 260 U.S. at 416.

Because the Board of Trustees has physically taken and occupies the upland touching the post-nourishment MHWL and its attendant littoral rights, they have a categorical duty to compensate STBR's members for possessing such property.[37] Accordingly, this Court should find the Board of Trustees' action constitutes an uncompensated taking in violation of the Fifth Amendment to the U.S. Constitution, reverse the Florida Supreme Court's Opinion, and remand for further proceedings consistent therewith.

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[37] The Respondents have previously asserted that there is no physical taking but a regulatory taking. In so doing they do not and cannot explain what the regulation is and how it regulates STBR's members' **use** of their property. *See Yee*, 503 U.S. at 522 (a regulatory taking exists when a government's regulation of the property's use goes too far). To the contrary, the Act does not regulate the **use** of any of STBR's members' properties; instead, it replaces and modifies the legal description in STBR's members' deeds by replacing the words "mean high water line" with "erosion control line." Thus, the taking in this case is physical and not regulatory.

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III. The Florida Supreme Court's Approval of a Scheme That Allows an Executive Agency to Unilaterally Modify a Private Landowner's Property Boundary Without Notice, a Judicial Hearing, or the Payment of Just Compensation Violates the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.

The determination of whether procedural due process has been violated is a two-part inquiry. The first inquiry is whether a party has been deprived of a protected property interest. *Am. Mfrs. Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). The second inquiry is whether the procedures employed in depriving the party of the protected interest comport with due process. *Id.*

As to the first inquiry, it is undisputed that procedural due process requirements of the Fourteenth Amendment apply to interests in real property. *See Board of Regents v. Roth*, 408 U.S. 564, 571-72 (1972) ("The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate . . . ."). There is little doubt that owners have a protected property interest in maintaining the boundaries of their real property, especially when one boundary is the MHWL which entitles them to constitutionally protected littoral rights.[38]

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[38] *See supra* note 34.

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The ECL survey adopted by the Board of Trustees and recorded in this case, according to the Act, changes the property boundary of STBR members' properties from the MHWL to the ECL. App. 207, 211, 261; Fla. Stat. § 161.191(1).[39] Thus, the Board of Trustees' recordation of the ECL that changes the boundary line of their real property deprives them of a protected property interest.

It is likewise obvious that the procedures employed in depriving landowners of their property interest do not comport with due process. Due process requires that an owner have a meaningful opportunity to be heard prior to being deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

This Court described the import of procedural due process in *Fuentes*:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. . . . [T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our

[39] Given this ECL survey covers a 6.9 mile stretch of beach and crosses more than 453 individual properties, it is assumed many other property boundaries were altered by the recording. App. 191-92, 201. One member of Save Our Beaches, Inc., testified that she owned four of these properties that included the MHWL as their boundary. App. 226.

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> constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference."

407 U.S. at 80-81 (citing *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). With limited exceptions, procedural due process requires notice and a meaningful hearing **before** the deprivation. *Id.* at 81 ("If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.").

The Act's procedures prior to establishing the ECL fall woefully short of meaningful. The Act provides:

> the board of trustees shall give notice of the [ECL] survey and the date on which the board of trustees will hold a public hearing for the purpose of receiving evidence on the merits of the proposed erosion control line . . . of locating and establishing such requested [ECL]. Such notice shall be [made] . . . in order that any persons who have an interest in the location of such requested erosion control line can be present at such hearing to submit their views concerning the precise location of the proposed erosion control line.

Fla. Stat. § 161.161(4).

The Act requires the Board of Trustees to approve or disapprove of an ECL:

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> In locating said line, the board of trustees shall be guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible.

Fla. Stat. § 161.161(5). Once approved the ECL survey is recorded in the official records of the appropriate county, the result of which changes the boundary line of a property.[40]

The Act's procedural requirements are deficient because the Act:

- Only requires notice of a preliminary public hearing where landowners can "submit their views";
- Only requires the Board of Trustees to "receive" landowners' views regarding the location of the ECL;
- Does not require the Board of Trustees to make a decision at the public hearing; rather the Board of Trustees delegates to an agent the decision of where to locate the ECL;
- Does not require that the littoral landowners be provided with notice of the final adopted ECL; and

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[40] Fla. Stat. § 161.181; App. 49-50, Pet. App. 112; *see generally supra* note 8.

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- Does not provide any ability to cross-examine witnesses for the Board of Trustees at the "public hearing" regarding the location of the ECL.

In fact, the members of the Board of Trustees do not even attend such public hearings nor do they even review, approve, or adopt the ECL. App. 49-51, 261. Rather, the Board of Trustees delegates all functions, duties, and requirements to an employee of DEP. *E.g.*, App. 49, 87-90.

The Act's provisions are a perfect example of what due process is not. There is nothing meaningful in the Act's procedures as they only include a requirement to hold a preliminary pro forma hearing to give the public a chance to speak. To be meaningful, the Act must provide a hearing before a judicial officer to approve the State's modification of a landowner's deed and provide compensation.[41] Otherwise, the modification of a deed would violate the Contract Clause.[42]

In *Fuentes,* this Court held that "the Florida . . . prejudgment replevin provisions work a deprivation of property without due process of law

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[41] *Goldberg v. Kelly*, 397 U.S. 254 (1970) (finding that failure to allow the confrontation or cross-examination of witnesses before the decision maker "are fatal the constitutional adequacy of the procedures," and further "It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker.").

[42] *See generally* Anson, *supra* note 36, at 82; *and* U.S. Const. art. 1, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ").

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insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor." 407 U.S. at 96. In that case, the Florida replevin statute allowed any person "whose goods or chattels are wrongfully detained by any other person" to obtain a writ of replevin to recover them. *Id.* at 73.

In order to obtain a writ of replevin, an applicant only had to allege in "conclusory fashion that he is 'lawfully entitled to the possession' of the property" in a complaint filed in court initiating an action for repossession, post a security bond for twice the value of the property, and prosecute the case without delay. *Id.* at 74. Upon filing of the complaint, the court clerk summarily issues the writ. *Id.* at 74. "There is no requirement that the applicant make a convincing showing before the seizure that the goods are, in fact, 'wrongfully detained.'" *Id.* at 73-74.

The predeprivation procedures and safeguards in *Fuentes*, though not meeting constitutional muster, far exceed the Act's predeprivation procedures. For example, the procedures in *Fuentes*, required a lawsuit to be filed and the involvement of the judicial branch. The Act, however, does not require the involvement of the judicial branch prior to any deprivation. This Court's primary problem with the scheme in *Fuentes* was the lack of a real test by a neutral decision maker prior to the deprivation. 407 U.S. at 83, 96-97. In *Fuentes,* a court clerk reviewing mere allegations in a complaint did not meet due process. *Id.*

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The Act in this case provides no meaningful test nor any standard at any point in time. Rather it vests unbridled discretion in a DEP employee–the Board of Trustees' agent–to place the ECL wherever it wants with no notice to landowners of the final location and no review by any third-party prior to recording the survey and changing the property boundary of hundreds of property owners. If the procedures in *Fuentes* are not meaningful and lack due process, the Act's procedures fall even shorter.

If the Act's process meets constitutional muster, there is nothing to stop the State from instituting similarly inadequate procedures and unilaterally modifying property boundaries with no judicial oversight when, for example, it builds highways. This Court has held that a legislature cannot, consistent with procedural due process, take property from one person and vest it in another:

> It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law
> . . . .

Davidson v. New Orleans, 96 U.S. 97, 102 (1877).[43]

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[43] *Accord Wilkinson v. Leland*, 27 U.S. 627, 657-58 (1829) (recognizing legislative transfer of property without landowner's consent always unconstitutional); *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 161 (1913) ("[A]ll

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As noted by Amicus Florida Association of Home Builders below, the process of recording two surveys that instantly modify boundaries for up to 453 properties without any judicial approval also raises serious concerns regarding marketability of titles. Pet. App. 221-23. In this case, the deeds of the six members of STBR were altered, not by a judicial decree in which each member was a party, but by a survey recorded by an executive agency. To say that a due process violation has occurred is a serious understatement.

CONCLUSION

The Florida Supreme Court "redefined" STBR's members' 100 year-old property rights so that the State would not be liable for a taking and have to pay compensation. Regardless of the Florida Supreme Court's attempt to characterize its decision otherwise, a taking is measured by what the opinion **does,** not what it "says" or how it attempts to justify the result. *Hughes*, 389 U.S. at 297-98. The Florida Supreme Court's Opinion effects a "sudden change in state law, unpredictable in terms of the relevant precedents" in violation of the Takings Clause.

The U.S. Constitution forbids the State's action in this case. For the reasons stated above, STBR respectfully requests that this Court determine that the establishment of the ECL and the Florida Supreme Court's sudden and dramatic change of Florida property law effects an uncompensated taking in violation of the Fifth and Fourteenth Amendments

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authorities agree that [the term due process] inhibits the taking of one man's property and giving it to another . . . .").

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to the U.S. Constitution. Accordingly, this Court should reverse the Florida Supreme Court's Opinion and remand this case for further proceedings consistent therewith.

D. Kent Safriet*
Richard S. Brightman
HOPPING GREEN & SAMS, PA
119 South Monroe Street, Suite 300
Tallahassee, FL 32301
(850) 222-7500
**Counsel of Record for Petitioner*

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