No. 08-1151

In The Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.,

Respondents.

On Writ Of Certiorari To The Florida Supreme Court

BRIEF OF *AMICUS CURIAE* THE FLORIDA SHORE AND BEACH PRESERVATION ASSOCIATION, THE FLORIDA ASSOCIATION OF COUNTIES, AND THE FLORIDA LEAGUE OF CITIES IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Florida Supreme Court's resolution of questions of Florida property law in this case lacked fair support in prior Florida law.

2. Whether, assuming the Act takes littoral property rights to accretion or reliction, the Act is unconstitutional for taking property without just compensation.

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STATEMENT OF INTEREST

The *amici* have received the parties' written consent to file this *amici curiae* brief supporting Respondents.[1] The Florida Association of Counties, Inc. (FAC) was formed in 1929 to assist counties and represent the interests and concerns of Florida county governments. Every county in the state is a member of the Association. The Florida League of Cities, Inc. (FLC) was formed in 1922 to assist cities and represent the interests and concerns of Florida cities. Ninety-nine percent of Florida's 411 municipalities are members of the League, as are five charter counties. Members of the Florida Shore & Beach Preservation Association (FSBPA) have been active participants, either as local government sponsors of a project or financial contributors, in virtually every beach restoration project undertaken in Florida. Its members include private property owners, public agencies and local governments, and professionals who advocate for substantive and financial program enhancements for beach management before the Florida Legislature and Congress. FSBPA members participate in and fund research regarding beach management options and the economic, environmental and storm protection benefits of beach restoration.

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

FSBPA, FLC, and FAC believe that the beach nourishment program in Florida effectively will be eliminated if this Court decides that the state must pay takings damages to every private property owner along a beach that the state, the federal government, or a local government attempts to restore. There is no possible way in which government can afford to condemn, or pay takings damages for, the supposed property rights associated with this case and carry out a meaningful beach restoration program.

In addition, these *amici* are concerned that due to the many Erosion Control Lines (ECLs) that already exist in the state in connection with beach restoration projects, a decision that the lines previously established are a taking of beachfront property of abutting upland property owners, will create an avalanche of takings claims against the State and local governments on completed or ongoing projects. Based simply on the transaction costs of claims for compensation, future projects would be prohibitively expensive, or miles of beaches in critical need of restoration would not be addressed. Moreover, the general public would question its support of a program which must be defended when abutting property owners file actions for monetary damages even though they most directly benefit from the expenditure of taxpayer dollars for beach restoration projects.

The outcome of this case will decide whether the beach restoration program will continue in Florida, as well as similar programs in the rest of the country.

Elimination of the beach restoration program will cause substantial economic losses to the state, beachfront communities, homeowners and businesses as a result of the loss of tourism and tax dollars. In addition, the loss or reduction of beach restoration projects will increase the exposure of upland buildings and infrastructure to the risk of catastrophic losses in the event of hurricanes and other storm events.

SUMMARY OF THE ARGUMENT

It has been suggested by the Petitioners and their *amici* in this case that the members of the Florida Supreme Court who reached the conclusion for the Court in the case at bar, have violated their solemn vows to observe and abide by the Florida Constitution and the United States Constitution, and have deliberately disregarded private property rights long recognized under the state's law of property in order to permit the state to take that private property without compensation, in violation of the Fifth Amendment. It is further urged by the Petitioners and their *amici* that this Court should decide the background principles of Florida's law of property, instead of the Florida Supreme Court, and disregard our federal system. Petitioner's suggestion is outrageous, and this Court should decline Petitioner's request to usurp the function of the Florida Supreme Court. The Florida Supreme Court's decision is based upon a fair and reasonable judicial analysis, and has

fair and substantial support in the state's prior judicial decisions. The claimed property interests allegedly taken in this case by the Florida Beach and Shore Preservation Act (the Act),[2] to wit: rights to have future accretion and land that reemerges by reliction, and a right to have the land make constant contact with the water, do not "inhere in the title to the Petitioner's property itself" under background principles of Florida's law of property. Further, given the enormous benefits that beach restoration bestows on a littoral owner and its property, such theoretical property rights, even if they did exist under Florida's law of property, are more than compensated for by the Act.

ARGUMENT

I. PUBLIC-SPONSORED BEACH RESTORATION UNDER THE PROVISIONS OF THE ACT IS CRITICALLY IMPORTANT TO THE ECONOMY AND WELFARE OF THE STATE OF FLORIDA AND ITS CITIZENS, BUT WILL CEASE IF COMPENSATION IS REQUIRED FOR THE PROPERTY INTERESTS PETITIONERS CLAIM IN THIS CASE.

Government-sponsored beach restoration, which prevents catastrophic losses to lives and property

[2] *Fla. Stat*. ch. 161, part I (2009). The specific sections of the Act in issue in this case are sections 161.191 and 161.201.

when hurricanes strike, protects and enhances littoral property values, assures that beaches are available to the public, and serves the state's and the nation's economies, is in mortal danger if this Court rules that the Florida Beach and Shore Preservation Act is unconstitutional.

Florida is known worldwide for its beaches, and beach restoration is considered vital to Florida, and critical to the state's economy. The State of Florida has 1,197 miles of coastline, and 825 miles of sandy beaches. Florida Department of Environmental Protection, Bureau of Beaches and Coastal Systems, *Strategic Beach Management Plan* (May 2008), p. 2, available at http://www.dep.state.fl.us/beaches/publications/pdf/SBMP/Cover%20and%20Introduction.pdf. Florida's coastline is subjected to powerful tropical storms and hurricanes on a regular basis. Since the Florida Department of Environmental Protection began identifying critically eroded beaches in 1986, Florida's beaches have been dramatically affected by major storms and hurricanes. *See generally,* Florida Department of Environmental Protection, *Critically Eroded Beaches in Florida* (June 2009), p. 1-3, available at http://www.dep.state.fl.us/beaches/publications/pdf/CritEroRpt09.pdf.

The catastrophic losses to beaches and beachfront property and structures caused by hurricanes and tropical storms are obvious and have been well documented by the media. Addressing these losses, and preventing them from occurring in the future, is a critical task. A 2000 report prepared by the Heinz

Center for Science, Economics, and the Environment for the Federal Emergency Management Agency, *Evaluation of Erosion Hazards* (April 2000) available at http://www.heinzctr.org/Programs/SOCW/erosion.shtml, concluded that in the next sixty years, one in four homes within 500 feet of the coast outside of major cities will fall victim to erosion if the beaches are not supported by beach restoration programs, and the effects of erosion are allowed to occur. *Id.* at 111-128. Further, during this time, erosion damage to property would average half a billion dollars annually. *Id.* at 129-130. If coastal construction of homes continues during that period, or if sea levels rise, the damage may be even higher. *Id.* at x.

Beach restoration has been the dominant beach protection policy of the State of Florida since the 1980's. Since the 1970's 203.6 miles of beach in Florida have been restored and renourished, by 61 projects. The federal government has conducted or partnered in approximately 125 of these miles of beach restoration. Presently, Florida has 396.4 miles of critically eroded beach. Local, state and federal entities are now managing over 200 miles of restored beaches in Florida. Florida Department of Environmental Protection, Beaches and Coastal Systems, *Beach Erosion Control Program* (BECP), available at http://www.dep.state.fl.us/beaches/programs/bcherosn.htm. It is estimated that the federal government contributed $680 million to beach restoration and renourishment in Florida through 2002. Significant additional federal funding was also provided for dune

construction, and as a result of the hurricane seasons of 2004 and 2005. National Oceanic and Atmospheric Administration, Coastal Services Center, *Historical Expenditures for Beach Nourishment Projects: Geographical Distribution of Projects and Sources,* available at http://www.csc.noaa.gov/beachnourishment/html/human/socio/geodist.htm.

Through the fiscal year 2006, over $582 million has been appropriated by the Florida Legislature for beach erosion control activities. http://www.dep.state.fl.us/beaches/programs/bcherosn.htm. Local governments also spend considerable sums for beach restoration and renourishment. Except for the Petitioner in this case, beach restoration has enjoyed substantial public and private support.

The reason for the support of beach restoration by littoral property owners is self evident. Because beach width reduces the strength of storm waves, beach restoration and nourishment reduce the risk of storm damage. A 1988 study of the damage due to Hurricane Eloise revealed that in areas where there is very little fronting beach, an additional 50 feet of beach width reduces by nearly half the risk of damage to structures. Robert G. Dean, *Beach Nourishment Theory and Practice,* 186-189 (World Scientific Publishing, Co. Pte. Ltd.) (2002). The economic advantages of beach nourishment on littoral property values are also significant. Two 1990's studies of restoration projects along Marco Island and Captiva Island on Florida's Gulf Coast showed typical increases in property values after restoration of

between 4 and 20 percent. W.B. Stronge, *The Economic Impact on Marco Island Beach Restoration: A Preliminary Analysis*, Proceedings, National Conference on Beach Nourishment Technology, 102-114 (1992), Florida Shore and Beach Preservation Association, Tallahassee, Florida; W.B. Stronge, *The Economics of Government Funding for Beach Nourishment Projects: The Florida Case,* 63(3) Shore and Beach 4-6 (1995). In addition, waterfront property buyers recognize that renourishment associated with beach restoration projects is a significant risk reduction against future erosion damage, and given a choice, most waterfront property buyers would prefer the house whose protection is renewed periodically, especially if the government pays for it. Warren Kriesel and Robert Friedman, *Coastal Hazards and Economic Externality: Implications for Beach Management Policies in the American Southeast,* Heinz Center for Science, Economics, and the Environment, 9 (May 2002).

Beach restoration is also important to state economies. Beaches generate income and taxes, and provide vacationing spots for people throughout the country.[3] Florida's restored beaches are enormously

[3] Of the 62.3 million out-of-state visitors who came to Florida in 2001, a total of 22.4 million indicated that going to the beach was a primary activity during their stay in Florida. *Florida Statistical Abstract,* 2002. In 2008, Florida had more than 84 million out-of-state visitors, and it is estimated that the number will be between 97 million and 104 million by 2010. VISIT FLORIDA and Center for Economic Forecasting and

(Continued on following page)

valuable. Florida's cities and counties have spent a fortune, along with the state and federal government, on restoring and maintaining critically eroded beaches. Typically, beach improvements in Florida are funded by a combination of federal, state and local contributions. Depending on the extent of public ownership and public access, federal funds can fund up to 65 percent of the project cost, while the state funds up to 50 percent of the non-federal share. The remainder is funded by cities, counties and special districts.

FSBPA, FAC, and FLC submit that this court's decision in this case cannot be made without regard to the enormous impacts it will have on the future of beach restoration. The decision in this case will have wide-ranging effects on the future of the United States coastline and the safety of citizens who have their homes at the shore. The public contributes hugely to beach restoration projects which, it generally perceives, the benefit of which accrues in large measure to the littoral property owners. Like any government-sponsored project that entails the expenditure of large sums of public funds, public support is determinative as to whether the project will take place. If the public has to pay littoral property owners for the property rights and interests the Petitioner in this case claim the Act takes, the

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Analysis (CEFA), Florida State University. *See also* http://www.visitflorida.org/AM/Template.cfm?Section=Research_FAQ&Template=/CM/HTMLDisplay.cfm&ContentID=10909.

public will not support future beach restoration projects and the state and local governments in Florida will not choose to do them.

II. THE LAW GOVERNING THE ISSUE OF WHETHER PETITIONER'S PROPERTY HAS BEEN TAKEN BY THE ACT IS THE STATE'S LAW OF PROPERTY, AND THE FLORIDA SUPREME COURT'S DECISION IS A JUDICIALLY REASONED, PROPERLY BALANCED ANALYSIS, UNDER COMMON LAW PRINCIPLES, OF THE SPECIAL FACTORS AND RELEVANT EXISTING PRECEDENTS THAT SHOULD INFORM SUCH AN IMPORTANT JUDICIAL DECISION.

At issue in this case is what Florida's common law of property is, a matter distinctly within the purview of the Florida Supreme Court. The Constitution, court precedent, and the principles of federalism counsel for judicial restraint, and properly place the determination of the state's law of property in the hands of the state courts. It is well established law that the property rights of a riparian owner of land on navigable waters are based on the rules and decisions of the state within whose boundaries the particular land lies. *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U.S. 349 (1897); *Barney v. Keokuk*, 94 U.S. 324 (1876); *Packer v. Bird*, 137 U.S. 661 (1891); *see also*, *Shively v. Bowlby*, 152 U.S. 1 (1894); *Lowndes v. Town of Huntington*, 153 U.S. 1 (1894).

The Florida Supreme Court determined that the provisions of the Act are a lawful balance between the property rights of littoral owners, the property rights of the public in littoral property, and the state's constitutional duties to preserve and protect Florida's beaches, and not to take private property without just compensation. As the Court explained, the provisions of the Act prevent loss of beaches while protecting littoral property owners from property loss. Incidental littoral property rights to access, use, navigation, and a view are not substantially or materially affected by the Act because the Act's provisions expressly preserve those rights after the restoration has been completed. "Just as with the common law, the Act facially achieves a reasonable balance of interests and rights to uniquely valuable and volatile property interests." *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102, 1115 (Fla. 2008) (*Walton County*).

This Court has the constitutional authority to decide what the United States Constitution means and what the federal law is. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). But since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) it has been absolutely clear that this Court has no authority to decide for a state what a state's common law is. *See also Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (where Justice Holmes, in dissent, aptly characterizes federal court intrusion into matters of state common law as "an unconstitutional assumption of powers").

Indeed, this Court has long followed a "tradition of deference to state courts on questions of state law." *Bell v. Maryland*, 378 U.S. 226, 237 (1964). This Court has never directed what a state's common law must be. Whatever that law is, or may be, it is determined by the state judges rather than by this Court. Accordingly, this Court cannot, and frankly should not, interfere with the Florida Supreme Court's determination of the common law of property in this case.

III. THE FLORIDA SUPREME COURT'S DECISION THAT THE ACT ACCURATELY DESCRIBES THE STATE'S LAW OF LITTORAL PROPERTY, AND DOES NOT, BY ITS TERMS, TAKE PRIVATE PROPERTY WITHOUT JUST COMPENSATION, IS A FAIR JUDICIAL APPLICATION OF THE COMMON LAW AND SHOULD NOT BE DISTURBED.

A. The Florida Supreme Court followed established common law, and did not "work a sudden change in state law, unpredictable in terms of the relevant precedents," nor did it reach its decision on the law of property as a scheme to deprive persons of their private property without just compensation under the Fifth Amendment.

Petitioner and its *amici* contend that the members of the Florida Supreme Court who joined in

the majority decision in this case violated their oaths of office by invoking "non-existent rules of state substantive law" and by effecting "a sudden and unpredictable change" in the law, simply to deprive Petitioner of its members' property. Initially, those *amici* would point out that the standard used by Petitioner in expressing its claim is an incorrect standard of review to evaluate this matter, where a state's highest court has expressed the state's law and the court's decision is challenged on a federal constitutional ground. This Court has established a different, more deferential standard for such matters, which is simply whether the state supreme court's expression of the state's law rests upon a fair or substantial justification. For instance, in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), this Court opined that state court decisions rejecting takings claims because the claimed property interest did not "inhere in the title itself, in the restrictions that background principles of the State's law of property . . . place upon land ownership," and are based upon new analysis or an extension of existing precedents, should be based on "an objectively reasonable application of relevant precedents." *Id.* at 1032, n. 18. Only when the decision is "without any fair or substantial support", *Ward v. Love County*, 253 U.S. 17, 22 (1920); *Demorest v. City Bank Farmers Trust Co.,* 321 U.S. 361 (1944), does this Court interfere with the state Court's decision. *See also Rogers v. Tennessee*, 532 U.S. 451, 468-69 (2001) (Scalia, dissenting, because the state supreme court's interpretation of the state's law was "reasonable.")

Such a standard is also appropriate given the doctrine of Our Federalism, and the recognized role and position of the state courts in society.

The Petitioner's claim is simply wrong. The Act's property provisions were not crafted in 1970 by the Florida Legislature as a means to an illegal end. On the contrary, they were enacted to state what the Legislature, based on the law at the time, understood were the respective property rights and interests of the state and the littoral property owner before and after a beach destroyed by erosion was restored. The Florida Supreme Court's decision that the Act fairly and legitimately expresses the state's law of property under such circumstances was also not a simple land grab, *ipse dixit*. There is nothing analytically, doctrinally, or intellectually dishonest about the Florida Supreme Court's judicial analysis and reasoning in this case. The court's decision on the law is a reasonable application of relevant law and common law precedents with fair, substantial support.

When Justice Scalia wrote the divided Court's decision in *Lucas v. South Carolina Coastal Council*, in 1992, the common law of property did not breathe its last breath and become only a matter of the past. When he explained that background principles of the state's law of property and nuisance law are relevant to whether there is a property interest or right that is being affected, he necessarily did so recognizing that such principles are ordinarily contained in a state's common law of property and nuisance. Likewise, he and the other Justices who joined in the opinion

surely recognized that the common law is a living body of law, which "does not work from pre-established truths of universal and inflexible validity." Benjamin Cardozo, *The Nature of the Judicial Function,* 22 (Yale University Press) (1921). On the contrary:

> The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make development and maintenance of general rules impossible; but if the rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must be re-examined.

Munroe Smith, *Jurisprudence*, 21 (Columbia University Press) (1909).

To presume that the issuance of the Court's decision in *Lucas* marked a point in time from which any further evolution of the common law of property would be an unconstitutional violation of the Fifth Amendment is *non sequitor*. The common law is not the Constitution. While there may be philosophical debate and discussion as to the effects of time on the

latter, the common law indisputably "belongs to the living, and not the dead." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), 15 *The Papers of Thomas Jefferson,* 392, 396 (Julian P. Boyd & William H. Gaines, Jr., eds., Princeton U. Press) (1958). In a common law system, precedents from earlier eras bind, but only to a degree. David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 Yale L. J. 1717, 1724 (2003).

B. The Florida Supreme Court performed a typical common law judicial analysis of the interests and factors informing a judicial decision in this case.

In *Shively v. Bowlby, supra,* at 26, this Court surveyed the property laws of the original states and concluded that that "there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tidewaters within its borders according to its own views of justice and policy, reserving its own control over such lands" and "the title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution." *Id.* at 57-58. The states have continued to create and express the common law of littoral property, each according to the state's (including the state's courts') views of justice and policy, and according to the analytical framework associated with the common law.

The question answered by the Florida Supreme Court was: "On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?" *Walton County*, at 1105. The Court plainly limited itself to the common law on this single matter: "[W]e emphasize that our decision in this case is strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act." *Id.*

The Florida Supreme Court found that while the state's common law has developed principles that are intended to balance the interests in naturally occurring changes of the shoreline, Florida's common law has never fully considered, or addressed, how public-sponsored beach restoration affects the property interests of the public and the property interests of the upland owners. *Id.* at 1114

It is fair to say that neither Blackstone, nor Coke, nor any of the other prior writers who have expressed the common law of littoral property rights ever experienced, or been made aware of, the magnitude of force and destruction of hurricanes and tropical storms, or their striking effects on the coastlines of North America, eastern Asia, the central Pacific, and the Gulf of Mexico. Blackstone's writings on the law of avulsion was based on streams cutting or changing course, not hurricanes that carve away miles and miles of beach and destroy whole communities.

The Florida Supreme Court was not faced with a matter within the ken of Blackstone, Coke, or their British contemporaries. Nevertheless, the Florida Supreme Court used the analytical methodology that would have been used by Blackstone or Coke, and, these *amici* submit, reached conclusions that would have been worthy of all three. This case involved an analysis of competing interests: littoral property rights versus a legitimate government interest in restoring a critically eroded public beach to preserve and protect rights guaranteed under the public trust and customary use doctrines. Recognizing that "Florida's common law attempts to bring order and certainty to this dynamic boundary in a manner that reasonably balances the affected parties' interests,"[4] *id.* at 1112, the Florida Supreme Court began its constitutional and common law analysis by stating that on one side of the balancing equation is the State's "constitutional duty to protect Florida's beaches, part of which it holds in trust for public use." *Id.* at 1114. "The Beach and Shore Preservation Act

[4] The Florida Supreme Court specifically wrote:

> These common law doctrines [erosion, reliction, accretion] reflect an attempt to balance the interests of the parties affected by inevitable changes in the shoreline. . . . While our common law has developed these specific rules that are intended to balance the interests in our ever-changing shoreline, Florida's common law has never fully addressed how public-sponsored beach restoration affects the interests of the public and the interests of the upland owners.

Walton County, at 1114.

effectuates this constitutional duty when the State is faced with critically eroded, storm-damaged beaches." *Id.* at 1115. On the other side of the equation are the property rights of littoral property owners. These are bathing, fishing, and navigation rights which littoral property owners hold in common with the public, as well as special affirmative easement rights to access to the water and use, and a negative easement right to a view, and contingent future interests to accretion and reliction. Based on these factors, the Court found that, on balance, the Act mirrored a proper common law balancing of these affected interests. *Id.* As to the impact specifically on private property interests, the Court found that "although the Act provides that the State may retain title to the newly created dry land directly adjacent to the water, upland owners may continue to access, use, and view the beach and water as they did prior to beach restoration. As a result, at least facially, there is no material or substantial impairment of these littoral rights under the Act." *Id.*

1. Consideration of general principles of Florida's common law of littoral property.

Under Florida's pre-existing common law of property, a riparian or littoral owner has a right of ingress and egress to and from the lot to the water, a right of unobstructed view over the waters, and in common with the public the right of navigating, bathing, and fishing. *Thiesen v. Gulf, F. & A. Ry. Co.,* 78 So. 491, 501 (1917); *Webb v. Giddens*, 82 So.2d 743, 745 (Fla.

1955). Riparian and littoral land owners also have rights that are based on accretion or reliction. *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*, 512 So.2d 934, 936 (Fla. 1987). There are, however, no Florida common law littoral property rights to wharf out from land into the water. *Thiesen,* at 61, 78 So. at 501, or to have permanent contact with the water.

2. Consideration of the common law of the public's rights and property under the public trust doctrine and the customary use doctrine.

The people also have rights in the shore according to the public trust doctrine, which is specifically safeguarded in Article X, Section 11, of the Florida Constitution: "The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people." Florida courts and other American courts have expansively interpreted the public trust doctrine to safeguard the public's use of navigable waters and the shoreline for purely recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty. *See also Glass v. Goeckel*, 703 N.W.2d 58, 73, 78 (Mich. 2005) (holding that the public has the right to walk along the beach, for which no compensation is owed to littoral owners); *R.W. Docks & Slips v. Wisconsin Dept. of Natural*

Resources, 628 N.W.2d 781, 787-88 (Wis. 2001). This Court has also ruled that states have the authority to define the parameters of the public trust doctrine and to protect the public's rights in those lands as they see fit. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988).

Florida common law also recognizes the rights of the public to access Florida's dry sand beaches under the customary use doctrine. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73, 78 (Fla. 1974) ("If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner."). The customary use of the beach by the public is subject to reasonable regulation by the state. *Id.* According to Justinian's Institutes "by the law of nature the air, running water, the sea, and consequently the shores of the sea" were "common to mankind." JUSTINIAN, INSTITUTES II:I:1. The shore of the sea "extends as far as the greatest winter flood runs up." JUSTINIAN, INSTITUTES, II:I:3. Justinian observed that under Roman law "[t]he public use of the seashore . . . is part of the law of nations, as is that of the sea itself; and, therefore, any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea; for the shores may be said to be the property of no man, but are subject to the same law as the sea itself, and the sand or ground beneath it." JUSTINIAN, INSTITUTES, II:I:5.

Thus, Florida's common law of littoral property reflects recognition of rights and interests of both the upland property owners and the state, which holds littoral property in trust for the people. The people have important property rights in littoral areas, too, and these rights are just as important as the private property rights of upland owners. The State cannot abdicate its trust duties over public trust property it holds for the people, *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-453 (1892), any more than it can take private property without just compensation.[5] Without beach restoration, littoral property owners will lose their property and businesses, and possibly their lives, and the people, as well, will invariably lose rights guaranteed them under the public trust and customary use doctrines as the beach continues to erode.

3. Consideration of Florida's common law of reemergence and recapture by public work.

It is also a background principle of Florida's law of property that when the state reclaims riparian or

[5] The Ninth Amendment, which was drafted, vetted by the states, and ratified contemporaneously with the Fifth Amendment, compels respect not only for the property rights of the individual, but also of the property rights of the people: "The enumeration in the Constitution, of certain rights, shall not be construed *to deny or disparage* others retained by the people." *Id.* (emphasis supplied).

littoral land, or causes land to reemerge by public work, the doctrines of reliction and accretion are not implicated, and the state holds title to such reclaimed or reemerged land. In 1927, the Florida Supreme Court held in *Martin v. Busch*, 93 Fla. 535, 112 So. 274 (1927), that under Florida's law of property, when the state lowered the water level of Lake Okeechobee and created dry land along the shore, the land so created belonged to the state rather than the upland riparian landowners, and the respective property line between the state and the upland owners remained where it had been prior to the lowering of the lake. The Court held that

> If to serve a public purpose the State, with the consent of the Federal authority, lowers the level of navigable waters so as to make the water recede and uncover lands below the original high water mark, the lands so uncovered below such high water mark, continue to belong to the State. . . . The doctrine of reliction. . . . , does not apply where land is reclaimed by governmental agencies as by drainage operations.

Id. at 574, 112 So. at 1287.

In so holding, the boundary line between the upland owner and the state was fixed at the line of ordinary high water, and in such cases, what was previously a variable property line at the water's edge was no longer so. Further, because the new water line was a distance from the prior high water line, the upland property owner's land holdings were no longer

influenced, affected, or increased by either accretion or reliction.

The common law contained in *Martin v. Busch* is codified in the Act, and, as background principles of the state's law of property, inheres in the title of any littoral landowner in Florida. Littoral property owners in Florida since at least 1927 have been apprised that their ancillary common law property rights are different if the state is reclaiming or restoring the shore. And, because the Act codifies Florida's common law as it is expressed in *Martin v. Busch*, the Petitioner in this case does not have the property rights it claims the Act, on its face, takes without compensation. Littoral property owners in Florida do not have a property right to accretion when the state restores the beach as the result of critical erosion. Nor do littoral property owners have a right to a fluid property line at the water's edge in such circumstances.

The rule of *Martin v. Busch* has been followed by the Florida courts in *Conoley v. Naetzker*, 137 So.2d 6 (Fla. Dist. Ct. App. 1962) ("If the disputed parcel was in fact reclaimed land resulting from drainage operations, then defendants as riparian owners on a navigable waterway could not have acquired title through reliction.") and *Padgett v. Central and Southern Florida Flood Control District*, 178 So.2d 900 (Fla. Dist. Ct. App. 1965) (holding that the doctrine of reliction does not apply to land reclaimed by drainage operations of governmental agencies). In 1981, the vitality of the rule in *Martin v. Busch* was affirmed,

and indeed extended, in *State Department of Natural Resources v. Contemporary Land Sales, Inc.*, 400 So.2d 488 (Fla. Dist. Ct. App. 1981), wherein the court held that the state would retain title to reclaimed bottomlands resulting from a project whose purpose was to lower the water level of a chain of lakes, and whose incidental effect was to expose new land.

Other state courts have similarly found no compensable taking where a government project associated with the shoreline affects littoral rights. In *Mississippi State Highway Comm'n v. Gilich*, 609 So.2d 367 (Miss. 1992), the Mississippi Supreme Court resolved ownership interests associated with construction of a man-made beach to support a highway project. *Id.* at 368-69. A property owner filed an inverse condemnation suit against the state claiming that the construction of the beach and highway resulted in a wrongful taking of their littoral rights. *Id.* The state took the position that the beach in question was land held in the public trust, and that the taking of riparian rights was noncompensable. *Id.* at 370. The Mississippi Supreme Court ruled against the property owner, finding that:

> Where the State has exercised its power to impose an additional public use on property already set aside for public purpose, the injury to riparian or littoral use on property already set aside for public purpose, the injury to riparian or littoral licenses is not a

> taking of private property for which compensation must be made.

Id. at 375.

Like the *Gilich* decision, the project in the instant case involves the construction of a man-made beach. In both cases, the littoral property owners claim that the government has taken littoral rights without compensation. The common law decisions amongst the various states apparently come to the same conclusion: there is no compensable taking associated with government projects and regulations associated with beach nourishment and restoration. In *Slavin v. Town of Oak Island*, 584 S.E.2d 100 (N.C. Ct. App. 2003), a North Carolina appellate court resolved a dispute between beachfront property owners and a town that had adopted a beach access plan and constructed a fence to protect a newly restored beach. *Id.* at 101. The littoral property owners claimed that the town had taken their riparian rights of access, because the owners could no longer directly walk down to the ocean, but now could only get to the ocean by traversing one of several designated public access points. *Id.* The North Carolina appellate court rejected the property owners' claims that they had a vested littoral right to direct access to the ocean, for which the government owed them compensation. *Id.* at 102. While the court agreed that the law recognizes the riparian right of access to the water, the property owners had misinterpreted that right. *Id.* The court held that a littoral property owner's right of access to the ocean is a qualified one, and is subject

to reasonable regulation by the state. *Id.* Thus, the court found that the property owners were not entitled to compensation from the state. *Id.*

Similar to *Slavin*, the Petitioner's access to the water is a qualified right, subject to reasonable regulation by the state. In *Slavin*, the town created an access plan and public access points which limited access along the newly restored beach, which meant that some property owners might have to walk some distance prior to accessing the beach. Here, after the beach restoration project is complete, Respondents will likewise still be able to access the water, if only after traveling the breadth of the new wider sandy beach to reach the water.

4. Consideration of whether there is a common law littoral property right in Florida to a seaward property boundary at the water's edge, or whether the littoral property right is only a right to access to the water.

The Florida Supreme Court's ruling in this case that, under Florida common law, there is no independent littoral property right of contact with the water, as contact is merely ancillary to the littoral right of access, *Walton County,* at 119, is a principled decision that is not simply designed to take property without just compensation. It rests solidly "upon *a fair or substantial basis*." The Florida Constitution and Florida common law both place the dividing line

between private property and state property at the mean high water line. *Brickell v. Trammell,* 82 So. 221, 228 (Fla. 1919); *Sullivan v. Richardson*, 14 So. 692 (Fla. 1894).

Under Florida common law, when erosion submerges littoral land that was previously dry, title does not necessarily revert to the state. Similarly, if it subsequently reappears as a result of accretion, it does not necessarily attach to the littoral upland property. In both cases, the relevant line is the mean high tide line, which is based upon a nineteen-year tidal cycle. *Kruse v. Grokap, Inc.*, 349 So.2d 788 (Fla. Dist. Ct. App. 1977) (rejecting a claim to title to littoral land that had eroded and been submerged for several years, and had thereafter reappeared by accretion, because plaintiff failed to present evidence based on the mean high water line). By establishing the common law property line as the mean high tide line rather than the day's high tide line, the common law in Florida affords littoral property owners more protection against losing their property to the sea.

At the same time, however, Florida's use of the mean high water line eliminates any notion that contact with the water is a property right associated with littoral upland property. Simply put, contact with the water is only possible if the line of demarcation between private property and public property is the water line. Use of the water line results in common contact with the water. Use of the high tide line, on the other hand, results in common contact with the water line for two short periods each day.

But use of the mean high water line as the common law property line results in common contact with the water for only very short periods of time, sometimes months apart. And as most of Florida's shores slope gently, the high tide line and the low tide line are ordinarily a significant distance apart.

Based on *Kruse*, there is nothing in the Florida Supreme Court's opinion in the present case that even remotely implies that the Court made an *ipse dixit* decision in this case with the transparent design to find no taking of private property. The Florida Supreme Court was clearly on solid doctrinal ground when it observed that any purported common law claim of a littoral property right to contact with the water is a claim without substance. The common law having, on balance, afforded the upland littoral property owner the benefit of the mean high water line, it follows that as a matter of logic as well as experience, there can be no absolute littoral property right of contact with the water where, by virtue of the mean high water line, contact with the water is not an inherent attribute of the upland owner's property or title. At best, contact with the water only happens on an extremely transitory basis, and for very limited periods of time. At all other times when the tide is below the mean high water line, a littoral property does not make contact with the water, and a littoral property owner must, invariably, cross another's land to enter the water.

5. Consideration of Florida's common law littoral right to access.

The Florida common law recognizes a littoral property right to access, which specifically is the right to access "over the foreshore" to the water. *Hayes v. Bowman*, 91 So.2d 795, 801 (Fla. 1957). If contact with the water was a right of its own, then both the right of *access*, and access "*over the foreshore*" would be unnecessary and redundant. The Florida Supreme Court was justified in observing this distinction in the common law that the property right is access, not uninterrupted contact with the water. The Act provides that the Board of Trustees of the Internal Improvement Trust Fund (which consists of the Governor and the members of the Cabinet) must establish the mean high water line for the area to be restored prior to the project. The restored area is only subject to the same easement rights in the public that existed prior to the project. *Fla. Stat*. § 161.141. The Act further provides that once the line is established, the restoration will not be effected seaward of the line "unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired." *Id.*

This assessment by the Florida Supreme Court is compatible with the common law in other states. Indeed, these *amici* cannot find that any state's common law of property contains a rule that a littoral property owner has a property right to absolute or uninterrupted contact with the water.

6. Consideration of the Florida common law of accretion in the context of the case.

Littoral land owners also have rights that are based on accretion or reliction. *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*, *supra,* at 936. But in the present case (as in all cases of beach restoration under the Act), given that the beach area has been scientifically determined to be critically eroded and not capable of being naturally restored by accretion or reliction, the likelihood of accretion is extremely remote, let alone accretion all the way to the pre-avulsive shoreline boundary. If it is evident that the beach will naturally restore itself, then there will be no need to restore the beach by public work. The Court in the present case therefore reasonably explained that the contingent future interest right to accretion is either non-existent or so remote as not to be relevant to a beach that is critically eroded. Nor is the matter of accretion relevant to the legal balancing of rights and interests necessary to decide whether the property provisions of the Act are a fair and just statement of the law and the legal rights and interests of the state and the littoral property owner when the state restores a severely eroded beach.

7. Consideration of the influence of the Florida common law of avulsion and its relevance to the judicial analysis.

There is also fair and substantial reason for the Florida Supreme Court to have considered the common law of avulsion in this case, as it indicates that the common law of littoral property is not subject to universal and inflexible rules. On the contrary, the common law has developed different rules to balance the interests and policies in different situations. By the common law, while the traditional rules of accretion and reliction operate to concomitantly increase or diminish the littoral property owner's lands, avulsion is treated differently, and losses or gains of dry land that are proved to be due to avulsive events do not affect the extent of title. *Bryant v. Peppe*, 238 So.2d 836 (Fla. 1970). Furthermore, whether it is the state or a private owner, upon proof of avulsion an owner of property generally has the right to restore the property within a reasonable time. *See generally* 1 Henry Philip Farnham, *The Law of Waters and Water Rights* § 74, at 331 (1904). As shown by this different (avulsion) common law regime, different rules have developed to reflect different circumstances, and the fact that the common law of littoral property is different under certain circumstances was certainly relevant to the Florida Supreme Court's judicial analysis.

In *Bryant v. Peppe*, *supra*, the Florida Supreme Court followed the doctrine of avulsion to hold that

dry land created by a hurricane where a pass had previously been belonged to the state, rather than to the adjacent private littoral properties. Further, the common law right of the state to reclaim submerged land by an avulsive public work was established in Florida in *Martin v. Busch, supra,* at least eighty years before the Florida Supreme Court applied this rule in the instant case. Moreover, the Florida law rule is consistent with the common law in other states. *See e.g., Barakis v. American Cyanamid Co.,* 161 F. Supp. 25 (N.D. Tex. 1958) (under Texas common law, land built up artificially by a Water District project is considered avulsion and does not change the boundaries between public and private land); *Garrett v. State*, 289 A.2d 542 (N.J. Super. Ch. 1972) (the state may construct a public work or allow a work that causes a navigable stream to dry up without losing title to the bed of the stream); *see also State by Kobayashi v. Zimring*, 566 P.2d 725 (Haw. 1977) (shoreland created by lava flows does not belong to the littoral property, but vests in the state). Specifically, the common law of other states recognizes that the state has the right to reclaim land after an avulsive event. *See City of Chicago v. Ward*, 48 N.E. 927 (Ill. 1897); *Fowler v. Wood*, 85 P. 763 (Kan. 1906).

Florida's common law of avulsion is reflected in the Act. The Act provides that the Erosion Control Line is the mean high water line, and further provides that an affected littoral landowner can challenge the line if he or she believes the mean high

water line is incorrect. The Act specifically states that the line so established shall not extend the state's claims to any lands not already held by the state. *Fla. Stat.* § 161.141.

The terms of the Act are a fair expression of what the common law is, and whatever property may be affected by the statute is adequately compensated for by the beach restoration and the state's future commitment to manage and maintain the restored beach that comes with the restoration. Thus, the Act follows the common law of littoral property, which is based on a balancing of interests and policy, and admittedly, to some extent (in favor of the private property owner and against the public), on "convenience." The Florida Supreme Court explained that:

> These common law doctrines reflect an attempt to balance the interests of the parties affected by inevitable changes in the shoreline. For instance, . . . *[t]here are four reasons for the doctrine of accretion:* (1) *[D]e minimis non curat lex*; (2) he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water.

Walton County, at 1114.

In sum, the balancing engaged in by the Florida Supreme Court is typical of the analytical methodology for the common law in general. Oliver W. Holmes explained that methodology in *The Common Law*:

> [T]he life of the [common] law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

Oliver W. Holmes, Jr., *The Common Law*, 1 (Boston, Little, Brown, and Company) (1881). The common law is dynamic. It is not a Decalogue from

on high, admitting of no variation. It has never been frozen in time. "[T]he common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk v. United States,* 290 U.S. 371, 383 (1933). Furthermore, "an adoption of the common law [by a state] in general terms does not require, without regard to local circumstances, an unqualified application of all its rules. . . ." *Id.* at 384.

C. The Act does not take property under the Fifth Amendment because the claimed property rights in this case are not part of the background law of property that inheres in the owner's title according to the state law of property.

This Court has explained that a landowner is not entitled to compensation under the Fifth Amendment for uses that are restricted by background principles of property and nuisance law, nor for property interests or rights that do not inhere in the landowner's title under the state's law of property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026-32 (1992); *see also Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (shore owner has no appurtenant property right to two natural levels of water in front of its lands).

IV. ON ITS FACE, THE ACT PROVIDES MORE THAN ADEQUATE COMPENSATION FOR ANY PRIVATE PROPERTY INTERESTS AFFECTED BY BEACH RESTORATION. THE RESTORED BEACH AND COMMITMENT TO MAINTAIN THE RESTORED BEACH ARE MORE THAN JUST COMPENSATION FOR ANY THEORETICAL LOSS OF FUTURE ACCRETION.

Even if the alleged interests were actually affected by the provisions of the Act, and had to be factored in the legal equation, where critically eroded beaches are restored by the government, the amount spent by government directly for the benefit of the upland owner and the immediate and lasting benefits that directly accrue to the upland owner are more than just compensation for beach restoration's effects on such interests. The Act is not unconstitutional, even if it does take property, because the value of the beach restoration that accompanies the Act's impacts is inherent in the Act and more than adequate to compensate for any such impacts. The Fifth Amendment speaks to takings *without just compensation*. The value of a contingent, yet remote, future interest in accretion on a shore that the visible and empirical evidence shows is not likely to ever occur is clearly offset by the value of the restoration. A reconstructed beach and a commitment by the government to maintain that beach against erosion from future hurricanes and catastrophic storms is "just compensation"

if purported property rights in accretion, reliction and contact with the water are affected or extinguished.

The average cost of a mile of reconstructed beach in Florida is between $3,000,000 and $5,000,000, simply for the initial restoration. The government continues to spend money over the period of the project to maintain and renourish the beach. A littoral property owner who, prior to the restoration, was presented with the clear and present danger of losing his or her property and any structures thereon to the sea, which structures may provide entire shelter of a business location, and possibly even his or her life, is no longer at risk. The owner's property value increases, and the cost to insure the property decreases.

CONCLUSION

This case does not evince a disregard for property rights, and beach restoration is too important to Florida citizens and to this country to lose over extreme views of property rights. The decision of the Florida Supreme Court should not be disturbed.

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Respectfully submitted,

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