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 AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should the Court recognize a "judicial taking," which would invalidate, under the Fifth and Fourteenth Amendments to the U.S. Constitution, a state court's decision that has departed abruptly from that court's own precedents and has eliminated a vested property right without providing just compensation?

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views and the views of its supporters on whether this Court should recognize a judicial taking, which would hold state courts accountable under the Fifth and Fourteenth Amendments to the U.S. Constitution when they depart unexpectedly from their own precedents and eliminate a well-settled property right without providing just compensation. [1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses from all parts of New England and the United States.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to New England's property

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus state that 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 its preparation or submission. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3(a), counsel for amicus have filed herewith written consent from counsel for each party for the filing of amicus briefs.

owners and business communities.[2] This is such a case, and NELF believes that this brief provides an additional perspective that could aid the Court in deciding the issue presented in this case.

SUMMARY OF ARGUMENT

This Court has long recognized that the Takings Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, applies to a state's judiciary as well as to the state's legislative and executive branches. However, the precise contours of the Takings Clause's application to judicial decisions affecting common law property rights remain unclear. This case presents the Court with the opportunity to recognize a judicial taking, as articulated in Justice Stewart's powerful concurrence in *Hughes v. Washington*, 389 U.S. 290 (1967), and hold that where, as here, a state court departs abruptly and unforeseeably from clear

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[2] *See, e.g., Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

precedent and eliminates well-established property rights, such a decision is a taking requiring just compensation under the Fifth and Fourteenth Amendments. Such a holding would be entirely consistent with the Court's long history of reviewing and reversing court decisions that change or eliminate constitutionally protected interests.

The Court's adoption of Justice Stewart's judicial taking analysis in *Hughes* would also be consistent with the general and time-honored principle that state courts may not circumvent the Constitution by invoking purported state-law grounds that actually lack "fair or substantial support" in state law and therefore constitute state judicial evasion of federal rights. Justice Stewart's judicial taking test, as articulated in *Hughes*, should be viewed within this larger doctrinal context of "fair or substantial" review as but a particular application of this established standard in the takings context.

ARGUMENT

I. The Court should recognize a judicial taking where, as here, a state court has abruptly eliminated a vested property right based on purported state-law grounds that lack "fair or substantial support" in state law.

This case presents the Court with the opportunity to embrace Justice Stewart's eloquent articulation of the test for a judicial taking in his

concurrence in *Hughes v. Washington*, 389 U.S. 290 (1967), and to align this test with the Court's power to review a state court decision implicating a federal constitutional right to determine whether there is "fair or substantial support" in state law to defeat the enforcement of that right:

> [W]e have long held that this Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds *"fair or substantial support"* in state law. . . . The reasons for that rule rest on nothing less than this Court's ultimate authority to review state-court decisions in which "any title, right, privilege, or immunity is specially set up or claimed under the Constitution." 28 U.S.C. § 1257(a); see *Martin v. Hunter's Lessee,* 1 Wheat. 304, 4 L.Ed. 97 (1816). "To hold otherwise would open an easy method of avoiding the jurisdiction of this court." *Terre Haute & Indianapolis R. Co. v. Indiana ex rel. Ketcham,* 194 U.S. 579, 589, 24 S.Ct. 767, 769, 48 L.Ed. 1124 (1904) (Holmes, J.).

Howlett By and Through Howlett v. Rose, 496 U.S. 356, 366 n.14 (1990) (emphasis added) (questioning adequacy of Florida court's expansive application of Florida precedent interpreting state sovereign

immunity law as requiring dismissal of § 1983 claims against county school board and officials sued in state court, when same parties would be amenable to § 1983 suit in federal court: "That holding raises the concern that the state court may be evading federal law and discriminating against federal causes of action.") (*Id.*, 496 US. at 366).[3]

As developed further below, a synthesis of Justice Stewart's concurrence in *Hughes* with this well-established "fair or substantial" review of the

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3 *See also Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540-541 (1930):

> Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court. Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon *a fair or substantial basis*. If unsubstantial, constitutional obligations may not be thus evaded. But, if there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule for that of the state court.

adequacy of state-law grounds could yield the following comprehensive standard of review: A state court decision that eliminates long-held property rights should constitute a judicial taking when the decision lacks "fair or substantial" support in state law such that it constitutes "a sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes*, 389 U.S. at 296 (Stewart, J., concurring). Under this standard of review, the Florida Supreme Court's decision should be struck as an unconstitutional judicial taking of the petitioner's members' littoral rights.[4]

This Court has long recognized that the Takings Clause of the Fifth Amendment applies to the judicial as well as to the legislative and executive branches of state government. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (stating that, where county's taking of interest earned on private interpleader account was held to be unconstitutional, "[n]either the Florida Legislature by statute, *nor the Florida courts by judicial decree*, may accomplish the result the county seeks . . . . ") (emphasis added); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1897) (declaring that "a judgment of a state court . . . whereby private property is taken for the state or under its direction for public use, without

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4 NELF relies upon petitioner's thorough and persuasive discussion of Florida property law in its brief on the merits to assert that the Florida Supreme Court's decision lacks a "fair and substantial" basis under that court's own precedents. *See* Petitioner's Brief, at 20-34.

compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment . . . "). *See also Hughes*, 389 U.S. at 298 (1967) (Stewart, J., concurring) ("[T]he Due Process Clause of the Fourteenth Amendment forbids . . . confiscation [of private property] by a State, no less through its courts than through its legislature").

However, the precise contours of the Takings Clause's application to judicial decisions affecting common law property rights have remained unclear, until now. This case should be recognized as the prototypical judicial taking, because a state court has departed abruptly from clear precedents and has eliminated a vested property right without providing just compensation. *See Hughes v. Washington*, 389 U.S. at 296-298 (Stewart, J., concurring).

To be sure, property rights are typically a matter of state law, and state courts should be generally free to shape and mold these rights gradually, from case to case, without federal interference.[5] See James L. Huffman, *Beware Of*

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5 *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930) (Brandeis, J.) ("The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of

Greens In Praise Of The Common Law, 58 Case W. Res. L. Rev. 813, 843 (2008) ("[T]he history of the common law reflects gradual, purposeful and constrained development."). However, where, as here, a state court effects a sudden, drastic and unexpected departure from its own precedent by discarding well-established property rights, the Takings Clause should apply with full force. In his concurring opinion in *Hughes v. Washington,* Justice Stewart articulated precisely this rationale for holding state courts accountable under the Takings Clause when they effectively confiscate well-established property rights without providing just compensation:

> [T]o the extent that [a state court's decision] constitutes a *sudden change in state law, unpredictable in terms of the relevant precedents*, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of *asserting*

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the earlier decisions."); *Patterson v. Colorado,* 205 U.S. 454, 461 (1907) (Holmes, J.) ("[There is] no constitutional right to have all general propositions of law once adopted [by state courts] remain unchanged"; "in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed").

> *retroactively that the property it has taken never existed at all.*"

Hughes, 389 U.S. at 296-297 (Stewart, J., concurring) (emphasis added).

Amicus urges the Court to adopt Justice Stewart's reasoning in *Hughes* and hold that, where, as here, a state court effects an abrupt and unforeseeable departure from precedent that eliminates well-established property rights, such a decision is a taking requiring just compensation under the Fifth and Fourteenth Amendments.[6] This view would be consistent with the Court's long recognition of the importance of protecting property owners' settled expectations in their rights of ownership from uncompensated governmental interference. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (extent to which governmental action interferes with reasonable

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6 As with the Florida Supreme Court decision here, Justice Stewart in his *Hughes* concurrence explained that the Washington Supreme Court in that case "[o]f course . . . did not conceive of [its] action as a taking" when it departed from its own precedent and held that the beachfront owner had no property right to accreted lands; the "Constitution [nevertheless] 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 *Id.* at 298 (emphasis in original). The key inquiry then becomes whether a state court has, in the guise of a decision purporting merely to apply established principles of property law, in fact departed abruptly and unforeseeably from its own precedent and has thereby effectively confiscated a property right without just compensation.

"investment-backed expectations" is relevant consideration in regulatory takings analysis). Moreover, the Court has long reviewed and reversed state court decisions that change or eliminate constitutionally protected property interests. *See Muhlker v. New York & Harlem R.R.*, 197 U.S. 544, 570 (1905) (state courts' power to "declare rules of property or change or modify their decisions" may not be "exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States").

Adoption of Justice Stewart's takings analysis in *Hughes* would also be consistent with the Court's long recognition that retroactive judicial interference with well-settled property rights is fundamentally at odds with due process of law. *Cf. Eastern Enter. v. Apfel*, 524 U.S. 498, 548-49 (Kennedy, J., concurring) ("If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity."). In the analogous area of federal patent law, the Court has admonished the lower federal courts to avoid making abrupt changes to a patent holder's rights in order to preserve settled property expectations. See *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002) ("[C]ourts must be cautious before adopting changes that disrupt the settled expectations of the [patent-holding] inventing community. . . .

Fundamental alterations in these rules risk destroying the legitimate expectations of inventors in their property.").

Finally, as discussed above, the Court's adoption of Justice Stewart's judicial taking analysis would be consistent with the fundamental principle that state courts must not be allowed to circumvent the Constitution by invoking purported state-law grounds that actually lack "fair or substantial support" in state law. *See Howlett By and Through Howlett v. Rose*, 496 U.S. at 366 n.14; *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540-541 (1930). Justice Stewart's judicial taking test should therefore be understood as a particular application of this well-settled "fair or substantial" standard of review, under which the Court has held state courts accountable to the Constitution by reviewing the adequacy of state-law grounds on which a state court has based its decision not to address federal constitutional challenges to state action. Justice Stewart's judicial taking analysis merely illustrates the principle that "[t]he adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review *de novo*." *Howlett*, 496 U.S. at 366.

As with Justice Stewart's judicial taking standard, the purpose of "fair or substantial" review is to allow the Court to penetrate the façade of a state court decision where, as here, the state court purports merely to apply established state law in concluding that no federal constitutional right is

implicated.[7] The inquiry allows the Court to determine whether the state-law grounds that a state court invokes are with or without foundation and, therefore, whether the decision offends the Constitution. As the Court has further explained:

> Whether the constitutional rights asserted by petitioner were given due recognition by the [state court] is a question as to which the [petitioner is] entitled to invoke our judgment . . . . It therefore is within our province to inquire not only whether the right was denied in express terms, but also *whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support.*

Staub v. City of Baxley, 355 U.S. 313, 318-319 (1958) (rejecting adequacy of state-law grounds, such as lack of standing, for state supreme court's refusal to reach facial First Amendment challenge to city criminal ordinance requiring permit to solicit workers to organize) (emphasis added).

Therefore, Justice Stewart's concurrence in *Hughes* should be viewed within this larger doctrinal context of "fair or substantial" review and should be readily accepted as but a particular application of this standard in the takings context. Moreover, the language of his concurring opinion in *Hughes* should

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7 See n. 6, above (discussing same).

be further enriched by this larger doctrinal context to yield the suggested standard of review with which amicus began its brief, and which bears repeating: A state court decision that, as in this case, eliminates long-held property rights should constitute a judicial taking when the decision lacks "fair or substantial" support in state law such that it constitutes "a sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes*, 389 U.S. at 296. Accordingly, the Florida Supreme Court decision should be struck as a judicial taking in violation of the U.S. Constitution.

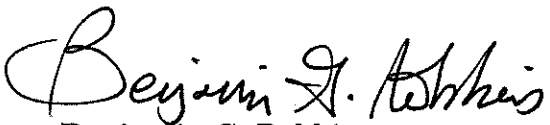
CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court reverse the Florida Supreme Court's opinion and remand this case for further proceedings consistent with the Court's decision.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By their attorneys,



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