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 *AMICUS CURIAE* OF OREGONIANS IN ACTION LEGAL CENTER IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Florida Supreme Court Opinion constitute a judicial taking of Petitioner's property without just compensation contrary to the Fifth and Fourteenth Amendments of the United States Constitution and contrary to the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution?

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IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

Pursuant to Supreme Court Rule 37.3(a) Oregonians In Action Legal Center (OIA) respectfully submits this brief *amicus curiae* in support of the

[1] No counsel for any party authored this brief in whole or in part. *Amicus* does cite to the brief of Petitioner where appropriate to avoid repetition. No person or entity other than *Amicus Curiae* Oregonians In Action, its members or its counsel made any monetary contribution specifically for the preparation or submission of this brief.

Petitioner. Written consent has been granted by counsel for all parties and has been or will be lodged with the Clerk of this Court.

OIA is a non-partisan, non-profit public interest law center focused on litigation to protect the constitutional rights of landowners from excessive and increasingly burdensome federal, state and local regulations. OIA successfully represented the Petitioner in the United States Supreme Court case of *Dolan v. City of Tigard*, and has filed other Petitions for Certiorari and has appeared *amicus curiae* in many significant takings clause decisions in state and federal courts in the last two decades.

OIA believes its experience with takings jurisprudence arising in Oregon can be helpful to this Court in formulating its decision.

SUMMARY OF ARGUMENT

The Florida Supreme Court Opinion, with due respect, exhibits a decidedly result-oriented decision. It transformed an "as applied" case from the factually developed record into one of a facial attack on a statutory and administrative scheme that both transferred legal title to lands from Petitioner's members to the State of Florida and transformed their vested common law right to exclusive access to the dry sand beach into a non-exclusive right shared with all others who choose to use it. This transfer of title and destruction of the right to exclude others should be held to constitute a per se taking which demands payment of just compensation.

The illusory system for objecting to the erosion control line (which sets the claim of ownership of the State landward) fails to meet the procedural due

process demands of the Fourteenth and Fifth Amendments.

Even if the decision of the Florida Supreme Court did not constitute a per se taking of the Petitioner's property, the ad hoc analysis set forth by this Court in *Penn Central* and *Tahoe-Sierra* strongly suggests that a taking occurred.

OIA urges the Court to refine and limit the element of general application of any scheme (legislative, administrative, executive or judicial) that has significant adverse impacts on the established real property rights of owners in any takings analysis. OIA submits that the thumb of justice should be placed on the owner's side of the scales where, as here, the scheme is directed at a limited number of owners and transfers an existing real property right (exclusive possession, title and accretion) from those owners to the public.

The need for a clear and more strongly articulated rule is demonstrated by the prior Oregon experience where its court applied—inappropriately, in the opinion of OIA—the doctrine of custom to make available to the public privately owned beaches from one end of Oregon to the other. Florida has used a different system, but the goal appears to be identical.

ARGUMENT

I.

A. Transfer of title and destruction of the right to exclude others should be held to constitute a per se taking under the Fifth and Fourteenth Amendments.

The Florida scheme at issue actually passes legal title from Petitioner's members to the State of Florida.

See Brief of Petitioner at 10, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., No.* 08-1151 (hereinafter Brief of Petitioner); Fla. Stat § 161.191(1), Vesting of Title to Lands.

In addition, the well-established common law right to exclusive possession of the dry sand area of the beach has been converted to a non-exclusive right to be shared with all others who choose to use that land. *See* Brief of Petitioner at 18 (". . . 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 [Petitioner's] homes."), and at 23, 27 and 34.

The clear transfer of legal title is the same result that would occur under the exercise of the power of eminent domain, but without the payment of just compensation that eminent domain requires.[2] The federal Declaration of Taking Act, 40 U.S.C. § 3114, irrevocably places title in the United States and makes it subject to payment of just compensation. Here, the Florida Supreme Court has sanctioned that transfer of title and short-circuited the ability to obtain compensation by method of redefining out of existence Petitioner's long-standing common law rights.

The destruction of the right of exclusive possession is equally troubling. *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994) is instructive. This Court in *Dolan*, citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383 (1979), made clear that compelling public access would deprive ". . . . . petitioner of the right to exclude others, 'one of the

[2] The Act clearly contemplates some use of the power of eminent domain. Fla. Stat. § 161.141.

most essential sticks in the bundle of rights that are commonly characterized as property'." *Dolan*, 512 U.S. at 384. This Court went on to explain how regulatory cases differ decidedly from those where the government winds up with an actual interest in the property: " . . . the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the City." *Id*. at 385. The Court also noted that the City had failed to justify the transfer of title to suit its goal given that leaving the area in question in private ownership, but under regulation, should suffice. *Id*. at 393. The Florida scheme likewise fails.

The government's intrusion in this case goes even further than in *Dolan*. The government actually directed its contractors to go, without permission, onto some of Petitioner's members' uplands property. *See* Brief of Petitioner at 11, 12.

This Court in *Dolan* also gave notice that "we see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of the poor relation in these comparable circumstances." *Dolan*, 512 U.S. at 392. OIA urges the Court to build off that salutary proposition set forth in *Dolan* to strengthen the rights which belong to the Petitioner property owners.

OIA respectfully submits that no court giving the just compensation clause its rightful place alongside the Fourth Amendment should any more allow compelled sharing of an exclusive right to possession of a beach and its attendant privacy than it would compel one to share the exclusive right to possession in their yard for all to use, which would grant them

the attendant ability to peer inward. *See e.g. California v. Ciraolo*, 476 U.S. 207, 106 S. Ct. 1809 (1986) (approving looking downward from 1,000 feet above a fenced backyard as not in violation of the Fourth Amendment.). Here, in order for the homeowner to maintain his or her previously-protected privacy he/she would have to either build a fence or install blinds and keep them closed to keep the public from looking from the newly-created public beach into his/her home. If the homeowner did that he/she obviously would give up the valuable view right of a riparian owner.

ARGUMENT

II.

A. The illusory system for objections to the erosion control line fails to meet procedural due process demands.

Petitioner's Brief at 59-66 sets forth the procedures that fail to provide any pre-deprivation meaningful hearing and yet allows for the transfer of legal title by approving and recording the erosion control line survey.

Fla. Stat.§ 161.161(3) ("Procedure for Approval of Projects") allows that "in lieu of conducting a survey, the board of trustees may accept and approve a survey as initiated, conducted and submitted by appropriate local government if said survey is made in conformity with the appropriate principle set forth in ss. 161.141-161.211."

The standard in Fla. Stat. § 161.161(5) that the board of trustees "shall be guided by the existing line of mean high water, bearing in mind that 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" is excessively broad and general and raises very serious questions as to how the Board must, if at all, consider the information obtained at the public hearing required by Fla. Stat. § 161.161(4).

Establishment of the Erosion Control Line ("ECL") modifies what was a dynamic boundary subject to accretion and reliction into one that is fixed. It is very difficult to remove that line. *See* Fla. Stat. § 161.211, Cancellation of Resolution for Non-Performance of Board of Trustees. This provision provides little protection in the way of timely removal of the ECL. Under subsection (1), if the project is approved and survey recorded, but the project is not commenced, the line can remain a full two years from the date of the recording. If the construction was commenced but halted for a period exceeding six months, a written petition signed by owners or lessees of the majority of the lineal feet of riparian property would be required to get relief.

Under subsection (3), the board of trustees "may"—but appears not to be required to—direct the agency charged with responsibility of maintaining the beach to restore it to the extent provided in the board of trustees' recorded survey, but only when the shoreline encompassed within the erosion control project has receded landward of the erosion control line. It is possible for removal of the ECL to be mandated, but that requires the majority of owners or lessees of the lineal feet of riparian property within the erosion control project to submit a written petition to that effect. Even then the agency charged with maintenance is given a period of one full year from the directive from the Board to restore the beach as directed

before the ECL is to be cancelled and vacated of record. The Florida procedures indeed contemplate a very difficult process to get around the legal implications of the recording of the erosion control line.

Given the impact of the recordation (transfer of title, among others) and the methodology, the fact that the Board is not required to consider the information it obtains, and the importance of the recording of the erosion control line, due process rightly demands a meaningful hearing. This Court in *Londoner v. City and County of Denver*, 210 U.S. 373, 28 S. Ct. 708 (1908), negated a scheme that allowed for submission in writing of all objections and complaints of a tax assessment and set aside an assessment for a local improvement district. It held:

> "If it is enough that, under set circumstances, an opportunity is given to submit in writing all objections to and complaints of a tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in a strictly judicial proceeding may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and if need by, by proof, however informal. It is apparent that such a hearing was denied to the plaintiffs in error."

Id. at 386 (internal citations omitted).

The context of *Londoner* was a tax assessment for a local improvement district. Here an actual transfer

of title and destruction of exclusive possession has occurred. *Londoner* does not require much, but the Florida system fails even under its standard. Unquestionably, the Florida system does not meet the modern authorities set forth by Petitioner.

ARGUMENT

III.

A. Even if there is not a per se taking of petitioner's property the ad hoc balancing required by this court strongly suggest that a taking has occurred.

Respondents have previously argued for a regulatory taking analysis. *See* Petitioner's Brief at p. 58, n. 37. OIA submits there is no need for this type of analysis. However, giving due weight to various elements identified in this Court's takings jurisprudence, the ad hoc analysis would also require a conclusion of a taking.

The opinion of the Florida Supreme Court quoted from the Declaration of Public Policy contained in Fla. Stat. § 161.088, which states that "beach erosion is a serious menace to the economy and general welfare of the people of the state and has advanced to emergency proportions . . . " *Walton County v. Stop the Beach Renourishment, Inc.*, 998 S.2d 1102, 1107 (Fla. 2008). However, the Act expressly provides for shore erosion emergencies at Fla. Stat. § 161.111, which was not at issue.[3]

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[3] The Florida Supreme Court clearly limited its consideration to specific sections of the Act which did not include the shore erosion emergency provision. *Walton County* 998 S.2d at 1103 n.2.

The Florida court's opinion also notes that the Department of Environmental Protection has been delegated the duty to determine "those beaches which are critically eroded and in need of restoration and nourishment". *Id*. at 1107-08. In turn, the Florida Administrative Code defined "critically eroded shoreline" as:

> "A segment of shoreline where natural processes or human activities have caused or contributed to erosion and recession of the beach and dune system to such a degree that Upland Development, recreational interests, wildlife habitat or important cultural resources are threatened or lost. Critically eroded shoreline may also include adjacent segments or gaps between identified critical erosion areas which although they may be stable or slightly erosional now, their inclusion is necessary for continuity of management of the coastal system or the design integrity of adjacent beach management projects.

Walton County, 998 S.2d at 1108 (quoting Fla. Admin. Code R.62B-36.002(4) (emphasis added)).

Petitioner's members' homes sit on an accreting beach more than 200 feet of dry sand and dunes away from the mean high water line. Upon completion of the beach nourishment there was a newly created 75 foot wide public beach seaward of the MHWL. *See* Petitioner's Brief at 6.

Taking the refined governmental interest from Florida Administrative Code, R.62B-26.002(4) as a starting point for analysis, we see that it allows transfers of private legal interests to the state under circumstances where it is possible that only natural processes contributed to erosion and recession of the

beach and dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost. OIA again points out that there is no claim here of any emergency or risk to life that is imminent. Instead, the interests asserted are only threatened.

The administrative rule continues to allow inclusion of "adjacent segments" or gaps between identified critical erosion areas which may be stable or slightly erosional now if their inclusion is necessary for continuity of management of the coastal system or for the design integrity of adjacent beach management projects.

Thus, it appears to be the case that petitioner's members whose homes sit on stable, accreting beaches could be included under the claim that such inclusion is necessary for continuity of management of the coastal system or with the design integrity of adjacent beach management projects.

The deprivation to the owners is well briefed by Petitioner at 51-58. OIA only underscores the self evident statement made in Petitioner's Brief at 55 n.34, that "a land being riparian 'is often the most valuable feature' of the property." *Hughes v. Washington*, 389 U.S. 209, 293, 88 S. Ct. 438 (1967); *Accord, Thiesen v. Gulf, F. & A.R. Co*., 75 Fla. 28, 78, 78 So. 491 (1917) (finding that "the fronting of a lot upon a navigable stream or bay often constitutes this chief value and desirability"; further, "riparian rights incident to the ownership of the land or the principal, if not sole, inducement leading to its purchase . . . ").

Although not stated in monetary terms the extreme value of these rights should be an adequate

marker and substitute for substantial monetary value.

The Florida Supreme Court separately described the purpose of the Act as promoting "the public's economic, ecological, recreational and aesthetic interest in the shoreline. *See Walton County*, 998 S.2d at 1115. It is noteworthy that these "public" interests are expanded at the expense of private property owners. The Florida Supreme Court gives no weight to the transfer of title away from the owners and the conversion of an exclusive right to use the beach to one of shared use with the public. Instead, it claims that there is no material or substantial impairment of those littoral rights under the Act. This assertion seems to fly directly in the face of both *Dolan* and *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 102 S. Ct. 3164 (1982).

The Florida Court also appears to rely on its assertion of a state constitutional duty to protect Florida's beaches and a claim of benefit to private owners based on the Act. However, its final conclusion is only that the Act facially achieves a reasonable balance between public and private interest in the shore. *Walton County*, 998 S.2d at 1120. The claimed benefit from maintenance is illusory at best. The Act expressly contemplates there will be circumstances where maintenance will fail. Fla. Stat. § 161.211(2).

The Florida Court did not perform an analysis using appropriate federal jurisprudence standards. We start with those. We choose this court's opinion in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al*., 535 U.S. 302, 122 S. Ct. 1465 (2002), because it analyzes and compares per se rules with those required for the ad hoc

balancing required under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978), which requires ad hoc factual inquiries designed to allow the careful examination and weighing of all relevant circumstances.[4]

The Florida Supreme Court did not cite or discuss any of the federal regulatory takings analysis cases. If allowed to stand, the great vice in what it has done could wipe out any owner's existing or even future claims of a taking under federal jurisprudence pursuant to the *Penn Central* doctrine of reasonable investment backed expectations. *See Penn Central*, 438 U.S. 104 (1978). How could any Florida landowner claim a reasonable, investment-backed expectation when faced with the highest court in the state rewriting property law in this sudden, about-face manner? It could happen again and again and again. The Florida Supreme Court has laid the groundwork for other courts to simply tell owners that they are charged with knowledge of such unpredictable changes and therefore cannot rely on the status of century-old law.

OIA respectfully submits that the Florida scheme transfers critically important and valuable rights to the public under circumstances where no contributing acts of the owners have in any way caused the

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[4] OIA reluctantly makes this argument because it seems so clear that there has been a physical taking. The Court in *Tahoe-Sierra Preservation Council*, 535 U.S. at 325 n.18, quoted from *Loretto*, 458 U.S. at 440, when discussing the distinction between physical and nonphysical takings: "So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity."

claimed problem. The impact falls on a small group of individuals who happen to own beachfront property.

OIA urges this Court to incorporate into its opinion a clear requirement weighing heavily in favor of landowners where it appears that the government is attempting to extract some right from them and transfer it to the public. The more important and valuable the right in question the more weight should be given to the landowner in the mix. In the instant case, these rights include both the littoral right of accretion and the exclusive use of the dry sands beach area added by the accretion and the title to the area. These are all critically important and valuable rights.

B. The Florida scheme lacks the safeguard of proper generality of application and should merit special judicial attention.

The Florida scheme could be read to apply to all beachfront owners both on the Gulf and Atlantic coasts of Florida, but further review of the statutory and administrative implementation show that its reach is much more restricted. Fla. Stat. § 161.161(6) prohibits beach restoration or beach nourishment projects where any local share is required without first obtaining the approval of the local government or governments responsible for that local share. This project, although it covers a 6.9 mile stretch of beach (*see* Petitioner's Brief at 8), affects a relatively small number of petitioner's members whose homes sit on an accreting beach more than 200 feet of dry sand and dunes away from the mean high water line. *See* Petitioner's Brief at 6. Following the beach nourishment there was an additional 75 foot wide public

beach seaward of the mean high water line. *See* Petitioner's Brief at 6.

In his dissent in *Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003, 1071 112 S. Ct. 2886 (1992), Justice Stevens noted:

> "The Just Compensation Clause 'was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' . . . . We have, therefore, in our takings law frequently looked to the generality of a regulation of property." (internal citations omitted).

Justice Stevens continued:

> ". . . similarly, in distinguishing between the Kohler Act (at issue in Mahon) and the Subsidence Act (at issue in Keystone), we found significant that the regulatory function of the latter was substantially broader. Unlike the Kohler Act, which simply transferred back to the surface owners certain rights that they had earlier sold to the coal companies, the Subsidence Act affected all surface owners—including the coal companies—equally."[5]

Id. at 1072-73.

Applying Justice Stevens' comparison of the Kohler Act with the Subsidence Act and his admonition for generality, the Florida system comes up short. The Florida system applies under the broadest possible reading to only those persons who have lands adjacent to the Gulf and Atlantic coasts. This narrow

[5] Generalized application can only take any analysis so far since ultimately if there is a constitutional violation of a citizen's rights, those rights must be preserved.

band of private owners who held exclusive rights in and title to the dry sand areas are subject to the well-organized and focused efforts of those who desire to have access to those beaches and at the same time are unwilling to pay the owners for that right.

The focus of the Florida scheme on only those owners who have property rights that the state wants for public use and access demonstrates the problem. It is highly doubtful that Florida would pass a legislative scheme imposing public easements in front, back and along the sides of all residential properties throughout the state for ease of its citizens to walk or bike to their destinations. It is that type of broad based generality, and only that type, that is protective of individual rights.

OIA urges this Court to clarify and limit use of the element of generality in analysis of takings cases. OIA submits that where it appears that government action takes an established real property right from one group and provides it to another by virtue of any type of legislative, administrative, executive, or judicial scheme, the element of generality of application should not be applied in takings analysis.

ARGUMENT

IV.

A. There is a need for a strongly articulated and clear federal rule.

The Oregon experience, like Florida's, is an example of judicial creativity to reach a desired result. The Oregon experience starts with *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 584 (1969), which rejected the basis upon which the case was originally tried and creatively applied the "custom" of

using the dry sands area of the beach from one end of the state to the other. Next was *Hay v. Bruno*, 344 F. Supp. 286 (D. Or. 1972), wherein a three judge panel upheld the decision in *Thornton* and subsequent legislation. Justice Stewart's analysis from *Hughes v. Washington*, 389 U.S. 290, 88 S. Ct. 438 (1967), which would prohibit sudden changes in state law unpredictable in terms of their relevant precedents, was held not applicable. *Id*. at 289. Next was *McDonald v. Halvorson*, 308 Or. 340, 780 P.2d 714 (1989). It cast significant doubt on the *Thornton* enunciation of custom applying to beachfront property from one end of the state to the other. Finally, *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), again sustained the doctrine of custom to allow public use of all dry sand areas. It cited *McDonald v. Halvorson* and may have left open the application of the doctrine of custom for access and use to even inland areas if the factual predicates for application of the doctrine were present.[6]

It's not clear to OIA the exact cause for such creativity except that our society has been able to create various groups with the focus and goal of organizing and funding lobbying and litigation. Perhaps the increased efforts of various interest groups and the fact that most state judges are elected are contributing causes. Whatever the cause, and with due respect, indeed great respect, for our courts it seems clear that there will always be efforts on the part of some group that claims to speak for a lofty public interest, but that has the goal of taking a property interest from those who own it and having it transferred to the public so all may take advantage of

[6] *See Stevens*, 317 Or. at 138.

it. These efforts seem quite pronounced when dealing with the coastlines of our country and along its rivers and streams. The Oregon experience is quite demonstrative with respect to both the coast and a stream—*Thornton* and *Stevens* with respect to the coast, and *Dolan* with respect to a creek.

Oregon's efforts at opening dry sand beach areas from one end of the state to the other, and the serious questions it raised under the takings clause are noted by Justice Scalia in his dissent (joined by Justice O'Connor) in *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S. Ct. 1332 (1994), where this Court denied Stevens' petition for writ of Certiorari. There is a suggestion by Justice Scalia that had there been a factual record the Court may have taken review of the case. *Id*. at 1335. *Amicus* points out in the instant case that there is a well-documented record in Petitioner's Brief.

Amicus adds a few points to those made by Justice Scalia in his dissent.

The first point is that the Oregon Supreme Court dismissed this Court's holding that the boundary marking upland ownership is the mean high tide line. *Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 22-27, 56 S. Ct. 23 (1935). After acknowledging that holding, the Oregon court then dismissed it with this statement:

> "This court has noted that although Borax 'may have expanded seaward the record ownership of upland landowners, it was apparently little noticed by Oregonians . . . [and] had no discernible effect on the actual practices of Oregon beachgoers and upland property owners.'"

Stevens, 317 Or. at 141 n.12.

The *Stevens* court was quoting from the earlier *Thornton* opinion, 254 Or. at 590. It thus seems that the Oregon court is quite willing to give sanction to ignoring controlling law if there is evidence of widespread violation of it.

However, it is clear that the *Borax* rule was not totally ignored. In 1978 the Ninth Circuit in dealing with the same rule that set the limit of the Corps of Engineers power under the navigational servitude and the Rivers and Harbors Act of 1899 rejected the Corps' efforts to extend jurisdiction above the mean high water line. *See Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir 1978). The Ninth Circuit noted that this Court's opinion in *Willink v. United States*, 240 U.S. 572, 36 S. Ct. 422 (1916), held that federal regulatory jurisdiction over navigable tidal waters extended to the mean high water line. *Id*. at 748. That power which defines the navigation servitude allowed removal of obstructions to navigability without compensation. The Ninth Circuit concluded:

> "Accordingly, an expansion of 'navigable water' shoreward diminishes the protection of the Fifth Amendment. We think an interpretation of the Act which accomplishes this, first advanced seventy-two years after its enactment, should be viewed with skepticism to say the least."

Id.

The Ninth Circuit also noted that *Borax* had used the same mean high water line to delineate boundaries between upland owners. It stated:

> "The navigational servitude reaches to the shoreward limit of navigable waters. To extend the servitude on the basis of a recently formulated administrative policy is to impose an addi-

> tional burden of unknown magnitude on all private property that abuts on the Pacific coast."[7]

Id. at 752.

The *Stevens* court also cited and relied on the federal district court opinion in *Hay v. Bruno*., 344 F. Supp. 286, but the *Bruno* court in 1972 did not have the benefit of the Oregon Supreme Court's vacillation and questioning of application of the law of custom set forth in *McDonald v. Halvorson* in 1989.

Amicus also calls to the Court's attention that it was not just the two dissenting justices who dissented on the denial of Certiorari but also a contemporaneous law review article that pointed out the deficiencies in the earlier *Thornton* opinion. *See* Lew E. Delo, *The English Doctrine of Custom in Oregon Property Law: State Ex rel. Thornton v. Hay*, 4 ENVTL. L. 383 (1974).

Whatever the flaws the Oregon trilogy of cases *Thornton*, *Halverson* and *Stevens* display, there was at least one judicial review (albeit without the benefit of the Halverson opinion casting some question on the reach of the "custom") of whether the *Thornton v. Hay* opinion constituted a sudden change in state law unpredictable in terms of the relevant precedents. Although rejecting that argument, the opinion also lays out the curious history of a trial judge using one

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[7] The *Leslie Salt* opinion also sets forth explanations of morning and afternoon tides known as 'diurnal in equality' and notes the differences between the mean high high water and mean high water line as being greater on the Pacific coast than either the Gulf or Atlantic coast, together with an explanation of the differences in the tidal cycles in the Gulf coast the Pacific and Atlantic coast. *See Leslie Salt*, 578 F.2d at 746 and 752 n.11.

theory and having the Oregon Supreme Court transform it to make it applicable from the top to bottom of the state along the Pacific coast. *See Hay v. Bruno*, 344 F. Supp. 286.

Thus, for all its flaws the Oregon experience at least had a concentrated and focused judicial review of the issue of sudden change in state law unpredictable in terms of relevant precedents. *Amicus* suggests that the authorities and logic contained in the dissent in the Florida Supreme Court case supports a different outcome here.

CONCLUSION

Amicus OIA respectfully submits that the Florida Supreme Court should be reversed and urges this Court to incorporate into its decision a clarification and strengthening of the points that *Amicus* has submitted.

Dated this 19th day of August, 2009.

Respectfully submitted,

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