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 Supreme Court of Florida

BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Florida Supreme Court reversed 100 years of uniform holdings that littoral rights are constitutionally protected. Does this sudden and unpredictable change in the nature of property rights constitute a "judicial taking" without compensation proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the important issue raised in this case of the protection of private property rights.

The Center participates in litigation defending the principles embodied in the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases including *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

The Center believes the issue before this Court is one of special importance to the liberties that the Founders sought to protect with the Constitution. The Founders saw property rights as the cornerstone for other liberties. This case goes to the heart of the system of property rights with which the Founders

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief by filing a blanket consent with the clerk.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any 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.

sought to protect the other liberties we now take for granted. The Florida Legislature and Supreme Court in this case have upset the settled expectations of littoral property owners by eliminating constitutional protection for littoral property rights. Though the state will argue that it is acting in the best interests of the larger public, the Constitution demands due regard for individual liberty.

SUMMARY OF ARGUMENT

The Takings Clause of the Fifth Amendment codifies the Founders' view of property rights as the cornerstone of individual liberty. Pre-revolutionary legal history demonstrates the importance of property rights in the scheme of liberty protected by the constitution. The Founders' original understanding of the Takings Clause and the law that developed to interpret it during the earliest years of our nation requires that compensation be paid when property owners are stripped of a settled right in property. This compensation requirement grants flexibility to respond to public needs (such as beach erosion) while respecting individual rights.

I

THE FOUNDERS VIEWED PROPERTY RIGHTS AS INSEPARABLE FROM LIBERTY, AND THE GUARDIAN OF EVERY OTHER RIGHT

One of the founding principles of this nation was the view that respect for property is synonymous with personal liberty. In 1768, the editor of the Boston Gazette wrote: "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd, that we cannot be said to

possess the one without the enjoyment of the other." Editor, Boston Gazette, Feb. 22, 1768, at 1. This widespread association of liberty and property, particularly fueled by the availability of land, grew from the background and influence of English law and philosophy.

The Magna Carta of 1215, included the first safeguard of rights from infringement by the monarch. James W. Ely, Jr., *Is Property the Cornerstone of Liberty?*, Lecture at Conference on Property Rights at the Alexander Hamilton Institute for the Study of Western Civilization (Apr. 30, 2009), at 1, *available at* http://www.theahi.org/storage/Is%20Property%20the%20Cornerstone%20of%20Liberty-March%2011.doc (last visited Aug. 19, 2009). Article 39 of the Magna Carta provided, "No free man shall be . . . disseised . . . except by the lawful judgment of his peers or by the law of the land." Magna Carta, 1215, Article 39, *available at* http://www.constitution.org/eng/magnacar.htm (last visited Aug. 19, 2009). William Blackstone's Commentaries on English Law in 1765 expounded on the application of the Magna Carta and defined private property rights as both sacred and inviolable. It was the "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 *Commentaries on the Laws of England* 135 (Univ. of Chicago Press 1979) (1765).

In the late seventeenth century, a wave of English political philosophers responded to the Stuart crowns' trespasses by developing theories of

property rights. Ely, *Lecture*, at 2. John Locke, the foremost of these influential thinkers, taught that the right to own private property was natural and in fact preceded the state's political authority. Locke's 1690 *Two Treatises of Government* suggested that rights in property were inseparable from liberty in general, and that the only purpose of government was to protect property and all of its aspects and rights. James W. Ely, Jr., *Property Rights: The Guardian of Every Other Right: A Constitutional History of Property Rights* 17 (1997). "The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the preservation of Property." John Locke, *Two Treatises of Government* 380 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

"Lockean" thinking helped to weaken claims of absolute monarchy in England and profoundly influenced 18th century Whigs. Their political and philosophical posture shifted to stress the rights of property owners as the bulwark of freedom from arbitrary government. Ely, *Property Rights*, at 17. Property ownership was identified with the preservation of political liberty.

Whig political thought and Blackstone's commentaries were widely studied and shaped public attitudes in colonial America, where property and liberty were inseparable. The Revolution, prompted by England's constant violation of property and commerce, is evidence of the depth of the Founder's commitment to the belief that rights in property could not be separated from political liberty. Arthur Lee of Virginia declared in his revolutionary 1775 publication, "The right of property is the guardian of

every other right, and to deprive a people of this, is in fact to deprive them of their liberty". Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* 14 (4th ed. 1775).

In 1776, the Declaration of Independence solidified this tie between political liberty and private property. In drafting the Declaration, Thomas Jefferson did not distinguish property from other natural rights, remaining consistent with Whig philosophy and borrowing heavily from John Locke. Ely, *Property Rights*, at 17. Locke described the natural rights government that was formed to protect as "life liberty, and estates". Jefferson substituted "pursuit of happiness" for "estates", however this should not be misunderstood as any de-emphasis of property rights. Instead, the acquisition of property and the pursuit of happiness were so closely transposed that the founding generation found the naming of either one sufficient to invoke both. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 193 (1980).

"Liberty and Property" became the first motto of the revolutionary movement. Ely, *Property Rights*, at 25. The new Americans emphasized the centrality and importance of the right to property in constitutional thought. Protection of property ownership was integral in formation of the constitutional limits on governmental authority. *Id.* at 26. As English policies continued to threaten colonial economic interests, they strengthened the philosophical link between property ownership and

the enjoyment of political liberty in American's eyes. Adams, *The First American Constitutions*, at 193.

The widespread availability of land did not alter the view that rights in property could not be overcome by a simple public desire. Instead, it strengthened the view that property was central to the new American social and political order. *Id*. Early State constitutions explicitly reflected this fundamental principle in their language. New Hampshire's 1783 Constitution was one of four to declare "All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness." N.H. Const. pt. 1, art. 2.

Revolutionary dialogue and publications emphasized the interdependence between liberty and property. In 1795, Alexander Hamilton wrote "Adieu to the security of property adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). When the delegates to the Philadelphia convention gathered in 1787, they echoed this Lockean philosophy. Delegate John Rutledge of South Carolina, for instance, argued that "Property was certainly the principal object of Society." 1 *The Records of the Federal Convention of 1787* 534 (Max Farrand ed., Yale Univ. Press rev. ed. 1937).

The order in which James Wilson listed the natural rights of individuals in his 1790 writing is telling—property came unapologetically first: "I am

first to show, that a man has a natural right to his property, to his character, to liberty, and to safety." James Wilson, 2 *Collected Works of James Wilson* ch. 12 (Kermit L. Hall & Mark David Hall eds., 2007). Also in 1790, John Adams proclaimed "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851).

In the minds of the Founders, property ownership was so closely associated with liberty that property rights were considered indispensible. The language of the Bill of Rights sharply underscores the Founders' understanding of the close tie between property rights and other personal liberties. It is of great significance that the Fifth Amendment contains key provisions safeguarding property as well as key procedural protections protecting other individual rights. This arrangement shows that the drafters saw no real distinction between individual liberty and property rights. Ely, *Lecture*, at 5.

The founding generation believed that all that which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* 58-61 (Oct. 10, 1787). From the beginnings of our country, and always in the minds of the Founders, these rights stood or fell together. Ely, *Lecture*, at 5.

II

THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE SHOWS HOW THE FOUNDERS PROTECTED INDIVIDUAL LIBERTY BY REQUIRING GOVERNMENT TO PAY COMPENSATION WHEN PRIVATE PROPERTY RIGHTS WERE TAKEN

With its limitations on the power of the Crown and recognition of individual liberties (for a few), the Magna Carta sowed the seeds for a new concept of government. Slowly, the idea began to take shape that individual citizens were the sovereigns and the state was subservient to them. Rights in property helped to propel this movement.

Blackstone's Commentaries showed that English law had built on Lockean ideas to broadly define the appropriate regard for private property rights: "So great moreover is the regard of the law for private property, that it will not authorize the least violation." Blackstone, *supra*, at 1:134. His Commentaries also addressed the eminent domain privilege of the state and paired it unequivocally with a just compensation principle in a precursor of the Takings Clause. Under English law in 1765, the state could take private property, but the owner was entitled to "a full indemnification and equivalent for the injury thereby sustained."

Even with labor short and land plentiful and cheap, colonists generally embraced the property-conscious tenets of English constitutional thought, later codifying especially the element of just compensation in the Takings Clause. As a group of German settlers in Maryland proclaimed in 1763,

"The law of the land is so constituted, that every man is secure in the enjoyment of his property, the meanest person is out of reach of oppression from the most powerful, nor can anything be taken from him without his receiving satisfaction for it." Dieter Cunz, *The Maryland Germans: A History* 126 (1948). However, the Colonists initially struggled with formulating governance that balanced individual rights with common good.

Notwithstanding this ethic of property rights, it soon became clear that a limit on the power of the government to take property would be required. Private property was taken without compensation during the Revolutionary era both to punish political opponents (royalists) and to accomplish public works on a limited budget. William Michael Treanor, *Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694 (1985). All of the states except South Carolina passed acts confiscating loyalist estates. Allan Nevins, *The American States during and after the Revolution, 1775-1789* 507 (1927). Undeveloped privately-owned land was also taken for roads. *See*, *e.g.*, Maryland Road Act: An Act to declare and ascertain the rights of citizens of this state to private roads or ways, Md. Stats. Ch. XLIX (1785). Only three of the original state constitutions discussed takings at all, Maryland, New York, and North Carolina, adopting the Magna Carta provision. 3 Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States Territories, and Colonies, nor or Heretofore forming the United States of America* 1688 (1909) (MD), 5 *id.* at 2632 (NY); 5 *id.* at 2788 (NC).

The compensation principle prior to the Revolution was imperfectly realized, but was nevertheless applied and practiced by the time of the Declaration of Independence. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 579 (1972). Eminent domain was regularly employed, but on a limited scale. Apparent evidence of the fact that the founding fathers regarded just compensation as a fundamental principle is seen in the gradual abandonment by colonial lawmakers of the practice of taking land for roads without payment. Ely, *Property Rights*, at 25.

In 1784 James Madison successfully sponsored a bill to halt further confiscation of British property in Virginia under the Trespass Act. *Id*. at 36. The same year, Alexander Hamilton represented a British merchant stripped of property in *Rutgers v. Waddington*, securing partial victory when the Mayor's Court restricted the reach of the Act, holding that the legislature could not have intended to violate the law of nations. *Rutgers v. Waddington*, New York Mayors Court (1784) (reported in Julius Goebel, *Law Practice of Hamilton* 1:282-315 (1981)).

South Carolina had always allowed widows dower in their Loyalist husband's land by the state. Ely, *Property Rights*, at 36. Other state law makers began to relieve the people from anti-Loyalist confiscations. Even before the Takings Clause was added to the Constitution, this Court noted that seizure of property by the state without compensation is normally characterized as a trespass. *See Respublica v. Sparhawk*, 1 U.S. 357, 362 (1788).

The compensation principle was codified for the first time in Vermont's constitution in 1777, and Massachusetts followed suit with a confiscation provision in its 1780 constitution. These forerunners to the Takings Clause in the Fifth Amendment show the important shift in attitude with respect to the exercise of eminent domain power. The movement constitutionalizing a just compensation rule strengthened the legal position of the huge new class of American property owners. Ely, *Property Rights*, at 31. In the early years of the nation, jurists in states without such clauses cited the Magna Carta, Blackstone, New York's Chancellor Kent, and other sources, in ruling that the common law or natural law mandated the payment of compensation for an owner whose land is taken for public use. Bernard H. Siegan, *Property Rights: From the Magna Carta to the Fourteenth Amendment*, New Studies in Social Policy #3 109 (Sept. 19, 2001).

The Founders chose vigorous, logical debate in personal letters and formal publications in order to test the evolution and amalgamation of their ideas and come to some agreement on the nature of individual rights in property. These writings reflect that there were some early communal rights sentiments expressed on the far ends of the spectrum. The Founders were not afraid to test different ideas in their discourse and discard those untenable in order to find the best solutions. A letter from Thomas Jefferson to James Madison in 1785 stated, "Whenever there is in any country uncultivated land and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on."

8 Thomas Jefferson, THE PAPERS OF THOMAS JEFFERSON 681-82 (J. Boyd ed., 1953). Alexander Hamilton and the other thinkers of the time roundly rejected this approach though, arguing that inequality of property ownership should never cause society to abridge liberty. "Inequality will exist as long as liberty exists, and it unavoidably results from that very liberty itself." Siegan, *supra*, at 14.

It is worth noting that even in Jefferson's most liberal suggestions on the subject of subordination of individual advantage for the common good, he always balanced a public need of access or trespass upon private property rights with a just compensation principle. When weighing the proposition that "every man who cannot find employment but who can find uncultivated land shall be at liberty to cultivate it, paying a moderate rent" he provided ample evidence that a fair price for any taking must still be paid. Jefferson, *supra*.

Property rights and the other individual liberties upon which the nation was founded were inextricably linked in James Madison's works. In 1789, Madison introduced the Bill of Rights to the House of Representatives. James Madison, Speech by Congressman James Madison introducing the Bill of Rights at the First Federal Congress (June 8, 1789), *available at* http://www.usconstitution.net/madisonbor.html (last visited Aug. 19, 2009). Writing the year after the ratification of the Fifth Amendment, his eloquent essay, *On Property* stated:

> A man's land, or merchandize, or money is called his property. A man has a property in his opinions and the free communication of them. He has a property of peculiar

> value in his religious opinions . . . he has a property very dear to him in the safety and liberty of his person. . . . That is not a just government, nor is property secure under it, where the property which a man has . . . is violated by arbitrary seizures of one class of citizens for the service of the rest.

James Madison, *On Property*, Mar. 29, 1792 (Papers 14:266-68).

The essay continues to outline the fundamental beliefs behind the Takings Clause,

> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property . . . which indirectly violates their property. . . . Such a government is not a pattern for the United States.

Id.

Madison's essay shows that the Founders supported on both legal and moral levels the just compensation principle in the Fifth Amendment. Treanor, *supra*, at 694. Legally, the Takings Clause bound the federal government to uphold the proposition that no land shall be taken even for public use without indemnification. More fundamentally, the requirement of just compensation evidenced the continuing concern that citizens should be secured in their property.

Early state judicial opinions reflected this concern and showed that protection against takings is not confined solely to direct damages. In 1816, Chancellor Kent required payment to a landowner suffering only indirect, consequential damages (a reduction in value). *Gardner v. Trustees of the Vill. of Newburgh*, 2 Johns. Ch. 162, 162 (N.Y. Ch. 1816). In 1841, the Connecticut Supreme Court further developed the protection for property rights ruling that owners were entitled to just compensation for damage to private property. *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146, 1841 WL 343, at *11 (1841).

These political philosophies are reflected in the Takings Clause of the Fifth Amendment. The power of eminent domain is recognized—but just compensation to the owner is required.

III

THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE REQUIRES COMPENSATION WHEN SETTLED PROPERTY RIGHTS ARE SUDDENLY ALTERED BY THE LEGISLATURE OR THE COURTS

The text of the Fifth Amendment is clear, "private property (shall not) be taken for public use, without just compensation." U.S. Const. amend. V. In this case, Florida decided to expand the public beach—but it did so at the expense of littoral property rights.

There is no question that states have long recognized the littoral rights as an important aspect

of property rights. Early writings and decisions make it clear that the concept of the littoral right to accretions was brought to America with the first Colonists. This has been long settled in our law. In 1865, Supreme Court Chief Justice Taney noted in *Banks v. Ogden*, 69 U.S. 57, 67 (1864), that "[a]lmost all jurists . . . both ancient and modern, have agreed that the owner of the land . . . bounded [by the sea], is entitled to these additions." These rights, including the right of access to the water, are in turn tied to the nature of littoral and riparian property as being in contact with the water.

Florida is no different. As noted in the dissenting opinion of Justice Lewis in the Florida Supreme Court, "In this State, the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no protection under Florida law." *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1122 (Fla. 2002) (Lewis, J. dissenting). Notwithstanding this long settled understanding that the littoral rights flow from the property's connection to the water, the Florida court ruled that Florida property owners no longer had a constitutionally protected property right to maintain contact with the water. The State of Florida is now free to sever all littoral rights (by severing the connection to the sea) without any obligation to pay compensation.

The Florida Court's sudden and unexpected reversal of long-settled property definitions works no less of a taking than an executive exercise of the power of eminent domain. This is no mean injury

which has been done. The individual right to own and use property that the Founders' viewed as critical to the protection of all other individual rights has been violated.

The Founders' legal and political background grew first from the background of Locke's compact they had brought with them to the new colonies. The purpose of government is to preserve liberty—especially the individual liberty in property. Locke, *supra*. A government that arbitrarily takes property "subverts the end of Government." *Id*. The writings during the founding era build on this premise. *See Calder v. Bull*, 3 U.S. 386, 388 (1798) (Opinion of Chase, J.).

> There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an . . . abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid,

> and punish. . . they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt;. . . or violate the right of . . . private contract; or the right of private property.

Id.

Case law after the Bill of Rights was ratified further expanded the notion that it was the duty of government to protect individual liberty including rights in property. James W. Ely, Jr., *Property Rights in the Colonial Era and Early Republic* 230 (1997). Lawyers representing individuals whose property had been taken by a state without payment uniformly contended that the Fifth Amendment's Just Compensation Clause was a national declaration of property rights. *See*, *e.g.*, *Bonaparte v Camden & A.R. Co.,* 3 F. Cas. 821, 824 (C.C.D.N.J. 1830); *People v. Platt,* 17 Johns. 195 (N.Y. Sup. Ct. 1819); *Gardner*, 2 Johns. Ch. 162; *Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38, 1796 WL 546, at *1 (1796).

In this case, the Court now faces the situation described by Justice Stewart in *Hughes v. Washington*, 389 U.S. 290 (1967). In his concurring opinion, Justice Stewart noted that

> the law of real property is, under our Constitution, left to the individual States to develop and administer.
>
> . . .
>
> But to the extent that it 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 retroactively that the property it has taken never existed at all.

Id. at 295-97 (Stewart, J., concurring).

The plain language of the Fifth Amendment, the writings of the Founders, and the practices found on examination of Revolutionary history make the intent to protect settled property interests from uncompensated takings very clear. There is no exception carved from the word "taking" in the Takings Clause that would permit the state judiciary to take property by sudden changes in state property law. A judicial process is not due process for the taking of property unless it involves compensation.

CONCLUSION

This case has given life to the distant fears of the anti-Federalists of unjust takings by their own government, the very fundamental concern that the Takings Clause of the Fifth Amendment was written to address. The sudden re-definition of state property law by the Florida courts cannot insulate the Florida law from the requirement of compensation. The Founders rightly saw the protection of rights in property as the chief protection of other individual rights. Amicus does not doubt that Florida was pursuing goals that it thought were in the public interest. However, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a

shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

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Respectfully submitted,

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