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 Petition for Writ of Certiorari to the Florida Supreme Court

REPLY TO BRIEFS IN OPPOSITION

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER

INTRODUCTION

Can a State Supreme Court replace constitutional rights with statutory rights without the payment of compensation or violating due process? Can a State Supreme Court approve the legislature's unilateral alteration of a property boundary in a private deed without violating due process?

The Briefs in Opposition filed by Respondents Walton County and City of Destin (collectively "City and County") and Respondents Florida Department of Environmental Protection and the Board of Trustees of the Internal Improvement Trust Fund (collectively "DEP") do nothing to address these two fundamental and elementary principles. Rather, Respondents' Briefs confuse the issues, argue the obvious, focus on the alleged "public good" done by the Beach and Shore Preservation Act, Chapter 161 of the Florida Statutes (2003) (hereinafter "Act"), and create new after-the-fact justifications for the Florida Supreme Court's actions. This Reply will correct those ill conceived notions.

1. The Florida Supreme Court's Opinion, Not the Act, Results in Judicial Taking.

A judicial taking occurs when the decision of the state court effects a "sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967). One looks "not [to] what a State [court] says, or by what it intends, but by what it does." *Id.* at 297-98. Respondents, however, ignore this principle and

focus only on what the Florida Supreme Court says and not what it does.

When focusing on the Act, it is no surprise that one can seemingly conclude that it is "facially constitutional" given the Act contains a savings clause requiring eminent domain proceedings "[i]f an authorized beach restoration . . . project cannot reasonably be accomplished without the taking of private property." Fla. Stat. § 161.141 (2003).

It is the application of the Act's provisions (and non-application of the savings clause) by the Florida Supreme Court – and not the mere existence of the Act – that has resulted in a "sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes*, 389 U.S. at 296-97.[1] Had the Florida Supreme Court applied the saving clause and required compensation for the constitutional rights taken by the state's application of the Act, there would not have been any change in the 100 years of precedent that hold littoral rights are "property rights that may be regulated by law, but may not be taken without just compensation and due process of law."[2]

---

[1] Thus, Respondent's argument that the Act has been in existence for 35+ years and is not a "sudden" change in law misses the mark.

[2] *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919); *accord Bd. of Trs. of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd.* (*Sand Key*), 512 So. 2d 934, 936 (Fla. 1987); *Belvedere Dev. Corp. v. Dep't of Transp.* (*Belvedere*), 476 So. 2d 649, 652 (Fla. 1985); *Florida. v. Fla. Nat'l Props., Inc.* (*Florida National Properties*), 338 So. 2d 13, 17 (Fla.

Instead, in order to allow the state to continue sponsoring beach nourishment projects, the Florida Supreme Court needed to avoid a holding that a taking of private property results from the manner in which such projects are conducted. Thus, based on these public policy reasons, the Florida Supreme Court redefined constitutional rights and employed a sham "balancing test" that strips individuals of 100 year old constitutional rights solely for the practical and economic convenience of the State.[3] Nothing could be more undemocratic and offensive to the notions of justice.[4]

2. All Littoral Rights Are "Vested" by Their Very Nature.

For this first time, the City and County argue that there is some distinction among the various littoral rights as if some are vested and others are

---

1976); *Thiesen v. Gulf, Fla. & Ala. Ry.*, 78 So. 491, 507 (Fla. 1917); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909).

[3] The Florida Supreme Court cited no law for this sham balancing test. *See* Appendix to Petition for Certiorari ("App.") at 26-28.

[4] "[T]he constitutional guarantee of compensation does not extend only to cases where the taking is cheap or easy. Indeed, the need for compensation is greatest where the loss is greatest. **If one must make a choice between the government's convenience and the citizen's constitutional rights, the conclusion should not be much in doubt."** *Palm Beach County v. Cove Club Investors Ltd.*, 734 So. 2d 379, 389 (Fla. 1999) (emphasis added) (quoting William B. Stoebuck, *Nontrespassory Takings in Eminent Domain*, 134-35 (1977)).

not.[5] One would expect to see case law cited for such a claim. This critical omission is not surprising given the Florida Supreme Court's clear holding:

> Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following **vested** rights: (1) the right of access to the water, including the right to have the property's contact with the water remain intact . . . and (4) the right to receive accretions and relictions to the property.

Board of Trs. of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd. (*Sand Key*), 512 So. 2d 934, 936 (Fla. 1987).

Littoral rights, by their very nature, are vested to the littoral property.[6] Respondents' "vesting" argument attempts to drive an imaginary wedge of distinction into the littoral right to

---

[5] Respondents' arguments have been anything but consistent. Respondents previously conceded littoral rights were taken by DEP's application of the Act but were not compensable. They now argue that no rights have been taken. Perhaps this is because the Florida Supreme Court has changed 100 years of law to achieve that result.

[6] *See Belvedere*, 476 So. 2d at 651 ("Riparian rights are property rights, incorporeal interests in real estate . . . ."). Thus, the City and County's attempt to draw some distinction among the rights in *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. (Haw.) 1985), *rev'd on procedural grounds*, 477 U.S. 902 (1986), is inapposite.

accretion by arguing the right to accretion only includes and protects past accretion that has created new lands, and does not protect or include future accretion that may create lands in the future. Thus, they argue, if new lands have not yet formed by accretion there is no "vested" right to receive those new lands in the future (as the right does not vest, apparently, until the land is created).

The littoral "right to accretion" has for 100 years included the right to past, present, and future alluvion or accretion.[7] Respondents' attempt to draw a distinction is expressly contradicted by Florida Supreme Court precedent. In *Florida National Properties* the Court could not have been clearer on two holdings. *Florida v. Fla. Nat'l Props., Inc.* (*Florida National Properties*), 338 So. 2d 13 (Fla. 1976). First, "the [littoral] right to future alluvion or accretion" cannot be taken without compensation under either the state or federal constitutions. *Id.* at 17. Second, a statutory scheme that authorizes "[a]n inflexible meander demarcation line [between submerged state property and upland property] would not comply with the . . . Federal or State Constitutions." *Id.* at 19.

The City and County, unable to distinguish the holdings in *Florida National Properties*, makes perhaps the most preposterous argument to date.

---

[7] "Alluvion" is the new sand that accumulates on the beach while the term "accretion" denotes the act of the new sand accumulating on the beach. *See* Mark S. Dennison, *Proof of Accretion or Avulsion in Title Boundary Disputes Over Additions to Riparian Land,* 73 Am. Jur. Proof of Facts 3d 167, § 2, at p. 180 (2003).

The City and County assert that the holdings from *Florida National Properties* quoted by the Petitioner in its Petition for Certiorari[8] are not the holdings of the Florida Supreme Court; rather "the trial court . . . issued the rulings" and the Florida "Supreme Court simply set forth the trial court's judgment in its opinion." *See City and County Brief*, p. 17.

This argument is unavailing given that the Florida Supreme Court – in its own words – states:

> **we conclude that the trial court correctly held** the efforts of the State to fix specific and permanent boundaries were . . . unconstitutional. . . . **[W]e also agree with the lower court's conclusion** that the statute . . . is invalid in its entirety.
>
> * * *
>
> **[W]e sustain the learned trial court**

---

[8] One quote from *Florida National Properties* being:

> By requiring the establishment of a fixed boundary line between sovereignty bottom lands and Plaintiff's riparian lands, Fla.Stat. s 253.151 . . . constitutes a taking of Plaintiff's property, **including its riparian rights to future alluvion or accretion**, without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of . . . the Florida Constitution.

Fla. Nat'l Props., 338 So. 2d at 17 (emphasis added).

> in holding Section 253.151, Florida Statutes, unconstitutional in its entirety. An inflexible meander demarcation line would not comply with the spirit or letter of our Federal or State Constitutions nor meet present requirements of society.

Id. at 18-19 (emphasis added).

While the Supreme Court in *Florida National Properties* affirms the trial court judgment *in toto*, it does not disagree with any portion of the trial court's ruling, and does not provide any alternative reasoning. *Id.*[9] For the City and County to say the Florida Supreme Court did not adopt the "learned trial court's" reasoning is baffling.

Thus, the attempt by the City and the County to distinguish between "vested" littoral rights and "unvested" littoral rights and avoid the Florida Supreme Court's holding in *Florida National Properties* is simply a serendipitous attempt to justify the Florida Supreme Court's overhauling of 100 years of precedent.

---

[9] Possibly more baffling is DEP's statement that *Florida National Properties* was decided based on "federal precedent contrary to state law" and has "very little precedential value" as a result. *See DEP Brief*, p. 14. DEP's statement is simply false and misleading as the *Florida National Properties* Court expressly held that the statute in that case violated both the federal and state constitutions and so stated on three different occasions. *Fla. Nat'l Props.*, 338 So. 2d at 17-19.

3. Petitioner's Members Have Far Less Than They Did Before Application of the Act.

The Respondents attempt to portray the Act and the beach nourishment as a "boom" to the property owner providing the owner with "protection from erosion" and claim the owner is better off with the Act than without it. This argument distorts the facts and mischaracterizes the effect of the Act on the Petitioner's members.

First, Respondents claim that any suggestion of accretion occurring on the Petitioner's members' property would be speculative given that the *Respondents* have labeled the members' beach "critically eroded." Clashing directly with this convenient label are conclusions from Respondents' own coastal engineers that find the members' beach is an accreting beach:

> Net longshore transport rates . . . **reveal an accretive trend. Taylor Engineering, Inc. (2003) concludes that the project area beaches possess the natural ability, as indicated by the accretive longshore sediment transport trend, to recover absent storms** . . . .

See ROA Joint Exhibit 1, Environmental Assessment, Walton County/Destin Beach

Restoration Project, 2003, p. 12-13 (emphasis added).[10]

Thus, absent storms, the Petitioner's members' beach is an accreting beach. It is important to note that washout of sand from storm events is avulsion – not erosion – and does not change the Mean High Water Line ("MHWL"). *See Bryant v. Peppe*, 238 So. 2d 836, 838 (Fla. 1970).

Second, the Act has a profound effect on the property. No longer does the property owner own all upland property to the MHWL with the exclusive right to use that property.[11] Rather, after the project, there will be a 60-120 foot wide publicly owned beach between the property of the upland owners and the water.[12] The conversion of the property in question from a private beach to a public beach and from a water front to a water view property and its effect on the value of ones property needs no explanation.[13]

---

[10] Given this evidence, it is irresponsible for DEP to represent to this Court that "this case involves a shoreline at significant risk of eroding, not accreting" without citing to any evidence in the record. *See DEP Brief*, n.5.

[11] *Board of Trustees v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. 2d DCA 1973) (holding beachfront owners "have the exclusive right of access over their own property to the water").

[12] The State suffers no "burden." Rather, the Act is the cheapest method for the State to commandeer a private beach and convert it into a public beach.

[13] In *Thiesen*, the Florida Supreme Court stated:

Third, Respondents misrepresent that landowners are guaranteed a constantly renourished beach that protects their property from erosion and if the State does not maintain the beach, such that the water line recedes landward of the ECL, all rights return to the "status quo ante." *See DEP Brief*, p. 3-4, n.4.

This broad sweeping statement by DEP (which quotes the Florida Supreme Court's majority opinion) could not misrepresent the process of cancellation of the ECL under the Act any more. Under Section 161.211, Florida Statutes, the cancellation of the ECL is anything but automatic as the Respondents' (and Florida Supreme Court) recklessly suggest. Rather, under the Act, there is no guarantee that the ECL will ever be cancelled and the "status quo ante" returned.[14]

> The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability . . . . [Littoral rights] and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity. In many cases, doubtless, the [littoral] rights . . . were the principal, if not sole, inducement leading to its purchase by one and the reason for the price charged by the seller.

Thiesen, 78 So. at 507.

[14] Section 161.211(3), Florida Statutes (emphasis added), provides that the State may cancel the ECL or "upon receipt of a written petition signed by the owners or lessees of a majority of the lineal feet of riparian property lying

Finally, the Respondents' proffered justification that the Act's replacement of constitutional littoral rights with statutory rights, along with some illusory guarantee against the risk of erosion somehow cures a constitutional taking is facially indefensible. It is precisely this "swap" of rights that is problematic.[15]

4. Right of Contact with the MHWL.

The City and County attempt to create a new argument that contact with MHWL is not a right and "has no significance beyond giving property a [littoral] character." *See City and County Brief*, p. 20. And since the Act provides the upland properties with "littoral character" via statutory rights, the now-landlocked property owners are still "littoral" owners. This logic – claiming that the property in question is land locked and littoral all at the same

---

within the erosion control project, shall direct or request" shall restore the beach within one year or thereafter cause the ECL to be cancelled.

[15] Contrary to the City and County's argument, the Constitution expressly guarantees the protection of free speech, equal protection, **and** property. *See City and County Brief*, p. 25. The only difference between these rights is that the United States Supreme Court defines the scope of free speech and equal protection and the state courts define "property." Once property is defined, it is protected by the United States Constitution. The Florida Supreme Court has for 100 years defined littoral rights as property with all attendant constitutional protections. Having done so, the Florida Supreme Court (or the legislature) cannot now redefine littoral rights to no longer be constitutional property.

time – is self-contradicting. It is, therefore, not surprising that the City and County again fail to provide any legal authority for this claim.

The City and County fail to comprehend that property must border the MHWL to be littoral and by that sole fact the landowners possess constitutional littoral rights.[16] It is this 100 year old fundamental background principle of state law that the Florida Supreme Court has suddenly and unpredictably changed. Neither the Florida Supreme Court nor the City and County cite to any principle of state property law that has ever held that a parcel that does not touch the MHWL enjoys "littoral rights" or even "littoral characteristics." Rather they deceptively try to equate statutory rights to true littoral rights by calling both littoral rights. This attempt to camouflage a monumental departure from 100 years of background principles of state law is disingenuous.

CONCLUSION

The Florida Supreme Court's opinion is a product of judicial engineering to achieve a desired policy result. The State was not shy in arguing below that the appellate court's ruling, which found a taking occurred, would impose "unprecedented financial burdens on local governments" that would cripple the State's beach nourishment program.

Likewise, the Florida Supreme Court did not shy from delivering a result that achieved the

---

[16] *See, e.g., Game and Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So.2d 189, 192 (Fla. 1981).

desired policy objective as well as obliterating Petitioner's members' littoral rights in contravention of 100 years of state property law to the contrary. The Florida Supreme Court's bold ruling designed to achieve this obvious policy result – all while pretending not to change any law – is repulsive and repugnant to the notions of due process, fairness, and justice.

This case is the ideal vehicle for this Court to finally rein in activist state courts that continue to invoke non-existent rules of state substantive law to avoid takings claims by declaring no property rights ever existed. *See Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1207 (1994) (Scalia, J., and O'Connor, J., dissenting from denial of the petition for writ of certiorari). Accordingly, this Court should grant certiorari.

D. Kent Safriet*
Richard S. Brightman
HOPPING GREEN & SAMS, P.A.
123 South Calhoun Street
Tallahassee, FL 32301
(850) 222-7500
**Counsel of Record for Petitioner*