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

RESPONDENT FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Florida Supreme Court's opinion upholding the state's Beach and Shore Preservation Act – which authorizes publicly-funded beach restoration projects solely in critically eroded areas, carefully balances public and private interests, maintains existing ownership of all upland property, and preserves all relevant common law littoral rights in protecting private property and carrying out the State's responsibility to manage and protect its beaches – constitute a "judicial taking" under the Fifth and Fourteenth Amendments of the United States Constitution?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

MISCELLANEOUS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Florida Supreme Court, *Walton County v. Stop the Beach Renourishment, Inc.*, is reproduced in the Petitioner's Appendix ("Pet. App.") at App. 1 and is reported at 998 So. 2d 1102 (Fla. 2008).

JURISDICTION

The Florida Supreme Court entered its judgment on September 29, 2008 and denied rehearing on December 18, 2008. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2000).

STATEMENT

The central issue in this case is whether Florida's Beach and Shore Preservation Act ("Act") constitutes an unconstitutional taking of the littoral right of potential future[1] accretion[2] from owners of beachfront property

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[1] This case does not involve state taking or regulation of *existing* accreted lands. *See Hughes v. Washington*, 389 U.S. 290 (1967) (involving ownership of existing accreted lands along beachfront property).

[2] Under the common law, beachfront owners possess the right to future gradual and imperceptible accretions of land due to naturally-occurring changes to the shore; (Continued ...)

that requires compensation. More than forty years ago, Florida's Legislature enacted the Act, chapter 161, Florida Statutes, under its state constitutional duty to protect the state's beaches, which are held in trust for the people. Art. X, § 11, Fla. Const. The Act, which applies only to critically eroded beaches, allows the state to restore storm-ravaged shorelines by placing sand on sovereign submerged lands.[3] This provides a substantial benefit to both the public and to private upland owners who retain all littoral rights of access, use, view, ingress/egress, boating, bathing, fishing, and so on (excepting only speculative future accretions).

As the Florida Supreme Court held below, the Act carefully balances the public interest in restoring critically eroded shorelines with the interests of private upland owners. The public interest is served because the addition of sand to eroded sovereignty lands "prevents further loss of public beaches, protects existing structures, and repairs prior damage. In doing so, the Act promotes the public's economic, ecological, recreational, and aesthetic interests in the shoreline." *Walton County*, 998 So. 2d at 1115.

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they also bear the reciprocal risk of erosion to their property and resulting loss of lands.

[3] Under the Act, sand placed landward of the dividing line with sovereignty lands becomes the property of the upland owner. *See* § 161.141, Fla. Stat. (2004).

The owners of upland properties along critically-eroded beaches also benefit substantially under the Act. As the Florida Supreme Court stated:

> [T]he Act benefits private upland owners by restoring beach already lost and by protecting their property from future storm damage and erosion. *Moreover, the Act expressly preserves the upland owners' rights to access, use, and view, including the rights of ingress and egress. See § 161.201. The Act also protects the upland owners' rights to boating, bathing, and fishing. See id. Furthermore, the Act protects the upland owners' view by prohibiting the State from erecting structures on the new beach except those necessary to prevent erosion. See id. ... As a result, at least facially, there is no material or substantial impairment of these littoral rights under the Act.*

Id. (emphasis added) (citation omitted). As the highlighted language makes clear, the Act expressly retains essentially *all littoral rights* of each owner of upland property. Indeed, every existing littoral right (including rights of access, use, view, ingress/egress, boating, fishing, and bathing) is retained *and* new statutory rights are enacted (including the prohibition against construction of structures on the public beach unless necessary to prevent erosion, and the reversion to the status quo if a beach restoration project is not

timely commenced, or halted, or a restored beach is not maintained).[4] *Id.*

The *only* littoral right of an upland owner that arguably might, if realized, be affected under the Act is the state-created common law right to potential future accretions, which is held in abeyance during the life of a beach restoration project.[5]

The way the Act works is that the existing mean high water line ("MHWL"), which varies over time, becomes a fixed erosion control line ("ECL"), set at the

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[4] As the Florida Supreme Court noted, the Act "provides for the cancellation of the ECL if (1) the beach restoration is not commenced within two years; (2) restoration is halted in excess of a six-month period; or (3) the authorities do not maintain the restored beach. *See* § 161.211. Therefore, in the event the beach restoration is not completed and maintained, the rights of the respective parties revert to the status quo ante." *Walton County*, 998 So. 2d at 1115.

[5] This case involves a shoreline at significant risk of eroding, not accreting. In a different context, little prospect has been noted for accreting coastlines in the United States. *See Massachusetts v. Envt'l Prot. Agency*, 549 U.S. 497, 521 (2007) (noting "actual" and "imminent" risks of rising sea levels). Given Florida's anticipated recurrent storm threats, Petitioner's accretion-based claim is very speculative.

then-current MHWL,[6] that separates the state's sovereign lands from the uplands. The critically-eroded beach is then restored and maintained with the ECL as the fixed property line between the upland properties and the sovereignty lands. Where the ECL represents the correct, pre-emergent MHWL, then "there would be no difference between the boundary under the common law and the boundary under the Act." *Walton County,* 998 So. 2d at 1118, n.15. (Fla. 2008).

In this situation, an upland owner continues to enjoy every pre-existing littoral right except the potential expansion of her property via accretions that hypothetically might form while the ECL is in place. As mentioned above, if a beach is not restored or maintained in accordance with the Act, the ECL is cancelled and the "rights of the respective parties revert to the status quo ante." *Id.* at 1115.

This litigation is based on the Petitioner's claim that the Act is unconstitutional because it has taken this common law accretion right without the payment of

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[6] The Act has a process for challenging the propriety of a proposed restoration project or the specific location of the ECL (which is set at the prevailing MHWL) prior to its recordation. *See* § 161.181, Fla. Stat. (2004). It also provides for eminent domain proceedings where setting the ECL effects an ouster from and transfer of *existing private land* to public ownership (e.g., where the ECL must be set landward of the prevailing MHWL due to engineering requirements). *See* § 161.141, Fla. Stat. (2004).

compensation.[7] Petitioners claimed they have lost a wide swath of littoral rights, but in actuality they retain *all* of their existing littoral rights (other than potential accretion) and are provided with additional statutory protections (as described above).

The Florida Supreme Court, in upholding the Act's facial constitutionality, held that the Act provides substantial benefits to upland owners and does not amount to a taking of the right of accretion, which is held in abeyance during the time period when the state bears all the risks of restoring and maintaining the critically-eroded beach. The Court concluded:

> [T]he Act effectuates the State's constitutional duty to protect Florida's beaches in a way that reasonably balances public and private interests. Without the beach renourishment provided for under the Act, the public would lose vital economic and natural resources. As for the upland owners, the beach renourishment protects their property from future storm damage and erosion while preserving their littoral rights to access, use, and view. Consequently, just as with the common law, the Act facially achieves a

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[7] Petitioner originally argued that the "right" to have property remain in contact with the water was also taken. The Florida Supreme Court recognized this asserted "right" as a means of ensuring the right of access, which the Act specifically preserves. *Walton County,* 998 So. 2d at 1119.

> reasonable balance of interests and rights to uniquely valuable and volatile property interests.

Id. at 1115. The Florida Supreme Court did not create or change any littoral rights in its decision; rather, it simply held that the State's protection of critically-eroded beaches under the Act is not facially unconstitutional. Moreover, it based its decision on existing state law doctrines, which support public efforts to restore shorelines and maintain boundaries between public and private lands. *Id.* at 1116-17. In short, the Florida Supreme Court held that the Act fairly balances the public interest in the state's critically-eroded beaches and the littoral rights of beachfront property owners in the context of avulsive events, critical erosion, and a state guarantee to maintain a prescribed shore.

ARGUMENT

The issue presented does not warrant this Court's review for two reasons. First, this case involves a state court deciding an issue of state law that raises no issue of state, regional or national importance that justifies this Court's review. Second, a "judicial taking" theory is wholly inapplicable. The Florida Supreme Court, using ordinary tools of constitutional adjudication, merely upheld the facial constitutionality of a decades-old state statute that allows the State to restore critically eroded beaches resulting in substantial economic and legal benefits to owners of uplands along the shoreline.

I. The Florida Supreme Court's Decision Implicates Only State Law Matters and Does Not Involve Any Issue Worthy of This Court's Review.

The Florida Supreme Court's decision is based on principles of state common and statutory law, and provides no conflicting or unsettled "important federal question" worthy of this Court's review. The opinion does not change the law in any respect or have broader federal application; it simply upholds the facial constitutionality of Florida's Beach and Shore Preservation Act, which was enacted many years ago pursuant to Florida's constitutional duty to protect its shorelines and beaches. In so doing, the decision affirms the legislature's balanced, if not elegant, manner of preserving critically eroded beaches, while also protecting the interests of upland property owners.

Petitioner overstates the nature of this case, which involves no physical taking of accreted lands nor any regulatory taking that deprives its members of essentially all meaningful use of their property. Notably, the right of potential future accretions is not a constitutional property right. Riparian/littoral rights are not mentioned in the federal constitution.[8] They are

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[8] Nor are such rights recognized in the Florida constitution. The only constitutional-based property rights at issue in this case are the state's rights and responsibilities with respect to public trust lands, which are embodied in the state constitution. *See* art. X, § 11, Fla. Const. (cited in *Walton County*, 998 So. 2d at 1109).

established by state law[9] and are subject to modification, provided a government regulatory program, such as the Act, does not go too far and result in an unconstitutional "taking."[10] Petitioner asks that this Court elevate accretion rights above a state statute that explicitly holds in abeyance a common law provision (accretion) under narrow circumstances where its application is rendered irrelevant. An asserted state common law right to potential accretions does not supersede Florida's Act under these circumstances.

Second, and more importantly, the inquiry here is one that evaluates only *state* common law and statutory considerations. This Court has consistently held that "state courts are the ultimate expositors of state law," and it will deviate from this rule only in "extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). None of the extreme circumstances that the Court has noted in the past is present here. *See*

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[9] *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"); *see also Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189, 191 (Fla. 1981).

[10] In *Lingle v. Chevron*, 544 U.S. 528 (2005), this Court recently reaffirmed that substantive due process challenges to governmental regulation of property rights are not subject to a higher judicial standard of review.

generally E. Gressman, K. Geller, et al., *Supreme Court Practice,* 142-146 (9th ed. 2007) (discussing extreme circumstances).

Here, the Florida Supreme Court decided the case based upon the common law relationship between the sovereign (in its proprietary, public trust capacity) and upland property owners in Florida, applying common law doctrines of accretion, erosion, and avulsion. Its decision worked only to resolve the balancing of state common law and statutory rights, without affecting federal law. Moreover, the Florida Supreme Court emphasized that its decision was "strictly limited to the context of restoring critically eroded beaches under the [Act]." *Walton County,* 998 So. 2d at 1120-21.

As the Florida Supreme Court determined, the Act is a reasonable, balanced method of ensuring that the State's critically eroded beaches are restored and protected while concurrently protecting the value of beachfront properties and the bundle of riparian/littoral rights of their owners. Because the decision involves only a state law matter and involves no federal issue of state, regional or national importance, jurisdiction should not be exercised.

II. The Florida Supreme Court's Decision Is Not a Judicial Taking.

Petitioner mistakenly claims that the Florida Supreme Court's decision falls into the category of a

"judicial taking."[11] Rather, the decision neither reverses prior precedent nor marks an unpredictable and sudden change in state law.

First, the decision can hardly qualify as a judicial taking. It involves the facial constitutionality of a state statute, not judge-made law that departs from established legal norms. The Act's challenged provisions had been on the books for more than forty years, its terms address only the narrow context of property rights along critically-eroded beaches, and it retains every littoral right other than potential future accretion. In analyzing the Act, the Florida Supreme Court was deferential to Florida's common law. The court reviewed the state's common law of littoral rights – with particular focus on accretion – and determined that the Act does not facially depart from constitutional norms.

Specifically, the court determined that the right of accretion is not implicated in situations where the Act applies. When the state establishes an ECL and restores (and then maintains) a critically eroded beach, it is the state – not the upland owner – who thereafter bears the risk of loss from a pattern of erosion. If repeated storm events ravage the beach, the state bears the risk and

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[11] A "judicial taking" may occur when a court, through sudden departure from established legal principles, has essentially changed long-standing property rights via judicial fiat so as to effect the "retroactive transformation of private into public property." *See Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring).

cost of repair. Moreover, because the ECL remains fixed at the pre-emergent MHWL separating upland property from the (formerly submerged) sovereign lands, even after a further destructive pattern of erosive events, the upland owner bears no risk of loss to her property resulting from a landward-migrating MHWL.

Lacking these protections, the common law's justification for the doctrine of accretion is based on the fact that the upland owner bears the risk of erosion and therefore equitably should receive the benefit of accreted lands that might occur. Specifically, the "significant historical foundation" of the right was discussed in *Board of Trustees of the Internal Improvements Trust Fund v. Sand Key Associates, Ltd.*, 512 So. 2d 934, 936-37 (Fla. 1987). In *Sand Key*, it was noted that the accretion right is based on principles of risk-bearing: if the upland owner bears the risk of loss from incursion of the sea, she deserves the benefit of lands gained from the sea via accretion. As Blackstone put it:

> And as to lands gained from the sea, either by *alluvion,* by the washing up of sand and earth, so as in time to make *terra firma;* or by *dereliction,* as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining....[T]hese owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss.

Id. (citing 2 W. Blackstone, Commentaries 261-62). Similarly, this Court has recognized the risk/benefit basis for accreted lands, *see Banks v. Ogden,* 69 U.S. (2 Wall.) 57, 17 L.Ed. 818 (1864), noting that the right to accretions is based on "the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion[.]" *Sand Key*, 512 So. 2d at 936-37 (citing *Banks,* 69 U.S. (2 Wall.) at 67).

Here, the Act eliminates the historical basis for the littoral benefit of accretion by *eliminating the littoral risk.* Owners of private uplands bordering critically eroded beaches restored under the Act do not bear the risk of losing property due to incursion of the sea. Under the Act, during a project's life, the portion of an upland owner's property that formerly would have been lost to the sea's intrusion (and become sovereign lands) is protected by a buffer; its property lines are undiminished; and, the upland property itself remains at all times in the upland owner's hands and control. As the decision notes, under the Act, the historical justification for accretion, and thus, the doctrine itself, is simply not implicated, and no deprivation occurs.

Finally, Petitioner relies on three state law cases, which are distinguishable and provide no basis for applying "judicial taking" theories. First, in *State of Florida v. Florida National Properties, Inc.*, 338 So. 2d 13 (Fla. 1976), the Florida Supreme Court considered a dispute arising out of the state's attempt to set by statute the boundary of certain upland property along a

fresh-water lake at a point significantly landward of the prevailing common law line, putting in question the ownership of roughly one-half of the existing property of the private landowner. *Id.* at 16. Because the case was deemed governed by federal precedent contrary to state law – a doctrine which has since been overruled[12] – those aspects of *Florida National Properties* that depend upon that error have very little precedential value.

It is unsurprising that the court rejected the state's attempt to fix the boundary at a point other than the current MHWL, observing that such a result "would not comply with the spirit or letter of our Federal or State Constitutions nor meet present requirements of society."[13] *Id.* at 19. Rather than involving a carefully-balanced effort to effectuate the state's constitutional duty to preserve its shoreline in the face of critical erosion (as is presented here), the statute in *Florida National Properties* was what this Court considers to be a "classic taking in which government directly

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[12] The court in *Florida National Properties* determined that it was "apparent from [*Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) and *Hughes* that Federal, not State, law governs the resolution of boundary line disputes between the sovereign and private owners whose lands border navigable bodies of water." *Florida Nat'l Props., Inc.,* 338 So. 2d at 17.

[13] Under the Act's careful balancing, in contrast, those requirements are met. *See Walton County,* 998 So. 2d at 1115.

appropriates private property or ousts the owner from his domain." *Lingle,* 544 U.S. at 539.

Second, the decision in *Sand Key* did not address a regulatory takings claim. It involved a quiet title action to resolve a dispute over existing accreted land. 512 So. 2d at 935. The property at issue had formed due to accretions allegedly caused by improvements that had not been constructed on the claimant's behalf, and were located one-half mile north of the claimant's land. *Id.* at 928. In determining that Sand Key was entitled to the existing accreted property, the Florida Supreme Court applied the common law principle that a riparian upland owner retains additional abutting land resulting from natural and artificial accretions not directly caused by an improvement to that owner's property. *Id.* at 941. The decision has no application here.

Third, the Florida Supreme Court's decision in *Belvedere Development Corporation v. Department of Transportation*, 476 So. 2d 649 (Fla. 1985), is easily distinguishable, on its facts and legal issues, from this case. First, *Belvedere* involved an actual physical taking of upland property versus a state regulatory program involving no physical taking. Second, *Belvedere* involved the severance of all riparian rights with no access easement to exercise them, versus the preservation of applicable riparian/littoral rights, including access, under the implementation of a critical state beach preservation program. Finally, *Belvedere* amounted to a ploy to avoid paying the true value for physically taking the uplands of a riparian property by separating its riparian rights from such property.

Importantly, the Florida Supreme Court in *Belvedere* stated that "we will not hold that riparian rights are never severable from the riparian lands. However, we must conclude that the act of condemning petitioners' lands without compensating them for their riparian property rights under these facts was an unconstitutional taking." *Id.* at 652. The emphasized language was prescient; here, none of the facts or policy issues in *Belvedere* is at issue.

In conclusion, because the issue below was a question of state law, in which state law precedents were fairly applied to an unresolved legal question, no support exists for a "judicial taking." The Florida Supreme Court's decision does not conflict with prior Florida law, much less constitute a sudden, unpredictable change in state law, and does not effect a "per se" "judicial taking."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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