Supreme Court, U.S.
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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 A Writ Of Certiorari To The Florida Supreme Court

RESPONDENTS WALTON COUNTY AND CITY OF DESTIN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As the body of this brief makes clear, this Court should deny Petitioner's petition for writ of certiorari as to the questions presented in the petition. In addition, and in accordance with Supreme Court Rule 15.2, Respondents raise the following objections to the questions presented:

The questions presented in the petition do not accurately reflect the Florida Supreme Court's holding. If this Court grants the petition, Respondents, the City of Destin and Walton County, submit the following as the more accurately phrased questions:

I. FLORIDA'S LEGISLATURE MAY CONSTITUTIONALLY DEVELOP FLORIDA COMMON LAW PROPERTY RIGHTS; THE FLORIDA SUPREME COURT'S AFFIRMANCE OF SUCH DEVELOPMENTS DOES NOT CAUSE A "JUDICIAL" TAKING PROSCRIBED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II. THE FLORIDA SUPREME COURT CORRECTLY DETERMINED THAT THE FLORIDA LEGISLATURE MAY ALTER COMMON LAW PROPERTY RIGHTS THAT HAVE NOT VESTED.

QUESTIONS PRESENTED – Continued

III. THE FLORIDA SUPREME COURT HELD THAT THE ACT CAN CONSTITUTIONALLY PERMIT THE STATE TO APPROVE THE ECL BUT THAT IT MUST COMPENSATE AN AFFECTED RIPARIAN LANDOWNER TO THE EXTENT OF ANY TAKING OF PROPERTY BY THE CREATION OF THE EROSION CONTROL LINE.

LIST OF PARTIES

Petitioner

Stop the Beach Renourishment, Incorporated.

Respondents

Florida Department of Environmental Protection; The Board of Trustees of the Internal Improvement Trust Fund; Walton County, Florida; and the City of Destin, Florida.

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JURISDICTION

This Court should not exercise jurisdiction over this case. It does not conflict with *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), rev'd on procedural grounds, *Ariyoshi v. Robinson*, 477 U.S. 902 (1986), as required by Sup. Ct. R. 10(b). In *Robinson*, the Ninth Circuit recognized that "[i]nsofar as judicial changes in the law operate prospectively to affect property rights ***vesting after the law is changed***, no specific federal question is presented by the state's choice of implement in changing state law" citing *Hughes v. Washington*, 389 U.S. 290, (1967) (Stewart, J. concurring) (emphasis added). The issues the *Robinson* court addressed are not presented by the facts of this case. The judicial decision affects: (1) littoral property rights not vested when the Supreme Court approved the 1970 Beach and Shore Preservation Act's constitutionality; or (2) littoral rights not altered at all.

Nor does this case present "an important question of federal law that has not been, but should be, settled by this Court" under Sup. Ct. R. 10(c). This case simply presents a state court's development of its own common law surrounding real property principles, a procedure this Court recognized as proper in *Hughes v. Washington*, 389 U.S. 290 (1967).

STATEMENT OF THE FACTS

Petitioner's entire challenge is premised upon a set of facts that do not exist. Petitioner posits that the Florida Supreme Court "suddenly and unexpectedly" changed Florida common law, which in turn caused a constitutional deprivation of common law property rights. Petition (hereinafter "Pet.") at 25, 31. The law which Petitioner now challenges, however, has existed for decades.

In 1965, the Florida Legislature enacted Chapter 161, Florida Statutes, entitled the Beach and Shore Preservation Act (the "Act"). The Act provided a process for private parties and governmental entities to obtain permits for beach and shore preservation projects. Under Section 161.051, Florida Statutes, any additions or accretion to the uplands caused by such projects remained the property of the State.

In 1970, the Florida Legislature amended the Act. The Act declared the legislative intent that it was in the public interest to make provisions for publicly financed beach nourishment and restoration projects. §161.141, *Fla. Stat.* The Act provided for the completion of a survey depicting the area of the beach to be restored and the location of a proposed "Erosion Control Line" ("ECL"). Once established, the ECL represented the landward extent of the claims of the state. §161.151(3), *Fla. Stat.* Prior to this statute, the Mean High Water Line ("MHWL") represented the landward extent of the claims of the State.

At the same time, the Florida Legislature provided for the vesting of title to lands after the filing of the ECL:

> (1) . . . title to all lands seaward of the [ECL] shall be deemed to be vested in the state by right of its sovereignty, and title to all lands landward of such line shall be vested in the riparian upland owners whose lands either abut the [ECL] or would have abutted the line if it had been located directly on the line of mean high water on the date the board of trustees' survey was recorded.
>
> (2) Once the [ECL] along any segment of the shoreline has been established in accordance with the provisions of ss. 161.141-161.211, the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, ***either by accretion or erosion*** or by any other natural or artificial process, except as provided in s. 161.211(2) and (3).

§161.191, *Fla. Stat.* (emphasis added).

In addition, Section 161.201, Florida Statutes, preserved a landowner's common law riparian rights except as otherwise provided in Section 161.191(2), Florida Statutes, including but not limited to rights of ingress, egress, view, boating, bathing, and fishing if an upland owner or lessee who by operation of the Act ceased to be a holder of title to the MHWL.

The Act contemplated that the State might be required to take private property. If so, the Act specifically provides that if an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.

Twenty-five years after the amendment of this Act, the City of Destin's and Walton County's beaches were critically eroded by the 1995 Hurricane Opal. (R.App. at 1). Pursuant to the Act, the City and County sought a Joint Coastal Permit from the Department of Environmental Protection ("Department") to restore, through nourishment, 6.9 miles of their beaches. The beach restoration would add sand waterward of the mean high water line. The result of the project would widen the beach by 210 feet and increase its elevation. The project would also restore dunes. (R.App. at 1).

Based upon the authority vested in it by the Act, the Department issued a Notice of Intent to Issue the draft permit. In conjunction with the proposed beach nourishment project, the Board of Trustees of the Internal Improvement Trust Fund adopted resolutions approving surveys of the ECL for the County and City.[1] (R.App. at 3).

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[1] The Act gives the Board of Trustees authority to set the ECL. §161.161, *Fla. Stat.*

Save Our Beaches, Inc. ("SOB") and Petitioner Stop The Beach Renourishment, Inc. ("STBR") were formed in 2004 to, among other things, protect and defend private property rights. Both associations purported to represent landowners who claimed to be affected by the permit. They petitioned for formal administrative hearing, challenging issuance of the draft permit. (R.App. at 4).

In their Amended Petition, SOB and STBR claimed, among other things, that the draft permit and ECL resulted in an unconstitutional taking. SOB's and STBR's constitutional challenges were dismissed for determination in court proceedings. SOB and STBR pursued these lawsuits in a separate action in circuit court in Leon County, Florida. In that lawsuit, SOB and STBR challenged the facial constitutionality of the Act and the constitutionality of the Act as-applied. The non-constitutional issues proceeded to administrative hearing. (R.App. at 4).

In the recommended order, the administrative law judge ("ALJ") recognized that SOB and STBR alleged the infringement of only two riparian rights: the right to accretion and the right to have the property contact the water. Because the Act eliminated these common law riparian rights, the ALJ reasoned that the City and County were not infringing on them, assuming the constitutionality of the Act. The ALJ recommended that the Department enter a final order issuing the permit, which it did. (R.App. at 5).

STBR[2] appealed to the First District Court of Appeal, in and for the State of Florida. It argued that the Act was unconstitutional, as-applied, because it eliminated its members' riparian rights to accretion and to have their property contact the water. (R.App. at 6).

The City and County maintained that the Act was not unconstitutional, on its face or as-applied. They noted that even though STBR argued the Act was unconstitutional as-applied, it actually made a facial challenge. The City and County explained that the Act did not take STBR's members' property because it did not physically invade, use, or possess it in its entirety. The City and County further urged that under a regulatory takings analysis, STBR failed to show that its members lost all beneficial use of the entire piece of property. Rather, they noted, the Act only affects two of many riparian rights. (R.App. at 6-7).

The First District Court found the Act unconstitutional as-applied. *Save Our Beaches, Inc. v. Fla. Dep't of Envtl. Prot.*, 31 Fla. L. Weekly D1173 (Fla. 1st DCA 2006). The court held that riparian rights are property rights that cannot be constitutionally taken without just compensation. *Id.* The

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[2] SOB also appealed but was dismissed as a party because it did not have associational standing. *Save Our Beaches, Inc. v. Fla. Dep't of Envtl. Prot.*, 31 Fla. L. Weekly D1173 (Fla. 1st DCA 2006).

court agreed with STBR that its members' riparian rights to: (i) receive accretion and relictions to the property; and (ii) have the property's contact with the water remain intact, were eliminated by the Department's final order, which applied the Act. *Id.* The court held that because STBR's members' riparian rights were unconstitutionally taken without an eminent domain proceeding as required by Section 161.141, Florida Statutes, those rights were infringed upon. *Id.*

The State moved for rehearing and certification to the Florida Supreme Court. *Id.* The First District granted the certification motion to the extent that it certified the following question to be of great public importance:

> Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably infringe on riparian rights, does not apply?

Id.

The City and County then appealed to the Florida Supreme Court, which reversed. *Walton County v. Stop Beach Renourishment*, 998 So. 2d 1102

(Fla. 2008). In doing so, the Court concluded that the First District had incorrectly phrased its certified question in terms of an as-applied challenge and, therefore, rephrased the certified question as follows:

> On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?[3]

Id. at 1105.

To answer this question, the Supreme Court highlighted several undisputed principles. First, it emphasized the State's constitutional duty to protect Florida's beaches, citing Art. X, §11, Fla. Const. *Id.* at 1110. Next, the Court recognized that the extent of littoral rights are a matter of state law. Based upon its own early Florida law, the Court noted that the littoral rights to access, use, and view are nothing more than easements under Florida common law. *Id.* at 1112. The littoral rights to accretion and reliction, the Court observed, are distinct from the rights to

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[3] The Court noted that the First District should have refrained from considering what is essentially a facial challenge since STBR acknowledged that it was a party in circuit court to a facial challenge of the same act citing *Key Haven Assoc. Enters. v. Bd. of Trs. of the Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982) (explaining that if a party chooses to pursue a facial challenge in circuit court, the party is foreclosed from proceeding with a facial challenge before the district court in its appeal of final agency action).

access, use, and view because they are not a current right, but a contingent future possessory right. *Id.*

The Court then outlined how the common law had traditionally treated changes to the shoreline. It noted that under the doctrines of erosion, reliction, and accretion, the boundary between public and private land is altered to reflect gradual and imperceptible losses or additions to the shoreline. In contrast, under the doctrine of avulsion, the boundary between public and private land remains the MHWL as it existed before the avulsive event led to sudden and perceptible losses or additions to the shoreline. Most importantly, the Court recognized that Florida's common law had never fully addressed how public-sponsored beach restoration affects the interests of the public and the interests of the upland owners. *Id.* at 1112-1114.

After outlining the common law's historical balancing of public and private interests, the Court held that the Act continued this historical common law pattern: ensuring the public does not lose vital economic and natural resources and protecting landowner's property from future storm damage and erosion while preserving their littoral rights to access, use, and view. Equally important, the Court found that the Act effectuated the State's constitutional duty to protect its beaches, side-by-side with the common law's balancing of public and private interests. *Id.* at 1115.

The Court reasoned that the First District incorrectly held the Act was unconstitutional because it had only analyzed the Act under the doctrine of accretion, not the doctrine of avulsion. As explained in its earlier case law, the Court emphasized that, under the doctrine of avulsion, the boundary between public lands and privately owned uplands remains the MHWL as it existed before the avulsive event. The Court held that the Act – which reclaims storm-damaged shoreline by adding sand to submerged sovereignty lands – allowed the State to do no more than it could do under the common law. The Court referenced *State v. Florida National Properties, Inc.*, 338 So. 2d 13 (Fla. 1976), during this discussion. *Walton County*, 998 So. 2d at 1116-1117.

The Court then addressed the landowner's right to accretion, which the First District held had been taken without compensation. The Court delineated the common law reasons for accretion and explained how the Act removed many of the reasons for the very existence of the accretion doctrine. For instance, the Court noted that that the Act removed the upland owner's risk of losses and repairs due to erosion – now the State bears that risk. Because the risk of erosion was one of the historical reasons to give a landowner the right to accretion, the Act's elimination of the riparian landowner's risk of erosion made unnecessary the concomitant right to future accretion. *Id.* at 1118.

The Court then analyzed the First District's conclusion that the Act was unconstitutional because

it eliminated the landowner's right to have the property's contact with the water remain intact. The Court noted that its prior cases had focused on the right of access as the paramount right, which was served by contact with the water. But as the Court noted, if the access was not impaired, then the right of contact was unnecessary. Although it did not discuss its prior reference to the fact that the right of access was solely an easement under its earlier decisions, presumably the Court factored this into its analysis when concluding that the Act fully preserved the right to access, with or without direct contact with the water. *Id.* at 1119-1120.

Lastly, the Florida Supreme Court distinguished *Belvedere Dev. Corp. v. Department of Transp.*, 476 So. 2d 649 (Fla. 1985), upon which the First District had relied to find that littoral rights could not be severed from uplands, by separating the uplands to the land with the littoral rights by a road. In *Belvedere*, the Department of Transportation severed the littoral rights in an attempt to limit the compensation for uplands in eminent domain proceedings. The Court held that littoral rights "cannot be severed by condemnation proceedings without the consent of the upland owner." *Id.* at 653. The Court limited its holding to the context of condemnation of upland property. *See id.* at 652.

Justice Lewis authored a lengthy dissenting opinion, with which one other Justice concurred. *Walton County*, 998 So. 2d at 1121. Justice Lewis quarreled with the majority's conclusion that riparian

property need not touch the water to maintain its riparian character, as long as the landowner retained access to the water. He ignored the fact that the Act ensured riparian landowners would continue to receive all rights associated with riparian ownership, even if their property did not touch the water. Justice Lewis portrayed touching the water as a "right," rather than what gave property its riparian character. *Id.* at 1124-1125.

His rationale for this belief was premised upon *Belvedere* and *Board of Trustees of the Internal Imp. Trust Fund v. Sand Key Associates, Ltd.*, 512 So. 2d 934, 937 (Fla. 1987), neither of which directly addressed the issue presented by the facts of this case. *Id.* at 1122-1123. His dissent theorized that the majority's holding would deprive other landowners of their riparian rights, even though the majority had expressly limited its holding to re-nourishment projects under the Act. *Id.* at 1128. Justice Lewis never explored the issues related to the Act's elimination of the right to future accretion, and presumably agreed that the Act's elimination of the right to accretion was constitutional.

After the Florida Supreme Court denied STBR's rehearing motion, this petition followed.

REASONS FOR DENYING THE WRIT

Petitioner has failed to provide good reason for this Court to ignore its own precedent. For thirty

years, this Court has followed its own rule of law that the law of real property is, under our Constitution, left to the individual States to develop and administer. The Florida Supreme Court has simply continued the development of its own common law – a process which is not stagnant but fluctuates – in light of real property developments related to beach renourishment projects. Its rationale was premised upon a detailed analysis of the genesis of a Florida riparian landowner's right to accretion and access to the water. Its ultimate decision honored the State's constitutional duty to protect Florida's beaches, while concomitantly respecting a landowner's common law riparian rights. Petitioner's argument results from its refusal to recognize the foundation for these common law doctrines, or that the common law fluctuates when the reason for these doctrines are altered. The Florida Supreme Court's decision peacefully co-exists with this Court's constitutional mandates and the Fifth and Fourteenth Amendments to the United States Constitution.

I. FLORIDA'S LEGISLATURE MAY CONSTITUTIONALLY DEVELOP FLORIDA COMMON LAW PROPERTY RIGHTS THAT HAVE NOT VESTED WITHOUT CAUSING A "JUDICIAL" TAKING PROSCRIBED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Florida Supreme Court Acted Consistent With This Court's Constitutional Limitations Placed Upon A State's Ability To Develop Its Own Common Law Property Rights.

Petitioner claims that this case presents "a unique opportunity" for this Court to address the "constitutional question" whether a state court can affirm the Florida Legislature's right to "eliminate" common law property rights. Pet. at 15. This opportunity has long past. In *Hughes v. Washington*, 389 U.S. 290 (1967), this Court addressed this very issue. There, an 1889 statute ambiguously expressed whether the right to accretion was eliminated, thereby rendering uncertain a property owner's right to the accretion that had accrued between that time and 1966. *Id.* at 296. *Hughes* made clear that a state may alter the common law right to accretion as long as it does so unambiguously and does not attempt to impinge upon accretion that has already accrued.

Indeed, Justice Stewart's concurrence only supports the ruling below. Justice Stewart recognized that

> Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners.

Hughes, 389 U.S. at 295.

Not once does Petitioner recognize a State's undisputed right to develop its real property common law as it relates to riparian owners. *See also Oregon State Land Board v. Corvallis Sand and Gravel Company*, 429 U.S. 363, 378-380 (1977) ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States."); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Petitioner attempts to overcome this point by arguing that the Florida Supreme Court has previously defined littoral or riparian rights as "constitutional." Pet. at 16. Even assuming this to be true, the Florida Supreme Court's later conclusion that certain aspects of common law littoral rights are not vested constitutional rights does not make its decision unconstitutional. Florida's Legislature has defined common law property rights so that constitutionally vested property rights are not impinged. *Hughes* approves such a result.

1. The Florida Supreme Court Properly Held That Florida's Legislature Could Eliminate The Right To Future Accretion Where The Common Law Reasons For The Development Of The Doctrine Have Changed.

Parsing out Petitioner's rhetoric of what the Florida Supreme Court did, Petitioner appears to complain that by affirming the Legislature's right to alter the common law surrounding non-vested littoral rights, the Court somehow deprived Petitioner's members of an alleged constitutional right to a permanent common law *definition* of littoral rights.

Petitioner's claimed basis for this constitutional right to a common law definition of littoral rights appears to emanate from *State v. Florida National Properties, Inc.*, 338 So. 2d 13, 17 (Fla. 1976). Petitioner claims that in *Florida National Property*:

> The Florida Supreme Court expressly recognized the nature of the littoral right to accretion was a future right: "the State, through the Trustees, claims not only the lands to which Plaintiff has already gained title through the operation of accretion and reliction, but also seeks to deny to Plaintiff the right to acquire additional property in the future through the process of accretion and reliction."
>
> . . . 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.

Pet. at 18.

The Florida Supreme Court did not make the rulings which Petitioner quotes. Rather, the trial court in that case issued these rulings. The Supreme Court simply set forth the trial court's judgment in its opinion. Although the Court affirmed the trial court's judgment, it did not adopt the trial court's reasoning as its own, or ever directly address whether a statute would be unconstitutional if it changed future rights to accretion or reliction, particularly when it simultaneously eliminated the landowner's risk of erosion. The Florida Supreme Court correctly ignored a prior case that did not directly address the issue before it in this case.

Not only is there no precedent that creates a permanent common law definition of littoral rights that encompasses the future right to accretion, the Florida Supreme Court's ruling is perfectly consistent with its prior explanation of the historical need for the accretion doctrine. In *Board of Trustees of the Internal Imp. Trust Fund v. Sand Key Associates, Ltd.*, 512 So. 2d 934 (Fla. 1987), the Court recognized that one of the very reasons for the right to accretion is the detriment of erosion:

> Almost all jurists and legislators . . . both ancient and modern, have agreed that the owner of the [waterfront property] . . . is entitled to these additions. By some the rule has been vindicated 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 . . .

Id. at 937.[4]

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[4] In fact, the *Sand Key* court noted that the Florida Legislature has continuously redefined the common law of riparian rights to coincide with public policy. In 1856, the Florida Legislature expanded waterfront owners' rights by modifying the common law rule concerning artificial additions to waterfront property in the enactment of the Butler Act. Ch. 791, Laws of Fla. (1856). This "Act to benefit Commerce" provided that the State of Florida, in consideration of this benefit, would divest itself of all right, title, and interest to lands covered by water lying in front of land of a citizen vesting title in riparian proprietor owners and "giving them the full right and privilege to build wharves into streams or waters of the Bay or Harbor as far as may be necessary . . . and to fill up from the shore, bank or beach, as far as may be desired, not obstructing the channel." In 1921, this Act was amended to specify that this grant of title did not affect submerged lands "until actually filled in or permanently improved." *See* ch. 8537, Laws of Fla. (1921). In 1957, this public policy was changed because of concern for the rights of the public in submerged sovereignty lands and these additional statutory riparian and littoral rights were repealed. *See* ch. 57-362, Laws of Fla. Section 161.051 was enacted in 1965 as part of the chapter entitled "Beach, Shore and Preservation Act," and has as its intent the regulation of construction,

(Continued on following page)

At the same time the Act suspends accretion for the duration of the project since the ECL can be reversed, it eliminates a landowner's burden to bear the future common law risk of erosion. Interestingly, Petitioner does not complain that its members' right to erosion is a constitutional right that it must bear. The Florida Legislature had every right to alter a common law principle to reflect a change to its very right of existence.

Petitioner's complaint that the Supreme Court cannot undo 100 years of property rights misses the mark. Pet. at 20. The Florida Legislature *can* alter unvested common law property rights. Petitioner refuses to recognize this point, even though this Court has affirmed this principle. *Hughes* at 295-296. The only constitutional limitation upon the Florida Legislature is that it cannot take away a landowner's vested property rights without due process or just compensation. Petitioner does nothing in its petition to overcome the constitutionally approved principle that the Legislature can alter a contingent common law property interest.[5]

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reconstruction, and other physical improvements on waterfront properties.

[5] Petitioner asserts that this issue was not raised below by any party and implies that the Florida Supreme Court concocted it all on its own. Pet. at 19, n. 23. This statement is inaccurate. *See* R.App. at 13, 29, 33.

2. The Florida Supreme Court Acted Well Within Constitutional Parameters When It Recognized That A Riparian Landowner's Common Law Right Of Access To The Water Is Satisfied Regardless Of Whether Its Property Directly Touches The Mean High Water Line.

Petitioner claims the Florida Supreme Court has eliminated its members' constitutional right to contact with the water. Pet. at 21-23. Petitioner argues that the very right to be a riparian landowner is based upon contact with the water. All other riparian rights, Petitioner claims, simply disappear if contact with the water dissipates. Except for making this bald assertion, Petitioner fails to carry forward this logic.

It cannot. Contact with the water is not a right, but what gives the property its riparian character. The Act did not change the riparian character of the property. As it pertains to riparian landowners whose beach is lost and re-nourished by the State under the Act, all riparian rights are expressly preserved regardless of where the ECL is set. §161.201, *Fla. Stat.* Thus, a riparian landowner remains a riparian landowner under the Act, with all rights of a riparian landowner. Petitioner fails to explain what its members cannot do as riparian landowners after the ECL was established that they could do prior to the establishment of the ECL.

B. A Judicial Taking Has Not Occurred Because The Florida Supreme Court Did Not Suddenly Change State Law Nor Did It Declare A State Property Right Never Existed.

Petitioner argues that judicial takings need to be stopped, and this Court has not done enough to stop them. Pet. at 31. Petitioner cites fifteen cases in which this Court has denied certiorari of alleged judicial taking cases. Even assuming there is an epidemic of judicial takings, the facts of this case do not present one. This is not the type of case like *Hughes* where there was a "sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes,* 389 U.S. at 266.

Petitioner cries "sudden" but ignores the fact that the relevant portions of the Act were created in 1970. This law – and how it works – has been on the books for over thirty-five years, including the suspension of the right to future accretion and creation of the ECL as the boundary.[6] By no means is this a sudden change in Florida common law. Nor was there anything ambiguous about what was said in the Act.

Moreover, the Florida Supreme Court's decision cannot remotely be construed as one that unconstitutionally holds a property right never existed. The

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[6] Nothing in the record shows if Petitioner's members purchased their riparian property before or after the enactment of the Act.

Florida Supreme Court has noted for decades that riparian rights (other than accretion, reliction and erosion) were easements. *Brickell v. Trammel*, 82 So. 221, 227 (Fla. 1919) ("These special rights are easements incident to the (littoral) holdings and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law. The common-law (littoral) rights that arise by implication of law give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction, and other similar rights."); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909) (same). The Florida Supreme Court recognized that these easements remain intact under the Act, regardless of whether the property touches the water. It is these easements that are the common law "rights" of riparian landowners.

Petitioner cites *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J., and O'Connor, J., dissenting from denial of the petition for writ of certiorari), to prove its point that because this Court has not done its job to curtail judicial taking cases, "state courts have become more aggressive in 'invoking non-existent rules of substantive law' to deprive landowners of property." Pet. at 30-31. Petitioner does applaud the federal circuit courts that it claims have cut-off such attempts.

Petitioner cites *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), rev'd on procedural grounds, *Ariyoshi v. Robinson*, 477 U.S. 902 (1986), as one example of what federal circuits should do to

prevent judicial takings. Yet as explained *supra* at 1, *Robinson* actually supports the outcome here. In *Robinson*, the Ninth Circuit addressed a party's right to irrigation water that had been given to it many years before through court decision. The court presented the substantive question as "whether the state can declare, by court decision, that the water rights in this case have not ***vested.*** The short answer is no." *Id.* at 1473. (emphasis added). However, the Ninth Circuit recognized that "[i]nsofar as judicial changes in the law operate prospectively to affect property rights ***vesting after the law is changed***, no specific federal question is presented by the state's choice of implement in changing state law" citing *Hughes v. Washington*, 389 U.S. 290, (1967) (Stewart, J. concurring) (emphasis added).

If anything, *Robinson* supports the Florida Supreme Court's conclusion that future rights that have not vested may be altered without impacting constitutional rights. This case involves nothing more than a court approving a legislature's thirty-year-old elimination of unvested common law property rights, to wit: future accretion, and replacing it with protection of loss by erosion. This Court has recognized that state courts may do so; no other federal circuit courts have ruled to the contrary. The facts of this case do not justify this Court exercising its jurisdiction to curb the allegedly rampant use of judicial takings.

II. THE FLORIDA SUPREME COURT CORRECTLY DETERMINED THAT THE FLORIDA LEGISLATURE MAY ALTER COMMON LAW PROPERTY RIGHTS THAT HAVE NOT VESTED.

Once again, Petitioner's argument is premised upon a distorted view of what the Act accomplished and what the Florida Supreme Court did. The Act altered the common law surrounding the right to future accretion. It did so because the Act replaced the obligation that a landowner bear the risk of future erosion, one of the common law reasons for the right to accretion. The Act also kept intact the riparian landowner's right to access the water, which has been a right by easement under decade-old Florida law.

Petitioner claims that the Florida Supreme Court approved the replacement of constitutional rights with statutory rights. As explained *supra* at 15, 19, common law rights that had not vested were not constitutional. Authority Petitioner relies upon to make its argument recites this very point. *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), rev'd on procedural grounds, *Ariyoshi v. Robinson*, 477 U.S. 902 (1986) ("[i]nsofar as judicial changes in the law operate prospectively to affect property rights ***vesting after the law is changed***, no specific federal question is presented by the state's choice of implement in changing state law").

Petitioner's arguments overlook this crucial step. The issue is whether the Florida Legislature can alter a common law property right. It can. While it cannot do so to effectuate a taking of a current property right, it can do so in a way that effects a right that has yet to occur. Notably, Petitioner refuses to engage in a discussion of how the right to accretion that may or may not occur in the future can be a vested property right. By ignoring this step, Petitioner asks this Court to accept jurisdiction of a constitutional issue that is not presented by the facts and background of this case.

Petitioner attempts to equate these unvested common law rights to the constitutional rights of free speech, access to the courts, equal protection, due process, and right to privacy. (Pet. at 35). These are rights that the Constitution expressly guarantees. Property interests are not created by the Constitution. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Although property interests are protected by the federal Due Process and Takings Clauses, the property interests themselves arise from independent sources, such as state law. *Id.* The extent of those property rights are defined by Florida's common law. *Hughes*, 389 U.S. at 295.

III. THE FLORIDA SUPREME COURT HELD THAT THE ACT CAN CONSTITUTIONALLY PERMIT THE STATE TO APPROVE THE ECL BUT THAT IT MUST COMPENSATE AN AFFECTED RIPARIAN LANDOWNER TO THE EXTENT OF ANY TAKING OF PROPERTY BY THE CREATION OF THE EROSION CONTROL LINE.

Petitioner's final argument is premised upon a logically flawed theory, and repeats many of its prior complaints. Petitioner claims that Florida's legislature altered a landowner's property line without due process when it changed the property boundary from the MHWL to the ECL. This argument is flawed for two obvious reasons.

First, it is premised upon Petitioner's erroneous belief that the Florida Supreme Court has previously held that "constitutionally protected" littoral rights cannot be separated from littoral property. Pet. at 37. Petitioner cites *Belvedere Dev. Corp. v. Department of Transp.*, 476 So. 2d 649, 651 (Fla. 1985).

Belvedere is not relevant to the facts of this case. In *Belvedere*, the Department of Transportation (DOT) sought to acquire uplands in fee simple absolute, while expressly reserving the littoral rights to the former upland owners. 476 So. 2d at 649. DOT severed the littoral rights in an attempt to limit the compensation for uplands in eminent domain proceedings. In *Belvedere*, the Florida Supreme Court was particularly concerned that the former upland owners did not have the actual ability to exercise any

of their reserved littoral rights since they held no easement or right to enter upon their former land. The Court thus held in *Belvedere* that littoral rights "cannot be severed by condemnation proceedings without the consent of the upland owner." *Id.* at 653. In so holding, the Court emphasized that its decision was limited to the context of condemnation of upland property. *Id.* at 652.

The Court did not hold in *Belvedere* that riparian rights can never be severed from upland property without the owner's consent. Indeed, the Court expressly declared that "we will not hold that riparian rights are never severable from the riparian lands." *Belvedere*, 476 So. 2d at 652. Rather, the Court expressed concern that the upland landowners in *Belvedere* would have "no easement or other retained right" to cross DOT's newly acquired riparian lands to get access to the water or to build a dock to the water. *Id.* at 651.

This case does not involve a condemnation proceeding to physically take Petitioner's members' lands without paying any compensation for the riparian rights. The landowners will retain title to and possession of all of their upland land. Also, unlike *Belvedere*, the Act, by statutory grant, guarantees the private landowners continued full rights of access to the water, "including but not limited to rights of ingress, egress, view, boating, bathing, and fishing." Fla. Stat. §161.201.

The attempted severance and reservation of riparian rights by DOT in *Belvedere* to avoid payment of full just compensation in an eminent domain action bears no resemblance to the State Legislature's limited modification of the common law to protect both public and private interests in critically eroded beach areas. Unlike DOT, the Legislature has the power to modify the common law, an important point which Petitioner continues to ignore.

Petitioner's argument is also flawed because it ignores the Florida Supreme Court's clear language that if the ECL takes a portion of the land owned by the Petitioner's members, then it would be a taking and must be compensated. *Walton County*, 998 So. 2d at 1118, n. 15. Notably, Petitioner never outlines how the new ECL causes its members a compensable property loss. Petitioner's members received a benefit: the re-nourishment of a critically eroded beach.

CONCLUSION

Petitioner correctly recites that a taking is measured by what an opinion does. Pet. at 40, citing *Hughes*, 389 U.S. at 297-298. Here, the Florida Supreme Court's opinion leaves Petitioner's members' **vested** common law property rights intact. The Supreme Court's opinion approved a change in the common law as to future contingent rights (accretion) because the very foundation (erosion) for that future

right had changed – to favor riparian landowners. Such a change in the common law is constitutional. At bottom, then, Petitioner's members have no less than they did before the ECL: vested riparian rights and the right to an as-applied challenge if the ECL impinged upon any of their reasonable investment-backed expectations.

Respectfully submitted,

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