No. 08-1151

IN THE
Supreme Court of the United States

STOP THE BEACH
RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,

Respondents.

ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

BRIEF AMICUS CURIAE OF COALITION FOR PROPERTY RIGHTS, INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Is the Florida Supreme Court's approval of a scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the Due Process and Takings Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution?

Is the Florida Supreme Court's approval of a scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without notice or a judicial hearing or the payment of just compensation a violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Coalition for Property Rights, Inc. ("CPR") submits this amicus curiae brief in support of Petitioner Stop the Beach Renourishment, Inc.[1]

CPR, a Florida-based nonprofit organization, is a grassroots education and advocacy group dedicated to the preservation of private property rights. CPR was founded by Florida landowners to bring greater public awareness to the importance of private property rights and to unify property owners on the premise that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and unalienable rights of man." *Vanhorne's Lessee v. Dorrance*, 2 Dall. 310 (D. Penn. 1795). Today, CPR's members and contributors represent a broad cross-section of Florida property and business owners, from individual homeowners to some of Florida's largest landowners. Among its members are owners of oceanfront property who are affected by the statute at issue in this case.

CPR has represented property owners and has participated as amicus in litigation before both Florida and federal courts. CPR hopes and expects that its

[1] CPR confirms that (i) no person other than CPR, its members or its counsel made a monetary contribution to the preparation or submission of this brief, (ii) no counsel for any party authored any part of this brief, and (iii) no party or counsel contributed money intendedto fund the preparation or submission of this brief. The parties have filed blanket waivers consenting to the filing of amicus briefs.

Florida perspective will assist this Court in considering the weighty constitutional matters presented here.

SUMMARY OF THE ARGUMENT

The Florida Supreme Court below in *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. 2008),[2] leapt right past the confiscatory regulation that this Court upbraided in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1986). This is no mere development exaction that went too far. As Justice Scalia noted, actual physical property confiscation to foster public access is an easy takings judgment. *Nollan*, 483 U.S. at 831. Littoral rights are water use appurtenances to oceanfront property, which may not be taken in Florida without compensation. *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909). No Florida Supreme Court decision has ever previously authorized outright confiscation of littoral or riparian rights of waterfront lands without compensation. The State Court below reversed over a century of established Florida

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[2] Undersigned counsel discloses that Charles T. Wells, now a partner with GrayRobinson, P.A., participated in the Florida Supreme Court's decision below as a Justice of that court. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d at 1121 (Wells, J., dissenting). Accordingly, pursuant to Rule 4-1.12, Florida Rules of Professional Conduct, former Justice Wells has played no role in GrayRobinson's representation of CPR, having been timely screened from any participation in the matter. He will be apportioned no fee from this representation. In addition to this disclosure to this Court, timely written notice was provided to the parties, enabling them to ascertain compliance with Rule 4-1.12, Florida Rules of Professional Conduct.

law of littoral rights. That Court allows an executive agency to reframe the rights of oceanfront owners that are grounded in the Florida Constitution and a century of case law, and to leave the aggrieved property owner with no meaningful remedy.

This Court emphasized in *Nollan* just how direct is the connection between deprivation of beachfront property rights and the right to compensation:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, ... we have no doubt there would have been a taking . . . . *Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them.*

483 U.S. at 831 (c.o.) (e.a.).

Florida's Supreme Court went well beyond *Nollan*. It did not just impose an easement, although it did that as well. It redefined permanently the constitutionally based boundary between upland, beachfront parcels and submerged sovereign lands. As this Court held in *Nollan*, the state may completely redefine oceanfront property rights, but it must pay just compensation for rights lost as a result. The Florida Supreme Court left that part out, in violation of well established principles of Florida law, dating back to March 3, 1845.

ARGUMENT

Florida's Constitution provides, since 1970, that the State holds title in the public trust to lands waterward of the mean high water line along beaches. Private upland ownership is bounded by an ambulatory mean high water line. *See S. Ansbacher and J. Knetsch, The Public Trust Doctrine and Sovereign Land in Florida: a Legal and Historical Analysis*, 4 FSU J. L.U. & ENVTL. LAW 337, 365-69 (1989) (Florida Constitution and common law establish title boundaries along tidally influenced waters at mean 19-year value).

Florida's Supreme Court held in *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909), that littoral rights of access, wharfage and view appurtenant to ownership at the high water line "are property rights that may be regulated by law, but may not be taken without just compensation and due process of law." The State Court below ignored its own precedent in *State v. Fla. Natl Properties. Inc.*, 338 So. 2d 13 (Fla. 1976), which confirmed that the high water line is a transient, and not permanently fixed boundary. The Florida Supreme Court held in *Fla. Natl Properties* that an attempt to fix permanently that boundary by statute was unconstitutional. Nothing has changed from a century of state property law precedent. Nothing, except Florida's means to an end of accentuating public access across private lands for free. Fixing the otherwise ambulatory boundary deprives oceanfront owners of their littoral rights. It is a physical taking.

I. Background Principles Of State Law

One must analyze Florida law in determining two fundamental points. First, what constitutes a property right? Second, when has a state action so deprived property rights as to require compensation? Florida law has long held that riparian or littoral rights are appurtenant to ownership along navigable waters. Additionally, deprivation of any of those rights has long been held to be compensable.

Art. I, S.2 of the Florida Constitution provides:

> Section 2. Basic rights – All natural persons . . . . have *inalienable rights*, among which are the right to *acquire, possess and protect property* . . . .

(e.a.) The Florida Supreme Court noted in *Shriners Hospital v. Zrillic*, 563 So.2d 64, 67 (Fla. 1990), that property rights are "woven into the fabric of Florida history (citing to organic common law, the Declaration of Rights in Florida's original Constitution and the current State Constitution)." In significant part, the *Shriners* Court stated:

> [T]he phrase "acquire, possess and protect property" in article I, section 2, includes the *incidents of property ownership: the "[c]ollection of rights to use and enjoy property . . ."*

563 So.2d at 67 (c.o.) (e.a.b.c). The *Shriners* Court emphasized that these property principles are found as

well in the takings clauses of the Florida and U.S. Constitutions. *Id*. at n. 4. *Shriners* notes that real property rights are "inalienable rights grounded in natural law . . . ." and are protected by Art. I, s.2. *Id*. Even reasonable property regulation may require compensation. *Id*.

Shriners held that Florida real property rights stem from organic common law. 563 So.2d at 67, n. 4, and accompanying text. *See generally*, *State ex rel Davis v. City of Stuart*, 120 So. 335, 345 (Fla. 1929) (citing the Magna Carta, as well as U.S. and Florida Constitutions in stating: "Our chief existing guarantees of individual liberty and private property" must be "preserved by our constitutional guarantees from invasion or impairment by governmental power of any kind.").

Florida has long held that lands abutting navigable waters carry appurtenant riparian or littoral rights. *See e.g., Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957) (ruling that a parcel that fronted the navigable Boca Ciega Bay carried rights of wharfage and access to, and view of, the navigable water body).

Florida law is consistent with this Court's authority. In *Pollard v. Hagan*, 44 U.S. (How.) 212 (1845), this Court held that the Equal Footing Doctrine fixed boundaries of sovereign title to lands underlying tidal waters as of the date of admission to the statehood. Florida entered the Union March 3, 1845. This Court stated in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 378-80 (1977), that a state is free to retain title to certain sovereign beds, but may convey other sovereign beds to private grantees

or otherwise constrict the definition of sovereign lands after it achieves statehood:

> Once the equal-footing doctrine had vested title to the riverbed in [the state] as of the time of its admission to the Union, the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have.

429 U.S. at 371. In sum, each state's law governs how and whether sovereign lands are altered. *See, Barney v. Keokuk*, 94 U.S. 324 (1876) (holding that a state may convey sovereign lands to private grantees).

This case addresses titles along a tidally influenced water, the Gulf of Mexico. Roman jurists held that the sea and foreshore were *res communes.* W. BUCKLAND, A TEXTBOOK OF ROMAN LAW 184, 186 (1921). The dominant English Common Law rule held that the high water mark was the boundary between sovereign and upland ownership. *See, e.g.*, *Fraser, Title to the Soil Under Public Waters - A Question of Fact*, 2 MINN. L. REV. 313, 321-22 (1918), *Atty Gen. v. Chambers*, 43 Eng. Rep. 486 (K.B. 1854). Pertinent to Florida, Spanish law also held that private ownership was bounded by the high water mark. *Apalachicola Land & Development Co. v. McRae,* 98 So.2d 505, 518 (Fla. 1973).

Under the Equal Footing Doctrine, Florida held sovereign title underlying all tidally influenced waters upon statehood. *See generally Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 108 S. Ct. 791 (1988)

(confirming that each state received title to all lands underlying tidally influenced waters upon statehood; holding also that each state may alter sovereign lands thereafter). Consistent with *Corvallis*, Florida early on altered boundaries along tidally influenced waters by common law to limit tidal lands owned by the sovereign to those under navigable waters. *See, e.g., State v. Black River Phosphate Co.,* 13 So. 640, 644 (Fla. 1893); *Clement v. Watson*, 58 So. 25 (Fla. 1925) (rejecting the "ebb and flow" test, in restricting sovereign lands to those under navigable waters). The 1968 Constitution was amended in 1970 to codify that boundary. The Constitution delineated the boundary between uplands and submerged sovereign lands as follows:

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, *including beaches below mean high water lines*, is held by the state, by virtue of its sovereignty, in trust for all the people.

ART X, section 11, Fla. Const. (1968, am. 1970) (e.a.). That section remains today.

This Court established the Mean High Water Line (MHWL) as a suitable boundary for tidelands in *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935). The *Borax* court considered the common law ordinary high water mark, which had been defined as the line of the medium high tide, and held that the scientifically determined MHWL was the modern

equivalent of that common law rule. 296 U.S. at 26-27. The MHWL is the average high tide over a 19-year lunar "epoch."

Florida's Supreme Court first considered the MHWL definition in *Miller v. Bay-to-Gulf, Inc.*, 141 Fla. 452, 193 So. 425 (1940). The Florida Court attempted to define the "ordinary high tide line" as "the limit reached by the daily ebb and flow of the tide." 193 So. at 428.

In 1974, Florida enacted Chapter 177, Part II, Fla. Stat., entitled the "Coastal Mapping Act." The amorphous definition of high tide line in *Miller* has been clarified by section 177.27(14) and (15), Fla. Stat.

> 177.27 Definitions — The following words, phrases, or terms used herein, unless the context otherwise indicates, shall have the following meanings:
>
> * * *
>
> (14) "Mean High Water" means the average height of the high waters over a 19-year period. For shorter periods of observation, "mean high water" means the average height of the high waters after corrections are applied to eliminate known variations and to reduce the result to the equivalent of a mean 19-year value.
>
> (15) "Mean High-Water Line" means the intersection of the tidal plane of mean high water with the shore.

In short, Florida's definition of MHWL since passage of Ch. 177, Part II, parallels *Borax*. *See Lee v. Williams*, 711 So.2d 57, 63 (Fla. 5th DCA 1998) (finding that sovereign lands under ART X, section 11, are "lands under navigable waters"). The decision below confirmed the first deviation from this long-standing definition. Florida has long acknowledged that riparian or littoral rights are appurtenances to lands on navigable waters, those rights cannot be taken without compensation:

> In so far as the declaration alleges the right of ingress and egress to and from the lot over the waters of the bay, it states a common law right appertaining to riparian proprietorship. The common law riparian proprietor enjoys this right, and that of unobstructed view over the waters, and in common with the public the right of navigating bathing, and fishing.

Webb v. Giddens, 82 So.2d 743, 745 (Fla. 1955), quoting *Thiesen v. Gulf, F&A Ry. Co.*, 78 So. 491, 501 (Fla. 1918). *Webb* noted that then Florida Statutes section 192.61, [and now section 253.141] "may be accepted as a partial codification of the common law on the subject." 82 So. 2d 745; *but see Feller v. Eau Gallie Yacht Basin*, 397 So.2d 1155 (Fla. 5th DCA 1987) (riparian rights stem from constitution and common law, and are not dependent on statute).

Florida's leading riparian case was *Hayes, supra*, 91 So.2d 795. The Florida Supreme Court explicated those rights further in *GFWFC v. Lake Islands, Ltd.*, 407 So.2d 189 (Fla. 1981), where the court held that a rule barring motorboats on a navigable lake was

constitutional in general, but struck it as applied to riparian owners along the lake:

> *For the riparian right of ingress and egress to mean anything, it must at the very least establish a protectable interest when there is a special injury*. To hold otherwise means the state could absolutely deny permissible access to an island property owner or block off both ends of a channel without being responsible to the riparian owner for any compensation. A waterway is often the street or public way; when one denies its use to a property owner, one denies him access to his property . . . . Reasonable access must, of course, be balanced with the public good, but a *substantial diminution or total denial of reasonable access to the property owner is a compensable deprivation of a property interest.*

407 So.2d at 193 (e.a.).

The seminal Florida treatise on water rights is MALONEY, ET AL, FLORIDA WATER LAW 1980 (Maloney). Maloney noted: "[T]he term mean high water line appears in Article X, section 11 of the Florida Constitution [and in several statutes]". *Id.* at 725. Maloney emphasized: "The Florida Coastal Mapping Act of 1974 is especially significant in this regard."

Maloney stated that the statutory definition partially codified common law. Maloney emphasized:

> In the Act it is expressly declared that the Florida Legislature "recognizes the desirability of confirmation of the mean high water line, as recognized in the State Constitution and defined in Section 177.27(15) as the boundary between state sovereignty, land and uplands subject to private ownership."

Id., quoting Florida Statutes Section 177.26.

Maloney listed the following cases that cited the above-noted definition by 1980: *Trustees v. Wetstone*, 222 So.2d 10, 13-14 (Fla. 1969); *City of Daytona Beach v. Tona-Rama*, 294 So.2d 73, 78 (Fla. 1974); *St. Jude Harbors, Inc. v. Keegan*, 295 So.2d 141, 142 (Fla. 2d DCA 1974); *Trustees v. Wakulla Silver Springs Co.*, 362 So.2d 706, 711 (Fla. 3d DCA 1978); and *St. Joseph Paper v. Trustees*, 365 So.2d 1084, 1087 (Fla. 1st DCA 1979). Maloney concluded:

> These recent decisions and the statutory provisions mentioned above indicated that the mean high water line is now *well-established as the legal boundary*, between private uplands and the state owned submerged lands in tidal waters of the state.

Maloney at 725 (e.a.).

Maloney explained that this meant "[m]any of the boundary and title problems which beset lands bordering waters are caused by changing shoreline." *Id.* at 726. Maloney noted that high water lines are ambulatory by definition, consistent with *Borax*. *Id.* at 720-22, 726-36. Maloney explained the general rule regarding "accretion," or gradual, imperceptible additions of soil to the shores":

> Florida follows the common law rule which vests title to soil formed by accretion along navigable waters in the owners of abutting lands.

Maloney at 727.

Maloney distinguished man-made additions to uplands, which do not generally alter waterfront boundaries in Florida. *Id.* at 729-30. Maloney noted a salient exception that stems from this Court's decision in *County of St. Clair v. Lovingston*, 90 U.S. 46 (1874), cited at Maloney, at 730-31:

> Generally, where the [upland littoral owner] claimant had no part in the erection of an obstruction causing accretion, the fact that the accretion was initiated or otherwise influenced by an artificial process will not impair his claim of title to the land formed.

Maloney at 730 (cits. om.):

Maloney cited *Trustees of the Internal Improvement Trust Fund v. Madeira Beach Nominee*, 272 So.2d 209

(Fla. 2d DCA 1973). The State there sought to enjoin the littoral land owner from constructing a seawall on accreted lands that resulted from a public project. The court refused, holding implicitly in pertinent part that vesting of accreted lands in the state as a result of a public works project would constitute a taking. Maloney at 733. This decision addressed Florida Statutes section 166.051., "which purported to vest title in the state to coastal accretions created by public works." *Id.* at 732.

The Florida Supreme Court agreed with *Madeira*, in *Board of Trustees v. Sand Key Assocs. Ltd.*, 512 So.2d 934 (Fla. 1987). The Court held that upland waterfront owners, who did not participate in improvements that resulted in accretion were entitled to that accretion. As in *Madeira*, the Court held that Florida Statutes section 166.051 did not vest title in the state against such an innocent landowner merely because of the perceived public benefit of the beach renourishment. The opinion cited a myriad of general authority and its prior opinions, including *Fla. National Properties,* in holding that the riparian right to alluvial deposits is a property right that cannot be taken without compensation.

II. The Act results in a physical taking of Petitioners' properties, in violation of the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Due Process Clause.

Property rights – and especially real property rights – are fundamental to the preservation of liberty and freedom. In his *Second Treatise of Government*, John Locke observed that "[t]he great and chief end,

therefore, of men's uniting into commonwealths, and putting themselves under government, *is the preservation of their property.*"[3] This idea – that preservation of private property is necessary to fulfillment of our "social contract" – informed our founding fathers as they drafted the Fifth and Fourteenth Amendments to the U.S. Constitution.[4]

Applying these bedrock principles to the instant case, the Act results in clear confiscations of Petitioners' properties, including constitutionally protected littoral rights.

More specifically, the Act:

- results in changes to the property actually described in Petitioners' deeds, by changing the seaward boundary from the dynamic MHWL to the static Erosion Control Line (ECL);

- permits the State's contractors to place sand both seaward *and landward* of the MHWL – the sand placed landward of the MHWL altered the elevation and contours of Petitioners' dry sand properties without their permission, and is, by itself, a physical invasion;

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[3] John Locke, *Second Treatise of Government*, Chapter IX: Of The Ends of Political Society and Government, ¶ 124 (1690) (e.i.o.).

[4] John Adams, *A Balanced Government* (1790) ("Property must be secured, or liberty cannot exist.")

- takes private oceanfront property, and turns it into ocean view property adjacent to a public beach;
- eliminates from the bundle of sticks comprising Petitioners' private property rights, the prized right to exclude others from this dry sand portion of the beach;
- confiscates entirely the constitutionally protected littoral right of accretion, replacing it with a fixed boundary (the ECL) that will never benefit from accretion; and
- confiscates entirely the constitutionally protected littoral right to have the property touch the MHWL, from which all other littoral rights spring.

These are all physical takings, not regulatory takings. Accordingly, compensation is a constitutional imperative under both the United States and Florida constitutions.

In physical takings cases, the government either takes title to what was private property, or authorizes a physical occupation of the property. *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Storer Cable TV of Florida, Inc. v. Summerwinds Apartments Assocs., LTD*, 493 So. 2d 417 (Fla. 1986). This case involves the more extreme version of physical taking – the Board of Trustees of the Internal Improvement Trust Fund has actually taken

title to previously private property, creating a public dry sand beach where none ever existed. In the process, the government has altered Petitioners' deeds, confiscated their littoral rights to touch the water and to receive accretions, has invaded private property by placing sand even landward of the MHWL, and has forever severed Petitioners' properties from the Gulf of Mexico. Petitioners are left with the same access to the water that members of the public have – that is, the shared right to access the water from the public beach. This amounts to a physical taking of property, not a mere regulation. *Nollan*, 483 U.S. at 831; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (explaining the distinctions between physical and regulatory takings).

In attempting to "balance" the landowners' littoral rights against other countervailing interests (mainly the newly-created governmental duty to "protect" the beach), the Florida Supreme Court erroneously applied a multi-factor test in this physical takings case.[5] This Court's precedent establishes that physical invasions of property must always be compensated. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (finding a taking where government imposed a public right of access across private property to a private pond's waters).

By suggesting that the State's newly-created "duty to protect the beaches" should somehow be "balanced"

[5] *Compare Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), which adopted a multi-factor test to determine a regulatory taking, with *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which held that a physical taking per se required compensation.

against Petitioners' constitutionally protected property rights, the Florida Supreme Court runs directly afoul of this Court's precedent. As this Court observed in *Loretto*, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426. Accordingly, all of the "balancing" done by the Florida Supreme Court below must be rejected by this Court. *Loretto*, 458 U.S. at 432 (emphasizing that previous cases "state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause.") Petitioners' property rights have been physically taken without compensation, in violation of the United States and Florida constitutions.

Similarly, the Florida Supreme Court's opinion below includes much discussion of what sounds like the government's "police power" – its authority to act in the public's health, safety and welfare – without directly calling it the "police power" by name. *E.g., Stop The Beach Renourishment, Inc.*, 998 So. 2d at 1115 ("[T]he Act promotes the public's economic, ecological, recreational, and aesthetic interests in the shoreline."). But invoking these laudable public interests does nothing to address the real issues. Even if it was necessary to confiscate Petitioners' property rights to accomplish the Act's aims, this is irrelevant to the matter of whether a taking has occurred. A permanent physical occupation of property is a taking, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto*, 458 U.S. at 434-35; *Penn Central Transp. Co. v.*

City of New York, 438 U.S. 104 (1978). Further, it is well established in both this Court's precedents and in Florida law that even valid exercises of the police power can result in takings for which compensation is required. *See Nollan*, 483 U.S. at 834-836, 841-42 (California could regulate coastal development, and accentuate public access, but had to pay for public easement imposed on private parcel); *see also Dept. of Agriculture v. Mid-Florida Growers*, 521 So. 2d 103 (Fla. 1984) (full and just compensation required even for a valid exercise of police power); *Drake v. Walton County*, 6 So. 3d 717 (Fla. 1st DCA 2009).

Overlooked entirely in the opinion below is the fact that the Act operates to take from these landowners the right to exclude the public from their properties. This Court has pronounced that the right to exclude "is universally held to be a fundamental element of the property right, [which] falls within the category of interests that the government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179-80, cited at *Nollan*, 483 U.S. at 831. Taking of the Petitioners' right to exclude the public from a private beach constitutes in and of itself a compensable taking of property.

In the Restatement of the Law of Property, the right to exclude others was recognized as inherent in the right to possess land:

> § 7 Possessory Interests in Land
>
> A possessory interest in land exists in a person who has a physical relation to the land

> of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land. [6]

In *Loretto*, this Court cited to Section 7 of the Restatement, pointing out that when the government physically occupies property, the owner is himself ousted from the property, and is prevented from possessing, using or disposing of the property. *Loretto*, 458 U.S. at 435-436. Similarly, *Kaiser Aetna* involved the Army Corps of Engineers' attempt to impose a navigational servitude that precluded the owners of a private pond from denying the public access to the pond. *Kaiser Aetna*, 444 U.S. at 167. This Court held that a public easement in the property effectuated an actual physical invasion. *Id.* at 179-80. In *Loretto* this Court observed that "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . . property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." *Loretto*, 458 U.S. at 436; *see also United States v. Causby*, 328 U.S. 256, 265 (1946).

To be sure, the State of Florida can take a portion of this beach for public recreational use, even without the renourishment project. The goal of providing the public with the opportunity to enjoy the dry portion of the beach, is laudable. The proper way to accomplish that aim under our constitutional system, though, is for

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[6] Restatement of Property § 7 (1936).

the State or municipalities to purchase the necessary property rights or to obtain them through eminent domain.[7] Such acquisitions for parks and for beach access are made routinely under the government's eminent domain power. Simply confiscating the property through legislative or judicial decree violates our constitutional prohibitions against the taking of private property without compensation. *See Nollan*, 483 U.S. at 831; *see also Bell v. Town of Wells*, 557 A. 2d 168, 180 (Maine 1989) (holding statute taking shorefront property through legislative codification of custom doctrine unconstitutional under both the United States and Maine constitutions).

It is, of course, not this Court's role to determine the amount of compensation that would be due the Petitioners if this Court upholds the Act but determines that the Petitioners must be paid for destruction of their property rights. *See Loretto*, 458 U.S. at 444 (acknowledging landowners' right to compensation for physical taking, but expressing no opinion regarding the amount of compensation due; instead this Court left that for the state court to consider on remand). Still, these owners paid a premium for the littoral rights and exclusivity that the Act now confiscates. *See Thiesen v. Gulf, F&A Ry. Co.*, 78 So. 491, 507 (Fla. 1917) (observing

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[7] Indeed, the Act expressly contemplates that condemnation might be necessary to acquire property needed for the renourishment project. Fla. Stat. 161.141 ("If an authorized . . . . beach renourishment . . . . project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings.").

that littoral rights are often the driving factor in determining the price of waterfront properties).

These Petitioners purchased oceanfront properties, complete with the right to exclude. After full implementation of the Act, though, they will own only properties with an ocean view. Their properties will no longer touch the water, instead being separated from the water by a public beach on which vendors can buy or sell wares. Their littoral rights are now owned by the Board of Trustees. As applied, the Act has worked an illegal physical taking of Petitioners' properties.

III. The Majority Opinion Below Concluded Incorrectly that the Act Provides a Balancing of Interests, Rather than Taking of Littoral Rights.

The majority opinion below characterized the Act as instead providing "a careful balance between the interests of the public and the interests of the private upland owners." *Stop the Beach Renourishment*, 998 So.2d at 1115. Critical to the majority opinion was its determination that "at least facially, there is no material or substantial impairment of these [common law] littoral rights under the Act." *Id.* at 1115. The Court concluded:

> [T]he Act expressly preserves the upland owners' rights to access, use, and view, including the rights of ingress and egress. See section 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*. Thus, although the Act provides that the State may retain title to the newly created dry land directly adjacent to the water, upland owners may continue to access, use, and view the beach and water as they did prior to beach restoration.

998 So.2d at 1115.

In fact, these provisions do not provide any meaningful balancing of interests or replacement of the upland owner's littoral rights. The Act leaves the upland owner with no more use of the beach than the general public.

A. The Statute Cannot Preserve Common Law Littoral Rights Where the Property No Longer Extends to the Mean High Water Line.

Under Florida law, a landowner must have title to property touching navigable water to enjoy or assert riparian or littoral rights. *Sullivan v. Moreno*, 19 Fla. 200 (Fla. 1882), (plaintiff lacked standing because "simple possession of part of the soil between the lines of ordinary high tide and the edge of the channel" does not impart riparian rights); *Immer v. Weintraub*, 413 So.2d 47 (Fla. 3d DCA 1982) (owner of lot that did not abut canal had no standing to challenge the riparian

rights of another property owner). As the dissent below aptly described:

> By essential, inherent definition, riparian and littoral property . . . is that which is contiguous to, abuts, borders, adjoins, or touches water. See, e.g., *Brickell v. Trammell*, 77 Fla. 544, 82 So. 221, 229-30 (1919) (explaining that under Spanish civil law and English common law, private littoral ownership extended to the high-water mark); *Miller v. Bay-to-Gulf, Inc.*, 141 Fla. 452, 193 So. 425, 427 (1940) ("[I]*t is essential that [the property owners] show the ordinary high water mark or ordinary high tide of the Gulf of Mexico extended to their westerly boundary in order for them to be entitled to any sort of [littoral] rights* . . . ." (emphasis supplied)); *Thiesen v. Gulf, F & A Ry. Co.*, 75 Fla. 28, 78 So. 491, 500 (1918) ("At common law lands which were *bounded by and extended to the high-water mark* of waters in which the tide ebbed and flowed were riparian or littoral to such waters." (emphasis supplied)). 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 and is merely some "ancillary" concept that is subsumed by the right of access. In other words, the land must touch the water as a condition precedent to all other riparian or littoral rights and, in the case of littoral property, this touching must occur at the MHWL.

Stop the Beach Renourishment, Inc., 998 So.2d at 1122 (Lewis, J., dissenting) (f.n.o.). Riparian (and littoral) rights cannot ordinarily be separated from the upland property. *Belvedere Development Corp v. D.O.T.*, 476 So.2d 649 (Fla. 1985).

In finding that the landowner's rights were not materially impaired, the Court referred to section 161.201, which provides in part that

> [a]ny upland owner or lessee who . . . ceases to be a holder of title to the mean high-water line shall, nonetheless, continue to be entitled to all common-law riparian rights except as otherwise provided in section 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing.

The cases cited above show that once the upland property ceases to own to the mean high water line and loses contact with the water, the landowner ***cannot*** enjoy common law riparian rights under Florida law. Therefore, any rights created or protected by section 161.201 are **not** common law riparian rights, but are instead some form of statutory right. *Compare, Webb,* 82 So.2d at 745, where the Court noted Florida's riparian Statute codified existing common law. These rights are not only more limited in scope than the lost riparian rights, they do not provide meaningful protections to the upland owner's interests.

B. The Act Destroys, Rather than Protects, the Upland Owner's Common Law Littoral Rights in the Sandy Beach.

The statutory "common law riparian rights" referenced in section 161.201 do not and cannot leave the upland owner with the rights to access, ingress, egress, bathing, fishing and use that property upland of an ECL previously enjoyed. By converting the sand beach above the actual mean high water line to public beach, the Act deprives the upland owner of any common law rights to use the beach and water, and leaves the upland owner with only those rights that any member of the public would enjoy.

Despite the "reservation" of common law riparian rights in the statute, the Florida Attorney General has determined that in the area seaward of an established ECL "the traditional uses for which are fishing, swimming, boating and other public purposes authorized by law, are held in trust for the public." *Florida Attorney General Opinion 79-71*. That is, after the establishment of an ECL, the general public has the same rights of use as a riparian owner in the entire sandy beach seaward of the ECL.

First, the upland landowner clearly loses the critical property right to exclude the public from the area between the high water mark and the ECL; that is, the right to a **private** sandy beach. The public generally has no right to cross privately owned sandy beach in order to gain access to navigable waters or the publicly owned wet sandy beach. *Madeira Beach Nominee, Inc.,* 272 So.2d 209. Florida law recognizes that this right to

exclude may be lost through dedication, prescription or by establishment of "customary use." *Trepanier v County of Volusia*, 965 So.2d 276 (Fla. 5th DCA 2007); *see also Reynolds v. County of Volusia*, 659 So.2d 1186, 1190 (Fla. 5th DCA 1995) (public had right to use beach under plat dedication); *City of Daytona Beach v. Tona Roma*, Inc. 294 So.2d 73, 78 (Fla. 1974) ("customary use" may be established if recreational use of beach is ancient, reasonable, without interruption and free from dispute). Prior to the instant case, Florida courts rejected universally government efforts to establish "public beach" rights on privately owned sandy beaches by statute or decree. *Trepanier*, 965 So.2d at 290 ("the specific customary use of the beach in any particular area may vary, but proof is required to establish the elements of a customary right."); *see also Florida Attorney General Opinion 02-38* (owners of private sandy beaches may complain to local law enforcement to prevent trespass until a court determines that the beach is subject to customary use). By allowing the government to create a new public beach seaward of the upland landowner's riparian property, the Act allows the government to displace the upland owner's right to a private sandy beach without the necessity of proving dedication, prescription or custom. This is wholly inconsistent with all prior Florida law, necessitating compensation.

The loss of the right to exclude the public from the dry sand beach destroys the value of the other common law littoral rights in the upland owner. Because there is public sandy beach between the water and the ECL, members of the public can freely set up blankets, umbrellas or cabanas, or sandcastles. Nothing in the

statute grants the upland owner a superior right to use this sandy beach so the upland owner will have no legal right to remove obstructing people, umbrellas, boats, sandcastles, etc., in order to exercise a traditional littoral right such as bringing a boat down to the water, launching or retrieving a boat, or even just swimming, fishing or otherwise accessing the water.

Section 161.201 provides that the state shall not allow any structure to be erected seaward of the ECL except as required to prevent erosion. This provision fails to protect the littoral right of view, which extends to the channel, and protects against structures or activities in the water. *Lee County v. Kiesel,* 705 So.2d 1013 (Fla. 2d DCA 1998) (bridge that cut in front of riparian property that materially interfered with riparian view of river was a taking). It also fails to protect the right of access, which at common law protects against structures or fill ***in the water*** that materially impair the ability of a boat to land upon or leave the property. *Webb, Thiesen*, *supra*. The Act therefore does not protect the upland owner from the types of encroachments that were remediable in *Kiesel, Webb,* and *Thiesen*.

Furthermore, the absolute prohibition against structures seaward of the ECL, along with the elimination of ownership to the mean high water line extinguishes (rather than merely regulate) the common law riparian right to wharfage. See *Freed v. Miami Beach Pier Corporation*, 112 So. 841, 844 (Fla. 1927); *Florida Attorney General Opinion 90-37* ("I have concluded . . . "wharfing out" is a riparian right incident to ownership of the upland property"). Under preexisting Chapter 161, Florida Statutes, and Florida

common law only an upland owner with riparian or littoral rights may apply to construct a wharf, pier or other structure that will require permission to use submerged lands. *See Webb, supra,* 82 So. 2d at 745.

C. The Landowner's Statutory "Riparian Rights" Are Unenforceable and Therefore Illusory.

Under common law, upland landowners have a number of avenues for vindicating their common law riparian or littoral rights. For example, Florida law holds that any private or public action or activity that materially impairs a riparian right creates special damages, even if that action involves the use of the public rights to navigate, swim, fish, or the like. *Ferry Pass Inspectors & Shippers Ass'n v. White's River Inspectors and Shipper's Ass'n*, 48 So. 643, *Deering v. Martin*, 116 So.54 (Fla. 1928) (threatening to place obstructions on sovereignty lands that would interfere with the rights of riparian owner causes special injury sufficient to enjoin sale); *Webb v. Giddens*, supra; *Lake Islands,* 407 So.2d 189 (rule prohibiting any motorboats on navigable lake enforceable as to non-riparian public but unreasonable and arbitrary as applied to riparian owners). A demonstrable interference with riparian rights establishes both standing and the irreparable harm necessary to support injunctive relief. *Ferry Pass, Deering, Webb*. Government actions that substantial impair or eliminate a riparian right, including the right to ingress and egress by boat, are compensable as takings. *Keisel*, 704 So.2d at 1014 (taking right of view); *Madeira Beach*, 272 So.2d at 214 ("a policy power regulation prohibiting swimming, fishing or boating may

be unchallengable by the public but constitute a taking with respect to a riparian"); *Florida Attorney General Opinion 85-47* (application of local ordinance prohibiting motor vessels within 300 feet of shore to riparian property could expose city to liability for compensation as taking).

Moreover, if a private party is using the (upland owner's) sandy beach, the owner can protect various riparian rights in the use of the sandy beach by having the intruder arrested for trespass. *Florida Attorney General Opinion 02-38*. This provides relief against the infrequent acts of particular individuals that might interfere with the upland owner's enjoyment of the right to use the beach or to launch or retrieve a boat from the beach.

Once an ECL is established and new public beach is interposed between the upland owner's property and the water, the Act leaves the landowner with no standing, or any effective legal means of vindicating the "rights" supposedly preserved by section 162.201. Florida courts look to legislative intent and language to determine whether a statute creates a cause of action. *Windom v. State*, 736 So.2d 741 (Fla. 2d DCA 1999) (statute requiring local governments to conform to state standards for traffic control devices did not create cause of action to stop city from installing non-standard devices); *Schupbach v. City of Sarasota*, 765 So.2d 131 (Fla. 2d DCA 2000) (city ordinance requiring abutting property owners to maintain sidewalks did not create cause of action against property owner who failed to do so). Nothing in the Act provides the upland owner with a statutory cause of action or a statutory remedy to

enforce its purported "common law riparian rights." This leaves the upland landowner looking to existing sources of law to protect these rights, and it is clear that existing law will not suffice.

Far from securing a private cause of action, section 161.201 provides:

> Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee; and the several municipalities counties, and special districts are authorized and directed to enforce this provision through their respective police powers.

This statutory direction does not even *mention* littoral rights. Of course, after the imposition of the ECL, the upland property owner's property ends at the ECL and does not include any property rights to use the sand beach seaward of the ECL. This provision does not protect the upland owner against actions that impair traditional riparian uses if those actions occur on the sandy beach seaward of the ECL. Uses of the new sandy beach that are injurious to the upland property need no new protections; the upland owner already *has* the ability to use the sandy beach itself for traditionally littoral purposes. That needs protecting, and the statute does nothing to define or protect those interests. Moreover, nothing in this language gives the landowner the right to compel a local government or state agency to protect his rights against any particular encroachment.

Because the upland owner has no title interest below the ECL, criminal or civil trespass cannot be used to prevent members of the public from using the public beach to interfere with the upland owner's exercise of the statutory rights. Injunctive relief would be useless against random or occasional interference by individuals and is not specifically authorized by the Act.

Even if some group engaged in organized and recurring activities that interfered with the upland owner's enjoyment of the statutory rights, it is unlikely that a littoral owner could get relief in court. Because the upland owner has no easement or other legal right in the public beach seaward of the ECL, it is unlikely that a court would find the "clear legal right to relief" that a common law injunction requires in Florida. Furthermore, it is unclear that the upland owner could demonstrate "damages particular himself differing in kind as distinguished from damages differing in degree suffered by the community as a whole" so as to have standing for injunctive relief. *Boucher v. Novatny,* 102 So.2d 132, 135 (Fla. 1958); *Windom*, 736 So.2d at 743.

D. The "Rescission" Provisions of the Act Guarantee a Temporary Taking Rather Than Preventing a Permanent Taking.

The Court below interpreted the Act as guaranteeing that "in the event the beach restoration is not completed and maintained, the rights of the respective parties revert to the status quo ante." *Stop the Beach Renourishment*, 998 So.2d at 1115. This assumption formed part of the majority's determination that the Act "balances the interest and rights involved."

Id. This assumption was incorrect, and ignores effects that lock in, rather than prevent, the taking of the upland owner's riparian rights.

Section 161.211 provides for the rescission of the ECL under some circumstances. Section 161.211(1) provides that the ECL will be null and void if the beach renourishment is not commenced within two year **and if** landowners representing a majority of the lineal feet of the project request it in writing. Under section 161.211(3), if a substantial portion of the beach erodes past the established ECL, **and if** the owners of a majority of the linear feet of the project petition the Board, the ECL is void if the beach is not renourished again within one year.

Nothing in the Act provides that the rescission of an established ECL "undoes" the transfer of title that is effected by the recording of the ECL. By the terms of the statute, the recording of the ECL "vests title" to the lands seaward in the state, and landward of the ECL in the upland landowner. Nothing in the language in section 161.191(1) or any other provision of the Act would lead to the conclusion that the revocation of the ECL would or could "undo" the vesting of title. Furthermore, the provisions in section 161.211(1) and (3) for voiding the ECL are not self executing, but require a petition to be filed by landowners representing "a majority of the linear feet" of beach in the project. This means that there is no guarantee of relief to any particular landowner whose rights are taken by the recording of the ECL. Finally, even if the provisions did restore the upland owners' previous title rights, the landowner is

deprived of those rights with no corresponding benefit for at least one to two years.

Under section 161.211(2), the "provisions of section 161.191(2) shall cease to be operative as to the affected upland" if the agency charged with maintaining the beach fails to do so and "as a result thereof the shoreline gradually recedes to a point or points landward of the erosion control line." Under this provision, erosion landward of the ECL continues to decrease the upland owner's property. However, the ECL is not voided by this provision, nor is the "vesting of title" under section 161.191(1) undone. Therefore, if the shoreline then accretes back to the ECL, any further accretions still belong to the state. This provision does not protect the upland owner at all; instead, it protects the agency from legal responsibility to the upland owner for preventing further erosion.[8]

Nothing in section 161.211 provides meaningful protection to the rights of the upland land owner. The statute does not "balance the interests" of the landowner and the state, and return the landowner to the "status quo ante" if the state fails to live up to its end of the balance. Instead, the statute locks in the landowner's loss, provides only illusory rights or protections, and in fact guarantees that the landowner will be subjected to at least a temporary taking.

[8] In a classic case of unintended consequences, the statute would, under these circumstances, divest the public from the right to use the wet sand beaches. Under the statute, the entire area landward of the ECL remains vested in the upland property owner, which would include areas of wet sand if the beach erodes landward of the ECL.

E. The Statutory Rights Provided are Ineffectual Replacements for Common Law Littoral Rights Because They Can Be Rescinded at Any Time.

Even if the Act were interpreted as providing legally defensible rights comparable to traditional riparian rights, the conversion of the ancient property right to a statutory right leaves the upland property owner with no meaningful replacement. 11th Circuit decisions accord statutorily created rights no inherent constitutional regard. They can be totally abrogated by later legislative acts, limited solely by minimal due process requirements. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir 1994), *cert. den'd*, 513 U.S. 1110; 115 S.Ct. 898 (1995) ("state based rights may be rescinded so long as the elements of procedural – not substantive- due process are observed"); *Greenbriar Village, LLC v. Mountain Brook*, 345 F.3d 1258 (11th Cir. 2003) (city could amend zoning ordinance to extinguish rights in permits, limited solely by "rational basis" test). Nor are statutory rights protected by the takings clause absent some particular vesting under individual facts.

Mere "statutory rights" are not protected under 11th Circuit precedent from arbitrary and capricious deprivation by executive actors. *McKinney, supra; Paedae v. Escambia County*, 709 So.2d 557 (Fla. 1st DCA 1998) (citing *McKinney*); *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So.2d 861 (Fla. 4th DCA 2002) (citing *McKinney*); *Ammons v. Okeechobee County*, 710 So.2d 641 (Fla. 4th DCA 1998) (citing *McKinney*, *infra*, holding that "where a state-based

right is revoked, it may be constitutionally rescinded [by executive act] where procedural due process is observed"). Furthermore, statutory rights are no longer protected fully by procedural due process guarantees under the 14th Amendment: under current doctrine in the 11th Circuit, the procedural due process protections for a "statutorily created right" are limited to those found in the statute or common law. *McKinney, DeKalb Stone Inc. v. Dekalb County*, 105 F.3d 956 (11th Cir. 1997); *Boatman v. Town of Oakland*, 76 F.3d 341 (11th Cir. 1996) (plaintiffs were not entitled to any procedural due process protection against illegal deprivation of permit other than to repair to state court). Here, the Act gives no protections given to the landowner to vindicate the "statutory rights," so the landowner would not be entitled to any federal due process protection against any action that deprived the landowner of those rights.

This means that the Legislature could simply rescind the statutorily provided "common law riparian rights" for any reason, without being subject to damages under either substantive due process or as a taking.

CONCLUSION

Some of this Court's previous takings cases have required intricate and nuanced analysis. This case does not. *See Nollan*, 483 U.S. at 831 (physical takings require compensation).

Petitioners owned littoral property before implementation of the Act. Those littoral rights now belong to the State. Petitioners owned oceanfront land before implementation of the Act. Their land no longer touches the water. Thus the property is permanently severed from the water by a newly-created public beach owned instead by the State. Petitioners previously enjoyed the right to exclude others from their property. The public now has the right to come and go as it pleases. Petitioners' deeds once reflected ownership to the MHWL. The State has altered those deeds to now indicate ownership only up to the ECL. Petitioners objected to the State's contractor entering their properties to place sand both seaward and landward of the MHWL. The State required its contractor to dump the sand there anyway, changing the contours and elevation of the land.

The State has physically taken Petitioners' properties without compensation and has violated their rights to due process. This Court must reverse the Florida Supreme Court's opinion, and remand with instructions to either: (i) invalidate the ECL, reinstate Petitioners' deeds reflecting ownership to the MHWL, and pay compensation for the temporary taking of Petitioners' properties, or (ii) institute eminent domain

proceedings to fix the amount of compensation due for the permanent takings of Petitioners' properties.

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