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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 WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT**

## BRIEF OF SURFRIDER FOUNDATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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## INTEREST OF SURFRIDER FOUNDATION AS *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, Surfrider Foundation ("Surfrider") submits this *amicus curiae* brief in support of Respondents Florida Department of Environmental Protection, The Board of Trustees of the Internal Improvement Trust Fund, Walton County, and the City of Destin.[1]

Surfrider is a nonprofit grassroots environmental organization dedicated to the protection and enjoyment of the world's oceans and beaches. Surfrider was founded in 1984 by a group of environmentally-minded surfers in Malibu, California to preserve the natural diversity and ecological integrity of the coastal environment and to promote the right of low-impact, free, and open access to the world's oceans, waves, and beaches for all people. Surfrider's over 50,000 members represent a broad cross-section of surfers, beach users, oceanfront landowners, and business owners in Florida and across the United States. Surfrider has over 3500 members in Florida, including 29 members in Florida who regularly access the property in dispute in this case in Walton County and Destin, and two members who own property within the boundaries of the project at issue in this case.

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[1] Surfrider confirms that (i) no person other than Surfrider, 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 intended to fund the preparation or submission of this brief. The parties have filed blanket waivers consenting to the filing of amicus briefs.

Surfrider has represented the public interest in litigation before both state and federal courts across the country. Surfrider has also participated as *amicus curiae* in several precedent-setting litigation proceedings concerning environmental stewardship and beach access. Surfrider believes that its perspective as an organization that represents oceanfront landowners as well as members of the public who access beaches throughout Florida and across the country will assist the Court in deciding the significant issues presented in this case.

## SUMMARY OF ARGUMENT

The Florida Department of Environmental Protection ("DEP") acted pursuant to its legislatively-designated role under Chapter 161 of the Florida Statutes to preserve critically eroded beaches in Florida. The DEP protected a critically eroded beach, and protected the public's interest in accessing Florida's beaches and waters. Petitioner Stop the Beach Renourishment, Inc.'s ("Petitioner") challenge to the constitutionality of the DEP's action fails for three reasons.

*First*, the Beach and Shore Preservation Act (the "Act") is facially constitutional. It provides reasonable and appropriate measures to enable the State of Florida to discharge its obligations to the citizens of Florida as trustee, under Article X of the Florida Constitution, of the public's rights to the State's lands under navigable waters. Where circumstances require the State to take action to preserve its shorelines through "renourishment" of critically eroded beaches, as occurred here, the Act fully protects private interests by assuring the preservation of long-standing littoral rights and, to the extent any property rights are "taken," by providing just compensation. In short, the Act preserves and protects both public and private interests. Petitioner's case, to the extent it presents a facial challenge to the Act, must fail.

*Second*, the Act is constitutional as applied here because no private property was taken. Petitioner complains that the State's "renourishment" project took two property rights from the owners of beach-front property. But neither the right of "contact"

with the water nor the rights to any accretions or relictions have been taken here. The property owners still enjoy the right of contact as part of their right of access; and there can be no accretion or reliction rights on a shoreline that is *losing* land through erosion (the basis for "renourishment" in the first place). The State is merely raising sovereign, State-owned land, to which the only future shoreline changes will now be the erosion of the State's property—not the private landowners, who are completely protected, with their property boundaries fully intact. The application of the Act not only did not take property away from them, it protected them from losing more, all at public expense.

*Third,* Petitioner asks this Court for the first time to endorse a "judicial takings" doctrine. This contradicts nearly 100 years of Supreme Court law. This is also not supported specifically in this case, since the Florida Supreme Court decision is not a "sudden change" in Florida law. Rather, the Supreme Court has applied its own common law, to which deference is applied, in examining a modern response to the constant threat of erosion in Florida. The Florida Supreme Court interpreted the laws of the Florida Legislature and decisions of Florida common law to properly and correctly uphold the constitutionality of the Act. There has been no "judicial taking" here.

## ARGUMENT

### I. Florida's Beach and Shore Preservation Act On Its Face Does Not Take Littoral Rights Without Just Compensation.

#### A. The Beach and Shore Preservation Act

Recognizing the critical importance of Florida's beaches, the Florida Legislature enacted in 1961 the Beach and Shore Preservation Act, codified at FLA. STAT. § 161.011 *et seq.* (2009) (the "Beach and Shore Preservation Act" or the "Act"). Under the Act, the Florida Legislature delegated to the Florida DEP the authority to designate beaches as "critically eroded" and, in partnership with affected local governments, to "authorize appropriations to pay up to 75 percent of the actual costs for restoring and renourishing a critically eroded beach." *Id.* § 161.101(1).

When a beach restoration project is commenced under the Act, a survey of the coastline is conducted to determine the mean high water line ("MHWL") for the affected area. *Id.* § 161.141. After the MHWL is established, the Board of Trustees of the Internal Improvement Trust Fund ("Board") then establishes the area of beach to be protected by the project and locates an erosion control line ("ECL"). *Id.* § 161.161(3). In locating the ECL, the Board is "guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible." *Id.* § 161.161(5).

After the ECL is recorded, it becomes the fixed property boundary between public lands and upland property during the life of the restoration project. *Id.* § 161.191(1). While the ECL is in effect, the common law no longer operates 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." *Id.* § 161.191(2). Upon completion of the restoration project and certain other contingencies, the boundary between public lands and upland property reverts to the status quo ante. *Id.* § 161.211 (prescribing revocation of the ECL in the event "renourishment" is not commenced within 2 years, "renourishment" is halted in excess of 6 months, or the authorities do not maintain the "renourished" beach).

### B. The Florida Supreme Court Analyzed This Case as a Facial Challenge to the Act.

The Florida Supreme Court analyzed this case as a facial challenge to the Beach and Shore Preservation Act. *See Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105, 1120–1121 (Fla. 2008) ("[W]e find that the Act, on its face, does not unconstitutionally deprive upland owners of littoral rights without just compensation."). This Court should likewise narrow its review to the question of the Act's facial validity. To do otherwise would require a fact-intensive analysis providing little precedential value. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002) ("Land-use regulations are ubiquitous and most of them impact property values in some tangen-

tial way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford."); *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958) ("Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case."). Therefore, at most, the Court should evaluate only whether the Act is constitutional on its face. For the reasons explained below, it is.[2]

### C. The Beach and Shore Preservation Act Is Constitutional on its Face.

As this Court has consistently held, ownership of waterfront property and riparian rights are matters left to the individual states. *See Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) ("This Court has consistently held that state law governs issues relating to [riparian lands], like other real property, unless some other principle of federal law requires a different result."); *see also In re Lemco Gypsum, Inc.*, 910 F.2d 784, 789 (11th Cir. 1990) (same); *Ga. Power Co. v. Baker*, 830 F.2d 163, 166 (11th Cir. 1987) (same). The Act does not authorize the taking of private lands, but instead strikes a reasonable balance between public and private interests in critically eroded shoreline in the unique, modern context of beach restoration.

[2] On this point the Florida Supreme Court was unanimous, the two dissenting justices finding fault only with the application of the Act to the facts presented. Opin. at 38, 53.

*First*, the Act effectuates Florida's constitutional duty to protect its beaches. FLA. CONST. art. X, § 11 ("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*.") (emphasis added); *id.* art. II, § 7(a) ("It shall be the policy of the state to preserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources."); *see also* *White v. Hughes*, 190 So. 446, 449 (Fla. 1939):

> The State holds the fore-shore in trust for its people for the purposes of navigation, fishing and bathing. It is difficult, indeed to imagine a general and public right of fishing in the sea, and from the shore, unaccompanied by a general right to bathe there, and of access thereto over the fore-shore for that purpose. Universal and habitual practice in England and America for many years has established this right .... Small inland streams and lakes, which are not navigable and not subject to the tides, may under certain circumstances become private property to all intents and purposes. But not so the sea, or its shore.

*Brickell v. Trammel*, 82 So. 221, 226 (Fla. 1919):

> The navigable waters in the State and the lands under such waters, including the shore or spaces between ordinary high and low water marks, are the property of the State or of

> the people of the State in their united or sovereign capacity. Such lands are not held for purposes of sale or conversion into other values, or for reduction into several or individual ownership, but for the use of all the people of the State for purposes of navigation, commerce, fishing, and other useful purposes afforded by the waters thereon.

The Act protects the people's use of "critically eroded" beaches. FLA. STAT. § 161.088 (determining that "beach erosion is a serious menace to the economy and general welfare of the people of this state and has advanced to emergency proportions" and declaring that it is "a necessary governmental responsibility to properly manage and protect Florida's beaches . . . from erosion"); *id.* § 161.101(1) (delegating to DEP the authority to determine "those beaches which are critically eroded and in need of restoration and nourishment"); FLA. ADMIN. CODE R. 62B-36.002(4) (2009) (defining "critically eroded shoreline" as "a segment of shoreline where natural processes or human activities have caused, or contributed to, erosion and recession of the beach and dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost").

The Florida Supreme Court also unequivocally limited its decision to evaluation of the Act in the context of critically eroded beaches. *See Stop the Beach Renourishment, Inc.*, 998 So. 2d at 1105 ("At the outset, however, we emphasize that our decision in this case is strictly limited to the context of restoring critically eroded beaches under the Beach and

Shore Preservation Act."). It is thus clear that the Florida Supreme Court's decision was not intended to, and does not, reach across various statutory schemes or even to all riparian property.

*Second*, the Act preserves littoral rights of upland property owners recognized under Florida's common law. FLA. STAT. § 161.201 (preserving "rights of ingress, egress, view, boating, bathing, and fishing"); *id.* § 161.141 (declaring that "there is no intention on the part of the state to extend its claims to lands not already held by it or to deprive an upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property").

*Third*, the Act itself provides just compensation for takings where necessary. *See id.* § 161.141 ("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."). For instance, if the Board were to set the ECL landward of the MHWL, just compensation might be required for the taking of the upland owner's property, as expressly provided by the Act.

*Finally*, the Act provides substantial benefits both (1) directly to upland property owners and (2) to the public at large. The benefits to waterfront landowners are substantial. Restoration projects protect owners against future erosion which, in the absence of restoration, would move the high water mark upland, reducing the size of the owner's property by moving its boundary inland. The Act also provides

value to owners under § 161.141 (prescribing that "any additions to the upland property landward of the established line of mean high water which result from the restoration project remain the property of the upland owner . . . "). Waterfront owners are also protected with respect to the use of the state's property below the mean high water mark. *See, e.g.,* § 161.201 ("[T]he state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line . . . except such structures required for the preservation of erosion."); *id.* ("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."). "Renourishment" of critically eroded beaches temporarily re-establishes beaches lost and as an interim measure reduces future storm damage to existing structures and further beach erosion.

## II. Florida's Beach and Shore Preservation Act Was Not Unconstitutionally Applied Since It Does Not Effect a Taking of Littoral Rights.

### A. Under Florida Law, Littoral Rights Are Not Absolute.

Petitioner claims that its members lost two littoral rights—the right of "contact" with the water and the right to accretions and relictions—both of them property rights. However, as the Florida Supreme Court accurately noted, these rights are not absolute. Opin. at 1, 30. The Supreme Court has long so held, and long recognized that riparian rights may be subservient to government necessities. "Under the doctrine of navigational servitude, the Federal Govern-

ment may erect structures or otherwise modify a navigable stream without offering financial compensation to the State or to the owners of the submerged land." *Murphy v. Dep't of Natural Res.*, 837 F. Supp. 1217, 1221 (S.D. Fla. 1993) (citing *United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1956); *Gibson v. United States,* 166 U.S. 269, 272 (1897)); *see also United States v. Willow River Power Co.*, 324 U.S. 499, 511 (1945) ("It would be strange if the State of Wisconsin is free to raise an adjacent land highway without compensation but the United States may not exercise an analogous power to raise a highway by water without making compensation where neither takes claimant's lands, but each cuts off access to and use of a natural level.").

### B. The Littoral Rights of Contact and Accretion/Reliction Are Not Implicated.

#### 1. Petitioner Asserts Only Contact and Accretion/Reliction Rights.

Petitioner has not asserted the loss of any littoral rights other than the right of contact and the right to accretion and reliction, because all other littoral rights are maintained under the Act. FLA. STAT. § 161.201 ("Any upland owner or lessee who by operation of ss. 161.141–161.211 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 s. 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing."). By asserting that the application of the Act here divested the upland owners of these two remaining lit-

toral rights, Petitioner effectively seeks not only the benefit of the protection to the upland property against further reduction by erosion (the very purpose of beach restoration under the Act) but also seeks, in effect, ownership of the state's sovereign land, along with any accretion or reliction to *the State's* land—and all at public expense. There is nothing in Florida's prior "100 years" of legal decisions which provides for such a windfall.

**2. There Is No Vested Right of "Contact."**

**a. The Right of "Contact" Is Only Part of the Right to Access, Which Is Unaffected.**

A property owner only has "contact" with the water, if at all, at the one moment in time when the shifting tides are at the precise MHWL—the boundary of the owner's property. No one disputes that the right to contact with the water seaward of the MHWL, or at virtually every other moment of tidal movement, belongs to the public.

Courts have generally recognized the right of the upland owner as a right of access that subsumes other attributes, such as bathing and fishing in, and the right to navigation over such waters. *White v. Hughes*, 190 So. at 448. Such common law rights have been recognized as subject to lawful regulation by the sovereign state in the interest of the public and subject to the authority of Congress as to commerce and navigation. *Freed v. Miami Beach Pier Corp.*, 112 So. 841, 844 (Fla. 1927).

Even *Board of Trustees v. Sand Key Assocs.*, 512 So. 2d 934, 936 (Fla. 1987), which Petitioner cites frequently, by recognizing "access to the water, *including* the right to have the property's contact with the water," acknowledges that the right to contact the water is only a part of the right to access—a right which Petitioner's members continue to have here, only not exclusively. *Id.* at 935 (emphasis added). *Sand Key*, however, was not a "contact" case, but an accretion case, where an artificially constructed jetty resulted in natural (gradual and imperceptible) accretion to the upland owner's property, and is therefore a very different case from this one. The Petitioner's citation to the portion of the *Sand Key* decision concerning the right to contact was thus merely dicta. *Id.* at 936.

This Court has previously ruled that littoral rights, at least in the state of Washington, do not include the right to "contact with the water." *Port of Seattle v. Or. & W. R. Co.*, 255 U.S. 56, 64 (1921) ("So complete is the absence of riparian or littoral rights that the State may—subject to the superior rights of the United States—wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water.") The Florida cases cited by Petitioner do not even mention the right of contact, but only hold that littoral rights extend to the high-water mark. *See* Petitioner's Br. at 25 & n. 17. Petitioner has cited no case, with the exception of the distinguishable *Sand Key* case, which claims a "right to contact." Pet. Br. at 24–27. This is the fundamental point of Petitioner's argu-

ment, yet it has barely any authority, much less authority on point, for its proposition.

Moreover, there can be no "right to contact" since Petitioner's land, or any other land, rarely if ever contacts the water at the MHWL, which is statutorily defined as the average height of the high waters over a 19-year period. FLA. STAT. § 177.24(14) (2007). Philip Flood, Environmental Manager for the State Bureau of Beaches and Coastal Systems, states that the "mean high water line changes throughout the day, throughout, I guess it changes with various storm events as the beach is in such dynamic area, the mean high water line fluctuates." Tr. at 27:1–4. Thus, the Petitioner's land does not have contact with the defined MHWL since it "changes throughout the day," every day. *Id.*

So there can be no right to literal contact, since it is impossible to have contact except at the one moment when the daily changing MHWL is exactly the 19-year average.[3] *See generally Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So. 2d 339, 343 (Fla. 1986) ("The high and low water marks of navigable waters change over time, but these natural changes do not divest the public of ownership of the navigable waters."). By the very nature of having a water mark which varies with the tide, when the water is below the high water mark, a property *cannot* con-

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[3] The mean high water line (MHWL) is a fictional line that is measured by averaging "all high tides over an 18.6 year cycle, as determined by the Department of Commerce, National Oceanic Survey." Joseph J. Kalo et al., COASTAL AND OCEAN LAW CASES AND MATERIALS 43 (2d ed. West Group 2002).

tact the water due to the property boundary terminating at the high water mark. *Bd. of Trs. v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 213 (Fla. Dist. Ct. App. 1973) ("Although the mean or high water mark is an average over a number of years, the daily mark of a high tide on the shore gives both the riparian and the public notice of their possible use of the land on either side of the mark. Freezing the boundary at a point in time, such as was done in *Martin* or as is suggested here by the state, not only does damage to all the considerations above but renders the ordinary high water mark useless as a boundary line clearly marking the riparian's rights and the sovereign's rights.").

### b. The Public Has a Right of Access to the Water Along the Shore That Is Paramount to Land Owners' Rights.

Contrary to Petitioner's position, beachfront property owners do not have the right to exclude the public from going along the shore to reach the water. Petitioner has cited *Medeira Beach*, 272 So. 2d at 214, for the proposition that beachfront owners have the "exclusive right of access over their own property to the water," but *Medeira* also states that beachfront owners cannot prevent the public from passing along the shore to reach the water. *Id.*; *see generally City of Daytona Beach Shores v. State*, 483 So. 2d 405, 408 (Fla. 1985) (Florida's "public trust doctrine . . . declares that Florida's beach sovereignty lands must be accessible to the public . . . ."). The waterfront property owner retains the right to access over his or her own property, but it does not have the ex-

clusive right to access the water. They share it with the public. *See Sand Key*, 512 So. 2d at 936 ("Riparian and littoral property rights consist not only of the right to use the water shared by the public . . . .").[4] Thus, the waterfront property owner does not have the "exclusive" right to access the water, since the public can go along the shore to have the same access. While Petitioner does have littoral rights to the MHWL, these rights do not extend as far as Petitioner claims.

Petitioner's members still have access to the water, which is the vested right of beachfront property owners. *City of Daytona Beach*, 483 So. 2d at 408. The owners can still walk from their property to the water, without any obstructions or structures being erected. While the distance that a landowner may have to walk to access the water may be increased, this is hardly the type of infringement upon littoral rights that Florida common law has held to be a taking. *Id.* The owners do not have, and have never had, a right to keep the public from accessing beaches. The Florida Constitution explicitly prevents exclusion of the public from the water. FLA. CONST. art. X, § 11. While the owners may have an exclusive right of access *from their own property* to the water, the public still has a right to use that water. Thus, the public's right to access the water is

[4] *Amicus* recognizes that this is dicta in *Sand Key*, but since Petitioner rely so heavily on this statement, it is appropriate that the "flip side" of the statement is relevant as well—while land owners have littoral rights, they do not have "exclusive" rights to the water.

paramount to the Petitioner's rights, not subordinate.

### 3. The Right to "Accretions and Relictions" Is Not at Issue.

#### a. The Contingent Right to Accretions and Relictions Does Not Exist Where a Beach Is Restored to Reduce Erosion.

Neither accretion nor reliction, both of them consisting of "gradual and imperceptible" *additions* to shoreline, *see Sand Key*, are implicated here. What we have here is a beach restoration project initiated because of, and to counteract *erosion*, where the shoreline is gradually and imperceptibly reduced—the opposite of accretion or reliction, where the shoreline is gradually and imperceptibly extended. *Anderson Columbia Co. v. Bd. of Trs. of Internal Improvement Trust Fund of State of Fla.*, 748 So. 2d 1061, 1068 (Fla. Dist. Ct. App. 1999) ("Gradual erosion or submergence is accretion in reverse . . . .") (Benton, J., concurring).

Further, none of the four policy reasons for giving littoral property owners a right to accretions apply here. *See Medeira Beach,* 272 So. 2d at 212–213. First, accretion is a *de minimis* act that is a "gradual and imperceptible accumulation of land" and thus not intended to apply here, where the State added a dramatic and perceptible accumulation of land. *Cf. Martin v. Bush,* 112 So. 274, 287 (Fla. 1927) ("The doctrine of reliction is applicable where from natural causes water recedes by imperceptible degrees, and does not apply where lands [sic] is reclaimed by gov-

ernmental agencies as by drainage operations."). Second, the doctrine that he who stands to lose should also gain is inapplicable here since the State stands to both lose and gain land after its perceptible increase to the land. *Medeira Beach,* 272 So. 2d at 214 (noting that Florida statute § 161.051 purports to vest title to accretions caused by public works in the state). Third, all land should have an owner, and the land at issue here is already owned by the State, so it is unnecessary to give ownership to the beach-front owners because it already has an owner. Lastly, the doctrine expanding property ownership to include accreted land is intended to preserve access to the water, which is not applicable here because access is expressly preserved in the Act.

What this case is about is the State's sudden and very perceptible elevation of its own, sovereign land to help protect the shoreline from further erosion. *See Wallace Corp. v. City of Miami Beach*, 793 So. 2d 1134, 1139 (Fla. Dist. Ct. App. 2001) (upholding "re-nourishment" where "the record contains an abundance of competent substantial evidence from which the ALJ could find that the beachwalk project was 'necessary' or 'required' to prevent erosion."). The State undisputedly deemed the beaches at issue here to be "**CRITICALLY ERODED**." Thus, by definition, there are no accretions or relictions involved.

The Florida Constitution explicitly authorizes the government to provide for and preserve its beaches, which is supported by cases interpreting this constitutional provision. FLA. CONST. art. X, § 11; *see, e.g., Trepanier v. County of Volusia,* 965 So. 2d 276, 286 (Fla. Dist. Ct. App. 2007). Since nearly

three-fourths of Floridians live in counties bordering the ocean, this provision is of great importance to the people of Florida. Kenneth E. Spahn, *The Beach and Shore Preservation Act: Regulating Coastal Construction in Florida*, 24 STETSON L. REV. 353, 357 (1995). The State, at public expense, addressed a significant erosion problem for the beaches of Destin and Walton County by following Florida Administrative Code and legislation. It is undisputed that the State properly executed its restoration.

#### b. The Act Was Applied Here to Restore, by Artificially Avulsive Action, Property Belonging to the State.

The principles on which Petitioner relies to establish a taking come from cases that involve only gradual and imperceptible shoreline changes constituting accretion and reliction. *Sand Key*, 512 So. 2d at 936; *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649 (Fla. 1985); *State v. Fla. Nat'l Props.*, 338 So. 2d 13, 17 (Fla. 1976). These cases uniformly involve imperceptible changes that move the MHWL seaward. *Id. Sand Key*, on which Petitioner so strongly relies, involved naturally occurring accretion resulting from and occurring after the State had increased its own land through an artificial structure—a "jetty." However, the issue in *Sand Key* was whether the gradual and imperceptible accretions resulting from the creation of the jetty were owned by the State. *Sand Key*, 512 So. 2d at 936. Here, the issue is whether the very sudden and perceptible elevation of the State's sovereign land, below the MHWL (an "avulsive" event artificially created by

the State), preserves the character of that land as state-owned.

There are any number of cases involving avulsive events in which Florida courts have preserved the ownership of sovereign land. *Sand Key*, 512 So. 2d at 936; *Bryant v. Peppe*, 238 So. 2d 836, 838 (Fla. 1970); *Martin*, 112 So. at 284–285; *Trepanier,* 965 So. 2d at 286; *Mun. Liquidators, Inc. v. Tench,* 153 So. 2d 728 (Fla. Dist. Ct. App.), *cert. denied,* 157 So. 2d 817 (Fla. 1963); *Siesta Props., Inc. v. Hart,* 122 So. 2d 218 (Fla. Dist. Ct. App. 1960). The court in *Schulz v. City of Dania*, 156 So. 2d 520, 521 (Fla. Dist. Ct. App. 1963), described the difference between avulsion and accretion/reliction as follows:

> where the loss occurs through avulsion, which is defined as the sudden or violent action of the elements, and the effect and extent of which is perceptible, the boundaries do not change. But where the sea, lake, or navigable stream imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the State.

Put simply, if there is an avulsive event, the boundaries do not change. Florida's restoration project was, as the Florida Supreme Court properly held, the equivalent of an avulsive event, and as such, the boundaries should not change here, either, with the sovereign land remaining the property of the State.

Thus, the upland owners here have the same rights to accretions and relictions that they did prior to the State's "renourishment." Avulsive events do

not relate to accretions and relictions. The Florida Supreme Court did not overturn "100 years" of Florida common law because this case relates to an avulsion caused by an artificial structure created by the State, and does not relate to "100 years" of law related to accretions or relictions. The State reclaimed its storm-damaged shoreline by re-establishing sand to its submerged sovereign lands. *Bryant*, 238 So. 2d at 838; *see generally* Opin. at 26–27.

The Petitioner seeks to discredit this theory by claiming that the avulsive event is the hurricane that preceded the "renourishment." But Petitioner does not take issue with the setting of the ECL which, because it was set precisely at the MHWL, marks the boundary between the privately and publicly owned land as a matter of law. The State continues to own the land seaward to the ECL, as if the "renourisment" (avulsive event) had never happened, and retains rights to the submerged land that was renourished by the State and made into dry land. *Bryant*, 238 So. 2d at 838 (approving doctrine of avulsion from drainage project undertaken by State) (citing *Martin*, 112 So. at 284–285). *See also Sand Key*, 512 So. 2d at 940 (citing *Martin*, 112 So. at 287) ("If to serve a public purpose the State, with the consent of the Federal authority, lowers the level of navigable waters so as to make the water recede and uncover lands below the original high water mark, the lands so uncovered below such high water mark, continue to belong to the State.").

The State thus took its own submersable land seaward of the MHWL and made it a dry beach as it is entitled to under the avulsion doctrine. The State

owned the submersable land before the "renourishment," and still owns the land after the "renourishment." Lost in the Petitioner's rhetoric is that the state owns land seaward of the MHWL prior to the "renourishment" in trust for all the people under the "public trust" doctrine and still owns this land.

### C. Restoring Land Based on an Avulsive Event Is Not a Judicial Taking of Littoral Rights.

#### 1. The Act Is Not a "Sudden Change" in Florida Law.

Petitioner incorrectly claims that the Florida Supreme Court "suddenly and dramatically changed 100 years of background property law in Florida" in asserting that the heretofore unrecognized "judicial takings" doctrine applies here. *Amicus* submits first that Petitioner has incorrectly focused on whether this is a taking of Petitioner's property, when this really is an advancement of the state's constitutionally-protected property rights to hold seaward land in trust for the public. The land defined by the MHWL boundary is subject only to imperceptible movement over time, either landward, due to erosion, or seaward, due to accretion or reliction, neither of them applicable under the Act, which presumptively involves only protection of beaches from erosion.

Florida constitutional law explicitly protects the people's right to the submerged land at issue here, which was dry land prior to the avulsive activity. *White v. Hughes*, 190 So. at 448–449 ("The beach of the Atlantic Ocean between high and low water

marks is the property of the State[.]"); *Freed*, 112 So. at 844 ("[L]ands within the territorial limits of the State below ordinary high water marks of the Ocean and Gulf and other navigable waters, became the property of the State by virtue of its sovereignty."). Even if this is the proper focus of the analysis, Petitioner has failed to demonstrate that the Florida Supreme Court so departed from Florida common law that this amounts to a novel "judicial taking."

And even if the Florida Supreme Court's decision represented an arguable change in law, which it was not, courts and legal scholars have traditionally believed that takings protections do not apply to the courts. *See, e.g.*, Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 517 n. 10 (1986). Justice Brandeis stated that "[s]tate courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930). Justice Cardozo similarly stated nearly 30 years later that "[t]he common law as administered by her judges ascribes to the decisions of her highest court a power to bind and loose that is unextinguished . . . and recognized as law anew." *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 365 (1932). As Barton H. Thompson Jr. put it bluntly in his 1990 article, *Judicial Takings*, "by the end of the New Deal, the concept of judicial takings seemed dead. Over and over, federal courts rejected the argument that courts could take property by changing the law." Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1467 (1990) (hereinafter "Thompson").

Although Justice Stewart, in a concurrence in *Hughes v. Washington*, 389 U.S. 290 (1967), argued that the concept of a "judicial taking" existed, no decision of this Court has ever found a "judicial taking" as argued here. Such a finding requires that the lower court's decision "constitutes a sudden change in state law." *Id.* at 296. As shown above, this is not a sudden change in state law, but rather a continuation of Florida common law that places the public good above private interests in accessing beaches and waters. Under the line of Florida cases cited above, *Brannon*, *Florida National*, and *Martin*, as well as the Florida constitution, the state may use its land to advance the public good under the public trust doctrine. Thus, the Act is not a sudden change in Florida law.

### 2. The Act Is a Continuation of Florida Constitutional and Common Law Rights to Beach Access.

There are two doctrines in Florida that provide a rationale as to why the Act's provisions of beach access to the public would not be a sudden change to Florida law: public trust and custom. The public has a right to access beaches through a public trust. FLA. CONST. art. X, § 11; *Trepanier*, 965 So. 2d at 284 ("The common law public trust doctrine is embodied in Article 10, section 11 of the Florida Constitution. Under that provision, title to the portion of the beach below the mean high water line is held by the state in trust for all the people."). Other states have also held that there is a public trust to provide public access to beaches below the mean high water line. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d

355, 369 (N.J. 1984) ("[P]rivate land is not immune from a possible right of access to the foreshore for swimming or bathing purposes, nor is it immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming."); *Thornton v. Hay*, 462 P.2d 671, 678 (Or. 1969) (holding that continued public use "takes from no man anything which he has a legitimate reason to regard as exclusively his."); *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1042 (R.I. 1995) (stating that in Rhode Island the "public trust jurisprudence recognizes the unique resource that tidal waters constitute and the necessity that they be held by the sovereign in a trustee capacity for the use and benefit of all citizens"); *Diamond v. State, Bd. of Land and Natural Resources*, 112 Haw. 161, 173–174 (Haw. 2006); *Arrington v. Mattox,* 767 S.W.2d 957, 958–959 (Tex. App. 1989) (the Texas Open Beaches Act does not empower the State to take rights away from a private owner of land, but rather furnishes a means for the public to enforce a historically existing collective right); *Weden v. San Juan County*, 135 Wash. 2d 678, 698, 719 (Wash. 1998) (holding "waters within ordinary high water lines and within the territorial boundaries of the state" are "reserved by a public property interest" for the benefit of all of the public.").

The right to access beaches based on custom has been recognized in Florida for at least thirty-five years. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 77 (Fla. 1974) (public gained a right to use the dry sand area for usual recreational activities through the customary use of that land without dispute or interruption for many years). The Florida

Supreme Court stated that "[t]he sandy portion of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected." *Id.* This right of custom was upheld in *Trepanier*, 965 So. 2d at 284 ("In Florida, courts have recognized that the public may acquire rights to the dry sand areas of privately owned portions of the beach through the alternative methods of prescription, dedication, and custom.").

In fact, the *Trepanier* court's recognition of the public's right of custom specifically foreclosed the potential "judicial taking" that is claimed here. The court stated, "If the law recognizes that the public has a customary right to drive and park on Appellants' property as an adjunct of its right to other recreational uses of that property, as recognized in *Tona-Rama*, then no takings claim can be made out." 965 So. 2d at 293. In Florida, if there is a right of custom as stated in *Tona-Rama* and heretofore undisputed by any subsequent cases, then there can be no judicial taking since the state's action is not a sudden change of law.

Oregon law on the right of custom allowing beach access is also instructive. Oregon has a long line of case law finding in favor of beach access and against a taking because the custom of Oregonians is to access beaches in that state. *See Stevens v. City of Cannon Beach*, 854 P.2d 449, 454–455 (Or. 1993); *Hay v. Bruno*, 344 F. Supp. 286 (D. Or. 1972); *Thorn-*

*ton*, 462 P.2d at 676–677. In *Thornton*, the seminal Oregon case on the rights to beach access, the Oregon Supreme Court found that "[t]he dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history." *Thornton*, 462 P.2d at 673. There was no sudden change of law by the state of Oregon because "this land has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited." *Id.* at 676–677.

Here, both under the Florida constitution and the common law, Florida has a long-running policy of promoting beach access by the public and of allowing the State to use its sovereign lands to promote the public good.[5] Thus, the Act is not a "sudden change" in the law, but instead a continuation of long-standing Florida precedent to a recent development in the state's exercise of its sovereign authority to protect "critically eroded beaches": the ability to dredge submersable land to restore existing beaches to reduce erosion. Florida courts have also recognized that the Act can be used to accommodate new technologies, such as the dredging process used here. *St. Joseph Land & Dev. Co. v. Fla. Dep't of Natural Res.*, 596 So. 2d 137, 139 (Fla. Dist. Ct. App. 1992)

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[5] The record in this case is undeveloped as to the prior customary use of the beaches of Destin and Walton County. *Amicus* submits that the "degree of customary and ancient use" of these beaches is unknown. *Trepanier*, 965 So. 2d at 290. While the State would have the burden of establishing custom, the undeveloped record is further evidence that this Court should not preclude a finding of a right of custom here.

(approving "a comprehensive engineering study and topographic survey that a CCCL [coastal construction control line] is necessary for the protection of upland properties and the control of beach erosion"); *Island Harbor Beach Club, Ltd. v. Dep't of Natural Res.*, 495 So. 2d 209, 217–218 (Fla. Dist. Ct. App. 1986) ("The selection and use of new scientific methodology was a matter of agency discretion that should not be set aside absent a showing that the agency's action is either arbitrary, capricious, an abuse of discretion, or not reasonably related to the statutory purpose.").

There are other problems with finding a "sudden change" via the Act and calling it a judicial taking. If a party, like Petitioner here, could challenge any judicial decision related to property law on the basis that it constituted a "sudden change" in state law, then every such case would turn into a constitutional case. Thompson, *supra* at 1511. There is also the issue of federal courts second-guessing state courts on questions of state property law. *Id.* at 1509. State courts are, and should remain, independent from the federal system of government. *Brinkerhoff-Faris*, 281 U.S. at 680 ("It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions[.]").

## CONCLUSION

For the reasons set forth above, and consistent with its commitment to secure "the right of low-impact, free and open access to the world's oceans, waves and beaches for all people," *Amicus* Surfrider respectfully submits that the decision of the Florida Supreme Court should be affirmed and urges this Court to incorporate into its decision the points that *Amicus* has submitted.

Respectfully submitted,

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