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 AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the right to

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief and were timely notified.

compensation for the taking of property under the Fifth Amendment.

STATEMENT OF THE CASE

Petitioner is an organization of homeowners whose property lies on the Florida coastline. Pursuant to a supposed "beach nourishment" project authorized by state statute, respondents have redefined the property lines of these homeowners from the Mean High Water Line in front of their homes to a new Erosion Control Line. This redefinition was accomplished by unilaterally recording a beach survey in the official property records of Walton County, without any judicial proceeding.

Prior to that redefinition of their property lines, the properties of these homeowners included an accreting beach in front of their homes with more than 200 feet of dry sand to the Mean High Water Line. J.A. 252, 261.[2] Now after that redefinition and the "beach nourishment," there is an additional 75 foot public beach between their properties and the water. J.A. 261. Their properties consequently no longer go to the water, and they have lost all the littoral rights that pertain to oceanfront properties, as discussed further in the Argument below. Yet no compensation has been paid for this loss of property rights.

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[2] In this brief, citations to the Joint Appendix are denoted by "J.A." Citations to the Appendix to Petitioners Petition for a Writ of Certiorari will be denoted by "Pet. App."

Oceanfront properties have been transformed into ocean view properties, and a private beach has been replaced with a public beach. The homeowners paid considerable sums for oceanfront properties with private beaches, yet they have received nothing for the loss of what they paid for.

Petitioner filed an administrative petition with the Florida Department of Environmental Protection ("DEP") challenging issuance of a Joint Coastal Permit to pursue the beach nourishment project. The DEP rejected that challenge, and Petitioner appealed to the Florida First District Court of Appeal.

That court held unanimously that the redefinition of the property lines of the coastal homeowners from the Mean High Water Line to the Erosion Control Line was an uncompensated taking of property rights of the homeowners, and invalidated the redefinition.

But the Florida Supreme Court reversed, redefining the littoral rights the homeowners enjoyed from their oceanfront property to no longer exist, in the process reversing 100 years of established property law and precedent in Florida. Since the redefined property rights no longer existed, the court held that they were not taken by the "beach nourishment" project. Justice Lewis said in dissent,

> "I cannot join the majority because of the manner in which it has 'butchered' Florida law….[T]he majority's construction of the Beach and Shore Preservation Act is based

> upon infirm, tortured logic and a rescission from existing precedent under a hollow claim that existing law does not apply or is not relevant here. Today, the majority has simply erased well-established Florida law without proper analysis…."

Pet. App. 41-42.

Petitioner filed a motion for rehearing with the Florida Supreme Court, which was denied. The requested Writ of Certiorari was granted on June 15, 2009.

SUMMARY OF ARGUMENT

Before the "beach nourishment" project, the petitioner homeowners enjoyed a private beach in front of their homes and extensive littoral rights resulting from their property lines extending out to the Mean High Water Line. The beach nourishment project, however, unilaterally replaced their property lines at the Mean High Water Line with new property lines at a newly established Erosion Control Line. As a result, a new 75 foot public beach was established in front of each of the homes seaward of the Erosion Control Line, and the homeowners lost all of their attendant littoral rights.

The oceanfront properties of each of the homeowners were consequently transformed into ocean view properties, with the view including the commercial vendors that now have the right to operate on the public beach in front of each of their homes. Through the "beach nourishment" project,

the established littoral property rights of the homeowners have been transferred to the state and local respondents for public use. No compensation has been paid to the homeowners for this loss and transfer of their property rights.

Florida courts have long recognized that the littoral property rights taken from the homeowners were protected by the Takings Clause of the U.S. Constitution. But the Florida Supreme Court below failed to follow these precedents. It made up new law to redefine the littoral property rights of the homeowners out of existence. That way the property rights could not have been taken and the state and local respondents would not have to pay any compensation.

Under long established precedents of this Court, state courts may not evade state responsibilities under the Takings Clause by such redefinition of established property rights. The attempted redefinition of the property rights of the homeowners cannot change what actually happened in this case: the state and local respondents have taken the established littoral property rights of the homeowners for public use.

The beach nourishment project also violated the due process rights of the homeowners. In addition, beach nourishment is not a pro-environment policy. Quite to the contrary, the policy has highly destructive environmental effects, and has been challenged as dumping taxpayer dollars into the ocean.

ARGUMENT

I. Unilaterally Revising Homeowners' Property Lines Involved an Unconstitutional Taking of Private Property Without Compensation.

A. The Beach Nourishment Project Took Private Property Rights of the Homeowners.

Before the "beach nourishment" project, the property line for each of the petitioner homeowners was recognized to be the Mean High Water Line. This provided the homeowners with oceanfront property running all the way to the water, including 200 feet of private, dry sand, beach.

The property line at the Mean High Water Line triggered littoral rights under long established Florida law. These littoral rights included the right to exclusive possession and use of the beach in front of their homes, and to exclude others from that beach. They include as well the exclusive right of access over their own property to the water. Included as well is the right of accretion, or ownership of any expansion of the beach over time. Another littoral right is the right to an unobstructed view of the ocean, without the obstruction of the general public and commercial vendors on a public beach. The homeowners paid substantial sums for this private beach and attendant littoral rights.

After the beach nourishment project, the property line for each of the petitioner homeowners

has been unilaterally changed by the state and local government respondents from the Mean High Water Line to a newly created Erosion Control Line. As a result, the property of each of the homeowners no longer goes to the Mean High Water Line, and the homeowners have lost all of the littoral rights that are contingent on their property extending to that line under Florida law.

The homeowners no longer own oceanfront property, or a private beach that goes to the water. Instead, their property goes only to the Erosion Control Line, after which there is a newly created, 75 foot, public beach that extends to the water. The right of the homeowners to the beach on the other side of the Erosion Control Line has been transferred to the state under the beach nourishment statute, which states, "title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty." Fla. Stat. Sect. 161.191(1). All of the littoral rights that go with ownership of property to the Mean High Water Line under Florida law have consequently now been transferred to the state as well.

The homeowners no longer enjoy the exclusive right of use of the beach in front of their homes to the water, or the right to exclude others from that beach. Instead the general public now has the right to use the beach on the waterfront. This includes the right of commercial vendors to operate on the public beach in front of the homes of each of the homeowners.

The homeowners also no longer enjoy the exclusive right of access to the water from the beach

in front of each of their homes. Anyone and everyone can now bring boats to the beach in front of each of their homes, and launch the boats in the water in front of their homes. Anyone and everyone can also now dive into the water and swim from the beach in front of each of their homes. The homeowners no longer own any right of access over their own property to the water, because they can no longer even access the water from their own property.

The homeowners also no longer enjoy the right to an unobstructed view of the ocean. Instead, that view is now obstructed by the general public on the public beach now in front of each of their homes, the commercial vendors on that beach, the boats launched by the general public from that beach, and the swimmers diving into the water in front of each of their homes from that beach.

Finally, the homeowners also no longer enjoy the right of accretion of the beach in front of each of their homes. Instead, by operation of the beach nourishment statute, that right has been transferred to the state, which owns the expanded portion of the beach resulting from the "beach nourishment." The statute states, "the common law shall no longer operate to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process…." Fla. Stat. Sect. 161.191(2).

Yet, the homeowners have received no compensation for the loss of these property rights to the state.

B. The Uncompensated Taking of the Private Property Rights of the Homeowners Violates the Constitution.

The courts have long recognized what should be obvious. The uncompensated taking of the private property rights of the homeowners as described above violates the Takings Clause of the U.S. Constitution. The Florida Supreme Court recognized this 100 years ago in *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909), holding that such littoral rights "are property rights that may be regulated by law, but may not be taken without just compensation and due process of law." *Thiesen v. Gulf, Florida & Alabama Railway Co.*, 78 So. 491 (Fla. 1917); *Brickell v. Trammell*. 82 So. 221 (Fla. 1919); *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957); *State v. Fla. Nat'l Prop., Inc. (Florida National)*, 338 So. 2d 13 (Fla. 1976); *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So. 2d 649 (Fla. 1985); *Board of Trustees v. Sand Key Assocs., Ltd.*, 512 So. 2d 934 (Fla. 1987).

In *Florida National*, a state statute replaced the property owner's property line at the Ordinary High Water Line with a different boundary between the property owner's upland and the state owned sovereign submerged lands. The court held the statute unconstitutional because changing the property line from the Ordinary High Water Line extinguished the property owner's riparian right to accretion without just compensation. The court said,

> "By requiring the establishment of a fixed boundary line between sovereignty bottom lands and Plaintiff"s riparian lands, Fla. Stat.

> s 253.151…constitutes a taking of Plaintiff's property, including it's riparian rights to future alluvion or accretion, without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of…the Florida Constitution.

338 So. 2d at 17.

This Court reached the same conclusion regarding riparian property rights 135 years ago in *County of St. Clair v. Lovington*, 90 U.S. 46, 68-69 (1874), saying,

> "The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds, to their natural increase. The right is a natural, not a civil one."

But the Florida Supreme Court below failed to follow these precedents. It made up new law to redefine the littoral property rights of the homeowners out of existence. That way the property rights could not have been taken and the state and local respondents would not have to pay any compensation.

In regard to the littoral right to accretion, the Florida Supreme Court below held uniquely in a trailblazing ruling that such a right was only "a

contingent future interest," not a presently vested right. In particular, this innovation directly contradicted its own holding in *Florida National*, where the court said,

> "the State…claims not only the lands to which Plaintiff has already gained title through the operation of accretion and reliction, but also seeks to deny to Plaintiff the right to acquire additional property in the future through the process of accretion and reliction."

330 So. 2d at 17. The court consequently recognized, unlike the Florida Supreme Court below, that the right to accretion is a present, vested, property right to future gains, like the future fruit from a tree, or the future gains from a flock or a herd. This was one of the property rights taken without compensation from the homeowners in the present case.

But as Justice Stewart said in *Hughes v. Washington*, 389 U.S. 290, 298 (1967), the "Constitution measures a taking of property not by what a state says,…but by what it does." And what the state has done in this case is take all of the littoral property rights of the homeowners discussed above in Part I.A. As Justice Lewis said in dissent below,

> "By essential, inherent definition, riparian and littoral property is that which is contiguous to, abuts, borders, adjoins, or touches water. 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 [Mean High Water Line].

Pet. App. 43-44 (footnotes and citations omitted). Once the homeowners' property lines were separated from the Mean High Water Line, all the littoral property rights discussed above in Part I.A. were lost, or more precisely, taken by the state and local respondents.

State courts, of course, cannot be allowed to avoid the state's responsibility to pay compensation for taken property rights under the federal Takings Clause by redefining the taken property rights out of existence, as the Florida Supreme Court has tried to do below. As Justice Stewart explained in *Hughes*, while a state, "is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners," the state still must pay compensation for any property taken. 389 U.S. at 295. Justice Stewart continued saying most importantly,

> "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."

Id. at 296-97.

Just as in the present case, a taking of private property rights by the redefinition of those rights is exactly what happened in *Hughes*, as Justice Stewart also explained,

> "There can be little doubt about the impact of that change [property rights redefinition] upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking….But the Constitution measures a taking of property not by what a state says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property – without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment."

Id. at 297-298.

This Court recognized a similar situation in *Chicago Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897). In holding that the

Takings Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment, the Court said,

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the high court of the state is a denial by that state of a right secured to the owner by that instrument."

166 U.S. at 241. These words apply exactly to what the Florida Supreme Court has done below.

The Court reached the same result in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679-80 (1930), saying,

> "If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative,

> executive, or administrative branch of government."

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court recognized a taking based on a state's redefinition of property rights similar to what the Florida Supreme Court did below. A state statute authorized the physical occupation of a portion of apartment buildings by cable TV companies for cable installation. The state argued that it had merely redefined the property rights of building owners to provide for space for cable TV companies for their cable installations. This Court held the state statute to nevertheless be an unconstitutional taking of private property rights without compensation.

A similar redefinition of property rights was found in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). A Florida statute there declared that the interest on interpleader funds deposited with the court clerk was income of the clerk. The Florida Supreme Court held that this was not a taking because the deposited money was "public" not "private" money. But this Court reversed, saying,

> "Neither the Florida Legislature by statute, not the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court.…To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even

> for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of government power."

449 U.S. at 164.

Similarly, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected the argument that property rights are created by the state, and the state, therefore, can reshape and redefine those rights with no takings claim because subsequent owners acquire the property with the lesser defined rights, and so have no reasonable investment backed expectation in broader rights. The Court said, in an opinion by Justice Kennedy, that the "State may not put so potent a Hobbesian stick into the Lockean bundle" because it "would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation." *Id.* at 627. In the present case, the homeowners have also been stripped of the ability to transfer their littoral property rights which they owned prior to the "beach nourishment" regulation and redefinition of their property rights.

Justice Scalia has also raised the alarm over takings by state redefinitions of property rights, particularly through judicial redefinitions, writing,

> "Just as a State may not deny rights protected under the Federal Constitution through

> pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate 'background law' – regardless of whether it really is such – could eliminate property rights….Since opening private property to public use constitutes a taking , if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their right to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking."

Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994)(Scalia, J. and O'Connor,J. dissenting from the denial of a petition for writ of certiorari). In the present case, "invoking non-existent rules of state substantive law" to redefine away the littoral property rights of the homeowners is exactly what the Florida Supreme Court did.

See also Kaiser Aetna v. U.S., 444 U.S. 164 (1979)(This Court found a physical taking where the government mandated a public right of access to a private pond); *U.S. v. Causby*, 328 U.S. 256 (1946)(This Court found a physical taking where government planes used private airspace to approach a government airport); *Ex Parte v. Virginia,* 100 U.S. 339, 346-47 (1879)(In a case involving the actions of a state judge, this Court held, "A State acts by its legislative, its executive, or its judicial authorities….Whoever, by virtue of public position under a State government, deprives another of

property, life, or liberty, without due process of law,…violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.")(emphasis added); *Scott v. McNeal,* 154 U.S. 34, 45 (1894)(This Court held that the 14th Amendment's due process of law "prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities."); *Neal v. Delaware,* 103 U.S. 370 (1880); Thompson, *Judicial Takings,* 76 Va. L. Rev. 1449 (1990); Zywicki, *The Rule of Law, Freedom, and Prosperity,* 10 Sup. Ct. Econ. Rev. 1, 22 (2003)("The documented effect of increasing rule of law values on economic growth is robust. Individuals are more willing to invest…where property rights are stable…."); *E. Enters. v. Apfel,* 524 U.S. 498, 594 (1998)(Kennedy, J. concurring)(drastic retroactive change in the law "can destroy the reasonable certainty and security which are the very objects of property ownership."); *Colo. v. N.M.,* 467 U.S. 310 (1984).

For these reasons, this Court should reverse the Florida Supreme Court below, and hold, as Justice Stewart stated in *Hughes*, that

> "A judicial taking may occur when a court, through sudden departure from established legal principles, has essentially changed long-standing property rights via judicial fiat so as to effect the 'retroactive transformation of private into public property.'"

389 U.S. at 296.

C. The Beach Nourishment Project Violated the Due Process Rights of the Homeowners.

Besides the Takings Clause violation discussed above, the "beach nourishment" project also violated the due process rights of the homeowners under the Fifth and Fourteenth Amendments.

The littoral property rights of the homeowners, and the boundary lines of their propreties, are unquestionably protected by due process. *Board of Regents v. Roth,* 408 U.S. 564 (1972). Due process requires a meaningful opportunity to be heard before deprivation of a property interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Fuentes v. Shevin,* 407 U.S. 67 (1972). As this Court said in *Fuentes*,

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of possessions….[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference."

407 U.S. at 80-81.

But the only process that the homeowners received in this case was notice of the planned survey and a public meeting before the Board of Trustees of the Internal Improvement Trust Fund to receive the views of the general public. Fla. Stat. Sect. 161.161(4). The Board then must later approve the conducted survey and the new Erosion Control Line, which would then be the new property line of the homeowners. Fla. Stat. Sect. 161.161(5). After approval, the survey specifying the Erosion Control Line is then recorded in the official property records of the appropriate county, which changes the property lines of all the homeowners.

In practice, the Board of Trustees does not even attend the public hearings, nor even review the survey. The Board just delegates all of these duties to an employee of the Florida Department of Environmental Protection, and then just rubber stamps his conclusions. J.A. 49, 87-90.

There is no judicial proceeding, no decision by a neutral, independent judge as to changes in the homeowners' property rights, no opportunity to cross-examine anyone involved in the process. Yet, the property rights of the homeowners are extensively changed as described in Part I.A. above, and their deeds effectively modified.

This is inadequate process for the property interests of the homeowners in the present case, and the transformation of those property interests involved. *Fuentes; Davidson v. New Orleans,* 96 U.S. 97 (1877); *Wilkinson v. Leland,* 27 U.S. 627 (1829); *Ochoa v. Hernandez y Morales,* 230 U.S. 139 (1913);

Goldberg v. Kelly, 397 U.S. 254 (1970). The transformation of these interests at issue here requires a judicial proceeding with full civil procedural rules and decision by a neutral, independent judge.

II. Beach Nourishment Is Not a Pro-Environment Policy; Rather, It Has Been Challenged as Dumping Taxpayer Dollars Into the Ocean.

The term "beach nourishment" sounds like a pro-environment policy to preserve beaches. Nothing could be further from the truth.

A recent report from the Senate Oversight and Investigations Committee explains,

> "The process of beach nourishment involves pumping sediment (often consisting of sand, mud, rocks and shell fragments) collected offshore onto beaches, where it is bulldozed. This is an unnatural process that disrupts local ecosystems both off- and onshore."[3]

The report further noted,

> "Politics, not science, tends to govern decisions about beach nourishment. Scientists have long noted that beach nourishment does not prevent beach erosion, but in fact may exacerbate it. In their analysis of the cost of

[3] "Washed Out to Sea: How Congress Prioritizes Beach Pork Over National Needs," Congressional Oversight & Investigation Report. United States Senate, 111th Congress, May, 2009, p. 6.

> beach nourishment projects, coastal experts Orrin Pilkey and Andy Coburn write, 'Almost without exception, nourished beaches disappear faster than natural beaches (2 to 12 times faster by our estimate)…[and nourished] beaches recover poorly after storms compared to natural beaches.[4]

A typical example is the beach nourishment project in early 2007 for Long Beach Island in New Jersey. Within a year, the added sediment seemed mostly washed away, and the town's mayor said of his local coastline, "It's right back to where we started."[5]

Localities that are committed to the beach nourishment strategy find that they have to do it over and over to maintain any gains, because the added sand quickly washes out to sea. The Senate report provided these examples,

> "The beach at Cape May, New Jersey, was renourished 10 times between between 1962 and 1995, at a total cost of $24.7 million. Another beach at Ocean City, New Jersey, was renourished 22 times between 1952 and 1995 at a total cost of more than $83.1 million."[6]

The National Oceanic and Atmospheric Administration (NOAA) refuses to fund beach nourishment projects because,

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[4] Id.
[5] Id.
[6] Id.

> "Sand placed on beaches often disappears rapidly because it does not prevent erosion and remains vulnerable to loss from [storm] events. As a result it usually involves a substantial long term investment rather than a one-time payment because of the need to continually renourish the beach."[7]

As a result, "Coastal geologists put the 10-year cost of maintaining nourished beaches along the developed shorelines of New Jersey, North Carolina, South Carolina, and Florida…at $5.9 million per mile."[8]

NOAA also notes this problem, "Beach nourishment also has the unintended effect of spurring new development as it tends to create the perception that an area is now safe for building, putting life and property at unnecessary risk."[9]

Federal funding for beach nourishment primarily comes from the U.S. Army Corp of Engineers. The Senate report states that, "Congress has literally dumped nearly $3 billion into beach projects that have washed out to sea."[10]

A report from the *St. Petersburg Times* explains how this money has been allocated,

> "Congress picks the beaches based on politics and lobbying rather than environmental

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[7] Id., p. 13.
[8] Id.
[9] Id., p.15.
[10] Id., p. 1.

> science…If you read the rules, you might think beaches are picked for federal sand based on a complicated formula about storm damage and flooding. But it's mostly politics, with a little science thrown in for good measure. [Harry] deButts, the head of public works for Avalon, [New Jersey,] calls it 'the game.' Although the Corps of Engineers analyzes each project, Congress decides which projects get built. What matters is raw political clout and whether a law maker has the chops to insert a local project in a bill. DeButts says there is a little science involved, but the real way to get money is to 'duke it out in D.C.'"[11]

The Senate report cites a Heritage Foundation study concluding that beach nourishment is trickle-up economic policy, transferring the tax dollars of ordinary Americans to protect the vacation homes and seasonal businesses of the well-to-do.[12] The Senate report offers this example,

> "As of 2004, beach nourishment along the coast of Long Beach, New York, had already cost federal taxpayers $24 million in studies, and was projected to cost $800 million in total. The project primarily benefited multi-million dollar homes located on the barrier island's primary dunes. Many of these homes had already been flooded or damaged repeatedly by storms, yet were always rebuilt, often tapping federally subsidized flood insurance.

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[11] Id., p. 20.
[12] Id., p. 23.

> Each of these rebuilt Westhampton beachfront homes exceeded exceeded $3 million in value."[13]

As to the environmental impacts, the NOAA states,

> "Beach nourishment projects can have serious long and short-term environmental effects…: disturbance of species feeding patterns; disturbance of species nesting and breeding habits; elevated turbidity levels…; changes in near shore bathymetry […ocean depth] and associated changes in wave action; burial of intertidal and bottom plants and animals and their habitats in the surf zone; and, increased sedimentation in areas seaward of the surf zone as the fill material redistributes to a more stable profile (National Research Council, 1995). Of particular concern are the impacts to endangered species such as sea turtles and shorebirds which use the beach as nesting areas."[14]

The Senate report also quotes the National Wildlife Federation on some of the environmental impacts of beach nourishment,

> "Processes like beach nourishment gravely affect the sea turtle nesting site. Compact sands and steeper dunes are not conducive to nesting females, as it is more difficult to climb

[13] Id., p. 24.
[14] Id., p. 26.

> and break apart those sands to create safe nests for laying eggs. Construction that brings intense lights and noise also adversely affect hatchlings that are already vulnerable to predators and degraded environments.[15]

The National Wildlife Federation also joins with Taxpayers for Common Sense to report,

> "[T]here is nothing nourishing about dredging machines mining sand offshore and blasting on the beach through a pipe, and then smoothing the sand with bulldozers. This process can harm shallowwater reefs and habitat essential for fish and other species. In Florida, a handful of projects could bury more than 100 acres of near shore reefs used by more than 500 marine species. The process smothers crabs, mollusks, and shrimp, which are an essential source of food for birds and other marine species. It also buries fragile nesting habitats for sea turtles. Increasingly, these separately considered projects are pieced together to encompass entire coastlines."[16]

As quoted in the Senate report, the coastal environmental experts Pilkey and Coburn ask, "Does anybody truly believe that you can pump millions of cubic yards of sand on a beach, bulldoze it around and do it again every few years…and not have a severe environmental impact?"[17]

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[15] Id., p. 27.
[16] Id., p. 28.
[17] Id., p. 29.

CONCLUSION

For all of the foregoing reasons, the decision of the Florida Supreme Court below should be reversed, and the taken property rights of the homeowners restored.

Respectfully submitted,

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