

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 *AMICUS CURIAE* OF THE
NEW JERSEY LAND TITLE ASSOCIATION
IN SUPPORT OF PETITIONER**

MICHAEL J. FASANO, ESQ. *
LOMURRO, DAVISON, EASTMAN
& MUNOZ, P.A.
Monmouth Executive Center
100 Willow Brook Road
Building 1
Freehold, New Jersey 07728
(732) 462-7170

* Counsel of Record *Counsel for Amicus Curiae*

August 20, 2009

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	4
ARGUMENT.....	6
I. DEPRIVING CITIZENS OF SIGNIFI- CANT AND ESTABLISHED PROP- ERTY RIGHTS CONSTITUTES A TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.....	6
II. THE COMPLETE AND UNANTI- CIPATED REVERSAL OF LONG STANDING PRINCIPLES OF PROP- ERTY LAW BY THE FLORIDA SUPREME COURT CONSTITUTED A TAKING WITHIN THE MEANING OF THE FIFTH AND FOURTEENTH.....	7
A. The Florida Supreme Court Abruptly Reversed Two Longstanding Prin- ciples Of Property Law.....	7
1. The Florida Supreme Court Reversed Its Position On The Right Of A Littoral Owner To Receive Accretions To Land.....	7
2. The Florida Supreme Court Reversed Its Position On The Right Of A Littoral Owner To Maintain Contact With The Water	8

TABLE OF CONTENTS—Continued

	Page
B. The Lower Court’s Decision Constituted A Taking Under The United States Constitution.....	11
III. A JUDICIAL TAKING IS NO LESS A TAKING WITHIN THE MEANING OF THE FIFTH AND FOURTEENTH AMENDMENTS THAN AN ACT OF THE LEGISLATURE	16
IV. THE RECOGNITION OF A DOCTRINE OF JUDICIAL TAKINGS IS NECESSARY AND IMPORTANT TO THE PROTECTION OF RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION.....	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
<i>Board of Trustees of the Internal Imp. Trust Fund v. Sand Key Associates, Ltd.</i> , 512 So. 2d 934 (Fla. 1987)	7, 8, 10, 15
<i>Boe v. State, Dep't of Human Services</i> , 367 N.J. Super. 572, 844 A.2d 531 (N.J. Super. Ct. App. Div. 2004).....	18
<i>Boe v. State, Dep't of Human Services</i> , 182 N.J. 139, 861 A.2d 844 (2004)	19
<i>Boe v. State, Dep't of Human Services</i> , 183 N.J. 289, 873 A.2d 500 (N.J. 2005).....	19
<i>Boe, v. State, Dep't of Human Services</i> , Dkt. 56, 267, 2004 WL 5475146 (N.J. April 29, 2004).....	19
<i>Brickell v. Trammell</i> , 82 So. 221 (Fla. 1919).....	8
<i>Broward v. Mabry</i> , 58 So. 398 (Fla. 1909)...	9, 14
<i>Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors & Shippers</i> , 48 So. 643 (Fla. 1909)	9
<i>Hayes v. Bowman</i> , 91 So. 2d 795 (Fla. 1957).....	9
<i>Hughes v. State of Washington</i> , 389 U.S. 290 (1967).....	16, 17, 18
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979).....	11, 12, 13, 14, 15
<i>Kendry v. State Road Dep't.</i> , 213 So. 2d 23 (Fla. Dist. Ct. App. 1968).....	14
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	11, 12
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992).....	11

TABLE OF AUTHORITIES—Continued

	Page
<i>M & D Associates v. Mandara</i> , 366 N.J. Super. 341, 354-355, 841 A.2d 441 (N.J. Super. Ct. App. Div. 2004), <i>cert. denied</i> , 180 N.J. 151, 849 A.2d 184 (N.J. 2004)....	19
<i>Moore v. State Road Dep't.</i> , 171 So. 2d 25 (Fla. Dist. Ct. App. 1965).....	14
<i>Penn Cent. Transp. Co. v. City of New York</i> , 438 U.S. 104 (1978).....	12
<i>Phillips v. Washington Legal Foundation</i> , 524 U.S. 156 (1998).....	13, 14, 15
<i>Ruckelshaus v. Monsanto Co.</i> , 467 U.S. 986 (1984).....	11
<i>State v. Florida Nat'l. Properties, Inc.</i> , 338 So.2d 13 (Fla. 1976)	15
<i>Stevens v. City of Cannon Beach</i> , 510 U.S. 1207 (1994).....	18
<i>Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency</i> , 535 U.S. 302 (2002).....	6
<i>Walton County v. Stop the Beach Renourishment, Inc.</i> , 998 So. 2d 1102 (Fla. 2008)	8, 9, 10
<i>Webb's Fabulous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155 (1980)...	6, 13, 15, 16, 17

CONSTITUTIONS

U.S. Const. amend. V	6, 16
U.S. Const. amend. XIV	5, 16, 20
Fla. Const. art. I, § 9	15

RULES

Sup. Ct. R. 37.....	1
Sup. Ct. R. 37.6.....	2

TABLE OF AUTHORITIES—Continued

	Page
N.J. Ct. R. 2:2-1(a)(1)	19
N.J. Ct. R. 2:12-4	19
 OTHER AUTHORITIES	
Barton H. Thompson, <i>Judicial Takings</i> , 76 <i>Va.L.Rev.</i> 1449 (2004)	17
Henry Philip Farnham, <i>The Law of Waters and Water Rights</i> , Vol I § 62 (1904)	10
John M. Gould, <i>Law of Waters</i> , § 149 (3d. ed. 1900)	10
Joyce Palomar, <i>Title Insurance Law</i> , Vol. I, § 1.8 (2008)	2, 3
Lawrence Joel Fineberg, <i>Handbook of N.J. Title Practice</i> , Vol I, § 803 (3d ed. 2007) ..	3

IN THE
Supreme Court of the United States

No. 08-1151

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 AMICUS CURIAE OF THE
NEW JERSEY LAND TITLE ASSOCIATION
IN SUPPORT OF PETITIONER**

STATEMENT OF INTEREST

The New Jersey Land Title Association (herein-
after “NJLTA”) is a trade association advancing the
interests of those involved in the real estate title
insurance industry in New Jersey.¹ The members of

¹ Consistent with the requirements of Rule 37, a blanket
letter of consent to the filing of Amicus briefs was filed with the
Clerk of the Supreme Court by way of a correspondence to the

the Association include – among others – more than ninety percent of the title insurance underwriting companies licensed to do business in the State. Those insurers alone are a significant cornerstone of the national economy. Nationally, in 2007 alone, NJLTA insurers insured over four trillion dollars of real estate.²

The insurance issued by such companies insures that title to real estate is good and free of encumbrances. Joyce Palomar, *Title Insurance Law*, Vol. I, § 1.8 (2008). Such insurance allows buyers to invest in real estate with confidence. Moreover, that confidence has a multiplier effect. Title insurance not only helps “buyers to buy” but it helps sellers to sell, lenders to lend, brokers to transact, builders to build, industries to expand and so on. Thus, the overall economic impact of title insurance is great.

Title insurance itself is unique. Unlike casualty insurance – which insures against *unknown future events* such as accidents or storms – title insurance deals with *known events* of the past. Joyce Palomar, *Title Insurance Law*, Vol. I, §§ 1.15, 1.16 (2008). It insures, for instance, that a seller’s title to real estate

Clerk of the Supreme Court dated July 7, 2009 from D. Kent Safriet, counsel for the Petitioner, confirming the blanket consent of all parties to the filing of Amicus briefs. Pursuant to Rule 37.6, counsel for Amicus states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus their members or their counsel made a monetary contribution to its preparation or submission.

² Statistics compiled from insurer annual statements on file with the State of New Jersey, Department of Banking and Insurance.

can be seamlessly traced backwards in time to a point beyond the statute of limitations for claims against that title. Lawrence Joel Fineberg, *Handbook of N.J. Title Practice*, Vol I, § 803 (3d ed. 2007). This allows purchasers of real estate to purchase property with assurance as to what they are receiving.

A prerequisite to the issuance of title insurance is a search of the title history of the property. Joyce Palomar, *Title Insurance Law*, Vol. I, § 1.16. The title search in turn entails, among other things, an analysis of recorded legal documents in light of known rules of law so that the title insurer can conclude that insuring the property is acceptably free of risks. Lawrence Joel Fineberg, *Handbook of N.J. Title Practice*, Vol. I, § 1005.

Thus, title insurance, unlike other forms of insurance, focuses more on an analytical risk-elimination rather than a risk-assumption, such as happens with casualty insurance. Joyce Palomar, *Title Insurance Law*, Vol. I, § 1.15. While the title searches designed to eliminate risks will generate increased operating expenses – if those title searches demonstrate minimal levels of risk – title insurance can be issued at relatively low cost and with a high degree of confidence. Palomar, *Id.*

Low risk, low premiums and high confidence are thus the very essence of the business model of title insurance. That business model accomplishes important societal objectives. It gives homeowners, investors, banks, businesses and others a low cost and proven way to insure their investments in land. Palomar, *Id.*

It is this very structure of the business model of title insurance that leads to NJLTA's interest in this

suit. Put simply, the retroactive re-allocation of property rights by judicial decisions can be disastrous to the title insurance industry. By retroactively taking away interests in property, such decisions manufacture claims against title insurance carriers whose business model is ill equipped to handle them. Such decisions nullify “risk elimination” and creates situations where title insurance companies operate with high operating expenses, low premiums and potentially high claims expenses. That is a threat both to the title insurance industry and to the individuals – be they homeowners, businessmen, developers or investors – who rely on the title industry to insure their investments.

Herein, the Florida Supreme Court retroactively re-allocated property rights for the apparent purpose of effectuating policy objectives. NJLTA seeks to address the constitutionality of the Florida Supreme Court’s action. Just like a property owner, NJLTA has an interest in assuring that the law protects established rights in property. Put bluntly, title insurance companies simply cannot do business if precedent regarding real property is treated as nothing more than window dressing.

Accordingly, this Court’s decision is important in that it directly impacts on the title insurance industry and the way it provides a pivotal service to commerce in real estate.

SUMMARY OF ARGUMENT

Under Florida law, a waterfront owner’s rights included a package of “littoral rights” such as the right to maintain the property’s contact with the water and the right to ownership of accretions of sand to the upland parcel. A long line of Florida

decisions had given “littoral rights” a special place in Florida law. Precedent had informed the citizenry that such rights could not be taken away without “just compensation.”

Recently, however, the State of Florida by statute has replaced these common law rights of littoral ownership with a statutory plan designed to deal with the problem of waterfront erosion. In doing so, the statute took away two valuable common law rights of waterfront owners, to wit, the upland owner’s contact with the water and the owner’s right to accretions of sand to the waterfront.

Apparently in order to effectuate the new statutory beach protection plan, the Florida Supreme Court held that such rights could indeed be taken away without compensation. In order to deal with past precedent to the contrary, the Court simply declared that they the rights taken had never existed in the first place.

Precedent is supposed to provide a guidepost pointing with reasonable directness towards conclusions upon which men and women can base their lives and guide their fortunes. That purpose is ill served when the reasonably entertained expectations of the citizenry are violated by decisions based more upon pretext than precedent. And when the negation of long standing precedent has the effect of transferring significant property rights from a citizen to the State, such actions should be treated as what they truly are – a taking – regardless of the fact that the agency effectuating the taking is a judicial body rather than a legislature.

ARGUMENT**I. DEPRIVING CITIZENS OF SIGNIFICANT AND ESTABLISHED PROPERTY RIGHTS CONSTITUTES A TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.**

The Fifth Amendment's prohibition against takings of private property for public use are applicable to the States through the Fourteenth Amendment. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 306-307 (2002). The final sentence of the Fifth Amendment itself prohibits such "takings" without the payment of just compensation. *U.S. CONST. Amend.V.* These two Amendments neither prohibit the Congress nor any State Legislature from passing laws changing property rights. But legislation which – without compensation – transfers existing, long recognized and significant property rights from a citizen to the State is a violation of the Constitutional protections given by those amendments. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980).

Amicus will argue that the uncompensated takings – forbidden to legislatures – are equally forbidden to state judiciaries. What cannot be done directly by legislature, cannot be done indirectly by judicial degrees abrogating existing, long-recognized and significant property interests of citizens in favor of the State.

II. THE COMPLETE AND UNANTICIPATED REVERSAL OF LONG STANDING PRINCIPLES OF PROPERTY LAW BY THE FLORIDA SUPREME COURT CONSTITUTED A TAKING WITHIN THE MEANING OF THE FIFTH AND FOURTEENTH AMENDMENTS.

This Point Two will argue the following:

One, the Florida Supreme Court did not interpret or reconcile existing precedent in order to resolve a disputed legal issue in a pending case. Rather, the court simply reversed two separate and long standing principles of law in order to arrive at a pre-ordained result.

Two, the result of this was the transfer of valuable property rights from citizens to the State which, under the facts of this case, constituted a taking under the United States Constitution.

A. The Florida Supreme Court Abruptly Reversed Two Longstanding Principles Of Property Law.

1. The Florida Supreme Court Reversed Its Position On The Right Of A Littoral Owner To Receive Accretions To Land.

In 1987 the Florida Supreme Court held that a littoral's owners right to accreted sand was a property right which could not be taken away without "just compensation and due process of law..." *Board of Trustees of the Internal Imp. Trust Fund v. Sand Key Associates, Ltd.*, 512 So.2d 934, 936 (Fla. 1987). This right was not simply the right to ownership of sand already accreted but included "the right to

receive accretions and relictions to the property.” *Sand Key Associates, supra.* (emphasis supplied) (citing *Brickell v. Trammell*, 82 So. 221 (Fla. 1919)). However, in the case under the review, the Florida Supreme Court held that “[t]he right to accretion and reliction is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction.” *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102, 1112 (Fla.2008). Based thereon the court held that the loss of the right to future accretions was not a compensable event. *Walton County, supra.* This was in direct contradiction to prior pronouncements of the court and it clearly defeated landowners of established rights.

2. The Florida Supreme Court Reversed Its Position On The Right Of A Littoral Owner To Maintain Contact With The Water.

In *Sand Key Associates*, the Florida Supreme Court was also specific about the right of a littoral owner to maintain contact with the water. The Court described that right as follows:

Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights ... the right of access to the water, including the right to have the property’s contact with the water remain intact.

Sand Key Associates, supra. (Emphasis supplied).

However, when in deciding the case under consideration, the same court stated:

We have never addressed whether littoral rights are unconstitutionally taken based solely upon

the loss of an upland owner's direct contact with the water.

Walton County v. Stop the Beach Renourishment, Inc., supra.

The Court then went on to hold that no such right ever existed in the first place! *Walton County v. Stop the Beach Renourishment, Inc., supra.* The Court justified that conclusion by stating that the right of "contact" was subsidiary to the right of "access" and since "access" to the water was still available under the challenged statute, "contact" was irrelevant. *Walton County v. Stop the Beach Renourishment, Inc., supra.* However, these conclusions are completely unsupportable under Florida precedent for two reasons.

First, Florida's littoral law is based upon its incorporation of the common law after its admission to the union. *See e.g., Broward v. Mabry*, 58 So. 398, 407-410 (Fla. 1909); *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors & Shippers*, 48 So. 643, 644-646 (Fla. 1909); *Hayes v. Bowman*, 91 So.2d 795, 798-800 (Fla. 1957). The common law, in turn, does not consider "contact" with the water to be a subsidiary to the right of access. Just the opposite is true. The very essence of the common law right inheres in contact with the water. Farnham's classic treatise on the common law of water and water rights states:

The courts do not fully agree in their enumeration of these rights. Some concede more than do others; but the principles involved which will be developed in the course of this and succeeding chapters accord the owner of riparian land the right to have the water remain in place, and

to retain, as nearly as possible, its natural character.

Henry Philip Farnham, *The Law of Waters and Water Rights*, Vol I § 62 (1904).³

Second, Florida precedent by its Supreme Court specifically affirmed that common law principle. It affirmed that littoral owners had “the right of access to the water, including the right to have the property’s contact with the water remain intact...” *Sand Key, supra*. (emphasis supplied). Accordingly, prior to the decision under appeal, littoral owners could rest assured that they possessed both rights of “access” and of “contact.” “Access” was not subsumed in “contact” but was a separate and distinct right in and of itself.

Nonetheless, the Florida Supreme Court held that there was no right to contact with the water under existing Florida law. Based thereon the Court held that the loss of the right to contact was not a compensable event. *Walton County, supra*. This, again, was in direct contradiction to prior pronouncements of the court and defeated landowners of established rights.

In looking at decision under review, the only conclusion that one can come to is that – for policy reasons – the Florida Supreme Court reversed its prior precedent and in doing so stripped owners of property rights while denying them compensation therefore. The Court did apparently did so in order to deal with the very real problem of beach loss in the

³ See also, John M. Gould, *Law of Waters*, § 149 (3d. ed. 1900) (a riparian proprietor has the right to water frontage belonging by nature to his land).

State of Florida. However, as addressed in Point One B below, this action – no matter what its justification – constituted a taking under the United States Constitution.

B. The Lower Court’s Decision Constituted A Taking Under The United States Constitution.

The United States Supreme Court has stated on numerous occasions that the Court has been unable “to develop any set formula for determining when justice and fairness require that economic injuries caused by public action” must be deemed a taking. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). Supreme Court jurisprudence does, however, recognize different categories of takings and has developed case law within each category. For instance, regulatory takings occur when a regulation so intrudes upon a property owners rights in property that the property is considered taken despite the absence of a physical taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-1031(1992). On the other hand, physical takings occur when all or even a part of a property is actually physically taken from an owner from public use. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-426, 441 (1982) (landlord required to permit permanent installation of communications cable equipment on his property). A subset of the physical takings category involves situations where individual but significant property rights – out of the “bundle of rights” which constitute ownership – are taken from an owner without compensation. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In such cases there exists no “permanent” occupation of the property but certain fundamental rights of ownership are, indeed,

permanently taken away. *Kaiser Aetna, supra*. (marina owner forced to grant public access to private lagoon). As discussed below, it is this last category that the present dispute falls into.

Here, no attempt has been made to “regulate” any part of the property owned by the upland owners. There has been no limitation placed upon the use of the property nor are there restrictions imposed upon its development. Cf. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (regulatory scheme limited the right to develop property 50 story office building over existing historical building). Simply put, there exists no regulatory scheme limiting what the affected owners can do with their properties and the cases dealing with regulatory takings are not apposite to the problem presented.

Similarly, there is no taking of a specific tangible portion of property of the type discussed in *Loretto, supra*. Instead, in this case, two of the rights of the owners herein – that of accretion and contact with the water – have simply been taken from the owners without compensation. That makes the present matter far more akin to cases involving the appropriation of specific rights of ownership than it is to a regulatory taking or a partial but permanent appropriation such as in *Loretto*.

Under Supreme Court precedent, the rights of ownership in land are sometimes referred to as a “bundle of rights” which taken together comprises the totality of “ownership.” *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). A significant appropriation of a portion of the rights in that “bundle” may constitute a compensable taking even if many of the other rights in the “bundle” remain. *Kaiser Aetna, supra* at 180. In the present case, two such rights of

ownership – contact with the water and accretion – were clearly appropriated by the State. The question arises: was that appropriation significant enough to constitute a taking?

Precedent supports the conclusion that it was.

For instance, in *Kaiser Aetna*, the government authorized public access to private waters. The Court explained such an action was a taking despite the fact that the government action did not destroy the total value of the land for other uses. The government's action was still a taking because the "right to exclude" others from one's property had been "universally held to be fundamental element" of property rights. *Kaiser Aetna, supra* at 179-180. Thus, by giving public access to private property the government's action had violated that significant right and constituted a taking. Similarly, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980), this Court held that the interest accruing on principal held in an interpleader fund could not simply be appropriated by the State. Again, the State in *Webb* did not attempt "take" the principal of the fund held in the interpleader account, that amount was left intact. *Webb's Fabulous Pharmacies, supra* at 161. Nonetheless, the right to the interest on the principal was held to be such a significant incident of ownership of the principal that its appropriation constituted a "taking." See, *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 166-167 (1998).

Importantly, the significant "incidents of ownership" found in cases like *Kaiser Aetna*, *Webb* and *Phillips* were not intellectual abstractions. They arose from an easily discernible foundation. That foundation was the traditional and long standing legal recognition of the importance of those rights.

For instance, in *Kaiser Aetna*, the Court noted that importance of the “right to exclude” was recognized universally as a crucial aspect of the rights of an owner. *Kaiser Aetna, supra* at 179-180. The same was found to be true about the inexorable relationship of interest-to-principal found in *Webb*. The inseparability of the right of interest from principal was quite simply a fundamental rule long recognized by State law. See, *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 166-167 (1998). Thus, in both cases the significance of the property right inhered in the traditional recognition of its importance by the law of the governmental entity seeking to appropriate it. *Kaiser Aetna, supra*; *Phillips v. Washington Legal Foundation, supra*.

Here, it is the same. It was the Florida courts themselves – prior to the decision below – that made it clear that littoral rights were important, essential, attributes of ownership of waterfront lands. These rights were, in fact, held to be so crucial that the Florida courts repeatedly stated that such rights could not be taken away without payment of compensation. For instance, as far back as 1909, the Florida Supreme Court made it specifically clear that riparian rights simply could not be taken “without just compensation.” *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909). The Florida courts consistently have echoed that theme for decades. *Moore v. State Road Dept.*, 171 So.2d 25, 28 (Fla. Dist. Ct. App. 1965). Florida appellate courts have held this principle to extend specifically to cases involving the destruction of riparian rights by virtue of the filling of submerged lands as has happened here. *Kendry v. State Road Dept.*, 213 So.2d 23, 27-28 (Fla. Dist. Ct. App. 1968). In fact, in one Florida Supreme Court case it was

stated that the right to receive accretions and the right to remain in contact with the water were:

...property rights that may be regulated by law, but may not be taken without just compensation and due process of law ...

Sand Key Associates, supra at 936.

And in *State v. Florida Nat. Properties, Inc.*, 338 So.2d 13, 18 (Fla. 1976), the Florida Supreme Court held that the State's attempt to deny the right of accretion to an upland owner would amount an unconstitutional taking "in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of Art. I, § 9, of the Florida Constitution." *State v. Florida Nat. Properties, supra* at 17. Thus – as in *Kaiser Aetna, Webb* and *Phillips* – the announced law of the entity seeking to appropriate the rights in question has itself defined those rights as fundamental.

Now, certainly, gifted legal minds could posit subtle distinctions between the case under review and cases like *Sand Key* and *State v. Florida Nat. Properties*. Based upon such subtle distinctions a person so inclined could engineer a conclusion that the quotes noted above (and in other Florida precedent) constituted obiter dictum, rather than ratio decidendi. But there is one conclusion that no one – no matter how gifted in exposition – could dispute. A person conducting an honest and good faith review of Florida case law (prior to the decision under appeal) would, of necessity, believe that littoral rights were powerfully protected interests under Florida law. Precedent had created clear expectations that littoral rights were not simply important – they were

sacrosanct. They could not be taken without just compensation.

But here – after littoral owners invested in property possessed of such littoral rights – the Florida judiciary simply reversed itself to the detriment of those owners. Put bluntly, the Florida Supreme Court first proclaimed such rights to be significant, important and protected, but later proclaimed that those identical rights were insignificant. In fact, it went further, it proclaimed that such rights had never existed in the first place!

But private rights cannot be transformed into public assets by word play. *Webb's Fabulous Pharmacies*, *supra* at 164. And it will be argued below that this result should be no different simply because the agent effectuating the change is a court instead of a legislature.

III. A JUDICIAL TAKING IS NO LESS A TAKING WITHIN THE MEANING OF THE FIFTH AND FOURTEENTH AMENDMENTS THAN AN ACT OF THE LEGISLATURE.

The Fifth and Fourteenth Amendments are not, by their terms, limited in application to legislative bodies. *Hughes v. State of Washington*, 389 U.S. 290, 298 (1967) (Stewart, J. Concurring). There is no reason, in principle, why judicial actions should not fall within their ambit. *Hughes, supra*. However, three arguments have been made against the application of the requirements of those amendments to the courts. They are: 1.) such a rule would bar courts from revising property law to meet social and technological changes, 2.) it would constitute a federalization of areas of law constitutionally within the states'

domain, and 3.) it would vastly expand the workloads of federal courts. Barton H. Thompson, *Judicial Takings*, 76 *Va.L.Rev.* 1449, 1499-1514 (2004).

But identical objections could be made with equal logic to the application of fourteenth amendment protections to legislation. *Thompson, supra* at 1534-1535. And the application of the Constitution's requirements to legislation has simply resulted in the accommodation of legislative policies to the obligation of protecting individual rights. There is no reason to suppose that state judiciaries are so fundamentally lacking in their expertise or the accountability, that they are unable accommodate their decisions to the obligation of protecting property rights under federal law. Nor is there any reason that they should be exempt from the obligation to protect such rights.

But there exists a more fundamental reason for the implementation of such a rule in this case. The present case simply does not necessitate a sweeping re-ordering of State and Federal relations. The issue in this case is narrow. It was posited in Justice Stewart's concurrence in *Hughes v. State of Washington* 389 U.S. 290, 296 (1967). Does a taking occur when a state court works "sudden change in state law, unpredictable in terms of the relevant precedents" which defeases an owner of property rights long recognized to be significant and important? *Hughes, supra*.

That is the issue.

There is no doubt under present Constitutional law that such an action – had it been taken by a legislature – would constitute a taking. *Webb's Fabulous Pharmacies, supra* at 164. There is no reason in this case why a judiciary should not be equally so bound.

IV. THE RECOGNITION OF A DOCTRINE OF JUDICIAL TAKINGS IS NECESSARY AND IMPORTANT TO THE PROTECTION OF RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION.

As Justice Scalia noted in his dissent in *Stevens v. City of Cannon Beach*,⁴ there is a real and significant difference between reasoned judicial decision making and result-oriented artifice. And to allow the latter in this case would “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.” *Hughes v. Washington, supra* at 296-297(1967)(J. Stewart, concurring). But the need to recognize a judicial takings doctrine transcends the matter under review. This case as well as the case of *City of Cannon Beach* as well as the case of *Hughes v. Washington* are simply reflective of a normal human tendency to see the “ends as justifying the means” when confronted with an issue of significant social concern. Many times the problems generated by this tendency are cured by the normal appellate process. For instance, in *Boe v. State, Department of Human Services*, 367 N.J. Super. 572, 844 A.2d 531 (N.J. Super. Ct. App. Div. 2004) a New Jersey appellate court abolished the centuries old rule that the survivor of a joint tenancy takes free of a predeceasing joint tenants debts. *Boe, supra* at 581. The purpose of that ruling was admittedly to allow the State to recover institutional liens for medical treatment. *Boe, supra*. At that time, however, there were probably thousands, if not tens of thousands, of parcels of property in the State of

⁴ 510 U.S. 1207 (1994) (Scalia, J., and O’Connor, J., dissenting from denial of the petition for writ of certiorari)

New Jersey owned by the survivors of what were once joint tenancies. The *Boe* decision would have retroactively created liens in favor of the state against titles to an untold number of properties. *Boe, v. State, Dept. of Human Services*, 2004 WL 5475146 (N.J. April 29, 2004) (Amicus Brief of New Jersey Land Title Association). The State Supreme Court granted certification to review that decision. *Boe v. State, Dept. of Human Services*, 182 N.J. 139, 861 A.2d 844 (2004). And even though the issue was mooted by a legislative enactment, the New Jersey Supreme Court vacated not only the judgment but even the *opinion* of the appellate court so that its dicta would not retroactively cloud titles as to liens other than the one dealt with by the curative legislation. *Boe v. State, Dept. of Human Services*, 183 N.J. 289, 873 A.2d 500 (N.J. 2005).

Results such as found in *Boe* are commendable but by no means guaranteed. As is the case with many of the nation's highest courts, in New Jersey appeals concerning violations of the United States Constitution are of right, R. 2:2-1(a)(1), but certification of non-constitutional claims is discretionary. R. 2:12-4. Discretionary certification is limited by court rule. R.2:12-4. It is not always granted. That fact can deny review of pretextual rulings depriving citizens of property rights, such as is presented herein. *See e.g., M & D Associates v. Mandara*, 366 N.J. Super. 341, 354-355, 841 A.2d 441, 449-450 (N.J. Super. Ct. App. Div. 2004) (owners of property were divested of title by implementation of unwritten and previously unannounced rules of procedure obviously designed by the court hearing the matter to reach a desired result), cert. denied 180 N.J. 151, 849 A.2d 184 (N.J. 2004).

This is why the present matter is important. A rule of law recognizing judicial takings will do no more than implement the words of the United States Constitution which provides that no “State” – regardless of the identity of the State actor – shall deprive citizens of property without due process of law. *U.S. CONST. Amend. XIV*. But importantly, it will caution judges – as well as legislators – on those occasions when the human tendency to see the “ends as justifying means” threatens to overshadow the dictates of the Constitution.

CONCLUSION

The rejection of “form over substance” is neither profound nor esoteric. It is a commonplace of modern law. It is a rejection of pretext over actuality. And where Constitutional rights have been denied by through pretext, Justices of this Court have spoken out against it. Here, the pretext of judicial decision-making has denied protected Constitutional rights. This case presents this Court with an opportunity to assure that the substance of the Constitution’s prohibitions against State takings is elevated over the form of pretextual rulings, which otherwise would deny rights guaranteed by the United States Constitution.

Respectfully submitted,

MICHAEL J. FASANO, ESQ. *
LOMURRO, DAVISON, EASTMAN
& MUNOZ, P.A.
Monmouth Executive Center
100 Willow Brook Road
Building 1
Freehold, New Jersey 07728
(732) 462-7170

* Counsel of Record

Counsel for Amicus Curiae