American Bar Association
www.supremecourtpreview.org

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

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER AND BRIEF AMICUS CURIAE OF OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PETITIONER

ROBERT H. THOMAS
Counsel of Record
MARK M. MURAKAMI
TRED R. EYERLY
DAMON KEY LEONG
KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
www.hawaiilawyer.com
Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to this Court's Rule 37, Owners' Counsel of America requests leave of the Court to file this brief amicus curiae in support of Petitioner.

Amicus requests leave to file this brief outside the time established in Rule 37.3(a) because undersigned counsel of record who was principally responsible for producing this brief experienced both the death of an immediate family member and concurrently contracted a severe case of adult chicken pox which resulted in hospitalization. Counsel of record for both Petitioner and Respondents were notified of the above circumstances and informed amicus they have no objection to the filing of this brief.

September 2009.

ROBERT H. THOMAS
Counsel of Record
MARK M. MURAKAMI
TRED R. EYERLY
DAMON KEY LEONG
KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
www.hawaiilawyer.com
Counsel for Amicus Curiae

QUESTIONS PRESENTED

The Florida Supreme Court invoked "nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. PROPERTY EMBODIES A CORE NORMATIVE COMPONENT WHICH MAY NOT BE ALTERED BY STATE COURTS WITHOUT COMPENSATION	3
II. REMEDIES FOR A JUDICIAL TAKING	11
III. JUDICIAL TAKINGS	15
A. Summarily Discarding Long-Established Common Law Rules	15
B. Eliminating The Right To Exclude By Custom	24
C. Expanding The Scope Of The Public Trust	26
CONCLUSION	28

TABLE OF AUTHORITIES

Page

CASES

Air Pollution Variance Bd. of Colorado v. W. Alfalfa Corp., 416 U.S. 861 (1974)..........................11

Ariyoshi v. Robinson, 477 U.S. 902 (1986).................20

Babbitt v. Youpee, 519 U.S. 234 (1997) 9, 12, 13

Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972)........................27

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930)..14

Broad River Power Co. v. South Carolina, 281 U.S. 537 (1930)...8

Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003)..6

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980).............11

Center for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008) 26

Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897)................................5

County of Hawaii v. Sotomura, 517 P.2d 57 (Haw. 1973), *cert. denied*, 419 U.S. 872 (1974) 21, 22

Damon v. Hawaii, 194 U.S. 154 (1904)........................3

Dolan v. City of Tigard, 512 U.S. 374 (1994) 11, 13

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)..11, 12

TABLE OF AUTHORITIES – Continued

Page

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 6

Ex parte *Virginia*, 100 U.S. 339 (1880) 5

Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005) 15

Hodel v. Irving, 481 U.S. 704 (1987) 8, 9

Hughes v. Washington, 389 U.S. 290 (1967) 8, 10

Ingraham v. Wright, 430 U.S. 651 (1977) 9

In re Ashford, 440 P.2d 76 (Haw. 1968) 23, 24

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 3, 6, 8, 10, 13

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ....*passim*

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 11

Matthews v. Bay Head Imp. Ass'n, 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984) 27

McBryde Sugar Co. v. Robinson, 504 P.2d 1330 (Haw. 1973) 16, 17, 18, 19

McBryde Sugar Co. v. Robinson, 517 P.2d 26 (Haw. 1973) (per curiam) 17, 18

Missouri ex rel. *Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930) 14

Muhlker v. New York & Harlem Railroad Co., 197 U.S. 544 (1905) 8

TABLE OF AUTHORITIES – Continued

Page

National Audubon Soc. v. Superior Court, 658 P.2d 709 (Cal.), *cert. denied*, 464 U.S. 977 (1983) 27

New York v. Burger, 482 U.S. 691 (1987) 11

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 4, 13

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 8

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 12, 13

Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) 8

Public Access Shoreline Hawaii v. County of Hawaii Planning Comm'n, 903 P.2d 1246 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996) 25, 26

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) .... *passim*

Robins v. Pruneyard Shopping Center, 592 P.2d 341 (Cal. 1979) 14

Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977) 18

Robinson v. Ariyoshi, 676 F. Supp. 1002 (D. Haw. 1987) 20

Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985) 15, 16, 19, 20

Robinson v. Ariyoshi, 796 F.2d 339 (9th Cir. 1986) 20

TABLE OF AUTHORITIES – Continued

Page

Robinson v. Ariyoshi, 887 F.2d 215 (9th Cir. 1990) 21

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 3

Saunders v. Shaw, 244 U.S. 317 (1917) 14

Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Haw. 1978) 22, 23

State ex rel. *Thornton v. Hay*, 462 P.2d 671 (Or. 1969) 24, 25

State of Hawaii v. Zimring, 566 P.2d 725 (Haw. 1977) 28

Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) 24, 26

United States v. Causby, 328 U.S. 256 (1946) 6

Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980) 3, 7, 8, 12

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 15, 20, 21

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 6

CONSTITUTIONAL PROVISIONS

U.S. CONST. ART. IV 4

U.S. CONST. AMEND. V ....*passim*

U.S. CONST. AMEND. XIV ....*passim*

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695 (1993)..2

James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After* Lucas, 35 ECOLOGY L.Q. 1 (2008) 2, 7

Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).............26

INTEREST OF AMICUS CURIAE

The Owners' Counsel of America (OCA) is a non-profit organization, organized under IRC § 501(c)(6) and sustained solely by its members.[1] OCA is a voluntary network of the most experienced eminent domain and property rights attorneys from across the country who seek to advance, preserve and defend the rights of private property owners, large and small, locally and nationally. Since its founding in 2000, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and to make that opportunity available and effective to property owners nationwide. OCA member attorneys have been and are involved in landmark property rights cases in nearly every jurisdiction nationwide.

SUMMARY OF ARGUMENT

This case concerns whether the "background principles" exception to *per se* takings in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), permits state courts to construe local property law in a manner that threatens to virtually swallow up all

[1] All counsel of record consented to the filing of this brief, and received notice of the intention to file this brief at least ten days before it was due. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus and counsel made a monetary contribution toward the preparation or submission of this brief.

regulatory takings.[2] Indeed, state courts have been actively encouraged to leverage their power to define background principles to avoid takings. *See* Huffman, *Background Principles*, 35 ECOLOGY L.Q. at 1 ("Fifteen years later, some who saw only dark clouds on the regulatory horizon as a consequence of *Lucas* now see a rainbow with a pot of gold at its end."); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 705 (1993) (nuisance law may consume the *per se* takings rule).

This brief addresses three issues. First, the notion of "property" embodies core components transcending a state court's power to redefine. The rule of accretion, which insures that littoral parcels remain so, is one of those fundamental components. Second, the remedy for a judicial taking is invalidation of the state court judgment. Third, this brief summarizes several of the more notable instances where state courts have openly and notoriously rewritten established rules of property. This was accomplished under the guise of "correcting"

[2] Professor James L. Huffman has suggested "background principles" includes public trust, natural use, navigational servitude, customary rights (including native gathering rights), various doctrines of water rights law, wildlife trust, Indian treaty rights, preexisting state and federal statutes and constitutions, destruction by necessity, criminal forfeitures, and revocable grants to public resources. James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After* Lucas, 35 ECOLOGY L.Q. 1, 9 (2008).

errors in long-standing common law doctrines, reinterpreting terms to alter their commonly understood meanings, or "discovering" that private property is (and has been all along) subject to a public trust.

ARGUMENT

I. PROPERTY EMBODIES A CORE NORMATIVE COMPONENT WHICH MAY NOT BE ALTERED BY STATE COURTS WITHOUT COMPENSATION

While the Fifth and Fourteenth Amendments expressly protect property, the contours of what constitutes property is left mostly to definition by state legislatures and courts. *See*, *e.g.*, *Damon v. Hawaii*, 194 U.S. 154, 157 (1904); *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). A state's authority is not exclusive, however, and it is well-accepted that the Takings and Due Process Clauses constrain a state's legislative and executive powers and prohibit those branches from rewriting the accepted rules of property and declaring that what has always been private is now public. *See*, *e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the state may not, "by *ipse dixit* . . . transform private property into public property without compensation"); *Lucas*, 505 U.S. at 1014 ("the

government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits"); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (agency improperly required landowner to dedicate public easement as a condition of development approvals). Were the actions of the Florida Supreme Court in this case attributable instead to the Florida Legislature or the executive branch, there is little doubt that a taking would be found.[3]

The authority of state courts is similarly constrained, as state courts are bound to honor federal constitutional limitations. U.S. CONST. ART. IV ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . "). The Fourteenth Amendment's Due Process clause

[3] For a recent example of a state using its legislative power to attempt to *ipse dixit* rewrite established common law rules of accretion, *see* Hawaii's Act 73. In Act 73, the state legislature sought to overthrow the ancient reciprocal system of littoral accretion and erosion, instead decreeing that the state acquires private lands lost to erosion, but also owns accreted lands. Under the Act, no one but the state is able to register or quiet title to accreted land unless a littoral owner overcomes a virtually insurmountable standard of proof. When challenged, a Hawaii trial court invalidated Act 73 as a taking. *See* Order Granting Plaintiffs' Amended Motion for Partial Summary Judgment filed February 13, 2006 (May 3, 2006), *Maunalua Bay Beach Ohana 28 v. State of Hawaii*, Civ. No. 05-1-0904-05 (Sep. 1, 2006) (available at http://www.inversecondemnation.com/accretion_order_mpsj.pdf). The state has appealed the judgment to the Hawaii Intermediate Court of Appeals.

incorporates the guarantees of the Fifth Amendment against the *states,* not merely state legislatures and state executive branches. U.S. CONST. AMEND. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"). In *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897), the case incorporating the Takings Clause against the states, this Court held:

> But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, "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." This must be so, or, as we have often said, the constitutional prohibition has no meaning, and "the State has clothed one of its agents with power to annul or evade it."

Id. at 234-35 (quoting Ex parte *Virginia*, 100 U.S. 339, 346-47 (1880)). In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court recognized that state courts have wide latitude to define property, but that ability is subject to constitutional limitations:

> It is, of course, well established that a State, in the exercise of its police power, may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.

Id. at 81 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976)).

The case at bar presents the Court the opportunity to provide definitive guidance that "property" is not a completely malleable term, but rather embodies a core set of normative principles immunized by the Fifth and Fourteenth Amendments from state court redefinition without compensation, especially where, as here, the result of state action is a *per se* taking of property.[4]

> If it were to be accepted that the . . . holding in *Lucas* can fairly be understood to embrace

---

[4] Florida's deprivation of Petitioner's members' rights to have their parcels maintain contact with the ocean is a *per se* taking of property because the Florida Supreme Court's new rule did not simply destroy the right, it transferred it to the public. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (state's reassignment of interest is a *per se* taking); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (government's invitation for the public to enter private marina was a *per se* physical taking); *United States v. Causby*, 328 U.S. 256 (1946) (government had not merely destroyed easement, but was using it for its own purposes).

> the notion that the common law is almost infinitely malleable at the discretion of any court or legislature, then the ambitions of those who would read the takings clause out of the constitution are finally and fully realized. But the common law cannot be so pliable at the hands of adjudicators and lawmakers or it no longer serves its core purpose: the rule of law. To be sure, legislators have power to alter or repeal the common law through legislation, but they do not, consistent with the rule of law, have power to declare the common law something it is not.

Huffman, *Background Principles*, 35 ECOLOGY L.Q. at 12.

This Court has addressed the issue before, although never directly. *See*, *e.g.*, *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring) ("I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common law rights by Congress or a state government. The constitutional terms 'life, liberty, and property' do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect."); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the state may not, "by *ipse dixit* . . . transform private property into public property without

compensation"); *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (government cannot wipe out property rights simply by legislating the property out of existence); *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540-41 (1930) ("[I]t is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded."); *Muhlker v. New York & Harlem Railroad Co.*, 197 U.S. 544, 570 (1905) (state judicial power does not extend to take away rights acquired by contract). *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (government cannot wipe out property rights by prospective legislation).

Common law rules of accretion and erosion – in Florida and elsewhere – are exactly the type of long-standing understandings which the Takings and Due Process Clauses were designed to protect from transfer to the public by a state court or legislature. *See*, *e.g.*, *Kaiser Aetna*, 444 U.S. at 179-80 ("we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation") (footnote omitted); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (interest on interpleaded funds); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998) (interest on lawyer's trust accounts is "private property"); *Hodel v. Irving*, 481 U.S. 704, 716

(1987) (passing property by inheritance a fundamental attribute of property); *Babbitt v. Youpee*, 519 U.S. 234, 239 (1997) (the statute in *Hodel* was struck down because "[s]uch a complete abrogation of the rights of descent and devise could not be upheld."). In *PruneYard*, Justice Thurgood Marshall concurred in the Court's holding that no judicial taking had occurred, but acknowledged:

> Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.

PruneYard, 447 U.S. at 93-94 (Marshall, J., concurring). Justice Marshall noted that in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court determined the Due Process Clause prohibits abolishment of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 672-73, *quoted in PruneYard*, 447 U.S. at 94 n.3 (Marshall, J., concurring).

The nearly universal rules of accretion and erosion have for centuries insured that riparian and littoral properties remain so, even when the water's edge shifts naturally over time. In the decision under review, however, the Florida Supreme Court radically

altered that ancient balance. To avoid ruling that a Florida statute abrogated rights which had been an established part of Florida law for more than a century, the court decreed those rights never really existed at all. With the stroke of a pen, the court eliminated the dominant feature of littoral and riparian property – continuous contact with the water, wherever the water naturally flows.[5] The ability to maintain a littoral parcel's physical contact with the ocean is not simply a unilateral expectation or a product of positive law, but an expectation "that has the law behind it." *Kaiser Aetna*, 444 U.S. at 178. Thus, it is property expressly protected by the Fifth and Fourteenth Amendments from arbitrary or capricious state action which includes a state court summarily altering established common law rules on which property owners have relied for over a century.

The Fifth and Fourteenth Amendments do not dictate what state law is, *see Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("The Takings Clause does not require a static body of state property law."), but they do constrain all state action. If state courts are not limited from transferring established and universal common law property rights to the public

[5] "Accreted" lands or "accretion" refers to land "gradually deposited by the ocean on adjoining upland property." *Hughes v. Washington*, 389 U.S. 290, 291 (1967). The accretion doctrine insures that riparian and littoral property owners maintain their parcel's access to water, which is often the most valuable feature of their property. *Id.* at 293.

under the guise of rediscovering the "true" law, then property will be "relegated to the status of a poor relation" to other rights protected by the Bill of Rights.[6]

II. REMEDIES FOR A JUDICIAL TAKING

The Takings Clause is self-executing and not merely a waiver of sovereign immunity. Nor is it a license for any branch of state government to run roughshod over established property rights provided the state is subject to an after-the-fact inverse condemnation lawsuit. The Takings Clause is a positive command as well as remedial: a state may not take private property without first condemning it and paying just compensation, and if a state has not provided compensation, its action may be invalidated or enjoined. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a plurality of this Court rejected the argument that a post-deprivation compensation remedy was the only available claim to a property

[6] As this Court recognized in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), "We see no reasons why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Id.* at 392 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Air Pollution Variance Bd. of Colorado v. W. Alfalfa Corp*., 416 U.S. 861 (1974); *New York v. Burger*, 482 U.S. 691 (1987); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980)).

owner who asserted that a statutory scheme violated the Takings Clause:

> Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief.

Id. at 522. *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the Takings Clause "stands as a shield against the arbitrary use of governmental power"); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (affirming district court's invalidation of statute for violation of the Takings Clause because statute "made no provision for the payment of compensation").

Consequently, the only constitutional way for Florida to acquire Petitioner's members' property interests is to condemn and pay for them, which the state admittedly has not done. While increasing public ownership of beaches may be a public good, "[a] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). In that case, the seminal takings decision, this Court held there was a constitutional violation despite the fact the property owners whose interests were impaired by the statute could have sued for inverse condemnation. The Court

did not order the government to pay for the private property interests taken. Rather, the Court concluded "the act cannot be sustained as an exercise of the police power" and invalidated it. *Id.* at 414. *See also Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond[.]"); *Babbitt v. Youpee*, 519 U.S. 234, 239 (1997) (affirming district court's invalidation of statute for violation of the Takings Clause because statute "made no provision for the payment of compensation"); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (court invalidated government action for violating the Takings Clause); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (invalidation for violation of Takings Clause). Similarly, the Florida Supreme Court's action in the case at bar cannot be sustained as a valid exercise of the state's judicial power.

The procedural posture of *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) provides one example of how this remedy for a judicial taking could be implemented. In that case, the California Supreme Court interpreted the free speech provision in the California Constitution to provide greater rights than under the First Amendment, and reinterpreted California law to allow "speech and petitioning, reasonably exercised, in shopping centers

even when the centers are privately owned." *Robins v. Pruneyard Shopping Center*, 592 P.2d 341, 347 (Cal. 1979). The California Supreme Court expressly overruled its decision in an earlier case which held to the contrary. *PruneYard*, 447 U.S. at 78. The shopping center owner appealed to this Court, asserting the California Supreme Court's decision was a taking of the right to exclude others – "which is a fundamental component of their federally protected property rights" – by "judicial reconstruction of [California's] laws of private property." *Id.* at 79.

The Court concluded that no taking occurred because the shopping center "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'" *PruneYard*, 447 U.S. at 84. The property owner "explicitly presented their federal constitutional right to prohibit public expression on their property[.]" *Id.* at 85 n.9. The Court further noted "this Court has held federal claims to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." *Id.* (citing *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *Missouri* ex rel. *Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917)). Had the Court found the shopping center's right to exclude was essential to its use of its property, the judgment of the California Supreme

Court would have been vacated, and the case remanded, the relief Petitioner seeks here.[7]

III. JUDICIAL TAKINGS

Perhaps more so than state legislatures, state courts may be susceptible to reordering established property norms via abrogation of common law rules, "discovery" of background principles or custom never before enunciated, or expansion of the public trust doctrine from use of tidelands and navigable waters to encompass all natural resources that should be – in a court's judgment – in public ownership. This section details several of the more storied instances where state courts have accomplished precisely that.

A. Summarily Discarding Long-Established Common Law Rules

Robinson v. Ariyoshi, the case in which the Ninth Circuit invalidated a Hawaii Supreme Court decision

[7] This procedure would not be subject to ripeness issues under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and would not require federal district courts to exercise appellate jurisdiction over state supreme courts. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) ("The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.").

on judicial takings grounds, started out in 1959 in a Kauai county trial court as a dispute among several sugar plantations over which of them possessed the rights to surplus water in a Kauai stream, among other things. 753 F.2d 1468 (9th Cir. 1985). The parties based their claims on long-standing water law and prescriptive rights precedent of the Kingdom, Territory, and State of Hawaii. Nine years later, the trial court issued a 65-page decision based on that precedent, and declared who was entitled to what. At that stage, the case was just another in a long line of water disputes between private parties. The losing parties appealed to the Hawaii Supreme Court, where no party – including the State – argued the controlling water law was anything but as established by long-standing Hawaii precedent.

The Hawaii Supreme Court, however, "*sua sponte* overruled all territorial cases to the contrary and adopted the English common law doctrine of riparian rights." *Robinson*, 753 F.2d at 1470 (citing *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330 (Haw. 1973)). The court "also held *sua sponte* that there was no such legal category as 'normal daily surplus water' and declared that the state, as sovereign, owned and had the exclusive right to control the flow," and "that because the flow of the Hanapepe [stream] was the sovereign property of the State of Hawaii, McBryde's claim of a prescriptive right to divert water could not be sustained against the state." *Robinson*, 753 F.2d at 1470.

In other words, in a dispute between "*A*" and "*B*" over which of them possessed water rights, the Hawaii Supreme Court simply declared "neither of you do, the State owns it all."

The private parties who thought they had owned something for over a hundred years were understandably upset that property they believed they possessed had morphed into public property simply by the stroke of three Justices' pens, and, to add insult to injury, without even the chance to brief the court before it announced the new rule. But after a rehearing on a narrow issue of state law, during which the court rebuffed an attempt by the private parties to raise federal constitutional issues, the court reaffirmed the *McBryde* ruling, with two Justices dissenting. *See McBryde Sugar Co. v. Robinson*, 517 P.2d 26 (Haw. 1973) (per curiam) (*McBryde II*).

Justice Bernard Levinson switched his vote from the first opinion, concluding that it was a "radical departure" from established law, and was a taking:

> Although I voted with the majority of this court in *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973) [hereinafter referred to as *McBryde I*], I am constrained to recant that position in view of my current understanding of the problems of this case. In light of the arguments adduced on rehearing, historical evidence discovered upon further research subsequent to the court's previous decision in this case, and a reappraisal of the reasoning supporting that

> decision, it is my opinion that the court committed error in holding that all surplus water belongs to the State and that private water rights, however acquired, may not be transferred to nonappurtenant land. Because of the importance of this case to the development of the law on the subject of Hawaii's water resources, I have undertaken to present a detailed analysis explaining why *McBryde I* is not in keeping with long established and unique principles of Hawaiian water law. Precisely because *McBryde I* is such a radical departure from these principles as they have been heretofore understood, moreover, I have concluded that *McBryde I* effectuates an unconstitutional taking of the appellant's and cross-appellants' property without just compensation and should be reversed on this ground as well.

McBryde II, 517 P.2d at 27 (Levinson, J., dissenting). This Court declined to review the Hawaii Supreme Court.

But that was not the last word. The sugar companies sued state officials in federal district court under 42 U.S.C. § 1983. The district judge held that the Hawaii Supreme Court's *McBryde* decision took property without just compensation, and enjoined the state from enforcing the decision. *See Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977). On appeal, the Ninth Circuit noted the tortured procedural path the case next took, including a detour back to the Hawaii Supreme Court on certified questions when

the Ninth Circuit asked that court whether it really meant what it said in *McBryde*:

> The leisurely pace of this litigation has produced three oral arguments in this court, two of which were followed by referral of certified questions to the Supreme Court of Hawaii. *See Robinson v. Ariyoshi*, 65 Hawaii 641, 658 P.2d 287 (1982) (*Robinson II*). Following the publication of the state court's answers to the certified questions, the parties briefed the remaining issues that had been narrowed by the earlier proceedings and reargued the case. A number of complex questions remain, but to expedite the matter we will discuss only those essential to a resolution of the main question: Can the state, by a judicial decision which creates a major change in property law, divest property interests?

Robinson, 753 F.2d at 1471. After addressing jurisdictional issues, res judicata, and the *Rooker-Feldman* doctrine, the Ninth Circuit addressed the merits:

> The state conceded at oral argument that the Fourteenth Amendment would require it to pay just compensation if it attempted to take vested property rights. The substantive question, therefore, is whether the state can declare, by court decision, that the water rights in this case have not vested. The short answer is no.

Robinson, 753 F.2d at 1473. The court determined the water rights claimed by the private parties were vested rights, and that neither the state legislature nor the state supreme court can alter those rights without condemnation and payment of just compensation.

By the time *Robinson* again reached this Court, *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) had been decided. Certain regulatory takings cases brought in district courts were not ripe without initial resort to state court processes, and this Court summarily vacated the Ninth Circuit's *Robinson* decision, ordering it to reconsider it in light of *Williamson County's* new ripeness rules. *See Ariyoshi v. Robinson*, 477 U.S. 902 (1986). The Ninth Circuit consequently vacated its earlier order (*Robinson v. Ariyoshi*, 796 F.2d 339 (9th Cir. 1986)) and remanded the case back to the district court, which found the case ripe under *Williamson County*. *See Robinson v. Ariyoshi*, 676 F. Supp. 1002, 1020-21 (D. Haw. 1987). Eventually, the Ninth Circuit vacated the district court's decision and remanded the case with instructions to dismiss because the thirty-one year old case was not ripe under *Williamson County* because the state had not yet implemented the Hawaii

Supreme Court's decision. *Robinson v. Ariyoshi*, 887 F.2d 215 (9th Cir. 1990).[8]

In *County of Hawaii v. Sotomura*, 517 P.2d 57 (Haw. 1973), *cert. denied*, 419 U.S. 872 (1974), in the course of a condemnation action the Hawaii Supreme Court *sua sponte* redefined the seaward boundary of a Torrens-titled[9] littoral parcel from the high water mark to the "upper reaches of the wash of the waves," holding the county owed no compensation for the land seaward of the new boundary line because it was owned by the state.[10] One Justice dissented, noting:

> I will not indulge in an extensive dissertation against the holding, for to do so will be but an exercise in futility. I merely point out that, in my opinion, the holding is plain judicial law-making. That is apparent from the quoted statement in the opinion that the holding is being made "as a matter

---

[8] *Robinson* also illustrates how a state court, keenly aware of the finality requirement in *Williamson County*, can tailor a decision and manipulate the ripeness rules to avoid federal court review simply by declaring that the new rule of law is not "final" and is an interlocutory ruling subject to change. State courts, like state and municipal agencies, are presumed not to employ "stupid staffs." *See*, *e.g.*, *Lucas*, 505 U.S. at 1025-6 n.12.

[9] In a Torrens system the state guarantees title, including a parcel's boundaries.

[10] The trial court awarded nominal compensation of one dollar to the property owner for the condemnation of this property, but the Hawaii Supreme Court declared that was error and took the dollar away because the land was not private property under the newly-announced rule.

> of law," and from the following reason given therefor: "*Public policy, as expressed by this court*, favors extending to public use and ownership as much as possible of Hawaii's shoreline as is reasonably possible."

Sotomura, 517 P.2d at 189 (Marumoto, J., dissenting) (emphasis original).

The property owners brought suit in federal district court for due process violations. The court determined "[j]udicial transfers of title to private lands to the State which do not permit the owner an opportunity to be heard or to present evidence is not constitutionally valid. Whenever a party is to be deprived of property, he is entitled to a meaningful hearing before the fact." *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 478 (D. Haw. 1978). The district court concluded:

> This Court fails to find any legal, historical, factual or other precedent or basis for the conclusions of the Hawaii Supreme Court that, following erosion, the monument by which the seaward boundary of seashore land in Hawaii is to be fixed is the upper reaches of the wash of the waves. To the contrary, the evidence introduced in this case firmly establishes that the common law, followed by both legal precedent and historical practice, fixes the high water mark and seaward boundaries with reference to the tides, as opposed to the run or reach of waves on the shore. For example, on the Island of Hawaii, the seaweed line was used

> to indicate the level of the high tides and high water mark. The decision in *Sotomura* was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation.

Id. at 480-81. The state's appeal to the Ninth Circuit was dismissed as untimely.

Earlier, in *In re Ashford*, 440 P.2d 76 (Haw. 1968), the Hawaii Supreme Court rejected over 100 years of its own precedent holding the boundary between public and private property on Hawaii's beaches was the mean high water line. The *Ashford* court disregarded these established precedents and changed the legal boundary of littoral parcels from the mean high water line to the "upper reaches of the waves," effectively confiscating for the public 20 to 30 lateral feet of what had until then always been private property. *Ashford*, 440 P.2d at 77. The court reached this result by reinterpreting the term *ma ke kai* ("along the sea" in Hawaiian) in the parcel's royal patent, concluding the earlier cases all misunderstood the true meaning of the phrase. The court concluded the King who executed the royal patent must have been ignorant of the survey data and therefore could not have intended to grant the land below the upper reaches of the waves. To reinterpret *ma ke kai*, the

court turned to oral testimony and reputation evidence regarding "customary" usage of the shoreline. *Id.* One Justice dissented, noting the majority relied on "spurious historical assumptions," and concluded there was nothing in ancient tradition, custom, practice, or usage which dictated the use of the upper reaches of the waves instead of the mean high water mark as established by the earlier cases. *Ashford*, 440 P.2d at 93 (Marumoto, J., dissenting).

B. Eliminating The Right To Exclude By Custom

Applying "custom," in *State* ex rel. *Thornton v. Hay*, 462 P.2d 671 (Or. 1969), the Oregon Supreme Court held that littoral property owners had no rights to the dry sand area of beaches because:

> [F]rom the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede.

Id. at 673. After this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) which held that background principles did not include law "newly legislated or decreed," the Oregon Supreme Court considered whether application of the *Thornton* rule was a taking. In *Stevens v. City of*

Cannon Beach, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994), the court held *Thornton* was not newly legislated or decreed and was not a sudden change in Oregon's property law. *Thornton*, the court held, "did not create a new rule of law," but "merely enunciated one of Oregon's 'background principles of . . . the law of property.'" *Id.* at 456 (quoting *Lucas*, 505 U.S. at 1029).

Similarly, in *Public Access Shoreline Hawaii v. County of Hawaii Planning Comm'n*, 903 P.2d 1246 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996), the Hawaii Supreme Court redefined the nature of fee simple absolute ownership, and abandoned the "Western concept of exclusivity" to impose a blanket easement retroactively over all Hawaii property. The case arose as a dispute over the standing of native Hawaiians to intervene in an agency hearing regarding a coastal permit sought by a property owner. *Id.* at 1250. The agency denied standing, concluding the native Hawaiians did not have interests different from the general public. The Hawaii Supreme Court determined native Hawaiians did possess unique rights, because custom dictated that Hawaii property owners never possessed the right to fully exclude native Hawaiians who wished to exercise "customary and traditional practices" on private property. *Id.* at 1268. The court found its decision did not work a judicial taking or a regulatory taking because the custom was a "background principle" of Hawaii property law, despite the fact it eliminated the right to exclude:

> Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawaii. In other words, the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property.

Id. at 1268 (citing *Stevens*, 854 P.2d at 456 ("[w]hen plaintiffs took title to their land, they were on [constructive] notice that exclusive use . . . was not part of the 'bundle of rights' that they acquired").

C. Expanding The Scope Of The Public Trust

The public trust doctrine, which was traditionally applied only to tidelands and navigable waters, has been judicially extended to other natural resources deemed worthy by courts of public ownership. *See, e.g.*, *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 595-96 (Cal. Ct. App. 2008) (public trust doctrine covers wildlife and is not limited to navigable waters and tidelands); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 467 (1970) ("certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace.").

Without constitutional limitations on state courts' abilities to enlarge the scope of the public

trust, the doctrine could effectively swallow up the concept of private property. For example, in *Matthews v. Bay Head Imp. Ass'n*, 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984), the New Jersey Supreme Court held the privately owned dry sand beach area of littoral property was subject to the public trust. The court expanded the geographic scope of the trust from tidelands and navigable waters to the dry beach because the public *needed* access in order to exercise its public trust rights in tidelands:

> Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine.

Id. at 364. The court held the public trust doctrine should "be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Id.* at 365 (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 55 (N.J. 1972)). *See also National Audubon Soc. v. Superior Court*, 658 P.2d 709 (Cal.), *cert. denied*, 464 U.S. 977 (1983) (property owners who purchase property subject to public trust do not state takings claims).

Similarly relying on the public trust doctrine, the Hawaii Supreme Court in *State of Hawaii v. Zimring*, 566 P.2d 725 (Haw. 1977), ignored its prior precedent regarding construction of shoreline property descriptions, and held the public owns land created by volcanic action. In 1955, the active volcano on the island of Hawaii created 7.9 acres of new land when lava flowed into the ocean. *Id.* at 727. The state assessed the littoral landowner property taxes on the new land, but thirteen years later sought to quiet title in itself, asserting public ownership of the new fast land. *Id.* at 738. The littoral owner's boundary description extended ownership to the "high water mark." The Hawaii Supreme Court, however, disregarded the accepted meaning of this term, holding instead the description was merely a "natural monument" and not an "azimuth and distances" description. *Id.* at 745 (Vitousek, J., dissenting). Consequently, the court vested title to the new land in the state because to adhere to the deed's language would, in the court's view, result in an inequitable "windfall" that should not "enrich" of any one landowner, but rather should inure to the collective public. *Id.* at 734-35.

CONCLUSION

As the decisions detailed above demonstrate, the judicial branch of state government is just as capable of taking property without just compensation and due process as are the legislative and executive branches.

The judgment of the Florida Supreme Court should be vacated, and the case remanded.

September 2009.

Respectfully submitted,

ROBERT H. THOMAS
Counsel of Record
MARK M. MURAKAMI
TRED R. EYERLY
DAMON KEY LEONG
KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
www.hawaiilawyer.com
Counsel for Amicus Curiae