No. 08-1151

In the Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC., PETITIONER

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
KATHERINE J. BARTON
JUSTIN R. PIDOT
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The United States will address the following question:

Whether a Florida Supreme Court decision determining petitioner's members' littoral property rights under the State's common law effected a judicial taking of property requiring compensation under the Just Compensation Clause of the United States Constitution.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 9
Argument:
The Florida Supreme Court did not take property of petitioner's members without just compensation 11
A. The Court should exercise restraint before concluding that a state supreme court decision interpreting state property law in itself effects a taking 12
B. This is not an appropriate case in which to recognize a judicial takings claim 18
C. The decision below reasonably applied existing law to new circumstances and does not result in a taking 22
D. Any infringement of rights to future accretions and direct contact with the water does not establish takings liability 29
Conclusion 33

TABLE OF AUTHORITIES

Cases:

Adams v. *Robertson*, 520 U.S. 83 (1997) 20
Andrus v. *Allard*, 444 U.S. 51 (1979) 30
Board of Regents of State Colls. v. *Roth*, 408 U.S. 564 (1972) 12

Cases—Continued: Page

Board of Trs. of the Internal Improvement Trust Fund v. *Sand Key Assocs., Ltd.*, 512 So. 2d 934 (Fla. 1987) 4, 26, 27
Brinkerhoff-Faris Trust & Sav. Co. v. *Hill*, 281 U.S. 673 (1930) 15
Broad River Power Co. v. *South Carolina*, 281 U.S. 537 (1930) 16
Brown v. *Legal Found. of Wash.*, 538 U.S. 216 (2003) 32
Bryant v. *Peppe*, 238 So. 2d 836 (Fla. 1970) 27, 28
Bush v. *Gore*, 531 U.S. 98 (2000) 16, 19
Chicago, Burlington & Quincy R.R. v. *City of Chi.*, 166 U.S. 226 (1897) 14
Demorest v. *City Bank Farmers Trust Co.*, 321 U.S. 36 (1944) 16
Duke Power Co. v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) 15, 16
Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 17
Ferry Pass Inspectors' & Shippers' Ass'n v. *White's River Inspectors' & Shippers' Ass'n*, 48 So. 643 (Fla. 1909) 25
First English Evangelical Lutheran Church v. *County of L.A.*, 482 U.S. 304 (1987) 20
Fox River Paper Co. v. *Railroad Comm'n*, 274 U.S. 651 (1927) 15
Georgia v. *Randolph*, 547 U.S. 103 (2006) 13
Hughes v. *Washington*, 389 U.S. 290 (1967) 13, 15, 22, 23, 25, 29

Cases—Continued: Page

Kruse v. *Grokap, Inc.*, 349 So. 2d 788 (Fla. Dist. Ct. App. 1977) 4, 31
Lingle v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) 12, 16, 31
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 29
Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 13, 14, 19, 29
Martin v. *Busch*, 112 So. 274 (Fla. 1927) 26, 28, 29
Montana v. *United States*, 450 U.S. 544 (1981) 2
Oregon v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) 14, 16
Palazzolo v. *Rhode Island*, 533 U.S. 606 (2001) 32
Penn Cent. Transp. Co. v. *New York City*, 438 U.S. 104 (1978) 30, 31
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) 14
Phillips v. *Washington Legal Found.*, 524 U.S. 156 (1998) 13, 16
Port of Seattle v. *Oregon & Wash. R.R.*, 255 U.S. 56 (1921) 25
Rescue Army v. *Municipal Court*, 331 U.S. 549 (1947) 22
San Remo Hotel L.P. v. *City & County of S.F.*, 545 U.S. 323 (2005) 16
Sauer v. *City of N.Y.*, 206 U.S. 536 (1907) 16
State v. *Florida Nat'l Props., Inc.*, 338 So. 2d 13 (Fla. 1976) 27, 28
Stevens v. *Arnold*, 262 U.S. 266 (1923) 25

Cases—Continued: Page

Stevens v. *City of Cannon Beach*, 510 U.S. 1207 (1994) 15, 17, 21, 22, 23
Tahoe-Sierra Pres. Council, Inc. v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) 21, 31, 32
Thiesen v. *Gulf, Fla. & Ala. Ry.*, 78 So. 491 (Fla. 1918) 13, 25
United States v. *Alaska*, 521 U.S. 1 (1997) 2
United States v. *Sponenbarger*, 308 U.S. 256 (1939) 32
Webb v. *Giddens*, 82 So. 2d 743 (Fla. 1955) 25
Williamson County Reg'l Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172 (1985) 20
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 19
Younger v. *Harris*, 401 U.S. 37 (1971) 16

Constitutions and statutes:

U.S. Const.:
Amend. V 11, 12
Just Compensation Clause . . . . . *passim*
Amend. XIV 11, 14
Due Process Clause 16
Fla. Const.:
Art. II, § 7(a) 2
Art. X, § 11 2
Submerged Lands Act, 43 U.S.C. 1301 *et seq.* 2
Tucker Act, 28 U.S.C. 1491 17
Administrative Procedure Act, Fla. Stat. Ann. § 120.68(2) (West 2008) 5

Statutes—Continued: Page

Beach and Shore Preservation Act, Fla. Stat. Ann.
§§ 161.011 *et seq.* (West 2006) 3
§ 161.021(3)-(4) 3
§ 161.088 3
§ 161.101(1) 4
§ 161.141 (West Supp. 2009) 4, 5
§ 161.151(3) 4
§ 161.161 . . . . . 3, 4
§ 161.161(1) 3
§ 161.161(3) 3
§ 161.161(3)-(5) 3
§ 161.161(5) 3, 4
§ 161.191 4
§ 161.191(1) 3
§ 161.191(2) 4, 5
§ 161.201 . . . . . 5, 8, 24, 26, 30
§ 161.211(2)-(3) 4
§ 161.212(2) 5, 6, 20
§ 161.212(3)(b) 32
Fla. Stat. Ann. (West 2000):
§ 177.27(14)-(15) 4
§ 177.28(1) 4

Miscellaneous:

1 William Blackstone, *Commentaries* 13

Miscellaneous—Continued: Page

Florida Dep't of Envtl. Prot., *Beach Erosion Control Program (BECP)* (last modified Sept. 1, 2009) <http://www.dep.state.fl.us/beaches/programs/bcherosn.htm> 2

3 Joseph Story, *Commentaries on the Constitution of the United States* (1833) 13

William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995) 13

1 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (1803) 13

In the Supreme Court of the United States

No. 08-1151

STOP THE BEACH RENOURISHMENT, INC., PETITIONER

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case concerns whether a state judicial decision may effect a taking of property for purposes of the Just Compensation Clause. The federal government often defends against takings claims and, in so doing, relies upon background principles of property law. Also, because the Federal Emergency Management Agency provides flood insurance to many coastal property owners through the National Flood Insurance Program, the United States has an interest in ensuring that state and local governments are able to protect coastal property against hurricanes and storms.

STATEMENT

1. In Florida, as in the States generally, submerged lands under navigable waters are held by the State as a fundamental aspect of its sovereignty and as a means of serving vital public purposes. Pet. App. 13-16; see, *e.g.*, *Montana* v. *United States*, 450 U.S. 544, 551, 552 (1981) ("ownership of land under navigable waters is an incident of sovereignty" and control over it is "strongly identified with the sovereign power of government"); *United States* v. *Alaska*, 521 U.S. 1, 34-35 (1997) (involving lands granted to States by Submerged Lands Act, 43 U.S.C. 1301 *et seq.*). The Florida Constitution expressly provides that "[t]he title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people." Art. X, § 11.

The Florida Constitution also directs the State to conserve and protect its natural resources. See Art. II, § 7(a). The beaches along Florida's coastline are among the most critical of these resources. The beaches serve as buffers to protect homes and businesses on the shore from storms, provide the cornerstone for the State's tourism industry, and support a wide variety of plant and animal life, including threatened and endangered species. J.A. 74.

Florida's beaches have been severely eroded in recent years by hurricanes and tropical storms. J.A. 73. Approximately 387 miles of the State's 825 miles of sandy beaches have experienced "critical erosion," meaning "a level of erosion which threatens substantial development, recreational, cultural, or environmental interests." Fla. Dep't of Envtl. Prot., *Beach Erosion Control Program (BECP)* (last modified Sept. 1, 2009)

<http://www.dep.state.fl.us/beaches/programs/bcherosn.htm>. The Legislature has determined that "beach erosion is a serious menace to the economy and general welfare of the people of this state and has advanced to emergency proportions." Fla. Stat. Ann. § 161.088 (West 2006).

2. The Beach and Shore Preservation Act (Act), Fla. Stat. Ann. §§ 161.011 *et seq.*,[1] was enacted to protect the State's beaches and shorelines, as well as upland property. The Act authorizes state and local governments to undertake projects to restore and renourish critically eroded beaches. *Id.* §§ 161.088, 161.161. Restoration is the placement of sand to rebuild a beach after it has been eroded, and renourishment is the maintenance of a restored beach by further addition of sand. *Id.* § 161.021(3)-(4); see J.A. 99.

a. Respondent Florida Department of Environmental Protection (Department) is responsible for identifying beaches that are critically eroded. Fla. Stat. Ann. § 161.161(1). A local government may apply for approval to restore a critically eroded beach. J.A. 75, 142-143. The Department is then responsible for issuing coastal construction and environmental permits, and respondent Board of Trustees of the Internal Improvement Trust Fund (Board) must authorize the use of the State's submerged lands, on which sand will be deposited to restore and renourish the beach. Fla. Stat. Ann. §§ 161.161(3) and (5), 161.191(1); Pet. App. 64-65.

Once an application is received, the Board surveys the beach and establishes an erosion control line (ECL). Fla. Stat. Ann. § 161.161(3)-(5). The ECL is generally

---

[1] Unless otherwise noted, all citations to the Act are to the 2006 edition of Florida Statutes Annotated (West).

set by reference to the then-existing mean high water line (MHWL). *Id.* § 161.161(5). The MHWL is the boundary between the land and sea, *id.* § 177.27(14)-(15) (West 2000), which ordinarily serves as the dividing line between upland coastal property and the submerged lands owned by the State, *id.* § 177.28(1) (West 2000); *Kruse* v. *Grokap, Inc.*, 349 So. 2d 788, 789-790 (Fla. Dist. Ct. App. 1977). The MHWL shifts gradually over time as a result of the movement of sand (accretion or erosion) or the rising or falling of sea level (reliction). See *Board of Trs. of the Internal Improvement Fund* v. *Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936-937 (Fla. 1987). By setting an ECL, the State fixes the boundary between the State's lands and the uplands. Fla. Stat. Ann. § 161.141 (West Supp. 2009); Fla. Stat. Ann. §§ 161.151(3), 161.191; J.A. 87-89.

Once the ECL is fixed, restoration proceeds. New beach is created by dredging sand from submerged lands offshore and depositing it on the State's submerged lands from the ECL seaward. J.A. 77-78, 108-110. That additional beach creates a buffer between the ocean and upland properties. Fla. Stat. Ann. §§ 161.101(1), 161.161; Fla. Stat. Ann. § 161.141 (West Supp. 2009); see J.A. 76-77. If erosion thereafter causes the water line to advance toward the ECL, the sponsoring local government must add sand in the buffer zone area. Fla. Stat. Ann. § 161.211(2)-(3).

b. The Act expressly provides certain rights to owners of upland property. The local government may not expand the newly created beach beyond the area identified in the survey without their written consent. Fla. Stat. Ann. § 161.191(2). No construction may occur on any lands that are created seaward of the ECL, except as necessary to prevent erosion; and no activity "injuri-

ous to the person, business, or property" of the upland owner is allowed on such lands. *Id.* § 161.201. In addition, although the upland owner's property will not extend seaward out across the new beach created on the State's submerged lands, the upland owner "shall, nevertheless, continue to be entitled to all common-law riparian rights except as otherwise provided in [§] 161.191(2), including but not limited to rights of ingress, egress, view, boating, bathing, and fishing." *Ibid.* Because the project establishes new beach on the State's submerged lands and fixes the State/upland boundary, "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." *Id.* § 161.191(2).

c. The Act provides an owner of upland property with two different avenues to seek judicial relief. First, the owner may bring an action under the Florida Administrative Procedure Act, Fla. Stat. Ann. § 120.68(2) (West 2008), to challenge the final permit decision on the ground that it is not in accordance with existing statutes or rules or is not based on substantial evidence. Fla. Stat. Ann. § 161.212(2). Second, an owner substantially affected may file an action in circuit court seeking damages on the ground that the "final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation." *Ibid.*[2]

---

[2] If a restoration project cannot "reasonably be accomplished" without taking private property, the sponsoring local government must institute an eminent domain proceeding. Fla. Stat. Ann. § 161.141 (West Supp. 2009). This provision would apply, for example, if engineering constraints required part of the ECL to be set landward of the MHWL, on the property of the upland owner. See State Resp. Br. 8 n.10.

d. Approximately 45 projects have been authorized under the Act, resulting in restoration of more than 20% of Florida's coastline. J.A. 82.

3. In 2003, respondents City of Destin (City) and Walton County (County) applied for a permit to restore 6.9 miles of beach in the Florida panhandle. J.A. 28, 191-192. That stretch of beach was battered by Hurricanes Erin and Opal in 1995, Hurricane Georges in 1998, and Tropical Storm Isidore in 2002, and had been designated as critically eroded. J.A. 30, 84-85, 163-164; Pet. App. 4 n.4, 106. Petitioner, an organization comprised of six persons who own property bordering the project area, filed an administrative challenge to the proposed permit. J.A. 10-26, 42-48; see Pet. App. 113. Petitioner contended, *inter alia*, that the Department had not properly located the ECL and that the project "results in a taking." J.A. 20, 22, 46-47. In petitioner's view, the project would take two littoral rights of its members: the right to add to their property through future accretions (because the ECL fixes the boundary between State and private lands) and the right to maintain contact with the water (because the waterline would be beyond the ECL, on the seaward side of the newly created beach on the State's land). J.A. 60, 211.

While petitioner's administrative challenge was pending, Hurricane Ivan struck, significantly eroding the beach at issue. See J.A. 187, 200. As a result, petitioner expressly "abandoned [its] challenge to the beach-related technical aspects" of the project, including its challenge to the location of the ECL. J.A. 53.

4. Although the administrative proceeding was still pending, petitioner filed an action in circuit court under Fla. Stat. Ann. § 161.212(2), alleging that the Act violates the just compensation and due process provisions

in the federal and state constitutions, on its face and as applied. See Am. Compl. at 5-14, *Save Our Beaches, Inc.* v. *Board of Trs. of the Internal Improvement Trust Fund*, No. 2004-CA-2093 (Fla. 2d Cir. Ct. Feb. 3, 2005). The parties then agreed to dismiss the constitutional claims from the administrative challenge. J.A. 264; Pet. App. 104, 115. An administrative law judge rejected petitioner's remaining challenges and recommended approval of the permit. Pet. App. 101-135. The Department approved the permit, *id.* at 88-100, and the project was commenced.[3]

In petitioner's takings suit in state circuit court, the parties filed cross-motions for summary judgment. The court denied the motions on the ground that the factual record was inadequate to determine whether petitioner had a viable takings claim. Order at 22-23, *Save Our Beaches*, *supra* (No. 2004-CA-2093) (July 20, 2005). The case has been held in abeyance since June 2007.

5. Petitioner challenged the Department's final order in the district court of appeals under the Florida Administrative Procedure Act. Petitioner contended that the project would unconstitutionally take its members' rights to receive any accretions that might occur in the future and to maintain contact with the water, without just compensation. Pet. App. 61-62. The court of appeals agreed, *id*. at 77-86, but certified that question to the Florida Supreme Court, *id.* at 2.

6. The Florida Supreme Court reversed. Pet. App. 1-60. The court treated petitioner's challenge as a facial challenge to the Act, and it rejected that challenge on the ground that the establishment of an ECL does not

---

[3] Respondents completed the restoration in 2007. See State Resp. Br. 28 n.46.

take any common-law littoral rights of upland property owners without just compensation. *Id.* at 2-3, 12, 28-29.

The court acknowledged that the Act replaces the ambulatory boundary between an upland property and the State's sovereign lands (the MHWL) with a fixed boundary (the ECL), and that as a result, upland property owners will no longer gain or lose property due to natural processes such as accretion or erosion. Pet. App. 16-27. The court explained, however, that littoral property owners have no vested right to receive future accretions and that instead "[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." *Id.* at 20; see *id.* at 34. The court further explained that the common-law rule that accretions inure to the upland owner is a "rule of convenience intended to balance public and private interests," and the rationales for that rule do not apply in the context of a beach restoration project, where the creation of a fixed boundary between state and private property protects the upland owner from losses due to erosion. *Id.* at 34-35.

The court also held that the Act does not unconstitutionally deprive upland owners of an asserted right to maintain contact with the water. Pet. App. 35-39. The court explained that, although it had previously found a compensable taking based on interference with an upland owner's right of access to the water, it had never before held that an upland owner has an independent right to maintain contact with the water. *Id.* at 36. The court noted that the Act expressly preserves the upland owner's common-law right of access, *id.* at 37 (citing Fla. Stat. Ann. § 161.201), and determined that there is no

independent "right to maintain a constant boundary with the water's edge," *id.* at 37-38.

The court therefore upheld the Act on its face. Pet. App. 40. Two Justices dissented. See *id.* at 40-58 (Wells, J., dissenting; Lewis, J., dissenting).

Petitioner filed a petition for rehearing, arguing that the Florida Supreme Court's decision effected a judicial taking of property without just compensation in violation of the federal Constitution. Pet. App. 140-148. The Florida Supreme Court denied the petition. *Id.* at 136-137.

SUMMARY OF ARGUMENT

A. This Court has never held that a state judicial decision may effect a taking under the Just Compensation Clause. There is good reason for the Court's hesitation. The text of the Clause counsels against such a claim, because it commits the definition of "private property" to independent sources, such as state law. It would be anomalous to hold that a decision defining state property rights also itself "takes" property. Nor does the historical understanding of what constitutes a taking support a judicial takings theory. And there are numerous jurisprudential and practical problems with recognizing such claims. They could unduly cabin the discretion of state courts to adapt the State's property law to new circumstances, upset the federal-state balance by assessing liability based on judicial decisions rather than on legislative and executive action, and encourage relitigation of property disputes as judicial takings.

B. If a judicial takings claim were ever to be recognized, this is not the case in which to do it. In the Florida courts, petitioner's complaint was that the Act,

as implemented, unconstitutionally takes certain littoral rights. That is a conventional takings claim challenging legislative and executive action. Only after petitioner lost in the Florida Supreme Court did it recast its claim as one for a judicial taking. The Court should not recognize a judicial takings claim when the property owner could present a conventional takings claim. Further, petitioner's judicial takings claim has never been considered by any court in this litigation. Petitioner has not pursued compensation for an alleged taking through available state procedures. And the record contains little of the detail that would be necessary to consider a takings claim.

C. If this Court were to recognize a judicial takings claim, it should only be when a state court radically and unexpectedly deviated from settled state property law, and the decision's impact is so substantial as to constitute a taking under conventional analysis. The decision of the Florida Supreme Court is not in that category, because it applied settled common-law principles to the particular situation of a beach restoration project. No prior decision had held that upland owners possessed property rights to receive future accretions and maintain contact with the water, as against the State's interests in filling its own submerged lands to protect beach resources and upland property. To the contrary, several prior decisions recognized the State's right to create dry lands out of submerged lands and retain title to them, which would preclude upland property from experiencing future accretions (or erosions) and maintaining direct contact with the water.

D. No takings liability would lie in any event because the loss of rights claimed by petitioner is not sufficiently severe to constitute a taking. The loss of future accre-

tions and contact with the water does not qualify as a *per se* taking. The State neither altered the boundaries of upland parcels nor physically invaded them. And petitioner does not claim that the restoration project deprived these lands of all economic value.

Nor could the loss of the claimed littoral rights result in a regulatory taking. Petitioner has made no attempt to quantify the burden of the beach restoration project on members' properties. In fact, the purpose and effect of the beach restoration project is to *protect* upland owners by buffering them from storms and hurricanes.

ARGUMENT

THE FLORIDA SUPREME COURT DID NOT TAKE PROPERTY OF PETITIONER'S MEMBERS WITHOUT JUST COMPENSATION

Petitioner asks this Court to hold that a state judicial decision interpreting state property law—in itself, and independent of any concrete measures taken by the other branches of government—has effected a taking that requires the payment of just compensation under the Fifth and Fourteenth Amendments. This Court has never found a taking in those circumstances, and there are good reasons for the Court's hesitation.

This Court need not decide whether to recognize a judicial takings claim, however, because petitioner's claim is not properly analyzed as one for a judicial taking. This case was litigated in the Florida courts on the theory that the Beach and Shore Preservation Act, as implemented, resulted in a taking of property. That is a conventional takings claim, which this Court should

not allow to be repackaged as a challenge to judicial interpretation.[4]

In any event, petitioner cannot succeed on a judicial takings claim. The Florida Supreme Court's decision did not constitute any sudden or dramatic change in the law concerning the two littoral rights asserted by petitioner's members. And even if it had, the infringement does not constitute a compensable taking under this Court's precedents.

A. The Court Should Exercise Restraint Before Concluding That A State Supreme Court Decision Interpreting State Property Law In Itself Effects A Taking

This Court has never held that the decision of a state supreme court interpreting state law affecting property rights has effected a taking. A number of considerations counsel caution before the Court takes that unprecedented step.

1. The text of the Just Compensation Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend V. That text places a condition on the taking of private property—if private property is taken for public use, compensation must be paid. See, *e.g.*, *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 536-537 (2005).

The constitutional text does not define "property" or confer any property interests; instead, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972). Because

---

[4] There is a substantial question whether any conventional takings claim—or any other claim—is properly before this Court. See City/County Resp. Br. 19-25.

the Just Compensation Clause is based on the presumption that property interests will be defined by state law,[5] and because state courts are the expositors of state law, it would be anomalous to hold that a state court decision that has interpreted state law concerning property simultaneously "takes" that very property. See, *e.g.*, *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 164 (1998) ("[T]he Constitution protects rather than creates property interests."); see also *Georgia* v. *Randolph*, 547 U.S. 103, 144 (2006) (Scalia, J. dissenting) (discussing *Phillips*).

2. The historical evidence suggests that the Framers viewed the Just Compensation Clause as confined to the government's physical appropriation of private property for public use by eminent domain. See, *e.g.*, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992); 1 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 305-306 (1803); see also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 790-791, 836-840 (1995). Those physical appropriations were traditionally undertaken by the legislature, 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1784, at 661 (1833), and executive agencies are now often authorized to do so. But it was well understood that courts did not have the independent authority to exercise the power of eminent domain. See, *e.g.*, 1 William Blackstone, *Commentaries* *135. A court's exposition of state property

[5] The parties do not rely on federal law to determine the littoral property interests. Cf. *Hughes* v. *Washington*, 389 U.S. 290 (1967); *Thiesen* v. *Gulf, Fla. & Ala. Ry.*, 78 So. 491, 503-505 (Fla. 1918).

law lies far afield from a claim for compensation based on the traditional exercise of eminent domain.

Of course, the original understanding of the Just Compensation Clause also did not encompass the idea that property could be taken through application of regulatory measures enacted by a legislature or implemented by an executive agency. See *Lucas*, 505 U.S. at 1014 (citing *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922)). But extension of the Clause to cover such affirmative measures by the political branches does not counsel further extension to decisions by the courts. Whereas the modern regulatory state is a new creation, calling for new applications of the Clause to govern its functions, the authority of courts to modify common law or interpret statutes remains essentially unchanged from the time of the Founding.

3. In the long history of its jurisprudence under the Just Compensation Clause, this Court has never held that a state court decision has effected a judicial taking. Over one hundred years ago, this Court applied the Just Compensation Clause to the States, noting that the Fourteenth Amendment "extend[s] to all acts of the State, whether through its legislative, its executive, or its judicial authorities." *Chicago, Burlington & Quincy R.R.* v. *City of Chi.*, 166 U.S. 226, 234 (1897) (internal quotation marks omitted). But that case concerned a traditional eminent domain proceeding, *id.* at 230, and the Court had no occasion to consider whether a state court's interpretation of state property law, independent of an action by the government to condemn property, could constitute a taking.

Since that time, the Court has repeatedly recognized that state courts have broad authority over state property law. See, *e.g.*, *Oregon* v. *Corvallis Sand & Gravel*

Co., 429 U.S. 363, 378-379 (1977); *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673, 681 n.8 (1930); *Fox River Paper Co.* v. *Railroad Comm'n*, 274 U.S. 651, 657 (1927). And the Court has remarked on several occasions that "[a] person has no property, no vested interest, in any rule of the common law." *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (internal quotation marks omitted). Those statements strongly indicate that a judicial decision cannot itself effect a taking.

Several Members of this Court have suggested that a claim for a judicial taking might be available in certain circumstances. In a concurring opinion in *Hughes* v. *Washington*, 389 U.S. 290 (1967), Justice Stewart suggested that a state supreme court decision that "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents," could constitute a taking. *Id.* at 296. But he explained that such a constitutional restraint would exist only in extraordinary cases, in which a State otherwise could "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 296-297. Similarly, in an opinion dissenting from denial of certiorari in *Stevens* v. *City of Cannon Beach*, 510 U.S. 1207 (1994), Justice Scalia, joined by Justice O'Connor, suggested that a state court decision may itself violate the Just Compensation Clause if the decision "invok[ed] nonexistent rules of state substantive law" as a "pretext[]" to deny the existence of a property right and thus to deny compensation to a landowner. *Id.* at 1211. But against the weight of the Clause's text, historical understanding, and this Court's precedents—as well as further considerations discussed

below—the Court should not embrace that theory. Cf. *Lingle*, 544 U.S. at 540-545.[6]

4. Recognizing a judicial takings cause of action under the Constitution would intrude on one of the core functions of the state courts. This Court long has acknowledged the state courts' authority to adapt common law property rules to new and changing circumstances. See, *e.g.*, *Duke Power Co.*, 438 U.S. at 88 n.32; *Corvallis Sand & Gravel Co.*, 429 U.S. at 379. Permitting takings claims based on state court property decisions would have the potential to significantly skew or chill the state courts in their exposition of property law.

Recognition of a judicial takings theory also would work a substantial change in this Court's relationship with the state courts. As a matter of "comity and respect," this Court ordinarily "defer[s] to the decisions of state courts on issues of state law." *Bush* v. *Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring); see, *e.g.*, *San Remo Hotel L.P.* v. *City & County of S.F.*, 545 U.S. 323, 343 n.24 (2005); *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). That is particularly true in the takings context, where the identification of a valid property interest is a necessary condition precedent to any claim under the Just Compensation Clause. See, *e.g.*, *Phillips*, 524 U.S. at 164; *Sauer* v. *City of N.Y.*, 206 U.S. 536, 546 (1907) (state court's determination regarding whether easement existed was "conclusive upon this [C]ourt"). Requiring States to pay compensation based on judicial

---

[6] The Court has indicated that a state court's decision determining property rights may in certain extraordinary circumstances implicate the Due Process Clause. See *Demorest* v. *City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944); *Broad River Power Co.* v. *South Carolina*, 281 U.S. 537, 540-541 (1930). But such a claim would not sound under the Just Compensation Clause. See *Lingle*, 544 U.S. at 543.

interpretations, rather than the actions of their political branches—or holding that a state supreme court has itself violated the Constitution by taking property if no compensation was available—would be a significant federal intrusion on the independent judgment and prerogatives of the state courts.

Recognition of a judicial takings claim also could lead to a variety of practical problems. It would encourage relitigation of unsuccessful conventional takings claims as judicial takings claims, as happened here. And if those claims were first raised before this Court, there would be little record evidence to evaluate whether a taking occurred. See *Stevens*, 510 U.S. at 1213 (Scalia, J., dissenting from denial of certiorari).

Further, if a state court's interpretation of state law affecting property could itself be treated as a taking of that property, the question might arise as to whether a decision of this Court construing federal law could also constitute a taking—*e.g.*, by overruling a prior precedent. But it is not clear how such a constitutional limitation on this Court's interpretation of the law would be administered. No court could sit in direct review of this Court's decision, and a collateral attack seeking compensation for the Court's decision in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491, would be exceedingly problematic—even if that Act could be interpreted to make compensation available based on an assessment of the Court's decisions.

5. In short, approval of a judicial takings theory could "throw one of the most difficult and litigated areas of law into confusion, subjecting States * * * to the potential of new and unforeseen claims in vast amounts." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in

part). At the very least, great caution should be exercised before embarking on that course. And surely, the Court should not work this revolutionary change in takings law in a case that, properly understood, does not even present a "judicial takings" issue.

B. This Is Not An Appropriate Case In Which To Recognize A Judicial Takings Claim

This Court should not recognize a "judicial takings" claim in this case because, at bottom, the action complained of was not that of a court. The gravamen of petitioner's claim has always been that the Act, as implemented, effects a taking by eliminating rights to obtain future accretions and maintain contact with the water. That is a conventional takings claim based on legislative and executive action, not a judicial takings claim. After the state supreme court rejected the conventional takings claim, petitioner attempted to transform that claim into one resting on an asserted judicial taking. That effort at repackaging should be rejected.

1. Petitioner's claim is not one for a judicial taking, because the essence of the claim is that the Florida Supreme Court erred in rejecting its conventional takings claim. Petitioner argued to the Florida Supreme Court that application of the Act effects a taking, because the establishment of the ECL and the restoration of beach on the State's land deprived its members of any direct contact with the water and the opportunity for future accretions to their land. Even in this Court, petitioner continues to tie its claim to the Act. See, *e.g.*, Pet. Br. 52 ("[T]he Act, with the blessing of the Florida Supreme Court, effects a physical taking of [petitioner's] members' property."); *id.* at 54 ("[T]he Act (with the Florida Supreme Court's blessing) takes all littoral rights, gives

them to the State, and 'replaces' them with inferior statutory rights without paying compensation.").

If they are to be recognized at all, judicial takings should be limited to situations in which a court's decision directly and of its own force allegedly impairs property rights through a declaration in a freestanding suit, because only in those circumstances is a property owner without other recourse. When non-judicial actors perform the actions that allegedly take property, property owners may seek compensation based on *those* actions, through a conventional takings claim. If the state court rejects the takings claim based on background principles of state common law, the owner may argue to this Court that a taking has occurred, and this Court may review the state court's interpretation and application of state law. See, *e.g.*, *Lucas*, 505 U.S. at 1032 n.18; see also *Bush*, 531 U.S. at 115 n.1 (Rehnquist, C.J., concurring). In those circumstances, the Court discharges its ordinary review function, rather than taking the extraordinary step of holding that the State's highest court has itself acted unconstitutionally, or effectively requiring that a State pay compensation based on a decision of that court.

2. By the very nature of petitioner's judicial takings claim—that the actions of the State's highest court in themselves constitute a taking—no court has ever previously considered the question.[7] *A fortiori*, neither has any court ever considered the issue of compensation for any such taking.

---

[7] Although petitioner did raise its judicial takings claim in a petition for rehearing to the Florida Supreme Court, see Pet. App. 144-148, that court's denial of discretionary rehearing does not express a view on the merits of the claim, see, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).

The Court ordinarily does not consider issues that were not pressed or passed upon below. *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam). That rule "serves an important interest of comity," "avoids unnecessary adjudication in this Court," and ensures that the Court "has an adequate legal and factual record" upon which to assess the federal claim. *Id.* at 90-91.

In addition, as the Court frequently has observed, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) (citing cases); see, *e.g.*, *First English Evangelical Lutheran Church* v. *County of L.A.*, 482 U.S. 304, 314-315 (1987). As a result, "no constitutional violation occurs until just compensation has been denied." *Williamson County*, 473 U.S. at 194 n.13. Just as "takings claims against the Federal Government are premature until the property owner has" sought compensation under the Tucker Act, a claim that a State has taken property in violation of the Just Compensation Clause is not ripe "until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State." *Id.* at 195.

Here, the Act itself expressly authorizes a person "substantially affected" by the Act to bring suit in state court to determine whether application of the Act "constitut[es] a taking without just compensation." Fla. Stat. Ann. § 161.212(2). Petitioner brought a lawsuit under that provision, which is still pending but stayed. Petitioner's members therefore had a fully adequate compensation remedy to challenge the application of the Act to them.

Petitioner's members have not separately sought compensation in state court for the alleged judicial taking, and they presumably would confront formidable practical and legal obstacles to prevailing on a claim that the state supreme court's decision constituted such an unwarranted and drastic departure from prior law to amount to a taking. But not all recourse is foreclosed, because the state supreme court specifically limited its ruling to rejection of a challenge to the Act on its face, not as applied to particular parcels.

3. Because petitioner's members did not pursue their takings claims under the state statute enacted for that purpose, the record is inadequate to resolve their claims. For example, the record contains no documentary evidence of the members' ownership of affected properties. Nor is there any evidence about the value of the properties or how the value would be affected by the restoration project. That type of evidence often is critical in takings cases, which normally involve "essentially ad hoc, factual inquiries." *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (internal quotation marks omitted). This Court should consider the viability of a judicial takings claim only in a case in which the record is sufficient to determine whether a taking actually has occurred. See *Stevens*, 510 U.S. at 1213 (Scalia, J., dissenting from denial of certiorari) (concluding that review of judicial takings claim would be inappropriate because no "record concerning the facts [was] compiled," so that it was "beyond [the Court's] power—unless [it] t[ook] the extraordinary step of appointing a master to conduct factual inquiries—to evaluate petitioner's takings claim").

4. Because petitioner's members had available a fully adequate procedure for presenting a conventional

takings claim, and for the other legal and practical reasons just discussed, the Court should deny their claim that the decision of the Florida Supreme Court itself constitutes a taking of property. In the alternative, the Court may wish to dismiss the writ for want of a properly presented federal question. See, *e.g.*, *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 573-574, 584 (1947).

C. The Decision Below Reasonably Applied Existing Law To New Circumstances And Does Not Result In A Taking

If a judicial takings theory were ever to be accepted, it must be limited to the extraordinary case in which a state court has radically and unexpectedly deviated from settled law. There was no such departure here. The Court therefore should reject the judicial takings claim in this case, and leave for another day the question whether or when such a claim might lie.

1. Members of this Court who have suggested the viability of a judicial takings claim have stressed that one would lie only if the state court's decision marked a startling departure from settled property rights. In *Hughes*, Justice Stewart suggested that if a state court decision "arguably conforms to reasonable expectations, [the Court] must of course accept it as conclusive," but that if "it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate." 389 U.S. at 296 (Stewart, J., concurring). Justice Scalia's formulation in *Stevens* was similar: if "it cannot fairly be said" that the court's decision had support in existing law, "then the decision now before us has effected an uncompensated taking." 510 U.S. at 1212 (Scalia, J., dissenting from denial of certiorari).

As those opinions suggest, any judicial takings claim must be limited to the rare occasion when a state court decision falls well outside the range associated with evolving common law. Put another way, the decision must work a "sudden," "unpredictable," or "unforesee[n]" change in state law (*Hughes*, 389 U.S. at 296-297 (Stewart, J., concurring)), in a manner that lacks "arguabl[e]" (*id.* at 296) or "fair[]" support (*Stevens*, 510 U.S. at 1212 (Scalia, J., dissenting from denial of certiorari)) in existing state law. A judicial takings claim therefore could not lie when a state court considers a matter of first impression, or has spoken to the issue presented only in dicta in prior opinions, or the issue arises in a new context presenting significant countervailing property interests or public interests not previously considered. Regardless of the precise standard utilized, the decision below cannot plausibly qualify as the type of rare and unfounded decision that could effect a judicial taking.

2. As petitioner acknowledges (Pet. Br. 27, 31; Pet. App. 140, 143), the Florida Supreme Court in this case did not overrule or disavow any of its prior precedents. Instead, after reviewing its prior decisions, the court reasonably concluded, in the previously unexamined context of a beach restoration project, that the property rights of upland owners do not include an entitlement to obtain future accretions and maintain contact with the water.

In particular, the court considered the impact of an Act under which the State authorized the restoration of beach through the placement of sand on the State's *own* submerged lands—lands that both the Florida Constitution and this Court's cases recognize as a fundamental aspect of state sovereignty. The court did not alter or

redefine littoral property rights that would exist in the absence of any such action by the State or other changed circumstances, as the Washington Supreme Court did in *Hughes*.

The loss by petitioner's members of direct contact with the water was simply the incidental consequence of the State's exercise of its proprietary and sovereign rights to restore beach on its property. And the Act expressly preserves the common law right of access to the water over the State's land—as well as the right of view, by generally prohibiting construction on newly restored beach. Fla. Stat. Ann. § 161.201. The absence of future accretions (or erosions) to uplands likewise is simply an incidental consequence of the State's using its own lands to restore the beach: with the placement of sand on the State's submerged lands, any future accretions (or erosions) necessarily will be at the seaward edge of the beach on the State's property, and there no longer is any water's edge on the upland property that new land could accrete *to*. Petitioner's takings claim is thus fundamentally a contention that its members' ownership of their parcels gave them an absolute right to prevent the State from placing sand on its adjacent land to restore the beach for the benefit of the public, including petitioner's members. Given the fundamental sovereign interests in submerged lands of this kind, general statements in prior Florida cases concerning the attributes of littoral property should not lightly be read to have foreclosed the State from taking these measures.

Indeed, in *Hughes*, which held that federal law afforded the littoral property owner a right to accretions by natural forces, the Court recognized that "these riparian rights are to some extent insecure * * * since they are subject to considerable control by the neigh-

boring owner of tideland." 389 U.S. at 294. The Court cited a case holding that "the State may fill its tidelands and thus block the riparian owner's natural access to the water." *Id.* at 294 n.3 (citing *Port of Seattle* v. *Oregon & Wash. R.R.*, 255 U.S. 56 (1921)). The Court also cited (*id.* at 294) a case which noted that in New Jersey as elsewhere the common law offered a right of accretion "as against the State as well as its grantees, where as here the grantees have not filled in the land." *Stevens* v. *Arnold*, 262 U.S. 266, 270 (1923). Florida law, of course, need not be the same as that of Washington, New Jersey, or other States. But in fact nothing in Florida law foreclosed the State from taking its balanced approach to beach restoration.

a. Petitioner first contends (Br. 24-27) that the Florida Supreme Court suddenly eliminated its members' rights to maintain contact with the water. The Florida Supreme Court rejected that argument, explaining that, although littoral property owners have a "core littoral right of access to the water," they do not have an independent right to have their property touch the water. Pet. App. 36-37.

That conclusion does not represent any sudden break in the law. The Florida Supreme Court had issued numerous decisions holding that uses of sovereign lands impermissibly deprived the upland owner of access to the water. Pet. App. 36 (citing *Webb* v. *Giddens*, 82 So. 2d 743, 745 (1955); *Thiesen* v. *Gulf, Fla. & Ala. Ry.*, 78 So. 491, 501, 506-507 (1917); *Ferry Pass Inspectors' & Shippers' Ass'n* v. *White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 646 (1909)). But the court had not addressed whether an upland owner who retains his common-law right of access has an independent right to

direct contact with the water, especially as against the interests of the State asserted here. *Ibid.*

In one prior decision—rendered 17 years after the relevant portion of the Act was passed—the Florida Supreme Court had remarked that littoral property rights include "the right of access to the water, including the right to have the property's contact with the water remain intact." *Board of Trs. of the Internal Improvement Trust Fund* v. *Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (1987). But that statement was dictum—the issue before the court was who owned certain lands, not whether there was an independent right to touch the water, *id.* at 934—and (in any event) that dictum did not suggest any right to contact the water independent of the right of access, especially in the quite different circumstances here. Pet. App. 36. Indeed, the Florida Supreme Court long ago held that when dry land is created adjacent to upland property through intervention by the State—by draining a lake—the newly exposed lands belong to the State. See *Martin* v. *Busch*, 112 So. 274, 284-285 (Fla. 1927). The necessary consequence is that the riparian owner loses the ability to touch the water from his own property. Similarly here, because the Beach and Shore Preservation Act rests on the State's exercise of its authority over its adjacent land, and expressly preserves the basic common law right of access, see Fla. Stat. Ann. § 161.201, the court reasonably concluded that the Act did not unconstitutionally deprive petitioner's members of an independent right to touch the water.[8]

[8] The longstanding common-law doctrine of avulsion also refutes the view that upland owners have an absolute right to maintain contact with the water. Under that doctrine, when there is a sudden and noticeable addition or loss of land, the legal boundary between state-owned tide-

b. Petitioner also contends (Br. 28-31) that the Florida Supreme Court eliminated a recognized "present right to acquire future property" through accretion. The court rejected that argument because "the 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," and because the principles supporting the common-law "rule of convenience" regarding accretions do not apply in the circumstances of a beach restoration project. Pet. App. 20, 34-35.

The Florida Supreme Court's decision did not make any sudden or dramatic change in the law regarding accretions. No prior decision had held that a littoral property owner has a vested right to prevent the filling of adjacent submerged lands owned by the State in order to keep open the possibility of expanding his property through future accretions. The court had held that the legislature could not eliminate a private landowner's title to accretions that had already occurred by retroactively fixing the boundary line between private and state land along the historic meander line of fresh water lakes. See *State* v. *Florida Nat'l Props., Inc.*, 338 So. 2d 13, 16-18 (Fla. 1976). But that decision did not concern a right to future accretions as against actions by the State such as those under the Act in this case. And the

---

lands and uplands remains unchanged. See *Bryant* v. *Peppe*, 238 So. 2d 836, 838 (Fla. 1970). Thus, if an avulsion shifts the MHWL seaward, creating new beach in an area that had been submerged, contact between the upland property and the water would be broken because title to the area that had been submerged would remain with the State. See *Sand Key Assocs.*, 512 So. 2d at 940-941.

beach restoration project has no effect on any land that an upland owner previously received by accretion.[9]

Moreover, although the Florida Supreme Court had recognized a common-law "rule of convenience" that an upland owner gains property through accretion or loses it through erosion, Pet. App. 34-35, the court had never held that an upland owner had a vested, absolute right in that "rule of convenience." It therefore was well within the court's discretion to conclude that the rule should not be applied in the new context of a beach restoration project under which the government agrees to create and maintain beach on adjacent state-owned land and the upland owner no longer bears the risk of erosion. See *ibid.*

Indeed, prior to the decision below, Florida law already had recognized that any right to receive future accretions is not absolute. For example, the doctrine of avulsion contains an implicit limitation on the right of accretion by preserving state ownership of suddenly created land. See, *e.g.*, *Bryant* v. *Peppe*, 238 So. 2d 836, 838 (Fla. 1970). And the court had applied that principle in the specific context of a project by the State to lower the level of a lake, recognizing that the State retained title to the previously-submerged lands. See *Busch*, 112 So. at 284-285, 287; *id.* at 288 (Brown, J., concurring). Citing that decision, the *Florida National* court acknowledged that when "land is reclaimed by deliberate drainage," the doctrine of reliction is inapplicable. 338

---

[9] Petitioner quotes language (Br. 28-29) from the *Florida National* decision referring to "the right to acquire additional property in the future through the process of accretion and reliction," 338 So. 2d at 17, but that was language used by the trial court and not adopted by the Florida Supreme Court, and in any event did not address the situation here.

So. 2d at 18 (citing *Busch*, 112 So. at 287); cf. *Hughes*, 389 U.S. at 294 & n.3. The Florida Supreme Court simply applied that settled principle in this case to conclude that when the State fills in its submerged lands as a buffer against future beach erosion, the closely related doctrine of accretion is inapplicable.

Accordingly, the decision below is by no means the type of extraordinary departure from settled law that would be a necessary predicate for holding that a decision of a state supreme court constitutes a taking under the Just Compensation Clause.

D. Any Infringement Of Rights To Future Accretions And Direct Contact With The Water Does Not Establish Takings Liability

Even if petitioner were correct that the Florida Supreme Court significantly changed settled law concerning rights to accretions and contact with the water, there is no taking under this Court's precedents.

1. This Court has held that a *per se* taking occurs when the government authorizes a physical occupation of property or actually takes title to the property, see, *e.g.*, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), or when the government "denies all economically beneficial or productive use of land," *Lucas*, 505 U.S. at 1015. None of those occurred here.

Petitioner complains that respondents trespassed on some members' land when restoring the beach (Br. 12 n.9) and that members of the public will walk on their portion of the beach (*id.* at 21). But a temporary trespass is not a taking, and the Florida Supreme Court did not rule on any claim regarding future physical invasion of property; it only addressed the asserted rights to re-

ceive future accretions and maintain contact with the water. Pet. App. 33-38. Because the state supreme court's decision did not address any physical invasion, it cannot constitute a judicial taking on that theory.[10]

Nor did the state court permit the State to actually take title to any portion of petitioner's members' property. Petitioner expressly abandoned its challenge to the location of the ECL, including the argument that the ECL deviated from the existing boundary between state and private property (the MHWL). See J.A. 53. Accordingly, it must be assumed that the ECL fixed the boundaries of petitioner's members' properties as they existed prior to the beach restoration project, and therefore no title has been taken.

That leaves petitioner with a claim that the Florida Supreme Court effected a *per se* taking by infringing upon rights to obtain future accretions and to maintain contact with the water. Petitioner does not allege that the result is to deny its members all economically viable use of their land. This Court has never recognized a categorical taking based on the elimination of two among the bundle of rights of a littoral owner, and it should not do so here. See, *e.g.*, *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 130-131 (1978) (whether taking occurred depends on "the nature of the interference with rights in the parcel as a whole"); *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) ("[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because

[10] Petitioner also complains (Br. 55) about the possibility of commercial vendors on the new beach. Even if such activities were permitted by the Act (but see Fla. Stat. Ann. § 161.201), that would not constitute an invasion of petitioner's members' land, because the State owns the newly created beach.

the aggregate must be viewed in its entirety."). And it would be contrary to the principles of "fairness and justice" that inform the interpretation of the Just Compensation Clause, see *Lingle*, 544 U.S. at 537 (internal quotation marks omitted), to conclude that the State has effected a *per se* taking by carrying out a restoration project on its own land to preserve and protect the upland property.

Moreover, the inability to realize future accretions is not akin to a physical appropriation of existing land. Any future interest a property owner has in accreted land is contingent on the shoreline expanding through accretion, rather than constricting through erosion or being subject to avulsion. And even assuming property owners bordering an ECL have lost pre-existing rights of contact and accretion, the State has not acquired those rights. As the owner of tidelands, the State has always owned the lands under the water. See, *e.g.*, *Kruse* v. *Grokap, Inc.*, 349 So. 2d 788, 789-790 (Fla. Dist. Ct. App. 1977). Any accretion that occurs at the seaward edge of the restoration project will shape the government-owned land that is now above the water, but will not increase the amount of governmental property. There is thus no basis for finding a *per se* taking.

2. Because the loss of an ability to exercise two littoral rights does not fall within the "relatively rare [and] easily identified" category of *per se* takings, this case should be analyzed as a situation where "the interference with property rights 'arises from some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Tahoe-Sierra*, 535 U.S. at 324-325 (quoting *Penn Cent.*, 438 U.S. at 124). For such a situation, this Court undertakes an "ad hoc, factual inquir[y] * * * designed to allow careful exami-

nation and weighing of all the relevant circumstances," *id.* at 322 (internal quotation marks omitted), considering factors such as the "economic effect on the landowner, the extent to which the [government action] interferes with reasonable investment-backed expectations, and the character of the government action," *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 617 (2001).

The question under the Just Compensation Clause is not whether property owners lost two discrete nonpossessory rights, but rather whether "the parcel as a whole" is so burdened that the Just Compensation Clause applies. *Tahoe-Sierra*, 535 U.S. at 327 (internal quotation marks omitted). Because petitioner has proffered no evidence as to the economic impact on the "parcel as a whole" of eliminating the claimed rights to contact and accretion, it has necessarily failed to make out its claim for a judicial taking under the *Penn Central* framework.

3. Finally, no Just Compensation Clause violation occurs, even where governmental action would otherwise constitute a *per se* taking, if the amount of compensation would be zero. See *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 240 (2003). The beach restoration project here provides important benefits to upland owners, such as protection from loss of their land through erosion and from damage to their property by storms and hurricanes and resulting surges. Any assessment of compensation must account for those offsetting benefits, which will in fact increase the value of many littoral properties. See *United States* v. *Sponenbarger*, 308 U.S. 256, 266-267 (1939); cf. Fla. Stat. Ann. § 161.212(3)(b). Petitioner has made no attempt to demonstrate that the project would reduce the value of its members' property. For this reason as well, the record

does not support a finding of a judicial taking without just compensation.

CONCLUSION

The judgment of the Florida Supreme Court should be affirmed. In the alternative, the writ should be dismissed.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN C. CRUDEN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
KATHERINE J. BARTON
JUSTIN R. PIDOT
Attorneys

OCTOBER 2009