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

REPLY BRIEF FOR PETITIONER

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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 U.S. Constitution?

Is the Florida Supreme Court's approval of a scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the Due Process and Takings Clauses of the Fifth and Fourteenth Amendment to the U.S. Constitution?

Is the Florida Supreme Court's approval of a scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without notice or a judicial hearing or the payment of just compensation a violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution?

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INTRODUCTION

"*The only dependable foundation of personal liberty is the personal economic security of private property*."[1]

This Court has recognized that states have authority to define "property" for purposes of the Fifth and Fourteenth Amendments. *See Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (the Constitution does not create property interests; instead they derive from an "independent source such as state law rules or understandings"). The Florida Supreme Court abused this authority by depriving littoral owners of what, for 100 years, has been their "property" by suddenly declaring that the "property" never existed under state law. The central question in this case is what federal constitutional remedy applies in such circumstances.

Respondents Walton County and City of Destin (collectively "County") and Florida Department of Environmental Protection and the Board of Trustees of the Internal Improvement Trust Fund (collectively "DEP") now assert that the Florida Supreme Court effected no changes to Florida property law,[2] despite previously admitting that changes in Florida property law had occurred.[3]

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[1] Walter Lippmann, *The Method of Freedom* 101 (1934).

[2] *See* County Brief, pt. III; DEP Brief, pt. I.A.2.

[3] Answer Brief of Appellee Florida Department of Environmental Protection at pt. III, *Save Our Beaches, Inc. v. Dep't of Envtl. Protection*, 31 Fla. L. Weekly D1173 (July 7, 2006) (No. 1D05-4086); Petitioners/Appellants' Initial

The Answer Briefs misstate the facts, obfuscate the issues, focus on the irrelevant alleged "public good" done by the Beach and Shore Preservation Act, Chapter 161 of the Florida Statutes (2003) (hereinafter "Act"),[4] and create after-the-fact justifications for the Florida Supreme Court's actions.[5] Respondents also claim waiver when Respondents themselves have waived any claim of procedural irregularities under this Court's Rule 15.2.

This Reply Brief exposes the flaws in Respondents' arguments in turn; however, Petitioner ("STBR"), initially pauses to correct two misrepresentations that permeate the Answer Briefs.

Brief on the Merits at 13-14, *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. 2008) (No. SC06-1447) [hereinafter *County FSC Brief*]. DEP's current "no change in Florida law" position directly contradicts its finding in its Final Order:

> Whether or not correct under the common law, it is certainly the case under [the Act] that the right to future accretion and the right of riparian land to touch the water have both been statutorily eliminated by [the Act] . . . .
>
> It is the establishment of the ECL and the [Act] . . . which might arguably be asserted as infringing on the common law rights of riparian owners.

Pet. App. 93-94.

[4] The original petition challenged the 2003 version of the Act; thus, all citations will be to the 2003 version.

[5] Respondents essentially ignore the merits of Questions II and III for which certiorari was granted; presumably because their positions are indefensible.

First, Respondents claim that STBR's motives are to gain private ownership of the state-created "new beach" for free. *See* County Brief 1-2, 17, 18, 37; DEP Brief p. 60-61. STBR has consistently opposed the project. STBR filed two motions to stay the permit's effectiveness and halt construction of the project until resolution of the appeal.[6]

Respondents proceeded with the project – even trespassing on private property – despite the appeal of the permit. It is now disingenuous for Respondents to imply that STBR relented during project construction to suddenly claim ownership of the new beach.

Perhaps Respondents intend to camouflage their own land grab. STBR's members never needed, or requested additional sand, as they owned littoral property on an accreting beach.[7] STBR members seek only what their deeds say they own, nothing more and nothing less. Barring return of their property rights, they have alternatively sought compensation.

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[6] *See* Petition to Stay Agency Action, *Save Our Beaches, Inc. v. Dep't of Envtl. Protection*, DEP No. 04-1370 (July 27, 2005); Response in Opposition to Petitioners' Motions for Stay of Mandate, *Save Our Beaches, Inc. v. Dep't of Envtl. Protection*, 31 Fla. L. Weekly D1173 (July 7, 2006) (No. 1D05-4086); Appellants' Motion for Stay, *Save Our Beaches, Inc. v. Dep't of Envtl. Protection*, 31 Fla. L. Weekly D1173 (July 7, 2006) (No. 1D05-4086).

[7] App. 252, 261. Respondents' claim that the beach is "eroded" ignores the only record evidence showing that any loss of beach sand resulted from hurricanes, which cause avulsion, not erosion.

Second, the suggestion that this Court should dismiss the writ of certiorari because STBR's members have not sought compensation from the state courts is inaccurate. *See* U.S. Amicus Brief p. 19-22. STBR's answer briefs asked the Florida courts for compensation by concluding: "the complete elimination of riparian rights is a physical taking that must be compensated." *See* Respondent's Amended Answer Brief at 50, *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. 2008) (No. SC06-1449), and at 37 in Case No. SC06-1447.

Respondents also suggest that STBR must file a lawsuit in a Florida circuit court seeking compensation for property rights that the Florida Supreme Court decided no longer exist. Such an exercise would not only be futile but absurd.

ARGUMENT

"*The preservation of the rights of private property was the very keystone of the arch upon which all civilized governments rest.*"[8]

I. Respondents' Taking of Littoral Rights Is A Physical Taking.

A. Littoral rights are valuable.

Respondents demean the significance and value of littoral rights and oceanfront property. In Florida, it is a "general rule that waterfront property

[8] Joseph H. Choate *in* Laurence J. Peter, *Peter's Quotations* 411 (2003).

is valued at a premium." *Peebles v. Canal Auth.*, 254 So.2d 232, 233 (Fla. 1st DCA 1971). Many courts have recognized this premium. *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1917) ("The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability"; further, "riparian rights incident to the ownership of the land were the principal, if not sole, inducement leading to its purchase . . . ."); *Pilafian v. Cherry*, 355 So.2d 847, 849 (Fla. 3d DCA 1978) (recognizing property not extending to navigable water would greatly diminish the value of the property), *rev. denied*, 361 So.2d 834 (Fla. 1978).

This Court has also recognized that a property's most valuable aspect is its fronting the water. *Hughes v. Washington*, 389 U.S. 290, 293 (1967) (concurring) (recognizing access to water is often the most valuable feature of riparian property); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 329 (1973) (recognizing riparian character of the land is a valuable feature), *overruled on other grounds*, *Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Potomac Steam-Boat Co. v. Upper Potomac Steam-Boat Co.*, 109 U.S. 672, 699 (1884) (recognizing present and historic value of riparian rights); *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870) ("This riparian right is property, and is valuable.").

B. Severing upland property from the MHWL is a physical taking.

Respondents argue that no physical taking has occurred because STBR's members still own every square inch of land they previously owned.

The opinion below has, however, transformed the essential character of every single one of those square inches. What was once oceanfront property is no longer. When DEP recorded the ECL, it robbed the property of its oceanfront character and transformed it into significantly less desirable and less valuable ocean-view property. The subsequent creation of a strip of dry land seaward of the ECL physically took the littoral character of STBR's members' property. The filing of the ECL survey in the official records changing the legal descriptions in STBR's members' deeds confirms this transformation.

The State now possesses the littoral property rights that STBR's members once owned. Such a taking is a physical taking. *See Lee County v. Kiesel*, 705 So.2d 1013 (Fla. 2d DCA 1998) (compensation required for physical taking of riparian owner's right of view when a bridge was built entirely on state property and not a square inch of property was taken from the riparian owner).

The Florida Supreme Court has repeatedly rejected attempts to sever littoral rights from littoral property without paying compensation. In *Worth v. City of West Palm Beach*, the court held:

> It appears to us that the chancellor did not take into consideration the damage suffered by the complainant in the court below in his property or privilege of riparian rights by reason of the city appropriating this strip of land for street purposes. Certainly those rights

> were damaged to a great extent by . . . [creation of a road] . . . between the remainder of the property and the . . . line where riparian rights begin, and **it may be said that the privacy of the riparian rights was totally destroyed by the construction . . . of the public street.** The record shows that the remainder of the property, exclusive of riparian rights, **was divested of a considerable part of its value by reason of the construction . . . of a public street which cut off the property from the water front.**

132 So. 689, 689-90 (Fla. 1931) (emphasis added).[9]

The court found the riparian rights "totally destroyed" when the government separated a riparian owner from the water. *Id.* There was no question whether a taking of riparian rights occurred. The only question was how much compensation was due.

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[9] *Accord Peebles,* 254 So.2d at 233-34 ("In the case sub judice, Smith's original appraisal was based upon an assumption of access across the property taken. Accepting the general rule that waterfront property is valued at a premium, it is incomprehensible to this Court how the removal of that assumption of access could result in the same appraisal of the appellants' remaining property. . . . **[I]t cannot be said that owning fee simple absolute title to the water's edge is the same as owning fee simple absolute title to a point 300 feet from the water's edge with intervening fee simple absolute title vested in another**." (emphasis added)).

The County ironically hypothesizes construction of a road below the mean high water line ("MHWL") completely on state land to argue that the law of eminent domain would regard the damages to the littoral owner (*i.e.*, separation from the MHWL) as "inconsequential," but cites no Florida law for this proposition. *See* County Brief p. 50-51. The *Worth* and *Peebles* cases cited above debunk this assertion. *See Lee County*, 705 So.2d 1013 (compensation required for a physical taking of riparian owner's right of view for bridge built completely on state property); *State Road Dep't v. Kendry*, 213 So.2d 23 (Fla. 4th DCA 1968), *rev. denied*, 222 So.2d 752 (Fla. 1969) (recognizing a cause of action to require eminent domain proceedings where state filled submerged lands below ordinary high water line ("OHWL") separating riparian upland from OHWL and appropriating riparian rights).

C. The record is more than adequate to find a physical taking.

Respondents suggest that the record is not adequate to determine whether a taking has occurred. All of Respondents' questions, however, relate to an inapplicable regulatory takings analysis.

There is no "regulation" applicable to STBR's members' properties and the State is not limiting any "use" of their properties. Rather, the Florida Supreme Court interpreted the Act to change the legal descriptions in STBR's members' deeds converting waterfront property to water-view. The State now holds what STBR members once held:

oceanfront property with all attendant littoral property rights.

The taking of property from A and giving it to B is a "physical" taking. In a physical taking, a Court does not look at the ad hoc factors claimed missing from the record by Respondents. Rather, the government "has a categorical duty to compensate the former owner," *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002), "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner . . . ." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). The record is more than adequate to establish Respondents' physical taking.

II. Changing 100 Years of Property Law.

Respondents have now uniformly abandoned previous admissions that littoral property rights were taken (albeit, they argued, in a noncompensable regulatory manner) to defend the Florida Supreme Court's newfound "principled" reasoning. Surprisingly, no Respondent argued this "principled" reasoning below, but now all Respondents suddenly proclaim it is "fairly and substantially" based in existing state law. *See supra* note 3. The truth is even Respondents could not foresee or predict the Florida Supreme Court's sudden and dramatic change of 100 years of state property law.

Respondents assert that the "Florida Supreme Court has wrought no change in Florida law whatsoever." DEP Brief p.38, 48, & 57; County Brief

p. 32-37. For 100 years, the following principles of law have been repeatedly reaffirmed in Florida:

- Littoral rights are constitutionally protected property rights that cannot be taken without just compensation.[10]

- Littoral rights are common law property rights that attach only to properties contiguous to the MHWL.[11]

- Littoral rights include, *inter alia*, vested rights of exclusive access to the water, and to receive accretions.[12]

Since 1953, Florida law has recognized that littoral rights are inseparable from the littoral land.[13]

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[10] *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919) (Riparian or littoral rights "are property rights that may be regulated by law, but may not be taken without just compensation and due process of law."); *accord Board of Trs. v. Sand Key Assoc., Ltd.* ("*Sand Key*"), 512 So.2d 934, 936 (Fla. 1987); *Belvedere Dev. Corp. v. Dep't of Transp.*, 476 So.2d 649, 651 (Fla. 1985); *Florida v. Fla. Nat'l Props., Inc.* ("*Florida National*"), 338 So.2d 13, 17 (Fla. 1976); *Thiesen*, 78 So. at 507; *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909). *See* Petitioner's Brief, p. 19-31, for elaboration of these cases.

[11] Fla. Stat. § 253.141; *Belvedere*, 476 So.2d at 651; *Miller v. Bay-to-Gulf, Inc.*, 193 So. 425, 427 (Fla. 1940); *Brickell,* 82 So. at 229-30; *Thiesen,* 78 So. at 500.

[12] *Sand Key*, 512 So.2d at 936; *Bd. of Trs. v. Medeira Beach Nominee, Inc.* ("*Medeira Beach*"), 272 So.2d 209, 214 (Fla. 2d DCA 1973); *Florida National*, 338 So.2d at 17.

[13] 1953 Laws of Florida ch. 28262 (littoral rights "are appurtenant to and are inseparable from the [littoral] land.") (codified at Fla. Stat. § 253.141); *accord Belvedere,*

These principles form the foundation of Florida property law with respect to littoral rights attaching to all 1,350 miles of littoral shoreline in the State of Florida and have for scores of years. This was undisputedly the law until the Florida Supreme Court issued its opinion below.

That opinion created a different set of legal principles. The traditional set of principles continues to apply to the 1,152 miles of Florida's un-restored coastline. The remainder of Florida's coastline, however, is now subject to a new and different set of legal principles regarding littoral rights (*i.e.*, common law littoral rights do not exist, only the Act's fewer, inferior, and revocable statutory rights).

The Florida Supreme Court and Respondents pretend that no principle of Florida law was changed by recasting the issue as one of "first impression." This ignores the reality that the Florida Supreme Court created "new law" to replace the 100 years of previously applicable law effecting a sudden and dramatic change in the law notwithstanding the court's nomenclature. This type of gamesmanship has been described as follows:

> the courts have indulged in the fiction that, when they re-interpret property law, they never deny anyone a property right. Rather, they simply "clarify" that, although some members of society may

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476 So.2d at 651 (expressly holding that riparian rights cannot be severed from riparian uplands absent an agreement with the riparian owner).

> have imagined that they had property rights, such rights in fact never existed.

David A. Dana & Thomas W. Merrill, *Property Takings* 230 (2002).

The Florida Supreme Court's intentional avoidance of 100 years of controlling law is so obvious that two dissenting justices sharply criticized the majority's legal manipulation. *See* Pet. App. 41-43. Justice Lewis, in his dissent, candidly exposed the majority's fiction:

> I cannot join the majority because of the manner in which it has "butchered" Florida law . . . [and] unnecessarily created dangerous precedent constructed upon a manipulation of the question actually certified. Additionally, I fear that the majority's construction of the . . . Act **is based upon infirm, tortured logic and a rescission from existing precedent under a hollow claim that existing law does not apply or is not relevant here.** Today, the majority has simply erased well-established Florida law without proper analysis . . . .

Pet. App. 41-42. (emphasis added). Respondents continue the fiction by unsuccessfully trying to distinguish two recent affirmations of Florida law while ignoring the numerous prior cases establishing the fundamental principles noted above.

A. The littoral right of access and the right to maintain contact with the MHWL have been taken.

Respondents continue to ignore the foundational condition precedent for the existence of all common law littoral rights: contact with the MHWL. If there is no contact with the MHWL, no common law littoral rights can exist at all.

Looking beyond Respondents' rhetoric, the issue is simple. The entire constitutionally protected littoral right of access (as well as the littoral rights to accretion and view) has been lost. Whether the littoral right of access includes an "independent" or "ancillary" right to maintain contact with the water is of no moment as the **ENTIRE** common law right of access that has existed for 100 years has been eliminated.

The substitution of an inferior and revocable statutory right of permission to cross state-owned property to reach the water – to which Respondents cling as a saving grace – is no replacement for a constitutionally protected common law littoral property right of exclusive access. *See Peebles,* 254 So.2d at 233 ("Privileges, such as a right of access to the [water], which are merely permissive and subject to revocation by the condemning party at any time cannot be availed of in the reduction of damages.").

Respondents' argument that the Act can destroy a right, but at the same time "preserve" it, is oxymoronic. Common law littoral rights exist only when a property touches the MHWL. Respondents do not explain how common law rights can still exist

or can legally be "preserved" (beyond stating the Act says so) when the connection with the MHWL has been severed by the ECL. The Florida Supreme Court has previously rejected this fictional logic.

In *Belvedere,* the Florida Department of Transportation ("DOT") condemned a parcel of riparian property from Belvedere and sought to "reserve" the riparian rights to Belvedere to avoid paying for the rights. *Belvedere,* 476 So.2d at 650. Belvedere alleged that DOT was taking only a portion of its lands and was required to take all of it or pay severance damages. *Id.* at 650.

The district court of appeal upheld the reservation but certified the question of severability of riparian rights to the Florida Supreme Court. *Belvedere Dev. Corp. v. Dep't of Transp.*, 413 So.2d 847, 851 (Fla. 4th DCA 1982), *overruled by*, 476 So.2d 649. Tellingly, the justice concurring specially in certification stated: "To speak of riparian or littoral rights unconnected with ownership of the shore is to speak a *non sequitur*. Hopefully, the Supreme Court will take jurisdiction and extinguish this rather ingenious but *hopelessly illogical hypothesis*." *Belvedere*, 413 So.2d at 851 (emphasis added).

The Florida Supreme Court held that "riparian rights are appurtenant to and inseparable from the riparian land." *Belvedere*, 476 So.2d at 651. It invalidated the attempted reservation of riparian rights because the rights could not exist apart from the riparian upland and the attempted reservation "was an unconstitutional taking." *Id.* at 652.

Justice Lewis exposed the Florida Supreme Court's dismissive treatment of *Belvedere* as a fiction in his dissent:

> Notwithstanding its apparent inconvenience to the majority, Belvedere continues to stand for the principle of law that riparian or littoral rights are generally inseparable from riparian or littoral uplands in this State. See 476 So. 2d at 651-52; See also § 253.141(1), Fla. Stat. (2005) . . . . Today, the majority has returned to a "hopelessly illogical hypothesis" without even an attempt to advance some rational analysis that conforms to the Florida Constitution, our common law, and section 253.141, Florida Statutes.

Pet. App. 45.

Finally, Respondents cannot cite any Florida case that allows a government to fix a permanent boundary between sovereign submerged lands and littoral uplands thereby severing littoral property from the MHWL. The only Florida cases addressing this issue have found such schemes unconstitutional. *Florida National,* 338 So.2d at 18 ("An inflexible meander demarcation line would not comply with the spirit or letter of our Federal or State Constitutions . . . .")[14]; *see also Medeira Beach*, 272 So.2d at 213 ("Freezing the boundary at a point in

[14] In *Florida National*, the "State concede[d] the invalidity of the boundary-setting" scheme. 338 So.2d at 19 (England, J., concurring in part and dissenting in part).

time" leaves riparian owners "in danger of losing access to water which is often the most valuable feature of their property . . . ." (quoting *Hughes*, 389 U.S. 290, 293-94)).

Curiously, the opinion below fails to acknowledge *Florida National*, which held that a boundary-fixing scheme materially identical to the ECL in this case was unconstitutional. *Florida National*, 338 So.2d at 18. The Florida Supreme Court has suddenly and dramatically altered the core foundation upon which littoral rights have rested in Florida for a century.

B. The littoral right to future accretions has been taken.

Respondents misrepresent that no Florida precedent holds that a littoral owner is entitled to future accretions as opposed to past accretions. *See* DEP Brief p. 49; County Brief p. 32-34. To the contrary, the Florida Supreme Court has twice **expressly recognized** that the common law right to accretion includes the right to existing **and future accretions**.

In *Sand Key*, the Florida Supreme Court "approve[d] the district court decision" that held "the disputed five acres of accreted property, **all future accretions on the property** and all property rights incident thereof belong to Sand Key." *Sand Key*, 512 So.2d at 941 (emphasis added) (quoting *Sand Key Assocs., Ltd. v. Bd. of Trs.*, 458 So.2d 369, 371 (Fla. 2d DCA 1984)). As support, the Florida Supreme Court quoted this Court's statement in

County of St. Clair v. Lovingston, 90 U.S. 46, 68-69 (1874):

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

Sand Key, 512 So.2d at 937 (emphasis in original).

The Florida Supreme Court also expressly recognized in *Florida National* that the littoral right to accretion **is a present right to acquire future property.** The court held "the State, through the Trustees, claims not only the lands to which Plaintiff has already gained title through the operation of accretion and reliction, **but also seeks to deny to Plaintiff the right to acquire additional property in the future through the process of accretion and reliction**." *Florida National*, 338 So.2d at 17 (emphasis added).[15]

The right to future accretion has always been part of the littoral right to accretion. The holding below that the right to accretion "is a *contingent, future interest*"[16] not worthy of immediate protection

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[15] Despite the Florida Supreme Court's affirming of the trial court's judgment, *id*. at 18-19, Respondents try to dismiss it is dicta. County Brief, p. 34; DEP Brief, p. 43-45.

[16] Pet. App. 20 (emphasis added).

is a judicial invention of a non-existent rule of state substantive law designed to avoid a taking. In short, it is a fiction with no basis in background principles of Florida law.

III. No Background Principles of State Law Justify the Court's Changing 100 Years of Law.

In an attempt to identify some "background principle of state law" to justify the change of law wrought below, Respondents assert that beach restoration is "artificial avulsion" under the common law. *See* DEP Brief p. 17-19; County Brief, p. 37-39. Not one Florida case holds the common law doctrine of avulsion applies to artificial or man-induced, intentional events, or even mentions the words "artificial avulsion."

No such principle exists and no background principles of Florida law address "artificial avulsion." In Florida, avulsion is the "sudden or perceptible loss of or addition to the land **by action of the water** . . . ." *Sand Key*, 512 So.2d at 936 (emphasis added); *accord Siesta Props., Inc. v. Hart*, 122 So.2d 218, 224 (Fla. 2d DCA 1960) (Avulsion is caused by "the sudden or violent action of the elements . . . .").[17]

DEP argued below that the restoration should be treated as avulsion relying on *Martin v. Busch*,

[17] A hurricane (a natural event) caused the avulsion in the only case cited by Respondents. *See Bryant v. Peppe*, 238 So.2d 836, 837 (Fla. 1970).

112 So. 274 (Fla. 1927).[18] The Florida Supreme Court rejected DEP's argument not even mentioning *Martin* in its opinion because it is not applicable to this case.[19]

The Florida Supreme Court has held that the argument DEP now advances to this Court misrepresents its holding in *Martin*. When DEP previously argued that *Martin* allowed the separation of the upland from the ordinary high water line thereby extinguishing riparian rights, the Florida Supreme Court admonished:

> We reject [DEP's] contention that the dicta in *Martin* means that riparian owners are divested, **not only of their riparian or littoral right to accretions, but also of their property's waterfront characteristics.** This Court expresses no such intent in *Martin v. Busch,* and, in fact, the concurring opinion states that ***Martin*** **does not involve the rights to accretion and reliction**. . . .

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[18] Amended Initial Brief of the Department of Environmental Protection and Board of Trustees of the Internal Improvement Trust Fund at 25-29, *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. 2008) (No. SC06-1449); Reply Brief of the Department of Environmental Protection and Board of Trustees of the Internal Improvement Trust Fund at 8-11, *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008) (No. SC06-1449).

[19] The opinion in *Martin*, 112 So. 274, never mentions or references the doctrine of avulsion.

> Our subsequent decisions show there was no intent to change common law principles regarding the right to accretions and relictions.

Sand Key, 512 So.2d at 940-941 (emphasis added) (citation omitted).

Neither *Martin* nor any other Florida case alludes to, much less establishes, any background principle of Florida law to support Respondents' "artificial avulsion" theory.[20]

IV. Judicial Takings Test and Proper Standard of Review.

A. Respondents essentially concede a judicial takings test should be recognized.[21]

A judicial taking occurs when the decision of a state court effects a "sudden change in state law, unpredictable in terms of the relevant precedents."

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[20] Even if the doctrine of avulsion was applicable, it includes the right of either the littoral owner or the state as owner of submerged lands to reclaim the boundary line that was lost. Pet. App. 31 (recognizing right of riparian to reclaim land and rights lost resulting from avulsion). The purpose of the right of reclamation is to restore the parties to the pre-avulsive status quo (i.e., a MHWL boundary line). *See* Frank E. Maloney, *Water Law and Administration* 393 (1968); Herbert Thorndike Tiffany, *A Treatise on the Law of Real Property* 1153-55 (1912); Henry Philip Farnham, *The Law of Waters and Water Rights* 1639-40 (1904).

[21] *See* DEP Brief, p. 54; County Brief, p. 25.

Hughes, 389 U.S. at 296 (Stewart, J., concurring). Whether such a change has occurred should be determined "not by what a State [court] says, or by what it intends, but by what it does." *Id.* at 298; *accord Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280 (1932) (passing on constitutionality of state tax "we are concerned only with its practical operation," not how the Mississippi Supreme Court defined it "or the precise form of descriptive words" used). Thus, this Court's duty, as described by Justice Stewart, is to analyze the state court's precedents to ascertain what the state's ruling does.[22]

B. Standard of Review.

The proper standard of review is the "fair or substantial basis" standard. This Court has repeatedly applied this standard to review state court decisions regarding state law. *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540-43 (1930) (recognizing a fairness component and a substantial component); *Howlett v. Rose*, 496 U.S. 356, 366 n.14 (1990) ("[W]e have long held that this Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds 'fair or substantial support' in state law.").

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[22] While several amici suggest that there would be too many unanswered questions if a judicial takings doctrine is adopted, they do not justify or explain why a state court judge should be allowed to violate the federal constitution with impunity when its co-equal branches of state government cannot.

In the takings context, this Court's:

> jurisprudence requires us to analyze the 'background principles' of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 . . . (1992).

Bush v. Gore, 531 U.S. 98, 115 n.1 (2000) (Rehnquist, C.J., concurring); *Cohen v. California*, 403 U.S. 15, 19-23 (1971) (finding state court decision did not have a fair or substantial basis); *accord Bouie v. City of Columbia*, 378 U.S. 347, 356 (1964); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 456 (1958); *Ward v. Board of County Comm'rs*, 253 U.S. 17, 22 (1920).

This Court should rigorously apply its fair or substantial basis standard where, as here, the State itself is interested in the outcome, 16B Wright & Kane, *Federal Practice & Procedure* § 4030 p. 422 (2d. ed. 1996) ("[I]f the state itself is interested in the outcome, the Court should exercise a more searching review"); the government action is "an apparent sham," *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 865 (2005); and two dissenting justices of the Florida

Supreme Court have exposed the majority's fiction, Pet. App. 41-42.[23]

Respondents seek to weaken this Court's traditional "fair or substantial basis" standard by suggesting a "fair basis" standard be applied with super deference. Respondents suggest, in effect, that any statement made by a state court should be conclusive and this Court should look no deeper than the words printed in the *Southern Reporter*.[24] This proposed standard is so deferential it constitutes no review at all.

The federal constitution and this Court's jurisprudence require more. Otherwise, only a state court with a "stupid staff" will commit a judicial taking. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (harm-preventing

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[23] A meticulous review is even more important when state judges are elected or retained by public votes. *See England v. Bd. of Medical Exam'rs*, 375 U.S. 411, 427 (1964) (Douglas, J., concurring) ("federal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities than elected state judges."); *accord Stone v. Powell*, 428 U.S. 465, 525 (1976) (Burger, C.J., concurring).

[24] Respondents argue that this Court should find that any decision that is "principled" must have a "fair basis." *See* County Brief p. 30. A decision by a state court, no matter how well reasoned or principled, cannot contravene a constitutional provision.

For example, the New York law at issue in *Loretto* was principled with a rational basis and legitimate public purpose. Such facts, however, can never justify the violation of a constitutionally protected right. Respondents are asking for precisely that result, in essence suggesting this is a "minor" rather than a "major" taking. The Constitution knows no such distinctions. *Loretto*, 458 U.S. at 421.

justification suggested by dissent for regulatory taking "amounts to a test of whether the legislature has a stupid staff" and is insufficient under the Takings Clause); *Kelo v. City of New London*, 545 U.S. 469, 502 (2005) (O'Connor, J, dissenting) ("difficult to envision anyone but the 'stupid staff[er]' failing" a test to determine whether a takings was for an "illicit purpose").

Relevant Florida precedents lead to the unmistakable conclusion that the opinion below has no fair or substantial basis in background principles of Florida law. Rather, the Florida Supreme Court dramatically eliminated Florida property rights and must be reversed.[25]

V. The Restoration Project Is Not Compensation Under The Constitution.

The claim that the restoration is an "enormous" benefit to STBR members is a fallacy, as is the suggestion that the restoration more than compensated STBR's members even if a taking did occur. No record evidence supports these

[25] Respondents' suggestion that federalism concerns weigh against a judicial takings doctrine ignores that this Court has always reviewed state court rulings for compliance with the U.S. Constitution. *See* Petitioner's Brief p. 48-49. STBR asks this Court to only do what it did in *Webb's Fabulous Pharmacies, Inc. v. Beckwith* ("*Webb's*"), 449 U.S. 155, 159 n.5 (1980). That is, prevent a state court from transforming private property into public property by court decree. No "federalism" concern was mentioned in *Webb's* and no such concern should exist here.

assertions.[26] Rather, the record indicates that STBR's members' property is located on an accreting beach.[27] Thus, the supposed benefit of no longer bearing the risk of erosion is inapplicable to this case.[28]

In any event, the measure of a taking is not how much benefit the government might confer to property retained by the landowner. *See Peebles*, 254 So.2d at 233-34 ("Privileges, such as the right to access to the [lake], which are merely permissive and subject to revocation by the condemning party at any time cannot be availed of in reduction of damages."). Thus, Florida Statutes Section 161.201, which replaces a common law property right of access with a statutory right of access, is no "benefit."

This is not a case where a landowner's property is about to collapse into the ocean. If it were, landowners would likely waive any right to compensation in exchange for beach restoration. This reality dispels the "sky is falling" scenarios urged by Respondents that reversal of the opinion below would end beach restoration. Instead, a ruling in favor of STBR will ensure that the government will use restoration for legitimate projects and not as

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[26] DEP's Brief frequently cites factual information not in the record, see DEP's Br. nn.3-5, 8, 24, 28-34, 38-41, 42, 45-46, & 53, which should not be considered. *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970).

[27] App. 252, 261.

[28] Respondents continue to misrepresent that the ECL will automatically disappear if the newly created beach is not continually renourished. *See* Fla. Stat. § 161.211(3).

a pretext to convert private beaches to public beaches.

VI. STBR Raised All Questions Presented And Respondents Waived Their Right To Object.

A. STBR raised the federal taking and due process claims below.

STBR raised the federal taking and due process claims (i.e., Questions Presented II and III) in its Motion for Rehearing. There, STBR argued the:

> [Act] and the Court's opinion allow for the complete elimination of **all** littoral rights and replaces them with inferior statutory rights, which is a wholesale violation of the United States Constitution.
>
> * * *
>
> Court's opinion . . . is a taking under the Fourteenth Amendment to the United States Constitution.

Pet. App. 141-42.

In *Webb's*, 449 U.S. at 159 n.5, a unanimous Court found that a federal takings issue was raised in oral argument and considered by the Florida Supreme Court from the mere mention of the words "taking without due process of law" and a finding of "no unconstitutional taking" in its opinion. If *Webb's*

properly presented a federal issue, then one is certainly presented here considering the numerous citations of federal case law by the Parties and the arguments in STBR's Motion for Rehearing.

Moreover, a petitioner need only raise the federal question at the first reasonable opportunity. *Richards v. Jefferson County*, 517 U.S. 793, 797 n.3 (1996) (petitioners timely raised due process challenge in application for rehearing to state high court); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930) (federal constitutional claim first raised in a petition for rehearing); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917) (due process challenge to state high court's decision brought in a second petition for rehearing). STBR timely raised its federal takings claims.

Additionally, the raising of a state takings claim includes a federal takings claim where the state and federal provisions are construed coextensively.[29] *See County FSC Brief*, *supra* note 3, at 16 (admitting the provisions are construed consistently). *See Howell v. Miss.*, 543 U.S. 440, 444

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[29] "Both the 14th Amendment to the United States Constitution and Article I, Section 9, of the Florida Constitution prohibit the taking of property without due process of law. We consider the federal and Florida constitutional guarantees as imposing the same standard and will discuss them as one." *Fla. Canners Ass'n v. Dep't of Citrus*, 371 So.2d 503, 513 (Fla. 2d DCA 1979), *aff'd sub nom.*, *Coca-Cola Co. v. Dep't of Citrus*, 406 So.2d 1079 (1981), *appeal dismissed sub nom.*, *Kraft, Inc. v. Dep't of Citrus*, 456 U.S. 1002 (1982); *accord Burgos v. Univ. of Fla. Bd. of Trus.*, 283 F. Supp. 2d 1268, 1271 n.4 (M.D. Fla. 2003).

(2004) (a "federal claim [could be raised] by implication [when] the state-law rule" is "identical" or "virtually identical"). Where state courts have "interpreted the relevant state takings law coextensively with federal law, petitioners' federal claims constituted the same claims that had already been resolved in state court." *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 335, 339 (2005) (recognizing state and federal issues were "functionally identical"). In fact, *San Remo* requires STBR to appeal the opinion below to this Court, as it precludes litigating the functionally identical federal claim in federal district court. Consequently, STBR's claims for a federal taking are properly before this Court.

B. Even if not addressed below, STBR's claims are properly before this Court.

Respondents rely on *Adams v. Robertson*, 520 U.S. 83 (1997), for the proposition that "[w]ith only 'very rare' exceptions, this Court lacks jurisdiction and will not consider claims not addressed or passed upon below." DEP Brief, p. 62; County Brief p. 19. Yet, Respondents ignore that this case falls squarely within the noted exceptions.

This Court has held federal claims to be "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." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 86 n.9 (1980) (allowing a federal procedural due process claim where state high court overruled a previously well-

established precedent, thereby denying petitioner of any possibility of state judicial relief) (citing *Brinkerhoff-Faris*, 281 U.S. at 677-78).[30]

Here, the Florida Supreme Court rendered "an unexpected interpretation of state law" and reversed prior interpretations depriving STBR of any meaningful state judicial relief. Accordingly, under the exception quoted above, Questions II and III were properly raised below.

In addition, even if an issue was not decided by the court below, this Court can and will consider the issue if it is "predicate to an intelligent resolution" of the question properly presented. *Ohio v. Robinette*, 519 U.S. 33, 38 (1996). The federal taking and procedural due process issues are a predicate to an intelligent resolution of the judicial takings question presented. The question whether the remaining procedures left in the Act comply with due process or result in a taking only arises because the Florida Supreme Court determined that the eminent domain requirement of Florida Statutes Section 161.141 is not applicable (because no littoral property rights existed to be taken).

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[30] *Accord Mo. ex rel. Mo. Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930) (state high court effected an unexpected interpretation of law), *disapproved on other grounds*, *U.S. v. Atlas Life Ins. Co.*, 381 U.S. 233 (1965); *Saunders,* 244 U.S. at 320 (allowing a due process challenge where "the act complained of [was] the act of the [state high] court, done unexpectedly at the end of the proceeding"); *see also Richards*, 517 U.S. at 797 n.3; *Terminiello v. City of Chicago*, 337 U.S. 1, 5-6 (1949); *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 367 (1932).

C. Respondents waived any objection to the questions presented under Rule 15.2.

Respondents' argument that Questions II and III were not properly presented to the state court below is too late. This Court's Rule 15.2 requires counsel "to point out in their brief in opposition, and not later, any perceived misstatement in the petition . . . that bears on what issues properly would be before the Court if the petition were granted." *See Adams,* 520 U.S. at 92 n.5 (Rule 15.2 duty is an independent obligation upon counsel).

Respondents did not "point out" or even "hint" that Questions II and III were not proper in their briefs in opposition. This Court held:

> [R]espondent's brief in opposition did not hint that the "questions presented" might not be properly preserved. Respondent's attempt to avoid the question now comes far too late. . . . [D]efects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari . . . .

City of Oklahoma v. Tuttle, 471 U.S. 808, 815 (1985); *Knowles v. Iowa*, 525 U.S. 113, 116 n.2 (1998) (refusing to consider government's preservation issue argument because that argument was "waived" by the government's failure to raise it in the brief in opposition).

Respondents did not object to Questions II and III until after this Court granted certiorari. *See Carcieri v. Salazar*, 129 S.Ct. 1058, 1068 (2009) (rejecting belated objection to facts in brief on the merits under Rule 15.2). Accordingly, Respondents have waived any objection to the Questions II and III and the Court should consider all questions presented.

VII. Miscellaneous Issues.

A. Alleged abandonment of the ECL challenge.

STBR initially challenged all technical aspects of the ECL, including how it was set, whether it was set in the proper location, etc. It became apparent, however, the exact location of the ECL was irrelevant. Rather, it is the mere existence of the ECL – wherever established in relation to the MHWL – that makes it unconstitutional.

Whether the ECL is landward or seaward of the MHWL, the effect is the same. The ECL severs the littoral owner from the MHWL without compensation. Thus, there was no need for STBR to challenge such irrelevant aspects of the ECL.

B. Alternative remedy – circuit court case.

Respondents also suggest that STBR should have pursued its as-applied takings claim in circuit court and STBR failed to pursue available remedies. These suggestions are misleading. STBR was required under state law to pursue its as-applied

challenge **only** in the district court of appeal following DEP's issuance of its Final Order. *Key Haven Associated Enters., Inc. v. Bd. of Trs.*, 427 So.2d 153, 158 (Fla. 1982) (an as-applied constitutional challenge to agency action must be appealed to the district court and not filed in circuit court). STBR's circuit court action only alleged a **facial** constitutional challenge, again as required by state law. *Id.*

Furthermore, DEP sought and obtained the order staying the circuit court action – over objection of STBR – claiming the issues in this case and the circuit court case are interdependent. *See* Defendants' DEP and Board of Trustees of the Internal Improvement Fund Motion to Hold Case in Abeyance at 4-5, *Save Our Beaches, Inc. v. Bd. of Trs.*, No. 04-2093 (filed Jan. 23, 2007) (noting STBR's objection). After erecting this barrier, Respondents cannot now assert STBR could and should have pursued this lawsuit.

CONCLUSION

The Florida Supreme Court has abused its authority to define property by "redefining" STBR's members' 100 year-old property rights out of existence. This Court must look beyond what the opinion below says, to determine what it **does**. *Hughes*, 389 U.S. at 297-98.

The Florida Supreme Court's opinion effects a "sudden change in state law, unpredictable in terms of the relevant precedents" in violation of the U.S. Constitution. This Court should reverse the Florida Supreme Court's Opinion finding its current ruling

constitutes a federal taking and remand this case for further proceedings consistent therewith.

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