No. 08-1151

In the Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,
Petitioner,
v.
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, AND CITY OF DESTIN,
Respondents.

On Writ of Certiorari to the Florida Supreme Court

BRIEF OF RESPONDENTS, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION & BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND

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QUESTIONS PRESENTED

Enacted more than forty years ago, Florida's Beach and Shore Preservation Act authorizes publicly-funded beach restoration projects that protect vulnerable public and private property and infrastructure along critically eroded beaches while preserving and supplementing the common law rights of upland owners of littoral property. The questions presented are:

1. Whether the Florida Supreme Court's decision facially upholding the Act's provisions constitutes a "judicial taking" of private property under the Fifth and Fourteenth Amendments of the United States Constitution.

2. Whether the Act itself is an unconstitutional taking of private property under the federal constitution, a question not passed upon below.

3. Whether the Act provides sufficient procedural due process protections under the federal constitution, a question not raised below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL & STATE PROVISIONS

REGULATIONS

MISCELLANEOUS

STATEMENT OF THE CASE

"The waters of the sea are usually considered a common enemy."[1]

I. Beach Restoration In Florida: Safeguarding Public Welfare While Preserving Private Property Rights.

Florida's beaches dominate its geography.[2] It has the longest coastline of the 48 contiguous states, comprising 1,350 miles of shoreline of which 825 miles are sandy beaches along the Gulf of Mexico and the Atlantic Ocean.[3] These beaches form a vital first line of defense against seasonal storms and hurricanes that endanger coastal areas, where almost 80% of Florida's residents live and work, and threaten damage to billions of dollars of property and infrastructure along Florida's beach and dunes system. [Joint Appendix ("JA") 74][4] The beaches also

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[1] *Paty v. Town of Palm Beach*, 29 So. 2d 363, 363 (Fla. 1947).

[2] *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 75 (Fla. 1974) ("No part of Florida is more exclusively hers, nor more properly utilized by her people, than her beaches.").

[3] *See Florida Shoreline Length Information* (Dec. 1993), http://www.dep.state.fl.us/beaches/publications/pdf/fl_beach.pdf (221 miles are in Florida's panhandle and 25.6 are in Walton County).

[4] *Economics of Beach Tourism in Florida*, Ctr. for Urban & Environ. Solutions, Fla. Atlantic Univ. (July 2005), http://www.dep.state.fl.us/beaches/publications/pdf/phase2.pdf.; (Continued …)

form the cornerstone of the state's biggest industry: tourism. *Id.* Beach-related tourism creates 500,000 jobs and also generates billions of dollars for Florida's economy annually. [JA 74][5] Florida's beaches also support a variety of endangered plant and animal habitats and "represent one of the most valuable natural resources of Florida." Fla. Stat. § 161.053(1)(a) (2004); [JA 74].

Under Florida's public trust doctrine, state-owned tidal lands are held in "trust for all the people." Fla. Const. art. X, § 11. The legal boundary between the state-owned tidal lands and the bordering upland properties is generally a dynamic mean high water line (MHWL) that moves inland due to erosion or seaward where land forms gradually and imperceptibly via accretion.[6] The legal boundary line does not change, however, when a sudden change to the shoreline occurs (avulsion). *See Bryant v. Peppe*,

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Fla. Stat. §§ 161.088, 161.091(3) (2004) (noting the beaches' critical importance to Florida's welfare and economy).

[5] *See Economics of Beach Tourism, supra* note 4.

[6] The existing MHWL bordering the navigable water is the boundary line between private upland property and sovereign lands. Fla. Stat. § 177.28(1). "Mean high water" means the average height of the high waters over a 19-year period. *See* Fla. Stat. § 177.27(14). "MHWL" means the intersection of the tidal plane of mean high water with the shore. *See* Fla. Stat. § 177.27(15); *see also Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 26-27 (1935) (discussing same). The MHWL is a dynamic interface of land and water due to waves, currents, tides, water levels, and meteorological conditions that alter the contours of the sea bottom and coastlines.

238 So. 2d 836, 838 (Fla. 1970) (state did not lose title to sovereign submerged lands that suddenly emerged as dry land after a storm); *Martin v. Busch*, 112 So. 274, 287 (Fla. 1927) (affirming state ownership of land that emerges due to government drainage operation). Avulsive changes may sever upland riparian[7] or littoral properties' physical contact with the water, but the upland properties retain their riparian or littoral character. *Id.*

Florida law, for almost a century, has recognized that the state may retain new dry lands arising in the course of a public project that were previously submerged sovereign lands, even if an upland property's physical contact with the water's edge is broken. *Id.* No compensable claim arises absent a material impairment of littoral rights of access, view, or use. *See, e.g., Duval Eng'g & Contracting Co. v. Sales,* 77 So. 2d 431 (Fla. 1954) (no compensable claim where bridge project slightly impaired littoral rights, but did not materially disturb littoral rights of access and view); *Paty*, 29 So. 2d at 363 (no compensation to oceanfront property owner for effects of a state project).

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[7] The terms riparian (relating to river or stream) and littoral (relating to coast or shore of ocean or sea) are generally used interchangeably in this brief. *See* [PA 3 n.3 (discussing meanings of riparian and littoral)]

A. Florida's Beach and Shore Preservation Act Combats Beach Erosion and Protects Beachfront Property Rights.

Florida long ago made it a major state priority to protect and restore critically eroded beaches through legislation that is extraordinarily protective of private property. In 1965 its legislature first enacted the Beach and Shore Preservation Act ("Act") to preserve and protect the state's public and private lands, its economy, and its general welfare. 1965 Fla. Laws, ch. 65-408. Soon thereafter, in 1970 the legislature enacted the Act's core provisions [App 1a-11a], which remain virtually unchanged today, due to beach erosion reaching a crisis level and posing a "serious menace to the economy and general welfare of the people of this State." 1970 Fla. Laws, ch. 70-276, §1 (codified, in substantial part, at Fla. Stat. § 161.088). Florida has since restored about 198 miles of sand beaches on its Gulf and Atlantic coasts via 60 major projects that remain actively managed.[8] The 1970 revisions codified Florida's commitment to preserving beaches and protecting private property rights in two significant ways, both consistent with Florida's common law, as the next sections discuss.

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[8] *See Strategic Beach Mgmt. Plan*, 6, 8 (Fla. Dep't of Envtl. Prot., May 2008), *available at* http://www.dep.state.fl.us/beaches/-publications/pdf/SBMP/Cover%20and%20Introduction.pdf (last visited Sept. 25, 2009).

1. The Act establishes a fixed boundary, the erosion control line ("ECL"), which protects upland owners from the loss of property due to future erosion.

First, the 1970 Act declared the need to fix a property boundary for restoration and nourishment projects along critically eroded[9] beaches between private uplands and state lands in order to clarify "proper claims and legitimate uses by both the State and private upland owners of lands created[.]" 1970 Fla. Laws, ch. 70-276 (Whereas clause). Section 2 defined the fixed line, known as an "erosion control line" ("ECL"), which reflected the landward extent of the state's common law ownership to pre-project submerged bottoms and shores. *Id.* at § 2(3).

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[9] "Critically Eroded Shoreline" is defined currently as:

> a segment of shoreline where natural processes or human activities have caused, or contributed to, erosion and recession of the beach and dune system to such a degree that upland development, recreational interests, wildlife habitat or important cultural resources are threatened or lost. Critically eroded shoreline may also include adjacent segments or gaps between identified critical erosion areas which, although they may be stable or slightly erosional now, their inclusion is necessary for continuity of management of the coastal system or for the design integrity of adjacent beach management projects.

See Fla. Admin. Code r. 62B-36.002(4).

The legislature ensured that the ECL would continue to reflect the pre-project, common law property boundary for the life of the project after sand was deposited on sovereign submerged land:

> Once the [ECL] along any segment of the shoreline has been established in accordance with the provisions of this act, *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, except as provided in Section 8(b) and (c) of this act.

Id. at § 6(b) (emphasis added) (Fla. Stat. § 161.191(2)). By adopting a fixed property boundary for restoration projects, the Act eliminated the vagaries of coastal dynamics that caused boundaries to shift due to erosion (loss of upland property) or accretion (gradual and imperceptible gain of property seaward), a substantial benefit to upland owners who live on a critically eroding beach. Indeed, the "whole purpose of the beach restoration is to provide protection to the upland properties." [JA 76]

The following diagram illustrates these concepts in a typical beach restoration project:

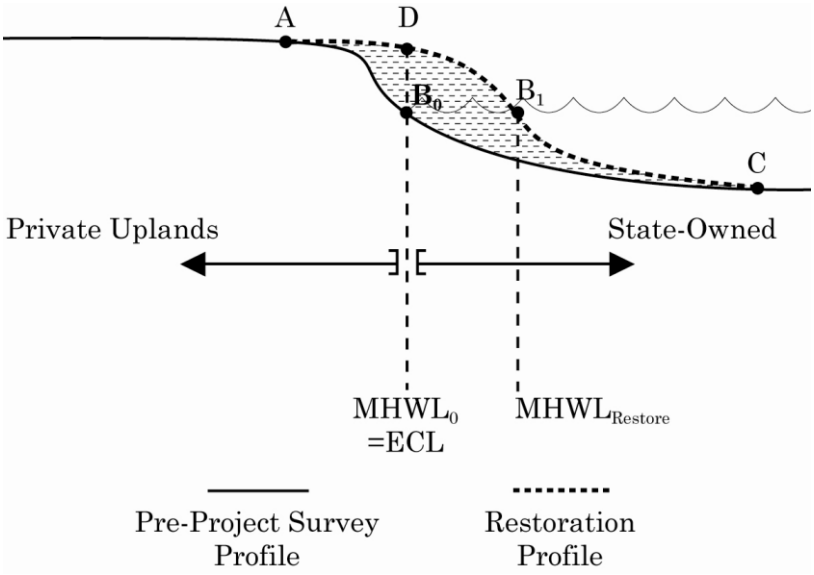

Figure 1

Figure 1 shows a pre-restoration critically-eroded beach profile (depicted as AB_0C). Under the Act, a survey is conducted to locate the pre-project mean high water line ("$MHWL_0$"), which separates private uplands from sovereign property at the pre-project point where tidal waters and the land meet (represented as B_0). The Act requires that the Board of Trustees of the Internal Improvement Trust Fund (the "Board") follow the existing, pre-project MHWL in setting the ECL, unless engineering or other

requirements dictate otherwise.[10] As is typical, the surveyed MHWL became the ECL in this case. [JA 53, 88][11]

During the project, sand is pumped into the restoration area primarily on the state-owned side of the ECL,[12] restoring the beach and creating a

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[10] Fla. Stat. § 161.141; Fla. Stat. § 161.161(5) ("the board of trustees shall be guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and *the need to protect existing ownership of as much upland as is reasonably possible*." (emphasis added)); *see also* [JA 261 (sheet 7 of 9) (showing the existing MHWL (ECL) for the project (marked in orange)]. The Act provides for eminent domain proceedings if setting the ECL effects an ouster or transfer of existing private land to public ownership (e.g., where ECL must be set landward of prevailing MHWL due to engineering requirements). *See* Fla. Stat § 161.141.

[11] *See Wallace Corp. v. City of Miami Beach*, 793 So. 2d 1134, 1136 (Fla. Dist. Ct. App. 2001) (ECL "is located along the mean high water line prior to beach restoration."). A property owner may challenge the proposed location of the ECL prior to its recordation, a challenge that STBR abandoned after storms caused additional erosion resulting in further landward movement of the MHWL from B_0. [JA 53, 187, 200]

[12] In this case, as is typical, sand was also added to the private uplands side of the ECL, depicted as area ADB_0, which became the property of upland owners at no cost. [JA 261 (sheet 7) (marking the ECL (orange) and upland extent of the project (pink))]; Fla. Stat. § 161.141. Because additional erosion occurred *after* the ECL was established in this case, extra sand was placed landward of B_0 that benefitted upland owners disproportionately compared to the typical restoration project. STBR's members have not made any taking claims in this litigation related to the placement of sand on their upland properties.

protective "sacrificial sand" buffer (depicted as the shaded area in Figure 1) that is designed to protect both the shoreline and upland properties for about 6-8 years until future erosion gradually consumes it. [JA 81][13] The point B_1 is where it is expected that the high water line will contact the newly-created shoreline ($MHWL_{Restore}$). Public use of the state-owned beach (DB_1) must be consistent with pre-project uses and is subject to additional protections that the Act affords to owners of littoral properties, as the next section discusses. *See* Fla. Stat. § 161.141.

2. The Act protects and preserves existing littoral rights and creates additional statutory rights for owners of littoral property.

Second, the 1970 Act specifically preserved and supplemented the common law littoral rights of upland owners whose properties, by operation of the Act, now extend to the ECL rather than the MHWL. Its preservation of littoral rights, and its additional statutory protections, both remain on the books today reflecting ten substantial levels of protection.

First, the 1970 Act explicitly provided that upland owners whose properties abut the ECL

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[13] *See Hillsboro Island House Condo. Apartments, Inc. v. Town of Hillsboro Beach*, 263 So. 2d 209, 212 (Fla. 1972) ("effective treatment of the problem [under the Act] requires the deposit of sands onto the beach shelf seaward beyond the ordinary low water mark. Piling sand only within the Town boundary would be to ignore the mechanics of erosion and invite failure.").

"continue to be entitled to all common law riparian rights of the uplands except as otherwise provided in Section 6(b) hereof [discussed *supra*], including but not limited to rights of ingress, egress, view, boating, bathing and fishing." 1970 Fla. Laws, ch. 70-276, § 7 (Fla. Stat. § 161.201 (entitled "Preservation of common-law rights")). The legislature did not extinguish existing littoral rights and reenact them as statutory protections; instead, it provided that any upland owner (or lessee) "who by operation of this act ceases to be a holder of title to the mean high water line shall, nonetheless, continue to be entitled to all common law riparian rights" as just outlined. *Id.* (emphasis added). Thus, by law, the properties of upland owners along the ECL retain essential waterfront characteristics with appurtenant common-law riparian rights (excepting only the possible increase or decrease of upland property from the ECL via future accretion or erosion in Section 6(b)).[14]

Second, by fixing the ECL at the existing pre-project MHWL, the private uplands remain privately owned and are not transformed into a state-owned public beach. Nothing in the Act changes the rights of private upland owners to their pre-existing parcel of

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[14] *See* Fla. Stat. § 161.191(1) (1970 Fla. Laws, ch. 70-276, § 6(a)) (after ECL recorded "title to all lands landward of such line shall be vested in the *riparian upland owners* whose lands either abut the erosion control line or would have abutted the line if it had been located directly on" the MWHL on the date survey recorded) (emphasis added).

land; none is physically taken; none is subjected to different or inconsistent uses.[15]

Third, fixing the ECL at the MHWL provides an enormous benefit to upland owners, who, during the project life, will bear no risk of loss due to erosion.[16]

Fourth, beyond preserving common law littoral rights, the Act prohibits any structures other than those required to prevent erosion on the state-owned portion (i.e., DB_1 in Figure 1):

> [T]he state shall not allow any structure to be erected upon lands created, either naturally or artificially, seaward of any erosion control line …, except such structures required for the prevention of erosion.

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[15] *See* Fla. Stat. § 161.141 (1970 Fla. Laws, ch. 70-276, § 1) (stating "there is no intention on the part of the State to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property"); *id.* (additions to upland property are "subject to a public easement for traditional uses of the sandy beach consistent with uses that would have been allowed prior to the need for the restoration project.").

[16] *See Hillsboro Island*, 263 So. 2d at 213 (beach restoration under Act goes beyond repair, extending the public beach 75 feet seaward "to adapt the beach itself as a means of averting erosion damage" while "enhanc[ing] its utility and beauty[.]").

Fla. Stat. § 161.201 (1970 Fla. Laws, ch. 70-276, § 7). By restricting structures, the Act supplements the common law rights of access, use, and view, further preserving the waterfront characteristics of uplands.

Fifth, the Act prohibits uses that would injure an upland owner and his business and property, or to the "person, business or property" of a lessee of the upland property. The Act states:

> Neither shall such use be permitted by the state as may be injurious to the person, business, or property of the upland owner or lessee; and the several municipalities, counties and special districts are [also][17] authorized and directed to enforce this provision through the exercise of their respective police powers.

Id. The Act thereby enlists state and local governmental powers to enforce its protections[18] against injurious uses and supplements the ability of

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[17] Section 7 of chapter 70-276 is identical to the current statute, but originally contained the word "also" as indicated in brackets; no subsequent legislation eliminated this word, which appears to have been inadvertently omitted.

[18] *See, e.g., Hillsboro Island*, 263 So. 2d at 212 (noting that "even though a substantial portion of the improved beach will be within the domain of the sovereign, under s 161.201, F.S.A., the Town will exercise its police powers over this improved area.").

local governments to regulate beach-related activities.[19]

Sixth, the width of the state-owned beach (i.e., DB_1 in Figure 1), which forms the primary buffer necessary for erosion control, is limited to the width set forth in the restoration project survey:

> … the state shall not extend, or permit to be extended through artificial means, that portion of the protected beach lying seaward of the erosion control line beyond the limits set forth in the survey recorded by the board of trustees *unless the state first obtains the written consent of all riparian upland owners whose view or access to the water's edge would be altered or impaired*.

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[19] In addition, Walton County regulates and places limits on vending activities including those that involve "water based activities" that are defined in its Code. *See* Walton County Code, §§ 22-42.A, 22-51 (2009). The Code makes no mention of permitting a "park" of such activities on the state-owned beach as STBR suggests. [Pet. Br. 55] To the contrary, the Code places significant regulations on all vending and related activities that involve use of the public beach. *See generally id*. at ch. 22. Those that involve "water based activities" are the most strictly regulated. *See id.* at § 22-60 ("Beach Vendors") (requiring that vendors of water-based activity operations have, inter alia, "an operations center located at a land-based location with direct access to the beach in the immediate area where the vending services are being provided for public use" as well as "a motorized chase boat or personalized watercraft in good running condition in the water" that meets "all U.S. Coast Guard safety requirements.").

Fla. Stat. § 161.191(2) (emphasis added) (1970 Fla. Laws, ch. 70-276 § 6(b)). As the emphasized language highlights, the width may not be extended without all affected upland owners' consent.[20]

Seventh, the Act sets forth remedies that may apply if a project is not commenced timely or commences but halts;[21] is completed but not maintained, so that the shoreline moves landward of

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[20] The Florida Supreme Court below, acknowledging that the restored beach might "be wider than the typical foreshore," specifically stated that "*the State is not free to unreasonably distance the upland property from the water by creating as much dry land between upland property and the water as it pleases*. There is a point where such a separation would materially and substantially impair the upland owner's access, thereby resulting in an unconstitutional taking of littoral rights." [Petition Appendix ("PA") 38 n.16] The Court relied on cases that it had summarized earlier. *Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.,* 407 So. 2d 189 (Fla. 1981) (boating regulation unconstitutionally denied littoral right of access); *see also Webb v. Giddens,* 82 So. 2d 743 (Fla. 1955) (culvert substantially impaired littoral right of access); *cf. Duval Eng'g & Contracting,* 77 So. 2d 431 (no compensable claim where only a slight impairment of littoral rights existed and owners did not show a material disturbance of the littoral rights of access and view). [PA 18]

[21] Fla. Stat. § 161.211(1) (1970 Fla. Laws, ch. 70-276, § 8(a)) (requiring Trustees to cancel and vacate an ECL if a project is not commenced within 2 years of the Trustees' survey or if construction commences but is halted for more than 6 months from commencement).

the ECL;[22] or is completed but a substantial portion of the shoreline moves landward of the ECL.[23]

Eighth, the Act provides that, if a project cannot "reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings." Fla. Stat. § 161.141 (1970 Fla. Laws, ch. 70-276, § 1). This protection provides a remedy, for example, where it is necessary for engineering reasons to place the ECL landward of the existing MHWL, resulting in the physical taking of a portion of an upland owner's existing property.

Ninth, the Act provides enormous publicly-funded benefits to upland owners in the form of erosion and storm surge protection.[24] Post-project, the

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[22] Fla. Stat. § 161.211(2) (1970 Fla. Laws, ch. 70-276, § 8(b)) (if the agency "charged with the responsibility of maintaining the restored beach fails to maintain the same and as a result thereof the shoreline gradually recedes to a point or points landward of the [ECL], … s. 161.191(2) shall cease to be operative as to the affected upland.").

[23] Fla. Stat. § 161.211(3) (1970 Fla. Laws, ch. 70-276, § 8(c)) (providing for cancellation of the survey and voiding the ECL if a substantial portion of the restored project recedes landward of the ECL).

[24] The Florida Legislature has appropriated $582 million (through 2006) for beach erosion control activities and hurricane recovery. Beach Erosion Control Program, http://www.dep.state.fl.us/beaches/programs/bcherosn.htm (last visited Sept. 25, 2009); Fla. Stat. § 161.101(1) (dividing beach restoration and subsequent maintenance project costs between local governments and state). In many cases (such as this one), (Continued …)

upland property is now protected by a substantial buffer of sand, depicted as the shaded area in Figure 1. The so-called "sacrificial sand" on state-owned property provides the first barrier against the sea's intrusion. The upland owner also has a fully-restored and aesthetically-desirable[25] dry sand beach, which the local government sponsor is responsible to maintain throughout the project life. The benefits – at no cost to upland owners in this case – are obviously substantial.[26]

Finally, the legislature provided for procedural protections, including notice and public hearings on the need for projects and the establishment of the ECL.[27]

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owners are not required to pay assessments or make special contributions to defray project costs.

[25] Sand quality must be consistent with existing sand in the area. [JA 132-37]; Fla. Stat. § 161.144.

[26] Local governments may seek state funds, provided the beach to be restored is critically eroded (as here) [JA 76] and the local sponsor agrees to maintain the project for a period of not less than 10 years. *See* Fla. Stat. § 161.151(4). In this case, the project's initial estimated agreed total costs were $15,361,285 consisting of $4,173,661 of state funds and $11,187,624 of local funds. Admin. Hearing Jt. Ex. 1, Part 6 ("Grant Agreement DEP Contract No: 04WL1," at 2).

[27] *See* Fla. Stat. § 161.161 ("Procedures for Approval of Projects") (1970 Fla. Laws, ch. 70-276, § 3) (notice by publication and via mail to affected riparian owners; public hearing for receiving evidence on merits of ECL); Fla. Stat. § 161.181 (contemplating legal challenges to ECL involving boundary disputes that are determined, not by the Board, but in circuit court under Fla. Stat. § 26.012(2)(g) (giving circuit courts original jurisdiction (Continued …)

3. The Act's establishment of an ECL is consistent with Florida's common law regarding artificial changes to boundaries from avulsive events.

The establishment of an ECL and the preservation of littoral rights of owners of upland properties along a beach restoration project are in harmony with Florida's common law, which provides that the state retains title to its submerged lands that emerge or materialize, whether by natural or artificial means, in a perceptible or intended way via avulsion.

In *Martin v. Busch*, a government drainage project at Lake Okeechobee caused water levels noticeably to drop, uncovering sovereign submerged lands abutting private uplands. An upland owner, whose property no longer had direct physical contact with the water, sought title to the new dry land. The Florida Supreme Court, however, held that title to the

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over "all actions involving the title and boundaries of real property.")). Challenges based on claims that a project area is not critically eroded, or alleged deficiencies in a pre-project MHWL survey, may be presented at the public hearing or following the Board's adoption of the resolution establishing the ECL, and presented via a petition for administrative hearing under Florida's Administrative Procedures Act with appeal to a district court (as occurred here). *See* Fla. Stat. §§ 120.569, 120.57 (Florida's APA). Absent an appeal or a judicial order preventing establishment of the ECL and/or a project from moving forward, the ECL is thereafter filed in the public records with a survey of the beach to be restored and the location of the ECL. Fla. Stat. § 161.181 (1970 Fla. Laws, ch. 70-276, §§ 5 & 6).

formerly submerged lands remained with the state, and that the doctrine of reliction (water receding naturally and imperceptibly) does not apply, *Martin*, 112 So. at 287, and that upland properties retained their riparian characteristics and rights. *See Bd. of Trs. of the Internal Imp. Trust Fund v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 940-41 (Fla. 1987) (rejecting argument that *Martin* divested riparian owners of their property's waterfront characteristics).

The Act parallels *Martin* by vesting title in the state to the new artificially-created sand beach seaward of the ECL over formerly submerged state tidal lands while retaining the riparian rights of owners of upland properties. This result is similar to *Bryant v. Peppe*, 238 So. 2d 836, in which the Florida Supreme Court rejected the dueling claims of waterfront property owners who sought title to a "narrow strip of land" that emerged over previously submerged lands in the wake of a hurricane. The Court noted that the result is the same whether the new lands are created artificially by a government works project as in *Martin* or naturally and suddenly by a seasonal storm:

> The particular parcel here in question was originally sovereignty land; and it did not lose that character merely because, by avulsion, it became dry land. *See Martin v. Busch*, … which is somewhat similar to the instant case. There, the avulsion resulting in the water bottom becoming dry was artificially rather than naturally created, resulting from a drainage project undertaken

> by the state. The court noted that, when the water receded suddenly, the "title to such lands, which remained in the state just as it was when covered by the lake. The riparian rights doctrine of accretion and reliction does not apply to such lands."

Id. at 838 (citation omitted) (quote from concurrence). As in *Martin,* as confirmed by *Bryant*¸ the new strip of land created over the submerged portion of state lands via a beach restoration project under the Act remains the state's property due to the purposive and perceptible nature of its creation (versus accretion, which by its gradual, imperceptible nature is inapplicable).

II. The Walton County Beach Restoration Project.

A. Seasonal Storms and Hurricanes Critically Erode the Beach Causing the City and County to Pursue Beach Restoration.

Erosion has been a serious problem along Florida beaches for a number of decades, resulting in a gradual loss of uplands.[28] Florida's panhandle is no

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[28] *See* Ann F. Johnson & Michael G. Balbour, *Dunes and Maritime Forests*, *in Ecosytems of Florida* 437 (Ronald L. Myers & John J. Ewel eds., 1990) ("Over the last several decades most of the Florida coast has been eroding landward at an average rate of 0.3-0.6 m/yr. Accretion has been parallel to the coast or at (Continued …)

exception. Over the years, a succession of seasonal storms and hurricanes decimated shorelines in the panhandle, causing the state to designate some beaches as "critically eroded" and a threat to upland properties and resources, both public and private. [JA 73]

For example, Hurricane Opal, which struck the Florida panhandle on October 4, 1995, was "one of the most severe hurricanes to impact Florida this century ... caus[ing] more structural damage along the Florida coast than all hurricanes and tropical storms combined since 1975."[29] The impact on Walton County was "severe county-wide."[30] Unlike other portions of the panhandle, "Walton County does not have a barrier island" along its coast; instead, it is "characterized by a mainland beach backed by very high dunes[.]"[31] For this reason, Opal's storm surge caused "excessively high wave uprush limits" across Walton County's entire shorefront, reaching up to

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the downdrift ends of barrier islands or capes, rather than seaward." (citations omitted)).

[29] *See Hurricane Opal: Beach and Dune Erosion and Structural Damage Along Panhandle Coast of Fla.*, Rep. No. BCS-98-01, 1, (Fla. Dep't of Envtl. Prot., Jan. 1998), *available at* http://bcs.dep.state.fl.us/reports/opal-rpt.pdf (last visited Sept. 25, 2009).

[30] *Id.* at D-10.

[31] *Id.*

elevations of 20 feet, destroying 100 homes and buildings, and other structures along the beach.[32]

Notably, "[o]ne of the worst hit areas was a half mile segment near the west end of the county between R13 and R16," which is in the same area where STBR's member properties are located.[33] Indeed, the state's storm report noted significant damage "near Sand Trap Road" immediately next to where three STBR members live as reflected on the highlighted map in the Joint Appendix.[34]

This critical and ongoing problem caused Walton County to begin the "long multi-year process of doing the necessary studies and designing construction" [JA 76] to pursue restoration of its beaches. [Petition Appendix ("PA") 4 n.4; JA 30, 53, 84, 107, 157, 163-64, 187, 195, 200] On July 30, 2003, the City of Destin and Walton County filed a joint application with the Florida Department of Environmental Protection ("DEP") to conduct a beach

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[32] *Id.* at D-13. Photographs of the severe erosion as well as structural damage are at pages 8, 37-38, and 44.

[33] *Id.* at D-10.

[34] *Id.*; s*ee* [JA 261 (sheet 7 of 9) (this map identifies the Slade parcel (#217), the Alford parcel (#218), and the Frost parcel (#219) immediately adjacent to Sand Trap Road and within 500 feet of Tang O Mar; the public access corridor is parcel #216 where Sand Trap Road ends near the beach; the Spence Family Trust parcel (#207) is about 900 feet west of these properties; the Styslinger parcel is about 2/3 of a mile east of this area on sheet 8 of 9) [JA 261 (*see* sheet 1 for project overview map)]; *see also* [JA 207 (testimony of Lindsey's Sand Trap address)]

restoration project to place sand along 6.9 miles of shoreline bordered by more than 450 parcels of primarily private upland property interspersed with a number of city- and county-owned public access corridors and other land. [JA 28, 192, 202, 261]

To determine the MHWL for the restoration area and other dimensions of the construction project, the applicants completed a shoreline survey in 2003 upon which the Board subsequently located the ECL. [JA 32, 88, 217-222] In July 2004, DEP issued its Notice of Intent to Issue a Joint Coastal Permit authorizing the project. [JA 27][35] The Walton County segment of the project ultimately began on February 5, 2006, and was completed on January 19, 2007, while this case was pending on appeal.[36]

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[35] The Joint Coastal Permit includes two separate permits and an authorization, including a coastal construction permit (*see* Fla. Stat. § 161.041 & Fla. Admin. Code r. 62B-41), a wetland environmental resource permit (*see* Fla. Stat. ch. 373, & Fla. Admin. Code r. 62-312), and a proprietary authorization to use sovereign submerged lands (*see* Fla. Stat. § 253.77; Fla. Admin. Code r. 18-21.00401, 18-21.0051, 62-312.065). [JA 27-40]

[36] Notably, the contractor building the restoration project did not place sand in front of the Alford, Slade and Frost properties due to their objections, but did place sand in front of the Spence and Styslinger properties. [JA 276-278] No objection by Spence appeared in the record, and whether Styslinger objected is not clearly reflected in the record. *Id.* Thus, STBR's claim of alleged trespassing upon these two members' property is unsupported on this record. [Pet. Br. 12 n.9, 33]

B. After Hurricane Ivan, STBR Limits Its Administrative Challenge.

On August 10, 2004, STBR (challenging the Walton County portion of the project) and another group (Save Our Beaches, Inc.)[37] (challenging the Destin portion of the project), filed petitions challenging DEP's issuance of the Joint Coastal Permit and requesting formal administrative proceedings pursuant to various Act provisions and regulations. [JA 10, 25][38] STBR initially asserted thirty-eight disputed issues of fact and later added a second petition challenging the ECL under the Act. [JA 14-19, 42]

On September 16, 2004, however, Hurricane Ivan struck, which was "one of the most impactive and destructive hurricanes to Florida's Panhandle coast in recorded history and the most severe since Hurricane Opal in 1995."[39] Ivan's impact was most

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[37] The ALJ held that SOB lacked associational standing, a conclusion that was subsequently adopted in DEP's Final Order, and not appealed. [PA 74]

[38] Few affected property owners apparently objected to the project. [JA 275-79]; *see also* Liza Martin, *Sandtrap Neighbors Upset Over Halt in Beach Project,* The Destin (Fla.) Log, Apr. 15, 2006, *available at* http://www.redorbit.com-/news/display/?id=473008 (last visited Sept. 25, 2009) (reporting neighbors' concerns about protecting upland property that objectors had put "in jeopardy").

[39] *See Hurricane Ivan: Beach and Dune Erosion and Structural Damage Assessment and Post-Recovery Plan for the Panhandle Coast of Fla.*, 1 (Fla. Dep't of Envtl. Prot., Oct. 2004), *available at*

(Continued …)

severe west of Walton County, but Walton County again "sustained major beach erosion impact" as well as "moderate structural damage" along its entire coast.[40] Indeed, the "entire coast of Walton County sustained major beach and dune erosion" causing the areas in which the properties of STBR members are located to be deemed "particularly vulnerable to further damages" due to their "proximity to eroded bluff lines."[41] The notion that property along the Walton County beaches, including where STBR members live, was somehow immune from severe erosion and its effects, and that houses "sat on an accreting beach," lacks any supporting evidence.[42]

After Ivan further eroded area beaches, STBR substantially amended and shortened its petition [JA 52], abandoning challenges to "technical aspects" of the Joint Coastal Permit including the critically eroded character of the shoreline proposed to be

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http://bcs.dep.state.fl.us/reports/ivan.pdf (last visited Sept. 25, 2009).

[40] *Id.* at 28.

[41] *Id.*

[42] *Compare* [JA 30, 53, 84, 107, 157, 163-64, 187, 195, & 200] *with* [Pet. Br. at 6 (claiming an accreting beach with plentiful sand and dunes prior to project)]; *see also* U.S. Geological Survey, http://coastal.er.usgs.gov/hurricanes/dennis2005/photosets/location17.html (last visited Sept. 25, 2009) (showing Destin hotel property and pool lost to erosion pre- and post-Ivan & Dennis); *id.* (location 19), http://coastal.er.usgs.gov/hurricanes/-dennis2005/photosets/location19.html (last visited Sept. 25, 2009) (showing erosion pre- and post-Ivan & Dennis within the Walton County project area).

restored and *the location of the ECL*. [JA 52-63] It substituted only the following claims: whether "turbidity"[43] standards would be met; whether the project would deny upland owners' use and enjoyment of their properties; whether the project would result in a "taking"; and whether the local sponsors had obtained requisite property rights to implement the project. [JA 61]

STBR claimed that its six members owned five beachfront parcels in the area of the project, but proffered no deeds or other property records; STBR itself made no claim to own property. [JA 60, 210; PA 73] STBR asserted that the project would impair riparian rights, particularly, the rights to "future accretions" and "to access the water." [JA 60] It did not seek a ruling on a constitutional "takings" claim (Florida ALJs may not decide constitutional claims), but filed a separate, parallel lawsuit in circuit court challenging the constitutionality of the Act.[44] [JA 274]

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[43] "Turbidity" means "a condition in water or wastewater caused by the presence of suspended matter, resulting in the scattering and absorption of light rays, as determined using approved methods." Fla. Admin. Code r. 62-610.200(66).

[44] In the circuit court case, *Save Our Beaches, et al. v. Bd. of Trustees, et al.*, 2004-CA-2093 (Fla. Cir. Ct.) (held in abeyance since June 21, 2007), STBR alleges the Act violates federal and state due process standards facially (Count I) and as-applied (Count II). On July 20, 2005, the court denied cross motions for summary judgment, refusing to make "a sweeping pronouncement on the constitutionality of a complex statutory scheme of first judicial impression on an inadequate factual record." Order Den. Cross Mots. Summ. J. at 22. The court noted that the "plaintiffs extrapolate from [the *Sand Key*] decision as to (Continued …)

The formal administrative process addressed only two permit-related issues: (1) whether Walton County/City of Destin had provided adequate assurances regarding water turbidity standards, and (2) whether Walton County/City of Destin needed to show adequate upland interest to sponsor the project or were covered by an administrative rule exempting them if the project does "not unreasonably infringe on riparian rights." [JA 68]; *see* Fla. Admin. Code r. 18-21.004(3)(b).

As to the first issue, the ALJ concluded in his recommended order, which DEP later adopted as part of its Final Order, [PA 99] that Walton County/City of Destin had provided adequate water turbidity assurances and this finding was not appealed. [PA 120] With respect to the second issue, the ALJ determined that the project activities would not unreasonably infringe on riparian rights. [PA 127-28] This second issue formed the basis of this ensuing litigation.

At the administrative hearing, DEP, Walton County, and Destin presented testimony about project

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the disposition of existing property to the circumstance here - an inchoate interest that may never materialize." *Id*. It also noted that language from *Sand Key* was "substantially oversold by the plaintiffs, at least on this record. Title is not necessarily vested in them because it is undisputed that no additional lands have been created by accretion or reliction. Whether the future possibility of such additional lands is anything more than purely speculative is not resolved on this record." *Id.* at 14 n.6.

related details and the operation of the Act. [JA 66] A DEP environmental manager testified about the value and benefits of beach preservation efforts; the mechanics of the permit process and analysis; the state's goal of ensuring that the mean high water and wave energies that cause erosion are moved away from upland homes, infrastructure, and coastal or recreational resources threatened by erosion; and, how much "sacrificial" sand was needed for a buffer, with a life expectancy of 6-8 years. [JA 76-81] DEP's administrator for permitting environmental programs testified that the project area is "significantly eroding" and that tidal waterfront property – unlike a freshwater lake or river – does not invariably touch the water. [JA 163]

STBR called one witness, Mr. Slade Lindsey, who testified that the project would adversely affect members' riparian rights with respect to turbidity in the water impacting their use of beach areas for swimming, snorkeling, boating, and regular enjoyment; accretion rights, and having his property not "touch[ing] the water's edge." [JA 211, 224] Mr. Lindsey acknowledged the project would add "50 to 80 feet" of "dry sandy beach" between his property line and the water, but expressed no concern with prospective public use of the beach. [JA 223]

STBR presented no evidence of the nature of its members' property interests, such as when their properties were acquired,[45] the extent of the public's

[45] STBR's members acquired their properties within the last 15 years. *See* Walton County Property Appraiser, Record Search, (Continued …)

pre-project use and County maintenance of the dry sand beach, the existence of any alleged future accretion, or the extent to which any member's property physically "contacts the water." [JA 207-25] Mr. Lindsey acknowledged that STBR's constitutional claims were the subject of separate litigation pending in the state circuit court. [JA 214] With respect to remedy, he made no claim for compensation, but sought to have the ECL removed in deference to his claimed riparian rights. [JA 214-15]

The ALJ's subsequent recommended order found the permit not to infringe the riparian rights of accretion, assuming the constitutionality of the statute. [PA 127] He further found no riparian right in Florida to contact the water, and noted that "riparian ownership only extends to the MHWL, and beachfront property usually is not in contact with the water." [PA 135 n.12] Alternatively, even if there were some infringement, the ALJ believed it not "unreasonable," thus obviating the need for evidence of upland interest in order for the project to move forward under the administrative rule. [PA 127] DEP adopted the Recommended Order in its entirety and the project thereafter commenced.[46] [PA 88-100]

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http://www.waltonpa.com (last visited Sept. 25, 2009) (showing the Alford property was acquired in 2001; the Frost property in 1994; the Lindsey property in 2001; the Spence property in 2002, and the Styslinger property in 1994); [JA 261 (sheet 7 of 9) (linking parcels with property owners)].

[46] STBR sought to stay the project, but the district court of appeal denied its motion, noting: "appellants primarily rely upon constitutional issues which are not at issue in this (Continued …)

C. STBR Raises an As-Applied Constitutional Claim on Appeal.

STBR appealed DEP's Final Order to the First District Court of Appeal. [PA 61] It ostensibly raised only the issue of whether the authorization of the project amounted to an "as applied" taking of riparian rights as a matter of Florida constitutional law (their facial constitutional challenge to the Act remained pending in circuit court). [PA 74] The First District reversed.[47] [PA 84] It held that DEP had effected a "taking" of the upland owners' constitutionally protected riparian rights to "receive accretions and relictions to the property, and … [to] have the property's contact with the water remain intact." [PA 84-86] It remanded the case, directing that there be satisfactory evidence of sufficient upland interest pursuant to agency rule. [PA 86 (referring to Fla. Admin. Code r. 18-21.004(3)(b))] The court denied motions for rehearing and rehearing en banc, but

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administrative appeal but are being litigated in the circuit court." [JA 262, 274] The project then began in January 2006 and, after being halted in May 2006 for six months due to issues with turtles [JA 278], the Walton County and Destin portions were completed on January 19 and June 24, 2007, respectively.

[47] The court incorrectly stated that the parties had agreed that "this project will cause the high water mark to move seaward and ordinarily this would result in the upland landowners gaining property by accretion." [PA 84] DEP's motion for rehearing, which sought to correct the Court's belief that "accretion" would occur (versus avulsive beach restoration seaward of the ECL) was denied. [PA 60]

certified a question of great public importance to the Florida Supreme Court, which granted review. [PA 2 (stating the original certified question)]

D. The Florida Supreme Court Upholds the Act's Facial Constitutionality.

The Florida Supreme Court, which heard oral argument on April 19, 2007, issued its decision on September 28, 2008. In an opinion by Justice Kenneth Bell, joined by four other justices, the Court limited its review to the question of whether the Act facially deprived upland owners of littoral rights without just compensation. [PA 3] The Court emphasized that its decision was "strictly limited to the context of restoring critically eroded beaches" under the Act [PA 4] and noted "a relative paucity" of prior opinions addressing the relationship between the state and upland owners regarding beaches. [PA 13, 25-26 (noting specifically that "Florida's common law has never fully addressed how public-sponsored beach restoration affects the interests of the public and the interests of upland owners")]

The Court thoroughly analyzed the state's common law and the Act's provisions, first noting the historic state sovereignty (back to English common law and colonial days) with respect to lands below the MHWL, which allow for public navigation, commerce, fishing, bathing, and other easements allowed by law in the waters. [PA 13-14] Florida law has recognized private upland owners to hold simultaneous bathing, fishing, and navigation rights in common with the public, but also to hold "several special or exclusive

common law littoral rights: (1) the right to have access to the water, (2) the right to reasonably use the water, (3) the right to accretion and reliction, and (4) the right to the unobstructed view of the water." [PA 17 (citing*, e.g., Sand Key*, 512 So. 2d at 936)] The Court's review of its precedents showed consistent protection of the littoral rights of access, use, and view over the water, but lesser protection of upland interests in the context of state-filled sovereign submerged lands appurtenant to uplands. [PA 18 (citing*, e.g.*, *Duval Eng'g & Contracting*, 77 So. 2d at 434 (holding that upland owners had no right to compensation for the state's filling of riparian lands for bridge construction where there was only a slight impairment of littoral rights and little disturbance to water access, use, or view)]

The Court's opinion identified two substantial deficiencies in STBR's loss of accretion claim. First, this case involved no present existing accreted property:

> The littoral right to accretion and reliction is distinct from the rights to access, use, and view … [because it involves] contingent, future interest[s] that only become[] a possessory interest if and when land is added to the upland by accretion or reliction.

[PA 20 (citing *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919) ("[Littoral] rights … give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction and other

similar rights")] Second, the Court found claims to future accretion to be irrelevant in the beach restoration context. [PA 34, 40] This case, for example, involves no gradual, imperceptible changes that added to the property of STBR's members. [PA 23-24, 29-33] The Court noted that Florida's courts have not required the state to forfeit property or compensate upland owners for littoral rights claims where sand is deposited through avulsive circumstances. [PA 30-31 citing, *e.g.*, *Bryant*, 238 So. 2d at 837-38] In this way, the Court found the Act to codify relevant common law principles:

> [T]he Act authorizes actions to reclaim public beaches that are also authorized under the common law after an avulsive event. Furthermore, *the littoral right to accretion is not implicated by the Act because the reasons underlying this common law rule are not present in this context.*

[PA 40 (emphasis added)] The Court also concluded that no common law riparian right of "contact with the water" exists independent of the right of access. [PA 35-38] It found STBR's argument under Florida law was based on a single line in a single sentence in the *Sand Key* case, noting that the Court has "never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water." [PA 36] It observed that any right of contact in coastal areas is an inherently flawed notion, since the "foreshore technically separates upland property from

the water's edge at various times during the nineteen-year period" underlying the MHWL. [PA 37] The Court noted that the Act expressly preserved access rights to upland owners of littoral property and prevented the state from allowing structures to be erected seaward of the ECL that might tend to interfere with the rights of upland owners. *Id.* On this basis, the Court concluded that the law did not infringe the littoral right of "direct access" and fully preserved common law littoral rights of access, use, and view over the water. [PA 38, 40]

Given that riparian rights (including the rights of use, view, and access) remained intact, the Florida Supreme Court found that the state could lawfully restore critically eroded beaches under the Act to protect uplands and the beaches from future damage and erosion. [PA 40] It reemphasized its decision was "strictly limited to the context of restoring critically eroded beaches under the [Act]." *Id.* Its opinion did not reference the federal Constitution or any decisions construing the federal Takings Clause, but instead cited this Court's precedents that recognize littoral rights issues to be matters of state law. [PA 18 n.9]

In dissent, Justices Charles Wells and Fred Lewis separately objected to the Court's addressing a facial versus an as-applied claim, and believed that compensation must be paid in order to apply the Act. [PA 41, 57-58] Justice Lewis contended that the legal essence of littoral land "is contact with the water," and that the oceanfront property at issue was transformed into "something far less" that would require "full compensation." [PA 44-58] Though

finding the Act deficient as applied,[48] both Justices believed it could be constitutionally applied in other circumstances. [PA 41, 58] The Court denied rehearing. [PA 136] STBR sought review in this Court on a federal "judicial takings" theory, which was granted.

[48] In contrast, the majority stated that "it is possible that STBR is without standing to raise this as-applied issue since its resolution might depend upon the assessment of particular facts and defenses inuring to each parcel and each individual owner." [PA 33 (citing *Fla. Home Builders Ass'n v. Dep't of Labor & Employment Sec.*, 412 So. 2d 351, 353 (Fla. 1982) (delineating the test for associational standing); *Palm Point Prop. Owners' Ass'n v. Pisarski*, 626 So. 2d 195 (Fla. 1993) (holding that a homeowners association lacks associational standing to enforce restrictive covenants applicable to its members' properties)]

SUMMARY OF THE ARGUMENT

This case addresses Florida's long-standing program for restoring and protecting its critically eroded beaches, the Beach and Shore Preservation Act ("Act"), which was first enacted over four decades ago. The Act authorizes the restoration of beaches that have become so critically eroded that they pose a substantial risk to public safety, private and public structures, upland property, and essential infrastructure such as roadways. Over the years, about 198 miles of Florida's 825 miles of beaches have been restored under the Act, providing enormous protection and benefits to the public as well as to thousands of beachfront property owners. None of these property owners have claimed entitlement to money or title to the state-owned portions of restored beaches – until now.

Petitioner (STBR), on behalf of its six members, claims that owners of littoral property along a beach restoration project have (a) vested rights to direct, continuous contact of their properties with the water's edge, and (b) vested rights to potential future accretions along the critically eroded beach. In its decision below, Florida's Supreme Court upheld the facial constitutionality of the Act, finding that the two littoral rights claimed are not recognized under state law or implicated by the Act. The court explicitly found no precedent on the former point, concluding that direct contact with the water's edge is ancillary to the common law right of access to the water, which is fully preserved under the Act. Moreover, it found that none of the common law justifications for

accretion were implicated by the Act, particularly given that upland owners along a beach restoration project bear no risk of erosion and loss or repair of property, a risk the government now bears.

STBR cites no relevant precedent, let alone a 100 year history of clearly-established state law, to support its claim to these two asserted rights. In contrast, the decision below is wholly supportable and provides no basis for a federal "judicial takings" claim under any formulation of the proposed doctrine. Because this case presents no basis for exploring the contours of a potential "judicial takings" theory, the Florida Supreme Court's decision should be affirmed.

On petition for review, STBR raises a claim that the Act itself, by establishing an erosion control line (ECL) and purportedly taking "all" littoral rights, has physically appropriated its members' property. The lower courts did not pass upon this federal claim for which jurisdiction is lacking. On the merits, this claim fails because the ECL was set at the existing legal boundary of littoral properties, which retain their littoral status and rights. STBR also abandoned its challenge to the setting of the ECL below. Under these circumstances, the Act's provisions cannot be said to violate STBR's members' rights.

Finally, STBR has raised for the first time a procedural due process claim, asserting that the Act provides insufficient notice and process. This claim was not asserted below, is without merit, and should be disregarded.

ARGUMENT

I. The Florida Supreme Court's Decision Is Not A "Judicial Taking."

The crux of STBR's judicial takings theory is its claim that the Florida Supreme Court's decision is a "sudden, dramatic change in state law, unpredictable in terms of relevant precedents,"[49] an odd spin on a case of first impression involving a forty year-old statute under which 198 miles of Florida's beaches have been restored. STBR has inaccurately stated the law of Florida and embellished the facts, making it sound as if private uplands have been transformed into state-owned beaches upon which all manner of activities by the public are allowed, resulting in the wholesale taking of littoral rights in their entirety from owners of beachfront property. A fair reading of the decision and applicable state laws paints a picture far different from what STBR has represented to this Court.

As the next sections explain, a judicial takings doctrine, if such a theory is even viable, has no possible application to the decision below under STBR's proposed standard or any other.[50] The

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[49] [Pet. Br. 17 (adopting two-part test from Justice Stewart's concurrence in *Hughes v. State of Wash.*, 389 U.S. 290 (1967))]

[50] State respondents support the position that the doctrine either should not exist (*see* Amicus Br., State of California), or should set a very high bar that is exceptionally deferential to preserve room for state appellate courts to render their decisions. *See* discussion *infra* p. 58.

decision is a carefully and narrowly written one, addressing novel and previously unaddressed issues of state law. The Florida Supreme Court has wrought no change in Florida law whatsoever. Its decision merely validates an established statutory framework by use of reasoning and analysis that is fully supportable. Given the unexceptional nature of the court's decision, and the exceptional nature of the state legislature's preservation, protection, and expansion of littoral rights, this case is an especially unsuitable vehicle for consideration of a judicial takings claim.

A. Rather Than Changing Florida's Common Law in a "Dramatic and Unexpected" or "Unpredictable" Way, the Decision to Uphold the Act is Consistent with Established Common Law Principles.

STBR makes two claims, both based on the notion that the decision below upended 100 years of well-established precedent in Florida law related to riparian/littoral rights. The first is that the decision below "ignored 100 years of Florida law" establishing a protectable property right in littoral property maintaining direct physical contact with the water. The second is that the decision below changed a purported "vested right to future accretions" into a "contingent future interest." [Pet. Br. 16] As the next two sections explain, and as the Florida Supreme Court held, the last century of Florida jurisprudence on riparian and littoral rights provides no support for STBR's unfounded assertions.

1. No independent Florida common law right exists to "contact with the water," which is an ancillary or subsidiary attribute to the recognized right of access to the water.

STBR's claim – that 100 years of Florida law grants owners of littoral property a protectable right to have their property continuously touch or have physical contact with the tidally-influenced water – is meritless for a number of reasons.

First, as the Florida Supreme Court thoroughly explained in its decision, actual physical contact is ancillary or subsidiary to the littoral right of access. [PA 35-38] The court focused on the single reference in *Sand Key* that purportedly created a right to contact, and weighed that language against its body of precedents, concluding that "under Florida common law, there is no independent right of contact with the water." [PA 36] Indeed, STBR's own claim has morphed in this litigation from a water "access" claim in its original petition [JA 60], to now an independent claim to contact the water or MHWL.

The Court found no precedent supporting the proposition that actual contact with the water is a vested property right held by littoral or riparian owners under state law. The Florida precedents make *access* to the water a protectable littoral right, but none have held that actual physical contact is an independent protectable interest. Thus, the court

noted that "[w]e have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water." [PA 36]

Given that Florida law protects the right of access to the water, the Court reasonably concluded that the alleged right of contact is an ancillary or subsidiary attribute, noting that access is the "sole justification" for this attribute. [PA 37] As to access, the Court concluded that the Act fully preserves all existing access rights of littoral owners, including ingress and egress, as well as prohibiting structures on the beach seaward of the ECL. [PA 36 (citing Fla. Stat. § 161.201)] Under the Act, access to the water is preserved and nothing in the record below suggests that any owner of littoral property in the project area has had access diminished. Given that all existing littoral rights of access are preserved, the Court reasonably concluded that no facial constitutional violation existed. No sudden or dramatic change occurred, nor any unpredictable result.

Perhaps even more importantly, the Court explained both pragmatically and theoretically why a right of actual contact with the water does not exist. The reason is that although the legal boundary line is drawn at the MHWL (or ECL), water does not actually contact that boundary on a continual basis. The confluence of tidal flows and the legal definition of the boundary line results in no guarantee that the waters of the Gulf of Mexico will actually and continuously touch any littoral property along panhandle beaches. As the Court stated:

> [I]t is important to understand that … *there is no littoral right to a seaward boundary at the water's edge in Florida.* Rather, as explained previously, the boundary between sovereignty lands and private uplands is the MHWL, which represents an average over a nineteen-year period. *Although the foreshore technically separates upland property from the water's edge at various times during the nineteen-year period, it has never been considered to infringe upon the upland owner's littoral right of access, which the ancillary right to contact is meant to preserve.* Admittedly, the renourished beach may be wider than the typical foreshore, but the ultimate result is the same. Direct access to the water is preserved under the Act. In other words, because the Act safeguards access to the water and because there is no right to maintain a constant boundary with the water's edge, the Act, on its face, does not unconstitutionally eliminate the ancillary right to contact.

[App. 37-38 (emphasis added)] This passage makes evident that constant contact with the water has never been protected because actual and continual contact does not, in fact, occur due to basic tidal principles and the application of the nineteen-year standard. At best, the tidal flow would result in water "touching" the upland intermittently, and not at all

for some extended periods. *See Borax Consol. v. City of Los Angeles,* 296 U.S. 10, 22-24 (1935) (discussing the effects of seasons and moon phases on ocean tides). Therefore, the Florida Supreme Court correctly answered the previously unaddressed question of whether the "right to contact" is a vested property right. Its decision is not sudden or dramatic, and is quite predictable given the Court's reasoning and harmonizing of past decisions, none of which addressed the topic, particularly in the context of the Act.

Notably, a lack of actual contact also arises where avulsion deposits sand seaward of the MHWL, creating a swath of dry land on state sovereignty property.[51] Under these circumstances, the pre-existing boundary between state and upland properties does not change. What does change is that tidal flows do not physically touch the private uplands; instead, they touch the newly created and wholly state-owned dry sand area. Again, no actual contact of tidal waters occurs with upland property, yet the character of the upland (so long as the water is easily accessed over the state-owned beach or shore) retains its littoral characteristics and rights, other than to future accretion.

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[51] *See, e.g., Bryant*, 238 So. 2d at 838; *Martin*, 112 So. at 287; *see also Sand Key*, 512 So. 2d at 940-41 (citing *Martin* and acknowledging that the state can uncover sovereign submerged land and would thereby divest an adjoining upland property of its accretion rights but not of its "waterfront characteristics").

STBR places substantial reliance on the *Sand Key* case, referring repeatedly to a single sentence in that decision, which states:

> Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights: (1) *the right of access to the water, including the right to have the property's contact with the water remain intact;* (2) the right to use the water for navigational purposes; (3) the right to an unobstructed view of the water; and (4) the right to receive accretions and relictions to the property. *See Hughes v. Washington,* 389 U.S. 290, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967); *County of St. Clair; Hayes; Brickell; Thiesen.*

512 So. 2d at 936 (emphasis added). This sentence is one of many in *Sand Key* that merely summarize, in an abbreviated way, the general nature of riparian and littoral rights in Florida.

This language – abbreviated dicta from a single opinion appearing nowhere else in Florida law – cannot be reviewed in a vacuum without examining its context and other Florida precedents. The statement in *Sand Key* was dicta because the only issue presented was, as the opinion reflects, a very narrow one: whether the state could claim title to land accumulated on waterfront property when the accumulation occurred slowly and imperceptibly, and

was caused in part by public improvements located one-half mile from the owner's property, and not constructed for that property's benefit. *Id.* at 935.

The accretion at issue in *Sand Key*, which by definition was gradual and imperceptible (versus the transformational beach restoration at issue here), occurred over a ten year period following the publicly-funded construction of the nearby jetty. The state claimed title to the accretions, *id.* at 935, and the trial court agreed, but the appellate courts both disagreed, finding that the gradual and imperceptible accumulation of accreted lands from mixed natural and artificial causes belonged to the upland owners.

Thus, the issue presented had nothing to do with contact with the water; instead, the narrow issue was the right to receive *existing* accreted property along the waterfront. Simply stated, *Sand Key* did not address the legal status of either future rights of accretion or a claimed right or attribute of direct contact with the water itself.

Given the narrow issue and holding in *Sand Key*, the Court's single statement, in background discussion, about the concept of "contact with the water" neither carries the weight that STBR attributes to it, nor compels this Court's or the Florida Supreme Court's recognition of it as an independent right. It is a most slender reed upon which to claim a well-established principle of Florida law with a purported 100-year history; indeed, its history is

limited to this lone passing reference of dicta in *Sand Key*. Furthermore, the five decisions[52] cited in *Sand Key* do not mention or establish a vested riparian right to continual direct contact with the water.

Notably, the phrase "right to have the property's contact with the water remain intact" is easily understood, in context, as shorthand for the right of a littoral owner to maintain his property's vital waterfront characteristics via access. *See Sand Key*, 512 So. 2d at 940-41 (acknowledging that under *Martin*, 112 So. 274, the sovereign could uncover land and effectively divest contact with the water, but *not* a property's "waterfront characteristics"). Interpreting "contact" more generally to refer to a property's waterfront character,[53] which the caselaw supports,[54]

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[52] *See Hughes*, 389 U.S. at 293 (loss of accreted land "would leave riparian owners continually in danger of losing the *access* to water" (emphasis added)); *County of St. Clair* v. *Lovingston*, 90 U.S. 46 (1874) (recognizing upland owner's right to existing accretion/alluvion); *Hayes* v. *Bowman*, 91 So. 2d 795, 799 (Fla. 1957) (describing common-law riparian rights of "an unobstructed view, ingress and egress over the foreshore from and to the water"); *Thiesen* v. *Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1917) (describing the "right of access to property over the waters, the unobstructed view of the bay, and the enjoyment of the privileges of the waters incident to ownership of the bordering land."); *Brickell*, 82 So. at 227 (describing common law riparian "right of access from the water to the riparian land and such other rights as are allowed by law.").

[53] "Contact" has various meanings including "touching" as well as "immediate proximity or association," which supports the notion that "contact" is shorthand for the upland property actually abutting state sovereignty lands thereby providing direct beach (Continued …)

makes far more sense than STBR's legally insupportable and unrealistic claim of a right to actual continual direct contact with the water itself.[55]

Notably, STBR muddles the "right of contact" issue further by claiming that "100 years of Florida law requires a property to contact the MHWL to *possess* littoral rights." [Pet. Br. 16 (emphasis added)]

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access. *See* Dictionary.com, http://dictionary.reference.com/browse/contact (last visited Sept. 25, 2009).

[54] *See, e.g., White v. Hughes*, 190 So. 446, 448 (Fla. 1939) ("riparian or littoral rights are those allowed by law in the use of the waters and of the beach or shore between high and low water mark. Such uses include *access to the water from the abutting property over the beach or shore*, and, in common with the public, the rights of bathing, fishing, and navigation in the waters subject to appropriate valid governmental regulations." (emphasis added) (citation omitted)).

[55] STBR relies on *Belvedere Development Corporation v. Department of Transportation*, 476 So. 2d 649 (Fla. 1985), which is easily distinguishable on its facts and legal issues from the instant case. First, *Belvedere* involved an actual physical taking of uplands property. Second, it involved the severance of *all* riparian rights with *no access easement* to exercise them (versus the *preservation of littoral rights* under a critical state beach preservation program). Third, *Belvedere* amounted to a ploy to avoid paying the true value for physically taking the uplands of a riparian property by separating its riparian rights from such property. Importantly, the court in *Belvedere* stated that "*we will not hold that riparian rights are never severable from the riparian lands*. However, we must conclude that the act of condemning petitioners' lands without compensating them for their riparian property rights *under these facts* was an unconstitutional taking." *Id.* at 652 (emphasis added). The emphasized language was prescient; here, none of the facts or policy issues in *Belvedere* is at issue.

STBR has it backwards. No one but STBR questions that littoral rights continue to attach to the beachfront property of its members. Their properties fully retain their littoral status, as the Florida Supreme Court discussed and confirmed. What STBR ignores is that all littoral property in Florida is subject to having *no* contact with the water due to the tidal foreshore and to avulsion seaward of the MHWL. As the Florida Supreme Court explained, coastal properties continue to retain their littoral character under Florida's common law even where the state's submerged lands become dry lands through avulsion or the addition of protective sands. [PA 29-38]

In passing, STBR demeans the Florida Supreme Court's discussion of Florida's public trust doctrine [PA 13-16], claiming it is pre-textual because article 10, section 11 of the state constitution creates no specific duty to protect beaches and shorelines. [Pet. Br. 31-32] STBR fails to explain, however, why the state's management of its most valued natural resources under the doctrine would not include beach and shore management activities "for the benefit of the people." [PA 16 (citations omitted)][56] Indeed, it is a century-old principle that the State's obligation is to do so, as the court below and the caselaw explain.[57]

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[56] *See generally White*, 190 So. at 448-49 (noting "no custom more universal, more natural or more ancient, on the sea-coasts, … than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto.").

[57] [PA 13-16]; *see also, e.g., State v. Gerbing*, 47 So. 353, 356 (Fla. 1908) (noting that the state has the right to control sovereignty lands "for the benefit of the people of the state, as such right is as (Continued …)

Likewise, STBR demeans the Florida Supreme Court's acknowledgement of the "policy of the state to conserve and protect its natural resources and scenic beauty" in article II, section 7(a) of the Florida Constitution. [Pet. Br. 32] Its hollow claim that beach restoration does not "protect [the state's] resources and natural beauty" is a non-sequitur.

In short, the Florida Supreme Court's decision caused no change in Florida law. As the Court demonstrated, no common law right exists in Florida for littoral property to have continual and direct physical contact with the water. The Act, which protects and supplements the well-established littoral right of access to the water, is facially constitutional as the Court concluded in a principled way.

2. Florida's common law creates a littoral right to existing accreted properties, but does not create an unyielding, vested right in potential and speculative future accretions, particularly where the common law basis for the accretion doctrine is absent.

STBR and its amici characterize the Florida Supreme Court's decision as judicially confiscating

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essential to the sovereignty, to the complete exercise of police powers, and to the welfare of the people of the new states as of the original states of the Union.").

accretion rights, repeatedly confusing the matter by making it sound as if *existing* accreted property is being taken. A right to existing accreted property is not at issue in this case; STBR's members have made no such claim and, indeed, no accreted property exists abutting the properties of those members of STBR who own littoral parcels.

The issue, as the Florida Supreme Court made abundantly clear [PA 20, 34], is the nature of a claim for *future* accretions *under the Act*. STBR ignores this distinction, relying heavily on *Sand Key*, which specifically involved parties claiming the right to existing, actual accreted property. *Sand Key* did not involve the right to potential *future* accretions, which has not previously been addressed by Florida's common law or accretion precedents. Tellingly, STBR can point to no Florida common law decision that clearly establishes a vested property right to future potential accretions; none exist.

Indeed, as the Florida Supreme Court held below, the nature of a claim to potential future accretion cannot be a vested property right due to its contingent and non-possessory nature. [PA 20] It is merely an expectation that if the common law basis for the accretion doctrine continues in force, and if actual accretion occurs and is proven, the upland owner is entitled to it. *See, e.g., United States ex rel. TVA v. Powelson*, 319 U.S. 266, 282 (1943) ("the

sovereign must pay only for what it takes, not for opportunities which the owner may lose").[58]

STBR claims that *State v. Florida National Properties, Inc.*, 338 So. 2d 13 (Fla. 1976), is "indistinguishable" from the instant case. [Pet. Br. 28] Yet the context and holding of that case are easily distinguishable. At issue was a statute that bears no resemblance to the Act. Unlike the Act, which sets the property boundary at the current MHWL, the statute in *Florida National* allowed the public/private boundary line along a lake to be set *retroactively to that existing as of the date of statehood* (March 3, 1845), rather than setting the boundary at the current high-water mark on a shoreline. *Id.* at 14. This divested owners of land that had accrued from accretions and reliction from the date of Florida's statehood in 1845 forward, constituting almost half of plaintiff's property. Unsurprisingly, the Court concluded that the retroactive line set by the statute was unconstitutional, and did not meet "present requirements of society." *Id.* at 19.

Here, in contrast, because the ECL is set at the current (i.e., existing pre-project) MHWL, no littoral owner loses any property. In addition, the statute in *Florida National* involved no beneficial governmental program, like the Act, which addressed a critical state

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[58] STBR's claimed loss of future accretion is highly speculative and akin to those for which no right exists. *See Coastal Petroleum v. Chiles,* 701 So. 2d 619, 625 n.2 (Fla. Dist. Ct. App. 1997) (rejecting a speculative claim to oil lease royalties).

problem; instead, it set property boundaries in isolation without any commensurate benefit to upland owners or any paramount public purpose for doing so. Finally, STBR has presented to this Court two quotations from *Florida National*, both erroneously represented as "holdings" of the Florida Supreme Court. [Pet. Br. 28, 29] Both were quotations from the trial court's order that the Court did not expressly affirm.

STBR also overlooks that the common law basis for the accretion doctrine is simply inapplicable under the Act, as the Florida Supreme Court explained. [PA 34, 40] The right of potential future accretions, of course, is not a "constitutional" property right as STBR and its amici incant. Riparian/littoral rights are not mentioned in the federal or constitutions.[59] They are established by state law[60] and are subject to modification.[61] Florida has never held that an upland owner must be compensated for a claimed loss of the speculative right to future accretions; instead, the

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[59] The only constitutional-based responsibilities at issue in this case are the state's with respect to public trust lands. *See* Fla. Const. art. X, § 11; [PA 16].

[60] *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law").

[61] *See, e.g., Port of Seattle v. Or. & W. R. Co.*, 255 U.S. 56, 64 (1921) (noting a state that wholly subordinated riparian interests and allowed development below the highwater mark that entirely separated upland owners from the water).

right is recognized only for deprivations of existing accreted property (as in *Sand Key*).

A review of the common law basis for the accretion doctrine demonstrates these points. The common law basis for assigning the accretion right to the upland owner is based substantially on the equitable notion that because the owner bears the risk of erosion and loss of lands, he should receive the benefit of any accreted lands. These principles of risk-bearing and the "significant historical foundation" of the accretion doctrine were discussed in *Sand Key*, quoting Blackstone:

> And as to lands gained from the sea, either by *alluvion,* by the washing up of sand and earth, so as in time to make *terra firma;* or by *dereliction,* as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining … [T]hese owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss.

512 So. 2d at 936-37 (citing 2 W. Blackstone, Commentaries 261-62). Indeed, this Court has recognized the risk/benefit basis for accreted lands, noting that the right to accretions is based on "the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever

benefits they may bring by accretion[.]" *Banks v. Ogden,* 69 U.S. 57, 67 (1864).

Given the common law rationale for assigning accreted lands to upland owners, the Florida Supreme Court's reasoning logically follows: the Act relieves the upland owner of the erosion risk (which is shifted to the government) thereby removing the common law basis for the owner's equitable right to accretion. As Blackstone might put it, because upland owners are no longer "losers by the breaking in of the sea" the "possible gain" of accretion is no longer necessary as a "reciprocal consideration for such possible charge or loss." Because the accretion doctrine is not implicated under the Act, no deprivation of future accretion can occur.[62]

B. Even if the Florida Supreme Court's Decision Changed Florida's Common Law, It Did Not Violate the Federal Takings Clause.

Even if the Florida Supreme Court's decision could be characterized as a departure from its precedents, the decision results in no possible violation of the federal Takings Clause. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74,

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[62] The Florida Supreme Court noted that the other three bases for the accretion doctrine (*de minimis non curat lex*; community interest in convenience of having accretion right assigned to upland owners; and the necessity of preserving the right of access to the water) also had no application under the Act. [PA 34-35]

82-83 (1980). A change in law alone, radical or otherwise, cannot amount to a judicial taking unless the challenged decision effects a recognized "taking" under federal law. Because the decision below neither caused nor results in a recognized "taking" of property under federal law, no need exists to determine the existence or contours of a judicial takings theory.

1. No ouster or physical appropriation under *Loretto* occurred.

First, the decision results in neither a physical taking of real property nor an ouster.[63] None of STBR's members has had any of their real property physically taken or appropriated under the decision. Upland owners continue to own all property landward of the preexisting boundary line (MHWL) in its entirety. Nothing has changed. All pre-project, dry sandy upland property remains in the hands of upland owners. The decision affects no per se or categorical taking of property as required for a facial taking under federal law.

STBR claims that a taking of all of its members' littoral rights has occurred by statutory replacement of "constitutional riparian rights" with statutory ones,

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[63] *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982) (providing that a permanent physical installation involving "a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall" effected an unconstitutional taking).

and that this amounts to a "physical taking." [Pet. Br. 54] This characterization is erroneous and nonsensical. It is erroneous because the members' riparian rights are not now – nor have they ever been – "constitutional riparian rights." Riparian rights are defined by principles of state property law, as embodied in statutes and common law.[64] Riparian rights have been explicitly preserved and supplemented under the Act, not displaced. It is nonsensical because the decision does not "oust" the upland owners from their property, either in fact, or by totally eliminating beneficial uses. Rather, the upland owners – both before and after the decision – retain possession and all beneficial uses of their existing property.

2. No per se taking under *Lucas*, or regulatory taking under *Penn Central*, occurred.

Second, nothing here has eliminated "all economically beneficial use" of the property or has any meaningful adverse economic effect on the property's value or use.[65] STBR has not, and indeed could not in

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[64] *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (acknowledging Court's "traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments").

[65] *Compare Lucas*, 505 U.S. at 1007 (Beachfront Management Act, whose effect was to bar erecting any permanent habitable structures rendering two residential lots "valueless", is (Continued …)

good faith, contend that a deprivation of all economically viable use of its members' property has occurred; indeed, no meaningful deprivation could have occurred because the upland owners retain title to the same physical property with identical rights to use their properties and all waterfront characteristics intact as before the project.

STBR's claim that the project took property essentially by changing the private character of the beach to public is also wholly unsupported by the record. STBR's only witness, Mr. Lindsey, testified that the project might add 50 to 80 feet of dry sandy beach, but expressed no concern with prospective public use of the beach. [JA 223] Furthermore, he did not rebut testimony that the County had long maintained the beaches adjacent to STBR members' properties (since before 1990) as "high use areas." [JA 187, 190][66]

Indeed, the Florida Supreme Court's decision validating restoration projects, and the completed project here, both substantially and materially *benefit* upland owners. Upland properties were improved and

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compensable taking) *with Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 136 (1978) (historic landmark law "does not interfere in any way with the present uses of the Terminal.").

[66] Public beach access directly borders the property of one STBR member (Lindsey) and is very close to others. [JA 261 (sheet 7) (listing Spence, Alford, and Frost properties and 3 different Walton County TDC "beach access" areas within a 20-lot span)] The public regularly uses 55 beach and bay access points, 56 dune walkovers, and 350 trash receptacles permanently sited along the beaches. [JA 187-91, 193-94]

protected at no cost to their owners. Because the "whole purpose" of a beach restoration project "is to provide protection to the upland properties," it stands to reason that upland properties are substantially benefitted and their values enhanced rather than diminished in any meaningful way. [JA 76] In contrast, nothing in the record establishes a per se or categorical regulatory taking, nor can one plausibly exist where no diminution of use has occurred and the real property at issue has benefitted enormously from the restoration project.

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Given Florida's jurisprudence regarding the two "rights" upon which STBR bases its argument, the Florida Supreme Court's decision can hardly qualify as a "judicial taking" within any plausible definition of the doctrine. The decision merely involved the facial constitutionality of a long-standing state statute on an issue of first impression under the Act. It established no judge-made law that departs from well-established precedents. In analyzing the Act, the Florida Supreme Court was deferential to and thorough in its analysis of Florida's common law. The court reviewed the state's law of littoral rights – with particular focus on accretion and access – and determined that the Act does not facially depart from its own precedents or constitutional norms. Because no change in Florida law occurred – let alone a sudden, dramatic or unpredictable change – no purported "judicial taking" exits under STBR's formulation of the doctrine.

Indeed, this case provides no basis for exploring a judicial takings theory generally. Federal courts should not involve themselves in and second-guess the evolution of state common law, which can vary widely from state to state. Federalism principles counsel that state appellate courts interpreting their state's laws under state constitutional law principles should not be subject to a federal takings claim, particularly on novel issues of state law in cases of first impression. A state supreme court's decision on a debatable matter involving its own common law is not the type of confiscatory use of governmental power the Takings Clause envisions.

State supreme courts are better positioned to know and apply their precedents, and should not be subject to potential Takings Clause litigation and liability absent a clear and incontestable showing that they have abused their judicial authority in such an egregious way that it can be fairly concluded that the decision is plainly a wholly unprincipled and pretextual departure from obvious and well-established legal principles; in addition it must show that it can be fairly concluded that a taking of property via a judicial ouster or physical appropriation was the intended result. The Florida Supreme Court's decision, which has none of these attributes, falls easily within the norms of adjudication and is thereby a poor vehicle for consideration of a judicial taking theory.

II. STBR's Federal Takings Claim Should Not Be Considered Or, Alternatively, Is Deficient.

In Section II of its brief, STBR raises a federal takings challenge, asserting that the Act itself confiscates physical property, leaves littoral owners "with no common law littoral rights at all," and transforms constitution-based rights into statutory rights. [Pet. Br. 52-54] This Court should not entertain a federal challenge that was not passed upon below. Neither lower appellate court addressed a federal takings claim, instead relying solely on Florida law. Under these circumstances, it cannot be said that a federal question is presented; jurisdiction is lacking. *See Adams v. Robertson*, 520 U.S. 83, 86-87 (1997).

Even if STBR's claim were addressed, its assertion that establishing an ECL is a physical taking is borne out by neither the language of the Act itself nor its application in this case. First, the ECL is set at the pre-project MHWL and thereby could not divest STBR's members of any of their physical property. Indeed, STBR dropped its challenge to the placement of the ECL.

Second, the Act explicitly preserves the ownership and waterfront characteristics of upland property consistent with the common law's protection of water access, use and view over the water to the

navigable channel. The claimed loss of *all* littoral rights is simply incorrect.[67]

Third, STBR can point to no provision of the federal or state constitutions for a "constitutional" right to actual contact with the water and a right to future accretion. Its characterization of these rights as "constitutional" rights is, again, incorrect.

Fourth, STBR claims the right to exclude the public from the newly-created state-owned sand buffer between the ECL and the "post-nourishment MHWL" – a right it claims was "once enjoyed" by its members. [Pet. Br. 54-55] The new sand buffer over state sovereignty lands, however, did not previously exist, making it unclear how STBR's member could have previously enjoyed such a right. Rather, what STBR's members are actually claiming is a right of *ownership* in the newly-created sand buffer between the ECL and the "post-nourishment MHWL" – a bold assertion given that the pre-project legal boundary of their property extended seaward only to the (uncontested) ECL and no further. Its view that it is legally entitled to what would amount to a substantial economic windfall (beyond what the Act already

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[67] Even if STBR's characterization of the claimed rights of water contact and future accretion were legitimate, these "rights" are non-compensable components in the far larger bundle of property rights that Florida law explicitly preserves to upland owners. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002) (takings analysis "focuses … on the nature and extent of the interference with rights in the parcel as a whole").

accords them) via the transfer of improved state-owned property to its side of the ledger at no cost find no support in law, logic, or equity.

Finally, takings analysis requires a tangible calculation of actual loss. But here, STBR established no baseline record of its members' property interests before the project sufficient to demonstrate the asserted value of lost contact with the water or future accretion.[68] [JA 207-25] With respect to remedy, Mr. Lindsey, on behalf of STBR and its members, made no claim for compensation, but only sought to have the ECL removed. [JA 214-15] For each of these reasons, STBR's claim in Section II must fail.

III. STBR's Procedural Due Process Claim Is Deficient And Was Not Raised Below.

Finally, STBR raises in this Court for the first time a claim that the Act allows the establishment of the ECL without sufficient procedural due process guarantees. [Pet. Br. 59] Its claim is substantively deficient, and must fail for the threshold reason that

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[68] Rather, as the Environmental Assessment ("E.A.") in this case reflects, the project area here would continue to erode without beach restoration due to anticipated recurrent storms. [*E.A., Walton County/Destin Beach Restoration Project 2003,* Admin. Hearing Jt. Ex. 1 at ¶¶ 2.1.1 ("The No Action alternative allows nature to take its course, i.e., storms will continue to erode the beach and further threaten upland development"); 4.3.2 ("Continued erosion of the beaches and shorelines along the study area threatens coastal habitat important to many species."); 4.9.1 ("The beaches would continue to erode and provide less width for recreation")]

it was not raised or decided below. With only "very rare" exceptions, this Court lacks jurisdiction and will not consider claims not addressed or passed upon below. *See Adams*, 520 U.S. at 86-87. No legitimate reason exists why this Court should take up a previously unasserted procedural due process claim that STBR failed to present to the Florida courts below. This point is particularly true given that STBR abandoned its challenges to the ECL and to the "critically eroded" character of the project area, thereby effectively waiving any claimed procedural deficiency under the Act. [JA 53]

Even on the merits, however, the procedures afforded by the Act are sufficient. The Act provides for notice, which STBR's members received [JA 90], and an opportunity for a public hearing related to the surveying and setting of an ECL prior to the Board's decision. Fla. Stat. § 161.161(4). If an owner seeks to challenge the Board's decision to adopt an ECL, it may do so in the recognized appropriate forum. The Act further protects property owners by restricting recordation of the ECL until review is complete, or the time for seeking review has passed. Fla. Stat. § 161.181. STBR's procedural due process claim is empty given the substantial process available to challenge an ECL, which STBR abandoned.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX