No. 08-1151

In the
Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Respondents.

On Writ of Certiorari to the Florida Supreme Court

BRIEF AMICUS CURIAE OF CATO INSTITUTE, NFIB LEGAL CENTER, AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, the Cato Institute, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center), and Pacific Legal Foundation (PLF) respectfully submit this brief amicus curiae in support of Petitioner Stop the Beach Renourishment, Inc.[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts.

The NFIB Legal Center, a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business association,

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[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents approximately 350,000 member businesses nationwide. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

PLF was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights.

PLF attorneys represented property owners in this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), and *Lucas v. S. C. Coastal Council*, 505 U.S. 1003 (1992). PLF filed an amicus brief in support of the Petition for Certiorari in this case, 129 S. Ct. 2792 (2009), and participated as amicus curiae in the court below in support of Petitioner. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008).

SUMMARY OF ARGUMENT

In the opinion below, the Florida Supreme Court departed from long-established state law protecting the property rights of beachfront landowners. *Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102. As Justice Lewis noted in his dissent, the decision summarily altered the definition of littoral property that had governed in Florida: "In this State, the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no protection under Florida law and is merely some 'ancillary' concept that is subsumed by the right of access." *Id*. at 1122 (Lewis, J., dissenting). So drastic was the court's departure from settled precedent that it functionally eliminated fundamental constitutional protections that owners of beach property had relied on for almost 100 years.

This Court never has formally addressed the question of whether state court rulings eliminating formerly established property rights can effect a taking, or violate an owner's due process rights, under the United States Constitution. This Court has sanctioned, and applied, an analytical framework similar to the judicial takings doctrine in a variety of other contexts, holding that state court decisions, just like actions of the executive and legislative branches, can violate constitutional rights.

There is no textual or theoretical reason for this Court to deny property owners just compensation for a taking solely because the acting branch of government is judicial instead of executive or legislative. In fact, the realities of modern property law, including the authority of state courts to define background

principles of property law as recognized in this Court's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1029-30, necessitate that property owners be protected, via the judicial takings doctrine, against state court decisions that abrogate constitutional rights.

ARGUMENT

I

THE JUDICIAL TAKINGS DOCTRINE IS NECESSARY TO PROTECT THE CONSTITUTIONAL RIGHTS OF PROPERTY OWNERS

This Court captured the theoretical basis for the judicial takings doctrine—so named though it incorporates due process guarantees as well—in *Lucas*.[2] In that case, the Court recognized that certain basic principles of property ownership are so fundamental as to be beyond the reach of the state, unless the state is willing to pay the owner for his property. *Lucas*, 505 U.S. at 1029-30. This Court arrived at that holding in part by way of negative examples; that is, by pointing to certain uses of property that, historically, *never* were lawful (and thus, the regulation of which could not require just

[2] Justice Scalia's dissent in *Stevens v. City of Cannon Beach*, for example, contemplates the doctrine applying to both takings and due process under some circumstances. 114 S. Ct. 1332, 1335-36 (1994) (Scalia and O'Connor, JJ., dissenting). Others, such as Roderick E. Walston, advocate its application *only* to due process claims, despite the nomenclature. *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379, 434-36 (2001).

compensation), the Court distinguished those incidents of ownership that *always* were lawful. *Id*. at 1030-31.

However, *Lucas* offers little guidance as to which aspects of property fit into which category. "This ambiguity has provided states with a loophole in the Lucas rule large enough to circumvent the rule entirely, provided that state courts are willing to be rather creative in defining background legal principles." W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487, 1489 (2004). "States may thus attempt to avoid compensation altogether by announcing that under their background principles of state law, the property owner never had the property right she claims has been taken. Of course, state courts can pull off this ploy better than state legislatures." *Id*. at 1490.

It is this reality that makes the theory of judicial takings necessary for protecting property rights. It is true that the courts are better equipped to define what constitutes a *Lucas* background principle. This is because "legislatures are presumed to act prospectively, saying what the law shall be, while courts are presumed to decide questions retrospectively, saying what the law is and has been." *Id*. at 1491. But this dexterity, if uncabined by federal review, is not without peril:

> [W]hen state courts are understood to wield the power not only to declare the law, but also to make it, the Lucas rule's background-principles exception invites state courts to reshuffle property rights in ways that state legislatures cannot, potentially allowing the

> state to avoid paying compensation for takings of property.

Id.

A. Federal Courts' Reluctance To Apply the Judicial Takings Doctrine Encourages States To Restrict Property Rights

The federal courts' reluctance to apply the judicial takings doctrine sends a message to state legislatures to forego legislative changes in the definition of property rights, in favor of encouraging state courts to effect the same policy without exposing the state to liability for just compensation.

One such example is the public-versus-private dispute over Oregon's beaches. Until the late 1960s, "no question concerning the right of the public to enjoy the dry-sand area" of the beach had presented itself in Oregon. *State ex rel. Thornton v. Hay*, 462 P.2d 671, 674 (Or. 1969). This state of affairs lasted until 1967, "when the notoriety of legislative debates about the public's rights in the dry-sand area sent a number of ocean-front landowners to the offices of their legal advisers." *Id*. at 675.

In response to this heightened legal awareness, as well as this Court's respect for well-established understandings of private property interests in *Hughes v. Washington*, 389 U.S. 290 (1967), the Oregon legislature passed a law establishing the policy that the state, "through dedication, prescription, grant or otherwise," had the exclusive right to all "ocean shore" property, regardless of private ownership of upland

dry-sand areas. Or. Rev. Stat. § 390.610. The legislature was unambiguous: "[I]t is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of Oregon's ocean shore." Or. Rev. Stat. § 390.610(4). This mandate did not extend, however, to actually legislating the taking of private property. For as the Oregon Supreme Court noted, "[t]he state concedes that such legislation cannot divest a person of his rights in land." *Thornton*, 462 P.2d at 675 (citing *Hughes*, 389 U.S. 290).

The constitutional issues involved in such a legislative divestment were avoided, because the Oregon Supreme Court accomplished the state's aim itself in *Thornton*. *Thornton* involved an owner of private dry-sand beach property who sought to enclose his parcel. *Id*. at 672. The state challenged this proposed use, asserting it would frustrate the public's access to the beach. *Id*. Citing the legislature's "statute [that] codifies a policy favoring the acquisition by prescription of public recreational easements in beach lands," *id*. at 676, the court did what the legislature could not. It held the private owner had no superior right to his own land, and transformed the property at issue, and all similarly situated property statewide, from private to public without just compensation or due process. *Id*. at 678. This government sleight-of-hand, accomplished at the behest of the legislature via the court's "unexpected revival and modification of the English doctrine of custom," Lew E. Delo, *The English Doctrine of Custom in Oregon Property Law: State ex rel. Thornton v. Hay*, 4 Envtl. L. 383, 384 (1974), starkly illustrates the need for the judicial takings doctrine.

The government should not be encouraged, or permitted, to avoid paying just compensation by way of formalistic trickery. State courts, no less than state legislatures, declare what the law is. This is a fundamental tenet of American jurisprudence, recognized by this Court in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."). Since *Erie* stands for the proposition that state courts are permitted to "make real law on behalf of the state," Sarratt, *supra*, at 1496, a state court's departure from established law must be treated by federal courts "as wielding real lawmaking power—including the ability to take property." *Id*. at 1497.

B. Federal Courts' Avoidance of the Judicial Takings Doctrine Is Particularly Harmful in the Context of Beachfront Property

The judiciary's ability to wield its power to make law is pronounced in property rights cases involving beach property, where judge-made law of custom governs. *See* William Blackstone, *Commentaries on the Laws of England*, Book II, ch. 17 (1765). Employing "custom as an end-run around *Lucas*," some state courts have "obliterated constitutional requirement[s] (whether articulated in a takings or due process idiom)" relating to property rights by invoking common law principles of custom that the courts themselves have developed. David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1438-39, 1442-43 (1996) (citing *Public Access Shoreline Haw. v. Haw.*

County Planning Comm'n, 903 P.2d 1246 (Haw. 1995); *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993)).

For example, in *Stevens*, owners of beachfront property in Oregon sought a permit to erect a seawall on their privately owned portion of the beach. When the permit was denied, the property owners brought suit, alleging the denial amounted to a taking of property under the Fifth and Fourteenth Amendments. A state trial court, followed by an Oregon appeals court, 835 P.2d 940 (Or. Ct. App. 1992), and the Oregon Supreme Court, 854 P.2d at 456, all rejected the takings claim.

The Oregon Supreme Court's basis for this rejection was its declaration that as a matter of state property law, the owners never possessed a right to their land superior to the public's right of access to the dry-sand area of the beach. 854 P.2d at 453-54. Only one year after this Court's decision in *Lucas*, the Oregon Supreme Court was cognizant enough of that holding's implications to broadly assert that Oregon's common law of custom satisfied *Lucas*'s focus on background principles. *Id*. at 456.

As *Stevens* illustrates, in the absence of federal review, state courts are free to fashion whatever rules they choose without being cabined by constitutional boundaries. That is, property rights amount to whatever a state court declares property rights, via background principles, to be. Justice Scalia, joined by Justice O'Connor in dissenting from this Court's denial of certiorari in *Stevens*, recognized the potential for state courts to overstep their bounds in their roles as definers of background principles: "Our opinion in

Lucas, for example, would be a nullity if anything that a state court chooses to denominate 'background law'–regardless of whether it is really such–could eliminate property rights." *Stevens v. City of Cannon Beach*, 114 S. Ct. at 1334 (Scalia and O'Connor, JJ., dissenting). The only solution to this problem is for the federal courts to hold all branches of government responsible for adhering to the mandates of the United States Constitution. *Chicago Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 234 (1897).

C. Federal Courts, Not State Courts, Should Define the Contours of the Takings and Due Process Clauses

Writing in the Virginia Law Review in 1990, Barton H. Thompson, Jr., authored the seminal article on the realities necessitating the judicial takings doctrine. Thompson's article identifies the need for federal courts to apply the judicial takings doctrine, focusing specifically on the importance of legal determinacy. Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1496-98 (1990). Because sudden changes from established precedent often are a signal that state courts have abdicated their roles as the "generally less political" branch of government, the public can view these changes with skepticism: "Justice Stewart's suggestion that judicial changes in property law are takings only when 'sudden' and quite unpredictable may have been designed partially to ferret out the more questionable judicial changes." *Id.* at 1496-97 (citing *Hughes,* 389 U.S. at 296-97 (Stewart, J., concurring)). While slow, gradual changes in the common law assure property owners that legal considerations, not political ones, dictated a ruling,

"[n]o such assurances accompany a sudden and quite startling judicial shift in property rights." *Id*. at 1497.

Thompson's article is among the earliest, if not the first, to address scholarly opposition to the judicial takings doctrine. He writes that the "few scholars to have seriously addressed the issue have generally argued that it would be catastrophic to subject the courts to the same constitutional constraints as the legislative and executive branches, but with little illumination as to why." *Id*. at 1453. There is nothing in the text of the Fifth or Fourteenth Amendments that would deny an application of the judicial takings doctrine. While nothing in the Constitution's language compels such application, the "broad language certainly does not preclude application to judicial changes in property rights." *Id*. at 1456. As outlined in Part II *infra*, this textual imprecision has done nothing to preclude this Court's application of due process guarantees to the state courts. Nor does the fact that the courts have no "fiscal purse" of their own, *id*. at 1456, invalidate the doctrine, for "the executive branch also lacks a separate purse and yet there is no doubt that the fifth amendment applies to at least some executive takings." *Id*. at 1456, n.22.

The main focus of Thompson's article, though, is the "normative pulls and counterpulls that have shaped our takings jurisprudence." *Id*. at 1454. To this end, he returns repeatedly to the dangers of allowing state courts, charged with defining themselves what is and isn't property under *Lucas*, also to serve as final arbiter of the validity of these definitions under the United States Constitution. The other branches of government recognize that "[c]ourts

have the doctrinal tools to undertake many of the actions that legislatures and executive agencies are constitutionally barred from pursuing under the takings protections—and pressure is mounting for courts to use those tools." *Id*. at 1451. Interest groups, as well, are aware of the lack of boundaries placed on state judiciaries' treatment of property: "Faced by growing environmental, conservationist, and recreational demands, for example, state courts have recently begun redefining a variety of property interests to increase public or governmental rights, concomitantly shrinking the sphere of private dominion." *Id*.

These pressures are likely to increase. "Indeed, while paying lip service to stare decisis, the courts on numerous occasions have reshaped property law in ways that sharply constrict previously recognized private interests." *Id*. Perversely, this Court's opinion in *Lucas*, offering greater protections for owners of private property, perhaps has left state courts even more free to effect takings and deny due process, as they step in where legislatures and executives now are more afraid to tread. This Court should set boundaries for such state court action, and apply the judicial takings doctrine to decisions of state judiciaries that violate property owners' constitutional rights.

II

THE CONSTITUTION PROTECTS CITIZENS FROM STATE COURT DECISIONS THAT VIOLATE GUARANTEED LIBERTIES

In the first opinion to incorporate the Federal Takings Clause against the states, this Court explicitly held that incorporation applies to state courts as well as state legislatures and executives. *Chicago Burlington & Quincy Railroad Co.*, 166 U.S. 226. In *Chicago Burlington*, this Court held that "a judgment of a state court . . . whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States." 166 U.S. at 241. *Chicago Burlington* declined to differentiate between takings and due process violations committed by state legislatures, and those effected by state courts: "[T]he prohibitions of the [Fourteenth] amendment refer to all the instrumentalities of the state—to its legislative, executive, and judicial authorities." *Id*. at 233. In this Court, for more than a century, "the final judgment of a state court is the act of the state for due process and takings purposes." Walston, *supra*, at 426. In property rights cases, then, the idea that state courts can violate due process guarantees, and take property, is as old as the incorporation doctrine itself.

The judicial takings doctrine finds analogues in other Court decisions holding that sudden judicial departures from settled state law violate citizens'

rights as guaranteed by the United States Constitution. For example, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court considered a Florida Supreme Court decision upholding a state statute permitting counties to seize the interest accruing on an interpleader fund paid into by private citizens. *Id.* at 155-56. As in the present case, the Court's analysis focused not as much on the relevant Florida statute as on the Florida Supreme Court's opinion interpreting that statute. This Court found that the Florida court's holding was unconstitutional, and that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as 'public money' because it is held temporarily by the court." *Id.* at 164. This Court concluded with a statement precisely on point for the present case: "[A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Id.*

Similarly, in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court was faced with a constitutional challenge to a state court decision that departed significantly from established jurisprudence governing a basic right. In *Bouie*, the South Carolina Supreme Court created an entirely new construction of a criminal trespass statute in order to uphold the convictions of two alleged trespassers. *Id.* at 362. This interpretation was such a departure from settled state law that this Court held it amounted to the imposition of an ex post facto law in violation of the petitioners' due process rights. *Id.* *Bouie* held that a state may not avoid constitutional restrictions on its power merely by delegating the restriction to the courts instead of

having them instituted by the elected branches: "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Id*. at 353-54.

Several of this Court's opinions in civil rights cases of the 1950s and 1960s make no distinction between unconstitutional actions of state legislatures or executives and those of state judiciaries. In *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958), this Court vacated as unconstitutional a state court order enjoining NAACP activities. The *Patterson* Court found that abridgements of constitutional rights "may inevitably follow from varied forms of governmental action." *Id*. at 461. Among these state actions are decisions of state courts: "It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." *Id*. at 463. Six years after *Patterson*, this Court reaffirmed its holding by again striking down as unconstitutional, on due process grounds, a state court order that prohibited the NAACP from operating in Alabama. *NAACP v. Ala. ex rel. Flowers*, 377 U.S. 288, 306-08 (1964).

This Court's First Amendment jurisprudence is particularly notable for holding state judiciaries accountable for constitutional violations. In *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971), this Court vacated an Illinois court order that enjoined an advocacy group from distributing pamphlets highlighting the real estate practice of racial

"blockbusting," holding the order was an unconstitutional restriction of free speech. *Id*. at 416, 420. Similarly, in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court was presented with a state court's award of damages in a putative libel case brought by a public official. It was not an ordinance or statute, but ultimately the "judgment of the Alabama courts," that was subject to this Court's "constitutional scrutiny." *Id*. at 265. This Court held that the state court's actions violated the First Amendment. *Id*. at 292.

These cases, drawn from different factual settings and dealing with several different constitutional liberties, highlight the manner in which this Court has interpreted the United States Constitution to protect persons from the actions of state courts. This Court should apply the same constitutional protections to owners of private property.

CONCLUSION

"The United States Supreme Court's reluctance to apply the takings protections to courts proves particularly puzzling [] when one compares the Court's treatment of other constitutional restrictions that, unlike the takings protections, are essentially noneconomic." Thompson, *supra*, at 1456. This Court has recognized, and condemned, the disparity between the judicial treatment of property rights and that of other constitutional liberties. "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or

Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

This Court should end this relegation and extend constitutional protections to owners of property threatened by the actions of state courts.

DATED: August, 2009.

Respectfully submitted,

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