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 Petition for Writ of Certiorari to the Florida Supreme Court

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

NICHOLAS M. GIESELER
Of Counsel

JAMES S. BURLING
*STEVEN GEOFFREY GIESELER
**Counsel of Record*
Pacific Legal Foundation
1002 SE Monterey Commons Boulevard, Suite 102
Stuart, Florida 34996
Telephone: (772) 781-7787
Facsimile: (772) 781-7785

Counsel for Amicus Curiae Pacific Legal Foundation

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to this Court's Rule 37.2, Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioner.

Written consent to the filing of this brief has been granted by counsel for Petitioner, and counsel for Respondent, Florida Department of Environmental Protection. Counsel for Respondents, Walton County and City of Destin, did not respond to amicus's request for consent, necessitating the filing of this motion.

DATED: April, 2009.

NICHOLAS M. GIESELER
Of Counsel

JAMES S. BURLING
*STEVEN GEOFFREY GIESELER
**Counsel of Record*
Pacific Legal Foundation
1002 SE Monterey Commons
Boulevard, Suite 102
Stuart, Florida 34996
Telephone: (772) 781-7787
Facsimile: (772) 781-7785

Counsel for Amicus Curiae
Pacific Legal Foundation

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 AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner Stop the Beach Renourishment, Inc.[1]

Pacific Legal Foundation (PLF) was founded over 30 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 represented property owners 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 participated as amicus curiae in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), and *Haw.*

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[1] Counsel of record for all parties received notice of amicus curiae's intention to file this brief. Due to misinterpretation of the Court's docket entry extending time to file a response to the petition (and thus the due date for the amicus brief), counsel received six days' notice of amicus's intent to file. Letters evidencing consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms 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 amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). PLF attorneys appeared 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).

Because of its history and experience with regard to private property rights and the limits on government power to take property without paying just compensation, PLF believes its perspective will aid this Court in considering the petition.

SUMMARY OF ARGUMENT

In the opinion below, the Florida Supreme Court departed from long-established state law protecting the property rights of beachfront landowners. *Id.* So drastic was this departure from settled precedent that it functionally eliminated fundamental constitutional protections that owners of beach property had relied upon for nearly a century. As Justice Lewis of the Florida Supreme Court noted in his dissent from the majority opinion, the court's holding made vanish, without any hearing or the payment of just compensation, the entirety of the beachfront owners' littoral rights. *Id.* at 1122 (Lewis, J., dissenting).

Despite occasional language on the matter, this Court never has formally addressed the question of whether state court departures from established principles of property law can effect a taking, or violate an owner's due process rights, under the Federal Constitution. This Court has sanctioned, and applied, such an approach in a variety of other contexts, holding that state court decisions, just like actions of the

executive and legislative branches, can violate persons' constitutional rights.

This Court should grant the petition in order to answer the question, without ambiguity, of whether owners of private property may avail themselves of similar protections. There is no textual or theoretical reason to deny property owners this protection. In fact, the realities of modern property law, particularly after this Court's opinion in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), illustrate the need for property owners to be protected against state courts that abrogate fundamental property rights via the judicial takings doctrine.

REASONS FOR GRANTING THE WRIT

I

THE FLORIDA SUPREME COURT'S OPINION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED BY THIS COURT

A. Justices of This Court Have Addressed the Question of Judicial Takings in Concurring Opinions and Dissents

The Fourteenth Amendment to the United States Constitution, incorporating the Fifth Amendment's protections, forbids states from taking private property for public use without just compensation. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 242-43 (1897). The most obvious of these prohibited takings

occurs when a government entity physically confiscates, occupies, or invades private property. *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). So too must government pay just compensation when it regulates property to the extent that it is taken for constitutional purposes. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-541 (2005).

While these takings of private property typically arise from legislative or administrative acts, the question remains whether actions of state courts can give rise to similar government liability. Known colloquially as the doctrine of "judicial takings"—though such scenarios implicate both the Takings Clause and guarantees of due process—this specific question has been asked of this Court before. Fifteen years ago, this Court denied a petition for writ of certiorari filed by the owners of beachfront property in Oregon. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S. Ct. 1332 (1994). The petitioners in *Stevens* alleged that the Oregon Supreme Court's application of the doctrine of customary use effected a taking of their private property, without just compensation, in violation of the Fifth and Fourteenth Amendments.

In dissenting from the Court's denial, Justice Scalia, joined by Justice O'Connor, invoked this Court's opinion in *Lucas*, 505 U.S. 1003, for the proposition that certain principles inherent in the right to security in private property are so fundamental as to require payment when they are abrogated by state action. *Stevens*,114 S. Ct. at 1334 (Scalia, J., dissenting). In Justice Scalia's reading, this holds true whether the

state actor applying such restrictions is the executive, the legislature, or the judiciary: "No more by judicial decree than by legislative fiat may a State transform private property into public property without just compensation." *Id*.

Justice Scalia's dissent recognized the general rule that "the Constitution leaves the law of real property to the States." *Id*. However, "just as a State may not deny rights under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law." *Id*. (citation omitted). Justice Scalia concluded that he would grant the petition to determine whether the lower court's ruling violated the property owners' due process rights. *Id*. at 1335-36. He also wrote that he would apply this theory of constitutional protection to takings claims in general. *Id*. This, even though the petition was founded entirely on a state court decision, implicating no split among federal circuits.

There are opinions of this Court that mirror Justice Scalia's view of the validity of the judicial takings doctrine. The clearest and most influential opinion of the kind is Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). In *Hughes*, an owner of upland property sought a determination of the ownership of accretions that had gradually formed along her beachfront property. *Id*. at 291. The land was conveyed to the landowner prior to the formation of what became the State of Washington. *Id*. At the time of the conveyance, the common law rule was that an owner of property bordering the ocean had the right

to include within his title any accretion gradually built up by the movement of the tides. *Id*.

This Court considered the issue of who owned the accreted land—the state or the upland private owner—and held that the upland owner was to remain the sole owner of the property. *Id*. at 294. In his concurrence, Justice Stewart emphasized that property owners have valid claims under the Takings Clause where state courts suddenly depart from settled property law to the detriment of private owners:

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Id at 296-97 (Stewart, J., concurring).

Justice Lewis, dissenting from the Florida Supreme Court's opinion in the case below, shared many of the concerns elucidated by Justice Stewart in his concurrence in *Hughes*. Justice Lewis wrote that the majority's decision summarily altered the definition of littoral property that had governed in

Florida for nearly a century: "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." *Stop the Beach Renourishment*, 998 So. 2d at 1122. Justice Lewis recognized that it was the Florida Supreme Court's novel interpretation of the state statute in question, and not the statute itself, that violated the well-established constitutional rights of the beachfront property owners. Writing of these owners' fundamental right to have their property maintain contact with the water, Justice Lewis wrote that "[t]he majority now avoids this inconvenient principle of law—and firmly recognized and protected property right[s]" by ignoring decades of settled state law on the matter. *Id.* at 1123. This Court should grant the petition to determine whether such a decision effects a taking of private property and violates the due process rights of the property's owners.

B. In Several Contexts, This Court Has Recognized That State Court Departures from Established Law Can Violate Fundamental Rights

Justice Stewart's concurrence in *Hughes* finds analogues in other Court decisions holding that sudden judicial departures from settled state law violate citizens' rights as guaranteed by the Federal Constitution. For example, in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), this Court considered a Florida Supreme Court decision upholding as constitutional a state statute permitting

counties to seize the interest accruing on an interpleader fund paid into by private citizens and maintained by county courts. *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 applied 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.* In the *Bouie* Court's view, 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.

These are but two examples of this Court's decisions that extend constitutional protections to judicial actions. There are perhaps scores of similar opinions. *See, e.g., NAACP v. Ala. ex rel. Flowers*, 377 U.S. 288, 306-08 (1964) (Alabama courts' injunction against NAACP operations in state violated Due Process Clause); *NAACP v. Ala. ex rel. Robinson*, 357 U.S. 449, 463 (1958) ("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."). This Court's First Amendment jurisprudence is particularly notable for holding state judiciaries accountable for constitutional violations, where state courts "assert[ ] retroactively" that private actors had no right to exercise their First Amendment liberties. *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971) (state court injunction forbidding distribution of pamphlet violated First Amendment); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175 (1968) (state court injunction against rally violated right to free speech); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (vacating state court restriction on publication).

II

THIS COURT SHOULD GRANT THE PETITION AND APPLY CONSTITUTIONAL PROTECTIONS TO PROPERTY OWNERS WHOSE RIGHTS ARE ABROGATED BY JUDICIAL ACTION

This Court captured the theoretical basis for the judicial takings doctrine in its opinion in *Lucas*. 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 compensation), the Court distinguished those incidents of ownership that *always* were lawful. *Id*. at 1030-31.

Despite this distinction, this Court's *Lucas* opinion does not establish 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. As Sarratt notes, the job of defining what constitutes a *Lucas* background principle, existing perhaps for centuries, is more appropriate for the judiciary. 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. Sarratt writes:

> [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.

Premising his conclusion in part on this Court's holding 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."), Sarratt views federal application of the judicial takings doctrine as necessary. Sarratt, *supra*, at 1496-97. Since *Erie* stands for the proposition that state courts are permitted to "make real law on behalf of the state," *id*. 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.

As Professor David J. Bederman has written, 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. David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1438-39 (1996). Citing "custom as an end-run around *Lucas*," Bederman writes of examples of state supreme courts having "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.[2] *Id.* at 1442-43. The danger in beach cases like *Stevens* and the case below, generally, is that in the absence of federal review, state courts are free to fashion whatever rules they choose without being cabined by constitutional boundaries.

Writing in the Virginia Law Review in 1990, Barton H. Thompson, Jr., authored what is widely recognized as the "seminal article on the judicial takings problem." *See* Sarratt, *supra*, at 1494.

[2] Whether judicial takings challenges are properly grounded in takings or due process law, or both, is unsettled even among those who are proponents of the general doctrine. Justice Scalia's *Stevens* dissent, for example, contemplates the doctrine applying to both takings and due process under some circumstances. 114 S. Ct at 1335-36. Others, such as Roderick E. Walston, advocate its application only to due process claims. *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 Utah L. Rev. 379, 434-36 (2001).

Arguing, two years before *Lucas*, that state courts were too eager, and too able, to take private property without repercussion, Thompson noted 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 these tools. 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. 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.

Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1451 (1990).

In the nearly two decades since Thompson wrote these words, the pressures he identified only have increased. 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 of private property, as they step in where legislatures and executives now are more afraid to tread. This Court should grant the petition in order to set boundaries for such state court action, and to

finally and unambiguously answer the question of the scope of the judicial takings doctrine.

CONCLUSION

As Thompson wrote in 1990, "[t]he United States Supreme Court's reluctance to apply the takings protections to courts proved 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. "Even where the Court has concluded that a specific noneconomic protection does not directly apply to the judiciary, the Court has sometimes extended the protection to judicial actions, using a more general constitutional provision." *Id*. at 1457. This Court should grant the Petition for Writ of Certiorari to fully consider extending such constitutional protection to owners of property threatened by the actions of state courts.

DATED: April, 2009.

Respectfully submitted,

NICHOLAS M. GIESELER
Of Counsel

JAMES S. BURLING
*STEVEN GEOFFREY GIESELER
**Counsel of Record*
Pacific Legal Foundation
1002 SE Monterey Commons
Boulevard, Suite 102
Stuart, Florida 34996
Telephone: (772) 781-7787
Facsimile: (772) 781-7785

Counsel for Amicus Curiae
Pacific Legal Foundation