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 Supreme Court of Florida

BRIEF OF THE EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation founded in 1981. For over twenty years it has defended principles of limited government, individual liberty, and private property. To ensure the guarantees of individual liberty enshrined in our written Constitution, Eagle Forum ELDF advocates fidelity to the text of the Constitution. Eagle Forum ELDF has a longstanding interest in defending private property rights, which are expressly protected by the Fifth and Fourteenth Amendments to the Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

The protection of private property is one of the great blessings of civil society and was a motivating force behind the design of the United States Constitution. In keeping with a principle deeply rooted in common and natural law, the Fifth Amendment to the United States Constitution protects property owners from uncompensated takings of their private property, regardless of whether the taking occurs at the hands of a legislature, an executive, or a court. The text and history of the Fifth Amendment—and its subsequent

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[1] This brief is filed with the written consent of all parties. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

incorporation against the states through the Fourteenth Amendment—make clear that a taking has occurred where, as here, a court decision physically deprives an owner of real property in a manner that is inconsistent with fundamental property rights that have been recognized since the Founding. Although state courts and legislatures retain the power to alter their laws regulating property rights, that power is subject to constitutional limitations. The constitutional term "property" is not simply an elastic word that the states are free to redefine at will. In particular, states cannot abolish longstanding property rights without paying just compensation.

Here, the Florida Legislature passed a law empowering local governments to sever a beachfront property owner's contact with the water by fixing what had previously been a dynamic property boundary—the mean high water line—in place, and by dumping sand seaward of the new property line to create a public beach between the owner's (now landlocked) property and the water. In the decision below, the Florida Supreme Court held that no compensation was due for this physical invasion of the owners' property because the rights the owners asserted did not exist in the first place. The court suggested that Florida case law had rarely described "the exact nature" of littoral property rights "in detail." Pet. App. 18. Under the guise of supplying that missing "detail," the court proceeded to define out of existence fundamental property rights recognized by more than a century of common law and tradition.

To hold that a state government may evade the limitations of the Takings Clause by doing through

judicial fiat what it clearly may not do through executive action or legislation would be inconsistent with the text and history of the Takings Clause and would prevent its meaningful enforcement. The Florida Supreme Court's decision should be reversed.

ARGUMENT

I. THE TEXT AND HISTORY OF THE TAKINGS CLAUSE MAKE CLEAR THAT THE JUDICIARY IS NOT EXCLUDED FROM ITS REACH.

Section 1 of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." This Court has held that this provision specifically incorporates the Fifth Amendment's Takings Clause against the states. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

1. The Fifth Amendment, in turn, provides that private property shall not be taken for public use "without just compensation":

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence

> to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. In deciding whether that provision applies here, the Court must ascertain its "normal and ordinary" meaning. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). The normal and ordinary meaning of the Takings Clause is not limited to any specific mechanism of taking property, nor is it confined to any specific branch or instrumentality of government. It is written in the passive voice and states simply that just compensation is required whenever "private property" is "taken for public use." That broad language is in contrast to other provisions of the Bill of Rights directed at specific governmental actors. The First Amendment, for example, begins with "Congress shall make no law," and the Sixth and Seventh Amendments are plainly directed at the conduct of court proceedings.

3. Contemporaneous dictionaries and usage confirm that the Eighteenth- and Nineteenth-Century meanings of "private," "property," and "taken" are similar to the modern meanings and that even the narrowest conception of "private property" being "taken" covers confiscation of land of the type that occurred in this case. "Private" meant personal, individual, and essentially non-public. 2 Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) ("Particular; not relating to the

publick"); Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (reprinted 1989) [*hereinafter* Webster 1828] ("Individual; personal; in contradistinction from public or national").

"Property" had a broad range of meanings and was used by the founders in different ways. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 826-27 (1995). For example, in a 1792 essay entitled *Property*, James Madison distinguished between property "in its particular application" and in "its larger and juster meaning." James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, *reprinted in* James Madison, WRITINGS 515 (Jack N. Rakove ed., 1999) [hereinafter Madison, WRITINGS]. The narrower definition was "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual"; the broader definition included other civil rights. *Id*. Webster's 1828 dictionary defined property as "[t]he exclusive right of possessing, enjoying and disposing of a thing," and "[t]he thing owned; that to which a person has the legal title, whether in his possession or not." Webster added that "the foundation of man's property in the earth and in all its productions" came from "the beginning of the world," when "the Creator gave to man dominion over the earth," and that "It is one of the greatest blessings of civil society that the property of citizens is well secured." Webster 1828; *see also* 2 Timothy Cunningham, A NEW AND COMPLETE LAW DICTIONARY (2d ed. 1771) ("Property is the highest right that a man hath, or can have to any thing, and no ways depending upon

another man's courtesy."); 2 Johnson ("[r]ight of possession" or "possession held in one's own right").

"Take" had numerous meanings, just as it does now, and in relation to property it referred broadly to possession, often to the exclusion of another. Webster's first definition of "take" is "[i]n a general sense, to get hold or gain possession of a thing *in almost any manner*, either by receiving it when offered, or by using exertion to obtain it." Other definitions include "To take from, to deprive of … to detract; to derogate." Webster 1828 (emphasis added). *See also* 2 Johnson ("To seize what is not given"; "11. To exact"; "12. To get; to have; to appropriate"; "48. To separate for one's self from any quantity; to remove for one's self from any place."; "65. *To* TAKE *away*. To deprive of.") (original emphasis).

The natural and ordinary reading of the words "nor shall private property be taken" therefore connotes a broad prohibition against depriving an owner of something he possesses and is not limited to acts of the legislature or the executive. A contrary interpretation would require the Court to add limitations to this broad language that it does not contain, thereby violating well-settled principles of constitutional construction. *See, e.g.*, *Heller*, 128 S. Ct. at 2821 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope to broad."). Essentially, respondents would have the Court read this provision as stating "nor shall private property be taken by the Legislature or by the Executive."

4. Such an interpretation would be entirely inimical to the understanding of fundamental rights shared by the founding generation. The founders recognized "property" as a fundamental, pre-political right, and the protection of property as one of the core functions of government. The right to security in one's property was confirmed in the Magna Carta, in a provision that resembles the Fifth Amendment's Due Process Clause. MAGNA CARTA § 29 (1297) ("No freeman is to be … disseised of his free tenement … save by lawful judgment of his peers of by the law of the land."). As Blackstone explained, property was the "third absolute right, inherent in every Englishman" (the other two being life and liberty). 1 William Blackstone, COMMENTARIES *138. John Locke observed that the very purpose of civilized society, and the reason why one would leave the "State of Nature," was "the mutual *Preservation* of . . . Lives, Liberties and Estates, which I call by the general Name, *Property*." John Locke, TWO TREATISES ON GOVERNMENT 350 (Peter Laslett ed., 1988) (1690).

The principle that just compensation was required whenever a government took private property was "deeply embedded in both the common law and natural law traditions." Michael W. McConnell, *Contract Rights and Property Rights*, 76 CAL. L. REV. 267, 281 (1988) (citing Blackstone, Grotius, Pufendorf, Burlamaqui, Vattel and Van Bynershoek); *see also* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 54-55 (1964) (similar, citing same authorities); *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (invoking natural and positive law reasoning in support of its holding that the state legislature could

not pass legislation transferring property from one citizen to another without just compensation: "It is inconsistent with principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary to both the letter and spirit of the Constitution.").

5. Those common and natural law principles were central to the political theory implemented by the founders in the Constitution. Scholars have observed that Blackstone and Locke, in particular, had an enormous degree of influence on the founders. *See, e.g.*, Richard A. Epstein, TAKINGS 29 (1985) ("It is very clear that the founders shared Locke's and Blackstone's affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights."); James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 673, 703 (2008) (noting the influence of Locke). "Critics as well as admirers observe that the American constitutional scheme was designed, in large part, for the protection of private property. . . . The protection of private property was a nearly unanimous intention among the founding generation." McConnell, 76 CAL. L. REV. at 270.

For example, while debating apportionment of representation in the legislature, Gouverneur Morris argued that property should be taken into account, as property was "the main object" of society and government. James Madison, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 211-2 (Gaillard Hunt & James Brown Scott, eds.

1920) (1787). Echoing Locke's arguments, Morris stated that "[t]he savage State . . . was only renounced for the sake of property which could only be secured by the restraints of regular government." *Id.* at 212. John Rutledge spoke up immediately afterward, to register his agreement with Morris that "Property was certainly the principal object of Society." *Id.*; *see also id.* at 215 ("[P]roperty was the only just measure of representation . . . the great object of Govern^{t};the great cause of war; the means of carrying it on." (quoting Pierce Butler)); 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 302 (Max Farrand rev. ed. 1966) ("One great objt. of Govt. is personal protection and the security of Property." (quoting Alexander Hamilton)).

6. Moreover, the founding generation specifically recognized that courts could deprive individuals of property, just as the legislature of executive. For example, the *Essex Result*, a critique of the proposed Massachusetts Constitution of 1778, and an influential document in the later drafting of the United States Constitution,[2] warned more generally of the threat to property rights that would result from the combination of the judicial power with the executive:

> [T]he subject would then have no permanent security of his person and property. The executive power would

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[2] The *Essex Result* is described as "the first clear formulation of the theory [of separation of powers] which was to become the basis of the Federal Constitution." *See* M.J.C. Vile, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 150 (1967).

> interpret the laws and bend them to his will; and, as he is the judge, he may leap over them by artful constructions, and gratify, with impunity, the most rapacious passions

Essex Result (1778), *reprinted in* Theophilus Parsons, MEMOIR OF THEOPHILUS PARSONS 359, 374 (1859). Similar dangers would result from the combination of the legislative and judicial powers, the *Essex Result* warned, as judges could make retrospective laws with impunity. *Id.* at 373-74.

7. The drafting history of the Fifth Amendment confirms that the Takings Clause was designed to guard against a range of potential misdeeds that could be committed by any branch of the government, including the courts. The Takings Clause was drafted by James Madison and is the only provision of the Bill of Rights not proposed by any state. Treanor, 95 COLUM. L. REV. at 791 (citing Edward Dumbauld, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 161-63 (1957)); Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991) (same, citing Dumbauld). Madison's *Federalist No. 10* explains his view that "factions"—particularly those created by the unequal distribution of property—had great potential to destabilize governments and that the United States government should be structured as a republic rather than a democracy so as "to break and control the violence of faction." THE FEDERALIST NO. 10, at 77, 79 (James Madison) (Clinton Rossiter ed., 1961).

Madison's writings reflect two overarching concerns embodied in the Takings Clause: (1) the desire to have an explicit bar against uncompensated

takings by the federal government, and (2) the desire to make a strong and explicit statement of national intent to respect property rights that would educate the public and would give future majorities pause before they violated property rights. *See* William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 710-12 (1985).

In his speech introducing the proposed Bill of Rights to Congress, Madison explained that a written Bill of Rights was desirable because, despite structural protections written into the Constitution, the potential for abuse of power still remained. 1 ANNALS OF CONG. 431, 437 (1789). The greatest danger, he stated, was "in the body of the people, operating by the majority against the minority." *Id.* As a further safeguard against that danger, Madison argued, "paper barriers" against certain abuses might inspire respect:

> It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention. . . . [Y]et, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be otherwise inclined.

Id. In his essay *Property*, Madison reflected a similar sentiment and directly invoked the Takings Clause. In *Property*, Madison argued that the United States government might take pride in its

commitment to property reflected in the Takings Clause, but cautioned that the government would dishonor its commitment to respect property rights if it did not also honor a broader range of liberties such as freedom of speech and conscience. Madison, WRITINGS 517; *see also* Treanor, 94 YALE L.J. at 712-13. The historical record thus evinces a clear intent to provide the broadest possible protection of private property rights from government encroachment.

8. Early Nineteenth-Century experience confirms that the understanding of property as a natural, fundamental, pre-political right survived well past the founding. Commenting on the Takings Clause, in 1833, Joseph Story observed that it "is an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1784 (1833) *See also* 2 James Kent, COMMENTARIES ON AMERICAN LAW 256 (1827) ("The right of property, founded on occupancy, is suggested to the human mind, by feeling and reason, prior to the influence of positive institutions."). Without security in one's property, Story recognized, "almost all other rights would become utterly worthless." 3 Story § 1784; *see also id.* ("[H]ow vain it would be to speak of [good government] when all property is subject to the will or caprice of the legislature, and the rulers.").

9. Moreover, the Takings Clause was influential in the Nineteenth Century in promoting respect for property rights. "It inculcated the belief that an uncompensated taking was a violation of a fundamental right." Treanor, 94 YALE L.J. at 714-5;

see also William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 572-3 (1972) (similar). In some states that did not yet have takings clauses, courts judicially imposed the requirement of just compensation. Stoebuck, 47 WASH. L. REV. at 573 & nn. 65-66. Most decisions imposed the requirement on the basis of natural law principles, *see, e.g.*, *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. Ch. 162, 167 (N.Y. Ch. 1816); *Young v. McKenzie*, 3 Ga. 31, 1847 WL 1302 at *8-10 (1847). States also began to add takings clauses to their own constitutions. By the 1820s, the principle of just compensation had won general acceptance, Treanor, 94 YALE L.J. at 714, and by the time of the Civil War, every state but North Carolina had a Takings Clause. 1 Julius L. Sackman, NICHOLS ON EMINENT DOMAIN § 1.3 (3d ed. 2006) (listing provisions).

10. Nineteenth-Century experience also demonstrates that there was nothing inconsistent or anomalous about the notion of a court "taking" property within the meaning of the Fifth Amendment. Indeed, there is a long tradition in this country of state courts exercising powers of eminent domain and ordering just compensation for takings of private property where warranted. In Tennessee, for example, if one person's land was enclosed by the land of another and he was not allowed to enter and exit his property through the latter's land, a statute allowed the enclosed landowner to apply to the courts for an order opening a public road through the latter's property. *Bashor v. Bowman*, 180 S.W. 326, 326 (Tenn. 1915). Applying a similar, though more open-ended statute, not premised on the applicant's land being enclosed, the Supreme Court of

Tennessee in 1858 rejected a private application for a highway running through the land of another private party. *McWhirter v. Cockrell*, 39 Tenn. 9, 1858 WL 2976 (1858). In the course of doing so, the court weighed the costs and benefits of the proposed road and acknowledged the duty of paying just compensation to the owners should it approve the highway:

> The public is entitled to all necessary roads and thoroughfares, and *it is the duty of the courts to grant them,* whenever they are needed, although they may be injurious to individuals, upon making compensation for the injury, as provided by law. . . . The advantage to the public must be sufficiently great to overbalance the private injury. . . . In the exercise of this very delicate and important jurisdiction, by which private property is taken for public use, *the courts should look, carefully, to the interests of all the citizens, and never exercise the right of eminent domain unless it is clearly and urgently demanded for the public good.*

Id. 1858 WL 2976 at *1 (emphases added).

11. When the Fourteenth Amendment was enacted, the meaning of the language in the Takings Clause was the same as in 1791 and, if anything, the value of security in one's property had gained even greater importance. The drafters of the Fourteenth Amendment were particularly concerned with the failure of Southern states to honor the property

rights of newly freed former slaves. Michael Kent Curtis, *The Fourteenth Amendment: Recalling What the Court Forgot*, 56 DRAKE L. REV. 911, 917 (2008). Late Nineteenth Century dictionaries confirm that the words "private," "property," and "taken" had essentially the same meanings as they do now and as they did in 1791. *See* Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1039 (1864) ("private" defined to include "Belonging to, or concerning an individual . . . not public"); *id.* at 1048 ("property" defined to include "that which belongs exclusively to an individual; that to which a person has a legal title, whether in his possession or not; thing owned"); *id.* at 1349 ("take" defined to include "to get the custody or control of; to reduce to one's power or will"). Indeed, the first edition of Black's law dictionary refers the Takings Clause in its definitions of "private property" and "take." "Private property" is defined as "*protected from being taken for public uses*, is such property as belongs absolutely to an individual . . . capable of being had in possession and transmitted to another, such as houses, lands and chattels." Henry Campbell Black, DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN 940 (1891) (emphasis added). "Take" is defined with more direct reference to the Takings Clause:

> 1. To lay hold of; to gain or receive into possession; to seize; to deprive one of the possession of' to assume ownership. Thus, it is a constitutional provision that a man's property shall not be *taken* for public uses without just compensation.

Id. at 1150 (original emphasis). The words of Section 1 of the Fourteenth Amendment, like the Fifth Amendment, are not limited to any specific mechanism of taking property; nor are they confined to any specific branch or instrumentality of government. *See, e.g.*, *Virginia v. Rives*, 100 U.S. 313, 318 (1879); *Chicago, Burlington & Quincy R.R. Co.*, 166 U.S. at 233-34. There is no basis in the text and history of either Amendment to conclude otherwise.

II. TO ALLOW THE DECISION BELOW TO STAND WOULD BE INCONSISTENT WITH THE TEXT AND HISTORY OF THE TAKINGS CLAUSE, AND WOULD PREVENT ITS MEANINGFUL ENFORCEMENT.

1. The Florida Supreme Court's decision is flatly inconsistent with this text and history. While the details of "private property" may be regulated by state law, including by the state courts, there is a "constitutionally mandated minimum" of property that states are not free to define out of existence. *See* Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1642 (1988). As Justice Thurgood Marshall observed, this Court's cases do not stand for the proposition that "private property" is an empty or elastic term left entirely up to the states to define:

> I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms

> "life, liberty, and property" do not derive their meaning solely from the provisions of positive law.

PruneYard Shopping Center v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., concurring); *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("[A] State, by *ipse dixit*, may not transform private property into public without compensation."). Rather, there are certain core, fundamental, and inalienable rights that were understood traditionally to accompany property ownership.

2. It is exactly those fundamental rights that are under attack here. As the petitioner's brief explains, for more than 100 years the owners of littoral property in Florida had a reasonable expectation, recognized by law, in their rights of accretion and contact with the water that come with having the Mean High Water Line as one of their property boundaries. Petitioner's Br. at 20-34.

3. Those fundamental rights were not merely recognized under Florida law, but were based on centuries-old common law understandings of the rights of owners of littoral property. Indeed, contact with the water is inherent in the meaning of the term "littoral." Thus, for example, Webster's 1828 dictionary and Samuel Johnson's 1773 dictionary both define littoral as "*belonging* to a shore." Webster 1828 (emphasis added); 2 Johnson ("belonging to the shore"). As Blackstone explained more than two centuries ago, the common law recognized the right of accretion as a fundamental right inhering in such property:

> [A]s 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.

2 Blackstone, at *261-62; *see also* Joseph K. Angell, TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOIL AND SHORES THEREOF 249-50 (2d ed. 1847) (explaining the right of accretion and tracing its origins to Roman, French, Spanish, and Louisiana jurisprudence and to the English common law); Webster 1828 (defining "alluvion" and "alluvium" to include a statement that "[t]he owner of the land thus augmented has a right to the alluvial earth").

4. Petitioner's members thus have a fundamental right long recognized under the Nation's history and traditions to a dynamic property boundary that permits natural expansion ("accretion") of the property through the action of the tides. The Florida government has fixed the boundary in place and deprived petitioner's members of their rights to contact with the water and to the dynamic parcel of land that would otherwise result from accretion. They have had "private property" "taken" from them through a physical invasion just as surely as the property owners in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

5. To allow Florida to evade the Takings Clause by acting through its courts would prevent the meaningful enforcement of the Takings Clause. It is settled law that when a state "takes" "private property," it must pay just compensation. *See, e.g.*, *Webb's Fabulous Pharmacies*, 449 U.S. at 160. There is simply no question that the State's action here would constitute a taking of private property requiring compensation if it were accomplished by the executive or by the legislature.

6. To say that the Takings Clause applies to the actions of courts does *not* mean, however, that the Fifth Amendment would apply in every case in which the courts adjudicated competing property rights—only where the courts dispense with a fundamental right of private property. This Court has consistently recognized that a case presents a constitutional issue where, as here, a property owner alleges a taking and a state court holds that no property right existed in the first place. *Demorest v. City Bank Farmers Trust*, 321 U.S. 36, 42-43 (1944) ("Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded."); *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540 (1930); *Fox River Paper Co. v. Railroad Comm'n of Wis.*, 274 U.S. 651, 654 (1927).

7. This Court has recognized that state governments have a variety of means at their disposal to deprive owners of their property and that "if the protection against physical appropriations of private property was to be meaningfully enforced,

the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992); *see also* Sax, 74 YALE L.J. at 46-48 (describing attempts by state governments to use formalities and indirect action to avoid the requirement of Just Compensation). In *Lucas*, the Court explained the intersection of the state's police power with the Takings Clause: the Court's "'takings' jurisprudence has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." 505 U.S. at 1027. Property owners' rights in their property are inherently subject to some amount of regulation by the state, and owners reasonably expect this, even—in the case of some personal property—to the extent of regulation that might render the property economically worthless. *Id.* at 1027-28. Where, however, a state regulation renders a parcel of land economically worthless, the state has "taken" the property, and must be required to pay just compensation if the guarantee of the Takings Clause is to be meaningfully enforced. *Id.* at 1028.

8. The same may be said of the right of state courts to refine and reconsider their precedents. The Court has recognized in the past—in dictum and in a case where a state judiciary approved an abnormally low award of just compensation for a taking—that there is no exception in the text of the Fifth or Fourteenth Amendments for government actors who are members of the judiciary, and that reading such an exception in would render the clause

meaningless. *See, e.g.*, *Webb's Fabulous Pharmacies*, 449 U.S. at 164 ("Neither the Florida legislature by statute, nor the Florida courts by judicial decree, may accomplish [a taking] simply by recharacterizing" private property as public."); *Chicago, Burlington & Quincy R.R. Co.*, 166 U.S. at 233-34 ("[i]t must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state—to its legislative, executive and judicial authorities . . . [t]his must be so, or, as we have often said, the constitutional prohibition has no meaning.").

This Court has traditionally recognized that state courts have latitude to overrule their own precedents, including those bearing on the law of property, without triggering the requirement of Just Compensation to all parties thereby aggrieved. *See, e.g.*, *Patterson v. People*, 205 U.S. 454, 461 (1907) ("[I]n general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed."); *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S 544, 570 (1905) ("We are not called upon to discuss the power, or the limitations upon the power, or the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States."); *cf. Lucas*, 505 U.S. at 1035 ("The Takings Clause does not require a static body of state property law.") (Kennedy, J., concurring).

That latitude, however, is not boundless, nor is it a license to violate the Takings Clause. Lower courts, commentators, and some Justices of this Court have explicitly recognized as much. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 (1994) (Scalia, J., dissenting from denial of certiorari) ("No more by judicial decree than by legislative fiat may a State transform private property into public property without just compensation. . . . if it cannot fairly be said that [the state court's invocation of an Oregon doctrine of custom to invalidate the petitioners' property rights], then the decision now before us has effected an uncompensated taking."); *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring) ("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."); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1471 (9th Cir. 1985) (the "main question" is "[c]an the state, by a judicial decision which creates a major change in property law, divest property interests?"); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1471 nn. 91-97 (1990) (citing state and lower federal court decisions recognizing judicial changes in the law as uncompensated takings); *see also generally* John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free From "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297 (1988). This Court's prior cases, such as *Webb's Fabulous Pharmacies* and *Chicago, Burlington & Quincy Railroad Co.*, have suggested a similar

conclusion but have not directly so held. The Court should take the opportunity to do so now.

9. Where, as here, a state court has abrogated a right inhering in private property that has stood for hundreds of years and been recognized as fundamental, the state has "taken" property and must pay just compensation. That is so whether the state accomplishes the taking through the overruling of longstanding precedent or through an unreasonable "interpretation" of prior law. This Court has described the prohibition against uncompensated takings as "the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Lucas*, 505 U.S. at 1027. As shown above, that compact by its terms forbids the action at issue here, and there is no basis in the text or history of that compact to hold otherwise.

CONCLUSION

For the reasons set forth above, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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