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 *AMICI CURIAE* OF SAVE OUR BEACHES AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Save Our Beaches ("SOB") is a Florida non-profit corporation founded in 2004 to protect private property rights as set forth in the United States and Florida Constitutions. More specifically, SOB was founded to defend the natural resources of the City of Destin beaches from unauthorized, unnecessary and inappropriate beach restoration activities. SOB is charged to seek redress for past, present and future unauthorized, unnecessary and inappropriate restoration activities and public uses in, on and around the beaches by any and all legal means, including judicial and administrative litigation. SOB was a party earlier in the litigation of the case before the Court, but was removed for lack of standing. After being subjected to the governments' continued violations of their constitutional rights, SOB sought the counsel of Southeastern Legal Foundation ("SLF").

Founded in 1976, SLF is a national constitutional public interest law firm and policy center that advocates limited government, individual economic freedom, and the free enterprise system. SLF strives

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to and been notified of the filing of this brief.

to protect private property rights and the environment, but believes that the environment can be protected without destroying the individual freedoms guaranteed by the Constitution.

In pursuit of its goals, SLF has represented numerous plaintiffs whose property rights have been infringed, including SOB. SLF currently represents SOB in a suit charging the City of Destin with violations of its members' and other beach property owners' right to equal protection of law.

For these reasons, SOB and SLF respectfully submit this brief in support of Petitioner and urge the Court to reverse the judgment below.

SUMMARY OF ARGUMENT

How many ways are there to skin a cat? In the instant case, local governments have tried any number of ways to achieve by fiat what cannot be achieved except by well-established constitutional process – taking private property with unique characteristics for perceived "public good."

The present case is about more than environmental protection, beach restoration, or the public good. It is about using protection of the environment as a pretense to circumvent legitimate methods for establishing property rights in order to accomplish otherwise impermissible goals. In spite of the Florida Supreme Court's resolve that the governments'

actions are legitimate state actions effected in pursuit of the constitutional duty to protect Florida's beaches, evidence shows that the local governments are concerned with more than simply the protection of beach property. The court has permitted Walton County ("County") and the City of Destin ("City") to obliterate constitutionally protected private property rights under the guise of "environmental protection." Moreover, Florida's city and county governments ignored the customary use requirements for establishing public rights to use private property by simply declaring the existence of such rights. Finally, the City has violated private beach property owners' right to equal protection of the law by intentionally refusing to enforce trespass laws on those properties. Thus, the Florida Supreme Court has permitted local governments to take private property without adhering to the judicial procedures established for lawfully effecting such a taking.

The City's specific actions, which have a direct and negative impact on private property rights, cannot be explained by beach restoration goals. To permit Florida governments to convert valuable private property to public use under the pretense of protecting the environment and without abiding by lawful and firmly established procedures directly harms the constitutionally guaranteed right to the full use and enjoyment of private property, a fundamental right in the American system.

There are ways of protecting Florida's beaches other than infringing the rights of private property

owners, and there are ways of obtaining private property interests other than by infringing private property owners' constitutional rights. Florida governments can obtain rights to private property by using the power of eminent domain. Alternatively, they can establish the public's customary use of private property in court proceedings. The County and City have not pursued either of the avenues for legitimately establishing the public's right to use private property, however, and there is no reasonable basis for permitting the County and City to take private property rights under the guise of environmental protection when judicially established avenues are available.

ARGUMENT

I. THE GOVERNMENTS' JUSTIFICATION OF ENVIRONMENTAL PROTECTION IS MERELY A PRETENSE FOR ESTABLISHING PUBLIC RIGHTS TO USE PRIVATE PROPERTY.

In *Mugler v. Kansas*, 123 U.S. 623, 661 (1887), the Court stated, "It does not . . . follow that every statute enacted ostensibly for the promotion of [the protection of the public morals, health and safety] is to be accepted as a legitimate exertion of the police powers of the state." Similarly, it does not follow that every action of state, city or county government taken ostensibly for the promotion of the public good should be accepted as a legitimate use of governmental

power. "The courts are not bound by mere forms, nor are they to be misled by mere pretenses." *Id.* Thus, if the government purports to take an action for the public good, but that action "is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and . . . give effect to the Constitution." *See id.*

In the present case, the County and City have acted ostensibly in pursuit of the state's duty to protect Florida's beaches. However, not all of the actions taken by the local governments can be explained by this purpose, and many of their actions have invaded the rights secured to property owners by Florida common and statutory law and by the U.S. Constitution. Florida's local governments took actions exposing the real purpose behind their beach restoration activities: to convert valuable private beach property to public use.

A. The Alternative Motive of the County and City to Convert Private Property to Public Use Is Evident.

i. The need for public beach space is great.

Since 1980, the population of Florida has increased by over 3 million people,[2] and in 2005, it

[2] *Florida: Population of Counties by Decennial Census: 1900 to 1990* (Richard L. Forstall ed., U.S. Bureau of the Census,

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was expected to continue increasing by an average yearly increase of "1,000 people per day, through 2010."[3] Moreover, this population growth has disproportionately occurred in the City and the County. In the County, the population nearly doubled between 1980 and 2000, increasing by 46.3 percent between 1990 and 2000.[4] Based on data from 2000 to 2003, it is ranked as "the 7th fastest growing county in the state of Florida."[5] In Okaloosa County, where the City is located, the population increased by over 80,000 people between 1970 and 2000, increasing by 24.6 percent between 1970 and 1980, by 30.8 percent between 1980 and 1990, and by 18.6 percent between 1990 and 2000.[6] "Okaloosa County's population is

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1995), *available at* http://www.census.gov/population/cencounts/fl190090.txt (last visited Aug. 14, 2009).

[3] Rodney L. Clouser & Hank Cothran, *Issues at the Rural-Urban Fringe: Florida's Population Growth, 2004-2010*, Univ. Fla., Aug. 2005, at 1, 1, *available at* http://edis.ifas.ufl.edu/pdffiles/FE/FE56700.pdf (last visited Aug. 14, 2009).

[4] *See* U.S. Census Bureau, *Population – Total and Selected Characteristics, Walton, FL*, *available at* http://censtats.census.gov/usa/usa. shtml (select "Florida," "Walton, FL," and "Population – Total and Selected Characteristics" from the drop down menus; then click "Go") (last visited Aug. 14, 2009).

[5] *Population Growth of Counties*, *Florida, Population change, 2000 to 2003*, ePodunk http://www.epodunk.com/top10/countyPop/coPop10.html (last visited Aug. 14, 2009).

[6] *See* U.S. Census Bureau, *Population – Total and Selected Characteristics, Okaloosa, FL*, *available at* http://censtats.census.gov/usa/usa.shtml (select "Florida," "Okaloosa, FL," and "Population – Total and Selected Characteristics" from the drop down menus; then click "Go") (last visited Aug. 14, 2009).

growing at a rate of more than 250 people per month, with 213,623 residents projected by the year 2010."[7]

This population growth has a significant impact and influence on "water and land allocation [issues], state and community infrastructure needs, and demands for local goods and services."[8] Florida's growing population, however, is not the only reason public beaches are becoming more crowded. After "two years of strong growth in 2004 and 2005," "[o]ut-of-[s]tate tourism in Florida amounted to 84 million person trips in 2006."[9] In 2006, "[o]ut-of-state tourism in [Florida had] increased by 19.9 percent since 2000."[10] Further, it is estimated that "2.2 million Floridians vacationed at the state's beaches in 2006."[11] Statistics from other websites suggest the number of visitors is only increasing.[12] As a result, local governments'

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[7] Okaloosa County Online, Public Works, Resources Division – Parks http://www.co.okaloosa.fl.us/dept_pw_resources_parks.html (last visited Aug. 14, 2009).

[8] Clouser & Cothran, *supra* note 3, at 1.

[9] Dept. of Econ. et al., *Florida Visitor Study* 1 (FAU Ctr. for Urban & Envtl. Solutions, Feb. 2008), *available at* http://www.cuesfau.org/publications/Florida%20Visitor%20Study%20-%20 February%202008.pdf (last visited Aug. 14, 2009).

[10] *See id.* at 3.

[11] *Id.* at 5.

[12] *See* Howard Group, Our Market http://www.howardgrp.com/our_market.html ("Walton and Okaloosa counties collectively saw over 7.6 million visitors in 2008, an increase of 9% over 2007"; "Walton County alone saw over three million visitors in 2008, an increase of 20% from 2007"; "over 80% of visitors return to Beaches of South Walton for their vacation

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desire and perceived need for more public beach space in a rapidly growing section of the Florida coast has resulted in hasty and ill-advised policies.

ii. The City's actions reflect a desire to create more public beach space.

In its rush to combat a perceived beach space problem, the City took steps contrary to private property rights. In June 1999, the City Council considered an ordinance which purported to establish a public right to use all of the dry sand area landward of the mean high water line ("MHWL") except a small area reserved for the fee owner. In June 2000, the City enacted a beach ordinance, which removed the requirement that vendors cannot operate within twenty feet of the property lines of adjacent property owners and which prohibited beach vendors from providing goods and services closer than twenty feet from the water's edge, ten feet farther from the MHWL than was previously permitted – effectively pushing vendors farther from the ocean and onto private properties. Later, the City issued a directive to the Okaloosa County Sheriff's Office, the law enforcement body for the City, instructing the Sheriff

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destination"; "[t]he Northwest Florida Gulf Coast area remains the second most popular drive-to destination in the Southeast"; and "the number of visitors [to Walton County] is up 185% over the last five years.") (last visited Aug. 14, 2009).

not to enforce Fla. Stat. Ann. § 810.09(1)(a) (2009), a criminal trespass law, against persons trespassing on private beach properties when the trespass occurs within twenty-five feet of the MHWL. The Sheriff has complied with this instruction in spite of the policy violating private property rights. When complaints arose, the City articulated its intention to continue to permit the public to use private property. In April 2005, the City passed another ordinance, this time prohibiting vendors from blocking pedestrian use between the ocean and a line twenty feet inland of the MHWL, even though no such pedestrian right of use has ever been established in Florida courts. By these actions, the City intended to open private property to public use; the "environmental protection" rationale fails to justify these constitutional takings.

iii. The City's actions reflect an understanding of private property rights and a lack of concern for whether its actions infringe such rights.

Even when the City purported to act in the interests of beach preservation through beach scraping on private properties, its actions reflected an understanding and deliberate disregard of private property rights.

In December 2004, the Department of Environmental Protection ("DEP") issued a permit for beach scraping activities which did not give authority to scrape on any properties owned by persons who

elected not to have the scraping conducted on their properties. The beach scraping permits authorized the City to place excavated material up to the dune escarpment or the pre-storm dune line on properties of persons who gave consent, farther inland than the MHWL or erosion control line ("ECL") which was the boundary of private properties. Thus, beach renourishment would entail placing thousands of tons of sand on private properties and between private properties and the ocean. In 2005, the City repeatedly acknowledged it required easements from affected property owners before entering upon private property to conduct beach restoration. The City was unsuccessful in its efforts and only obtained a minority of property owners' consents, but the City scraped private properties anyway.

Because the City disregarded private property owners' objections, DEP issued a second permit in March 2005 expressly excluding SOB members' properties from the authorization of the permit. The City subsequently managed to remove the limitation with the proviso that it either obtain each property owner's written permission or proceed under the City's police powers or other appropriate authority. The amended permit expressly stated it did not authorize trespass of any type under any circumstances. When SOB members did not give the City permission to scrape their beaches, the City purported to justify the beach scraping as an emergency measure necessary to protect beachfront structures from storm damage. The effort did little to protect

beach structures, however, and quickly eroded within a few months.

After these attempts by the City to justify beach scraping on private property without permission, a subsequent permit expressly stated:

> This permit does not convey to the permittee or create in the permittee any property right, or . . . interest in real property, nor does it authorize any entrance upon or activities on property which is not owned or controlled by the permittee. The issuance of this permit does not convey any vested rights or . . . exclusive privileges.[13]

Regardless of this express limitation, the City continues beach scraping activities, with and without property owners' permission.

The City's actions demonstrated it knew the dry sand area of the beach, above the MHWL, was privately-owned property, necessitating permission to use or scrape. When the City, under the pretense of protecting Florida's beaches, was unable to obtain permission, however, it continued its actions in spite of property owners' objections. The City's rationale of environmental protection is no more than a means to

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[13] Consolidated Joint Coastal Permit and Sovereign Submerged Lands Authorization, 3, No. 0218419-001-JC (July 2005) *available at* http://bcs.dep.state.fl.us/env-prmt/okaloosa/pending/0286575_Western_Destin_Beach_Restoration_Project/Application/Attachment%20J%20-%20Permit%20No.%200218419-001-JC%20(07-28-05).pdf (last visited Aug. 14, 2009).

accomplish that which it is unauthorized to do otherwise.

iv. The Florida Supreme Court's opinion reflects an understanding of the littoral rights being infringed and an effort to redefine those rights to keep them from impeding Florida's beach restoration program.

In the present case, the Florida Supreme Court followed in the City's footsteps, making every possible effort to avoid recognizing private property rights in order to uphold what it deems good public policy. This side-stepping by the court is quite evident throughout its opinion. The court began its opinion by recognizing case law which clearly defined littoral rights as including "the following vested rights: . . . the right of access to water, including the right to have the property's contact with the water remain intact" and "the right to receive accretions and relictions to the property." *See Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008); *Bd. of Trs. v. Sand Key Assocs., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987) (citations omitted). The court additionally recognized that "littoral rights are private property rights that cannot be taken from upland owners without just compensation," *Walton County*, 998 So. 2d at 1111 (*quoting Sand Key*, 512 So. 2d at 936). However, the court interpreted a statement from a prior decision that "the exact nature of these rights rarely has been described in

detail," *id.* at 1111 (*quoting Webb v. Giddens*, 82 So. 2d 743, 745 (Fla. 1955)), to mean the court was free to redefine any of the littoral rights that had been affirmatively recognized by common or statutory law into nonexistence. *See id.* at 1112 (reasoning that the vested "right to accretion . . . is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion").

First, the court addressed the right to accretions, asserting the state could usurp the right if it also took away the conditions necessary to claim the right. *See id.* at 1118-19 (Since "[n]one of these doctrinal reasons apply here," "the common law rule of accretion, . . . is not implicated in the context of this Act"). The court failed to address all of the reasons for the right, however, disregarding its holding in *Florida National Properties* and other cases that the littoral right to accretions exists partly to protect the littoral right to maintain upland property's contact with the MHWL. *Hughes v. Washington*, 389 U.S. 290, 293 (1967) (recognizing that losing the law of accretions "would leave riparian owners continually in danger of losing [their property's] access to water which is often the most valuable feature of their property"); *State v. Fla. Nat'l Props., Inc.*, 338 So. 2d 13, 12, 16 (Fla. 1976) (*quoting Hughes*, 389 U.S. at 293, recognizing that "the ancient common law relating to accretion and reliction prevails in Florida," and ruling that a Florida statute which fixed a "specific and permanent boundar[y]" was unconstitutional).

Additionally, the court cited authority noting a *private property owner's* right to reclaim beach property destroyed through an avulsive event for the proposition that the *public* could "restore *its* shoreline" after an avulsive event had engulfed much of the shore. *Walton County*, 998 So. 2d at 1117 (emphasis added). Under the cited authority, however, when a private property owner did not reclaim his property in a reasonable amount of time, the submerged property became property of the state. *See id.* (*quoting* 1 Henry Philip Farnham, *The Law of Waters and Water Rights* § 74, at 331 (1904)) ("If a portion of the land of the [littoral] owner is suddenly engulfed, and the former boundary can be determined or the land reclaimed within a reasonable time, he does not lose his title to it."). Contrary to the court's opinion, the public never had a right to restore engulfed shoreline because if the land was not restored, the State would still hold title to the shoreline up to the MHWL and the littoral property owner would be the only one who had lost property.

Second, the court addressed the right to maintain contact with the water, redefining this right as ancillary to the right of access. *Id.* at 1124. The judicial and legislative branches in Florida had never before defined the right to contact with the water in this manner, however. *See Walton County*, 998 So. 2d at 1124 (Wells, J., dissenting) ("Our common law, statutes, and Constitution indicate that the right of contact with the water is neither 'independent of,' nor 'ancillary to,' . . . littoral property, its ownership, and

associated protected rights."). Rather, prior Florida case law holds the right to contact with the water is a foundational right on which all other littoral property rights depend. *Id.* at 1122-24 (Wells, J., dissenting). Other cases support the right to maintain contact with the water is tied to the right to exclusive access to the water over one's own property. *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1918) (noting "[t]he right of *access to the property* over the waters" as a principal reason that many riparian owners purchase their properties (emphasis added)); *Bd. of Trs. v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. Dist. Ct. App. 1973) (noting that riparian owners "have the exclusive right of access over their own property to the water" (citation omitted)). Even if Florida statutory law is capable of preserving constitutional rights, this right of exclusive access is clearly not preserved in Florida Statutes Chapter 161 ("Act") if that statute can be read to permit littoral property's contact with the MHWL to be severed. *See Walton County*, 998 So. 2d at 1119-20 (noting that "the renourished beach may be wider than the typical foreshore," and thus, may create a stretch of public land between the MHWL and the ECL, the private property owner's new boundary under Fla. Stat. Ann. §§ 161.151(3), 161.161(3), and 161.181 (2009)).

Last, the court reasoned that the Act is constitutional because it "benefits upland owners by restoring lost beach, by protecting their property from future storm damage and erosion, . . . by preserving their littoral rights to use and view . . . [and] by

protecting their littoral right of access to the water." *Walton County*, 998 So. 2d at 1120. Such an argument is tantamount to claiming that an act which takes storm-damaged front lawns for use as public picnic areas without compensation is constitutional because it benefits the former property owner by restoring storm-damaged property, relieving the property owner of the responsibility of mowing his lawn, and preserving the property owner's rights to access the road and to view and use his lawn in common with the rest of the public. In both cases, the "benefits" described do not outweigh the harms of taking the exclusive right to use property from one owner and conveying it to the public.

Every property must be maintained, and the removal of the maintenance burden cannot outweigh the property owner's pain at knowing that the property is no longer exclusively his. A law cannot be constitutional simply because it could be said to "benefit" the one who claims injury, and it is disingenuous for the court to avert attention from the injuries brought before it to the rights the law did not infringe or the "benefits" the law could provide. The extent to which a taking benefits a property owner may be relevant when determining the amount of compensation due, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437-38 n.15 (1982) (stating that the possibility "§ 828 'likely increases both the building's resale value and its attractiveness on the rental market' . . . may . . . be relevant to the amount of compensation due"), but it does not transform a

taking into a non-taking. Moreover, at least three of the "benefits" listed by the court are not really benefits at all. Instead, the rights to use, view, and access were rights the property owners held before passage of the Act, and the right to access was actually diminished by the court's decision which removed the supposed "ancillary" right of contact with the MHWL.

The court recognized the historical guarantees of the littoral rights to accretion and to maintain contact with the water, but made every effort to diminish and trivialize them in order to avoid enforcement and to rationalize Florida's beach restoration project. The tortured logic of the court's opinion can only be the result of its desire to place the public policy pretense of beach restoration (the conversion of private beaches to public beaches) before the rights of private property owners. *See Walton County*, 998 So. 2d at 1121 (Lewis, J., dissenting).

B. The Requirement of Proving Customary Use Before Disregarding Trespass Law and Property Rights Is Well-Established.

Common law is clear that the public has no rights in private beach property except those which a court establishes.[14] The Attorney General of Florida

[14] Neither prescription nor dedication are applicable in the present case because the public has not used the land exclusively or adversely and the private property owner has not

(Continued on following page)

stated that the nature and extent of any public right to use the dry sand area of private property arises only to the extent such is "ancient, reasonable, without interruption, and free from dispute," all of which "is a mixed question of law and fact that must be resolved judicially." 2002 Fla. AG LEXIS 81, 13-14 (2002). The "doctrine requires the courts to ascertain in each case the degree of customary and ancient use the beach has been subjected to. . . ." *Id.* at 14. "[U]ntil a court establishes a 'customary right of use' by the public in [privately-owned] real property, the fee owners thereof may make complaints of trespass to local law enforcement officers as they occur." *Id.* at 15.

In *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994), Justices Scalia and O'Connor recognized that permitting the public to use private beach property without first establishing the public's customary use of that private property was a taking without just compensation. *Id.* at 1212 (Scalia, J., dissenting). At least three different states, including Florida, acknowledge the doctrine of customary use "to afford the [public] rights in beach property." *City of Daytona Beach v. Tona-Rama*, 294 So. 2d 73, 78 (Fla. 1974). Florida first recognized the customary use doctrine in 1974, *see id.*, and as late as 2007, the Florida District Court of Appeals applied the doctrine to analyze the

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"expressed 'a present intention to appropriate his lands to public use.' " *See Trepanier*, 965 So. 2d at 284-85.

extent of public rights to use privately-owned beach property. *Trepanier v. County of Volusia*, 965 So. 2d 276, 286-93 (Fla. Dist. Ct. App. 2007). In Florida, the doctrine of customary use is well-established law for determining the extent of public rights to use private property.

Furthermore, the doctrine of customary use must be determined for each locality individually. While the customary use doctrine can be used to deprive private property owners of their exclusive rights to enjoy the dry sand portions of the beach, it must not be applied too broadly. *Stevens*, 510 U.S. at 1212 n.5 (Scalia, J., dissenting) (noting that customs apply to "particular districts" rather than "all property 'similarly situated'"). Proving the public has customarily used private property at one Florida beach does not mean the public has customarily used private property on every Florida beach. *See Trepanier*, 965 So. 2d at 289 (stating that "the acquisition of a right to use private property by custom is intensely local" and must be proved in each particular geographical area); *County of Volusia v. Reynolds*, 659 So. 2d 1186, 1190 (Fla. Dist. Ct. App. 1995) (stating the customary use "doctrine requires the courts to ascertain in each case the degree of customary and ancient use the beach has been subjected to. . . ."). Because of this, private property owners "must be afforded an opportunity to make out their constitutional claim" in each locale "by demonstrating that the asserted custom, is pretextual." *Stevens*, 510 U.S. at 1214 (Scalia, J., dissenting).

C. The Governments Have Not Met The Elements For Establishing Customary Use in This Case.

In *Tona-Rama*, the Florida Supreme Court stated that, for the doctrine of customary use to apply, the public's use of private beach property must be "ancient, reasonable, without interruption and free from dispute." *Tona-Rama*, 294 So. 2d at 78. The customary use "doctrine requires the courts to ascertain in each case the degree of customary and ancient use the beach has been subjected to and . . . to balance whether the proposed use of the land by the fee owners will interfere with such use enjoyed by the public in the past." *Reynolds*, 659 So. 2d at 1190. "This right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself," but permits the public to use private land for the purposes to which they have become accustomed. *Tona-Rama*, 294 So. 2d at 78.

In the present case, the County and City have not made any efforts to prove the public acquired rights to use private beach properties by custom. Rather, the local governments assumed this alleged "right" to use the private beaches based on custom, by-passing the adjudicatory process. This is because customs in locations differ, and thus, customary use rights will also differ. *Trepanier*, 965 So. 2d at 289. Thus until a court establishes the ancient and reasonable public uses on private beach properties, Florida governments must protect the owners'

exclusive right to use their properties and to exclude others. 2002 Fla. AG LEXIS 81, 15 (2002).

The court articulated no justification for failing to follow established customary use requirements other than to circumvent the governments' duty to protect private property rights. The court was not forced to decide between upholding private beach property owners' rights and permitting the Florida government to pursue policies it deemed to be of public importance. If the court had struck down the governments' application of the Act, it would not have destroyed the Florida government's ability to pursue its public policy interests. "If the Court construed the Act in a manner that did *NOT* sever . . . littoral property from the water," and that paid just compensation for any invasions of private property, "the Act [could] be applied constitutionally," but the governments' present application of the Act destroys property rights guaranteed by the U.S. and Florida Constitutions. *See Walton County*, 998 So. 2d at 1126 (Lewis, J., dissenting). By failing to uphold private property rights, the court dealt a great blow to rights which are of "critical and . . . fundamental importance." *Id.* at 1128 (Lewis, J., dissenting). "The rights inherent in private-property ownership are at the foundation of this nation and this State." *Id.* (Lewis, J., dissenting).

The court recognized in the *Medeira* case, "quieting title in the state [to accreted land] will little benefit the state while causing great harm to . . . riparians." *Medeira,* 272 So. 2d at 214. There is "no

reason for causing such a result." *Id.* "[R]estoration and renourishment in the form of filling currently submerged property to separate . . . littoral property from the resulting MHWL simply violates all prior notions of waterfront property rights in Florida." *Walton County*, 998 So. 2d at 1126 (Lewis, J., dissenting). The decision of the court deals a great blow to the property rights, which our U.S. Constitution and the Florida Constitution protect for the sole purpose of upholding state programs and policies which rely on pretense to circumvent private property rights.

II. BY CIRCUMVENTING THE CUSTOMARY USE REQUIREMENT, THE COURT HAS EFFECTED A JUDICIAL TAKING WITHOUT JUST COMPENSATION IN VIOLATION OF PRIVATE BEACH PROPERTY OWNERS' DUE PROCESS RIGHTS.

A. Beach Owners' Property Rights Are Real and Not Illusory.

This Court need not interpret state statute, nor follow the interpretation of the state Supreme Court, to establish the well-founded principle that private beach property is entitled to full constitutional protection.

"[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." *Hughes*, 389 U.S. at 296-97 (Stewart, J., concurring). In the present case, the Supreme Court of Florida permitted the State of Florida to take private property without compensation. This right to exclusive possession of private beach property is real and not illusory, unless a court recognizes a public customary use of the property.

The Florida Constitution states, only title to the portion of the beach "below [the MHWL] is held by the state . . . in trust for all the people" FLA. CONST. art. X, § 11; the MHWL "along the shores of land immediately bordering on navigable waters is recognized and declared to be the boundary between the foreshore owned by the state . . . and upland subject to private ownership," Fla. Stat. Ann. § 177.28(1) (2009). The court noted the State only owns the shore space between "high and low water marks . . . for the purpose of navigation and other public uses," if "such waters as by reason of their size, depth and other conditions are in fact capable of navigation for useful public purposes." *Clement v. Watson*, 58 So. 25, 26 (Fla. 1912). Thus, in *Clement*, the court ruled a cove adjacent to the New River Sound was private property, and as such, the owner had a right to exclude the public from fishing in the cove. *Id.* at 27.

On the other hand, the area above the MHWL is subject to private ownership. *Trepanier*, 965 So. 2d at 284. Because this dry sand area is not navigable or useful to improve navigation, it is not automatically the property of the government subject to public use.

See Clement, 58 So. at 26. Florida statutory law establishes the MHWL as the boundary for private beach property. Fla. Stat. Ann. § 177.28(1) (2009). The law affirmatively recognizes the doctrines of "accretion, reliction, erosion, [and] avulsion" as part of Florida's common law. Fla. Stat. Ann. § 177.28(2) (2009). Private beach property owners clearly have exclusive rights in their properties extending to the MHWL, including all littoral rights incident to such properties.

B. The Taking of Private Beach Properties and Property Rights for Public Use Without Just Compensation Is a Direct Violation of Property Owners' Rights.

The harm to private property rights in the present case is not merely the "incidental consequence of the lawful and proper exercise of a governmental power." *See Scranton v. Wheeler*, 179 U.S. 141, 157 (1900) (citation omitted). Rather, the State has taken a portion of private properties and subjected them to trespass by the public, Fla. Stat. Ann. § 161.191(1) (2009) (noting the establishment of a fixed ECL boundary to replace the flexible MHWL boundary), and the government's forcible entry onto their properties to place thousands of tons of sand as a part of its beach restoration. Moreover, the legislature has seized private property owners' littoral rights to accretion and contact with the water. *See* Fla. Stat. Ann. § 161.191 (2009). These two sets of property rights will be discussed in turn.

i. Private beach property owners have the right to just compensation when their properties are taken for public use.

The Fifth Amendment to the United States Constitution declares that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. In addition, the Florida Constitution reads, "No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner. . . ." FLA. CONST. art. X, § 6(a). The "just compensation" which the Constitution requires "is to be measured by the loss caused to [the owner] by the appropriation. He is entitled to receive the value of what he has been deprived of. . . . To award him less would be unjust to him. . . ." *Bauman v. Ross*, 167 U.S. 548, 574 (1897). Thus, if the court finds the State has taken private properties, the owners must be justly compensated.

The permanent physical occupation of property is always a taking. *Loretto*, 458 U.S. at 434-35. It deprives the owner of the power to exclude others, which power "has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Id.* at 435 (citations omitted). The government's grant of permission to the public to trespass upon private properties is an invasion of their exclusive property rights. Fla. Stat. Ann. § 810.09(1)(a) (2009) states, "[a] person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property . . . [a]s to which

notice against entering or remaining is given . . . commits the offense of trespass on property. . . ." Additionally, private property owners have littoral rights to protect their property from trespass: "Among the common-law rights of those who own land bordering on navigable waters . . . are . . . the right to protect the abutting property from trespass and from injury by the improper use of the water for navigation or other purposes. . . ." 1985 Fla. AG LEXIS 58, 13 (1985) (citation omitted). The physical occupation of private properties by members of the public is a taking for which the owners deserve compensation.

Additionally, fixed boundaries are both permanent and physical. The sand deposited onto private properties physically occupies them in a permanent way since the Act gives the government the responsibility of maintaining the sand on the beaches. The State's redefinition of private property boundaries also constitutes a taking by permanently depriving the owners of their right to accretions and to hold all land between the landward boundaries of their properties and the MHWL without unauthorized interference.

Case law also states "it remains true that where real estate is actually invaded by superinduced additions of . . . sand . . . so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution. . . ." *District of Columbia v. Prospect Hill Cemetery*, 5 App. D.C. 497, 516 (D.C. Cir. 1895). Moreover, "[t]he making of . . . improvements necessarily involves the taking of the

property." *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884). Whether superinduced additions are interpreted to be destructive or improvements, the State does not have the right to place such additions onto property without the owner's consent or the payment of just compensation for the rights taken.

ii. Private beach property owners have the right to just compensation when their littoral rights are taken.

"[R]iparian rights are legal rights," *City of Eustis v. Firster*, 113 So. 2d 260, 261 (Fla. Dist. Ct. App. 1959) (citations omitted), which "exist in Florida as a matter of constitutional rights and property law and are not dependent on" statutes, *Feller v. Eau Gallie Yacht Basin, Inc.*, 397 So. 2d 1155, 1157 (Fla. Dist. Ct. App. 1981).[15] "[L]ittoral rights of owners of lands are derived from the common law as modified by statute and are property rights 'of a qualified or restricted nature of which the owner ordinarily cannot be deprived without his consent or without proper compensation.'" 1985 Fla. AG LEXIS 58, 16-17 (1985) (citations omitted) (also stating "the provisions of [FLA. CONST. art. X, § 6(a)] would appear to directly affect any . . . action by the municipality" to repeal an

[15] Cases and statutes have used the word "riparian" to describe all waterfront property, whether littoral or riparian. *Walton County*, 998 So. 2d at 1105 n.3.

exemption for littoral owners along public beaches and would "require that full compensation be paid for the taking of such rights."); 1990 Fla. AG LEXIS 37, 15 (1990) ("[R]iparian rights are property rights that may not be taken without just compensation." (citations omitted)). In addition, the rights of "littoral landowners are at times greater than those of the general public." 1985 Fla. AG LEXIS 58, 15 (1985); *see also Medeira*, 272 So. 2d at 214 ("[E]ven beachfront property owners are members of the public. Their status as riparian owners, however, has historically entitled them to greater rights, with respect to the waters which border their land, than inure to the public generally.").

Moreover, the rights to accretion and to maintain littoral property's contact with the MHWL are protected littoral rights. "[L]ittoral property rights . . . include" not only "the right to use the water shared by the public," but also "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, . . . and (4) the right to receive accretions and relictions to the property." *Sand Key,* 512 So. 2d at 936. Littoral property owners "have the exclusive right of access over their own property to the water." *Medeira*, 272 So. 2d at 214 (citations omitted). Additionally, in *Fla. Nat'l Props., Inc.*, 338 So. 2d at 17, the Florida Supreme Court quoted the reasoning of the Florida Court of Appeals that:

> an owner of land bounded by the ordinary [MHWL] is vested with certain riparian

> rights, including the right to title to such additional abutting soil or land which may be gradually formed or uncovered by the processes of accretion or reliction, which right cannot be taken by the State without payment of just compensation.

The court went on to rule that a statute fixing the boundary line between sovereign lands and riparian uplands was unconstitutional under both the Federal and State Constitutions because it eliminated this riparian right to accretion without just compensation. *Id.* at 17-18. Thus, any governmental action which denies private property owners their littoral rights to accretion and to maintain their properties' contact with the MHWL is a taking for which compensation is due.

III. THE COUNTY'S AND CITY'S DISREGARD OF TRESPASS LAWS VIOLATES PRIVATE PROPERTY OWNERS' RIGHTS TO EQUAL PROTECTION OF THE LAW.

The local governments' non-enforcement of trespass laws raises equal protection concerns. One of the hallmarks of constitutionally protected property rights is the right to exclude. The Equal Protection Clause of the Fourteenth Amendment reads, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Similarly, the Florida Constitution states, "All natural persons . . . are equal before the law and have inalienable rights, among

which are the right . . . to acquire, possess, and protect property. . . .” FLA. CONST. art. I, § 2.

In order to prove a violation of the Fourteenth Amendment’s Equal Protection Clause, one must prove that the state has not treated similarly situated persons similarly. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

> Though the law . . . be fair on its face, and impartial in appearance, . . . if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Id.

In the present case, the City is enforcing trespass laws unequally, violating property owners’ rights. The City has acted with “clear and intentional discrimination” by directing the Sheriff not to enforce state trespass laws on the City’s beach property up to 25 feet from the MHWL, *see, e.g., Gundling v. Chicago*, 177 U.S. 183, 186 (1900), but giving no such orders in regard to any other properties in the City. Through this decision, the City is deliberately treating similarly situated persons differently.

In order to defeat an Equal Protection claim, the City must show that the facts may be reasonably “conceived to justify” discriminatory state action. *See*

Metro. Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935). There is no state of facts that could reasonably be conceived to justify an uncompensated denial of constitutionally-protected property rights, however. The condoned trespass on private property is a grave deprivation of constitutional rights.

> [A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. . . . [S]uch an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

Loretto, 458 U.S. at 436. If a regulation of the use of property can require just compensation under the Fifth Amendment, *see Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537-40 (2005), then the Constitution protects property owners from trespasses onto property which are "qualitatively more severe" than property regulations. *See Loretto*, 458 U.S. at 436. The City has specifically chosen to make its trespass laws inapplicable to a 25-foot-wide portion of private properties, effectively giving the public an easement in private beach properties and depriving the owners of the exclusive use of their properties without compensation. Since the government has treated the City's beach property owners differently than others with respect to the enforcement of its laws, the City

has violated the private property owners' right to equal protection of the law.

CONCLUSION

For the foregoing reasons, SOB and SLF respectfully urge this Court to reverse the opinion of the Florida Supreme Court and rule in favor of Petitioners, Stop the Beach Renourishment, Inc., and in favor of a restoration of the constitutionally protected and predictable property rights on which this nation was founded and on which its citizens depend.

Respectfully submitted,

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