No. 08-1151

In The
Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEP'T OF ENVIRONMENTAL PROTECTION, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF *AMICUS CURIAE* SAVE OUR SHORELINE IN SUPPORT OF PETITIONERS

DAVID L. POWERS (P39110)
SMITH, MARTIN, POWERS & KNIER P.C.
900 Washington Avenue
Bay City, Michigan 48708
(989) 892-4861

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

AMICUS CURIAE WILL ADDRESS THE FOLLOWING QUESTION:

> 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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INTEREST OF *AMICUS CURIAE*

Amicus Curiae[1] Save Our Shoreline ("SOS") is a Michigan nonprofit membership corporation comprised of approximately 3,000 families who own a home or cottage, or live, along Michigan's 3,288 miles of Great Lakes shoreline. The organization's mission is to "preserve and maintain riparian rights, including the right to maintain safe recreational beaches and waterfront areas, both public and private; and to preserve and maintain a proper balance for the coexistence of man and nature upon and near waterfront property." *See* <www.saveourshoreline.org> (viewed August 17, 2009). The organization was formed in 2001 in response to low water levels and a new and sudden assertion of government control over the newly exposed beaches. Such government claims were based on numerous legal theories under state and federal law which SOS investigated and found to be of questionable merit. For example, the United States Army Corps of Engineers Detroit District asserted that the movement of sand involved in beach grooming violated the Clean Water Act. So when a similar issue presented itself before this Court in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 536 U.S. 903, 122 S. Ct. 2355 (mem), 153

[1] *Amicus Curiae* submits this brief supporting petitioners; both parties have consented to its filing. *See* Rule 37.3. No counsel for either party authored this brief *amicus curiae* either in whole or in part. Furthermore, no persons other than *amicus curiae* contributed financially to the preparation of this brief.

L. Ed. 2d 178 (2002), SOS filed an *amicus curiae* brief alerting the Court that a finding that deep plowing of ranchland violates the Clean Water Act might also bring beach grooming within the Act. In other federal litigation, SOS supported a retired couple alleged to have violated the Clean Water Act by grooming their beach (in that case to remove and prevent invasive, non-native phragmites plants), and secured dismissal and a decision curtailing Corps of Engineers' jurisdiction. *See U.S. v. Marion L. Kincaid Trust*, 463 F. Supp. 680 (E. D. Mich. 2006).

Most important to the litigation before this Court, SOS supported cottage owners against claims that the State of Michigan owned their beach. *See Glass v. Goeckel*, 683 N.W.2d 719, 262 Mich. App. 29 (2004), *rev'd and remanded*, *Glass v. Goeckel*, 703 N.W.2d 58, 473 Mich. 667 (2005). In that case, the Michigan Supreme Court declined to find that the lakeshore was publicly owned. But in a monumental shift, the Court ignored prior law placing exclusive use of the shore with the riparian owner. Instead, the Michigan Court created a "public trust" upon the dry lakeshore which included the public's right to walk on the dry shore. Despite claims that the decision effected a judicial taking, this Court refused the landowner's Petition for Writ of Certiorari. *Goeckel v. Glass*, 546 U.S. 1174, 126 S. Ct. 1340, 164 L. Ed. 2d 54 (2006).

This Court's decision in the case at bar may well determine the fate of the private owners of Michigan's 3,288 miles of Great Lakes shoreline, who for most of

the 160 year period before *Glass v. Goeckel* enjoyed the rights of exclusive use of the bank and shore accorded them under the clear, unambiguous, and longstanding decisions of the Michigan Supreme Court and the actions of the executive and legislative branches of Michigan government.

SUMMARY OF THE ARGUMENT

Now that the nation's coastlines have been substantially developed under caselaw in many states firmly putting the shores in private ownership, states seek to change the rules, and convert these once private shores to the public domain. The states increasingly do this using their courts, which abuse common law principles to simply deny that private rights ever existed. Florida's example, presented in this case, is only the most recent. Four years ago, the Michigan courts employed this strategy to abruptly change Michigan law, deny exclusive-use rights to a riparian owner, and grant new public rights to use the shore. By using this method, the judiciary conveniently acquires new rights for the state without compensating the owner. But through this method, the judiciary improvidently makes policy choices for its citizens, while at the same time avoiding debate – or even input – about the propriety of its choices. The approach used by the states to shift such substantial rights among their citizens is not good government,

but more importantly, it violates constitutional protections of private property.

ARGUMENT

Our nation's private shorelines are extremely valuable properties in American society. According to the American Shore and Beach Preservation Association, citing the U.S. Census Bureau, 54 percent of our nation's population lives within 50 miles of a coast. *See* <http://www.asbpa.org/publications/fact_sheets/pubs_fs_myth_reality.htm> (viewed August 18, 2009).

A U.S. Army Corps of Engineers researcher defined the importance of beaches in this way:

> Travel and tourism is America's leading industry, employer, and earner of foreign exchange; and beaches are America's leading tourist destination.

Houston, James, "The Economic Value of Beaches – a 2008 Update." <http://www.marloweco.com/files/Economic_Value_of_Beaches_(2008).pdf.> (viewed August 4, 2009). The societal value focused on beaches in turn raises the economic value of waterfront property, which of course leads to investment in vast sums by private owners. Waterfront property represents "some of the most expensive real estate in America." Slade, *et al*., "Putting the Public Trust Doctrine to Work" (Coastal States Organization 1997).

Given the value of our nation's coastal real estate, it is no surprise that the beaches have become the battleground between state and citizen for testing our Constitution's protection of private property. The battle, however, is not new. What is new is the states' success in utilizing the courts themselves – the last peaceful defense against governmental trouncing of private rights – to seize control of this highly prized property.

Petitioner noted in its Petition for a Writ of Certiorari that "[s]ince 1994, this Court has been presented with no less than 15 petitions for writs of certiorari asserting a judicial taking." Petition, p. 31. Michigan's *Goeckel v. Glass*, *supra* is certainly a worthy candidate for that list. In that case, in the shadow of a clamoring press, a 5-2 majority of the Michigan Supreme Court ignored the long-standing "exclusive use" holding of *Hilt v. Weber*, 233 N.W. 159, 252 Mich. 198 (1930), imposed a "public trust" along the dry shore, and created a public right of beach-walking along the shore.

As explained in the *Hilt* decision, Michigan decisions had long observed that riparians own, and have the right of exclusive use, to the water's edge. *Id*. at 222. That precedent was briefly upset by *Kavanaugh v. Rabior*, 192 N.W. 623, 222 Mich. 68 (1923) and *Kavanaugh v. Baird*, 217 N.W. 2, 241 Mich. 240 (1928), which for the first time placed the boundary at the "meander line." The *Hilt* court expressly overruled the "*Kavanaugh* cases" and re-established the boundary at the water's edge, consistent with

earlier cases such as *People v. Warner*, 74 N.W. 705, 116 Mich. 228 (1898).

In doing so, the *Hilt* court acknowledged the pressures on the court to appropriate the beaches to public use:

> With much vigor and some temperature, the loss to the State of financial and recreational benefit has been urged as a reason for sustaining the *Kavanaugh* doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the State and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The State should provide proper parks and playgrounds and camping sites and other instrumentalities for its citizens to enjoy the benefits of nature. But to do this, the State has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The State must be honest.

Hilt at 224. The *Hilt* court instead sided with the private shore owner, a policy choice which aided "development of the lake shores," and allowed the state

"to levy and collect taxes on the relicted land." *Id.* at 227. The *Hilt* court therefore affirmed in 1930 that the private owner "has full and exclusive use of the relicted land" representing the shore above the water's edge. *Id.*

For 75 years thereafter, the *Hilt* decision was followed by Michigan courts. *See*, *e.g.*, *Schofield v. Dingman*, 247 N.W. 67, 261 Mich. 611 (1933) (riparian owners on Lake Michigan generally enjoy exclusive rights to beach); *Meridian Twp. v. Palmer*, 273 N.W. 277, 279 Mich. 586 (1937) (citing *Hilt's* exclusive use rule and applying it to inland lake); *Thies v. Howland*, 380 N.W. 463, 424 Mich. 282 (1985) (citing *Hilt's* exclusive use rule and applying it to inland lake); *Peterman v. DNR*, 521 N.W.2d 499, 446 Mich. 177 (1994) (finding that riparian rights include "exclusive use of the bank and shore"; that the right of exclusion is "one of the essential elements of property in land"; and affirming damage award against state for unnecessary destruction of neighboring beach, including beach below "ordinary high water mark," in constructing boat ramp). Moreover, the state recognized the riparian's rights of exclusive use to the shore. *See*, *e.g.*, OAG 1977-1978, No. 5327 (July 6, 1978) ("The riparian owner therefore has trespass control to the water's edge.").

The exclusive use rights that Michigan Great Lakes Shoreline Owners long enjoyed suddenly changed in *Glass v. Goeckel*, *supra*. In that case, the Michigan Court of Appeals reviewed Michigan law and concluded that because riparians "have the right

to the exclusive use and enjoyment of their land to the water's edge," they may exclude trespassers. *Glass v. Goeckel*, 683 N.W.2d 719, 262 Mich. App. 29 (2004). But in reversing, the Michigan Supreme Court simply ignored both the clear holding of the *Hilt* court 75 years earlier, and the longstanding position of the state's chief law enforcement officer, its attorney general. Instead, it created out of whole cloth "the [public's] right to walk along the shore of Lake Huron on land lakeward of the ordinary high water mark." *Id*. at 675. In his vigorous and poignant dissent, Justice Markman recognized that this holding altered "the longstanding status quo in our state concerning the competing rights of the public and lakefront property owners" that existed "over 160 years and probably even earlier." *Id*. at 709, 713. The Goeckels appealed to this Court complaining of a judicial taking, but this Court denied certiorari. *Goeckel v. Glass*, *supra*.

Commentators have argued that *Glass* plainly effected an unconstitutional taking. *See*, *e.g.*, Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan, 58 Hastings L.J. 1095 (2007). The result-oriented *Glass* decision clearly acknowledged its belief that it was immune from a judicial taking claim, citing this Court's decision in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988) that "the individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see

fit." *Glass*, *supra* at 703. Of course, the question here is what the state can do *after* it has long ago defined those limits.

It is clear that many states, through their highest courts, have found the common law a convenient vehicle for confiscating private beach rights without paying just compensation. Spurred on by this Court's decision in *Phillips Petroleum, supra*, and despite the public trust doctrine's "disuse and neglect," the Coastal States Organization, now comprised of the governments of 35 coastal states, has published a treatise outlining how they can utilize the doctrine to expand public rights over private property. *See* Slade *et al*., "Putting the Public Trust Doctrine to Work" pp. xiii and 9 (Coastal States Organization 1997). The authors are unapologetic about the benefit of this approach as a "management tool for coastal resources":

> When acting under the authority of the Public Trust Doctrine, however, the state and state agencies are in a strong position to defend against "takings" claims.

Id. at 9. They are also clear about other benefits of the doctrine: it allows "the State to manage these resources as a property owner without having to exercise either regulatory police powers or its powers of eminent domain." *Id*. at 8. The states have thus been clear about their coordinated approach to attacking shoreline property rights: they will take a little used doctrine and offer it as a means to

confiscate private rights and avoid takings claims. Michigan's *Glass v. Goeckel*, *supra* is but one example of how the public trust doctrine was used by a willing court to create new public rights at the expense of private owners without precedent. Perhaps the most far reaching example is *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 369, 95 N.J. 306 (1984), where the Supreme Court of New Jersey created a public "right to cross private land and to use a portion of the dry sand" to "swim and bathe," among other things.

At this writing, the new assault on private beach rights is being played out in a widely publicized Ohio case, where the state has disregarded longstanding prior caselaw and asserted public ownership of the shore based on the public trust doctrine. It has required riparians to "lease" from it the right to maintain structures on the dry shore. *See State of Ohio Ex. Rel. Robert Merrill, Trustee, et al. v. State of Ohio, Department of Natural Resources, et al*., Ohio Court of Appeals Case No. 2008-L-008, viewed at <www.ohiolakefrontgroup.com> (viewed August 17, 2009). That case will almost certainly make its way to the Ohio Supreme Court, and then be presented to this court for review. The insatiable government appetite for control over private shores is sure to continue so long as this Court continues a "hands off" response to judicial confiscation of America's private beaches.

Save Our Shoreline submits that the approach used is also poor governmental policy. Litigants in a

court of law in property cases are especially accustomed to arguing issues of *stare decisis* as opposed to policy, especially when prior law is clear and well-established, such as in *Glass v. Goeckel, supra.* Simply put, litigants in property cases do not anticipate that a court will effect a sudden change in the law governing private property rights. As such, a court that suddenly deviates from the law and imposes its own views does so without sufficient input about the ramifications of its actions. If control of the lakeshores must necessarily be suddenly shifted from private owners to government, that issue should be fully debated in the open. When a court instead focuses its efforts on convincing parties and the public that it has not changed property rights when in fact it has, the proper debate never occurs.

CONCLUSION

The concept of judicial taking is often discussed as a possible tool for this Court to curb abuse by state courts which might use their power to develop the common law as a means to confiscate private property for public use. Private ownership of beaches and shoreline property are under attack by state governments unwilling to settle for regulatory control under the police power, and the protections such an approach provides private owners. As evidenced by cases in New Jersey, Michigan, and now Florida, among others, state courts continue to disregard their prior decisions and shift control of such lands to the

states, some without any discussion of why public policy favors such a move. With property law being a creature of the common law, the constitutional protection of private property will mean little if state courts can change the common law of property whenever they deem a public need. This court should find that the Florida approach in this case violates the Fifth and Fourteenth Amendments to the U.S. Constitution.

Respectfully submitted,

SMITH, MARTIN, POWERS & KNIER, P.C.
Attorneys for Save Our Shoreline

DAVID L. POWERS (P39110)
900 Washington Avenue
Bay City, Michigan 48708
(989) 892-4861

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