No. 08-1151

In The
# Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

*Petitioner,*

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WALTON COUNTY, and CITY OF DESTIN,

*Respondents.*

**On Writ Of Certiorari To The Florida Supreme Court**

**BRIEF *AMICUS CURIAE* OF THE AMERICAN PLANNING ASSOCIATION AND THE FLORIDA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF RESPONDENTS**

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The American Planning Association and the Florida Chapter of the American Planning Association respectfully submit this brief *amicus curiae* in support of respondents.[1]

## STATEMENT OF INTEREST

The American Planning Association ("APA") is a nonprofit public interest and research organization founded in 1978 to advance the art and science of planning – including physical, economic and community planning – at the local, regional, state, and national levels. The APA's mission is to encourage planning that contributes to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society. The APA has 47 regional chapters, including the Florida Chapter, and 20 divisions devoted to specialized planning interests. The APA values the diversity of state property laws within our nation because it provides citizens with choices about the types of communities in which to live and work and permits valuable social experimentation.

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

**SUMMARY OF ARGUMENT**

Petitioner and its *amici* urge the Court to embrace the novel idea that a state court ruling on an issue of state common law can constitute a compensable taking under the Fifth Amendment to the U.S. Constitution. The Court has never in its long history recognized a judicial takings claim and it should not do so in this case.

It is well established that, if a state court ruling on an issue of state law is a pretext designed to evade or subvert a federal constitutional right, the Court, pursuant to the Supremacy Clause, can set aside the state court ruling on the ground that it lacks a fair or substantial basis and proceed to vindicate the federal right. The argument that a state court ruling lacks a fair or substantial basis is available to a property owner who contends that a ruling on an issue of state property law has improperly precluded consideration of a federal taking claim based on some legislative or executive branch action. This well established and highly deferential legal standard recognizes that the state courts are solely responsible for defining the state common law of property, but creates a mechanism to ensure that illegitimate state law-making cannot subvert federal constitutional rights.

Petitioner and its allies are now asking the Court to expand enormously the power of the federal courts to supervise state court state law-making and, in effect, to substitute a federal rule of property for the distinct property rules of the individual states. The judicial takings proposal is inconsistent with the Court's established understanding that the term "property" in the Takings Clause is generally defined by reference to state law, and that the state courts, not the federal courts, are the final expositors of the meaning of state law. It is also inconsistent with the language and original understanding of the Takings Clause. More generally, the judicial takings concept conflicts with our system of federalism, and in particular the principle, epitomized by *Erie v. Thompkins*, 304 U.S. 64 (1938), that the federal courts lack the power to exercise a general supervisory authority over the content of state common law. Finally, the judicial takings theory is inconsistent with the tradition of "cooperative judicial federalism" that has long governed the relationship between the federal and state court systems.

## ARGUMENT

### I. THE COURT SHOULD REJECT THE NOVEL THEORY THAT A JUDICIAL RULING ON A QUESTION OF STATE PROPERTY LAW CAN CONSTITUTE A COMPENSABLE TAKING UNDER THE FIFTH AMENDMENT.

The Court should reject the proposal by petitioner and its *amici* that the Court adopt the novel theory that a state court ruling on an issue of the state common law of property can constitute a compensable taking under the Fifth Amendment. The

Court rejected this theory over a hundred years ago and no subsequent decision of the Court supports the theory now. Furthermore, as a matter of first principles, the judicial takings theory is inconsistent with both the limitation on the jurisdiction of this Court to matters of federal law and a proper reading of the Takings Clause.

**The Definition of "Property" Under the Takings Clause.** The so-called judicial takings theory should be rejected because it is well established that the "term" property in the Takings Clause is not defined by the Constitution but instead is defined by reference to some independent source of law, usually state law. When, as in this case, the nature and scope of the property at issue has been defined by a state court under state common law, the state court ruling on the issue represents the final word and this Court has no power to directly review the state court's ruling, whether under a judicial takings theory or on any other basis.

Under the Supremacy Clause, the provisions of the Constitution, as well other federal laws, "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art VI, ¶ 2. Equally important, however, under our federal system, consistent with the Tenth Amendment, the state courts, as arms of independent sovereigns, have the final word on the meaning of state law. "A State's highest court is unquestionably 'the ultimate expositor of state law,'" and "the prerogative of [a state court] to say what [state] law is merits respect in federal forums." *Riley v. Kennedy*, 128 S.Ct. 1970, 1985 (2008), quoting *Mullany v. Wilbur*, 421 U.S. 684, 691 (1975).

Consistent with this understanding, the Court has long disclaimed jurisdiction to review state court decisions on state law issues. *See Murdock v. City of Memphis*, 87 U.S. 590 (1875). Furthermore, the Court has ruled that it will not review a state court decision, even when it addresses federal law issues, when a state law ground discussed by the state court provides an "adequate and independent" basis for the decision. In perhaps its most emphatic articulation of this rule, the Court stated:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

*Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Under these principles, a state court ruling in a case involving a federal taking claim that the claim fails at the threshold because the claimant has no basis for claiming a protected property interest under state law presents no question to this Court about whether the state court ruled correctly. *See* 28 U.S.C. §1257 (limiting the Court's jurisdiction to issues arising under the federal Constitution, statutes, or treaties). The text of the Takings Clause ("nor shall private property be taken for public use, without just compensation") distinguishes the question of what is "property" from the question of what is a "taking" of property. While the meaning of the term "taking" unquestionably involves an issue of federal law, the term "property" is *not* defined by the Constitution; instead, the Court has "resort[ed] to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify as 'property' under the Fifth Amendment." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); s*ee also Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) ("the Constitution protects rather than creates property interests"). Because the Takings Clause points to state law to define property, and because state courts are the final expositors of the meaning of state law, there is no basis for seeking review under the Takings Clause of a state court ruling on the nature and scope of a state property interest.

The Court unambiguously embraced this position over a hundred years ago in *Sauer v. City of New York*, 206 U.S. 536 (1907). The case involved a

Manhattan property owner claiming that the city's construction of an elevated viaduct above the street abutting his property resulted in a taking of an easement of access, light and air. The Court said that the "only question" it had to decide was "whether the property which the plaintiff alleged was taken existed at all." *Id*. at 547. The New York Court of Appeals had concluded that "the plaintiff had no such easements," *id*., and this Court, on that basis alone, rejected the federal taking claim. The Court's reasoning is worth quoting at length:

> Surely such questions [of state law] must be for final determination of the state court. It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement. . . . [T]his court has neither the right nor the duty . . . to reduce the law of the various states to a uniform rule which it shall announce and impose. Upon the ground, then, that under the law of New York, as determined by its highest court, the plaintiff never owned the easements which he claimed, and that therefore there was no property taken, we hold that no violation of the 14th amendment is shown.

*Id*. at 549. Remarkably, despite the obvious relevance of this decision to this case, and the clarity of its reasoning, neither the petitioner nor any of its *amici* even cite *Sauer*.

The ruling and opinion in *Sauer* effectively resolved a debate that had split the Court two years earlier in the case of *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544 (1905). That case involved a very similar dispute over whether government-authorized construction of an elevated railway track above a public street resulted in a taking of abutting owners' easements of light and air. The Court overturned the New York court's rejection of the taking claim (and contract claim), with a four-justice plurality opinion and a fifth justice joining in the result. Justice Holmes and three other justices dissented. The plurality opinion arguably adopted the position that the state court ruling that the plaintiffs lacked the state property interest they claimed was subject to challenge as a taking. Justice Holmes, in characteristically pithy yet eloquent language, rejected this theory. Because Justice Holmes's dissenting views in *Muhlker* clearly carried the day in the subsequent *Sauer* case, his reasoning in *Muhlker* is also worth quoting at length.

Justice Holmes began with the following observation: "If at the outset the New York courts had decided that, apart from statute or express grant, the abutters on a street had only the rights of the public and no private easement of any kind it would have been in no way amazing." *Muhlker*, 197 U.S. at 572-73. After discussing decisions from other jurisdictions that had denied the existence of easements in these circumstances, he continued:

> If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by everyone. But if that be admitted, I ask myself what has happened to cut down the power of the same courts as against the same constitution at the present day.

*Id*. at 573. Holmes then discussed the argument that an earlier decision of the New York Court of Appeals recognized the existence of an easement in these circumstances, and that the New York court's ruling in this case overturned that earlier precedent. In response, Justice Holmes rejected the idea that such a change in state law could support a taking claim: "I know of no constitutional principle to prevent the complete reversal of [the earlier precedent] tomorrow if it should seem proper to" the New York court. *Id*. at 574. In addition, he observed that plaintiff's argument (like petitioner's argument in this case) did not actually challenge the power of the state court to overturn earlier precedent, but its authority to interpret earlier precedent. Thus, in Holmes's view, the plaintiff had to "go much further" in order to prevail, and had to argue "not only that the state courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound." *Id*.

Justice Holmes rejected this approach. Contrasting his position with that of the plurality, Justice Holmes said he thought the distinctions drawn by the New York court were "not wanting in good sense." But he continued:

> I am not discussing the question of whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the court of appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decisions obviously not having been given its form for the purpose of evasion, I think we should respect and affirm it, if we do not dismiss the case.

*Id*. at 575. Finally, he stated:

> I cannot believe that whenever the 14th Amendment . . . is set up, we are free to go behind the local decisions on a matter of land law, and . . . declare rights to exist which we should think ought to be implied from a dedication or location if we were the local courts. I cannot believe that we are at liberty to create rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do so, then I am wrong in my assumption that, if the New York courts originally had declared that the laying out of a public way conferred no private rights, we should have nothing to say. But if I am right, if we are bound by local decisions as to local rights in real

> estate, then we are equally bound by the distinctions and the limitations of those rights declared by the local courts.

*Id*. at 576. As is apparent from the reasoning in the subsequent *Sauer* decision, these views, initially expressed in dissent, became the Court majority position two years later.

The Court has cited the *Sauer* decision with approval in subsequent cases, *see, e.g., Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 n.5 (1944); *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 655 (1927), and we know of no reason to question the validity of the decision. *See also Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 n.8 (1930). Petitioner acknowledges (without discussing Justice Holmes's opinion in *Muhlker* or the Court's subsequent decision in *Sauer*) that Holmes's views contradict its judicial takings theory. (Pet. Br. at 38). But petitioner's answer is simply to cite Justice Holmes's subsequent opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), suggesting that his (and the Court's) recognition of the concept of a regulatory taking meant that all of Holmes's (and the Court's) previous insistence on the autonomy of the state common law of property implicitly fell by the wayside. A brief review of *Mahon* shows the fallacy of this argument, for in that case the Court said there was no dispute that the defendant possessed a property interest under Pennsylvania law; the only question was whether Pennsylvania mining legislation "took" the property.

**The Text, Original Understanding and Purpose of the Takings Clause.** Apart from the fact that the Takings Clause makes the definition of "property" an issue of state law, and this Court has no jurisdiction to review state court rulings on issues of state law, neither the text of the Takings Clause considered as a whole, nor the clause's original understanding, nor the purpose of the clause supports the judicial takings theory.

As discussed, the language of the Takings Clause makes a distinction between "property" and "taking," thereby establishing a two-step inquiry, focusing first on the property issue and then on the taking issue. In other words, the takings question *presupposes* the existence of a property interest. Given this language, it would be, at best, awkward to read the Takings Clause as supporting the idea that a state court's resolution of the threshold question of whether a property interest exists can itself constitute a "taking" under the Fifth Amendment.

The judicial takings theory is impossible to square with the evidence regarding the original understanding of the Takings Clause. Adoption of the Takings Clause generated essentially no debate during the deliberations over the Bill of Rights, suggesting that this provision was not intended to break new ground. *See* William M. Treanor, *The Original Understanding of the Takings Clause*, 95 Colum. L. Rev. 782, 791 (1995). Contemporary evidence indicates that the drafters' primary goal was to codify the general (but by no means universal) practice of government payments for establishing roads through private lands, and to address public concerns during the Revolutionary War about military seizures of livestock and other personal property. *Id*. It is generally accepted that the drafters did not intend that police power regulations, which were hardly unknown during the colonial period, would be regarded as potential takings. *See* John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine,* 109 Harv. L. Rev. 1252 (1996); *see also Lucas v. South Carolina Coastal Council*, 505 U.S. at 1028 n.15 ("early constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

So far as we know, there is no evidence that the drafters contemplated that judicial common law rulings could constitute takings. The thought would almost certainly have been perceived as incredible in view of the traditional understanding that common law law-making involves an effort to find, not make, the law. *See* 1 Blackstone, *Commentaries on the Laws of England* 135 (1765). Tellingly, while petitioner's *amici* present detailed accounts of the historical background of the Takings Clause, none offers a wisp of actual evidence that the drafters believed the Takings Clause would apply to state court rulings on common law property questions. In sum, the proposal that the Court adopt the theory of judicial takings represents an invitation to embrace novel doctrine that has no foundation in "the historical compact recorded in the Takings Clause." *Lucas*, 505 U.S. at 1028.

Finally, the judicial takings theory, at least as articulated by petitioner and its allies, is inconsistent with the basic purpose and scope of the Takings Clause. Petitioner contends, in effect, that the ruling of the Florida Supreme Court should be held to be a taking because it represents a bad faith application of state law designed to defeat federal constitutional rights. (Pet. Br. at 16, 22, 23 (referring to the decision as "result driven," "an attempt to camouflage," and an exercise in "judicial reengineering")). But a proper taking claim presumes that the government has acted for a "public use," that is, a valid public purpose. *See Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 539 (2005). As the Court explained:

> [T]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property '*for public use*.' It does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'

*Id*. at 543, quoting *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987) (emphases in original). Petitioner's proposed judicial taking claim does not logically fit within takings doctrine because petitioner is contending that the Florida court acted for an illegitimate purpose, that is, *not* for a "public use." As discussed in Section II, *infra*, such a challenge to state court law-making might support some argument under the U.S. Constitution, but it cannot conceivably support a claim of a taking for a public use.

**Federalism Concerns.** The judicial takings theory also involves an impermissible intrusion into the state law-making process that is inconsistent with our system of federalism. The theory that a state court's refusal to recognize an asserted right as an entitlement under state law could itself constitute a taking implies that this Court can define, as a matter of federal constitutional law, the permissible dimensions of state real property law. But, as discussed above, the Court has repeatedly recognized that state law defines property interests within the meaning of the Takings Clause, and the Court has long said that it has "neither the right nor the duty" to substitute its understanding of property for that of the state. *Sauer*, 206 U.S. at 549. To be sure, the Court has ruled that certain kinds of government actions are and are not within the scope of the Takings Clause. *See Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (impositions of financial liability unrelated to any impact on a tangible property interest are outside the scope of the Takings Clause). The Court also has ruled, as a matter of federal law, that a claimant's property interests must generally be viewed in the aggregate to assess whether the burden of a government action on private property rises to the level of a taking.

*See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331-32 (2002). In addition, the Court has defined, under federal law, whether government actions should be characterized as restrictions on property use (triggering deferential review), or whether they should be regarded (more rarely) as permanent physical occupations of property interests (triggering more demanding review). *Compare Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978) with *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982). But the Court has never suggested that the Takings Clause, of its own force, compels the states to recognize property interests that the state courts have not already identified under state law.[2]

[2] In the due process context, the Court has stated that whether an interest in receiving a discretionary government benefit qualifies as property within the meaning of the Due Process Clause turns in part on whether the plaintiff has a "legitimate claim of entitlement," an issue governed by federal law. *Memphis Light, Gas & Water Division v. Craft*, 461 U.S. 1, 9 (1978). But the Court has never read the Takings Clause to compel the states to recognize property interests, much less property interest in land, that have no basis in state law. *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (addressing whether state-recognized rights in trade secrets "qualify" as property for the purpose of the Takings Clause). Contrary to the argument of one of petitioner's *amici*, *see* Brief of National Association of Homebuilders, the fact that the Court has ruled that the meaning of the term "property" in a federal statute should be treated as involving a question of federal law, *see United States v. Craft*, 535 U.S. 274 (2002), hardly supports the idea that the federal Constitution, which is replete with

(Continued on following page)

Furthermore, the theory that the Takings Clause can be read to mandate the content of state property law flies in the face of the Court's landmark decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). In that case the Court held that the federal courts lack the authority to develop and apply a general federal common law to resolve questions about the content of state common law. As Justice Brandeis wrote:

> Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. *And no clause in the Constitution purports to confer such a power upon the federal courts*.

*Id*. at 78 (emphasis added). *Erie* reflects the Court's understanding that rulings of state courts on matters of state law are definitive expressions of the will of the states in their sovereign capacities and that the federal judiciary lacks the constitutional authority to promulgate national legal rules that trump state law. In the Court's words:

> '[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing

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provisions designed to safeguard the legal and political autonomy of the states, should be read in the same fashion.

> by the authority of that State without regard to what it may have been in England or anywhere else. . . .' 'The authority and only authority is the State, and if that is so, the voice adopted by the State as its own . . . should utter the last word.'

*Id*. at 79, quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co*., 276 U.S. 518, 533-34, 535 (1928) (Holmes, J., dissenting). *See generally* Frank I. Michelman, *Property, Federalism, and Jurisprudence: a Comment on Lucas and Judicial Conservatism*, 35 Wm. & Mary L. Rev. 301 (1993) (discussing the serious tension between the principle of *Erie* and the notion that federal courts in takings cases might exercise a close supervision over state court definitions of state property interests).

The theory of judicial takings is even more problematic because it implies a federal power to police the *evolution* of state law. Common law courts, by their nature, are authorized to modify legal rules over time "in light of changed circumstances, increased knowledge, and general logic and experience." *Rogers v. Tenn.*, 532 U.S. 451, 464 (2001). Based on this understanding of the common law process, the Court's cases have "clearly established that '[a] person has no property, no vested interest, in any rule of the common law.'" *Duke Power v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n.32 (1978), *quoting Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912), in turn quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877). If no person can claim an entitlement to any particular rule of the common law, it is difficult, to say the least, to see how a judicial modification of a common law rule can give rise to a taking.

The conclusion that state common law definitions of property are beyond the direct control of the federal government means that private property regimes will vary from state to state and over time, as they obviously do generally and in the case of littoral property rights specifically. *See Walton County v. Stop the Beach Renourishment*, 998 So.2d 1102, 1111 n.9 (Fla. 2008) (observing that "the law regarding littoral rights varies among the states," and distinguishing the law of Florida from that of Mississippi and North Carolina); *see also Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (discussing the diverse laws of littoral ownerhip adopted by the thirteen original states). This diversity is not to be lamented but rather celebrated as the intended and desirable result of a federalist system that respects and supports the independent law-making authority of each sovereign state. This diversity promotes choice for our citizens in selecting the kinds of communities in which to live and work and provides room for valuable social experimentation.

At the same time, there is no logical inconsistency between the diversity of state property law and the idea that the Bill of Rights establishes fixed national rules. As Justice Scalia has explained:

> There is nothing new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change. The Fifth Amendment provides, for instance, that 'private property' shall not 'be taken for public use, without just compensation'; but it does not purport to define property rights. We have consistently held that 'the existence of a property interest is determined by reference to "existing rules or understandings that stem from an independent source such as state law."' The same is true of the Fourteenth Amendment Due Process Clause's protection of 'property.' This reference to changeable law presents no problem for the originalist. No one supposes that the *meaning* of the Constitution changes as States expand and contract property rights.

*Georgia v. Randolph*, 547 U.S. 103, 144 (2006) (Scalia, J., dissenting) (emphasis in original) (internal citations omitted).

The logical outcome is that this Court, exercising a proper judicial restraint, must allow federal constitutional claims to fail in some cases based on state judicial rulings about the scope of private property interests with which a majority of the Court might disagree if it had authority to decide the state law issue. As the Court explained in *Sauer*:

> This court, whose highest function is to confine all other authorities within the limits prescribed for them by the fundamental law,

> ought certainly to be zealous to restrain itself within the limits of its own jurisdiction, and not be insensibly tempted beyond them by the thought that an unjustified or harsh rule of law may have been applied by the state courts in the determination of a question committed exclusively to their care.

206 U.S. at 547.

**Practical Problems With the Judicial Takings Theory.** Apart from the constitutional reasons for rejecting the judicial takings theory, the theory raises a host of difficult questions about where and how such a claim might be litigated. It would be difficult for this Court to hear every possible claim of a judicial taking, both because there would generally be no factual record to support a takings analysis, *see Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1213 (1994) (Scalia, J. dissenting), and because this type of litigation would create serious and long-lasting tensions between the federal and state court systems. In the past, the Court has described the relationship between the federal and state courts as one of "cooperative judicial federalism," *Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974); embracing the judicial takings theory would obviously undermine cooperation. So-called judicial takings claims might be remanded to state trial courts, but that arrangement would put state trial courts in the seemingly untenable position of reviewing the constitutionality of rulings by the states' highest courts.

The obstacles to litigating judicial takings claim in federal District Court appear even more formidable. First, while this Court has never directly addressed the issue, *cf. City of Monterey v. Del Monte Dunes at Monterey Ltd*., 526 U.S. 687, 741 (1999) (holding that the Eleventh Amendment did not bar a takings suit against a municipality in federal court, but recognizing that the issue of the immunity of a state from a takings suit in federal court raised a distinct issue), the consensus among the federal courts of appeals that have addressed the issue is that the Eleventh Amendment makes the states immune from suit in federal court under the Takings Clause without their consent. *See*, *e.g.*, *DLX, Inc. v. Ky.*, 381 F.3d 511, 526 (6thCir. 2004); *Harbert Int'l*, *Inc. v. James*, 157 F.3d 1271, 1277 (11thCir. 1998).[3] Because the state courts are a branch of the state, a state would be immune from liability in federal District Court based on the rulings of its courts.

Second, a takings suit in federal District Court based on a state judicial ruling would apparently be barred under the *Rooker-Feldman* doctrine. This

[3] In *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. at 316 n.9, the Court rejected the argument that sovereign immunity doctrine barred the conclusion that the presumptive remedy for a violation of the Takings Clause should be monetary relief. That reasoning does not answer the question whether the states, absent their consent or a valid abrogation of immunity, possess immunity from suit under the Takings Clause based on the Eleventh Amendment.

doctrine prohibits a federal District Court from exercising subject matter jurisdiction over a lawsuit complaining of an injury caused by a state court judgment and seeking review and rejection of the judgment. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005). The basis of the doctrine is 28 U.S.C. §1257, which confers exclusive jurisdiction to review the final judgments of state courts upon this Court, and inferentially bars the District Courts from exercising the same jurisdiction. *Id.* While the Court has recently emphasized "the narrowness of the *Rooker-Feldman* rule," *Lance v. Dennis*, 546 U.S. 459, 464 (2006), the doctrine would appear to clearly apply to a claim that a state court effected a "judicial taking." *See Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923) (ordering dismissal for lack of jurisdiction of a suit in federal District Court challenging federal constitutionality of a state court ruling). Tellingly, a leading academic advocate of the judicial takings theory has acknowledged that the *Rooker-Feldman* doctrine might well bar collateral attacks on state court decisions based on a takings theory in federal District Court. *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. R. 1449, 1511 (1990) ("Because of the limited authority of federal district courts to review state court decisions collaterally . . . , only the United States Supreme Court may be able to hear most judicial takings challenges to state decisions.").

Notwithstanding the *Rooker-Feldman* doctrine, a few lower federal courts have entertained claims that state court rulings impaired property rights in violation of the federal Constitution. *See*, *e.g.*, *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D.Haw. 1977), *aff'd in part and rev'd in part*, 753 F.2d 1468 (9thCir. 1985), *vacated and remanded*, 477 U.S. 902 (1986), *dismissed on ripeness grounds*, 887 F.2d 215 (9thCir. 1989); *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D.Haw. 1978). But, in our view, the U.S. Court of Appeals for the Fifth Circuit adopted the better approach in affirming, based on the *Rooker-Feldman* doctrine, an order dismissing a claim that an allegedly "erroneous and unpredictable decision" of the Georgia Supreme Court violated the Takings Clause. *Reynolds v. State of Georgia*, 640 F.2d 702 (5thCir. 1981).

Finally, assuming that state courts may be open to hear federal takings claims based on judicial rulings, judicial takings claims based on state court rulings would not be ripe for consideration in federal District Court, at least in the first instance, because the claimants would not have exhausted available state compensation remedies. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

On a yet more practical level, the judicial takings theory is in serious tension with the practice of the federal courts to defer routinely to state courts on issues of state law, precisely because they have been recognized by this Court as the "final expositors" of state law. With the encouragement of the Court, *see Lehman Bros. v. Schein*, 416 U.S. 386 (1974) (vacating judgment and remanding case so appeals court could consider certification of issue to the Florida Supreme Court in view of "the novelty of the question and the great unsettlement of Florida law"), all or virtually all states have adopted procedures for accepting certification of state law issues from federal courts. *See* 17A Wright & Miller, *Federal Practice and Procedure* §4248 (3d ed. 2007). Federal courts frequently invoke the certification procedure to obtain state court resolution of state property law questions. *See*, *e.g.*, *Klamath Irrigation Dist. v. United States*, 532 F.3d 1376 (Fed.Cir. 2008) (certifying question of state water law in pending takings case to the Oregon Supreme Court). The basic premises of this procedure are that the federal courts stand as "outsiders" relative to the state legal system, and that the state courts are uniquely competent to resolve state law issues. *Lehman*, 416 U.S. at 391.

Various branches of federal abstention doctrine are also based on the premise that state courts should resolve issues of state law. In *Railroad Comm'n v. Pullman Co*., 312 U.S. 496 (1941), invoking its "scrupulous regard for the rightful independence of the state governments," *id*. at 501, quoting *Di Giovanni v. Camden Ins. Ass'n*, 296 U.S. 64, 73 (1935), the Court held that a federal District Court, rather than resolving a disputed issue of state law itself, should have deferred to the Texas Supreme Court to obtain a "definitive ruling" on the issue. *Id*. at 501. In *Burford v. Sun Oil Co*., 319 U.S. 315 (1943), the Court declared that, when faced with a claim arising from a complex state administrative process, a federal court should consider dismissing the action in favor of a state proceeding to avoid "[d]elay, misunderstanding of local law, and needless federal conflict with State policy." *Id*. at 326.

There is a considerable conflict between the idea of allowing the filing of claims under the Takings Clause based on state court rulings on state property law issues and the foregoing doctrines mandating that federal courts defer to state courts for definitive rulings on issues of state law. Is a state court, after resolving a state legal question at the behest of a federal court, to be met with a claim that its ruling subjects the state to financial liability under the Takings Clause? If the answer were "yes," state courts would accept case referrals from federal courts far less frequently in the future.

**Petitioner's Arguments.** Petitioner and its allies make various arguments in favor of the judicial takings theory, none of which is convincing. They cite a handful of state court decisions on state law property issues that also involved or implicated potential federal taking claims that they contend justify dramatic expansion of traditional takings doctrine. Apart from the fact that these cases are relatively few in number, all appear to involve reasonable, or at a minimum defensible, interpretations of state law. Even under petitioner's theory, not every state judicial ruling altering state law should trigger takings review and the cases cited clearly are neither so numerous nor so out of bounds as to support a revolution in takings doctrine.[4]

Furthermore, contrary to petitioner's argument, there is absolutely nothing in the recent state court decisions that represents any kind of break from the common law tradition of courts modifying private property interests, particularly in relation to water, to reflect new conditions and social values. *See*, *e.g.*, *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882) (repudiating riparianism in favor of prior appropriation doctrine in view of the "imperative necessity" created by arid conditions in the west); *Martin v. Bigelow*, 2 Vt. 184 (1827) (repudiating natural flow riparian doctrine in favor of reasonable use doctrine to facilitate "reasonable" industrial uses of Vermont's rivers). Thus, the suggestion that the judicial takings theory can be justified at this late date as a response to modern-day judicial adventurism is fallacious.

[4] Weighing on the other side of the argument are state court decisions declining to adopt seemingly sensible modifications of common law rules specifically to avoid adversely affecting existing property interests. *See*, *e.g.*, *Bott v. Michigan Department of Natural Resources,* 327 N.W.2d 838 (Mich. 1982); *cf. State ex rel. Martinez v. City of Las Vegas*, 89 P.3d 47 (N.M. 2004) (exercising equitable authority to mitigate effects of judicial modification of state water allocation rules). Because the state courts are aware of the consequences of changes in common law rules for property owners, and evidently shape their decisions to avoid or mitigate these effects, there is even less reason for this Court to embark on the radical innovation advocated by petitioner and its allies.

Petitioner and its allies contend that this Court should make no distinction between judicial rulings and actions by the executive and legislative branches. They contend that all types of state government actions should be subject to challenge under the Takings Clause on the same basis and that the tests to identify takings should be the same in all contexts. This appeal for parallel treatment fails on several grounds.

Most fundamentally, the argument ignores the fact, discussed at length above, that our system of federalism makes the state courts the final expositors on state law issues and neither this Court nor any other federal court has the authority to supervise state judicial law-making, especially on issues arising from the development of a state's common law of property.

In addition, the language of the Takings Clause itself provides a basis for generally treating the actions of the legislative and executive branches differently from judicial rulings on property law questions. Government measures restricting or otherwise intruding on recognized private property rights are evaluated as potential "takings," with the inquiry typically focusing on whether the measure is so economically burdensome as to be the functional equivalent of a physical occupation or appropriation. By contrast, judicial rulings on the nature and scope of property interests involve the meaning of the term "property." As discussed, the terms "property" and "taking" are further differentiated by the fact that the meaning of the first is governed by state law, whereas the meaning of the second is governed by federal law. Given these differences, there is no reason to assume, and indeed there is strong reason not to assume, that judicial rulings on common law property issues should be evaluated under the Takings Clause in the same fashion as other government actions.

Furthermore, state courts have a recognized institutional responsibility and capacity to defend federal constitutional rights that distinguishes them from other branches of state (or local) government. This Court has "emphatic[ally] reaffirm[ed] . . . the constitutional obligation of the state courts to uphold federal law," and has "express[ed] . . . confidence in their ability to do so." *Allen v. McCury*, 449 U.S. 90, 105 (1980). The Court's recognition that the state courts are full partners with the federal courts in protecting federal constitutional rights is surely related to the fact that the state courts are organized in a hierarchical system supervised by a single high court. As a practical matter, preserving the independent decision-making authority of the state courts in matters of state law involves less risk to federal constitutional interests than would be case with, for example, the policy-making authority of the many thousands of local government units across the country.

Finally, the concept of a judicial taking raises particular federalism concerns because it would involve federal intrusion into an area specifically reserved to the states. As Justice Kennedy explained in *Alden v. Maine*, 527 U.S. 706 (1999), our federal system preserves the independent sovereign status of the states, in part, by:

> reserv[ing] to [the states] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. The States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'

*Id*. at 714, quoting The Federalist No. 39, p. 245 (J. Madison) (C. Rossiter ed. 1961). The Court has repeatedly said that the task of defining and developing the basic rules of real property law unquestionably falls within the "sphere" reserved to the states as independent sovereigns. *See*, *e.g.*, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988). Thus, federal court review of state court rulings on issues of state real property law would directly intrude upon the states' portion of national sovereignty, including "the dignity and essential attributes inhering in that status."

Contrary to the position of some of petitioner's *amici*, the regulatory takings doctrine, as applied to other branches of state and local government, does not intrude on federalism values to the same degree that a judicial takings doctrine would. While state and local governments exercise a substantial portion of the nation's authority to regulate property, that authority is by no means reserved to them. *See*, *e.g.*, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (federal regulation of rail banking); *Babbitt v. Sweet Home Chapter, Cmtys. for a Greater Oregon*, 515 U.S. 687 (1995) (regulation of land use under the Endangered Species Act). Furthermore, a ruling that a unit of local government can only proceed with a valid regulation on the condition that it pay financial compensation, though no doubt burdensome, is certainly less intrusive than would be an order essentially striking down a state court ruling as "result driven . . . judicial reengineering of the case," as petitioner would have it. (Pet. Br. at 16, 23).

## II. THE COURT ALREADY HAS THE AUTHORITY TO ADDRESS PRETEXTUAL STATE COURT RULINGS DESIGNED TO CIRCUMVENT FEDERAL CONSTITUTIONAL PROTECTIONS.

The conclusion that a property owner cannot bring a taking claim based on a state court ruling on an issue of state common law of property does not preclude property owners from avoiding the effect of egregious state court rulings illegitimately designed to subvert the protection of the Takings Clause or any other provision of the Constitution. While it has never embraced the theory of a judicial taking, the Court has recognized that, when a state court ruling apparently rests on an adequate and independent state law ground, a party can present, and this Court can consider, an argument about whether the state law ruling actually represents an adequate and independent ground. Thus, the Court has "long held" that it has "an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds 'fair or substantial support' in state law." *Howlett v. Rose*, 496 U.S. 358, 366 n.14 (1990). This exception to the general rule that the federal courts are the "final expositors" of state law is rooted in "this Court's ultimate authority to review state-court decisions in which 'any title, right, privilege, or immunity is specially set up or claimed under the Constitution.'" *Howlett*, 496 U.S. at 366 n.14, *quoting* 28 U.S.C. §1257(a). In other words, the fair or substantial test is ultimately based on the Supremacy Clause, which necessarily includes the power to avoid state court rulings on state law issues that unreasonably and illegitimately seek to evade the command of federal law. *See Ward v. Board of County Comm'rs*, 253 U.S. 17, 22-23 (1920).

While the established fair or substantial test may not subject the state courts to the close and rigorous policing advocated by some of petitioner's *amici*, this time-tested standard largely addresses the basic concerns they raise, while according a larger measure of deference to the state courts.

The fair or substantial basis test allows the Court to exercise jurisdiction over state law issues to the extent necessary to protect and enforce supreme federal law generally; it is not an inquiry specific to takings cases. A takings claimant can challenge the dismissal, on the ground that the claimant does not possess a protected state law property interest to begin with, of a takings suit based on some legislative or executive branch action, by arguing that the state law ruling has no fair or substantial basis. *See*, *e.g.*, *Demorest v. City Farmers Trust Co.*, 321 U.S. 36 (1944). In addition, however, the Court has applied this test in a variety of other contexts, including to factual determinations related to federal claims, *see*, *e.g.*, *Ward v. Board of County Comm'rs*, rulings on state procedural issues, s*ee, e.g., NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958), and determinations about other substantive state law issues that are logically antecedent to federal law claims. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347 (1964).

The fair or substantial basis test calls for highly deferential review, consistent with the principles that the state courts have the final word on state law and can be relied upon to defend federal constitutional interests in the same fashion as federal courts. The Court has said that the key inquiry is whether, considering all relevant circumstances, the state court ruling was consciously designed to "evade" or "subvert" a federal constitutional right. *See Fox River Paper Co. v. Railroad Comm'n,* 274 U.S. at 655; *Mullaney v. Wilbur*, 421 US at 691 n.11; *cf. Sauer*, 206 U.S. at 556 (leaving open the possibility of setting aside a state court state law ruling as an "evasion"). Professor Laura Fitzgerald has summarized the appropriate test as follows: "[T]he Court may claim appellate jurisdiction to reverse state-court state-law judgments . . . only where it can identify and substantiate some concrete indication that the state court has deliberately manipulated state law to thwart federal law and then evade Supreme Court review." Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 Mich. L. Rev. 80, 89 (2002). It is not enough under this standard that the state court ruling departs from prior precedent or that this Court would have arrived at a different result if it had the authority to define state law. *See Fox River*, 274 U.S. at 657 (in applying the fair or substantial basis test "[w]e are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine"); c*f. Rogers v. Tenn.*, 532 U.S. at 464 (upholding criminal murder conviction, based on retroactive overruling of common law rule that would have barred conviction, because the change in the common law was not so "unexpected and indefensible" as to violate the Due Process Clause).

Significantly, the Court has recognized in a variety of contexts that the legislative branch has broad discretion to modify common law rules. "The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (internal quotations and citations omitted). Federal judicial review under the Constitution of judicial common law rulings obviously cannot be any less deferential than federal court review of legislation modifying common law rules.

Applying the fair or substantial test is relatively straightforward when a claimant has asserted a taking claim based on some legislative or executive branch measure, the state court has rejected the claim on the ground that no property interest exists under state law, and the claimant contends that the state law ruling has no fair or substantial basis. In that scenario, in the rare case where the fair or substantial basis argument actually succeeds, the Court should simply disregard the state law ruling and proceed to address the underlying taking claim on the merits.

It is less clear how the Court should address a fair or substantial argument if there is no underlying federal taking claim based on a legislative or executive branch measure, and the claim, in effect, is that a free-standing judicial ruling on a state law issue exposes an owner to the risk of future legislative or executive branch action which, but for the state law ruling, would constitute a taking. The fact that this hypothetical case involves no explicit federal taking claim tends to undermine any possible argument that the ruling was made for the purpose of evading or subverting a federal constitutional right. But it does not necessarily preclude the argument. However, such a claim would not present a ripe claim based on the Supremacy Clause because the state law ruling has not yet been interposed to impede a federal claim. In other words, any claim that a state law ruling lacks a fair or substantial basis and threatens to impede potential future takings claims would have to await a ripe claim based on actual application of the state law ruling to defeat a federal claim based on some independent government action. It cannot sensibly be argued that a state law ruling lacks a fair or substantial basis when no federal taking claim based on some legislative or executive branch action has actually been litigated in state court.

While petitioner's legal theory is not entirely clear, petitioner appears to rest on a judicial takings theory rather than a fair or substantial argument. Therefore, the Court can properly dismiss this case and defer possible consideration of the proper application of the fair or substantial test to some case that squarely raises the issue. If the Court views the fair or substantial argument as having been presented, the petitioner's case should be rejected for several reasons. First, as discussed by respondents, the Florida Supreme Court's ruling on the nature and scope of littoral owners' property interests is consistent with Florida precedent and, at the very minimum, has a fair or substantial basis. Furthermore, as respondents have also explained, petitioner cannot contend that the state law ruling impeded consideration of any federal taking claim based on the Beach and Shore Preservation Act because petitioner challenged the Act as a taking under the Florida Constitution, not the U.S. Constitution. Finally, to the extent the petitioner can be viewed as making a free-standing argument that the Florida court's interpretation of state law lacks a fair or substantial basis, and that that ruling might impede some future federal takings claim, the argument is neither ripe nor meritorious.

## CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Florida Supreme Court.

Respectfully submitted,

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October 2009