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 OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS AND FLORIDA HOME BUILDERS ASSOCIATION SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The Florida Supreme Court invoked “nonexistent rules of state substantive law" to reverse 100 years of uniform holdings that littoral rights are constitutionally protected. In doing so, did the Florida Court's decision cause a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that eliminates constitutional littoral rights and replaces them with statutory rights a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

Is the Florida Supreme Court's approval of a legislative scheme that allows an executive agency to unilaterally modify a private landowner's property boundary without a judicial hearing or the payment of just compensation a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

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INTEREST OF THE AMICI

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this amici curiae brief supporting petitioners.[1] NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the shelter industry. As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations, of which the Florida Home Builders Association is one. About one-third of NAHB's 200,000 members are home builders and/or remodelers, and its members construct about 80 percent of the new homes built each year in the United States.

NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant and amicus curiae to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife,* 551 U.S. 644 (2007). Attached at Appendix A to this brief is a list of cases in which NAHB has participated before this Court as amicus curiae or "of counsel." A large number of those cases involved landowners and other

[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

parties aggrieved by over-zealous regulation under a wide array of statutes and regulatory programs.

The organizational policies of NAHB have long advocated that a property owner must be compensated when government acquires their land or reduces its value by regulation. NAHB's members frequently face state action that eliminates the economically viable use of their property, and it supports the application of the Fifth Amendment's Takings Clause to legislative, executive, and judicial action.

SUMMARY OF ARGUMENT

This matter provides an opportunity for the Court to clarify that the Takings Clause of the Fifth Amendment applies to judicial action in the same manner as it applies to actions taken by other branches of government. *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897), applied the Takings Clause to state action, and strongly suggested that state courts were subject to its requirements. Since this decision, there has been debate as to whether a judicial taking can occur, yet this Court has not directly addressed the operation of the Takings Clause to decisions by state courts.

This Court has recognized that state courts are not immune from other Constitutional protections, and it should now unequivocally state that judicial takings are no different than legislative or executive takings.

ARGUMENT

I. THE FOURTEENTH AMENDMENT REQUIRES APPLICATION OF THE TAKINGS CLAUSE TO STATE JUDICIAL ACTIONS.

A scholarly debate has long existed concerning the existence of "judicial takings."[2] NAHB suggests that an application of this Court's longstanding precedent dictates that judicial takings can and must occur, thereby triggering the payment of compensation to aggrieved property owners.

The Court has consistently found that judicial action is encompassed by the Fourteenth Amendment's applicability to state action. *Infra* pp. 3-6. Furthermore, the Court has long held that the Fifth Amendment's Takings Clause applies to the states, through the Fourteenth Amendment. *Infra* pp. 7-8. NAHB respectfully submits that because the Takings Clause applies to state action through the Fourteenth Amendment—and judicial action is encompassed by state action—then the Takings Clause must apply to judicial actions and decisions.

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[2] *Compare* Barton H. Thompson, Jr., *Judicial Takings,* 76 Va. L. Rev. 1449 (1990) (arguing that there is no justification for exempting courts from property protections that are applied to other branches of government) *with* Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings,* 2001 Utah L. Rev. 379 (2001) (the Takings Clause is limited to legislative and executive action).

A. State Courts Have Been Found to Violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

This Court has unequivocally determined that state judicial action is state action to which federal Constitutional protections apply. The foundation of this principle has been based on this Court's recognition that the Fourteenth Amendment applies to judicial decisions in the same manner as it applies to legislative and executive actions.[3]

In *Shelley v. Kraemer,* 334 U.S. 1 (1948), the Court forcefully reiterated this stance, holding that the Fourteenth Amendment encompassed all state action of whatever sort, including those taken by the judiciary. The Court explained:

> [F]rom the time of the adoption of the Fourteenth Amendment . . . it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials . . . it has never been suggested that state court action is immunized from the operation of those provisions simply

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[3] *Broad River Power Co. et al. v. South Carolina,* 281 U.S. 537, 540 (1930) ("Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded.")

> because the act is that of the judicial branch of the state government.

Id. at 18. The Court in *Shelley* determined that the state court violated the Equal Protection and Due Process clauses of the Fourteenth Amendment by upholding racially motivated restrictive covenants. *Id.* at 20. It is important to note, however, that the Court did not limit the application of the Fourteenth Amendment to Due Process and Equal Protection—stating broadly the Amendment applied generally to state judicial action.

Since *Shelley*, this Court, the lower federal courts, and state courts have all regularly determined that judicial decisions can violate Due Process and Equal Protection guarantees under the Fourteenth Amendment.[4]

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[4] *E.g., Brinkerhoff-Faris Trust & Savs. Co. v. Hill,* 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."); *Vill. of Willowbrook v. Olech,* 528 U.S. 562 (2000) (Equal Protection clause applied to all government activity, whether legislative, executive, or judicial); *Moose Lodge 107 v. Irvis,* 407 U.S. 163 (1972) (state action may stem from administrative, legislative, or judicial action for purposes of equal protection violation); *Rogers v. Tennessee,* 532 U.S. 451, 456 (2001) (judicial reformation of the law in the context of criminal statutes violates due process); *Jones v. Evans,* 932 F. Supp. 204, 206 (N.D. Ohio 1996) ("[I]t is clear that the action of state courts and their officers is regarded as action of the State within the fourteenth amendment."); *Commonwealth Natural Res. and Envt'l Prot. Cabinet v. Kentec Coal Co.,* 177 S.W.3d 718 (Ky. 2005) (holding that equal protection clause applied to all government activity, including judicial action).

B. State Court Actions Have Been Found to Violate Other Aspects of The Constitution Through the Fourteenth Amendment.

In addition to finding that the judiciary can violate the Fourteenth Amendment's application of Due Process and Equal Protection to the States, other provisions of the Constitution have been used to check judicial action through the Fourteenth Amendment.[5]

For example, in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), the Supreme Court of Alabama's libel judgment against the New York Times was held to violate the paper's First Amendment rights, as incorporated through the Fourteenth Amendment's Due Process Clause. Similarly, the D.C. Circuit acknowledged this application of the First Amendment to judicial actions in *Edwards v. Habib,* 397 F.2d 687, 699 (D.C. Cir. 1968), where it determined that a state court could not uphold the eviction of a tenant in retaliation for reporting housing code violations. The court explained that "[a] state court judgment . . . may unconstitutionally abridge the right of free speech as well as the right to equal protection of the laws." *Id.* at 694.

Likewise, this Court has held that state court criminal sentences may violate the Eighth Amendment. In *Solem v. Helm,* 463 U.S. 277, 290-92 (1983), the question was whether the South Dakota

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[5] *See, e.g. Duncan v. State of La.,* 391 U.S. 145 (1968) (holding that state court violated the Sixth Amendment and Fourteenth Amendment by refusing to provide jury trial in a criminal case).

Supreme Court's affirmance of a life sentence for "uttering a 'no account' check for $100" was cruel and unusual punishment. Relying on the established common law principle that punishment must be proportionate to the crime, the Court held that the excessive sentence issued by the state judicial branch violated the Eighth Amendment. *Id.*

Finally, the imposition of constitutional restraints on judicial decisions does not stop with the Bill of Rights. In *Muhlker v. New York & Harlem R.R. Co.,* 197 U.S. 544 (1905), the Court determined that a New York appeals court decision that infringed on a property owner's easement violated the Contract Clause. The property owner asserted that the elimination of an established property interest by the state judiciary violated both the Contracts Clause and the Fourteenth Amendment.[6]

* * *

Therefore, as shown above, the Court has steadily held that the "state action" requirement of the Fourteenth Amendment applies to judicial action in the same manner as it applies to legislative and executive action.

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[6] In addition to emphasizing that state courts could not take away rights "acquired by contract," the Court explained that the public interest "is not more necessary to the making of a city than the rights to light and air, held . . . in individual ownership . . . and asserted only as rights of private property." *Id.* at 571; Walston, *supra* note 2 at 427 ("*Muhlker* suggests that the Constitution restricts the courts' authority to change their definitions of property rights.").

C. The Takings Clause is Applicable to the States Through the Fourteenth Amendment.

This Court has also consistently held that the Fifth Amendment's Takings Clause is applicable to the states through the Fourteenth Amendment.[7] *Chicago, B. & Q. R.,* held that the Fourteenth Amendment Due Process Clause incorporates the Fifth Amendment Takings Clause, thereby mandating that state governments pay compensation when they take private property for public use. *Id.* at 236. Additionally, *Chicago, B. & Q. R.* provides that states violate the Fourteenth Amendment when property is unlawfully taken, regardless of what branch of government affects the taking. *Id.* at 235. Justice Harlan explained:

> If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state, within the meaning of that amendment.

Id. Thus, pursuant to *Chicago, B. & Q. R.,* the Taking Clause is incorporated into the Fourteenth

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[7] *See Webb's Fabulous Pharmacies, Inc. et al. v. Beckwith,* 449 U.S. 155 (1980) (county's actions violated the Fifth and Fourteenth Amendments by unlawfully appropriating private money).

Amendment and state courts can be liable for its violation.

* * *

Accordingly, in the case at bar, there is no reason for the Court to depart from *Chicago, B. & Q. R.* It should affirm that because the Takings Clause is incorporated into the Fourteenth Amendment, and the Fourteenth Amendment may be violated by judicial action, it follows that the Takings Clause may be violated by state judicial action. There is no reasoned principle to relegate the Takings Clause to the "status of a poor relation," and somehow immunize state courts from the obligation to pay compensation when their actions rise to the level of a Fifth Amendment infraction.[8]

[8] *See Dolan v. City of Tigard,* 512 U.S. 374, 393 (1994).

II. THE COURT SHOULD NOT VIEW THE JUDICIARY ANY DIFFERENTLY THAN THE EXECUTIVE OR LEGISLATURE WHEN APPLYING THE TAKINGS CLAUSE.

As the legislative and executive branches are considered to be components of state governments, so is the judiciary.[9] There is no policy reason that the judiciary should be treated differently than the other two branches for purposes of the Takings Clause.

A. The Judiciary is a Division of the State.

The acts of a state court should not be viewed in isolation. A court is not an entity unto itself, but a component of the State along with the executive and legislative branches.[10] In Florida specifically, the powers of the government are "divided into legislative, executive and judicial branches." Fla. Const. art. II, § 3. Takings for "public use" that result from executive or legislative action are acts of the State, and trigger the constitutionally-compelled remedy of just compensation.[11] Similarly, if a judicial

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[9] *See Mistretta v. United States,* 488 U.S. 361 (1989) (separation of powers principle is based on distribution of power among different branches of government); *Ind. Wholesale Wine & Liquor Co., Inc. v. State ex rel. Ind. Alcoholic Beverage Comm'n,* 695 N.E.2d 99 (Ind. 1998) (judiciary is but one of three coequal branches of government).

[10] *Ex parte Commonwealth of Virginia,* 100 U.S. 339, 347 (1879) ("A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.").

[11] The "public use" requirement is thus coterminous with the scope of a sovereign's police powers. *Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229, 240 (1984); *see also Kelo v. City of New*

decision results in the deprivation of private property for public use, it is the public that benefits.[12] In the case below, the public that utilizes the newly created beach will benefit from the Florida Supreme Court's decision. As the public is the ultimate beneficiary, the responsibility to redress the taking lies ultimately with the state government.[13] No branch of the government should be allowed to "forc[e] some people alone to bear the public burdens to which, in all fairness and justice, should be borne by the public as a whole."[14]

London, 545 U.S. 469, 483-84 (2005) (upholding "an economic development plan that . . . provide[d] appreciable benefits to the community . . .."); *Thompson v. Consol. Gas Utils. Corp.,* 300 U.S. 55, 80 (1937) (providing "one person's property may not be taken for the benefit of another private person," unless there is a public purpose); *Members of Peanut Quota Holders Ass'n, Inc. v. United States,* 421 F.3d 1323, 1330 (Fed. Cir. 2005) (providing that takings occur when property interests are "appropriated by the government for the *benefit of the public*.") (emphasis added).

[12] "The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government." *Brinkerhoff-Faris,* 281 U.S. 673, 680 (1930).

[13] *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.,* 482 U.S. 304, 321 (1987) ("Once a court determines that a taking has occurred, *the government* retains the whole range of options already available.") (emphasis added).

[14] *Armstrong et al. v. United States,* 364 U.S. 40, 49 (1960); *see also Pa. Coal Co. v. Mahon et al.,* 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for change.").

The ideas that a state court is an entity exempt from Constitutional limitations, and that private property owners are not due "just compensation" if their property interests are eliminated by aberrant judicial determinations, is anathema. Such notions would permit the State to benefit through the device of judicial intervention in circumstances where similar actions by the executive or legislative branches would fail.[15] If the courts were used as shields for legislative or executive branch takings, then no private property interest could be protected from effective confiscation by the state, no matter how widely recognized or vested the interest might be. For example, a state court on its own might declare private home ownership to be non-existent. Yet, without recognition of a "judicial taking," there would be no Constitutional safeguard calling for the payment of compensation to owners whose homes were confiscated.

In assessing whether a constitutionally protected taking has occurred, courts should consider the actual result and effect of the State action, and not the source of the action. As Justice Brennan's influential plurality dissent explained, "[f]rom the property owner's point of view, it may matter little whether his land is condemned or flooded, or . . . restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it." *San Diego Gas & Elec. Co. v.*

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[15] "[L]egislatures and administrative agencies will use the courts as a means of sheltering numerous other changes from compensation." Thompson, 76 Va. L. Rev. at 1508.

San Diego, 450 U.S. 621, 652 (1981) (Brennan, J. dissenting).[16] Under a similar analysis, from a property owner's perspective it is irrelevant which branch of government causes his economic deprivation.[17]

To paraphrase Gertrude Stein, a taking, is a taking, is a taking.[18] It matters not if the culprit is the executive, the legislative, or the judicial branch.

B. If The State Judiciary Takes Private Property, The State Must Pay Just Compensation.

The fact that the judiciary has no power to appropriate money for payment is a red herring. Although the power to appropriate is limited to the legislature, the Takings Clause is applied to the executive without question.[19] In fact, judicial

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[16] The Alaska Supreme Court accurately captured this analysis, explaining that a taking "depends on whether someone has been deprived of the economic benefits of ownership, not whether the State captures any of those benefits." *Hageland Aviation Services, Inc. v. Harms,* 210 P.3d 444, 450 (Alaska 2009).

[17] *See Tulare Lake Basin Water Storage Dist. v. United States,* 61 Fed. Cl. 624, 630 (Fed. Cl. 2004) (providing that when determining just compensation courts should look at what was taken "from the point of view of the owner" not the government's.) (quoting *Pitcairn v. United States*, 547 F.2d 1106, 1122 (Ct. Cl. 1976).

[18] Gertrude Stein, *Sacred Emily, in* Geography and Plays 178 (University of Nebraska Press 1993) (1922).

[19] "[T]he legislature should not be able to evade the takings protections simply by delegating lawmaking power, but not the

decisions "often result in governmental expenditures in the name of compliance with the Constitution."[20]

III. THE COURT SHOULD LOOK AT THE SUBSTANCE OF A PROPERTY RIGHT TO DETERMINE WHETHER IT IS PROTECTED BY THE CONSTITUTION.

After confirming the concept of judicial takings, the Court must decide whether one occurred in this case. However, before resolving whether the Florida Supreme Court violated the Takings or Due Process clauses, the Court must determine whether the land owners held property rights protected by the Constitution.[21] It is well established that the Constitution does not create property rights, but that such rights come from an independent source "state law." *Bd. of Regents of State Coll. v. Roth,* 408 U.S. 564, 577 (1972). Nevertheless, the Court has never provided that state law is the sole source of property rights or that it must defer to state court findings to determine whether a protectable right exists.

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spending power with which to compensate takings, to the courts. If state courts have the lawmaking power to take property, states are obligated to establish some means of making compensation for such takings." W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487 (2004).

[20] J. Nicholas Bunch, *Takings, Judicial Takings, and Patent Law,* 83 Tex. L. Rev. 1747, 1771 (2005).

[21] *See Lucas v. S.C. Coastal Council,* 505U.S. 1003, 1027 (1992) (a court must look at a property owner's "bundle of rights" to determine whether a taking occurs.); *Conti v. United States,* 291 F.3d 1334, 1339 (Fed. Cir. 2002) (the first part of a takings analysis is whether the claimant holds a "property interest.").

In *United States v. Craft*, 535 U.S. 274 (2002), this Court established a paradigm for determining whether a property right exists under a federal statute. NAHB suggests that this paradigm is appropriate to determine whether a property right is protectable under the Constitution.

In *Craft*, a husband who owned real property as a tenant by the entirety failed to pay income tax for seven years. Subsequently, the Internal Revenue Service (IRS) assessed him $482,446 for unpaid tax liabilities, which he also failed to pay. *Id.* at 276. Pursuant to 26 U.S.C. § 6321, the IRS thus attached a federal tax lien to "all property and rights to property . . ." belonging to the husband. *Id.*

The issue in *Craft* was whether a tenant by the entirety possessed "property" or "rights to property" as those terms were used in 26 U.S.C. § 6321. The Court of Appeals for the Sixth Circuit, relying on state law, found that a federal tax lien could not attach to the property, because under Michigan law "the husband had no separate interest in the property…." *Craft*, 535 U.S. at 277.

This Court reversed. The majority explained that the question of whether the husband's interest constituted "property or rights to property" was "ultimately a question of federal law." *Id.* at 278. However, because the federal tax lien law created no property rights, the answer depended on state law. Accordingly, the Court "look[ed] initially to state law to determine what rights the taxpayer [had] in the

property . . . then to federal law to determine whether the taxpayer's state-delineated rights qualifi[ed] as 'property' or 'rights to property' . . ." *Id.* (quoting *Drye v. United States*, 528 U.S. 49, 58 (1999)).

In determining that the husband's interest was "property or rights to property," the Court was "careful to consider the *substance of the rights* state law provides, *not merely the labels* the State gives these rights or the conclusions it draws from them." *Id.* at 279 (emphasis added). In so doing, it reviewed the history of tenancies in the entirety and all of the privileges that attached to the property, such as the right to use the property, the right to exclude others, the right to share income, and the right to survivorship. *Id.* at 280-82. Ultimately, the Court found that the husband held rights that were "property or rights to property" under the federal tax lien law, even though under Michigan law he held no separate right to the property. *Id*. at 288.

In the case at bench, to determine whether the littoral owners held property protected by the Constitution, NAHB respectfully suggests the Court follow the analysis it developed in *Craft.* Similar to the federal tax lien statute, the Constitution does not create property rights. Thus, the Court should look to Florida law to determine the rights that the littoral owners held, and then to the Constitution to determine whether the rights qualify as protectable property. *See Craft,* 535 U.S. at 278.

The Florida Supreme Court labeled the property owners' littoral rights to access, use, and view as "easements" and the right to accretion as a "contingent future interest." *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102, 1112 (Fl. 2008). It then found that the right to accretion was not implicated by the Beach and Shore Preservation Act and that littoral owners had no "independent right of contact with the water." *Id*. at 1119.

As in *Craft*, the Court should not simply accept the Florida Supreme Court's conclusions on whether the littoral owners held protectable property rights. It must evaluate the substance of the rights. *Craft*, 535 U.S. at 279. For example, the Court should determine on its own whether, as littoral owners, the Petitioners possessed a right to acquire additional property by accretion and to have their property adjoin the water. Further, the Court should also resolve whether it is the State, or the littoral property owners, that have the right to reclaim land lost by an avulsive event. Only after resolving what rights the littoral owners held can the Court decide whether they are protected by the Constitution.

CONCLUSION

For the reasons stated above, the Court should clarify that a judicial action can take property without compensation in violation of the Fifth Amendment. In addition, the Court should review the substance of the Petitioners' littoral rights to

determine if they are constitutionally protected property.

Respectfully submitted,

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APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825 (1987); *Pennell v. City of San Jose,* 485 U.S. 1 (1988); *Yee v. City of Escondido,* 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.,* 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Franconia Assocs. v. United States,* 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005); *Kelo v. City of New*

London, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.,* 547 U.S. 370 (2006); *Rapanos v. United States,* 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife,* 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States,* 551 U.S. 130 (2008); *Summers v. Earth Island Inst.,* 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009).