No. 08-1151

In The
Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.,

Petitioner,

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Respondents.

On Writ Of Certiorari To The Florida Supreme Court

BRIEF FOR THE STATES OF CALIFORNIA, ARKANSAS, DELAWARE, ILLINOIS, IOWA, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OHIO, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTION, STATUTE:

OTHER AUTHORITIES:

INTEREST OF THE STATES

As sovereigns within our federal system, the States are empowered to articulate and develop their property laws. The States therefore establish property laws (*Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998)) and may adapt them as necessary to address changing conditions. See *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 379 (1977).

Petitioner, however, is proposing an ill-conceived new doctrine that would undermine the States' well established and traditional authority to determine the scope of their own property laws. It would do this by expanding takings law to subject state court property law determinations to federal review. Specifically, petitioner would encourage dissatisfied litigants to argue that a state court has taken property without payment of just compensation because it has issued a decision that purportedly departs from prior holdings. This would subject state court property laws to unwarranted and unprecedented review by the federal judiciary. Further, it could subject a wide range of state court decisions to such scrutiny, including decisions concerning:

- Corporate asset distributions
- Marital property allocations
- Inheritance rules
- Employee rights
- The scope and location of easements

- Vested rights involving licenses
- Franchise rights

The States have a strong interest in preserving their authority to determine and shape their own property laws without federal review. The States represented here therefore respectfully request that this Court reject petitioner's proposed doctrine and adhere to its numerous decisions acknowledging that state courts have the paramount power to determine and interpret their property laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 542 (2005), this Court provided much needed clarity by disentangling the Takings Clause from the Due Process Clause of the United States Constitution. This turned an area of the law that Justice Kennedy characterized as "perplexing" (*Eastern Enterprises v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring and dissenting)) into one that is now more coherent as a doctrine and more workable in practice. Petitioner would frustrate this newly found clarity by creating a novel, confusing "judicial takings" doctrine. It asks this Court to create an "ad-hoc test" under which a judicial decision amounts to a taking if it "suddenly and dramatically" changes state property law in an "unpredictable" manner. Pet. Br. 48, 50.

In this brief, the States first will explain why a judicial takings doctrine would reverse this Court's longstanding affirmation that, under our nation's federal structure, the sovereign States determine their own property laws. That dramatic change would ignore the special ability of state courts to develop rules of property grounded in the individual State's unique history and physical landscape.

Moreover, in addition to requiring a fundamental alteration in how the courts develop and review state property laws, petitioner's argument could have major practical consequences. Only this Court could hear judicial takings claims against state courts because various jurisprudential doctrines would preclude their review in the lower federal courts. This Court could therefore be flooded with petitions seeking its review of state court decisions touching a wide range of property issues, without a realistic ability to entertain more than a handful of these disputes or to perform the fact-finding that takings claims inevitably entail.

Next the States will outline why applying takings review to federal judicial decisions – an outcome that petitioner's argument compels – is also inappropriate. Because the Fifth Amendment's Takings Clause applies equally to the federal government, petitioner's new doctrine would lead to the logical and equally untenable conclusion that a federal court's reconsideration of its prior property law decisions, which occurred in cases such as *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, *supra,* 429 U.S.

363, might be deemed takings. It could also inundate the Court of Federal Claims with "judicial takings" claims against other federal courts. See, *e.g., Brace v. United States*, 72 Fed. Cl. 337, 359 (2006). Although petitioner asserts that its new ad hoc test would mitigate this impact (Pet. Br. 48, 50), it would generate additional litigation, as parties dispute whether the new amorphous takings test applies to their factual circumstances.

All of these concerns call for the rejection of a highly intrusive and unworkable judicial takings doctrine.

ARGUMENT

I. BOTH CONSTITUTIONAL AND PRACTICAL CONSIDERATIONS PRECLUDE THE APPLICATION OF A JUDICIAL TAKINGS DOCTRINE TO STATE COURT DECISIONS

Our Founding Fathers recognized that "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State." *The Federalist No. 45,* at 292-93 (Clinton Rossiter ed., 1961). They affirmed the States' role in both the Tenth Amendment to the

United States Constitution,[1] and in the Constitution's Guarantee Clause, under which the United States must "guarantee to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4. This Court's decisions therefore respect the role of the States in declaring and interpreting their law, and acting as laboratories for the development of new approaches to new problems. *Chandler v. Florida*, 449 U.S. 560, 579-80 (1981), favorably citing *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Ignoring the States' sovereignty, petitioner asks this Court to enunciate a new takings rule that would not only authorize federal judicial review of state real property law decisions but also a wide range of other state court decisions interpreting state laws.

Since the States ratified the Fifth Amendment in 1791, however, this Court has never held that a court can be subject to a claim for just compensation under the Takings Clause. Moreover, no party or amici has pointed to any hint that the Founders' original understanding of that amendment included the concept that the States could be required to pay compensation for their courts' decisions. For over two centuries, this nation has not had nor needed a

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[1] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

judicial takings doctrine. For federalism, doctrinal, and pragmatic reasons, this Court should reject petitioner's invitation to create this novel doctrine.

A. This Court Has Long Recognized That In Our Federal System, The States And Their Courts Decide Matters Of Property Law

The Fifth Amendment "protects rather than creates property interests." *Phillips v. Washington Legal Found*., 524 U.S. at 164. In our nation, those interests are created and defined by each individual State. This fundamental aspect of the constitutional structure was underscored in *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co*., 429 U.S. at 378, where Justice Rehnquist, writing for the majority, stated that "[u]nder our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States." Justice Rehnquist emphasized this point by quoting *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944): "'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.'" *Corvalis* at 378. As a result of this core principle, for over a century this Court has affirmed the authority of state courts to interpret property laws without offending the Takings Clause.

This is seen, for example, in *Sauer v. City of New York,* 206 U.S. 536 (1907). There, the City built a viaduct over a street that impaired a landowner's access to his land, as well as his access to light and air. The owner sued, but New York's highest court denied relief on the ground that, under New York law, he had no easements of access, light, or air that could restrict street improvements. This Court then heard the owner's claim that the City, in building the viaduct, denied him due process by taking his property without compensation. *Id.* at 547. The Court rejected the claim. It reasoned that various state court decisions concerning this issue "have been conflicting, and often in the same State irreconcilable in principle. *The courts have modified or overruled their own decisions*. . . ." *Id.* at 548 (emphasis added). This Court made it clear, however, that this is a matter for the States, not the federal judiciary, to decide. "Surely such questions must be for the final determination of the state court." *Ibid.*

The Court's reasoning in *Sauer* essentially adopted the dissent of Justice Holmes in a case decided two years earlier. In *Muhlker v. New York & Harlem R.R. Co.,* 197 U.S. 544 (1905), a four-Justice plurality concluded that a state court violated the Contract Clause of the United States Constitution when it held that a railroad could deprive property owners of light and air easements by elevating its tracks. However, Justice Holmes issued a dissent that three other justices joined. He stressed that "I know of no constitutional principle to prevent the complete

reversal of the elevated railroad cases tomorrow, if it should seem proper to the [New York] Court of Appeals." *Id.* at 574 (Holmes, J., dissenting). Then, focusing on the property owner's takings claim, Justice Holmes explained that "Plaintiff's rights, however expressed, are wholly a construction of the courts. I cannot believe that . . . we are free to go behind the local decisions on a matter of land law. . . ." *Id.* at 575-76.

In *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924), the Court again followed the reasoning of Justice Holmes and reaffirmed the right of state courts to modify or even overrule their prior property law decisions without violating the Constitution (in that case, due process requirements). The *Tidal Oil* litigants disputed who owned two tracts of land. When the case reached this Court, Tidal Oil Company alleged that the Oklahoma Supreme Court had changed its prior rulings concerning the sale of a minor's property in such a manner that deprived the company of its due process right to the property. *Id.* at 449. This Court rejected the argument. Citing a string of prior Supreme Court decisions, the Court in *Tidal Oil* reiterated that "the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law." *Id.* at 450.

This Court once more affirmed that the federal courts should not second-guess state court property law decisions in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff-Faris*

the Court explained that courts administering the common law have the right to alter prior decisions "to conform with changing ideas and conditions . . . without offending constitutional guaranties, even though the parties may have acted to their prejudice on the faith of the earlier decisions." *Id.* at 681, n.8.

The Court reiterated this point in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). In that case, the Montana Supreme Court overruled a prior holding concerning the right of parties to recover freight overcharges. A question before the Court was whether the Takings Clause prevented the state court from only applying its new rule prospectively. Writing for the Court, Justice Cardozo explained that it was up to the state court: "the Federal Constitution has no voice on the subject." *Id.* at 364. Whether the new decision is based on the common law or on statute, a state court has the option of applying the prior law to past activities, or "[o]n the other hand, it may hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning." *Id.* at 364-65.

More recently, in *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, the Court underscored the paramount power of state courts (and even legislatures) in determining state property rights. In that case, the Court decided whether state

or federal law governed property ownership disputes between the State and a private landowner where a navigable river changed its location in a sudden and perceptible (avulsive) manner. In explaining why state law should apply, the Court relied on *Barney v. Keokuk*, 94 U.S. 324 (1877). It stated that in *Barney*, "the Court clearly articulated the rule that the States could formulate, and modify, rules of riparian ownership as they saw fit." *Corvallis*, 429 U.S. at 379. It characterized this and related holdings as articulating "correct principles" that should apply to both tidal and non-tidal waters. *Ibid*.

Two cases corroborate the States' paramount role in determining state property law, while indicating that this Court would only consider reviewing those determinations under extraordinary circumstances: *Fox River Paper Co. v. Railroad Comm'n*, 274 U.S. 651, 657 (1927) and *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930). The Court in *Fox River* reviewed whether a law requiring dam operators to allow the State to acquire the dam after thirty years violated "the rights vested in riparian owners" to use water power, and therefore amounted to "a taking of property without due process." *Fox River*, 274 U.S. at 652-54. The state court had rejected that claim, determining that the riparian owner's right was subordinate to that of the State to control its navigable waters, and that the State could prohibit the dam, or permit it with restrictions such as this condition. *Id.* at 654. This Court upheld the state decision, reiterating the need to defer to state

court determinations of state law: "We 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." *Id.* at 657 (emphasis added).

The Court went on to say that it is for the state courts "to define rights in land located within the state, and the *Fourteenth Amendment*, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent." *Id.* at 657 (emphasis in original).

In *Broad River Power Co. v. South Carolina*, 281 U.S. at 540, this Court reiterated *Fox River's* observations, explaining that, so long as there is no "evasion of the constitutional issue," the Court will uphold the state court decision. The Court "will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court." *Id.* at 541.

These early cases affirm that, absent extreme circumstances, this Court should not review state court property law determinations.[2] They do not

[2] Any review needs to be limited to particularly extraordinary situations. In contrast to most constitutional rights that are federally created and that exist independently of any state law, the Fifth Amendment's property protections are necessarily bound up with a State's definition of property. The federalism reasons outlined in this brief for rejecting a judicial

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support the creation of a "judicial takings" rule authorizing the highly intrusive federal review of state property laws that petitioner seeks. To the contrary, like the numerous other decisions reviewed

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takings doctrine therefore also call for a very high threshold before this Court reviews a state judicial determination concerning a State's property law.

The States represented here therefore suggest that this Court utilize a highly deferential standard such as the one used in substantive due process cases. See *Caperton v. A.T. Massey Coal Co*., 129 S.Ct. 2252, 2265 (2009) (" 'shocks the conscience' ") (citation omitted); *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 402 (3d Cir. 2003) (same). *Cf. Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) ("a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.") (internal quotation marks and citation omitted). In the extraordinary, hypothetical event that a state court redefined property in an objectively indefensible attempt to evade a takings claim, this Court may be required to evaluate the proper interpretation of state law that should have been applied. In that very rare circumstance, the state court would effectively be failing to review a federal claim as required by the Supremacy Clause and this Court could utilize its appellate authority to direct the state court to interpret state property law correctly. See, *e.g.,* Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 Mich. L. Rev. 80, 171 (2002). That would not, of course, amount to a judicial taking or other constitutional violation. Rather, just as an appellate court's alteration of a lower court decision does not create a cause of action against the lower court, this Court's ruling would not create a judicial taking or any other type of claim against the state court.

in this section of the brief, they call for a rejection of petitioner's new, officious takings test.

B. State Courts Are Best Situated To Decide Matters Of State Law

Aside from stare decisis, the policy reasons underlying the cases outlined above call for rejecting petitioner's judicial takings doctrine. The cases not only respect the federal structure of our nation. They also recognize that state property laws are best understood by the state courts that administer those laws.

For example, as recently as last year, this Court affirmed that it is up to the States to establish the property rights of riparian owners. See *State of New Jersey v. State of Delaware*, 128 S.Ct. 1410, 1422 (2008); see also *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. at 378-79. There are good reasons why our federal system demands that this division of power should stay that way. The development of state boundary law is complex, nuanced and intensely factual, and it reflects each individual State's historic values and policy preferences.

Take the accretion doctrine, upon which the petitioner bases its claim that it has an inherent right to future increases in land adjoining its property. The common law has never guaranteed that newly added land belongs to riparian owners. The common law is riddled with a variety of situations in which the

courts have refused to apply the accretion doctrine and have denied riparian owners the benefit of additions to new shoreline property. See, *e.g., Arkansas v. Tennessee*, 246 U.S. 158, 174-75 (1918) ("reemergence" doctrine); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912) ("avulsion" doctrine); *DeBoer v. United States,* 653 F.2d 1313, 1315 (9th Cir. 1981) ("substantial accretion" exception to accretion doctrine); *Carpenter v. City of Santa Monica*, 147 P.2d 964 (Cal.App. 1944) ("artificial accretion" doctrine); *Martin v. Busch*, 112 So. 274, 287 (Fla. 1927) (drainage and reclamation exception); *State v. George C. Stafford & Sons, Inc.,* 105 A.2d 569, 574 (N.H. 1954) (denying upland owners benefit of additions they caused); *State v. Longyear Holding Co*., 29 N.W.2d 657, 667 (Minn. 1947) (limiting reliction doctrine to permanent changes); *Weinberger v. Passaic*, 86 Atl. 59, 60 (N.J. 1913) (filled land exception).

The Court recognized this divergence and complexity of state laws concerning riparian property rights and boundaries more than a century ago. In *Shively v. Bowlby*, 152 U.S. 1, 26 (1874), the Court explained that "each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy. . . ." As a result, "[g]reat caution . . . is necessary in applying [riparian property right] precedents in one state to cases arising in another." *Ibid.*

These divergent approaches highlight the nature of the common law: (1) each State develops its own set of property rules based on policy choices and

physical conditions unique to that State; (2) application of state boundary rules such as accretion and erosion is inherently flexible because state courts constantly encounter unanticipated, complex factual situations and must adapt their common law and statutory rules in a way that makes sense and that is faithful to past precedent; (3) because the States' common law property rules necessarily develop from one case to the next, it is rare that a state court decision abruptly departs from "settled" law because application of these rules is rarely settled.[3]

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[3] This case exemplifies how unsettled riparian boundary law has been. As far back as 1917, the Florida Supreme Court suggested that property owners' littoral rights are subject to the right of the State to fill its submerged waters. In *Thiesen v. Gulf, Florida & Alabama Co.*, 78 So. 491 (1917), the court held that the railroad before it was liable for damaging an upland owner's littoral rights, including the owner's right to accretion, stressing the fact that the railroad was "private." *Id.* at 507. In contrast, the court explained that had the *State* constructed the same structures, "as the owner of the submerged land," it would not be liable. *Ibid.* Moreover, in a setting similar to the one before this Court, the Florida Supreme Court held that under the law concerning "a common enemy," where a statute authorized a municipality to build seawalls and other structures to protect public lands from the "danger of destruction because of action of the sea," a private upland owner had no right to damages even though the structures caused his land to "excessively wash away." *B.F. Paty v. Town of Palm Beach*, 158 Fla. 575, 576-77 (1947). On the other hand, in *Webb v. Giddens,* 82 So.2d 743 (Fla. 1955), the court found that fill for a highway improperly impaired an upland owner's right of access to a lake. In doing so, however, the Florida Supreme Court expressly recognized the unsettled nature of riparian rights. It explained that these property rights "have been broadly and inexactly stated," and

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This Court has even recognized this dynamic nature of the common law in the criminal law context, where the consequences of any alteration can be particularly severe. In *Rogers v. Tennessee*, *supra,* 532 U.S. 451, the petitioner stabbed an individual, who died 15 months later. The state court then convicted the petitioner of murder. Under the State's "year and a day" common law rule, however, no person could be convicted of murder unless the victim died within a year and a day of the act. The Tennessee Supreme Court nevertheless upheld the conviction. It did so by abolishing the common law rule, finding that "the original reasons for recognizing the rule no longer exist." *Id.* at 455. This Court affirmed.

In affirming, the Court explained that "our case law system" contains "divergent pulls of flexibility and precedent." *Id.* at 461 (internal quotation marks and citation omitted). As such, strict "limitations on judicial decisionmaking would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system." *Id.* at 461. The Court reasoned that this is especially so "[i]n the context of common law doctrines," where "there often arises a need to clarify or even to reevaluate prior opinions as new

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that this is a "field of law which is unusually dependent upon the facts and circumstances of each case." *Id.* at 745.

circumstances and fact patterns present themselves." *Ibid.*

The proposed judicial takings doctrine, however, ignores this essential element of the common law. It similarly fails to respect the special authority of state courts to interpret their own property laws by drawing upon their experience with the State's laws, history, physical environment, commercial activities, social mores and other relevant factors. For many years, the Court has deferred to state decisions concerning state property laws. The petitioner is now seeking to reverse that history and to have the federal judiciary second-guess the delicate balancing that state courts must engage in to resolve these property issues. The Takings Clause should not be expanded to encompass such an intrusive doctrine.

C. This Court Alone Would Have Jurisdiction To Hear Takings Claims Against State Courts

1. The Eleventh Amendment, judicial immunity and the *Rooker-Feldman* doctrine each prevent lower federal courts from hearing takings claims against state courts

When government "takes" property, it is required to pay compensation. The Takings Clause does not prohibit improper acts, but rather mandates compensation for proper acts. As this Court explained in *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. at 543, the

provision "does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'" (quoting *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987)) (emphasis added in *Lingle*).

The Eleventh Amendment, however, bars federal courts from hearing damage claims against the States. See, *e.g.*, *Alden v. Maine*, 527 U.S. 706, 747, 765 (1999).[4] This immunity reflects the "vital role reserved to the States by the constitutional design." *Id.* at 713. Federal courts from around the country therefore consistently apply the Eleventh Amendment to takings claims brought against the States.[5]

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[4] See also *Lake Country Estates v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 410 (1979) (because it is not a state entity, the Tahoe Regional Planning Agency does not enjoy immunity from federal court takings actions); *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) (explaining, by using the right to just compensation as an example, that "[t]he doctrine of sovereign immunity – not repealed by the Constitution, but to the contrary at least partly reaffirmed as to the States by the Eleventh Amendment – is a monument to the principle that some constitutional claims can go unheard.").

[5] *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526 (6th Cir. 2004); *State Contracting and Engineering Corp. v. State of Florida*, 258 F.3d 1329, 1338 (Fed. Cir. 2001); *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1277 (11th Cir. 1998); *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 94 F.3d 996, 1005 (5th Cir. 1996), rev'd on other grounds sub nom. *Phillips v. Washington Legal Found.*, *supra,* 524 U.S. 156;

(Continued on following page)

As a result of this bar, the only federal court that could entertain a judicial takings claim against a state court would be this Court, as the Eleventh Amendment does not constrain its appellate jurisdiction over state court decisions. See *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 31 (1990).

Moreover, aside from Eleventh Amendment immunity, judicial immunity would bar a suit against a state court and its judges for the very relief provided by the Takings Clause, that is, monetary relief. As this Court has explained, "[a] long line of this Court's precedents acknowledges that, generally, a judge is immune from a suit for money damages." *Mireles v. Waco*, 502 U.S. 9 (1991) (per curiam) (citations omitted); see also *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (state judge immune from suit seeking damages for forced sterilization).[6]

Finally, federal district court review of state court decisions would be prohibited under the *Rooker-Feldman* doctrine. Under that doctrine, United States district courts lack subject matter jurisdiction over challenges to final state court decisions. *District of*

Citadel Corp. v. Puerto Rico Highway Auth., 695 F.2d 31, 33 n.4 (1st Cir. 1982); *Garrett v. Illinois*, 612 F.2d 1038, 1039 (7th Cir. 1980).

[6] Suits for injunctive relief are sometimes allowed but only where "a declaratory decree was violated or declaratory relief was unavailable." See 42 U.S.C. § 1983; *Roth v. King*, 449 F.3d 1272, 1286 (D.C.Cir. 2006).

Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983); *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 283-84 (2005). The doctrine applies even if the challenge alleges that the state court action was unconstitutional. *Feldman* at 486; *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). Under the *Rooker-Feldman* doctrine, while parties may appeal a state court decision to the State's highest court, and then to this Court if a federal constitutional question is presented, "horizontal" review of a state court decision in federal court is unavailable. *Rooker*, 263 U.S. at 416.

Thus, if this Court establishes a "judicial takings" doctrine, it would be the only federal body that is able to apply that doctrine to a state court decision. For this reason, and for the reasons discussed below, establishment of such a doctrine would be unwise and impracticable.

2. This Court could be flooded with petitions that would require it to resolve disputed facts

If the Court creates a judicial takings doctrine, any party asserting that a state court adopted or affirmed a rule of property that is allegedly inconsistent with prior law may claim that its property was taken. This new concept would not be limited to disputes between governments and private parties; it would also apply to a wide variety of controversies between private parties. Disgruntled heirs could

assert that they were denied property to which they were allegedly entitled under prior judicial holdings or legislative acts. Similar assertions would be raised by spouses in marital controversies; shareholders in corporate disputes or dissolutions; real property owners in boundary, easement, and other disputes; employees in controversies over labor conditions or employment terms; insured individuals and corporations in disputes over insurance coverage claims, and so on. To bring themselves within the rubric of a judicial takings claim, advocates would have little hesitation characterizing unfavorable state court decisions as "novel," "extraordinary," or "unprecedented" alterations of their clients' property rights.

Moreover, many judicial takings claims would not come to the Court with an adequate factual record to adjudicate a taking claim. If a litigant successfully petitioned this Court for certiorari on the ground that the state court committed a judicial taking, the Court would need to determine whether a taking occurred and, if so, the amount of damages. A state might argue in its defense that its action was not a taking under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), requiring a comprehensive trial, so that the parties could present evidence on economic impact and the other fact-specific *Penn Central* factors. See *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. at 538-39. This Court is not equipped to conduct evidentiary trials on the existence of a taking and the amount of damages.

Further, the nature of a judicial taking likely precludes the Court from directing a lower court to address factual questions on remand, as it might otherwise do. In a judicial taking case against a state court, remand would be to the very state judicial system that allegedly must compensate the party for the taking. As a result, state courts would presumably be precluded from hearing the case. See *Caperton v. A. T. Massey Coal Co.*, 129 S.Ct. at 2259. As a practical matter, this Court would therefore either reject virtually all petitions claiming a judicial taking or be forced to appoint Special Masters to hear these claims.

Petitioner's new doctrine would therefore create an untenable situation that would burden the Court to the neglect of its other responsibilities. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 504 (1971). Thus, subjecting state courts to judicial takings claims is impracticable as well as counter to this Court's consistent recognition of the States' role in determining their own property laws.

II. APPLYING A JUDICIAL TAKINGS CONCEPT TO FEDERAL COURT DECISIONS IS JUST AS INAPPROPRIATE

The doctrinal and practical problems with a judicial takings concept do not end with its application to state courts. Applying it to federal courts is just as troubling.

A. A Judicial Takings Doctrine Would Logically Apply To Federal Courts

Petitioner asserts that a state court should be deemed to commit a judicial taking when the court's decision fails to meet petitioner's proposed new ad hoc test. Pet. Br. 48. Under that test, a judicial decision amounts to a taking if it "suddenly and dramatically" changes state property law in an "unpredictable" manner. *Id.* at 50. Although petitioner's articulation of its test limits it to state court decisions, logically it would also apply to federal court decisions, including this Court's opinions, as the Takings Clause applies to federal actions. See *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 11-12 (1990). The implications for the federal judiciary would be profound.

Just as "common law systems need flexibility" (Pet. Br. 48), this Court has faced new circumstances calling for it to reexamine long-established property laws. It has therefore reached decisions that petitioner would apparently characterize as judicial takings, including at least two that concern the same type of property interests involved in this action: assertions of title to lands beneath navigable waters.

For the first "two generations" of our nation's existence, courts in the United States followed the English rule under which the sovereign owned the beds of tidal waters, while the nontidal rivers of England could be privately owned. See *Barney v. Keokuk*, 94 U.S. 324, 338 (1877) (discussing

development of sovereign ownership rule). This rule made sense in a relatively small country whose rivers became largely unnavigable beyond the reach of the tide. But it made no sense in the United States, where large navigable freshwater rivers and lakes were the principal highways of commerce. As a result, this Court saw that the circumstances of this new land required that rivers which would have been considered proprietary in England should be recognized as navigable and subject to sovereign ownership in the United States.

Consequently, as the *Barney* Court observed, this Court overruled years of precedent in *Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), to hold that non-tidal waters may be navigable for commerce clause purposes. *Barney*, 94 U.S. at 338. As a result, lands that were free of any easements before *Genessee Chief* became subject to a dominant federal navigable servitude that enables the government to construct channels and similar navigational improvements without compensating landowners. See *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 701 (1987). Moreover, as explained in *Barney*, the change meant that "it would now be safe" for States to decide that title itself in these non-tidal waters turned on whether they were navigable for commerce clause purposes. *Ibid.* Thus, in addition to becoming subject to a federal servitude, in many cases lands that may have been deemed private just after the American Revolution became sovereign public lands "two generations" later following this Court's eventual

adaptation of the common law to the needs of the New World. *Ibid.*

This Court has also revised its choice of law on riparian boundaries to the detriment of landowners. "[F]rom 1845 until 1973," the Court let the States apply their own boundary laws in determining the private ownership of land along a State's navigable waters when the location of the waters shifted. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co*., 429 U.S. at 382. Then, in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), the Court held that, for States admitted after the original 13 States, federal common law determined ownership in these disputes between the States and private property owners. *Corvallis*, 429 U.S. at 369-70.[7] That changed property ownership around the country, because, as illustrated by the Oregon and Arizona laws reviewed in *Corvallis* and *Bonelli*, state laws governing boundary movements often differ from federal law. Three years later, the Court changed title rights again by overruling *Bonelli.* See *Corvallis*, 429 U.S. at 382.[8]

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[7] Arguably, the Court started to alter the law six years earlier, when it ruled in *Hughes v. Washington*, 389 U.S. 290 (1967), that federal law applied to boundary movements involving private ocean-front property held under a federal patent. See discussion in *Corvallis* at 377, n.6.

[8] This Court has similarly revised property law concerning navigable air space. In *United States v. Causby*, 328 U.S. 256, 260-61 (1946), the Court determined that "[i]t is ancient doctrine that at common law ownership of the land extended to the

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Under petitioner's judicial takings theory, litigants could claim that those decisions, and untold others, amounted to temporary or permanent judicial takings. For example, like the amici in *Corvallis*, petitioner could assert that *Bonelli* "represented a sharp break with well-established previous decisions of the Court." See *Corvallis*, 429 U.S. at 368. This Court's decisions in those cases represented a far more drastic break with the law than anything supposedly undertaken by the Florida Supreme Court in this case. But none of this Court's property decisions are judicial takings; they were efforts of the Court to adapt ancient rules to a modern world. That is the hallmark of what state courts do when asked to apply their common law rules in new factual settings.

This Court should not be subject to petitioner's new doctrine. As will be seen, it would also be inappropriate to apply this doctrine to lower federal courts.

B. A Judicial Takings Doctrine Could Overwhelm The Court Of Federal Claims By Requiring It To Review Countless Decisions Of Other Federal Courts

If this Court establishes a judicial takings doctrine, the Court of Federal Claims could become inundated with lawsuits, as disgruntled parties freely

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periphery of the universe. . . . But that doctrine has no place in the modern world."

assert that the lower federal courts – or even appellate courts – took their property by abruptly departing from past precedent. *Brace v. United States*, *supra*, 72 Fed. Cl. 337, highlights this problem. In *Brace*, a litigant brought suit in the Court of Federal Claims seeking compensation because an order of a federal district court had allegedly taken his property. The Court of Federal Claims, however, rejected the argument that a takings claim arises where a state or federal court overrules doctrines established by prior decisions that the litigant relied on. In addition to citing numerous holdings of this Court and of lower courts, *Brace* explained that "were the court to accept plaintiff's syllogism, it would constantly be called upon by disappointed litigants to act as a super appellate tribunal reviewing the decisions of other courts to determine whether they represented substantial departures from prior decisional law." *Id.* at 359.

Petitioner responds to this concern by asserting that its "proposed ad-hoc [judicial takings] test can be applied easily just like other ad-hoc tests this Court has developed." Pet. Br. 48 (citing *Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. 104). Members of this Court and others, however, have found nothing easy about ad hoc takings tests. Referring to *Penn Central*, for example, Justice Kennedy explained that "[c]ases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring and dissenting); see also Michael B.

Kent, Jr., *Construing The Canon: An Exegesis Of Regulatory Takings Jurisprudence After* Lingle v. Chevron, 16 N.Y.U. Envtl. L.J. 63 (2008) ("It is by now axiomatic that regulatory takings jurisprudence over the last three decades has been 'muddled,' 'confused,' and 'a constitutional quagmire.' ").

Although *Lingle v. Chevron U.S.A., Inc., supra,* 544 U.S. 528 added needed coherence to takings law, petitioner seeks to go in the opposite direction by having this Court adopt a new, confusing judicial takings doctrine. Petitioner's proposed ad hoc test would encourage litigation, not contain it, and would generate countless disputes over its application. In addition, it would spark numerous procedural battles as the courts decipher the rules governing how these claims should be brought.[9] Takings law would once

[9] For example, would the taking occur when (1) the highest available court fails to meet petitioner's new ad hoc takings test (Pet. Br. 48), (2) the injured party then seeks compensation through a new lawsuit, and (3) the court then denies compensation? Petitioner did not do that here. Is petitioner's position that a judicial taking is ripe as soon as the highest available court does not meet the ad hoc test? Could a temporary judicial taking occur when a trial court fails to meet petitioner's ad hoc test, even if its decision is reversed on appeal? What party is liable for just compensation? For example, where the "judicial taking" was the result of a decision benefiting one private party over another private party, does the party that benefited owe damages? The trial court? The appellate court? If a court is potentially liable, would due process require the litigant asserting a judicial taking claim to name the court as a party? (That was not done here.) Would the Court of Federal Claims have jurisdiction to hear judicial takings claims against a federal

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again become "the lawyer's equivalent of the physicist's hunt for the quark." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Jefferson City*, 473 U.S. 172, 199, n.17 (1985) (citation and internal quotation marks omitted).

CONCLUSION

This Court should not establish a judicial takings doctrine.

Respectfully submitted,

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appellate court, or even this Court? Would compensation be barred because the alleged judicial taking was not "authorized" by Congress or by the state legislature? See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127, n.16 (1974). The courts will be plagued with these and no doubt many other questions if this Court creates a judicial takings doctrine.