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 Supreme Court of Florida

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether the Florida Supreme Court's resolution of questions of Florida property law in this case has full or fair support in prior Florida law.

2. Whether, as petitioner asserts, the judgment of the Florida Supreme Court gives rise to a cause of action for just compensation under the Takings Clause.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include county and city governments and officials throughout the United States.[1] *Amici* have a compelling interest in preserving their police power to engage in reasonable land use regulation in furtherance of environmental preservation, such as beach renourishment in littoral States whose economies and quality of life depend upon taking essential measures to counter beach erosion.

This Court has historically been reluctant to interfere with state and local governments' exercise of their police powers, even when alleged to effect a deprivation of property, and has accorded police power regulations "a considerable latitude of discretion." *Reinman v. City of Little Rock*, 237 U.S. 171, 177 (1915). As explained by the court below, "[r]ecognizing the importance and volatility of Florida's beaches, the [Florida] Legislature . . . enacted the Beach and Shore Preservation Act." Pet. App. 8. As this case demonstrates, the "judicial takings" theory advanced by petitioner would pose a serious obstacle to the accomplishment of the vital environmental preservation that has been the goal of this statute for almost half a century.

Amici respectfully submit that a judicial takings doctrine is both unnecessary for the protection of constitutional rights and unworkable as a legal re-

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

medy. They accordingly submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

1. There is no need for this Court to recognize petitioner's proposed "judicial takings" doctrine because there is nothing novel about its federal constitutional challenge to the judgment below. For over a century the Court has conducted limited and highly-deferential review of state-court interpretations of state law challenged as violating federal rights. As this Court reiterated six decades ago, state-law questions are "conclusively settled by the decision of the state court save only as this Court, in the performance of its duty to safeguard an asserted constitutional right, may inquire whether the decision of the state question rests upon a fair or substantial basis." *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 654 (1942).

The judgment of the Supreme Court of Florida easily satisfies scrutiny under the traditional "fair or substantial" standard. The court below had more than fair or substantial support in state law for its judgment because it did not change Florida law in any significant respect. Its judgment is based on detailed analysis of, and pertinent quotations from, Florida common and statutory law. There is nothing to suggest that the court reached its decision in bad faith; on the contrary, the existence of substantial majority and dissenting opinions indicates a full and fair canvassing of state law. Notwithstanding petitioner's invocation of a "judicial taking" doctrine, the judgment below should be affirmed because of its fair and substantial basis in Florida law.

2. Petitioner's "judicial takings" theory is legally unsound and violates core principles of constitutional federalism. The Takings Clause was enacted against a legal backdrop that included a long history of legislative and judicial modification of state-law property interests. Examples of such reasoned and reasonable modifications abound since the adoption of the Bill of Rights.

Such development of property law has always been based on a strong interrelationship between state legislatures and state courts, an essential foundation of our legal system. The strong interrelationship between the legislative and judicial branches of state government which has always been essential for the development of American law would be seriously threatened by the adoption of a novel doctrine of "judicial takings."

Finally, petitioner's judicial takings theory is unworkable. It would encourage inefficient litigation and make this Court the final arbiter of diverse state property-law doctrines, all in aid of a novel legal remedy that is unnecessary to protect constitutional rights.

ARGUMENT

I. THE JUDGMENT OF THE SUPREME COURT OF FLORIDA SHOULD BE AFFIRMED BECAUSE IT IS SUPPORTED BY A FAIR AND SUBSTANTIAL BASIS IN FLORIDA LAW.

There is nothing novel about petitioner's federal constitutional challenge to the state-law judgment of the Supreme Court of Florida, nor does it require this Court to fashion a new and uncharted doctrine of "judicial takings." For over a century the Court

has conducted limited and highly-deferential review of state-court interpretations of state law that are challenged as violating federal rights. As the Court explained in *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 654 (1942), state-law questions are "conclusively settled by the decision of the state court save only as this Court, in the performance of its duty to safeguard an asserted constitutional right, may inquire whether the decision of the state question rests upon a fair or substantial basis." *Id.* at 654 (citing *Broad River Power Co. v. South Carolina*, 281 U.S. 537 (1930)). *E.g., Demorest v. City Bank Farmers Trust Co.* 321 U.S. 36, 42 (1944).[2]

In *Demorest* this Court rejected petitioner's claim that a judgment of the New York Court of Appeals

[2] *Accord Howlett v. Rose*, 496 U.S. 356, 366 (1990) (municipalities' state-law immunity subject to review if state-law basis for immunity was "without any fair or substantial support"); *New York Times v. Sullivan*, 376 U.S. 254, 265 n.4 (1964) (state-court ruling not reviewed by this Court because it did not lack 'fair or substantial support' in prior Alabama decisions"); *Wolfe v. North Carolina*, 364 U.S. 177, 185-86 (1960) ("It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support."); *Staub v. City of Baxley*, 355 U.S. 313, 318-19 (1958) (state-court ruling implicating right to freedom of speech inadequate because it was "without any fair or substantial support" in state law); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958) (state court judgment on state-law grounds reviewed because it was "without any fair or substantial support"); *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 282-83 (1932) (state-law grounds for refusal by state court to consider constitutionality of a tax were not "fair or substantial" but rather were "unsubstantial and illusory"); *Ward v. Love County Bd. of Comm'rs*, 253 U.S. 17, 22 (1920) (state-court ruling evaded federal law "by putting forward non-federal grounds of decision that were without any fair or substantial support").

effected a federal taking by overruling prior decisions and modifying certain rights of income and remainder beneficiaries in trust property. If, the Court explained, "there is no evasion of the constitutional issue . . . and the nonfederal ground has fair support, this 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 42 (quoting *Broad River Power Co.*, 281 U.S. at 540).

While this rule ensures that a state court judgment cannot evade a federal claim or insulate an unconstitutional statute from federal review merely "by putting forward non-federal grounds of decision," *see Ward v. Love County Bd. of Comm'rs*, 253 U.S. 17, 22 (1920), where there is "no pretence that the [state] Court adopted its view in order to evade a constitutional issue" this Court must accept the state court's determination of its law as authoritative. *Nickel v. Cole*, 256 U.S. 222, 225 (1921). By contrast, a state ground of decision is inadequate "where [it] is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164-65 (1917).

The applicable line of cases demonstrates that this Court's sole interest when reviewing state-court judgments interpreting state law is ensuring that state courts do not willfully evade the Constitution's requirements. The Court thereby ensures that federal rights will not be violated by state courts acting in bad faith. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bouie v. City of Columbia*, 378 U.S. 347, 455 (1964); *Ward*, 253 U.S. at 22.

When the judgment below is examined to determine whether it rests on a fair or substantial basis in Florida law, it is clear that it should be affirmed. As respondents Walton County and the City of Destin demonstrate, the Supreme Court of Florida "had more than fair support" in state law because "it did not change Florida law in any significant respect at all." Resp. Br. 32; *see id.* at 32-41. The state court's construction of the Beach and Shore Preservation Act is replete with detailed analysis of, and quotations from, Florida common and statutory law. There is nothing in the opinion to suggest any bad faith on the part of the court; on the contrary, the existence of substantial majority and dissenting opinions indicate a full and fair canvassing of the law by the Florida justices. There is accordingly no basis to conclude that their judgment lacked a fair or substantial basis in state law.

By contrast, petitioner's proposed "judicial takings" doctrine squarely conflicts with the long tradition of limited, highly deferential review of state court judgments by this Court. It thus fails to provide a federal-law basis for reversing the judgment of the Supreme Court of Florida.

II. PETITIONER'S JUDICIAL TAKINGS THEORY IS LEGALLY UNSOUND AND VIOLATES CORE PRECEPTS OF FEDERALISM.

From the time of the adoption of the Takings Clause, regulation of property rights was accepted as compatible with the Amendment's mandate. Petitioner and its *amici* emphasize that property rights were important to the Founders. They ignore, however, the centuries-long tradition of respect for state power to define and regulate property interests

through statutory and common law. Petitioner's theory of "judicial takings" and its *amici*'s skewed account of takings jurisprudence fail to incorporate this constitutional history and run roughshod over core principles of federalism.

A. The History of the Takings Clause Shows Respect for State Control of the Development of Property Law.

The Fifth and Fourteenth Amendments were adopted against a legal backdrop that included significant legislative and judicial modifications of long-established common-law property interests.

This history is left out of the expansive interpretation of the Takings Clause advanced by petitioner and its *amici*. From our very beginnings, property regulation went hand-in-hand with American ideals; "American legislatures extensively regulated land use between the time America won its independence and the adoption of the property-protecting measures of the Constitution and the Bill of Rights." John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099, 1100 (2000).

At the time of the Founding, most States were engaged in reform of traditional inheritance laws. *See* Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 Mich. L. Rev. 1 (1977). Thomas Jefferson was the prime mover behind Virginia's statutory revision of inheritance laws, which was "[t]he brightest example of the reform process." *Id*. at 12.

Prior to Jefferson's reform efforts, Virginia's inheritance law "largely adhered to the English system." *Id.* By 1785, with Jefferson's help, Virginia

had changed the law to abolish both entail and primogeniture. *Id.* at 13. James Madison, the Framer most responsible for the Takings Clause, supported these efforts despite the fact that "Virginia's abolition of entail destroyed valuable reversionary interests in land and slaves that Virginia courts had long protected." Hart, *Land Use Law in the Early Republic*, *supra*, at 1130. Certainly the abolition of entail modified a significant property interest, but Madison did not suggest that termination of this property interest was improper or required compensation.

The other States followed suit, and by 1800 virtually all of them had changed their property laws to abolish primogeniture and entail. To the extent this property-rights limitation was challenged, the Supreme Court upheld it. *See Van Rensselaer v. Kearney*, 52 U.S. 297 (1850) (upholding New York court's validation application of the N.Y. statute of which abolished entail).

The adoption of the Fourteenth Amendment, and the application of the Takings Clause to the States, did not change this legal landscape. In the era of Reconstruction, reform movements sought to change archaic common-law concepts that had grown incompatible with changing conditions and ideals. One example of such reform is the statutory modification of marital property interests and abrogation of the common law of coverture.[3]

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[3] The centuries-old common law of coverture had given husbands rights in their wives' property and earnings. *See* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 Geo. L.J. 2127 (1994). During the nineteenth century, however, States passed legislation modifying or repealing the law of coverture to give wives the capacity to enter into legal transactions and grant them

The law of coverture was reformed in two phases. First, "reform began with the passage of married women's property acts that allowed wives to hold property in their own right." Siegel, *The Modernization of Marital Status Law*, *supra*, at 2141. Second, the reform movement advocated for earnings statutes, which would have "allowed wives to assert property rights in their labor and granted wives various forms of legal agency respecting their separate property, including the capacity to contract and file suit." *Id.*

After these reform statutes were enacted, "[i]t fell to the courts in the late-nineteenth century to decide how to square the reform statutes with a common law tradition." *Id.* at 2148. Prior to coverture reforms, the common law property "bundle of sticks was rather large for men and correspondingly small for married women." Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. Legal Educ. 539, 540 (2006). After the reform of coverture, certain elements henceforth belonged to women. Yet despite this alteration of property rights, neither the reform acts themselves nor the judicial decisions squaring the statutes with the common law were declared unconstitutional takings.

Accordingly, at the time the Takings Clause was ratified, as well as when it was applied to the States in the mid-nineteenth century, States were extensively engaged in modification of common law property interests in response to changed conditions.

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rights in their property and earnings. *See, e.g.*, Kathleen S. Sullivan, Constitutional Context: Women and Rights Discourse in Nineteenth Century America 69-70 (2007); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 Geo. L.J. 1359, 1397-98 (1983).

B. Development of State Property Law Requires a Strong Relationship Between State Legislatures and State Courts That Should Not Be Sundered by Petitioner's Doctrine of Judicial Takings.

The examples of property law development discussed above are illustrative not just of the constitutionality of state reform of the common law, but also of the interaction between background common law interests and legislative enactments. Petitioner's proposed federal "judicial takings" review threatens to disturb this time-honored, incremental development of state common law of property by state and local policy makers and state courts.

From the beginnings of our legal system, the United States has "been a nation of both statutes and common law." Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 Iowa L. Rev. 545, 548 (2007). Following Oliver Wendell Holmes, legal theorists observed that state legislatures, enacting statutes, and common law courts, by interpreting these statutes and filling in any gaps related to background common law principles, worked in tandem and "argued for a strong interrelationship between the common law and legislative developments." *Id.* at 551.

As Dean Pound noted, even in an era of increased legislative and executive lawmaking, common law remained necessary "to fill the gaps in legislation, to develop the principles introduced by legislation, and to interpret them." Roscoe Pound, The Spirit of the Common Law 174 (1921). *See also Moragne v. States Marine Lines*, 398 U.S. 375, 392 (1970) ("It has always been the duty of the common-

law court to perceive the impact of major legislative innovations and interweave the new legislative policies with the inherited body of common-law principles—many of them derived from earlier legislative exertions.”).[4]

The interaction between the common law and statutory law has been longstanding. One of Blackstone’s purposes was to “show legislators the problems with the state of the common law so that they might be inclined to exercise their statutory authority in amending it.” Bernadette Meyler, *Towards a Common Law Originalism*, 59 Stan. L. Rev. 551, 562 (2006).[5]

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[4] If common-law courts fill in a legislative gap in a way at odds with the will of the people or the intent of the state legislature, the latter can clarify the law to reverse or soften judicial common law decisions. *See* M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. Ark. Little Rock L.J. 555, 562 (1996) (“Where a state’s high court has countenanced a new rule, the political process provides for a legislative veto.”); Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. Pitt. L. Rev. 995, 997 (1982) (“Even in cases to which no statute presently applies, the fact that the legislature is always, or virtually always, in session casts a considerable shadow on innovation in common law growth and development.”).

[5] The first States recognized the diversity of state common law, and the potential for further diversity due to state court interpretations of the common law or legislative modifications. *See* Hugh Henry Brackenridge, Law Miscellanies iv (Lawbook Exchange Ltd. 2001) (1814) (compilation designed to create “an edition of Blackstone’s Commentaries . . . referring to the variations in the law as it is in the state of Pennsylvania from that of England: the variations in the introduction of the common law, and in the statute law as it has been changed, or superseded, by our acts of assembly”).

Connecticut Supreme Court Justice Ellen Ash Peters has noted that "the role of statutes is just as crucial in the litigation involving so-called common law subjects, such as torts, contracts, property, and procedure, as elsewhere." Peters, *Common Law Judging in a Statutory World*, *supra*, at 995. Statutes themselves are often "a source of policy for consistent common law development." *Id.* at 998. Just as legislatures consider the common law in enacting statutes, state courts consider statutes "as a source of common law policy." *Id.* at 1006.

Interrupting this dynamic relationship through federal "judicial takings" review would undermine the nation's system of "cooperative judicial federalism," *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), in which state courts have the authority to define and develop state common law rules of property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992). Federal court review of state common-law judgments under the guise of "judicial takings" claims would have a disruptive effect on cooperative judicial federalism.

The Florida legislature acted precisely to keep pace with its changing environment in enacting the Beach and Shore Preservation Act of 1965. Fla. Stat. §§ 161.011 *et seq*. Acting to protect the State's citizens and environment, the legislature declared that "beach erosion is a serious menace to the economy and general welfare of this state and has advanced to emergency proportions." Fla. Stat. § 161.088. The Act modifies or suspends certain aspects of common law to respond to changing environmental and economic conditions, while expressly preserving all other common law rights. *Id*. § 161.201.

This statute and the Florida Supreme Court's construction of it in accordance with the common law principles exemplify the dynamic relationship in which state courts and state legislatures engage to develop state law. This Court is ordinarily highly deferential to this process. *See, e.g., General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992). As the Court explained in *Sauer v. City of New York*, States have the right to modify and determine complex issues at the intersection of private and public property, even if it is sometimes a messy process:

> The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the decisions have been conflicting, and often in the same state irreconcilable in principle. The courts have modified or overruled their own decisions, and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy. As has already been pointed out, this Court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various states to a uniform rule which it shall announce and impose.

206 U.S. 536, 548 (1907).

Amici urge the Court to ensure that state legislatures and common law courts are allowed the "substantial leeway" required to reevaluate and refine common law interests in response to changing conditions. *See Rogers v. Tennessee*, 532 U.S. 451, 462 (2001).

C. Petitioner's Judicial Takings Theory Is Unworkable.

Petitioner's theory of federal judicial takings review would encourage inefficient litigation, make this Court the final arbiter of diverse state property law regimes, and, as explained in Argument I, *supra*, introduce a novel constitutional theory that is wholly unnecessary to protect constitutional rights.

Any claims raised under a judicial takings theory could likely only be brought on direct review to this Court. Federal review of state court judgments is based on the Supremacy Clause of Article VI, as enforced by the First Judiciary Act, 1 Stat. 73, 85 (1789), codified at 28 U.S.C. § 1257. Section 1257 confers exclusive jurisdiction to review the final judgments of state courts upon this Court. *Id.*

The *Rooker-Feldman* doctrine has made clear that a federal district court may not exercise subject matter jurisdiction over a lawsuit complaining of an injury caused by a state court judgment and seeking review and rejection of the judgment. *See, e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280, 291 (2005); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923). *See also Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Remo Hotel v. City and County of San Francisco,* 545 U.S. 323 (2005). Accordingly, challenges to state court decisions as violative of the Takings Clause can be brought only in this Court. *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 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.").

With the Supreme Court as the only federal forum, petitioner's judicial takings theory raises logistical difficulties, particularly where, as here, there is no evidentiary record on key elements of a takings claim. *Cf. Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J., dissenting from denial of certiorari) (noting that the lack of "any record concerning the facts" was an obstacle to reviewing petitioners' judicial takings claim).

In this case, there has been no record compiled on the property owner, the parcel of property, the value of the property, or any offsetting benefits. There has been no demand for just compensation and the State has not denied such compensation. *See San Remo*, 545 U.S. at 326 ("[T]akings claims are not ripe until a State fails 'to provide adequate compensation for the taking.'") (quoting *Williamson County*, 473 U.S. at 195). As Justice Scalia noted when the Court was faced with a similar evidentiary lacuna, "[i]t is beyond our power—unless we take the extraordinary step of appointing a master to conduct factual inquiries—to evaluate petitioners' takings claim." *Cannon Beach*, 510 U.S. at 1207.

Petitioner's judicial takings theory would require this Court to monitor and review diverse systems of state property law. This theory would also compel the Court to oversee the development, *ab inititio*, of evidentiary records adequate to adjudicate each judicial takings claim. In short, petitioner's theory is unworkable as a practical matter as well as unsound as a legal matter.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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