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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 08-1151, Stop the Beach
5 Renourishment v. The Florida Department of Environmental
6 Protection.

7 Mr. Safriet.

8 ORAL ARGUMENT OF D. KENT SAFRIET

9 ON BEHALF OF THE PETITIONER

10 MR. SAFRIET: Mr. Chief Justice, and may it
11 please the Court:

12 Today we ask this Court to expressly
13 recognize that a State court decision, unpredictable in
14 terms of relevant precedents, which redefines
15 century-old property rights to no longer exist, violates
16 the Fifth Amendment of the United States Constitution.

17 The Florida Supreme Court suddenly and
18 dramatically redefined littoral property rights,
19 converting oceanfront property into oceanview property
20 to avoid the finding of a taking. It did so in the
21 context of a beach restoration project which could have
22 been accomplished without taking any private property at
23 all. Given this Court's jurisprudence that a State's
24 legislative and executive branches cannot violate the
25 Fifth Amendment, we see no reason why the judicial

1 branch should be treated any differently.

2 JUSTICE GINSBURG: I thought your basic
3 position in the litigation in Florida was that the
4 Florida legislation violated the takings protection, and
5 so it's kind of strange to switch your target from the
6 legislature, which enacted this measure, and then say,
7 because the judiciary upheld it, the judiciary somehow
8 is complicit in this violation by the legislature
9 implemented by the administrative offices.

10 MR. SAFRIET: That is correct, Your Honor.
11 Below, the case was litigated as one of a taking by the
12 legislature when it passed the Act.

13 When it passed the Beach and Shore
14 Preservation Act, it contained a provision within
15 section 161.141, which is a savings clause, that said to
16 the extent the beach restoration cannot be accomplished
17 without taking property rights, the requesting
18 authorities have to use eminent domain proceedings to
19 take those rights.

20 At the First District Court of Appeal, they
21 agreed with us that the littoral rights were being taken
22 by the Act of the legislature and that those had to be
23 compensated for. When we arrived at the Florida Supreme
24 Court, again, all of the parties were arguing those
25 issues, whether there was a physical taking of these

1 rights or a regulatory taking of these rights by the Act
2 and whether the savings clause would apply.

3 To everybody's shock, the Florida Supreme
4 Court said: We're going to go back to step one and
5 decide you don't have any littoral rights. The
6 legislature didn't eliminate any protected littoral
7 rights that you thought you once had for over a hundred
8 years as the relevant precedents in common law indicate.
9 So it was that decision of the Florida Supreme Court,
10 that said you have -- no longer have property, that
11 gives rise to the issue before this Court is, can the
12 Florida Supreme Court redefine those 100-year-old rights
13 to no longer exist?

14 JUSTICE GINSBURG: Applied in a new
15 situation. It was never the kind of situation
16 involved here with the beach restoration project. The
17 -- the precedent did not involve the kind of situation
18 that this case presents.

19 MR. SAFRIET: Yes, Your Honor. There is no
20 precedent with respect to the Beach and Shore
21 Preservation Act as it has ever been applied. We do
22 concede that.

23 However, there are two fundamental
24 principles of Florida law that have existed for more
25 than a hundred years, and those are property that must

1 -- property that borders the mean high-water line and
2 must remain in contact with the mean high-water line to
3 possess common law littoral rights. If that connection
4 is not there, there are no common law littoral rights.
5 Common law littoral rights are constitutionally
6 protected and cannot be taken without due process and
7 just compensation.

8 JUSTICE SCALIA: Well, they're -- they're
9 eliminated -- at least the right of contact with the
10 water can be eliminated by an avulsion, right?

11 When there's -- when there's avulsion, even
12 at common law and under Florida law, it -- it can happen
13 that some land between the property owner and -- and the
14 water will be owned by the State.

15 MR. SAFRIET: That is correct, Your Honor.
16 Under the --

17 JUSTICE SCALIA: Well, why wasn't this an
18 avulsion?

19 MR. SAFRIET: Well, because the avulsion in
20 this case, Your Honor, was the hurricanes that the State
21 cites as the reason for the beaches being washed away,
22 and -- and it was --

23 JUSTICE SCALIA: Well, well, well, well.
24 There were -- there were two avulsions. One was the
25 avulsion of its being washed away and the other was the

1 -- the rapid replacement of sand. That -- that is not a
2 natural, gradual phenomenon.

3 MR. SAFRIET: That is right, Your Honor, but
4 the -- there is no case law in Florida or no principle
5 that says avulsion can occur by artificial means. So
6 there is -- the beach restoration, where they placed
7 sand on the beach, is not avulsion.

8 JUSTICE SCALIA: If there's no case law, it
9 seems to me you've lost your case.

10 MR. SAFRIET: No, the case law specifically
11 says that avulsion is a result of natural occurrences,
12 by the action of the wind and the water. That's what
13 avulsion is in Florida and has been -- you know, for at
14 least 50 years, I believe. It's --

15 JUSTICE BREYER: They have a new situation.
16 It's sort of like an avulsion. It's sort of like an
17 accretion. The only precedent of -- you keep talking
18 about a hundred years -- it seemed to me some dictum in
19 a case called Sand Key, which does say that the upland
20 property owner has the right to touch the water.

21 So in this case, the Florida Supreme Court
22 says the purpose of that was to make certain that the
23 upland property owner could go to the water. And so
24 here we have a case that assures he can go to the water,
25 and they have a new situation, which, as I think

1 Justice Scalia said, looks an awful lot like an
2 avulsion, though of course there are differences.

3 So it sounds like a typical common law
4 situation. A new situation arises. You try to apply
5 old precedent, and they reached the result they did.
6 Now, what's your response to that? Because that's the
7 argument the other side makes.

8 MR. SAFRIET: The response to that, Your
9 Honor, is the doctrine of avulsion -- as part of the
10 doctrine of avulsion is the doctrine -- or the right to
11 reclaim what was lost by the landowner. So when an
12 avulsion event occurs, the landowner that has lost
13 property has a right under common law to reclaim what
14 they lost.

15 JUSTICE BREYER: You didn't lose any.
16 It just went out the front door there. The land ended
17 here, and the new avulsion comes in and extends it
18 further. You didn't lose one inch. All you lost was
19 the right to touch the water. But the court here says
20 you in effect have that right because you can walk right
21 over it and get to the water.

22 MR. SAFRIET: What -- what was lost in this
23 case, Your Honor, is the right to contact the mean high-
24 water line, and I think there's a distinction between
25 the right to contact the mean high-water line and the

1 water's edge. The Florida Supreme Court didn't address
2 the former issue, contact with the mean high-water line.
3 That's --

4 JUSTICE BREYER: Don't you have a right to
5 walk across and put your boat in the water and swim, and
6 nobody can stop you?

7 MR. SAFRIET: Right. Across the foreshore,
8 yes, Your Honor. And also, as part of the common law
9 rights of access --

10 JUSTICE BREYER: Now you have that right.
11 They didn't take that away from you. The statute gives
12 it to you.

13 MR. SAFRIET: That's correct. We have that
14 right --

15 CHIEF JUSTICE ROBERTS: If somebody wanted
16 to put up a hot dog stand on this new land, would you
17 have the right to tell them they can't?

18 MR. SAFRIET: Absolutely not, Your Honor,
19 and that's the point I was getting to.

20 JUSTICE BREYER: You say "absolutely not."
21 I thought there was a provision in this law that said
22 they cannot put anything on that strip which destroys
23 your right of enjoyment of the upland right. Now, if
24 they put a noisy hot dog stand that keeps you up at
25 night, doesn't that violate the statute?

1 MR. SAFRIET: I think the statute provides
2 no permanent structures can be constructed on that new
3 property.

4 JUSTICE BREYER: It doesn't say anything
5 about your right to peaceful enjoyment?

6 MR. SAFRIET: It certainly does.

7 JUSTICE BREYER: And what does it say?

8 MR. SAFRIET: It says that the -- you know,
9 your regular common law uses that cannot be --

10 JUSTICE BREYER: So what does the statute
11 say about your right to have peaceful enjoyment of your
12 land?

13 JUSTICE SCALIA: Well, you can have quiet
14 hot dog stands during the daytime.

15 (Laughter.)

16 MR. SAFRIET: Yes. Yes. It's says no uses
17 of that property can be injurious to the common law --

18 JUSTICE BREYER: Injurious, okay.

19 CHIEF JUSTICE ROBERTS: But do you have any
20 --

21 MR. SAFRIET: Of course, now --

22 CHIEF JUSTICE ROBERTS: Do you have any
23 reason to suppose that that's a redefinition of -- of
24 property that the legislature isn't free to change
25 tomorrow?

1 MR. SAFRIET: Yes, the legislature can
2 change this definition of property. They can define
3 property in the State of Florida as to whatever they
4 want it to be, but if they do so and take property, they
5 must pay for it under the just compensation clause.

6 JUSTICE SOTOMAYOR: Counsel, before this
7 legislation, in the seaward side of the land that
8 belonged to the State, from the mean high-water mark, a
9 hot dog stand could have sat in the water, correct?

10 MR. SAFRIET: If somebody wanted to put one
11 in the water, yes, Your Honor.

12 JUSTICE SOTOMAYOR: And someone could have
13 stood there, a boat could have docked there, assuming
14 that it -- it was a shallow boat.

15 You had no control over anyone placing
16 anything on the seaside submerged lands that belonged to
17 the State, outside of whatever regulations the State
18 decided it wanted to impose?

19 MR. SAFRIET: We had no exclusive right to
20 exclude them from that property. But they could not
21 unnecessarily interfere with our right to view or our --

22 JUSTICE SOTOMAYOR: The ECL that has been
23 created by this legislation -- you gave up any challenge
24 to it -- it was established at that mean water mark,
25 wasn't it?

1 MR. SAFRIET: Yes. The ECL in this case, as
2 the case was litigated, was assumed to be located
3 directly on top of the mean high-water line. We did not
4 abandon a challenge to the ECL. What we abandoned was
5 any challenge as to where the ECL was placed in relation
6 to --

7 JUSTICE SOTOMAYOR: So, right now, we just
8 have to assume that it was -- that it -- it has
9 established the line at a point where the State owns all
10 the land seaward of the ECL, correct?

11 MR. SAFRIET: Yes, Your Honor.

12 JUSTICE SOTOMAYOR: So after this project
13 finishes, that hot water -- that hot dog vendor will be
14 on stateside land, correct?

15 MR. SAFRIET: That is correct, Your Honor.

16 JUSTICE SOTOMAYOR: No different than what
17 exists today, before the legislation, which is if the
18 hot dog vendor wanted to sit in a foot of water, it
19 could have?

20 MR. SAFRIET: It certainly could sit in a
21 foot of water.

22 JUSTICE SOTOMAYOR: All right. So none of
23 your actual use rights, pleasure rights, or anything
24 else has been changed. What you're arguing is that --
25 and what

1 the Florida State Supreme Court described as the
2 contingent future possibility that the high-water mark
3 might change and you could push that hot dog vendor back
4 another foot or two.

5 MR. SAFRIET: That is correct, Your Honor.
6 Anybody allowed --

7 JUSTICE SCALIA: Of course, such -- such
8 boats floating in -- in the water below the mean high-
9 water mark are available with respect to all littoral
10 properties. Isn't that right?

11 MR. SAFRIET: That is right, Your Honor.

12 JUSTICE SCALIA: But what can't happen with
13 other littoral property is that folks can't come in and
14 lay down beach blankets and occupy that sand, right, so
15 that you have open sand in front of -- in front of your
16 house?

17 MR. SAFRIET: That is correct, Your Honor.
18 The --

19 JUSTICE SCALIA: And people pay a lot more
20 money for beach -- beachfront homes, for that reason,
21 don't they?

22 MR. SAFRIET: Absolutely, Your Honor. The
23 value of beachfront property is a premium.

24 JUSTICE SCALIA: And that's quite different
25 from having a house behind the beach at Coney Island,

1 isn't it?

2 MR. SAFRIET: Absolutely, Your Honor. And
3 in this case --

4 JUSTICE GINSBURG: Well, can you -- can you
5 explain something that's unclear to me from the briefs
6 and the records? That is, there -- this -- what is
7 referred to as "the foreshore," was that wet all the
8 time? I thought the suggestion was that that was in
9 effect beach, public beach, that people could walk on,
10 not swim in.

11 MR. SAFRIET: The foreshore, Your Honor, is
12 typically the land area between the mean high-water line
13 and the low high-water line, and depending on the tide
14 cycles of the day, some of that foreshore is dry, and
15 then at other times --

16 JUSTICE GINSBURG: And the -- and the public
17 -- what -- what was the situation here? Was there a
18 strip of dry land that the public has been using?

19 MR. SAFRIET: There's -- the foreshore, Your
20 Honor, which is periodically dry on any given day and
21 periodically wet -- the public can use that, and they
22 have always been able to use that. That is State-owned
23 land, and they can use that to traverse up and down the
24 beach. But, again, because it's wet every day, you
25 don't have hot dog vendors putting hot dog stands in the

1 water. You don't have people laying their blankets in
2 the water to enjoy that beach.

3 And what we're talking about here is the
4 exclusive right to use the dry sand area that stays dry
5 all of the time in our case, which in our case was a
6 200-foot stretch of beach before this project began, and
7 we had 200 feet of beach, and we had the right to
8 exclude commercial vendors or anybody else from that
9 property.

10 Now what we have after that, according to
11 this project, is another 80 feet to 100 feet of dry sand
12 beach owned by the State where the landowners have no
13 ability to exclude commercial vendors or any other
14 obnoxious uses of that property.

15 JUSTICE GINSBURG: Who owns that land? I
16 mean, when it was submerged it belonged to the State.
17 And is it your position that the owners in your
18 organization, that they have title to that land that was
19 once owned by the State?

20 MR. SAFRIET: Absolutely not, Your Honor.
21 It's our position that the State, as a matter of public
22 use under the Takings Clause, can condemn that property
23 and make a public beach in front of a private one. They
24 absolutely can do that.

25 JUSTICE GINSBURG: No, I mean -- I mean,

1 without condemning it, you say the title is held by the
2 private owners even though the title was held by the
3 State when the land was submerged.

4 MR. SAFRIET: No, Your Honor, I'm not saying
5 that the landowners own that new 80-foot stretch of
6 beach now, as it currently exists. What we argue is we
7 own to the erosion control line, which is the property
8 boundary that the State created in this case. And the
9 State, by operation of the Act, claims title to the new
10 80-foot strip of beach. And what we're trying to obtain
11 here is the State to go through eminent domain
12 proceedings to pay us compensation for the loss of
13 littoral rights that they're taking by creating this
14 public strip of beach.

15 Now, the State may at the end of the day
16 say, well, we're not going to claim title to that; we're
17 going to reinstate your boundary as the mean high-water
18 line -- that would be 80 feet further out -- and no
19 compensation, in that case, would be due. But --

20 CHIEF JUSTICE ROBERTS: It would be -- what
21 would your position be, assuming you still have title,
22 you still have the right of littoral title, contact with
23 the water? Would you concede that the State has
24 different regulatory interests with respect to that new
25 strip of land versus the old strip of land?

1 It's still your property. The State can
2 regulate your property. Presumably, they regulate your
3 beach property now. Would their different -- would
4 their authority to regulate be greater with respect to
5 the new area?

6 MR. SAFRIET: As the owner of the property,
7 Your Honor? If the State owned that property?

8 CHIEF JUSTICE ROBERTS: No. Your -- you
9 would still have the title to the property.

10 MR. SAFRIET: Okay.

11 CHIEF JUSTICE ROBERTS: It's still your
12 property. You know, the State regulates property all
13 the time, in zoning -- would their authority be broader
14 with respect to that new land than with respect to the
15 old?

16 MR. SAFRIET: No, Your Honor, I don't think
17 so. The State already has broad authority to regulate
18 property already, and then would -- I wouldn't see any
19 need for them to have any broader authority for that new
20 strip of beach if our members owned it.

21 CHIEF JUSTICE ROBERTS: Sometimes -- and I
22 don't actually know what the law is on this. Sometimes
23 the State builds, you know, sidewalks in front of
24 people. Maybe they do it on their own land, and they
25 say: We're putting this easement, and people can walk

1 across it. Would this be in the same category of public
2 project? They say, well, it's your land because you
3 have a right to the mean high-water land, but we built
4 it so we have greater rights with respect to regulation
5 than we might have with respect to the natural beach.

6 MR. SAFRIET: No, Your Honor, I don't think
7 they would have any greater rights to that. I mean, if
8 -- if the landowners are the fee-simple title owner,
9 then the State has its basic police powers to regulate
10 as it would any other land, absent some type of easement
11 or reservation of our agreement with the landowners that
12 give them greater rights and --

13 JUSTICE SCALIA: The State gave you some
14 quid pro quo for this, which is to say this new sand is
15 projected to last 6 years, has to be replaced regularly,
16 because your -- your property is being eroded, which is
17 the reason the State went into this. And what the State
18 has given you in exchange is that if and when there is
19 further erosion, you will continue to own up to whatever
20 this new line is called.

21 MR. SAFRIET: ECL.

22 JUSTICE SCALIA: The ECL. You will continue
23 to -- to own up to there, despite the fact that under
24 common law when there's more erosion, your -- your line
25 would recede to the new mean high-water mark. So, you

1 know, who -- who knows? Maybe that's sufficient
2 compensation. You know, if you go in and ask for
3 compensation, the State might say, you know, we've given
4 them -- given them this property right in exchange, and
5 the difference between that and what they have now is
6 two dollars.

7 MR. SAFRIET: That -- that may well be the
8 case, Your Honor, but, again, they haven't provided us
9 the opportunity to go to that trial, that jury trial, to
10 argue that these -- the value of this new 75-foot
11 stretch of beach on top of the 200-foot stretch of beach
12 provides value above and beyond the taking of the --

13 JUSTICE KENNEDY: Let me ask you this
14 question on Florida valuation. Assume you prevail,
15 there's a cause of action for a taking. You have a
16 beachfront area, beachfront home, in which there's a
17 hurricane and there's a loss of the beach and a sudden
18 drop, so that it's now a 60-foot -- a 60-foot drop. The
19 State comes in and says the only way we can fix this
20 is to extend the beach and make it a larger beach on
21 what was formerly our submerged land. And it does that
22 that. Under -- and it -- and it has the same rule.

23 Under your view, is the State required to
24 pay you for the loss of your right of contact to the
25 beach, your littoral right, because there's let's say

1 another 100 foot of new beach? Are they entitled to
2 offset that against the enhanced value to your property
3 by reason of the fact that they've saved it from further
4 erosion and have given you a beach where there was none
5 before?

6 MR. SAFRIET: Yes, Your Honor, they are able
7 to offset that, and the -- the statute provides for that
8 offsetting such that in an eminent domain proceedings
9 whatever value the landowners lost as a result of their
10 -- losing their contact with the mean high-water line,
11 that any benefit provided by the additional sand would
12 be offset --

13 JUSTICE KENNEDY: So the enhancement from
14 the post-project benefit is a credit to the State in the
15 takings action?

16 MR. SAFRIET: That -- that is according to
17 the statute that was passed, Your Honor.

18 JUSTICE SCALIA: Did any of these beachfront
19 owners think this was a good deal, that the State has
20 prevented further erosion of their land and, you know,
21 the price they pay for that is that they have this
22 60-foot stretch that -- that the public can use, and
23 that may wash away in 6 years anyway, and if they're
24 lucky the State won't have enough money to put it back?
25 Or --

1 (Laughter.)

2 JUSTICE SCALIA: Did anybody -- I'm not sure
3 it's a bad deal. And they're guaranteed against --
4 against further loss of property because they will
5 continue to own up to that -- to that new line, even
6 if it's all covered by water.

7 MR. SAFRIET: No, Your Honor. Our --

8 JUSTICE SCALIA: Nobody -- nobody thought it
9 was a good deal? Everybody thought that they had been
10 done out of something?

11 MR. SAFRIET: With respect to the
12 Petitioner's members, they thought it was a bad deal,
13 Your Honor.

14 JUSTICE SCALIA: Petitioner's members, but
15 other people along -- along the same coast? I mean, if
16 I had a place and it's being -- it's being eroded by
17 hurricanes constantly, you know, I -- I'm not sure
18 whether I wouldn't -- wouldn't want to have the sand
19 replaced, even at the -- at the cost of having a 60-foot
20 stretch that the State owns.

21 MR. SAFRIET: I think that's the fundamental
22 misunderstanding in this case. The beach was not
23 eroding. It was not lapping under these houses. There
24 was 200 feet of dry beach, and the beach is accreting,
25 meaning it grows gradually, day by day or week by week.

1 JUSTICE GINSBURG: But what happened? There
2 were a succession of hurricanes, I thought.

3 MR. SAFRIET: With the exception of
4 hurricanes. But hurricanes are, again, avulsive events
5 that don't change the property boundary line. We talked
6 about the right to reclaim earlier. So this is an a
7 accreting beach, 200-foot accreting beach. These
8 property owners did not view that they were gaining
9 anything.

10 JUSTICE SCALIA: It may not change the
11 property line, but all of your property might be under
12 water --

13 (Laughter.)

14 JUSTICE SCALIA: -- right? That wouldn't be
15 very good.

16 MR. SAFRIET: That's a risk that they --
17 Petitioner's members -- were willing to take. They
18 bought oceanfront property.

19 JUSTICE SCALIA: Well, your members were,
20 but I was asking whether some other people might not
21 have thought it was a pretty good deal.

22 MR. SAFRIET: Sure. Sure, Your Honor, there
23 are a lot of properties, probably even in this stretch,
24 where water is lapping under the houses, and the -- and
25 the landowners will want sand, and they'll be willing to

1 waive any types of property rights claims or
2 compensation claims to get that sand. But that's not
3 what happened --

4 CHIEF JUSTICE ROBERTS: Could the State --

5 MR. SAFRIET: -- in this case.

6 CHIEF JUSTICE ROBERTS: Could the State sell
7 this new land to somebody else?

8 MR. SAFRIET: Yes. There's no reason they
9 couldn't, because they own the fee-simple title to it,
10 as well as they could send the sovereign submerged lands
11 in front of the property.

12 JUSTICE KENNEDY: But it would be subject to
13 the easement that the State acknowledges you have, which
14 is the easement of access?

15 MR. SAFRIET: I'm not sure it would be, Your
16 Honor. The statute provides that right of access --

17 JUSTICE KENNEDY: Well, but the -- the --

18 MR. SAFRIET: -- so basically it's not an
19 easement per se that inheres in our title.

20 JUSTICE KENNEDY: No, no. As I understand
21 the supreme court's opinions, you have several special
22 and exclusive -- or exclusive -- or exclusive, common
23 law littoral rights: right to have access, right to
24 reasonable use of the water, right to accretion and
25 reliction, right to the unobstructed view. They can't

1 sell that.

2 MR. SAFRIET: Yes, but we don't have common
3 law rights anymore, Your Honor, because we don't --

4 JUSTICE KENNEDY: No, no.

5 MR. SAFRIET: -- contact the mean high-water
6 line.

7 JUSTICE KENNEDY: The -- the hypothetical is
8 the State says that the property owner, the upland
9 owner, has these rights. The Chief Justice asked you,
10 could this property be sold? I think the answer would
11 be yes, but it would be subject to the continuance of
12 that easement in the dominant estate. That has to be
13 the answer under the supreme court's opinion. Now, you
14 may not agree with that.

15 MR. SAFRIET: Under the supreme court's
16 opinion, yes, because it purports to reserve common law
17 rights across this new stretch of State-owned beach.
18 It's our contention that all common law rights have been
19 lost when we lose connection to the mean high-water
20 line.

21 JUSTICE KENNEDY: All right. That gets to
22 the question, if we agree with you that there is such a
23 thing as a judicial takings, what is the standard by
24 which we decide when the Federal courts can and must
25 intervene to disagree with the -- with the State law and

1 to characterize it as a taking when the State has said
2 that it is not? Would we just find all sorts of
3 adjectives -- it's sudden, unexpected, unfounded -- we
4 just have a string of adjectives, sort of like an
5 adequate independent State ground rule or something?

6 MR. SAFRIET: Yes, Your Honor, that would be
7 the test that we would suggest, as Justice Stewart noted
8 in his concurring opinion in Hughes. And the test we
9 would propose is that a judicial taking occurs when a
10 State court effects a sudden and dramatic change in
11 State law, unpredictable in terms of relevant
12 precedents, that have no fair or substantial support in
13 well-established background principles of State law.

14 JUSTICE KENNEDY: Okay, I'm familiar with
15 that opinion. Now, in this case, number one, it seems
16 to me that in order to do that, we have to become real
17 experts in Florida law.

18 Number two, once we do that it seems to me
19 that this opinion really addresses something that's --
20 that's new, and it's -- it's grounded in common law
21 doctrines. It's a close case. It might have gone
22 either way. Let's assume that. Does there have to be
23 some finding that the State decision is clearly
24 unreasonable? I mean, if it's a close case, does the
25 State win under your test?

1 MR. SAFRIET: Your Honor, I think the test -
2 - again, the fair and substantial support -- provides
3 adequate deference to the State court. And in
4 objectively reviewing the precedents, this Court doesn't
5 have to become an expert in State law. It merely has to
6 review those precedents to make sure that the Florida
7 Supreme Court in fact relied on background principles of
8 law rather than creating nonexistent rules of State
9 substantive law --

10 JUSTICE KENNEDY: Well, it seems to me that,
11 reading the opinion, I -- I can get there. There was
12 some talk about the Belvedere case as helping you. I
13 thought it did not at all. That was a very odd case
14 where the easement is wholly separated from the
15 dominant. It's the reverse. They take the main
16 property and leave the easement, rather than vice versa.
17 So I just thought that was irrelevant.

18 MR. SAFRIET: Yes, the case law, Your Honor,
19 and the incremental changes that we are dealing with
20 here that would be part of your test is the government
21 or the State can gradually change these property rights
22 or property laws so long as they leave the owner with
23 the rights. And in this case what the Florida Supreme
24 Court has done is said: We're not just gradually
25 changing them and leaving you with these common law

1 littoral --

2 JUSTICE KENNEDY: The State can do an
3 accretion --

4 MR. SAFRIET: -- we're taking them.

5 JUSTICE KENNEDY: -- but not an avulsion?

6 MR. SAFRIET: Right. We're taking them.
7 What the Petitioner's members possessed, the State now
8 possesses.

9 JUSTICE SCALIA: I thought Martin was -- the
10 Martin case was -- was pretty close, the lake that --
11 that the State lowered.

12 MR. SAFRIET: Yes, the Martin v. Busch case.
13 That --

14 JUSTICE SCALIA: Right.

15 MR. SAFRIET: That case, ironically, has --
16 has been relied upon by the State at the Florida Supreme
17 Court level.

18 JUSTICE SCALIA: Did the -- did the Florida
19 Supreme Court cite it?

20 MR. SAFRIET: Absolutely not, Your Honor.

21 JUSTICE SCALIA: Isn't that weird? Why
22 didn't they cite it?

23 MR. SAFRIET: It's not weird, because in
24 1987 in the Sand Key case, the Florida Supreme Court
25 said that the proposition that the State has cited that

1 case for was not the issue there in that case. It said
2 that case dealt with a property boundary dispute. It
3 didn't deal even deal with the doctrine of avulsion or
4 reliction or accretion.

5 JUSTICE SCALIA: Do you think that's true?

6 MR. SAFRIET: I'm sorry, Your Honor?

7 JUSTICE SCALIA: I know they said that. Do
8 you think that's true? When I read it, it seemed to me
9 to deal with reliction precisely.

10 MR. SAFRIET: I do think that's true,
11 because the majority in Sand Key said that it dealt with
12 them.

13 (Laughter.)

14 MR. SAFRIET: If there are no further
15 questions, I'd like to reserve my time for rebuttal.

16 JUSTICE SCALIA: A good lawyerly response.

17 MR. SAFRIET: Thank you.

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: Thank you. Thank
20 you, Mr. Safriet.

21 Mr. Makar.

22 ORAL ARGUMENT OF SCOTT D. MAKAR

23 ON BEHALF OF THE RESPONDENTS

24 MR. MAKAR: Mr. Chief Justice, and may it
25 the Court:

1 Let me go ahead and address some issues that
2 have come up about Florida law. Number one, this idea
3 of artificial avulsion that was discussed earlier, the
4 Bryant v. Peppe case, which cites the Martin -- that was
5 discussed in the Martin case, talks about when the State
6 comes in on its own property and either lowers the water
7 or, in this case, puts sand on the -- on the State side
8 of the property line, that that's an artificial
9 avulsion, the State retains title to its State lands,
10 the upland owner, the private property owner retains
11 ownership of their land.

12 CHIEF JUSTICE ROBERTS: I suppose it depends
13 on -- or maybe not -- how quickly it all happens. I
14 mean, if the State project is such that they add a foot
15 a year, is that an avulsion or accretion?

16 MR. MAKAR: Well, it would be an avulsion.
17 It would still be the State adding sand to its side of
18 the line.

19 CHIEF JUSTICE ROBERTS: Well, is your view
20 whenever the State does it, it's an avulsion?

21 MR. MAKAR: If it's on -- if it's on its
22 property, that's absolutely the case.

23 JUSTICE SCALIA: Why is that? I thought
24 avulsion by definition is a sudden change.

25 MR. MAKAR: No, no. Under, Florida Law the

1 Bryant v. Peppe case, which was an avulsion case that
2 arose out of a hurricane, where there was land that
3 was previously submerged, it came up, it was over State
4 property, the private owners wanted to get the -- get
5 it, and they asserted that it was theirs in accretion,
6 and the court said no, and it cited to Martin. There's
7 no right to having contact with the water.

8 JUSTICE SCALIA: Why -- you're -- we're
9 wandering off the point. Why wasn't it an avulsion? It
10 was an avulsion in that case, wasn't it, because it was
11 sudden?

12 MR. MAKAR: But it was done by the State.
13 I'm sorry, maybe I'm confusing cases.

14 JUSTICE SCALIA: Is -- is --

15 MR. MAKAR: Martin --

16 JUSTICE SCALIA: You have a case for the
17 proposition that an -- what would otherwise be an
18 avulsion is an accretion if it's done by the State?

19 MR. MAKAR: Oh, no, no, no.

20 JUSTICE SCALIA: Or vice versa. What would
21 otherwise be an accretion is an avulsion if done by the
22 State?

23 MR. MAKAR: No, no, no. An -- an accretion
24 would have to be a sudden, imperceptible change in the
25 shore line.

1 JUSTICE SCALIA: Right.

2 MR. MAKAR: When the State adds to its side
3 of the line, adds sand in this case, that's not a
4 gradual, imperceptible --

5 CHIEF JUSTICE ROBERTS: No, no. I know. My
6 -- my questions was what if it is?

7 JUSTICE SCALIA: What if it is?

8 CHIEF JUSTICE ROBERTS: I don't recall how
9 quickly things happened here.

10 MR. MAKAR: Oh, well, sure. No, it's --

11 CHIEF JUSTICE ROBERTS: But if it's -- if
12 it's gradual, even though the State is doing it, it can
13 be an accretion, right?

14 MR. MAKAR: Well, if it's gradual and
15 perceptible --

16 CHIEF JUSTICE ROBERTS: Yes.

17 MR. MAKAR: -- the answer would be yes.

18 CHIEF JUSTICE ROBERTS: It's a foot a year.
19 It's a foot a year.

20 MR. MAKAR: It would be yes. And if the
21 State came in and took that property, yes. The 100
22 years --

23 CHIEF JUSTICE ROBERTS: So, on these
24 facts --

25 MR. MAKAR: On these facts --

1 CHIEF JUSTICE ROBERTS: On these facts, if
2 the State's project added sand at a foot a year, the
3 landowner would win?

4 MR. MAKAR: I would disagree with that,
5 because what -- that is not a gradual imperceptible
6 change. It's a -- water.

7 CHIEF JUSTICE ROBERTS: A foot -- are we
8 dickering over the distance?

9 MR. MAKAR: We are, I think, because in this
10 case what happened --

11 CHIEF JUSTICE ROBERTS: Well, then, wherever
12 you want to say it's an accretion -- what -- it's an
13 inch, 6 inches --

14 MR. MAKAR: Well, that's -- but that's not
15 the way it is under -- under Florida law, if the State
16 comes in on its own property and adds to it, as it did
17 in Martin, where it lowered the -- the water or in this
18 case where they added the sand, it -- the State retains
19 the right to it. The upland owner doesn't get it. It's
20 --

21 JUSTICE ALITO: And why isn't it a
22 fundamental --

23 CHIEF JUSTICE ROBERTS: So, you're --

24 JUSTICE ALITO: Why isn't it a fundamental
25 change in Florida property law to extend these concepts

1 of accretion and avulsion to things that are done by the
2 State? If someone owns beachfront property, they
3 accept -- they -- they understand the risk that a
4 hurricane may cause avulsion, a hurricane may knock down
5 their house. Does that mean the State could come in and
6 knock down the house and say this is an artificial
7 avulsion?

8 MR. MAKAR: No, absolutely --
9 (Laughter.)

10 MR. MAKAR: No, absolutely not. I mean,
11 what the State did here is it -- 40 years ago, was to --

12 JUSTICE ALITO: Well, what's the difference?
13 You're taking a concept that has to do with a risk that
14 you bear because of the -- the vagaries of -- of the
15 weather and storms, and you're applying it to something
16 that's done by the State.

17 MR. MAKAR: Well, maybe we're on Mars and
18 Venus here because we're talking about a label. We're
19 talking about the State's --

20 JUSTICE ALITO: Yes, talking about a label,
21 and putting the avulsion label and the accretion label
22 on something that the State does, doesn't -- doesn't
23 eliminate the fact that there's been a fundamental
24 change. You have taken a doctrine that applies to
25 things that occur as a result of nature and you've

1 applied it to things that are produced by the State.

2 MR. MAKAR: Well, there's no question under
3 Florida law that the State has the right on its
4 sovereignty lands to control those lands and use those for
5 the public trust. And what the Florida legislature did
6 40 years ago -- keeping in mind this has been on the
7 books 40 years, 200 miles of beaches have been restored
8 over those years, and no one has complained that this is
9 a taking of property. That -- it's a reasoned response
10 for the Florida Supreme Court to come in and say, okay,
11 they're challenging the Act. They say it denies
12 them two things: the right to future accretion and the
13 right to have contact with the water.

14 Martin v. Busch and Bryant v. Peppe say,
15 look, if -- you don't have a right of contact with the
16 water, if you have avulsion or if you have it in -- in
17 Martin, it was a State drainage project.

18 CHIEF JUSTICE ROBERTS: If I can -- we're
19 arguing about the application of a doctrine to this
20 case. I'd like to step back if I can and talk about
21 the doctrine through a hypothetical, if that's all
22 right.

23 MR. MAKAR: Sure.

24 CHIEF JUSTICE ROBERTS: The -- the -- let's
25 say the legislature passes an act saying the boundary of

1 beachfront property is now where the sand starts, and
2 not the mean high-water mark but the mean high-sand
3 mark. All right? And -- and then -- so that's sued.
4 You -- you sue under that, and the court says: Yes, of
5 course, that's a taking; our precedents have always said
6 it's the mean high-water line and nothing else.

7 Florida has judicial elections. Say,
8 somebody runs for election for the Florida Supreme Court
9 and says: I'm going to change that law. I'm going to
10 say that it is not a taking. I think people should be
11 able to walk right up to the land.

12 And that person is elected, and the law is
13 changed. Now, is -- is that a judicial taking?

14 MR. MAKAR: I think under the scenario
15 you're posing that's a possibility. That's where the --

16 CHIEF JUSTICE ROBERTS: Is it a possibility
17 or is it a clear case?

18 MR. MAKAR: Well, I think it would -- if
19 it -- if it's -- it sounds like this is the Cannon Beach
20 situation, where the court judicially said, okay, you
21 don't own to the mean high-water line; now you own up --
22 only up to the vegetation line. Or something along
23 those lines where it was an ouster. Here there's no
24 ouster of property rights.

25 CHIEF JUSTICE ROBERTS: No, no. I know.

1 You're changing --

2 MR. MAKAR: Right.

3 CHIEF JUSTICE ROBERTS: I understand you
4 have a different view about here. But under my
5 hypothetical, would you agree that the action of the
6 Florida Supreme Court is a taking?

7 MR. MAKAR: Yes, I would -- I would
8 countenance that -- that here we have a far different
9 situation, which we have an act of the legislature that
10 draws this line, and that the two attributes that they
11 are claiming have no basis whatsoever in background
12 principles of Florida law. There is no case they can
13 point to, to say that we have a right of contact --

14 JUSTICE BREYER: Well, what they say is the
15 following -- this is what they say, I think: They point
16 to a case called Sand Key, and in Sand Key it says
17 littoral property rights include the following vested
18 rights: One, the right of access to the water,
19 including the right to have the property's contact with
20 the water remain intact. That's what the court said.

21 And in the court's opinion what it says
22 about that is it says, in this case, the Act expressly
23 protects the right of access to the water, which is the
24 sole justification for the subsidiary right of contact.

25

1 in Sand Key, and they're asking why was it there in Sand
2 Key, and that's what they come up with.

3 Now, after this sentence I just read you,
4 there is no citation. So I want you to add anything you
5 would like to say why this is, that sentence I read you,
6 justifiable under Florida law.

7 MR. MAKAR: Well, you're talking about the
8 legislation.

9 JUSTICE BREYER: No --

10 MR. MAKAR: I'm talking about the Sand Key
11 --

12 JUSTICE BREYER: I'm giving you what I took
13 was -- I don't want to characterize the answer. I might
14 have found it sufficient, others might not have. I
15 don't know. I'm saying they point to Sand Key. I've
16 read you what I thought was the answer.

17 MR. MAKAR: Oh, sure.

18 JUSTICE BREYER: Tell me if I'm right, and
19 if I am right, that that is meant to be the answer,
20 justify it, if you can.

21 MR. MAKAR: Sure. What they're citing to is
22 some dicta in Sand Key that had nothing to do with the
23 holding of that case, and if you try to go back and look
24 at the citations to the cases that Sand Key cites for
25 that proposition of contact with the water, none of them

1 have to do with contact with water.

2 Instead, the most important point is to look
3 at Martin v. Busch, which was a case where the State
4 lowered the water in a lake, the upland owners at -- the
5 property line was determined not to have moved, they
6 didn't have any contact with the water any longer, and
7 the submerged sovereignty lands became the State's
8 property. There's no right of contact there. It's --

9 JUSTICE SCALIA: Sand Key's statement
10 strikes one as -- as correct simply because I think
11 that's -- that's the view of the common law. I -- I
12 don't think that's unique or distinctive to Florida. I
13 think it would be very strange to have a principle that
14 all the -- all the littoral owner gets is a right to
15 access the water and not the right to be on the water,
16 to have his property on the water.

17 I think -- I think in every State,
18 beachfront owners would be astounded to learn that
19 that's the case.

20 So, I -- you know, I thought that Sand Key
21 was just expressing what -- what was the common law.
22 And the notion that -- that the only purpose of the
23 contact with the water is so that you can have access,
24 that is -- is that not silly?

25 MR. MAKAR: No. Well, two points here I

1 would like to make. Number one, let's assume there was
2 an avulsive event that added sand on the State's
3 property along the beach line, so now we have the
4 property line not changing, it's exactly where it was
5 before, but now we have, say, 75 feet of sand, new sand
6 seaward, over the State's property. That's the State's
7 property --

8 CHIEF JUSTICE ROBERTS: But that's not the
9 question. I mean, you just said that, let's assume the
10 -- assuming the property line doesn't change. The other
11 side is saying the property line is the mean high-water
12 line, and so if you -- whoever adds sand, the State,
13 mother nature, you dumping it -- I guess you can't do
14 that, but whoever adds it, the property line is the mean
15 high-water line.

16 MR. MAKAR: But -- but -- well -- but under
17 this avulsive event where there is sand added seaward,
18 the contact by the upland owner with the water no longer
19 exists, and that's been on the books in Florida for --

20 CHIEF JUSTICE ROBERTS: Yes, but that's
21 because you think the property line is the ECL rather
22 than the MHWL.

23 MR. MAKAR: I'm sorry, Mr. Chief Justice.
24 What I'm talking about is put the Act aside and just say
25 at common law in Florida. If the sand is added through

1 avulsive events, the upland owner has no contact with
2 the water any longer. They certainly have access. And
3 the Florida Act is so solicitous of protecting the
4 property rights of riparian ownership. You go through
5 the statute, and you see they preserve common law
6 littoral -- littoral rights. They have a section --

7 JUSTICE SCALIA: Would that person still be
8 considered a littoral owner?

9 MR. MAKAR: That was my second point.

10 JUSTICE SCALIA: After there has been the
11 avulsive event that separates him from the ocean by 60
12 feet of State-owned land, would he still be a -- a
13 riparian owner? I thought --

14 MR. MAKAR: Absolutely, absolutely. And
15 that's a major misnomer in this case, is that the upland
16 owner here, even after the beach restoration project,
17 has riparian littoral property. That's what the Florida
18 Supreme Court has held, that's what the Florida
19 legislation says. There's --

20 CHIEF JUSTICE ROBERTS: Well, but it's not
21 -- it's not the same as the property right he held
22 before, right?

23 MR. MAKAR: I -- I would disagree with that,
24 Mr. Chief Justice.

25 CHIEF JUSTICE ROBERTS: So he can exclude

1 people from the additional 60 feet?

2 MR. MAKAR: But it's not his -- it's not
3 their property. It's the State's --

4 CHIEF JUSTICE ROBERTS: But, that's what
5 the case is about.

6 MR. MAKAR: Well, I -- I agree that's what
7 they have tried to make it about. What they've said is
8 the State now has this swath of sand. It's a barrier to
9 protect against erosion. It's no wider than this
10 courtroom.

11 JUSTICE ALITO: Well, suppose that --
12 suppose that a city decided that it wanted to attract
13 more students who are going to the beach in Florida for
14 spring break, and so therefore it decided it was going
15 to create a huge beach in front of -- of privately owned
16 homes. Under the decision of the Florida Supreme Court,
17 I don't see anything that would stop the city from doing
18 that. So you could have -- you could have televised
19 spring break beach parties in front of -- of somebody's
20 house. Now, in -- as a practical matter, doesn't that
21 have a real effect on the value of the property?

22 MR. MAKAR: Well, Justice Alito, in
23 response, what I'd say here is keep in mind this is the
24 Beach and Shore Preservation Act. It isn't designed to
25 create some recreational playground for spring breakers.

1 It's designed to --

2 JUSTICE ALITO: No, I understand that, but
3 if the -- but the Florida Supreme Court said that there
4 isn't any right -- if there is a manmade extension of
5 the beach, there is no right to exclude people from it;
6 it's -- the beach is owned by the State. So all of that
7 could take place, couldn't it?

8 MR. MAKAR: Well, not under the Act, because
9 -- here's why: Under the Act, what has to be done is a
10 survey. And you'd have the --

11 JUSTICE SCALIA: He's not talking about the
12 Act. He's just talking about your theory of the case.
13 Your theory of what the rights of beachfront owners
14 consist of would permit this to happen, if not under
15 this Act, under some other act, right?

16 MR. MAKAR: Well, if there was -- if there
17 were some other act where the legislature passes a
18 law --

19 JUSTICE SCALIA: Right. Well, it's the
20 Spring Break Act of 2010, okay?

21 (Laughter.)

22 JUSTICE SCALIA: They could do that,
23 couldn't they?

24 MR. MAKAR: Well --

25 JUSTICE SCALIA: Under your theory of the

1 case?

2 MR. MAKAR: Well, they -- they would, but
3 the point being is that they would have to preserve the
4 littoral rights of --

5 JUSTICE BREYER: Well, why do we have to say
6 that? I mean, they're writing a -- a -- an opinion here
7 against a background of an act, and as I read that
8 opinion -- you can add something to this if you want --
9 I make a list of what they say in effect provides, not
10 perfectly, but provides, roughly, the same kind of
11 protection that the Sand Key statement provided.

12 One, you can go to the water; two, you have
13 a right of ingress and egress, if that's any different
14 from the first. I'm not positive. Three, you have a
15 right under the Act that nobody can put anything on that
16 strip which is injurious to the upland owner. All
17 right?

18 So those are at least three things, and I
19 think there's a fourth. Yes, the fourth is that nobody
20 can build anything there that is harmful, except if it's
21 to do with the environment; that's not harmful, that's
22 helpful to the beach owner. It's supposed to be
23 helpful. And, five, you get your beach guaranteed.

24 So all of those things are things you get
25 under this Act in an intermediate case where it's a

1 little like an avulsion and a little not like an
2 avulsion. Now, do I add anything to my list? And do
3 you have to go beyond that?

4 MR. MAKAR: No, well, there's -- there's
5 even more, Justice Breyer.

6 JUSTICE BREYER: Okay, that's what I wanted
7 to know. What more?

8 MR. MAKAR: What the legislature in Florida
9 did as well is to say that when they do the survey, as
10 you see in the document attached in the joint appendix,
11 they have to set out what the width of the berm will be,
12 the sacrificial sand that's there to erode away over
13 time. They put the width in there. And in this
14 particular instance, it's about 75 feet. And it's going
15 to erode away. That cannot be increased without the
16 consent of the owners.

17 CHIEF JUSTICE ROBERTS: So why doesn't --
18 why don't you take your list and Justice Breyer's list
19 and submit that in the just compensation hearing? When
20 the landowner comes in and says, look, you have taken my
21 property and it is worth \$100,000, and you come in and
22 say oh, no, no; it's not worth \$100,000; look at all
23 these things we saved and gave you. It's only -- what
24 you have lost is only worth \$20,000. And a court will
25 review that and say yes, no, whatever, and that's what

1 you get.

2 MR. MAKAR: Well, because, Mr. Chief
3 Justice, under background principles of Florida law,
4 they have no right to contact with the water, and this
5 accretion right is --

6 CHIEF JUSTICE ROBERTS: Again, that is what
7 the whole case is about, whether they have a right to
8 contact the water or not. It seems to me if your only
9 answer to every question is they don't have the right,
10 you're just completely begging the question.

11 MR. MAKAR: But under -- with due respect,
12 under Florida law, they don't. And the --

13 JUSTICE BREYER: Well, isn't the question
14 here that the reason they don't under Florida law is in
15 a situation where the law isn't clear, we draw the
16 Florida law this way rather than that way, and that is a
17 reasonable common law decision because of the six points
18 that we've listed on the list?

19 MR. MAKAR: Absolutely. Given this --

20 JUSTICE BREYER: So it's not that it's a
21 taking --

22 MR. MAKAR: Absolutely.

23 JUSTICE BREYER: -- and you're compensating;
24 it is a reason why this is a -- I am somewhat putting
25 words in your mouth, but I mean --

1 (Laughter.)

2 MR. MAKAR: Well, certainly our position is
3 that there's no --

4 JUSTICE SCALIA: You won't disagree with
5 that.

6 (Laughter.)

7 JUSTICE GINSBURG: Do you know the answer to
8 the question that was asked of your colleague? That is,
9 here we have an organization representing several
10 landowners. Is there any indication about how these
11 beachfront owners in these communities -- what their
12 view is, that they are benefited, that they are harmed?
13 Is there any indication of that?

14 MR. MAKAR: Other than these Petitioners,
15 Justice Ginsburg, no one has complained about this and
16 said that -- and brought an action or -- or otherwise.
17 This is a very beneficial program. It's basically a
18 beachfront property protection act, so it's sort of
19 anomalous that anyone would complain.

20 JUSTICE KENNEDY: But the problem with the
21 argument that I'm having is that in the last colloquy
22 with Justice Breyer, we heard how reasonable this act
23 was. That's one thing. But you have taken the position
24 that it's your property and you can do with it what you
25 want anyway. Now, maybe in this case it won't make a

1 difference, because it's so reasonable, it's -- there's
2 not a taking. But what about -- what do you call those
3 -- the spring fling, the spring break --

4 (Laughter.)

5 JUSTICE KENNEDY: -- hypothetical, or a
6 permanent oceanography museum?

7 MR. MAKAR: Sure, Justice Kennedy. We have
8 cases in Florida, for example, where a bridge was built
9 entirely across the view of the -- of the river, and the
10 upland owner in that situation had a total impairment of
11 their right to view, and that's compensable. So -- so
12 -- but here what we have --

13 JUSTICE GINSBURG: And this statute
14 provides --

15 JUSTICE KENNEDY: So you --

16 JUSTICE GINSBURG: This very statute says if
17 -- if what happens is a taking, then there's
18 compensation.

19 MR. MAKAR: Right. That said --

20 JUSTICE KENNEDY: And you think there's a
21 taking as a matter of Georgia -- pardon me, of Florida
22 law if enjoyment of the view and access is substantially
23 impaired? I mean, is that the test?

24 MR. MAKAR: That's the law in Florida,
25 Justice Kennedy, is that if there's a substantial

1 impairment. There's cases that say that --

2 CHIEF JUSTICE ROBERTS: So on behalf of the
3 State, you concede if any of this list -- these -- the
4 list of good things that the land owner gets, if the
5 legislature next year takes them away, that would be a
6 taking?

7 MR. MAKAR: Sure, if they took away the --
8 the swath of littoral rights or a substantial portion,
9 that would be highly problematic and likely be a taking.

10 JUSTICE KENNEDY: Do you think that either
11 all of the time or some of the time a public beach
12 would -- that intervenes between the upland and the
13 water would be a substantial impairment of the upland
14 owner's rights?

15 MR. MAKAR: No, no, no. The -- the State
16 owns the beach, and let me make this analogy.

17 JUSTICE KENNEDY: That -- that's exactly my
18 point. You say that the State owns the beach, and it's
19 okay because there's a protection against unreasonable
20 use. And I'm asking whether or not a State beach with,
21 what do you call them, port-a-johns and hot dog stands
22 and so forth, isn't a substantial impairment of the
23 upland owner's use? And you say, well, the State owns
24 it --

25 MR. MAKAR: Well --

1 JUSTICE KENNEDY: But that takes away from
2 your earlier argument that we don't need to worry
3 because there can be no interference with substantial
4 enjoyment. And it seems to me that Justice Alito's
5 question has still not been answered in your argument.

6 MR. MAKAR: Well, I believe the answer is
7 that this is a facial challenge. There could be an
8 as-applied challenge. Keep in mind, the association
9 here owns no property.

10 JUSTICE KENNEDY: I want you to talk to me
11 about what the constitutional law ought to be in this
12 case as a general matter. We'll figure out facial and
13 -- and as-applied later. I still see that your argument
14 leaves open this question in my mind raised by the
15 concerns that Justice Alito has expressed.

16 MR. MAKAR: Well -- and the Florida Supreme
17 Court was very careful in narrowing its decision and
18 saying that the actual property owners may pursue, if
19 they feel -- beyond this opinion, they may pursue an
20 as-applied claim, where they -- this has no takings
21 record before this Court whatsoever, and that would have
22 to be developed, keeping in mind that much --

23 JUSTICE KENNEDY: But when they do, they're
24 going to be met by you when you're in the trial court
25 and you say the State owns the property.

1 MR. MAKAR: Well, just because the State
2 owns the property doesn't mean there cannot be an
3 impairment of the -- of the right. This is an analogy
4 to say this was a road where -- if I might --

5 CHIEF JUSTICE ROBERTS: You can complete
6 your thought.

7 MR. MAKAR: Sure. That if this were a road
8 and the traffic -- there's a country road and there's
9 very little traffic, and over the years the traffic
10 built up, that somehow the owner of the property along
11 that road would have a cause of action. It's just not
12 the case.

13 Thank you very much.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Kneedler.

16 ORAL ARGUMENT OF EDWIN S. KNEEDLER

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICI CURIAE, SUPPORTING THE RESPONDENTS

19 MR. KNEEDLER: Mr. Chief Justice, and may it
20 please the Court:

21 From the outset, this case has been a
22 challenge to the actions of the Florida legislature and
23 its executive branch in enacting and implementing the
24 Beach Restoration Act.

25 That is a conventional takings claim and

1 that is the way I think it is most useful for this Court
2 to approach it. Rather than seizing on particular
3 statements in the opinion of the Florida Supreme Court
4 and regarding the Florida Supreme Court's judicial act
5 as itself a taking, it's best to focus on the Act
6 itself.

7 And with respect to the Act itself, what --
8 what has happened here is the State has exercised, not
9 just sovereign regulatory rights; it has exercised
10 critical sovereign proprietary rights.

11 CHIEF JUSTICE ROBERTS: Mr. Kneedler, that's
12 a clever ploy. We're talking about judicial takings and
13 you say, don't look at what the court did; look at what
14 the legislature did. That changes the whole ball game.

15 MR. KNEEDLER: Well, but -- but, in
16 fairness, first of all, that's how this case originated,
17 was a challenge --

18 CHIEF JUSTICE ROBERTS: There's no choice.
19 If their argument is what the court did constituted the
20 taking, they couldn't have raised that earlier --

21 MR. KNEEDLER: No. My --

22 CHIEF JUSTICE ROBERTS: -- and said, oh, we
23 think we know that the court is going to change things.

24 MR. KNEEDLER: My -- my point isn't -- isn't
25 so much about whether it could have been raised earlier.

1 It is that what -- what is -- what is being objected to
2 here is a -- is a -- this was not a judicial
3 declaration, for example, that somebody who has littoral
4 property can walk up to the edge of the water and can't
5 touch it. There was no abstract declaration on littoral
6 rights.

7 CHIEF JUSTICE ROBERTS: Judicial -- judicial
8 taking if that were the case?

9 MR. KNEEDLER: That -- that would be more
10 like Hughes. I'm not sure that I would analyze it as a
11 judicial taking. I think another way --

12 JUSTICE SCALIA: No, no, no --

13 MR. KNEEDLER: -- to come at this --
14 and this may even be suggested in -- in Justice Scalia's
15 dissent in the Cannon Beach case -- is that the -- the
16 usual principle that where State law is interposed in a
17 way that would -- would defeat a Federal constitutional
18 right, a court can look to see whether there is a fair
19 and substantial basis for it.

20 That's not really a -- there's no need to
21 fashion a new judicial taking doctrine when you have --

22 JUSTICE BREYER: Well, why not? Because --
23 because what they said is: We have a right to touch the
24 water, and you've taken it. That's what they said this
25 Act does.

1 MR. KNEEDLER: Right, and --

2 JUSTICE BREYER: The court said: You've
3 never had that right. And it's just like a person who
4 owns 40 acres in the middle of Vermont, and the State
5 wants to build a nuclear power plant, and they say, you
6 have to pay us. No, says the State. And the court of
7 the State upholds it on the ground there is an implicit
8 easement under Blackstone to take land for power plants
9 without paying for it; it's called the power plant
10 easement. Okay?

11 Now, in such a case, it would be the
12 judicial taking because their ground is not -- whatever
13 you normally have, but their ground is you never had
14 that property right in the first place.

15 Now, how -- if that ever were to happen --
16 and that probably, perhaps, is not this case, but if
17 that ever were to happen, wouldn't there have to be a
18 remedy under the Constitution for it?

19 MR. KNEEDLER: And -- and maybe so, but --
20 but, again, I think it -- it would be possible to -- to
21 review it under the general principle about whether a
22 State interpretation of State law that would defeat a
23 claim to Federal right would be without any fair or
24 substantial basis, without -- without saying that the
25 supreme court itself has committed an unconstitutional

1 act. It -- it could be looked at that way.

2 But if I -- but if I could turn to the --
3 the operation of this statute, what -- what has happened
4 here is -- as this Court has recognized in numerous
5 cases, the authority of the State over its submerged
6 lands is a critical aspect of sovereignty. It is held
7 in trust for the public and for public uses, and what
8 has happened here is the State, with respect to its own
9 sovereign lands, has filled that land. That does not
10 change the ownership of the sovereign lands.

11 They remain sovereign lands, and the State
12 has done it for a critical public purpose, to protect --

13 CHIEF JUSTICE ROBERTS: Accretion --
14 accretion, of course, would change.

15 MR. KNEEDLER: Accretion --

16 CHIEF JUSTICE ROBERTS: It would take
17 submerged State land and give it to the landowner.

18 MR. KNEEDLER: Accretion would, but -- but
19 avulsion or rapid change would not.

20 CHIEF JUSTICE ROBERTS: So a foot -- I'll
21 get back to what I raised earlier. A foot a year, if
22 the State does it and it's a foot a year, does the
23 property owner get the foot, or does the State get the
24 foot?

25 MR. KNEEDLER: I -- I don't want to quibble,

1 but I think it depends. The -- the Florida Supreme
2 Court's decision in Sand Key was a situation where the
3 State had -- had erected a jetty or an offshore
4 structure that caused sand to accrete on the -- on the
5 property, and the Florida Supreme Court said that
6 belongs to the littoral property owner under the
7 doctrine of -- of accretion.

8 On the other hand, if the State came along
9 once a year, on one day, and added a foot, that would
10 not be gradual and imperceptible, but would be quite
11 perceptible because the State would have added a foot of
12 property. And even though it's a small avulsion, I
13 think it -- I think it would still count as an avulsion.

14 CHIEF JUSTICE ROBERTS: So it makes a
15 difference whether it's done in a day or done in a
16 month?

17 MR. KNEEDLER: Well, the -- the difference
18 between accretion and avulsion is whether it's gradual
19 and imperceptible or whether it's -- whether it's
20 dramatic or --

21 JUSTICE KENNEDY: What authority is there in
22 Florida law or in general law to say that the act of
23 an -- an artificial person is an accretion or avulsion,
24 instead of just an act of nature? What -- what case do
25 I read or authority do I read?

1 MR. KNEEDLER: Well, the Florida Supreme
2 Court's decision in the -- in the Peppe case relied on
3 Martin v. Busch, which -- I agree with Justice Scalia,
4 it's very critical here, where there was State action in
5 draining the lake, which exposed the surface -- the --
6 the formerly submerged land, and the Florida Supreme
7 Court said that land belongs to the State, it was action
8 by the State in a dramatic way.

9 And Florida --

10 JUSTICE KENNEDY: But -- but did they call
11 it an avulsion?

12 MR. KNEEDLER: They -- they did not there,
13 but in -- but in --

14 JUSTICE KENNEDY: That -- that -- so that
15 doesn't answer my question.

16 MR. KNEEDLER: No, but my point was, in
17 Peppe, where -- where there was actually an avulsion,
18 the court characterized what happened in Martin v. Busch
19 as an avulsive act. But you don't need to label
20 avulsion, because there's a separate doctrine that when
21 the State fills its own land, it remains its own land.

22 And I'd like to point out -- this is not
23 a unique doctrine --

24 JUSTICE ALITO: Can I just ask you this,
25 Mr. Kneedler, before your time expires, what --

1 I agree, Martin v. Busch seems to be the case that's
2 most -- provides the greatest support for what the
3 Florida Supreme Court did here. But what do we do about
4 the fact that the Florida Supreme Court didn't rely on it?

5 MR. KNEEDLER: I -- I think it is
6 surprising, although the Florida Supreme Court did
7 discuss avulsion, but if -- if I could just make one
8 point. This is not a -- a unique notion in Florida law.

9 This Court's decision in
10 Hughes v. Washington, which dealt with accretion,
11 responded to the -- to the point that was -- that was
12 made there and said, well, the -- the littoral property
13 right is vulnerable anyway because the owner of the
14 adjacent submerged lands can always take action on his
15 own lands that could affect what the upland property
16 owner did.

17 And this -- and this Court said, yes, that's
18 right, but we're talking, here, about natural causes.
19 And in -- in Hughes, the Court cited two cases, one in
20 Washington State, for example, where the -- where there
21 was an absolute right to fill the submerged lands even
22 if that completely cut off access.

23 It also pointed out another case, from New
24 Jersey, where -- where the -- a case of this -- from
25 this Court, where the Court said, you have a right to

1 accretion as long as nobody's filled the land
2 in between.

3 CHIEF JUSTICE ROBERTS: Counsel, what is
4 your --

5 MR. KNEEDLER: But once the land --

6 CHIEF JUSTICE ROBERTS: I'm sorry. What --
7 what is your view on the hypothetical I posed to your --
8 to your friend? The legislature moves it to the
9 vegetation line. The State supreme court says that's a
10 taking. Somebody runs for election to the State supreme
11 court, saying, I'm going to change that. He's elected.
12 He changes the law.

13 Is that a judicial taking?

14 MR. KNEEDLER: Again, I think I would
15 analyze it under the fair and substantial basis. But,
16 yes, if there -- if there is no justification in
17 background law, if it's basically pretextual in the
18 same way that -- that any --

19 CHIEF JUSTICE ROBERTS: Well, doesn't --
20 it's not pretextual.

21 MR. KNEEDLER: Not pretextual, but if
22 there's --

23 CHIEF JUSTICE ROBERTS: He says, I think
24 they got the law wrong.

25 MR. KNEEDLER: But -- but the phrasing the

1 Court has used in the due process is whether it's
2 unforeseen and indefensible.

3 I mean, if -- if there's just -- if there's
4 just -- if it's just ipse dixit. But there -- but
5 there -- but that's by no means true here. And it's
6 important that Martin v. Busch was cited in the two --
7 and distinguished in the two principal cases on which
8 the Petitioner relies here.

9 In Sand Key, the court distinguished Martin
10 v. Busch on the ground that in Sand Key it was an
11 accretion, but -- and it distinguished Martin v. Busch
12 on the -- on the ground that there it was a -- it was a
13 sudden, dramatic action by the State, and the -- and the
14 same thing was also true in the Florida National case,
15 where the -- the court again distinguished --

16 JUSTICE SOTOMAYOR: Counsel --

17 MR. KNEEDLER: -- Martin v. Busch on that
18 ground.

19 JUSTICE SOTOMAYOR: Would you have
20 answered Justice Scalia's question that there's a
21 common -- a generally understood common law right,
22 littoral right, to contact with the water? Would you
23 say there is not?

24 MR. KNEEDLER: I would -- I would say
25 there -- I would say it's tied up with the right of

1 access, as long as the littoral property owner remains
2 adjacent to the water.

3 But what you have here is a neighboring
4 property owner, the sovereign, exercising critical
5 sovereign rights over its property, which has its own
6 property interests, and if under Florida law the -- the
7 State is permitted to put sand on the beach -- this is
8 -- this is not filling for an amusement park. This is
9 adding something that is very germane to the maintenance
10 of the beach, for critical public purposes, the very
11 reasons --

12 CHIEF JUSTICE ROBERTS: It could be -- it
13 could be adding an amusement park, though, under your
14 theory, right?

15 MR. KNEEDLER: No, it -- I don't think
16 there's any universal theory of this. As I -- as I said
17 in -- in the Port of Seattle case --

18 CHIEF JUSTICE ROBERTS: It's the State's
19 property.

20 MR. KNEEDLER: Well, I --

21 CHIEF JUSTICE ROBERTS: It's the State's
22 property. If they want to put an amusement park on,
23 they can.

24 MR. KNEEDLER: No. It varies. And in --
25 that may be true in the Port of Seattle case discussed

1 in Hughes, where the State had the -- you're balancing
2 the rights of adjacent property owners, just like --
3 just like
4 nuisance or other principles do. In Washington State,
5 apparently, you could completely fill the submerged land
6 and the upland owner had no rights.

7 In Florida -- Florida is actually more
8 protective than that. It has limited rights. You have
9 a -- you maintain a right of view, a right against
10 unreasonable interference. So there's no one
11 constitutionally based rule. It's a question of Florida
12 property law. And the background principles of Florida
13 property law under Martin v. Busch and the fact that the
14 State owns the adjacent land, I think, not only is there
15 -- there is more than a fair and substantial basis here.
16 There is a -- it's very solidly grounded in State law.

17 CHIEF JUSTICE ROBERTS: Let's see if there
18 are any further questions.

19 (No response.)

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 Mr. Safriet, 4 minutes.

22 REBUTTAL ARGUMENT OF D. KENT SAFRIET
23 ON BEHALF OF THE PETITIONER

24 MR. SAFRIET: Thank you, Your Honor.

25 First, Martin v. Busch does not stand for

1 the principles that the Respondents suggest they do.
2 The court in Sand Key said, and in -- and in
3 distinguishing the Martin v. Busch case, and I quote,
4 "Our subsequent decisions show there was no intent to
5 change common law principles regarding the right to
6 accretion and relictions in Martin v. Busch."

7 And even if it did stand for that principle,
8 the Martin v. Busch case didn't discuss whether the
9 landowner was entitled to compensation for the severance
10 of their waterfront property as a result of the lowering
11 of the water.

12 What also must be noted here is the State
13 is changing the deeds. They're changing the legal
14 description and the deeds of the Petitioner's members.
15 These Petitioner's members own to the mean high-water
16 line. They have a right, not only under Florida common
17 law to own to the mean high-water line; under their
18 deeds, that's what they purchased. And there has been a
19 lot of discussion and, I think, maybe some confusion
20 about this right to contact the water.

21 JUSTICE SCALIA: They wouldn't own to the
22 mean high-water mark if there were an avulsion, if --
23 right? If --

24 MR. SAFRIET: No, Your Honor.

25 JUSTICE SCALIA: If by nature, this 60-foot

1 beach had been put in, then their deed would be
2 changed, wouldn't it?

3 MR. SAFRIET: Temporarily, Your Honor,
4 because under the doctrine of reclamation, they can
5 reclaim the boundary line that they lost, just as if in
6 a case where the hurricane washes sand away, the
7 landowner, under common law, the doctrine of
8 reclamation, can bring in sand where the water is to
9 reconnect to that mean high-water line that would be
10 underwater following a hurricane.

11 JUSTICE BREYER: Now, how does that work? I
12 mean, I have a beachfront property; I wake up one
13 morning and there's a little half-mile island attached
14 to half of it, and there we are. Mean high-water mark
15 is half a mile away. You say I can reclaim that under
16 Florida law? What's that mean?

17 MR. SAFRIET: Yes, Florida law allows, under
18 the doctrine of reclamation, which is what the Florida
19 Supreme Court relied on --

20 JUSTICE BREYER: Which is -- how does it
21 work?

22 MR. SAFRIET: You'd have to remove the sand.

23 JUSTICE SCALIA: You shovel away the sand.

24 JUSTICE BREYER: Oh, no, no. This is -- you
25 can't. You can't.

1 JUSTICE SCALIA: What if it's going the
2 opposite way? What if it's -- if they built up sand? I
3 mean --

4 JUSTICE BREYER: It's rock.

5 JUSTICE SCALIA: Yes.

6 (Laughter.)

7 JUSTICE BREYER: Okay, so what happens?

8 MR. SAFRIET: I'm not sure the common law
9 envisioned rock coming up to --

10 JUSTICE BREYER: It can happen. Okay. So
11 my point is, I think, which is the same, I think, as
12 Justice Scalia, that he -- that the upland owner no
13 longer, under the law of Florida, has a way of getting
14 his land out to the mean high-water mark. Am I right or
15 wrong?

16 MR. SAFRIET: I think that's wrong, Your
17 Honor. Under the doctrine of reclamation --

18 JUSTICE BREYER: Okay. Because?

19 MR. SAFRIET: Under the doctrine of
20 reclamation, they can reclaim the boundary line. If
21 that's by depositing new sand where the water is to
22 reach the mean high-water line, where it was prior to
23 the hurricane. They can do that.

24 Conversely, if sand is washed up as a result
25 of a hurricane, they can remove the sand to bring the

1 water line back to them.

2 JUSTICE SCALIA: They can go on the State
3 land to do that? Because that sand is sitting on State
4 land.

5 MR. SAFRIET: That wouldn't be State -- they
6 can -- the common law allows them to reclaim what
7 they're lost -- what they lost, Your Honor. And the
8 Florida Supreme Court tries to rely on this doctrine of
9 reclamation in this case. It asserts that the State is
10 only doing what it was allowed under common law,
11 reclaiming the land that it lost.

12 But in this case, the Florida Supreme Court
13 -- or the State of Florida didn't ever possess any dry
14 sand land, so they can't reclaim any dry sand land. The
15 only thing they have ever owned was the foreshore and
16 the sovereign submerged lands. So that's the only thing
17 they can reclaim.

18 I think there was another question about the
19 support for this case. There is more than five
20 landowners that don't support this case. In the lower
21 courts, there was another group, Save Our Beaches, that
22 had, I believe, roughly 150 members that opposed this
23 project as well in the City of Destin.

24 In this case, we're also dealing with a
25 physical taking.

1 JUSTICE GINSBURG: Why did they drop out?

2 MR. SAFRIET: Lack of standing at the
3 administrative hearing, Your Honor.

4 What we're dealing with in this case is a
5 physical taking. What rights were physically possessed
6 by the Respondent's members -- the Petitioner's members
7 in this case are now possessed by the State. It's a
8 wholesale transfer of these rights, along with the
9 transfer of the deed -- or the description of the deed.
10 We're not asking this --

11 JUSTICE GINSBURG: I don't understand why
12 isn't it -- it is equally an addition to the private
13 property owners' rights when they had a narrow beach and
14 now they're claiming that -- that it's all theirs, the
15 full 75 feet.

16 MR. SAFRIET: I'm sorry, Your Honor, I
17 didn't hear your question.

18 JUSTICE GINSBURG: They have, under your
19 theory, much more property than they had before. They
20 have a wider beach that's theirs, so they have gained
21 property, but that doesn't count?

22 MR. SAFRIET: Well, they haven't gained
23 property, Your Honor, because the State's claiming title
24 to that new beach. So our -- the Petitioner's members
25 owned exactly what they owned as of September 7, 2003,

1 when the property boundary was changed, and the new
2 boundary would -- the new land would be State-owned.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. SAFRIET: Thank you.

5 CHIEF JUSTICE ROBERTS: The case is
6 submitted.

7 (Whereupon, at 11:04 a.m., the case in the
8 above-entitled matter was submitted.

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