IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 1D22-895

NORTHSHORE HOLDINGS, LLC; and
LAVIN FAMILY DEVELOPMENT, LLC,

Appellants,

v.

WALTON COUNTY, FLORIDA,
A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA,

Appellee.

On Appeal from the First Judicial Circuit Court of
Walton County, Florida
(Case No. 2021 CA 210)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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INTRODUCTION

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Appellants Northshore Holdings, LLC, and Lavin Family Development, LLC, in their appeal from the decision of the First Judicial Circuit Court dated March 21, 2022.

A property owner's right to exclude is "one of the most treasured rights of property ownership" and also "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (citations omitted). This fundamental right, together with its brethren property rights, "are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017).

However, Appellee Walton County now seeks to strip Appellants of their most essential right by asserting that the public may freely access Appellants' private beachfront property under Florida's judicially created doctrine of customary use. This attempt to get for free by declaration what it may only acquire through eminent domain and the payment of just compensation, eviscerates the Appellants' long-standing right to exclude the public and is both unconstitutional and contrary to the doctrine itself.

The Circuit Court initially agreed and determined that Walton County's physical invasion of the Plaintiffs' property was presumptively an unconstitutional taking. However, based upon an assumption that customary use was a "background principle[] of [Florida's] nuisance and property law" under *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) and a takings exception, it ruled in the Defendant's favor. This was in error.

Property comes with certain pre-existing limitations upon its use that have always been there, regardless of whether or not there was a regulation or declaration that said so. For example, a property owner cannot use his or her property in a way that creates a substantial health risk to the public. Public nuisances are not permissible even in the absence of a regulation prohibiting them. These pre-existing limitations are background law and regulations that codify background law are not unconstitutional takings because they are not taking away any property rights of the owner.

By contrast, regulations or declarations that do not codify pre-existing limitations but instead alter long-standing property rights are unconstitutional takings absent the payment of just compensation. Nor can the government immunize itself from takings liability by imposing confiscatory regulations or declarations and then asserting retroactively that the property right never existed.

In this case, Florida's "custom" did not codify a pre-existing limitation. Traditionally, property owners have had the right to exclude and Florida's customary doctrine to the contrary was a new and unique creation that did not exist until the Florida Supreme Court's decision in *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974). Accordingly, it does not, and cannot, constitute background law. As the U.S. Supreme Court explained in *Lucas*, "the use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit." *Lucas*, 505 U.S. at 1030.

Even to assume otherwise, customary use does not apply in the way in which Walton County seeks to apply it. It is an individual determination applied to specific parcels and specific facts; not a doctrine of global application to be generically applied to a large swath of private beachfront property as the County purports to do. (Record on Appeal, ("R.") at 981)

In light of the above, the Circuit Court's decision should be reversed.

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual

liberty, and economic freedom. Founded nearly 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in several landmark Supreme Court cases in defense of the right to make reasonable use of property and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226 (2021); *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). Furthermore, it frequently participates as amicus curiae in cases that pertain to important property rights issues. PLF also has prior experience litigating the issue of customary use with respect to public beach access in Walton County. *Goodwin v. Walton Cnty., Fla.*, No. 3:16-CV-364/MCR/CJK, 2018 WL 11413298 (N.D. Fla. Mar. 6, 2018).

As the case presently before this Court raises important constitutional questions with respect to the Takings Clause of the Fifth Amendment and in particular background principles and their effect on the Takings Clause, PLF believes its experience will assist the Court in resolving this case by providing an understanding of background law and customary use.

ARGUMENT

I. The Customary Use Doctrine Is Not a *Lucas* Background Principle

Appellants have the right to exclude the public from their private beachfront. *See, e.g., Cedar Point Nursery*, 141 S. Ct. at 2074; *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979) (property owners enjoy those rights that "have the law back of them"). Yet Walton County now seeks to open that private property to public access. But rather than take title by eminent domain, it is invoking Florida's doctrine of customary use to bypass the requirement of Just Compensation.

The Circuit Court correctly determined that allowing the public onto private land is a physical taking contrary to the Fifth Amendment:

> the activities on private property described by the Florida Supreme Court in *Tona-Roma* and which Walton County now seeks to validate . . . clearly involve physical invasion of the plaintiff's private property and would constitute a taking, as shown by *Kaiser Aetna*, *Cedar Point Nursery* and other cases cited by the defendant.

Northshore Holdings, LLC v. Walton County, No. 2021 CA 210 (Fla. Cir. Ct. Mar. 21, 2022) (R. at 985).

Regulations or declarations that enable the physical invasion of private land are categorically unconstitutional, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982). As the Supreme Court stated in *Cedar Point*, "government-authorized invasions of

property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation." *Cedar Point Nursery*, 141 S. Ct. at 2074.

That Walton County seeks to allow third parties to invade private land, as opposed to the County itself, is irrelevant to the determination. *Loretto*, 458 U.S. at 432, n.9 ("a permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant"); *Cedar Point Nursery*, 141 S. Ct at 2072 ("[t]he essential question is . . . whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred"); *Nollan*, 483 U.S. at 832 (A physical taking occurs "where individuals are given a permanent and continuous right to pass to and fro so that the real property may continuously be traversed").

However, the Circuit Court also noted that "except in rare circumstances . . . [it] is without authority to rule contrary to a decision of the Florida Supreme Court." (R. at 984). Specifically, this presented an issue with respect to *Tona-Rama*.

In *Tona-Rama*, after the property owner constructed an observation tower on its beachfront pier, certain objectors filed suit seeking declaratory relief, an injunction, and the removal of the tower. Their claim was that the public had acquired a prescriptive right to the property owner's land. In ruling for the property

owner, the court held that no adverse public easement had been acquired because the public's use of the land was by consent. *Tona-Rama*, 294 So. 2d at 77.

Although not necessary to the case's resolution, the Florida Supreme Court also discussed customary use in dicta. While that doctrine did not previously exist in Florida, *Tona-Rama* stated that "[i]f the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner." *Id.* at 78.

The Circuit Court believed that it would be at odds with the dicta within *Tona-Rama* if it held that customary use was an unconstitutional taking.

To facilitate a perceived way out, the Circuit Court "assumed" that *Tona-Rama* considered customary use to be background law (even though *Tona-Rama* never discussed it) and thus, exempt from takings liability. (R. at 987). In the eyes of the Circuit Court, this assumption was mandatory and "must be considered before making any decision which might be deemed contrary to Florida Supreme Court precedent." (R. at 987).

Irrespective of the Circuit Court's perceived restraints, background law does not apply.

A. Newly Created Law Does Not Qualify as a **Lucas** *Background Principle*

Background principles, or background law, is shorthand for a predicate

determination that looks to whether the property right at issue was a part of the owner's "bundle of sticks." The primary background law case is *Lucas v. S.C. Coastal Council.* Therein, the Supreme Court explained that background law only applies to those property uses that were always prohibited, regardless of whether there was a regulation to prohibit it. "The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit." *Lucas*, 505 U.S. at 1030 (emphasis in original). Thus,

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Id. at 1029; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (background law "independently restrict[s] the owner's intended use of the property"); *Murr*, 137 S. Ct. at 1943 (2017) (background law are those restrictions "already placed upon land ownership")

In light of the above, Florida's customary use doctrine can be considered a *Lucas* background principle only if prohibiting public access to private beachfront

property was "always unlawful." *Lucas*, 505 U.S. at 1030; *Cedar Point Nursery*, 141 S. Ct. at 2079 (the regulation must be a "longstanding background restrictions on property rights" and a "pre-existing limitation upon the land owner's title").

Clearly that is not the case.

Florida's customary use doctrine did not come into existence until the Florida Supreme Court's determination in *Tona-Rama*. *Tona-Rama, Inc.,* 294 So. 2d at 78. Prior to that point, if Walton County had wanted to take title to allow for public access across private beachfront, it would have had to condemn an easement. It still should have to. Nonetheless, background law does not apply to new creations:

> It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in *Lucas,* which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. A law does not become a background principle for subsequent owners by enactment itself. *Lucas* did not overrule our holding in *Nollan,* which, as we have noted, is based on essential Takings Clause principles.

Palazzolo, 533 U.S. at 629–30 (cleaned up).

In addition to the fact that customary use was new to Florida, Florida's version of customary use was also new to the world. Eschewing the traditional English definition of customary use, Florida, without explanation or discussion, reduced the

number of elements to be proven from seven to four. *Tona-Rama, Inc.*, 294 So. 2d at 78. While Florida's version may be similar, it is also different and stands alone.

As the Circuit Court noted, "[t]he only conclusion that can be reached by this court is that the Florida Supreme Court intentionally adopted a new and different standard for the establishment of enforceable rights for the public at large . . . a right not previously expressed in this history of Florida jurisprudence." (R. at 986).

No new law, created for the first time in 1974, and unique even amongst other customary use doctrines, can stand as a pre-existing limitation upon property rights.

The Supreme Court's discussion of *Stevens v. City of Cannon Beach* is instructive here for several reasons. Although certiorari was denied, ostensibly because of a lack of available facts in the record (*Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1335 (1994)), the petition pertained to whether Oregon's customary use doctrine was a taking. Dissenting from the denial of certiorari, Justice Scalia was critical of the Oregon court's adoption of custom:

> But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas,* for example, would be a nullity if anything that a state court chooses to denominate "background law"-regardless of whether it is really such-could eliminate property rights. A State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation. Since opening private property to public use constitutes a taking, if it cannot fairly be said that an

> Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.

Id. at 1334 (cleaned up).

Here, the Appellants are private owners of beachfront property, with a corresponding right to exclude the public. Yet, Walton County seeks to use a new doctrine of customary use to retroactively declare that the Appellants' right to exclude never existed at all. In that way, any distinctions between this case and Justice Scalia's concerns in *Stevens* are hard to discern.

It is also noteworthy that in *Stevens*, Oregon adopted the seven-element English test of custom, *id.* at 1333, which is the same one that Florida departed from in order to create its own unique version. *Tona-Rama, Inc.*, 294 So. 2d at 78. As referenced above, that Florida's version is something both new and different highlights the fact that Florida's customary use doctrine could not have been a pre-existing limitation on property rights.

Walton County also seeks to apply customary use to a substantial portion of privately owned beachfront; a delineation similarly criticized by Justice Scalia in *Stevens*:

> To say that this case raises a serious Fifth Amendment takings issue is an understatement. The issue is serious in the sense that it involves a holding of questionable constitutionality; and it is serious in the sense that the landgrab (if there is one) may run the entire length of the Oregon coast. It is by no means clear that the facts—either as to the entire Oregon coast, or as to the small segment at issue here—meet the

> requirements for the English doctrine of custom. The requirements set forth by Blackstone included, *inter alia,* that the public right of access be exercised without interruption, and that the custom be obligatory, *i.e.,* in the present context that it not be left to the option of each landowner whether he will recognize the public's right to go on the dry-sand area for recreational purposes.

114 S. Ct. at 1335.

The concurring opinion of Justice Stewart in *Hughes v. Washington*, 389 U.S. 290 (1967), also provides helpful insight. The Court held that the plaintiff landowner was entitled to accretions to its private beachfront property pursuant to federal law, as opposed to state law which gave ownership to the State.

Justice Stewart would have additionally considered whether the State's claimed termination of the right to accretions was a taking. In 1966, the Washington Supreme Court held that the right to accretions had ceased in 1889 with the enaction of Article 17 of the Washington Constitution. The question thus became whether that 1966 court decision created something new, or simply confirmed what was already known to be:

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.

389 U.S. 290, 296–97 (1967). Justice Stewart was of the opinion that it was something new, and hence, a taking:

> There can be little doubt about the impact of that change upon [the private property owner]: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

Id. at 297-98.

The same scenario is playing itself out in this matter. Pursuant to a 1974 court decision, Florida created a sudden change in state law through its adoption of a new and unique customary use doctrine. And based upon that new law, Walton County now seeks to take title to private property retroactively and without paying just compensation.

Thus, "where 'permanent physical occupation' of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved." *Lucas*, 505 U.S. at 1028

(citation omitted). Property rights are not exclusively co-extensive with state law and "States do not have the unfettered authority to shape and define property rights and reasonable investment-backed expectations, leaving landowners without recourse against unreasonable regulations." *Murr*, 137 S. Ct. at 1944–45.

B. Florida's Customary Use Doctrine Is Not in Accord with Traditional **Lucas** *Background Principles*

Florida's customary use doctrine does not comport with those inherent and pre-existing laws that were considered by the Supreme Court to constitute background law.

Under *Lucas*, background law was intended to apply to nuisance and necessity. *Lucas*, 505 U.S. at 1029 ("A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise"); and *id.*, at 1029, n.16 ("The principle 'otherwise' [supra] that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others").

A broader reading allows for claims beyond nuisance and necessity but still stay within the framework of property uses that were never permitted as of right

irrespective of the regulation or declaration. *See Cedar Point Nursery,* 141 S. Ct at 2079 (noting that background limitations also encompass reasonable searches and seizures under the Fourth Amendment); *Bennis v. Michigan*, 516 U.S. 442, 452–53, 731–32 (2010) (1996) (same); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 351–52 (2002) (Rehnquist, dissenting) (normal, short-term delays in land use decisions and permitting)*; Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.,* 560 U.S. 702, 731–32 (2010) (certain state littoral rights).

Florida's customary use doctrine is not in accord with any of these traditional and accepted forms of *Lucas* background law.

II. The Customary Use Doctrine Cannot be Used To Take Approximately 18 Miles of Beachfront

Under Florida's customary use doctrine, the public may acquire rights to private land upon proof by the government that such use is "ancient, reasonable, without interruption and free from dispute." *Tona-Rama,* 294 So. 2d at 78. However, that doctrine was not intended to allow Walton County to provide the public with access to many miles of private beachfront property.

Custom is a more focused and localized issue. *Trepanier v. Cnty. of Volusia, Fla.*, 965 So. 2d 276, 290 (Fla. Dist. Ct. App. 2007). It only protects local rights, *Trepanier*, 965 So. 2d at 289 (an "intensely local" issue) and may only be alleged and adjudicated on a "*particular area*." *Tona-Rama*, 294 So. 2d at 78 (custom applies to "persons of a certain locality") (quoting 3 Tiffany, Real Property § 935

(3d ed. 1947)); *Florida Attorney General Opinion*, 2002-38, at 4 ("a particular piece of property").

Moreover, unlike modern prescriptive rights, which rest on adversity between property owner and claimant, *Tona-Rama*, 294 So. 2d at 76, customary rights rest on consent. 1 William Blackstone, *Commentaries* *77; *Trepanier*, 965 So. 2d at 289 ("widely-accepted" practice).

Consequently, for each individual parcel, Walton County must prove that public access meets the customary use criteria.

First, it must put forth evidence of the chain of title for each parcel. The United States took title to all land in Florida in 1819, with the execution of the Adams-Onis Treaty with Spain. In 1845, Florida was admitted as a State on the condition that federal lands remain undisturbed. *See* Act of March 3, 1845, chs. 75 and 76. At different points in time thereafter, certain federal lands, including beachfront land, were conveyed into private ownership. This is relevant because an "ancient" and customary public right of access across private lands cannot start until the land is first privately owned.

The County must also prove that the public, without interruption, actually used the specific and individual beachfront at issue. However, there are numerous potentialities for otherwise. *State ex rel. Haman v. Fox*, 594 P.2d 1093, 1101 (Idaho 1979)*;* private development (Jon W. Bruce & James W. Ely, Jr., *The Law of*

Easements and Licenses in Land § 6:2 (1988) ("Private beachfront development by landowners seemingly interrupts public usage" and defeats custom)); abandonment by the public (Blackstone, *Commentaries* *77 ("if the right be any how discontinued for a day, the custom is quite at an end")); and legal interruption by Walton County, including the fact that in 1970, the County outlawed public driving in the area.

This determination is crucial because once custom is severed, it cannot return. Blackstone, *Commentaries* *77 ("if the right" is halted, it is "at an end"); *Hammerton v. Honey*, 24 W.R. 603, 604 (Ch. 1876) (Eng.) (a long interruption means there is no custom).

For each individual parcel, Walton County also must show reasonableness. This factor requires the Court to consider the impact of the alleged custom on affected private property owners. *Mercer v. Denne*, 2 Ch. 534 (1904), *aff'd*, 2 Ch. 538 (Eng. C.A. 1905) (considering custom "so long as they do not thereby throw an unreasonable burden on the landowner"); *Hall v. Nottingham*, 1 Ex. D at 1, 3 (1875) (Eng.) (Kelly, C.B.) (noting concern that the custom could "have the effect of taking away from the owner . . . the whole use and enjoyment of his property").

In light of the above, the doctrine of customary use cannot be generically applied to allow public access to such a large stretch of private beachfront property. The County must make individualized determinations for every parcel for which it seeks to allow public access.

CONCLUSION

For the reasons set forth herein, the decision of the First Judicial Circuit Court dated March 21, 2022, should be reversed.

DATED: June 13, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman, 14-point font and in compliance with Fla. R. App. P. 9.210(a)(2). I further certify that the word-count of this brief is 4,374 words and in compliance with Fla. R. App. P. 9.370(b).

DATED: June 13, 2022.

s/ Kathryn D. Valois
KATHRYN D. VALOIS

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2022, I electronically filed the foregoing with the Clerk of Court by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kathryn D. Valois
KATHRYN D. VALOIS