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Supreme Court's Regulatory Takings Case Draws Widespread Interest

By JENNIFER KOONS of Greenwire

More than half of the nation's state attorneys general and two dozen interest groups have weighed in on a high-profile regulatory takings case that the Supreme Court will hear in December.

Solicitor General Elena Kagan, attorneys general from 26 states, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors and others filed friend-of-the-court briefs yesterday in *Stop the Beach Renourishment v. Florida*, which turns on whether Florida's Supreme Court violated the Constitution's regulatory takings clause when it upheld a plan to create a state-owned public beach between private waterfront land and the Gulf of Mexico.

Amicus briefs supported the state of Florida and come a month after more than a dozen other organizations, including the National Association of Home Builders, the Cato Institute and the Pacific Legal Foundation filed similar briefs backing the private waterfront landowners who filed the lawsuit (*Greenwire*, Aug. 26).

The case arose in 2004, when property owners filed a lawsuit to halt the planned restoration of beaches in Walton County along the Florida Panhandle.

Under the state's Beach and Shore Preservation Act, counties and cities can restore beaches eroded by hurricanes and storms by adding sand beyond a state-designated erosion control line, which separates private property from state property. Sand placed beyond the line becomes public beach because the projects are funded with state and federal dollars.

A Florida district court ruled in 2006 that the state's restoration effort constituted an uncompensated taking, depriving property owners of their right to maintain contact with the water and their "right to accretion," which is the gradual accumulation of land by natural forces.

Last September, the Florida Supreme Court reversed the lower court order.

In June, the U.S. Supreme Court agreed to hear the case.

A majority finding that the Florida Supreme Court violated the takings clause "would undermine the states' well established and traditional authority to determine the scope of their own property laws," the attorneys general warned in their combined friend-of-the-court brief.

"It would do this by expanding takings law to subject state court property law determinations to federal review," they wrote. "Specifically, petitioner would encourage dissatisfied litigants to argue that a state

court has taken property without payment of just compensation because it has issued a decision that purportedly departs from prior holdings. This would subject state court property laws to unwarranted and unprecedented review by the federal judiciary."

The Supreme Court would likely resist such overt involvement in takings disputes, according to Jay Austin, senior attorney with the Environmental Law Institute.

"The only thing that petitioners have to cite to even suggest any precedent is a concurring opinion by former Justice Potter Stewart in another beach case 40 years ago," Austin said.

"Well, he's the justice who famously said about obscenity that 'I'll know it when I see it.'" This case would put the justices in the same position, he said, adding: "Just like they had to screen films in the basement of the Supreme Court to see whether they were obscene, they'd have to wade into all of these individual disputes, and I'm not sure that's something they want to do."

The case has divided private landowners as well as property rights groups.

"Opponents are trying to frame it as the environment versus property, but this is really property owners versus property owners," said John Echeverria, an environmental law professor at Vermont Law School who filed a friend-of-the-court brief on behalf of the American Planning Association and the Florida Chapter of the American Planning Association.

"Only a handful of affected landowners have joined in this lawsuit," Echeverria said. "Others are saying they're glad that the government stepped in to protect the beachfront."

The Florida-based Coalition for Property Rights, which counts among its members owners of oceanfront property who have been affected by the statute at issue in the case, said Supreme Court intervention was necessary to reel in a state action that went too far.

"In attempting to 'balance' the landowners' littoral rights against other countervailing interests (mainly the newly-created governmental duty to 'preserve' the beach), the Florida Supreme Court erroneously applied a multi-factor test in this physical takings case," CPR argued in its amicus brief.

Both sides will make their cases to the court during oral arguments on Dec. 2.

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