No. 05-764

In The
Supreme Court of the United States

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Petitioners,

v.

JOAN M. GLASS,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITIONERS' BRIEF IN REPLY

SCOTT C. STRATTARD
Counsel for Petitioners
BRAUN, KENDRICK,
FINKBEINER, P.L.C.
4301 Fashion Square Blvd.
Saginaw, Michigan 48603
(989) 498-2100

DAVID L. POWERS
Counsel of Record
for Petitioners
SMITH, MARTIN, POWERS &
KNIER, P.C.
900 Washington Avenue
Bay City, Michigan 48708
(989) 892-3924

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER PETITIONERS PROPERLY RAISED THEIR FEDERAL CLAIMS BELOW, SUCH THAT THIS COURT MAY PROPERLY REVIEW THE DECISION OF THE MICHIGAN SUPREME COURT.

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INTRODUCTION

Petitioners submit their reply brief pursuant to Supreme Court Rule 15 solely to respond to Respondent's assertion, not addressed in the Petition, that "Petitioners failed to properly raise their federal constitutional challenge in the state court proceedings." Because they raised their federal constitutional claims immediately upon a sudden and unexpected taking of title to their beach property by the Michigan Court of Appeals, and again when the Michigan Supreme Court suddenly and unexpectedly took away their long-established, well-followed, and state-enforced exclusive rights of possession, Petitioners raised their federal claims with "fair precision and in due time."

PETITIONERS PROPERLY RAISED THEIR FEDERAL CLAIMS, AND THIS COURT MAY PROPERLY REVIEW THE DECISION OF THE MICHIGAN SUPREME COURT.

Respondent has challenged the jurisdiction of this Court to review in this case the taking of 3,288 miles of shoreline by the Michigan Supreme Court for use of the public, asserting in her Brief that Petitioners did not timely raise any federal constitutional issue in the state courts, and that the Michigan Supreme Court did not consider any constitutional claim. As explained below, these assertions are incorrect, and this Court does in fact have jurisdiction.

As it relates to the Petition before this Court, the gravamen of Respondent's Complaint is contained in paragraphs 22 and 24:

> The *shoreland and waters* of Lake Huron lying below and lakeward of the natural ordinary high water mark *are subject*, under federal and state statutory law and common law, *to a navigational servitude* held by the state of Michigan, and a dominant navigational servitude held by the United States, under which *such land* and water *is held in trust* for the benefit of the people of this state and country *for navigational and recreational activities* . . . As a resident and citizen . . . , [p]laintiff *has* the right to navigate and walk across those portions of the shore and waters of Lake Huron lying below and lakeward of the natural ordinary high-water mark . . . (emphasis added).

Petitioners responded to these allegations by denying them and affirmatively asserting the state of the law as it then existed:

> Great Lakes riparian owners [sic] title line is wherever the water's edge exists at the moment. It is known as the "Moveable Freehold" Doctrine. The right of the riparian owner [is] subject to the Great Lakes Submerged Lands Act, being MCLA 322.701, et seq. This Act does not change the moveable freehold theory, as the State of Michigan does not have title to the property between the statutory fixed ordinary high water mark and the actual water's edge. The State, pursuant to the Great Lakes Submerged Lands Act, has the right to regulate the use of the same. The Riparian owner has the right to the exclusive use of the property to the water's edge, which may be a moveable line as the water rises and falls. . . . Plaintiff and others have the right to navigate portions of the water above the low water mark

> but to [sic] not have the right to walk on those portions above the then existing water line . . . .

In reviewing Respondent's Complaint, it is clear that the question set up by her Complaint was whether she had a right of beachwalking under existing Michigan law, and not whether Michigan law should be *changed* to establish such a right. Moreover, no government action was presented by the pleadings; no taking had occurred; and no due process had been denied. Under these facts, Petitioners were not put on notice that the State would be confiscating their shoreline rights, and had no reason to plead the existence of a taking or lack of due process, as suggested in Respondent's Brief. Respondent's Brief in Opposition, pp 25-26.

Judge Kowalski's ruling (later invalidated on appeal) that a state statute granted Respondent beachwalking rights did not address the change in the common law complained of by this Petition. It was only when the Michigan Court of Appeals ruled that, by virtue of state common law, the state – and not the Goeckels – owned the beach, that Petitioners were put on notice that the State of Michigan might through its courts use this case as an opportunity to take Petitioners' beach from them. App, p 109. In response to that unexpected ruling, Petitioners in their Brief to the Michigan Supreme Court specifically asserted the issue they present to this Court:

> Regardless of whether action from this Court, or the Legislature, any retreat from the water's edge proclamation in *Hilt* . . . would deprive beachfront property owners of land to which they had either title or exclusive right to use, and would therefore constitute an unconstitutional taking without compensation under both State

> and Federal law. See *Peterman*, supra, brief of Amici Curiae Michigan Chamber of Commerce, et al., Section III C, and Brief of Defendants (sic) of Property Rights, Section II.

Brief on Appeal – Appellees, p 21, n 9.

The well-written Brief of Defenders of Property Rights, adopted by Petitioners both in note 9 and at page 33 of their Brief, was devoted almost entirely to the federal takings issue, specifically citing the Fifth and Fourteenth Amendments to the United States Constitution. Moreover, that brief specifically addressed the course complained of in the Petition at issue:

> Both the Supreme Court and other federal courts have repeatedly held that when the government takes the title to real property, or destroys the owner's ability to exclude others, a categorical violation of the Fifth Amendment's just compensation clause has occurred for which compensation must be paid.

Id. at 6, citing *Yee* v *City of Escondido*, 503 US 519, 522; 112 S Ct 1522; 118 L Ed2d 153 (1992).

Notwithstanding this briefing, the Michigan Supreme Court changed Michigan law, not by affirming the taking of *title* by the Court of Appeals, but by suddenly imposing a new concept of public trust which it now says has always existed separate from title. Of course, "[c]ourts seldom confess to changing the law." Thompson, *Judicial Takings*, 76 Va L R 1449, 1478 (1990). Instead, the Michigan Supreme Court incredibly concluded that the exclusive use rights described in the state's caselaw, acknowledged by its attorney general, and implemented by its administrative agencies and law enforcement, simply never existed. App,

p 35 ("the state cannot take what it already owns.").[1] Presumably in response to Petitioners' argument that "a categorical violation of the Fifth Amendment's just compensation clause" occurs when government "destroys the owners' ability to exclude others," the court ruled that "no taking occurs when the state protects and retains that which it could not alienate: public rights held pursuant to the public trust doctrine." Brief on Appeal – Appellees, pp 21, 33; Brief of Defenders of Property Rights, p 6; App, p 35. The Michigan Supreme Court was well briefed on the federal takings issue, and its ruling appears to have considered and decided the issue.

Despite this background, Respondent makes numerous arguments denying this Court's jurisdiction. She complains that "Petitioners did not plead any federal taking or due process claim in their complaint, nor did the trial court address any taking or due process issues." Respondent's Brief, p 26. Yet Respondent does not demonstrate how Petitioners could properly do so before any state action had in fact occurred.

Respondent then complains that Petitioners did not "raise their federal claims in their statement of questions presented in either the Michigan Court of Appeals or the Michigan Supreme Court (nor did they address the issue at all in the Court of Appeals.)." *Id*. This Court has not required such technical niceties:

[1] It is illuminating that in effecting its taking of Michigan's 3,288 miles of shoreline for the use of the public, and then denying a taking, the Michigan Supreme Court implicitly suggested that federal courts such as this Court would not interfere with that ruling. App 35, n 35.

> No particular method of presenting federal issues is required by the Supreme Court's own jurisdictional – or prudential – limits. The test is functional, in response to the policies underlying the presentation requirement. Wright et al, *Federal Practice and Procedure*, §4022, p 327 (1996).

Under Michigan jurisprudence, only the Michigan Supreme Court has the power to change – subject to constitutional protections – the common law. Petitioners squarely put the federal constitutional question at issue in their brief for that Court to consider as it contemplated the question before it. Respondent points to no policy reason which is frustrated by this method of presentation.

Finally, because only the Michigan Supreme Court may effect a change in Michigan common law, Petitioners' due process and takings claims did not arise until the Michigan Supreme Court unexpectedly departed with precedent and effected a taking of Petitioners' riparian rights, long considered property under Michigan law. In response, Petitioners filed their Brief in support of Motion for Rehearing, specifically including their takings claim in their Statement of Questions Presented. This Court has found jurisdiction in similar circumstances, even where federal issues were not necessarily addressed in the state court. In *PruneYard Shopping Center* v *Robbins*, 447 US 74, 85 n 9; 100 S Ct 2035; 64 L Ed2d 741 (1980), this Court found that "federal claims . . . have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation." Indeed, a contrary result would leave a state's highest court free to enact a surprising change in property law in any given case and then avoid review by this Court.

As *PruneYard* suggests, this is not the law. The facts demonstrate that Petitioners presented their federal claims with "fair precision and in due time," *Adams* v *Robertson*, 520 US 83; 117 S Ct 1028; 137 L Ed2d 203 (1997), and that alone is sufficient for the Court to properly consider Petitioners' claim.

Even where a party fails to raise a federal issue in the state courts, where a state's highest court rules on a federal issue, it may properly be reviewed by this Court. *First English Evangelical Lutheran Church* v *County of Los Angeles*, 482 US 304, 313 n 8; 107 S Ct 2378; 96 L Ed2d 250 (1987). The court below denied a taking without specifying whether it was considering a taking under federal or state law. But it is instructive in this context that the court below cited *Phillips Petroleum Co* v *Mississippi*, 484 US 469, 475; 108 S Ct 791; 98 L Ed2d 877 (1988) for the proposition that the question is one of state law. App 35-36, n 35. Moreover, the court was apparently responding to Petitioners' Brief, and those adopted by it, referring to a taking under both state and federal law.

In any event, even if the reference by the court below was limited to the state question, this Court has found the federal issue sufficiently preserved. See *Wood* v *Georgia*, 450 US 261; 101 S Ct 1097; 67 L Ed2d 220 (1981) (equal protection argument preserved where defense counsel's conflict of interest raised in court below).

CONCLUSION

For the foregoing reasons, Petitioners submit that their due process and federal takings claims were timely submitted in the Michigan courts, and that this Court may, and should, grant their Petition and review this case. Petitioners respectfully submit that a failure to do so will fuel the spreading fire of judicial confiscation of riparian property rights.

Dated: February 15, 2006

Respectfully submitted,

SCOTT C. STRATTARD
Counsel for Petitioners
BRAUN, KENDRICK,
FINKBEINER, P.L.C.
4301 Fashion Square Blvd.
Saginaw, Michigan 48603
(989) 498-2100

DAVID L. POWERS
Counsel of Record for Petitioners
SMITH, MARTIN, POWERS &
KNIER, P.C.
900 Washington Avenue
Bay City, Michigan 48708
(989) 892-3924