No. _____

In the

Supreme Court of the United States

GREGORY P. NIES and DIANE S. NIES,

Petitioners,

v.

TOWN OF EMERALD ISLE,
a North Carolina municipality,

Respondent.

On Petition for Writ of Certiorari to the North Carolina Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Takings Clause permits a state to statutorily redefine an entire coastline of privately owned dry beach parcels as a "public trust" area open for public use, without just compensation?

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PETITION FOR WRIT OF CERTIORARI

Gregory and Diane Nies (Nies) respectfully petition for a writ of certiorari to review the judgment of the North Carolina Court of Appeals.

OPINIONS BELOW

The published opinion of the North Carolina Court of Appeals issued on November 17, 2015. It is available at *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. Ct. App. 2015). The opinion is attached here as Appendix A.

The North Carolina Supreme Court issued its order dismissing the Nies' appeal from the lower court judgment on December 14, 2016.[1] It is attached as Appendix B. The order of the North Carolina Superior Court, Carteret County, is attached as Appendix C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1331, 42 U.S.C. § 1983, and the Fifth Amendment to the United States Constitution.

[1] On February 15, 2017, the Chief Justice granted Petitioners' application to extend the time to file this Petition to, and including, April 28, 2017.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

STATUTES AT ISSUE

North Carolina General Statutes § 77-20(d) & (e) states:

> (d) The public having made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial, this section shall not be construed to impair the right of the people to the customary free use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the common law and are a part of the common heritage of the State recognized by Article XIV, Section 5 of the Constitution of North Carolina. These public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State.
>
> (e) . . . "[O]cean beaches" means the area adjacent to the ocean and ocean inlets that is subject to public trust rights. This area is in constant flux due to the action of wind, waves, tides, and storms and includes the wet sand area of the beach that is subject to

> regular flooding by tides and the dry sand area of the beach that is subject to occasional flooding by tides, including wind tides other than those resulting from a hurricane or tropical storm. The landward extent of the ocean beaches is established by the common law as interpreted and applied by the courts of this State. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.

INTRODUCTION

This case raises an important Takings Clause issue concerning whether a state, here North Carolina, can legislatively classify an entire coastline of private dry beach parcels as a "public trust" area subject to public and government access, without paying just compensation. The North Carolina courts concluded that North Carolina could, and in fact, did so under N.C.G.S. § 77-20(d) & (e).[2] *See* Pet. App. A-14 to A-19. The state court held that N.C.G.S. § 77-20 extends the "public trust doctrine" to privately owned dry beach lands, *id.* at A-14 to A-22, in derogation of a common law tradition limits the public trust doctrine to the state-owned wet beach. *See Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892) (explaining that a state's "title" to tidelands is "held in trust for the people of the state" for fishing, navigation and commerce). In so doing, the statute has taken private

[2] For brevity, Petitioners will refer to N.C.G.S. § 77-20(d) & (e) as simply N.C.G.S. § 77-20 throughout this Petition.

dry beaches the length of North Carolina's Atlantic coast.

The dispute arises from Emerald Isle, a barrier island off the coast of North Carolina. The Petitioners (Nies) bought a residentially developed beachfront lot on Emerald Isle in 2001. Like most North Carolina beachfront parcels, their lot extends seaward to the mean high water line—the boundary of state-owned beaches. The Nies' lot therefore includes a dry sand area lying between the mean high water line and the first line of dunes or vegetation. Under state common law, this private dry beach is not subject to the "public trust doctrine" which allows public use of state-owned wet beaches. *Gwathmey v. State Through Dep't of Env't, Health, & Nat. Res. Through Cobey*, 464 S.E.2d 674, 678 (N.C. 1995) ("the public trust doctrine is not an issue . . . where the land involved is above water").

Subsequent to the Nies' purchase, the Town passed ordinances authorizing the public and governmental officials to use and drive on private dry beaches, such as that owned by the Nies'. When the Nies' sued the Town, alleging that this invasion of their property caused an unconstitutional taking, the Town claimed that private dry beaches are a public trust area open for public use. As authority, it pointed to N.C.G.S. § 77-20.

State courts have never previously opined on the meaning of that 1998 statute. Nevertheless, in this case, the state appellate court adopted the position that N.C.G.S. § 77-20 changed the common law so as to

expand the "public trust"-impressed beach to privately owned dry beach parcels.[3] It held, for instance:

> N.C. Gen. Stat. § 77-20(d) . . . states the position of the General Assembly that the public trust portions of North Carolina ocean beaches include the dry sand portions of those beaches . . . .

Pet. App. A-14. Although the Nies' argued that N.C.G.S. § 77-20 caused an unconstitutional taking of property if read this way, *see* Plaintiffs-Appellants' New Brief at 28-29, the appellate court rejected this contention. The North Carolina Supreme Court then agreed to hear the case, but it changed its mind, leaving the appellate opinion as the final word.

To say that the lower court's conclusion that N.C.G.S. § 77-20 turned an entire coastline of private lots into a public beach "raises a serious Fifth Amendment takings issue is an understatement." *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1335 (1994) (Scalia, J., dissenting from denial of certiorari). The Nies and other beachfront property owners bought fee simple titles to dry sandy land that has never been encumbered by public trust doctrine access rights. N.C.G.S. § 77-20 suddenly makes their title subservient to the public trust doctrine, and related public use rights, in conflict with a century-long common law tradition. And it does so without compensation. This leaves North Carolina coastal governments, like the Town in this case, free to invade

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[3] The state appellate courts' reading of the State's statute, subsequently finalized when the North Supreme Court denied review, "is within the [state] court's competency" and the Court "must take the statute as so read and interpreted." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

private dry beach property for public and government purposes, eviscerating the owners' right to control, use, and protect their land, without compensation. Absent this Court's review, N.C.G.S. § 77-20 will not only deprive the Nies' of their property rights, it will accomplish one of the most far-reaching legislative takings of coastal property in American history.

STATEMENT OF THE CASE

For over a century, North Carolina state courts have recognized, like most coastal states, that the state holds the tidelands it acquired upon statehood in "trust" for certain public navigation, fishing and recreational uses. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-74 (1988); *Illinois Cent. R.R.*, 146 U.S. at 452. North Carolina courts have also recognized that state ownership of tidelands ends at the mean high water mark. *West v. Slick*, 326 S.E.2d 601, 617 (N.C. 1985).

Since the public trust doctrine flows from the state's title, and that title terminates at the mean high water mark, public trust doctrine rights also end at the mean high water mark under state common law. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 177 S.E.2d 513, 516 (N.C. 1970). More landward areas—often called the "dry beach"—are privately owned, *id.*; N.C.G.S. § 77-20(a); and not subject to public trust uses. *Gwathmey*, 464 S.E.2d at 678 ("the public trust doctrine is not an issue . . . where the land involved is above water"); *Cooper v. United States*, 779 F. Supp. 833, 835 (E.D.N.C. 1991) ("This court is not aware of any decision by the courts of North Carolina creating a public trust right in privately-owned dry sand . . . ."). This is consistent

with this Court's precedent and the law of every other coastal state except one.[4]

As indicated above, this Petition arises from the lower court's determination that N.C.G.S. § 77-20 expanded the public trust doctrine beach area to privately owned dry beaches, allowing the Town to authorize uncompensated public and government use of the Nies' and others' land.

A. The Setting

The barrier island of Emerald Isle was virtually undeveloped until approximately 1973, when the first modern bridge connecting the island to the mainland was built. Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869, 1877 n.35 (2000). In recent times, Emerald Isle has grown in population and development. Homes fill the coast line along the southwest end of the island, where the Nies' property sits. Adjacent to the homes is dry sand and then, the shore. The island is a popular spot during summer months due to its warm waters, vacation homes, and recreational options.

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[4] *Glass v. Goeckel*, 703 N.W.2d 58, 68 (Mich. 2005) ("In applying the public trust doctrine to the oceans, courts have traditionally held that rights . . . extend from the waters themselves and the lands beneath them to a point on the shore called the "ordinary high water mark."); *see also* Celeste Pagano, *Where's the Beach? Coastal Access in the Age of Rising Tides*, 42 Sw. L. Rev. 1, 10 (2012) (explaining that most states recognize the public trust to the mean high water mark, some limit it to more—seaward low water mark, and that "New Jersey alone applies the public trust doctrine to so-called 'dry beach' above the high tide line").

B. The Nies' Property

1. The Nature and Scope of the Nies' Beachfront Lot

The Nies initially became aware of Emerald Isle when vacationing there on several occasions prior to 2001. Pet. App. A-1. They liked it so much that, in 2001, they bought a parcel of residential beachfront property at 9909 Shipwreck Lane. *Id.* The land included a home similar to surrounding houses. The purchase was consummated with transfer of fee simple deed. In subsequent years, the Nies lived in the home, while occasionally renting it out during summer months.

According to their deed, the subdivision plat creating their lot, and North Carolina law, the Nies' property extends seaward to the mean high water mark. N.C.G.S. § 77-20(a); *West*, 326 S.E.2d at 617. The Nies' title thus includes dry beach land lying between the mean high water mark and the first line of vegetation or dunes. (R pp 53, 611.) Tidelands seaward of the mean high water mark (and thus, of the Nies' dry sand property), are State-owned property. *Carolina Beach*, 177 S.E.2d at 516.

The Nies' dry beach measures about 150 feet in width (from mean high water mark to the vegetation line) and 76 feet in length (between their lot lines and parallel to the Atlantic), comprising approximately 11,000 square feet. (R p 611.) The area is effectively the Nies' backyard. (R p 611.)

At the time of purchase, the public sometimes drove on the hard packed wet beach bounded on the landward side by the mean high water mark, but no driving occurred on upland dry sand beaches.

(R pp 245-248.)[5] This was consistent with a 1980 Town ordinance in effect at the time, which allowed public shoreline driving only on the "foreshore[6] and area . . . consisting of hardpacked sand." (R at 526.)[7] The Nies' title is not subject to a recorded public access easement or a right-of-way proven in court under common law doctrines such as prescription or dedication.[8] (R p 611.)

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[5] The lower court suggested the Nies' conceded dry beach driving lawfully existed at the time of purchase. Pet. App. A-6 to A-8. This is false. The Nies' unrebutted record testimony showed that no dry sand driving occurred at the time of, or in the immediate years after, their purchase of the property. (R pp 245-248.)

[6] The "foreshore" is a term that refers, under state law, to the area of beach lying between open water and the mean high water mark. *See West*, 326 S.E.2d at 617.

[7] The lower court's statement that "the record does not contain the [pre-2001 (1980)] Carteret County Beach Vehicular Ordinance" is not true. Pet. App. A-5. The ordinance is in the Record on Appeal at page 526. The court's statement that a later (2004) Ordinance allowing driving "primarily" on "hardpacked sand" "accurately reflects the defined permitted driving area from the time Plaintiffs purchased the Property in June of 2001" is also wrong. Pet. App. A-5 to A-6.

[8] As in other states, people can acquire access to particular tracts of private property by proving the existence of a prescriptive (adverse possession) easement the land. This is a fact issue, in which the claimant bears the burden to prove that all the factual elements of prescription are present. *West*, 326 S.E.2d at 610-11. "Prescriptive easements, by their nature, can be utilized only on a tract-by-tract basis, and thus cannot be applied to all beaches within a state." 3 Richard R. Powell, *Powell on Real Property* § 34.11[6], at 34-171 (1994). Individual tracts may also be dedicated to the public upon judicial proof of the elements of a dedication. *Metcalf v. Black Dog Realty, LLC*, 684 S.E.2d 709, 723 (N.C. Ct. App. 2009). The Town neither pled or argued these

(continued...)

2. The Town's Initial Attempt To Take the Property

In 2003, the Town attempted to secure an access easement on the Nies' dry sand land to facilitate a Beach Renourishment Project. The Town sent the Nies a form easement that would have given the Town a perpetual access easement on their land. (R pp 55-59.) The Nies declined to sign this easement, however, and instead executed a temporary easement that expired on March 31, 2005. (R p 61.) Finding this inadequate (R pp 630-631), the Town filed a complaint and a declaration of taking against the Nies in the Carteret County Superior Court, to obtain its desired access easement through a "quick take" eminent domain procedure. (R pp 75, 634-636.)

Through this action, the Town immediately condemned a perpetual public and Town access easement over the dry sand portion of the Nies' property. (R pp 633-635.) However, the Nies contested the taking in the state trial court (R pp 637-645). Approximately a year later, that court issued a "Consent Order Modifying Beach Re-nourishment Easement" (R pp 652-662), that significantly reduced the easement the Town acquired through the quick take procedure. The modified easement allowed the Town to access the Nies' dry beach property only to inspect and restore erosion damage from major storms. (R pp 659-660.) It did not give the public a right to access the Nies' property, nor did it give the Town itself a right to use the property for general municipal purposes, such as driving. (R pp 659-661.) The

[8] (...continued)
doctrines with respect to the Nies' property or any other dry beach lands.

easement declares that it is not to be construed to interfere with the Nies' right to use their property. (R p 661.) The Town has acquired no easement since then.

C. The Town Passes Ordinances Declaring Private Dry Beaches To Be Public Trust Areas

1. The Town Authorizes Public Driving on Private Dry Beach Areas

In 2004, the Town amended its ordinances to allow public driving "primarily" on the "hardpacked sand" between the sea and ten feet seaward of the dunes. (R p 541.) In 2013, it amended the driving ordinance further, this time permitting public driving on the "public trust beach," defined as "all land and water area between the Atlantic Ocean and the base of the frontal dunes." Town Code § 5-1; Pet. App. A-6 to A-8. This provision cited to N.C.G.S. § 77-20. *Id.*[9] The operative public driving ordinance, one of the ordinances challenged here, thus allows public driving on all private dry sand areas between the dunes and mean high water mark—the dry beach.

Under the 2013 driving ordinance, the public is allowed to drive on privately owned dry sandy beach lands between September and May (R p 549-550 (Town Code § 5-60)), upon paying a fee to the Town and obtaining a permit. Town Code §§ 5-60 - 5-61. The

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[9] The relevant law states: "the public trust beach area, [] defined by G.S. 77-20, and includes all land and water area between the Atlantic Ocean and the base of the frontal dunes." Town Code § 5-1.

ordinance allows the Town manager to regulate these permits. *Id.*

The Town has issued many permits allowing the public to drive on the Nies' and others' dry sand beaches. In 2014, the Town issued 1,246 driving permits and generated $78,000 in income in so doing. (R p 682.) Under authority of these Town permits, the public regularly drives the Nies' property, leaving trash and tire ruts in their wake. (R pp 443:18; 462, 668-681.)

2. The Town Imposes a Twenty-Foot Town Vehicle Lane on the Nies' Property

In 2010, the Town enacted a different ordinance giving the Town itself vehicular access to private dry beach lands. (R p 98.) This ordinance stated:

> No beach equipment, attended or unattended, shall be placed within an area twenty (20) feet seaward of the base of the frontal dunes at any time, so as to *maintain an unimpeded vehicle travel lane for emergency services personnel and other town personnel providing essential services on the beach strand*.

(R p 98 (Town Code § 5-102(a)) (emphasis added).) It is undisputed that the strip of land lying "twenty feet seaward of the base of the frontal dunes" includes privately owned dry sand areas, such as that owned by the Nies'. In 2011, the Town amended this ordinance to make the "twenty-foot from the dunes" driving lane applicable from May 1 through September 14. (R p 545 (Town Code § 5-19(b)).) In 2013, the Town amended the Ordinance to reiterate that it was intended to clear the

way "for unimpeded vehicle travel by emergency vehicles and town service vehicles on the public trust beach area." (R p 545 (Town Code § 5-19(a)).)

Under this Town road ordinance, Town garbage trucks, construction vehicles, police cars, and "quads" regularly drive and park on the Nies' dry sand beach land. (R pp 311-312, 461-463 (Nies deposition).) Walking on the land became unsafe and sometimes impossible for the older Nies. (R p 314:15-18; *id.* p 315:5-12.)

Moreover, because the Town's twenty-foot dry beach travel lane is defined on the landward side by an ambulatory boundary (vegetation or dunes), the Town has capitalized on storm-induced erosion to move its traffic lane further into the Nies' residential lot. (R p 738 (Nies affidavit).) In 2011, Hurricane Irene moved the dunes inland by approximately thirty feet. (*Id.*) Immediately afterward, the Town began driving "vehicles over the whole [newly denuded, sandy] area including some with caterpillar treads . . . municipal vehicles were already using an additional 30 feet of our property." (*Id.*)

D. Procedural Background

1. The Initial Suit

The Nies and four other property owners sued the Town in the North Carolina Superior Court, Cateret County, in December 2011. Pet. App. A-8 to A-11. In so doing, they filed an Inverse Condemnation action and a complaint alleging in part that the Town had taken the Nies' property in violation of the United States Constitution and the North Carolina Constitution. (R pp 3-100.) The complaint asserted: "Defendant Town's adoption of ordinances, based on claimed

authority of North Carolina General Statutes § 77-20 Sections (d) and (e), purporting to allow and/or regulate use by Defendant Town and the public of the 'dry sand' portions of Plaintiffs' property above mean high water is . . . an unconstitutional taking of Plaintiffs' property." (R p 37 ¶ 109.) The Nies sought just compensation and damages under 42 U.S.C. § 1983. (R pp 35-38.)

After the Town unsuccessfully attempted to remove the case to the federal district court (R pp 102-104), the Nies' case was separated from the other plaintiffs and they proceeded to litigate on a pro se basis in the North Carolina superior court. The Town subsequently filed an Answer that offered one substantive defense to the Nies' takings claims: that the state's public trust doctrine permitted its actions. It did not allege or seek to prove that there was a common law easement on the Nies' property under doctrines like prescription, or dedication.

On August 25, 2014, the state trial court granted the Town's motion for summary judgment on all the Nies' claims, including their takings claims, without elaboration. (R p 757.) The Nies then appealed to North Carolina Court of Appeals, raising only their takings claims.

2. The Appellate Court Decision

In the state appellate court, the Town argued that N.C.G.S. § 77-20 legislatively extended public rights associated with the public trust doctrine to privately owned dry sand areas, thus allowing public and Town use of the Nies' property. Defendant-Appellee's Brief at 10. The Nies argued that this reading of the statute

turned it into an unconstitutional taking. Plaintiffs-Appellants' New Brief at 28-29.

a. The Appellate Court Holds That N.C.G.S. § 77-20 Imposes the Public Trust Doctrine and Related Public Use Rights on Privately Owned Dry Beaches

On November 17, 2015, the Court of Appeals issued a published decision affirming judgment for the Town on the Nies' takings claims. *See* Pet. App. A. The Court initially noted the existence of certain public rights in "the watercourses of the State" under the public trust doctrine. *Id.* at A-12 (quoting *Fabrikant v. Currituck County*, 621 S.E.2d 19, 27 (N.C. Ct. App. 2005)).[10] The lower court recognized that dry sand beaches located landward of the mean high water mark are privately owned, Pet. App. A-3 to A-5, and that it could find no case law extending public trust rights to privately owned dry beaches, *id.* at A-14 to A-16. This prompted the court to turn to N.C.G.S. § 77-20. It concluded that:

> N.C. Gen. Stat. § 77-20(d) . . . states the position of the General Assembly that the *public trust portions of North Carolina ocean*

[10] The court noted that "public trust rights are 'those rights held in trust by the State for the use and benefit of the people of the State in common. . . . They include, but are not limited to, the right to navigate, swim, hunt, fish and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches . . . ." Pet. App. A-11 to A-12 (quoting *Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Pres. v. Coastal Res. Comm'n*, 452 S.E.2d 337, 348 (N.C. Ct. App. 1995)).

> *beaches include the dry sand portions of those beaches* . . . .

Pet. App. A-14 (emphasis added). The court elaborated:

> The [North Carolina] General Assembly has the power to make this determination through legislation, and thereby modify any prior common law understanding of the geographic limits of these public trust rights.

Id. at A-15.

The court clarified that the landward boundary of the beaches subject to public trust doctrine rights under N.C.G.S. § 77-20 is the vegetation or dune line. This meant that all private dry beaches are subject to public trust doctrine rights: "[t]he ocean beaches of North Carolina, as [thus] defined in N.C. Gen. Stat. § 77-20(e) and this opinion, *are subject to public trust rights* unless those rights have been expressly abandoned by the State." *Id.* at A-19 to A-20 (emphasis added). In sum, the court held N.C.G.S. § 77-20 "mandate[s]" public access "to the dry sand beaches of North Carolina." *Id.* at A-17.[11]

In reaching this decision, the Court ignored and necessarily rejected the argument that N.C.G.S. § 77-20 results in an unconstitutional taking as construed to extend public trust rights to private dry beach areas. *See* Plaintiffs-Appellants' New Brief at 28-29 (arguing

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[11] The court below also referred briefly to "public consciousness," to "what the majority of North Carolinians understand as a 'public' beach," and to the Nies' out-of-state origin, in recognizing public trust rights on private dry beaches. Pet. App. A-19. Of course, since neither naked (purported) public opinion or parochialism are a source of state property law, the court's decision necessarily and explicitly rests on N.C.G.S. § 77-20. *Id.* at A-19 to A-21.

"[e]ven if one wanted to read N.C.G.S. § 77-20 as extending public trust beach rights to private dry uplands, it could not be construed that way without causing an unconstitutional taking.").

b. The Appellate Court Concludes That the Town Did Not Unconstitutionally Take the Nies' Dry Beach Property in Permitting Public and Government Use of the Land

Once it held that N.C.G.S. § 77-20 impressed private dry beaches with public trust rights, the court below proceeded to hold that the statute absolved the Town of liability for authorizing public and governmental driving on the Nies' dry beach. The court stated, "it is not the Ordinances that authorize public access to the dry sand portion of the Property; public access is permitted, and in fact guaranteed, pursuant to the associated public trust rights." Pet. App. A-32. In the court's view, N.C.G.S. § 77-20's imposition of public trust rights eliminated the Nies' right to exclude the public or government from their dry beach, and this prevented them from claiming a taking based on the Town's actions:

> The right to prevent the public from enjoying the dry sand portion of the Property was never part of the "bundle of rights" purchased by Plaintiffs in 2001. Because Plaintiffs have no right to exclude the public from public trust beaches, those portions of the Ordinances regulating beach driving, even if construed as ordinances "allowing"

> beach driving, cannot effectuate a Fifth Amendment taking.

Id. at A-21 (footnote omitted).

The court similarly held that the Town's use of the Nies' property for Town vehicles was not a taking given the court's prior conclusion that N.C.G.S. § 77-20 impressed the land with public trust doctrine. *Id.* at A-24 to A-27.

c. The North Carolina Supreme Court Grants Review and Then Dismisses the Case Without Explanation

After the North Carolina Court of Appeals issued its decision, the Nies' petitioned the North Carolina Supreme Court for review. In the Petition, the Nies' argued that review was justified in part because the lower court's construction of N.C.G.S. § 77-20 "causes a taking of property and conflicts with the principle that legislatures may not define away vested property interests—at least not without paying just compensation." Petition for Discretionary Review at 23-24.

On April 12, 2016, the state supreme court granted review. The parties then fully briefed the case. Again, the Nies argued that the appellate court's view of N.C.G.S. § 77-20 was wrong and converted the statute into an unconstitutional taking. Plaintiffs-Appellants' New Brief at 29.

On September 30, 2016, the Nies sold their property and moved for health reasons. A few days later, they filed a letter explaining that they had not sold or waived their takings claims, and that the

claims were not moot because they sought damages. *See Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 8-9 (1978) (constitutional claims arising from a subsequently terminated injury to property interests are not moot if the claims seek damages). There was no response from the Town, State or Court. On November 7, 2016, the composition of the North Carolina Supreme Court changed due to an election. On December 14, 2016, the state court issued an order dismissing the Nies' appeal without explanation.

REASONS FOR GRANTING THE WRIT

This case raises an important issue as to whether a state may statutorily classify a coastline of privately owned dry beaches as a public trust doctrine area, subject to public and government use, without just compensation. Although N.C.G.S. § 77-20 has never been previously interpreted to impose public trust rights on private dry beach parcels (indeed, it has never been construed at all until now), the decision below has authoritatively construed the statute to do just that.

N.C.G.S. § 77-20 thus creates a "public trust doctrine" easement on all dry sand private property, without compensation to the owners. This divests thousands of citizens of their fundamental property rights. Indeed, the far-reaching and sudden nature of the court's decision unsettles titles to all private dry beach areas along North Carolina's Atlantic coast. It is grossly unjust and conflicts with this Court's Takings Clause precedent, and with the decisions of other state courts.

The Court should grant the Petition.

I

THE DECISION BELOW RAISES FEDERAL CONSTITUTIONAL PROPERTY RIGHTS ISSUES OF FAR-REACHING AND CRITICAL IMPORTANCE

A. The Decision Below Suddenly and Drastically Eviscerates the Property Rights of Thousands of North Carolina Dry Beach Owners

As the following shows, N.C.G.S. § 77-20 jettisoned a standard, established common law framework under which the public trust doctrine applies to tidelands below the mean high water mark, so as to subject all private dry beaches to public and government access. In denying that the owners have a constitutional right to compensation, the decision below dramatically and unfairly effects a great transfer of real property from private to public hands. These are highly important developments that will effect the nature and status of the coastline now and in the future. Joseph J. Kalo & Lisa Schiavinato, *Customary Right of Use: Potential Impacts of Current Litigation to Public Use of North Carolina's Beaches*, 6 Sea Grant L. & Pol'y J. 26, 52 (2014) ("Whether the public has the . . . right to use the State's dry sand beaches and, if that right exists, how will that affect the rights of oceanfront property owners[,] are critical questions that will shape the character and economy of coastal North Carolina.").

1. Under State Common Law, Private Dry Beaches Have Never Been Subject to Public Trust Uses

North Carolina's coast line is approximately three-thousand (3,000) miles in length.[12] Since dry beaches located landward of the mean high water line were not part of the tidelands to which the State took title upon entry to the Union, those areas were put into private ownership and subdivided long ago. *Cooper*, 779 F. Supp. 835 (noting 1938 subdivision including dry beach property). Such areas have been bought, sold, otherwise transferred, leased, taxed, and sometimes developed, as part of private parcels that extend to the mean high water mark. *Cooper*, 779 F. Supp. at 836; *Gwathmey*, 464 S.E.2d at 678.

During this time, no court decision ever applied the common law public trust doctrine to private dry beach areas, *Cooper*, 779 F. Supp. at 835. *Gwathmey*, 464 S.E.2d at 678 ("the public trust doctrine is not an issue . . . where the land involved is above water"); *Carolina Beach Fishing Pier*, 177 S.E.2d at 515-16 (noting that "[t]he 'strip of land between the high- and low-tide lines' . . . 'is reserved for the use of the public'" and recognizing that the high tide line is a "mean high water mark"); *West*, 326 S.E.2d at 617-18 (same). The State's traditional limitation of the public trust doctrine to State-owned wet beaches flows from this Court's precedent, which also recognizes the public trust doctrine on State-owned tidelands seaward of the "ordinary" high tide line. *Shively v. Bowlby*, 152 U.S. 1, 13 (1894) ("title in the soil of the sea, or of arms of the sea, below *ordinary high-water mark*, is in the king . . .

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[12] *See* https://coast.noaa.gov/data/docs/states/shorelines.pdf (last visited Apr. 17, 2017).

and that this title, jus privatum, whether in the king or in a subject, is held subject to the public right" (emphasis added; citations omitted)); *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 22-23 (1935) ("[B]y the common law, the shore 'is confined to the flux and reflux of the sea at ordinary tides.' It is the land '*between ordinary high and low-water mark*, the land over which the daily tides ebb and flow.' " (emphasis added; citations omitted)).

The lower court acknowledged the absence of state common law authority extending the public trust to private dry beaches located inland of the mean high water mark. Pet. App. A-14 to A-16. There is no other inherent common law public easement on private dry beach property.[13]

2. Under the Decision Below, N.C.G.S. § 77-20 Destroys Common Law Property Rights So As To Create Public Trust Rights on Private Beaches

In light of the state's common law tradition, private titles to dry beaches have always been like any

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[13] In the state appellate proceedings, the Town and certain amici occasionally referred to the English doctrine of customary law as a potential source of inherent public rights in dry beaches. *See generally*, David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375 (1996). The North Carolina Supreme Court has, however, specifically rejected customary law as a source of state property rules. *Winder v. Blake*, 49 N.C. (4 Jones) 332 (1857). Moreover, the Town declined to raise customary law as a defense in the trial court, (R pp 116-117, 119), or to argue it in the appellate court, and the decision below did not rely on custom; it relied on N.C.G.S. § 77-20.

other title to private land. Individual tracts can be encumbered by prescriptive easements upon proof in a court of law,[14] but until then, they are fee simple interests that include normal ownership rights, such the right to privately use the property and to exclude others, including the government, from its use.[15] *Hildebrand v. S. Bell Telephone & Telegraph Co.*, 14 S.E.2d 252, 256 (N.C. 1941).

When N.C.G.S. § 77-20 was enacted in 1998, no one understood it to change the common law or to create public rights on dry beaches.[16] It was considered to be a policy statement. Kalo, *The Changing Face of the Shoreline*, 78 N.C. L. Rev. at 1895. Since passage of N.C.G.S. § 77-20, no State court has construed the statute, much less held that it abrogates common law public trust doctrine rules.

Yet, under the decision below, N.C.G.S. § 77-20 converts the entire private dry beach coastline into a public trust area that the public may "freely use and

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[14] *See supra*, footnote 8.

[15] The Town has pointed out that people have been on and around the North Carolina shore for a long time. But the presence of people does not create public rights under the public trust doctrine. Such rights flow exclusively from the State's title to tidelands. Indeed, a mere public presence cannot even create an easement by prescription. *Dickinson v. Pake*, 201 S.E.2d 897, 900 (N.C. 1974) (public use of private land is presumed to be permissive or with the owner's consent and does not alone create rights).

[16] The text of the law states: "public trust rights in the ocean beaches *are established in the common law* as interpreted and applied by the courts of this State." N.C.G.S. § 77-20(d) (emphasis added).

enjoy," including for beach driving. Pet. App. A-12. It allows the government to use private beaches as a service road. *Id.* at A-19 to A-21. The owners cannot constrain, deny or make rules regarding public access to their dry beach land. The government has that right.[17] The government can sell vehicular access to the owners land for a profit. The owners cannot peaceably enjoy the dry beach land for their own purposes. The public has that right. Indeed, there is no principled limitation on the "public trust" activities that the public may now engage in on the Nies and others' privately owned dry beaches or on government's ability to access such land.[18] The practical result for property owners is virtually non-stop traffic (R pp 311-312), "litter, noise, bonfires, relief of bodily functions, requests for use of the bathroom and the telephone, and unauthorized use of [private] outdoor showers." *Fabrikant*, 621 S.E.2d at 23.

N.C.G.S. § 77-20 strips all dry sand owners of the right to exclude non-owners from the land, including

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[17] In the past, local coastal governments have used eminent domain proceedings to acquire access to private dry beaches for re-nourishment of adjacent state beaches, providing due process and, potentially, compensation to affected owners. This is now unlikely to occur, as N.C.G.S. § 77-20 secures the desired government access to private dry beaches by legislative fiat.

[18] In Emerald Isle, site of the Nies' property, the Town permits the public to engage in the following activities on "public trust areas": vehicle parking and driving, public alcohol consumption, and horseback riding. It decides when and under what conditions such activities may occur. Town Code §§ 5-60 - 5-66. Conversely, the Town code bars people, such as property owners, from selling anything on public trust lands. Town Code § 5-21(a). It bars owners from leaving personal property on the "public trust" land they own. *See* Town Code § 5-19.

the government, and to control or prevent objectionable activity on their property. These rights are among the "most essential" in the bundle of rights we call "private property." *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).[19] N.C.G.S. § 77-20 accomplishes this intrusion without a dime in compensation to the fee title holders.

Titles to dry beach parcels have been completely upended. Property owners pay taxes on their dry beach property and perhaps bear liability, yet they now hold their land "in trust" for public use. The owners purchased the land for private enjoyment, but it is the public and government that controls the land. Without warning in the text of N.C.G.S. § 77-20 or in common law, a coastline of separately divided and individually used and sold parcels of private dry beaches are now a uniform public trust area. Such a radical statutory change to pre-existing property rights raises serious constitutional concerns. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, 560 U.S. 702, 715 (2010) ("If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property . . . .") (emphasis deleted).

Indeed, N.C.G.S. § 77-20 not only takes all existing privately dry beaches for "public trust" uses, it ensures that additional areas of coastal land will be taken without just compensation in the future. This is because the dry sand area now subject to the public

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[19] Because of its centrality to the concept of private property, the right to exclude strangers is itself a fundamental property right that may not be destroyed without compensation. *Kaiser Aetna*, 444 U.S. at 180.

trust doctrine under the statute is not fixed; it is migratory and subject to inland shifts.

As sea levels rise and storms cause the vegetation and dunes which mark the public trust area to erode inland, more areas of private coastal property will end upon on the dry sand public trust area. *Sansotta v. Town of Nags Head*, 724 F.3d 533, 537 (4th Cir. 2013) ("Like many parts of North Carolina's Outer Banks, the Town's beaches have eroded in recent decades, some of them at a rate of approximately two feet per year for over two decades."). When this happens, parcels that have never previously part of the beach or used by the public will instantly become open for public access and use under N.C.G.S. § 77-20(d) and (e). (R pp 375-376) (Nies' testimony describing how a storm moved the dunes inland by 30 feet, creating an additional thirty feet of dry sand on their land, which the Town proceeded to use). This will "depriv[e] oceanfront property owners of a substantial right . . . without requiring compensation or proof of actual use of the property allegedly encumbered whenever natural forces cause the vegetation line to move inland so that property not formerly part of the dry beach becomes part of the dry beach." *Severance v. Patterson*, 370 S.W.3d 705, 726 (Tex. 2012).

By imposing a public trust easement on private dry beaches, N.C.G.S. § 77-20 suddenly wipes out fundamental and constitutionally protected property rights for the current land owners and for those who come to own dry sandy areas in the future. This is extraordinary land grab. The Court should not let it stand. *See Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984) (reviewing a case where a state attempted to suddenly assert a

public trust easement over all land that was tidelands at the time of statehood, regardless of present, private status).

II

THE LOWER COURT'S CONCLUSION THAT N.C.G.S. § 77-20 IS NOT A TAKING CONFLICTS WITH THIS COURT'S PRECEDENT

This Court has never directly addressed the issue of whether states can use legislation to redefine privately owned beach areas as a "public trust " area subject to public use, consistent with the Takings Clause. However, the idea conflicts with this Court's precedent.

A. The Lower Court's Decision That N.C.G.S. § 77-20 Is Not a Physical Taking Conflicts with This Court's Precedent

1. Physical Takings Law

The Fifth Amendment's prohibition against the taking of private property for public use without just compensation applies to the states through the Fourteenth Amendment. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Under this Court's jurisprudence, any governmental action that results in a physical occupation of land is considered a *per se* taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-40 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). An uncompensated physical occupation is unconstitutional "'without regard to whether the action achieves an important public benefit or has only a minimal

economic impact on the owner.'" *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32 (1987) (quoting *Loretto*, 458 U.S. at 434-35). Physical invasions of property are judged so strictly (at least in part) because they eviscerate the owner's right to exclude strangers, a fundamental property right. *Kaiser Aetna*, 444 U.S. at 176, 180.

Unconstitutional physical occupations of property may be most obvious when the government "directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002). But such direct appropriation is not necessary for a physical taking. Such a taking may also occur when the government authorizes third parties to use private property. *Nollan*, 483 U.S. at 832 (a physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed"). Such access is equivalent to an easement, and "if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Kaiser Aetna*, 444 U.S. at 180. It makes no difference if the public (or government) exercises a public access right only intermittently; it is granting of *the right* to use private land that causes a physical taking. *Nollan*, 483 U.S. at 832.

2. N.C.G.S. § 77-20 Is a Physical Taking under *Nollan* and Related Precedent

Here, N.C.G.S. § 77-20 makes dry beaches that are not subject to the public trust doctrine under common law into a public trust area available for public access, recreation and driving. The effect is

creation of an expansive public trust easement on all privately owned dry beaches—one that destroys the owners' right to exclude non-owners (or to control the time, place, and manner of any access they want to permit). The statute includes no provision for compensation, and the state courts did not infer one.

As so construed, N.C.G.S. § 77-20 conflicts with precedent, such as *Nollan*, which indicates that imposing public access on private land by fiat is a *per se* physical taking, without compensation. 483 U.S. 831-32; *see also*, *Preseault v. I.C.C.*, 494 U.S. 1, 24 (1990) (O'Connor, J., concurring) (reading *Nollan* to stand for the proposition that "a taking would occur if the Government appropriated a public easement"). Both the North Carolina appellate court and state supreme court heard this argument and rejected it. For the Nies, the decision means N.C.G.S. § 77-20 gives the public a "public trust" right to drive, park, and recreate on their dry beach property, and the Town can use the land as a road, without violating the Takings Clause.

The Court should grant the Petition to confirm that the legislative creation of a public area on private beach lands is an unconstitutional, *per se* taking, without just compensation.[20]

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[20] Commentators have long noted that the interaction between the public trust doctrine and the Takings Clause in the coastal property rights context raises important and controversial issues. *See* David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis) Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339 (2002); Sean T. Morris, *Taking Stock in the Public Trust Doctrine: Can States Provide for Public Beach Access Without Running Afoul of Regulatory Takings Jurisprudence?*, 52 Cath. U. L. Rev. 1015 (continued...)

B. The Decision Below Conflicts with Takings Cases Limiting the Legislative Redefinition of Common Law Property Rights

N.C.G.S. § 77-20 not only conflicts with this Court's physical invasion takings precedent, it is inconsistent with a line of cases holding that states cause a taking when they define away previously established common law private property rights.

Beginning with *Webb's*, 449 U.S. at 163-65, this Court has made clear that states cannot alter common law property rules so as to erase important property rights, without just compensation. In *Webb's*, the Court reviewed a statute that changed interest earned on funds deposited with state courts from private property into public funds. The Court held this was a taking, stating "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Id.* at 164. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998), the Court re-confirmed that "at least as to confiscatory regulations . . . a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." More recently, in *Stop the Beach Renourishment*, 560 U.S. at 713, the Court observed that "States effect a taking if they

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[20] (...continued)
(2003); James R. Rasband, *Equitable Compensation for Public Trust Takings*, 69 U. Colo. L. Rev. 331 (1998); John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. Davis L. Rev. 931 (2012); Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust Doctrine and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 Vt. L. Rev. 81 (1995).

recharacterize as public property what was previously private property."

The lower court's construction of N.C.G.S. § 77-20 conflicts with this strand of Takings Clause precedent. As previously noted, the common law has never identified private dry beaches in North Carolina as a public trust doctrine area open for public use. *Gwathmey*, 464 S.E.2d at 678 ("the public trust doctrine is not an issue . . . where the land involved is above water"). As the decision below notes, N.C.G.S. § 77-20 disavows this understanding, Pet. App. A-19 to A-21. In so doing, it re-characterizes private dry beach property as public trust property, without compensation. *Stop the Beach*, 560 U.S. at 713; *Phillips*, 524 U.S. at 167. Thus, even if N.C.G.S. § 77-20 can be characterized as a "modification" of state common law property rights, rather than as an explicit and affirmative grant of a public access easement on private land, it conflicts with this Court's Takings Clause precedent.

It is true that statutes may codify common law understandings that already limit private property rights without violating the Takings Clause. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-31 (1992). But that is not what happened here. Pet. App. A-14 to A-16. If N.C.G.S. § 77-20 merely codified the common law, it would recognize that public trust doctrine rights end at the mean high water mark boundary of state-owned beaches, as held by state courts. But N.C.G.S. § 77-20 now "modifies" the common law to extend public trust doctrine rights to privately owned, upland dry sand beaches. Pet. App. A-14 to A-16. This is a legislative redefinition of property

rights that wipes out private property interests recognized and protected under the common law.[21]

This Court should grant the Petition to confirm that, while state legislatures have power to modify common law rules, the exercise of that power is subject to the condition of just compensation when legislative changes destroy important, pre-existing private property rights, including the right to exclude others from private property.[22]

III

THE LOWER COURT'S DECISION THAT N.C.G.S. § 77-20 IS NOT A TAKING CONFLICTS WITH THE DECISIONS OF OTHER COASTAL STATES

Several other states besides North Carolina have considered legislation extending the public trust beach from state-owned shore areas to privately owned, upland beaches. But courts in those states have concluded that such legislation violates the Takings Clause. The decision below conflicts with that precedent.

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[21] Although states may generally have power to define the scope public trust rights in tidal areas acquired at statehood, *Phillips*, 484 U.S. at 484, this Court has never held that states may expand the geographic reach of the public trust doctrine from tidelands acquired at statehood to private inland areas, without paying just compensation.

[22] The case should then be remanded to the state courts to reconsider whether the Town's actions against the Nies' property cause a taking warranting compensation.

In *Opinion of the Justices*, 313 N.E.2d 561 (Mass. 1974), the Massachusetts Supreme Court considered the constitutionality of legislation that sought to establish a public right-of-way across privately owned dry beaches (areas lying between the mean high water mark and the highest reach of the water). The court noted that the effect was to "take easements for the benefit of the public" that "require private owners to permit affirmative physical use of their property by the public." *Id.* at 568. Noting "the interference with private property here involves a wholesale denial of an owner's right to exclude the public," *id.*, and did not provide compensation, the court held that the law was an unconstitutional taking. *Id.*

Purdie v. Attorney General, 732 A.2d 442, 447 (N.H. 1999), is similar. There, the New Hampshire legislature passed a statute that extended the boundary of the "public trust" beach from the mean high tide line to the highest water mark, again, the vegetation line. The result was to impress private dry sand areas with "public trust rights." The New Hampshire Court held this was a taking:

> the legislature went beyond [] common law limits by extending public trust rights to the highest high water mark. Although the legislature has the power to change or redefine the common law to conform to current standards and public needs [citation omitted], property rights created by the common law may not be taken away legislatively without due process of law [citation omitted]. Because [the statute]

> unilaterally authorizes the taking of private shoreland for public use and provides no compensation . . . it violates the prohibition in Part I, Article 12 of the State Constitution and the Fifth Amendment of the Federal Constitution . . . .

Id. (citing *Nollan*, 483 U.S. at 831-32).

Unlike the New Hampshire and Massachusetts courts, the court below held that legislation expanding the public trust beach area from the mean high water mark to private, inland parcels was not an unconstitutional physical taking of property. The decision below thus squarely conflicts with *Purdie* and *Opinion of the Justices*.[23] While New Hampshire and Massachusetts invalidated the uncompensated, state-wide conversion of private beach lands into a public (trust) area, North Carolina sanctioned this result, eviscerating rights and destabilizing titles along the length of the State's Atlantic coast.

The Court should grant the Petition to resolve the conflict. *Webb's*, 449 U.S. at 159 (noting probable jurisdiction due to a conflict among state courts on a taking issue).

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[23] *See also Bell v. Town of Wells*, 557 A.2d 168, 176-78 (Me. 1989) (a statute expanding the nature of permitted public trust rights on private shore lands caused a taking).

CONCLUSION

The petition for writ of certiorari should be granted.

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