No. 09-820

In the
Supreme Court of the United States

MARY D. SHARP,

Petitioner,

v.

UNITED STATES OF AMERICA, on its own behalf and as trustee on behalf of the Lummi Nation, and THE LUMMI NATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE WASHINGTON STATE FARM BUREAU IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the common law doctrine of accretion and erosion limits a tideland owner's right to claim title to upland property to land that has either actually eroded or is actually submerged beneath tidal waters?

2. Whether, under federal property law, the existence of a lawful, man made structure that stops the tide from overflowing or eroding upland property establishes the boundary between the tideland and upland?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation and the Washington Farm Bureau submit this brief amicus curiae in support of Petitioner Mary D. Sharp.[1]

Pacific Legal Foundation (PLF) was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys participated as lead counsel in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and participated as amicus curiae in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). Because of its history and experience with regard to issues affecting private property, PLF believes that its

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

perspective will aid this Court in considering the petition.

The Washington Farm Bureau (WFB) is an organization based in Washington state comprised of more than 38,000 active member families. WFB is organized to speak out on issues of concern to rural America. Formed in 1920, as a part of the American Farm Bureau Federation, WFB is the largest trade association in Washington. Because many WFB members make their living by cultivating crops on their land, the organization is concerned about economic issues surrounding land use and property rights law in Washington. Washington's agricultural industry under normal conditions is an industry with low profit margins. Limitations on property rights, especially in areas designated for agricultural use, increase production costs and further lower profit margins and the viability of WFB members' businesses. WFB takes particular interest in the outcome of this case due to the impact that the Court's decision could have on the viability of commercial agricultural land in Western Washington.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision created a new rule of federal property law, holding that an owner of tideland property has "a vested right in the potential gains" resulting from the unimpeded erosion of upland property. *United States v. Milner*, 583 F.3d 1174, 1188 (9th Cir. 2009). The Ninth Circuit determined that this newly adopted property right was superior to the upland property owners' right to protect their property from erosion. *Id.* at 1189-90. Thus, the Ninth Circuit concluded that the coastal property owners had trespassed on the "interest in the neighboring

tidelands" by maintaining lawful shore defense structures on their own property, and ordered the upland property owners to remove the shore defense structures. *Id.* at 1189-90.

The Ninth Circuit's decision is particularly objectionable—and particularly appropriate for review—because it departs from long-standing common law rules. In particular, it conflicts with the doctrines of accretion and erosion, which preserve dry land that is not reached by the tides for use by the upland owner, common law rules that allow property owners to protect their land, and violates this Court's policy of avoiding rules that would unsettle titles. Amici urge this Court to grant the petition to reaffirm the principle that an upland property owner has the right to protect her land from erosion and retains title to all land not actually submerged by tidal waters.

The decision will have profound impacts locally and nationally. This case is of particular importance to agriculture in Washington's Skagit Valley, which produces hundreds of millions of dollars of revenue annually and provides thousands of jobs. A third of this agricultural land is dependent on shore defense structures like dikes and tide gates which keep salt water from inundating the fields. The livelihood of many Washington families depend on the agricultural industry. However, this case is not just a parochial matter. If left unreviewed, the Ninth Circuit's rule has the capacity to unsettle the expectations of shoreline property owners across the nation. This Court's review is necessary to prevent the potential upheaval of shoreline property rights.

ARGUMENT

Coastal shorelines move. *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 189 (1890). Based on a variety of conditions, shoreline property can grow, shrink, or remain stable for periods of time. *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10, 11-18 (1935). The common law, as interpreted and applied by our courts, has dealt with the changing conditions on shorelines in a remarkably consistent manner. *County of St. Clair v. Lovingston*, 90 U.S. (23 Wall) 46, 66-68 (1874). Put simply, the boundary between the generally public tideland and private uplands advances or retreats along with gradual changes to the shoreline. *Id.* at 67.

The purpose of this doctrine is to provide stability to shoreline property rights. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 382 (1977). The doctrine assists courts in determining what constitutes upland property (land that is "'dry and maniorable,' that is, not reached by the tides") and what constitutes the tideland ("land over which the daily tides ebb and flow"). *Borax*, 296 U.S. at 22-24 (quoting Lord M. Hale, *De Jure Maris et Brachiorum ejusdem*, cap. vi (1667)). Until the Ninth Circuit's decision, this rule has had the benefit of "uniformity and certainty, and . . . eas[e] of application." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 481 (1988) (quoting *Cobb v. Davenport*, 32 N.J.L. 369, 7 (1867)).

However, in *Milner*, the Ninth Circuit abandoned the common law's distinction between dry and wet land, adopting a new rule that awards the tideland owner title to all upland property that could potentially be eroded or overflowed in the future. *Milner*, 583 F.3d at 1189-90. Applying this new rule, the Ninth Circuit

held that a shore defense structure that was lawfully constructed on upland property and doing precisely what it was designed to do—protecting upland property from erosion—trespassed on the tideland owner's right to all upland property that could erode if the shoreline was left in a natural, undeveloped state. *Id.* at 1189-90. This decision raises an important issue of federal common law property rights because it threatens to unsettle the rights of shoreline property owners across the nation and departs from federal common law.

I

THE NINTH CIRCUIT'S DECISION RAISES AN IMPORTANT ISSUE BECAUSE IT THREATENS SHORELINE PROPERTY ACROSS THE NATION

Reduced to its core, the Ninth Circuit's decision holds that a tideland owner has a right to force a shoreline property owner to remove any structure that impedes the flow of water over the uplands. This rule has broad and untenable consequences. It exposes countless tracts of private shoreline property across the nation to erosion and inundation of tidal waters. Most immediately threatened is valuable and traditional farmland in Skagit Valley in Western Washington. Indeed, the decision threatens to upset (previously) well-settled shoreline property rules nationwide because state courts regularly look to the federal common law for guidance on the rights of shoreline property owners.

A. The Ninth Circuit's Decision Threatens To Expose Private Property to Erosion and Inundation

The Ninth Circuit's decision allowing tribal tideland owners to remove private erosion barriers poses a clear and present danger to one of the most productive agricultural areas in Western Washington—the Skagit Valley. Prior to western settlement, the deltas and floodplains of the Skagit and Samish Rivers of the Skagit Valley were ill-suited for agriculture. Although the valley was extremely fertile, saltwater intrusion rendered the soil unusable for nearly all crops.[2] In the mid-1800s, settlers began clearing and draining the lowlands and constructing dikes to protect the newly created agricultural land.[3] By 1884, the settlers constructed 150 miles of dikes along the seaward edge of the delta to prevent saltwater intrusion, and a system of tide gates, sloughs, and pumps to drain high volumes of surface water that accumulated behind the dikes.[4] This infrastructure continues to provide desperately needed flood control to protect the region's commercial agriculture.

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[2] *See* Skagit County Planning and Permitting Center, Draft Programmatic Environmental Impact Statement: Development of a Critical Areas Ordinance for Application to Designated Agricultural Natural Resources Lands (Ag-NRL) and Rural Resource Natural Resource Lands (Rrc-NRL) Engaged in Ongoing Agricultural Activity, Volume 1 at 5-13 (Skagit County, Wash. Feb. 2003) (Skagit Draft EIS).

[3] Skagit Draft EIS, Volume I at 6-2-5.

[4] Skagit Draft EIS, Volume I at 6-3.

Currently, the Skagit Valley contains over 700 farms on 93,000 acres of arable land.[5] The region's agriculture contributes significantly to Washington State's economy. Skagit County is the second most productive agricultural county in Western Washington with revenues of approximately $256 million. *See* U.S. Department of Agriculture 2007 Census, Skagit County.[6] The industry also generates over $143 million in secondary revenue through related industries and agritourism, such as the Tulip Festival, Harvest Celebration, and County Fair.[7] County agriculture directly employs over 3,300 individuals and supports secondary employment of 2,350 for a total of 5,650 jobs.[8] The importance of these jobs is underscored by the fact that this employment represents 8% of the entire County workforce, which is 5% higher than the same measure for Washington State as a whole.[9] But continued production in the valley depends on the network of dikes and drains. *Swinomish Indian Tribal Cmty. v. W. Washington Growth Mgmt. Hearings Bd.*, 166 P.3d 1198, 1204 (Wash. 2007).

Not everyone applauds the Skagit Valley agricultural system. Swinomish tribal interests have

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[5] Skagit Draft EIS, Volume I at 6-2.

[6] *Available at* http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/County_Profiles/Washington/cp53057.pdf (last visited Feb. 4, 2010).

[7] Skagit Draft EIS, Volume I at 4-3-4.

[8] Skagit Draft EIS, Volume I at 4-3-4.

[9] Skagit Draft EIS, Volume I at 4-3.

targeted the valley's agricultural lands for litigation, with the goal of removing dikes and tide gates to restore the area to its pre-settlement condition. If they were to succeed, approximately a third of this land (30,000 acres) could be inundated at high tide.[10]

From 2002 to 2007, the Swinomish unsuccessfully used Washington's growth management appeals process to try to force Skagit Valley farmers to return productive agricultural land to its pre-settlement condition. *Id.* at 1206. Then, in 2008, the Swinomish Tribe filed a lawsuit with the Federal District Court for the Western District of Washington alleging that the County's repair of three failing tide gates violated the Clean Water Act and Endangered Species Act. *Swinomish Indian Tribal Cmty. v. Skagit County Dike Dist. No. 22*, 618 F. Supp. 2d 1262 (W.D. Wash. 2008). The district court granted summary judgment in favor of the tribe, *id.* at 1271, after which the County settled the case by agreeing to remove the tide gates and allow 400 acres of private agricultural land to be inundated by sea water.

The Ninth Circuit's decision provides a new and potent weapon for tribal forces who would like to see agriculture end in the rest of the Skagit Valley. The 1855 Treaty of Point Elliott, Jan. 22, 1955, 12 Stat. 927, reserved to certain Washington tribes, including the Lummi and Swinomish, the right to fish in their "usual and accustomed grounds and stations."[11]

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[10] Skagit Draft EIS, Volume I at 5-13.

[11] Amici Curiae agree with Petitioner's argument that the Ninth Circuit erred in concluding that under the "equal footing doctrine" the federal government reserved ownership of the tidelands in

(continued...)

Milner, 583 F.3d at 1184. The Swinomish Tribe's usual and accustomed fishing grounds includes the Skagit River and its tributaries. *United States v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1978). Thus, when the Ninth Circuit concluded that "possession of the tidelands was 'a necessary prerequisite to the enjoyment of fishing,'" *Milner*, 583 F.3d at 1184 (quoting *United States v. Stotts*, 49 F.2d 619, 620-21 (W.D. Wash. 1930)), it opened the door for the Swinomish to assert "a vested right in the potential gains" of up to 30,000 acres of Skagit Valley farmland that would result from removal of farmers' dikes, culverts, and tide gates. *Milner*, 583 F.3d at 1188. The Court should grant review to address the important question as to whether tideland owners have a right to dismantle vital levee systems so as to allow the tide to flow in, and increase their own area of control.

B. The Ninth Circuit's Decision Will Expose Coastal Property Owners to Lawsuits Seeking To Upset Previously Settled Rights Under State Law

The impact of the Ninth Circuit's decision is not limited to Washington. It threatens to undermine shoreline private property established and existing nationwide under previously well-settled state law. Major urban centers across the nation, such as

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[11] (...continued)
trust for the Lummi Tribe. If the decision is not reviewed, this conclusion will support a Swinomish claim to private agricultural property protected by dikes and tide gates.

New Orleans,[12] Seattle,[13] and San Jose,[14] for example, are protected from erosion and inundation by a system of levees and seawalls. Under the Ninth Circuit's rule, tideland owners—whether tribal or public—could demand removal of such defense structures so as to allow the tide to migrate freely.

The foundation for such an attack on coastal private property is already in place. For years, legal commentators have argued for a change in the law that would allow citizen suits under the doctrine of accretion and erosion or the public trust doctrine to force property owners to remove lawful shore defense structures. *See, e.g.*, Benjamin Longstreth, *Protecting "The Wastes of the Foreshore": The Federal Navigational Servitude and its Origins in State Public Trust Doctrine*, 102 Colum. L. Rev. 471, 496-500 (2002) (proposing that the federal navigational servitude may be used to impose environmental conditions on private

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[12] *See* Laurie A. Morin, *A Tale of Two Cities: Lessons Learned from New Orleans to the District of Columbia for the Protection of Vulnerable Populations From the Consequences of Disaster*, 12 U. D.C. L. Rev. 45, 50 (2009) (New Orleans is shaped like a bowl with elevations ranging from 12 feet above sea level to 9 feet below.).

[13] S.L. Kramer & M.O. Eberhard, *Seismic Vulnerability of the Alaskan Way Viaduct: Summary Report* at 2 (prepared for Washington State Dept. Of Transportation and U.S. Dept. Of Transportation July 1995). *Available at* http://www.wadot.wa.gov/NR/rdonlyres/6399A235-8AC2-453B-A1EF-4CE55F4AFFEC/0/SeismicVulnerabilityoftheViaduct_TRAC_July1995.pdf (last viewed Feb. 4, 2010).

[14] United States Department of the Interior, United States Geological Survey, *Delta Subsidence in California, The Sinking Heart of the State* (USGS, FS-005-00 April, 2000). *Available at* http://ca.water.usgs.gov/archive/reports/fs00500/fs00500.pdf (last viewed Feb. 4, 2010).

shoreline property); James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 Md. L. Rev. 1279, 1361-84 (1998) (proposing that the public trust be used to impose a rolling easement that would move with the extent of the high water mark, forcing property owners to remove bulkheads when the tide intersects with them). Until now, however, anti-seawall forces had no concrete legal mechanism to anchor their crusade.

The Ninth Circuit's published decision provides that mechanism. Although the decision is one of federal law, this will not limit its practical scope because state courts often follow federal common law in demarcating the relative rights and obligations of tideland and upland private property owners. *See, e.g.*, *Brainard v. State*, 12 S.W.3d 6, 17-19 (Tex. 1999); *State of California ex rel. State Lands Comm'n v. Superior Court*, 900 P.2d 648, 656 (Cal. 1995); *Borough of Wildwood Crest v. Masciarella*, 240 A.2d 665, 668-69 (N.J. 1968). Thus, the Ninth Circuit's recognition of a right in tideland owners to the uninterrupted migration of the tide gives advocates of coastal "retreat"—removal of private coastal structures—a ready vehicle to wage a litigation campaign to force shoreline property owners to remove functioning and effective shore defense works from the shoreline.

This threat is not hypothetical. In *Phillips Petroleum*, this Court concluded that Mississippi owned all the land under nonnavigable tidal waters, which meant that its tidelands were subject to the public trust doctrine. *Phillips Petroleum*, 484 U.S. at 476, 479-80. The decision authorized states to break a chain of title that granted upland property owners a

right to nonnavigable tidelands. *Id.* at 485 (O'Connor, J. dissenting). Justice O'Connor, joined by Justice Stevens and Justice Scalia, expressed concern over the "grave injustice to be done to innocent property holders in coastal States." *Id.* at 494. While it was not clear how many property owners would actually be targeted for litigation, Justice O'Connor noted that New Jersey's adoption of an expanded definition of public trust resulted in the state claiming title to hundreds of properties. *Id.* at 493 (O'Connor, J. dissenting).

> "Due to this attempted expansion of the [public trust] doctrine, hundreds of properties in New Jersey have been taken and used for state purposes without compensating the record owners or lien holders; prior homeowners of many years are being threatened with loss of title; prior grants and state deeds area being ignored; properties are being arbitrarily claimed and conveyed by the State to persons other than the record owners; and hundreds of cases remain pending and untried before the state courts awaiting processing with the National Resource Council."

Id. at 493 (quoting Alfred A. Porro, Jr. & Lorraine S. Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 Seton Hall L. Rev. 323, 325-26 (1972)).

The Ninth Circuit's decision—covering the coastal states of California, Oregon, Washington, and Hawaii —poses an even greater threat to private property. Any shoreline areas governed by federal common law (or state law following it) are now subject to the right of tideland owners to demand destruction of lawful, pre-existing protective barriers so that the tide can

flow inland and they can acquire title over new areas. The decision therefore raises an important issue worthy of this Court's review.

II

THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE FEDERAL COMMON LAW OF SHORELINE OWNERSHIP, AS ARTICULATED BY THIS COURT

A. The Ninth Circuit's Recognition of a Right in Tideland Owners To Acquire All Land That Would Be Touched by an Unimpeded Tidal Flow Is Inconsistent with the Common Law

The Ninth Circuit claimed that its decision—giving a tideland owner a vested property interest in the unimpeded erosion of upland property —stemmed from a need to recognize a reciprocal right in the tideland owner equivalent to the upland owner's right to accretion. *Milner*, 583 F.3d at 1189-90. Accretion, of course, allows the owner of property upland of the waterline to acquire new land when the tide recedes toward the sea. The Ninth Circuit apparently believed the federal common law authorized it to categorically enforce a converse principle; *i.e*, that a tideland owner has a per se right to gain title over any uplands that might be touched by the tide if there were no barriers. *Id.* at 1189-80. But there is no basis for this in the federal common law.

The Ninth Circuit purported to derive its decision from language in *County of St. Clair* stating that "[t]he

riparian right to future alluvion[15] is a vested right." This, the Ninth Circuit claimed, gave rise to a correlative "vested" right in tideland owners to future tideland "gains" caused by unimpeded erosion. *Milner*, 583 F.3d at 1187-88 (citing *County of St. Clair*, 90 U.S. (23 Wall) at 66-68).

But, when read in context, *County of St. Clair* offers no support for the Ninth Circuit's decision. In *County of St. Clair*, the U.S. government awarded veterans three 100-acre militia tracts which bordered the Mississippi River on the west. *Id.* at 48-51. The grants designated the river bank as the waterward boundary of the parcels. *Id.* at 48-51. Over time, substantial land accumulated due to accretion on the river bank resulting from dikes that had been constructed upriver, and the County of St. Clair brought suit, claiming title to the newly formed land. *Id.*, at 51-52. The question presented asked whether a riparian property owner had title to alluvial soil. *Id.* at 68. And on this issue, the Court held that it was immaterial whether a man-made structure caused the shoreline to advance, retreat, or remain the same:

> If there be a gradual loss, [the riparian owner] must bear it; if, a gradual gain, it is his. The principle applies alike to streams that do, and to those that do not overflow their banks, and where [dikes] and other [defenses] are, and where they are not, necessary to keep the water within its proper limits.

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[15] Alluvium (or alluvion) is material, such as clay, silt, or gravel, that is deposited by running water. *Black's Law Dictionary* 77 (7th ed. 1999).

Id. at 69; *see also id.* at 66 ("Whether the flow of the water was natural or affected by artificial means is immaterial."). The Court stated that, when accretion occurs, "[t]he riparian right to future alluvion is a vested right." *Id.* at 68. Thus, what *County of St. Clair* holds is that actual, existing conditions on the shoreline—natural or man-made—determine the property boundary.

The Ninth Circuit read *County of St. Clair* to create a new right that gives the upland property owner title to all *potential future* accretion, not just existing accretion. *Milner*, 583 F.3d at 1189-90. According to the Ninth Circuit, this new right to future accretion includes a right to demand that the shoreline be kept in a natural state, free of any artificial shore defense structures on neighboring tracts, in order to maximize the potential benefits to his own property. *Id.* at 1189-90. Whatever else can be said about this rule, it does not arise from this Court's decision in *County of St. Clair*. *See Western Pac. Ry. Co. v. Southern Pac. Co.*, 151 F. 376, 398-99 (9th Cir. 1907) ("The controversy in [*St. Clair County*] did not even remotely relate to the right to future alluvion, but related only to alluvion then existing. We cannot think that the court meant to announce the doctrine that the right to alluvion becomes a vested right before such alluvion actually exists."); *Humble Oil & Refining Co. v. Sun Oil Co.*, 190 F.2d 191, 194 (5th Cir. 1951) (At common law, "no riparian owner has a vested right in the general law of accretion, except as to the alluvion that was added to the shore[.]"). The Ninth Circuit's adoption of a vested right to any potential future gains resulting from the unimpeded erosion of upland property conflicts with the common law, as articulated by *County of St. Clair* and progeny. Thus,

Milner effectively created a new rule of federal property law which should be reviewed by this Court.

B. The Ninth Circuit's Decision Is Inconsistent with the Common Law Because It Eviscerates a Landowner's Right To Protect Her Property from Erosion

The Ninth Circuit's decision is inconsistent with common law principles not only in holding that a tideland owner has a right to future erosion, but also in failing to uphold the right to protect private property. The Ninth Circuit did recognize that the common law grants a coastal property owner "the right to build on their property and to erect structures to defend against erosion and storm damage," subject to reasonable regulation. *Milner*, 583 F.3d at 1189. But it then proceeded to eviscerate that right by holding that a shoreline property owner could not interfere with a tideland owner's newly created right to the unimpeded erosion of neighboring upland property. *Id.* at 1189-90. This decision conflicts with rules allowing riparian property owners to maintain their dry land by erecting structures halting the tides.

1. The General Right To Protect Private Property from Erosion and Overflow Is Well-Settled

It is well established that, under the common law, a property owner has a right to defend his property against the elements. *See Cubbins v. Mississippi River Comm'n,* 241 U.S. 351, 363-64 (1916) (It is "universally recognized" that the common law entitles shoreline owners "to construct works for their own protection."); Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: the Rights of Littoral Owners in the Twenty-First Century*, 83 N.C. L. Rev. 1427, 1490 (2005) (At common law, "[e]ach landowner had the right to erect structures to protect her land from the ravages of the sea[.]"). And there is nothing in the common law suggesting that this right is inferior to a neighboring property owner's right to gains (through erosion or accretion) against an abutting property. *Cubbins*, 241 U.S. at 364-65 (A property owner whose interest is affected by a lawful shore defense structure has "no cause of complaint."). To the contrary, the common law has always made the right to protect one's property from harm paramount. *Id*; *Pechacek v. Hightower*, 269 P.2d 342, 344 (Okla. 1954) (Riparian owner has the absolute right to construct necessary defense structures to maintain or restore a bank without liability to other riparian owners.); *Katenkamp v. Union Realty Co.*, 59 P.2d 473, 473-74 (Cal. 1936) (A coastal property owner has the right to erect reasonable defense structures to protect his land from inroads of the sea.); *Cass v. Dicks*, 44 P. 113, 115 (Wash. 1896) (A neighboring land owner has no right to prevent a property owner from constructing defense structures to protect his land from overflow). The Ninth Circuit reversed the traditional order, making

private property rights in productive uplands inferior to natural forces, like the tide.

2. A Shoreline Owner Is Entitled to Land Protected from Innundation and Erosion by Lawfully Constructed Defense Structures

The common law right to defend property from the tide entails a correlative right to own the dry land maintained by the shoreline defense structures—the very right the Ninth Circuit's decision has now repudiated in favor of perpetual erosion. Prior decisions, one early and one in the modern era, provide a good example of how this Court has rejected a tideland owner's claim to land that is protected from innundation by lawfully constructed defense structures.

First, the early case: *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836). A large portion of New Orleans included lands made up of alluvion from the Mississippi River. *Id.* at 717. The city constructed levees to protect the land from being overflowed by the Mississippi. *Id.* at 717. If it were not for the levees, the City of New Orleans and much of the countryside would be submerged and uninhabitable. *Id.* at 717-18. The United States filed a petition claiming ownership of the alluvial lands. *Id.* at 663, 711. This Court rejected the United States' petition, holding that, as a riparian proprietor, New Orleans had a right to the gains in alluvial land resulting from its construction of levees. *Id.* at 718, 737. The fact that the levees were man-made structures had no impact on the Court's analysis.

But the Ninth Circuit has come to the opposite conclusion. It holds that the existence of protective structures divests the dry upland owner of any right to own the land kept dry by the structures.

Over a century after *County of St. Clair* and *New Orleans*, this Court reaffirmed the common law principle that a shoreline property owner is entitled to dry land created by a shore defense structure. In *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273 (1982), the United States, as the upland owner, erected a jetty off the coast of California that resulted in the creation of new land due to accretion. As the owner of the tidelands, California claimed title to the accreted land. This Court, however, concluded that as a matter of federal property law "accretions of *whatever cause* belong to the upland owner." *Id.* at 288 (emphasis added); *see also Alexander Hamilton Life Ins. Co. of America v. Gov't of the Virgin Islands of the United States*, 757 F.2d 534, 546 (3d Cir. 1985). The existence of an artificial shore defense structure was immaterial to the decision.

Both *New Orleans* and *California ex. rel. State Lands* show that a lawful shore defense structure is considered part of the actual, existing conditions of the shoreline. That is, such a structure—not hypothetical erosion—establishes the boundary of the tideland owner's interest. The common law simply does not grant a tideland owner an interest in the dry land that is created or protected by a shore defense structure. Instead, ownership of tidelands has always been limited to land that is actually beneath tidal waters. *See, e.g.*, *Borax*, 296 U.S. at 22-23; *Appleby v. City of New York*, 271 U.S. 364, 381 (1926); *Shively v. Bowlby*, 152 U.S. 1, 57 (1894); *Illinois Central R. Co. v. Illinois*,

146 U.S. 387, 435 (1892); *Knight v. United Land Ass'n*, 142 U.S. 161, 183 (1891); *Hardin v. Jordan*, 140 U.S. 371, 381 (1891); *McReady v. Virginia*, 94 U.S. (4 Otto) 391, 394 (1876); *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 65 (1873); *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 477-78 (1850).

The Ninth Circuit departed from the common law, as articulated by this Court, when it created a right that entitled tideland owners to force the removal of a lawful shore defense work for the sole purpose of expanding the reach of the tides.[16] This departure justifies this Court's plenary review.

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[16] The Ninth Circuit's new rule is also inconsistent with the recognized policy underlying the doctrine of accretion and erosion, which provides the upland property owner with the gains from accretion as *de minimis* reciprocal consideration for having to bear the burden of loss due to erosion or the cost of defending his property against erosion:

> And as to lands gained from the sea, either by alluvion, by the washing up of land and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water-marks; in these cases the law is held that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex*; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss.

Blackstone, William, 2 Commentaries on the Laws of England, The Rights of Things (Oxford Claredon Press 1765-69) 261-62.

CONCLUSION

The Court should grant the Petition.

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Respectfully submitted,

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