No. 02-1304

IN THE
Supreme Court of the United States

ESPLANADE PROPERTIES,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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QUESTION PRESENTED

Amici curiae address only the second question presented by the Petition:

Whether the "public trust doctrine" articulated by the City of Seattle in this case as justification for denying all economically productive use of Petitioner's property constitutes a "background principle[]" of property law, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029 (1992), sufficient to preclude consideration of Petitioner's claim under the Fifth Amendment's Takings Clause.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a public interest law and policy center with supporters in all 50 states, including many in the State of Washington. WLF regularly appears in legal proceedings before federal and State courts to defend the principles of free enterprise and limited government. WLF has appeared before this Court in numerous cases involving Fifth Amendment regulatory taking claims. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 5687 (1999); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). WLF is representing a South Carolina landowner whose regulatory takings claim were before the Court last year and are now before the South Carolina Supreme Court on remand. *McQueen v. South Carolina Coastal Council,* 340 S.C. 65 (2000), *vacated and remanded for reconsideration in light of Palazzolo v. Rhode Island,* 533 U.S. 943 (2001). Mr. McQueen's regulatory taking claim has been met with a "public trust doctrine" defense almost identical to the one raised herein.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study,

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that if the Ninth Circuit's decision is allowed to stand, governments seeking to avoid regulatory taking claims will have been handed a recipe for ensuring that all such claims are defeated. It is uncontested in this case that Petitioner paid substantial sums for its property and, as a result of regulations imposed by the City of Seattle, has been denied all economically productive use of that property. Nonetheless, it has been denied all compensation for its loss on the ground that allowing Petitioner to develop its land would cause some amount of environmental harm. *Amici* do not dispute that government has the right to invoke an environmental rationale as the basis for prohibiting a landowner from developing his property. Nonetheless, when the forms of development thus blocked have been approved for numerous similarly situated landowners, *amici* believe that the landowner is entitled to be compensated for his losses. *Amici* oppose efforts by governments to latch onto a newly-discovered "public trust doctrine" as a means of avoiding compensation and thereby "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

Amici have no direct financial interest in the outcome of this case. They are filing due solely to their interest in protecting the private property rights of all Americans. *Amici* are filing this brief with the consent of both parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby adopts by reference the Statement of the Case contained in the Petition.

In brief, Petitioner Esplanade Properties ("Esplanade") owns property along the shore of the harbor of Respondent City of Seattle. The land is classified as first class (*i.e.*, urban) tidelands; it is dry for half of the day during low tides and is submerged in water for the other half of the day during high tide.

Esplanade purchased its property in 1991 for $40,000, with plans to develop the property as residential housing. Esplanade's chain of title dates back to 1906, when its predecessor in interest purchased the property from Seattle. During the past century, Seattle's tidelands have been extensively developed, transforming Seattle into one of the leading port cities in the nation. Indeed, it was precisely to encourage such development that Seattle sold off much of its tidelands.[2]

At the time the 1991 purchase, Esplanade's property was zoned SF 7200, meaning that the only permissible

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[2] Appendix F to the Petition is an authoritative history of policies adopted by the State of Washington to encourage development of the State's tidelands. Kenan R. Conte, *The Disposition of Tidelands and Shorelands: Washington State Policy 1889-1982,* Nov. 1982. There is no serious dispute of Conte's conclusions: the Washington legislature at the turn of the 20th century adopted a policy of encouraging the sale of tidelands into private hands, a "policy which would facilitate the growth and development which the State depended on." Pet. App. F-5.

development was single-family residential housing, medium density. Pet. App. C-2. The property was also subject to the state Shoreland Management Act (SMA), RCW 90.58, which had been adopted by the Washington legislature in 1972 to control shoreland development. Also, Seattle had adopted regulations (Seattle's Shoreland Master Program, or "SSMP") to implement the SMA. As the district court noted, the SSMP as of 1991 "seemingly allowed above-water residential construction" on Esplanade's property. Pet. App. C-2.

Accordingly, soon after purchasing its property Esplanade submitted a plan to Seattle to construct nine above-water residential houses. But by 1993, it became increasingly clear that Seattle would not permit any houses to be built on the property. Seattle zoning regulations require single-family homes to have on-site parking, but Seattle interpreted the SSMP as prohibiting parking built over water in a residential zone. *Id.* That interpretation prohibited any residential development, since it obviously was not possible to comply both with a rule *requiring* on-site parking and a rule *prohibiting* on-site parking. Moreover, that interpretation effectively prohibited *any* economically beneficial use of the property, because the property was zoned for residential uses only. Esplanade continued to seek approval of its development plans for several more years, but those efforts proved fruitless. In 1998 Seattle canceled Esplanade's development application on the ground that Esplanade had failed to address several design issues raised by the City -- most prominently, the parking issue. *Id.* at C-4 - C-5.

Esplanade thereafter filed an inverse condemnation suit against Seattle in state court, seeking to recover damages allegedly inflicted by Seattle's regulation of its property. The case was later removed by Seattle to federal court. The federal district court initially granted Seattle's motion for summary judgment on Esplanade's substantive due process claims, holding that the only recourse open to Esplanade was a taking claim under the Fifth Amendment to the U.S. Constitution and Art. I, § 16 of the Washington Constitution. *Id.* D-1 - D-6.

On October 31, 2001, the district court granted summary judgment to Seattle on the taking claims. *Id.* C-1 - C-21. First, the court concluded that Esplanade had failed to establish that Seattle's actions were the "proximate cause of its injury." *Id.* C-7 - C-10. That conclusion was based on the court's findings that: (1) Seattle's ruling that on-site parking was both required and prohibited was based on its "reasonable interpretations of the SSMP," *id.* C-8; (2) the development project was not "feasible" because it could never have complied with other provisions of the SMA and the SSMP, *id.* C-8 - C-9; and (3) the project was not "feasible" because Esplanade did not show that it could have raised the funds necessary to complete the project. *Id.* at C-10.

Second, the court articulated an "alternative basis" for denying Esplanade's taking claim: the "public trust doctrine" -- which the court deemed to be part of the "background principles of Washington law" -- barred Seattle and the State of Washington from approving the development project, even if they had been inclined to approve it. *Id.* C-11. The court stated that the public trust doctrine "'prohibits the State from disposing of its interest in the waters of the state in such a

way that the public's right of access is substantially impaired.'" *Id.* C-13 (quoting *Weden v. San Juan County,* 135 Wn. 2d 678, 698-99 (1998)). While conceding that the public trust doctrine as it existed in the early part of the 20th century would not have prohibited Esplanade's development, the court held that that doctrine has been modified in recent years, particularly by adoption of the SMA in 1971. *Id.* C-15 - C-16. "Washington courts have, accordingly, recognized that whatever public trust doctrine existed prior to the enactment of the SMA has been superceded and the SMA is now the declaration of that doctrine." *Id.* C-15. The court held that Esplanade's Takings Clause claim was barred by the SMA because the SMA was enacted before Esplanade purchased its property:

> Esplanade's historical arguments would be more germane had it bought the property before 1971 and was challenging the effects of the SMA itself. Such a scenario would have made it analogous to the facts of *Lucas*. But a crucial difference between *Lucas* and this case is that *Lucas* was challenging a new statute which, he alleged, deprived him of reasonable use of his property. The Supreme Court therefore addressed whether "background principles" of South Carolina law would have precluded the uses anyway. These are not the facts presently before the court. Esplanade purchased the property in 1991, not 1891, and was thus subject to the limitations imposed by the public trust doctrine as codified in the SMA.

Id.

The court went on to conclude that Esplanade's proposed development was incompatible with its conception of the "modern" public trust doctrine. The court held that the proposed development would interfere with fishing and recreational use of Esplanade's property by the general public; in particular, the court noted that the property was just 700 feet away from a Discovery Park, a public recreation area. *Id.* C-19 - C-20. Because the proposed development was incompatible with this background principle of property law, the court concluded, Seattle's refusal to permit Esplanade to develop its property could not be deemed a regulatory taking for which compensation was required.

The Ninth Circuit affirmed. *Id.* A-1 - A-16. While stating that the public trust doctrine "has always existed in Washington," *id.* A-13, the Ninth Circuit admitted that the current conceptions of the doctrine are far broader than in decades past. In particular, the appeals court recognized "a long history 'favoring the sale of tidelands and shorelands,' resulting in the privatization of approximately 60 percent of the tidelands and 30 percent of the shorelands originally owned by the state." *Id.* (quoting *Caminiti v. Boyle,* 752 P.2d 989, 996 (Wash. 1987)). The court stated that the public trust doctrine had broadened in more recent years following adoption of the SMA in 1971; the court stated that adoption of the SMA evidenced the Washington legislature's determination that "'unrestricted construction on the privately owned or public owned shorelines . . . is not in the best public interest.'" *Id.* (quoting RCW 90.58.020). The court held that the public trust doctrine is "reflected in part in the SMA" and "ran with the title to the tideland properties and alone precluded the shoreline residential development proposed by Esplanade." *Id.* A-13 - A-14.

The appeals court held that development of Esplanade's property was inconsistent with the public trust doctrine and thus impermissible, because it would interfere with the public's use of the property for fishing and general recreation. *Id.* A-16. The court did not discuss the fact that Esplanade's chain of title predated 1971, nor did it discuss whether this Court's decision in *Palazzolo* affected the appeals court's determination that the 1971 SMA constituted a "background principle of property law" for purposes of evaluating Esplanade's Takings Clause claim.

In light of its ruling with respect to the public trust doctrine, the Ninth Circuit found it unnecessary to address the district court's alternative grounds for dismissal of the Takings Clause claim: that Esplanade failed to establish that its damages were proximately caused by Seattle's actions. *Id.* A-11.

REASONS FOR GRANTING THE PETITION

This case raises property rights issues of exceptional importance. Seattle insists, and the lower courts agreed, that it is absolved from any Takings Clause liability in this case despite the largely uncontested evidence that its regulation of Esplanade's property has eliminated all economic value from the property. The Ninth Circuit's sole rationale for that conclusion was that the modern version of the "public trust doctrine" -- which the appeals court found to preclude all development of Esplanade's property -- constitutes a "background principle[]" of property law of the type that *Lucas* and *Palazzolo* deemed sufficient to defeat a Takings Clause claim. Yet, as the lower courts candidly admitted, this modern version of the public trust doctrine dates back to

1971 at the earliest; it seemingly permitted residential development of Esplanade's property until Seattle ascribed a contrary interpretation to the SMA and the SSMP *after* Esplanade had filed its development application; and it was never articulated by a Washington court until 1987 at the earliest, if then.

Because Esplanade's chain of title to the property predates by at least 65 years the development of this modern version of the public trust doctrine, there is considerable tension between *Palazzolo* and the Ninth Circuit's determination that the modern public trust doctrine constitutes a background principle of property law sufficient to defeat Esplanade's regulatory taking claim. As the Court explained in *Lucas,* regulations that prohibit "all economically beneficial use of land" entitle the landowner to compensation under the Takings Clause, unless the regulatory prohibitions "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas,* 505 U.S. at 1029. *Palazzolo* made clear that if government regulation of property does not constitute a "background principle[]" of property law with respect to the Takings Clause claims of one owner, it cannot constitute a "background principle[]" of property law with respect to the Takings Clause claims of subsequent owners whose title derives from the initial owner. *Palazzolo,* 533 U.S. at 629-30. The Ninth Circuit's decision therefore conflicts with *Palazzolo* to the extent that the appeals court relied on the fact that Esplanade purchased its property after enactment of the SMA by the Washington legislature. Rather, Esplanade can be denied compensation in this case only if it can be shown that the modern public trust doctrine would constitute a "background principle[]" of

property law even with respect to a landowner who had purchased the Esplanade property in 1906.

Palazzolo explicitly left open the question whether newly-adopted legislation can constitute a "background principle[]" of property law sufficient to defeat a Takings Clause claim. *Palazzolo*, 533 U.S. at 629 ("We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."). *Amici* submit that this case presents an ideal vehicle for addressing that question. There are few disputed issues of fact; for example, the lower courts agreed that development of first-class (urban) tidelands was encouraged by Washington law in past decades, and that it was not until the enactment of the SMA in 1971 that the State began to restrict such development.

Moreover, Washington is not unique among the States in its increasing concern over potential environmental hazards arising from developmental activity adjacent to and within the nation's waterways. Numerous State and local governments have sought in recent decades to impose new restrictions on such development. That trend has led to substantial numbers of Takings Clause suits filed by landowners whose property is rendered worthless by such regulation. The lower courts are in desperate need of additional guidance regarding the very question left open by *Palazzolo*: under what circumstances can environmental legislation designed to protect waterways constitute "background principles" of property law sufficient to preclude a Takings Clause claim by affected landowners? Indeed, numerous Takings Clause defendants have been raising the same defense raised by

Seattle herein: they cite a modern "public trust doctrine" that derives it content from recently enacted environmental legislation. Lower court have provided a variety of responses to that defense; *amici* respectfully suggest that the Court should step in to clear up the confusion.

Certiorari should be granted for the additional reason that the Ninth Circuit's answer to the preceding question is clearly incorrect. The Court made clear in *Palazzolo* that "[a] regulation or common-law rule cannot be a background principle for some owners but not for others." *Palazzolo*, 533 U.S. at 629. Yet, the Ninth Circuit made no effort to square its holding -- that Esplanade's proposed development is inconsistent with the modern public trust doctrine -- with the fact that the owners of many other tidelands within the City of Seattle have developed their property far more extensively than anything proposed by Esplanade. Indeed, Seattle has become the bustling port we see today precisely because numerous landowners have been permitted to erect above-water structures on their tidelands. In the absence of any explanation from Seattle regarding why such developments are allowed to remain in place yet Esplanade is prohibited from making *any* economically viable use of its property, *Palazzolo* dictates that the legislation cited by Seattle to support its prohibition cannot be deemed "background principles" of property law sufficient to bar Esplanade's Takings Clause claims. Certiorari should be granted to resolve the conflict between *Palazzolo* and the decision below.

I. REVIEW IS WARRANTED TO PROVIDE GUIDANCE ON THE IMPORTANT AND RECURRING QUESTION LEFT OPEN BY *PALAZZOLO* REGARDING WHAT CONSTITUTES A BACKGROUND PRINCIPLE OF PROPERTY LAW

Virtually all of the major regulatory taking cases that have come before the Court in recent years (*e.g., Lucas, Palazzolo,* and *Tahoe-Sierra*) have involved land-use restrictions imposed for the purpose of preserving the environmental quality of adjacent bodies of water. That focus is hardly coincidental; the number of such regulatory taking cases has risen dramatically in tandem with the growing public consensus that governments at all levels must take decisive steps to prevent further degradation of marine environments. Landowners who bring such litigation do not dispute the need for such steps; rather, they claim that they are being singled out unfairly to bear the cost of new regulations.

In *Lucas,* the Court began the process of sorting out when the Takings Clause requires compensation for landowners whose property has been rendered worthless due to land-use restrictions imposed to prevent environmental harm. It determined that compensation is required in such cases unless the regulatory prohibitions "inhere in the title itself, in the restrictions that background principles of the State law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029. The Court did not endeavor to provide any detailed explanation regarding what constitute "background principles of the State law of property."

The Court provided additional guidance on this issue in *Palazzolo*. It held that if government regulation of property does not constitute a "background principle[]" of property law with respect to the Takings Clause claims of one owner, it cannot constitute a "background principle[]" of property law with respect to the Takings Clause claims of subsequent owners whose title derives from the initial owner. *Palazzolo,* 533 U.S. at 629-30. The Court explained:

> The State's rule [that postenactment purchasers cannot challenge a regulation under the Takings Clause] would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself.

Id. at 627.

Palazzolo reversed the Rhode Island Supreme Court's holding that the landowner's Taking Clause claims (based on decreased property value attributable to wetlands regulations) were barred because he had taken title with notice of the previously enacted regulations. *Id*. at 626-30. The Court did not, however, directly address whether those wetlands regulations could be deemed "background principles" of property law within the meaning of *Lucas*. Indeed, the Court explicitly held, "We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here." *Id*. at 629.

This case raises the precise issue left open by *Palazzolo*. Washington first adopted comprehensive regulation of tidelands development in 1971 when it enacted the SMA, and it was on the basis of this legislation that the Ninth Circuit determined that background principles of Washington property law precluded Esplanade's proposed residential development.[3]

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[3] The Ninth Circuit cited the "public trust doctrine" as the relevant "background principle" of property law. It also quoted the Washington Supreme Court as stating in 1987 that the public trust doctrine "has always existed in Washington." Pet. App. A-13 (quoting *Orion Corp. v. Washington,* 109 Wn.2d 621, 747 P.2d 1062, 1072 (Wash. 1987)). However, the court made clear that the "public trust doctrine" that it was invoking was not the same "public trust doctrine" that had "always existed in Washington." Rather, the court explained that it was invoking a more modern "public trust doctrine," one that takes into account the SMA adopted in 1971. *Id.* Indeed, the appeals court explicitly recognized that before 1971 Washington law had had a "long history" of favoring the sale and development of tidelands, particularly (as here) urban tidelands. *Id.*

> The public trust doctrine, as initially recognized by Washington and other jurisdictions, imposed an obligation on States to ensure that any submerged lands sold by the States to private parties not be developed in a manner that would "substantially impair" the public interest in navigation, commerce, and fishing. *See, e.g. Illinois Central Railroad Co. v. Illinois,* 136 U.S. 387, 456 (1892). As originally conceived, that doctrine was never understood to prohibit development (or filling) of tidelands outside of commonly used navigation channels. Indeed, Esplanade's property would not have been deemed "navigable" under the original understanding of the public trust doctrine and as that term was used by the Washington Supreme Court as recently as 1973. *See Harris v. Hylebos Industries, Inc.,* 81 Wn.2d 770, 775, 505 P.2d 457 (1973) (the "line of navigability" is "the inner harbor line" -- a line well seaward both of the low water mark
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> (continued…)

Thus, the lower courts erred in dismissing Esplanade's Takings Clause claims – unless it is true, as both the district court and the Ninth Circuit held, that the SMA constitutes a background principle of property law that justifies a prohibition of all economically beneficial use of first class (*i.e.,* urban) tidelands in Washington.

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[3](…continued)
and of Esplanade's property); *id.* at 785-86 ("[T]idelands [deeded to private individuals by the State] have never been classified by the state as navigable waters, but have been treated as land."). *Harris* made clear that as of 1973, the Washington "legislative intent regarding the use of tidelands in harbors of cities is manifestly that the navigable portions of such harbors, behind the harbor lines, shall consist of commercial waterways, and that the filling and reclaiming of tidelands which have been sold to private parties shall be encouraged." *Id.* at 786. It was not until 1987 that the Washington Supreme Court, in *Caminiti* and *Orion*, adopted a modern version of the public trust doctrine that expanded that doctrine beyond its initial focus on preserving navigation and fishing rights:

> Historically, the trust developed out of the public's need for access to navigable waters and shorelands, and thus the trust encompassed the right of navigation and fishery. . . . Recognizing modern science's ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects.

Orion, 109 Wn. 2d at 640-41. *Orion* went on to hold that land-use restrictions imposed by the SMA were exempt from challenge under the Takings Clause because the SMA qualified as "a public health and safety regulation." *Id.* at 660. Thus, it is evident that both the Ninth Circuit and the Washington Supreme Court decisions upon which it relied viewed a modern version of the public trust doctrine (one that included the SMA itself) – not the public trust doctrine as it was historically understood -- as the relevant "background principle[]" of property law.

The lower courts have reached widely disparate results when addressing the issue left open by *Palazzolo*. In many of those cases, governments have attempted to avoid Takings Clause claims by reference to a modern version of the "public trust doctrine" that incorporates recent legislative enactments. Several courts have explicitly rejected efforts to expand the public trust doctrine in this manner. *See, e.g., Douglaston Manor, Inc. v. Bahrakis,* 89 N.Y.2d 472 (1997) (refusing to extend the public trust to waters not navigable in fact because it would "precipitate serious destabilizing effects on property ownership principles and precedents"); *Bell v. Town of Wells,* 557 A.2d 168 (Me. 1989) (legislation allowing public recreation on private intertidal land amounted to a compensable taking); *Purdie v. Attorney General*, 732 A.2d 442 (N.H. 1999) (legislation extending the public trust to dry-sand areas would constitute a taking); *Anderson Columbia Co. v. Board of Trustees,* 648 So.2d 1061, 1067 (Fl. App. 1999) (legislative effort to assert public trust control over filled land previously granted to private owners would constitute compensable taking). Other courts, including the courts below, have reached the opposite conclusion. *R.W. Docks & Slips v. Wisconsin,* 628 N.W.2d 781 (Wis. 2001); *National Ass'n of Home Builders v. New Jersey Dep't of Environmental Protections,* 64 F. Supp. 2d 354, 359-60 (D.N.J. 1999) (statute requiring landowner to allow public access to privately owned riverside path is exempt from Takings Clause challenge under public trust doctrine).

Both in view of the importance of the question left undecided by *Palazzolo* and in view of the widely disparate answers provided by the lower courts to this issue, review by this Court is warranted. This case provides an ideal vehicle

for addressing the question, given that the facts of this case are largely undisputed. In particular, there can be no serious dispute that Seattle has deprived Esplanade of all economically productive use of its property. The only use of the property permitted under Seattle's zoning ordinance is residential housing, yet Seattle has prevented such use by simultaneously requiring and prohibiting on-site parking. Moreover, both the Ninth Circuit and the district court were explicit in identifying the SMA -- legislation not enacted until 1971 -- as their principal basis for concluding that Esplanade's Takings Clause claims were barred by "background principles" of Washington property law. Indeed, both courts acknowledged that before adoption of the SMA, state law actively promoted development of tidelands such as Esplanade's. Accordingly, this case squarely presents the issue left open by *Palazzolo,* a recurring issue of exceptional importance that has divided the lower courts.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH *LUCAS* AND *PALAZZOLO*

Review is warranted for the additional reason that the Ninth Circuit's decision is in direct conflict with this Court's decisions in *Lucas* and *Palazzolo*. As noted above, those decisions did not fully define what constitutes a "background principle[]" of property law that would exempt property regulations from Takings Clause challenge. But the Court made clear one essential ingredient of any such background principles: they must apply equally to all property owners. *See, e.g., Palazzolo,* 533 U.S. at 630 ("A regulation or common-law rule cannot be a background principle for some owners but not for others.").

The modern public trust doctrine articulated by the Ninth Circuit fails that test. The appeals court ruled that its version of the public trust doctrine precluded all development of Esplanade's tidelands because development "would have interfered with fishing and recreational use of the tidelands."[4] But the City of Seattle clearly does not intend that the standard it applied to Esplanade should be applied to other tideland owners in the city. If that standard were applied uniformly, much of Seattle harbor would need to be dismantled. The harbor includes numerous above-water structures built on its tidelands. The continued presence of those structures undoubtedly interferes with the ability of the public to use those tidelands for recreational purposes. In the absence of any explanation from Seattle regarding why such developments are allowed to remain in place yet Esplanade is prohibited from making *any* economically viable use of its

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[4] *Amici* note that the Ninth Circuit's test is far stricter than the one heretofore employed by the Washington Supreme Court. That court has held:

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any *substantial impairment* of the public interest in the lands and waters remaining.

Caminiti, 107 Wn. 2d at 670 (emphasis added) (quoting *Illinois Central*, 146 U.S. at 453). Based on evidence that some individuals have on some unspecified occasions used the Esplanade tidelands for recreation and fishing, the Ninth Circuit determined that the planned development "would have interfered with those uses" and thus deemed the development "inconsistent with the public trust doctrine." Pet. App. A-16. The Ninth Circuit made no effort to determine whether such interference would constitute a "*substantial impairment* of the public interest in the lands and water remaining."

property, *Palazzolo* dictates that the SMA -- the legislation cited by Seattle in support of its prohibition -- cannot be deemed a "background principle[]" of property law sufficient to bar Esplanade's Takings Clause claim.

This Court has stated repeatedly that State and local governments may not redefine the meaning of property rights "by *ipsi dixit*," in order to avoid the strictures of the Takings Clause. *See, e.g., Phillips v. Washington Legal Found.,* 524 U.S. 156, 164 (1998). Seattle is attempting just such a redefinition in this case. It is attempting to defeat Esplanade's Takings Clause claim by insisting that Esplanade's ownership interests do not include the right to develop its tidelands, while declining to apply that same rule to other tideland owners. *Lucas* and *Palazzolo* dictate that such selectively-applied rules do not constitute background principles of property law sufficient to defeat Takings Clause claims. The Court should grant review in order to resolve the conflict between the decisions of this Court and the Ninth Circuit's decision.

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: April 7, 2003