No. ________

In The
Supreme Court of the United States

RANDALL PAVLOCK, KIMBERLEY PAVLOCK, and RAYMOND CAHNMAN,
Petitioners,

v.

ERIC J. HOLCOMB, in his official capacity as Governor of the State of Indiana, et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For decades, Petitioners and their predecessors have owned beachfront property along Lake Michigan in northwestern Indiana. Their deeds clearly indicate ownership of the beach below any conceivable definition of the lake's ordinary high-water mark. Petitioners used their private beach for gatherings and recreation, paid taxes on it, and in 1980, when the United States requested a walking easement across the property for the benefit of the public, they agreed—in exchange for a federal promise to maintain and clean it. But four years ago, the Indiana Supreme Court in *Gunderson v. State*, 90 N.E.3d 1171 (Ind. 2018), declared that the State held exclusive title to all land abutting Lake Michigan up to the ordinary high-water mark. The decree effectively extinguished Petitioners' rights to the beach and transferred authority to the State Department of Natural Resources. Petitioners, who were not parties in *Gunderson*, alleged that *Gunderson* decreed a taking of their property without compensation. They sued to enjoin the state officials responsible for implementing the decision from depriving them of their property rights, including the fundamental right to exclude the public from their property. The questions presented are:

1. Whether a "judicial taking" under the Fifth and Fourteenth Amendments is a cognizable cause of action.

2. Whether a property owner who is deprived of property under the authority of a state court decision may seek prospective injunctive relief in federal court to halt encroachment on their property by state officials acting under the authority of that decision.

PARTIES TO THE PROCEEDING

Petitioners and plaintiffs below are three individuals who own lakefront property in Porter County, Indiana: Randall Pavlock, Kimberley Pavlock, and Raymond Cahnman.

Respondents and defendants below are Indiana officials, sued in their official capacities: Governor Eric Holcomb, Attorney General Todd Rokita, Director of the Department of Natural Resources Dan Bortner, and Director of the State Land Office Jill Flachskam.

STATEMENT OF RELATED PROCEEDINGS

The proceedings in federal district and appellate courts identified below are directly related to the above-captioned case in this Court:

Pavlock v. Holcomb, No. 2:19-CV-00466 JD, United States District Court, N.D. Indiana, Hammond Division, order of dismissal filed March 31, 2021.

Pavlock v. Holcomb, No. 21-1599, United States Court of Appeals for the Seventh Circuit, decision affirming dismissal issued May 25, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Randall Pavlock, Kimberley Pavlock, and Raymond Cahnman respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is published at 35 F.4th 581 (7th Cir. 2022) and included in Petitioners' Appendix (App.) at 1a. The district court's opinion is published at 532 F.Supp.3d 685 (N.D. Ind. 2021) and included here at App.22a.

JURISDICTION

The District Court granted the defendants' motion to dismiss on March 31, 2021. Petitioners timely appealed. On May 25, 2022, a panel of the Seventh Circuit affirmed the dismissal. Petitioners timely sought an extension to file this Petition on or before September 22, 2022, which was granted on August 10, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment to the U.S. Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

INTRODUCTION

Like their neighbors along Porter Beach on Indiana's Lake Michigan shoreline, Randall and Kimberley Pavlock owned a strip of private beach behind their home. The Pavlocks owned and paid

taxes on the property for decades, primarily using it for gatherings and recreation with friends and family. The property is clearly marked on the Pavlocks' deed and was so plainly theirs that they granted an easement to the federal government in 1980 that allowed the public limited walking rights on their beach. But in 2018—contrary to its own precedent, decades of practice, and the law of every other Great Lakes State—the Indiana Supreme Court declared that Indiana holds *exclusive title* to the Lake Michigan shoreline below the ordinary high-water mark (OHWM). *Gunderson v. State*, 90 N.E.3d 1171, 1173 (Ind. 2018). With the stroke of a pen, what was once the Pavlocks' property was declared the State's, to be managed and controlled by the Indiana Department of Natural Resources (DNR).[1]

This case presents a rare but nonetheless real situation in which a state's highest court suddenly declares, contrary to its own precedent, the history and custom of lakefront ownership, and Petitioners' own title deeds, that what was once manifestly identified as private property now belongs to the State. With State ownership, Petitioners have lost all right to exclude the public from what used to be their beach. Had such a transfer occurred via legislation or regulation, there is no doubt the property owners would be entitled to a federal remedy for a taking. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2074 (2021); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982). But because

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[1] Petitioner Raymond Cahnman acquired his property in 2006, after his predecessor had granted the walking easement to the United States. In all other respects his situation is identical to that of the Pavlocks. App.57a–58a.

the State assumed control over Petitioners' property under the authority of a state supreme court decree, the Seventh Circuit doubted that they could allege a takings claim at all. App.8a–12a. And even if they could, the Court of Appeals held that no remedy exists for property owners in this situation. *See* App.13a–19a. Although the court below tried to avoid answering whether a "judicial taking" could ever occur, it effectively shut the door on such claims by holding that no defendant exists from whom a property owner may obtain relief.

Yet not long ago, this Court was poised to recognize explicitly the existence of judicial takings. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 715 (2010), a four-Justice plurality of this Court pronounced that a judicial declaration that "what was once an established right of private property no longer exists" effects a taking for which just compensation is due. Since then, however, "no federal court of appeals has recognized this judicial-takings theory. What has occurred instead is avoidance: every circuit to consider the issue has expressly declined to decide whether judicial takings are cognizable." App.11a; *see also, e.g.*, *Petro-Hunt, L.L.C. v. United States*, 126 Fed. Cl. 367 (2016), *aff'd* 862 F.3d 1370 (Fed. Cir. 2017). Even when lower courts assume that judicial takings claims are cognizable, they conflict in their analysis and approach both as to the elements of the claim and justiciability concerns about standing and sovereign immunity. *See, e.g.*, *Weigel v. Maryland*, 950 F.Supp.2d 811, 837–39 (D. Md. 2013), *appeal dismissed* (4th Cir. 2014).

Is a "judicial taking" just like any other taking, as the *Stop the Beach* plurality opined? Only this Court can provide the answer. Petitioners believe the answer is yes, because the Fifth Amendment as incorporated through the Fourteenth Amendment applies to entire states without carving out exceptions. *Stop the Beach*, 560 U.S. at 714 ("There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation."). If the *Stop the Beach* plurality was correct, this case provides a strong vehicle for determining the parameters of the constitutional claim, including the necessary corollary of identifying whom may sue and whom are the proper defendants. And if no such claim exists, property owners can stop wasting courts' time and resources on these claims. Either way, it is an important national question that only this Court can resolve.

STATEMENT OF THE CASE

This case comes to the Court at the pleading stage, and all alleged facts must be presumed true. *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 164 (1993).

A. Petitioners Bought, Used, Maintained, and Paid Taxes on Beachfront Property

Petitioners own parcels of land abutting Lake Michigan in Northwest Indiana. App.56a–58a. Their homes and properties are located entirely within one of the nation's newest parks, the Indiana Dunes National Park. *Id.* But the enclave known as Porter Beach remained privately owned even as the United

States gradually bought up the surrounding land. *See* App.71a–75a. In the midst of this process, the Pavlocks, Petitioner Cahnman's predecessor-in-interest, and other beachfront owners negotiated with the federal government to grant an easement allowing the public to walk across their private beaches. App.62a–63a. In return for limited public access, the United States agreed to keep the beach "reasonably clean and free of debris." App.63a. The easements expressly noted the property owners' continued exclusive rights in the property other than walking; the public had no right to loiter, picnic, or fish on the beach. *Id.*

For decades, Petitioners exercised uncontested ownership over the beach consistent with their deeds and the public easements. App.57a–58a, 75a. Ownership of the beach below the OHWM was consistent with both State law and actual practice. Owing to the nontidal nature of the State's main navigable river (the Ohio), the Indiana Supreme Court early on rejected the traditional English common law rule that the sovereign retains ownership to the OHWM of navigable waters. *See Stinson v. Butler*, 4 Blackf. 285 (Ind. 1837). Instead, that court consistently held that private ownership extends to the river's low-water mark "subject only to the easement in the public of the right of navigation." *Martin v. City of Evansville*, 32 Ind. 85, 86 (1869). For their part, Petitioners never disputed the existence of a public trust along the shoreline.

B. Historically, Property Owners and All Levels of Government Treated Beachfront Property Below the OHWM as Private

The history of ownership along Lake Michigan shows that the low-water mark rule was not restricted to the Ohio River. On the contrary, it was understood to apply to the shoreline of Lake Michigan, which, like the Ohio, is a navigable, nontidal waterway.[2] At Porter Beach, this understanding dates to 1891, when the plats in question were first drawn and the properties misleadingly marketed as being close to the Chicago Stockyards. App.60a. Quiet title actions involving Porter Beach plats were common after many property owners realized the area was nowhere near the Stockyards and abandoned their lots. *Id.* Many lots were partially or fully submerged by the lake, but the county continued to assess nominal property taxes against the owners of even entirely submerged lots. App.60a–61a. In years when the lake level dropped, lots with uncovered beach were assessed for substantially more. App.61a.

Everyone from federal government agents on down similarly treated property below the OHWM of Lake Michigan as privately owned. The federal government's negotiation with several property owners—including the Town of Dune Acres—to obtain public walking easements would have been unnecessary if the State already held exclusive title to the beach. App.62a–63a. The entire process of federal and state land acquisition along the lakeshore that preceded the formation of the National Park and the

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[2] *See Glass v. Goeckel*, 473 Mich. 667, 690 (2005) (recognizing nontidal nature of the Great Lakes).

adjacent Indiana Dunes State Park rested on the universal understanding that the beaches were privately held.[3] The initial proposal for federal acquisition of the lakeshore in 1916 noted the beach's desirability for "bathing facilities" and "fishing," making it clear that the proposal referred to area below the lake's OHWM. App.65a. Examples abound throughout the years:

- The initial bill proposed in Congress for federal acquisition of the lakeshore in the 1950s excluded the lakefront towns of Dune Acres, Ogden Dunes, and Johnson Beach because the beaches in those towns were either privately owned or owned by the municipality. App.69a.
- Opponents of federal acquisition included the private tracts of Ogden Dunes in the proposed bill as a poison pill, but park supporters ultimately supported federal purchase of all private beach property held by individuals and steel mills—which was estimated to cost about $23 million. App.70a–71a.
- Lawmakers devised a creative solution to purchase land in the town of Beverly Shores because some property owners had built their homes on the dunes and the beach, and were reluctant to sell the land down to the water's edge to the government. As a

[3]The existence of a property interest is determined by reference to "existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

compromise, these property owners sold their private beaches to the government and retained an occupancy right for 15 years. App.72a.

- In Ogden Dunes, the federal government erected signs to demarcate the public National Lakeshore from private beach areas, and a National Park Service administrative history documented the trouble that emergency vehicles had accessing the beach, because some hostile private beachfront owners blocked access. App.73a.
- In 1975, the Town of Ogden Dunes purchased a tract of private beach known as "Ogden Dunes Beach" from the local Homeowners Association and passed a resolution that the beach was reserved "solely for the use and benefit of residents of the Town of Ogden Dunes and their guests." Four years later, Ogden Dunes—along with Petitioners and the Town of Dune Acres—agreed with the federal government to permit public access to its portion of the shoreline. App.74a–75a.

None of this fully documented, longstanding historical use and uncontested ownership of the beach makes sense if Indiana *always* held exclusive title to the beach below the OHWM. And indeed, nobody contested Petitioners' ownership of the beach for decades. App.75a.

C. *Gunderson* Upends Property Owners' Settled Expectations

In 2010, the Town of Long Beach—a few miles to the east of Porter Beach—passed a first-of-its-kind ordinance that purported to make the Department of Natural Resources' "administrative high-water mark" of 581.5 feet above sea level the boundary between public and private property. App.75a–76a. Long Beach landowners sued DNR in state court seeking a declaration that they held title down to the water's edge. *Id.* The parties (along with intervenor Save the Dunes and nonparty Cahnman filing an amicus brief) also disputed the proper scope of Indiana's public trust doctrine. *See Gunderson*, 90 N.E.3d at 1188–89.

Both the trial court and the Indiana Court of Appeals held that the Long Beach property owners held title down to the lake's low-water mark, subject to established public trust rights up to the OHWM. *Id.* at 1174–75. The Court of Appeals explained that the Gunderson property extended to "the ordinary low water mark, subject to the public's rights under the public trust doctrine up to the OHWM." *Gunderson v. State*, 67 N.E.3d 1050, 1060 (Ind. Ct. App. 2016), citing *Glass*, 473 Mich. at 687–89 (adopting the same rule in Michigan). The lower courts disagreed over the precise location of the OHWM, but—consistent with prior Indiana law and the facts on the ground—agreed that Indiana law permitted property owners to own the beach below it.

The Indiana Supreme Court granted petitions for transfer. In the state supreme court, DNR argued that the 581.5-foot administrative high-water mark was the boundary between public and private property, while the landowners maintained that they held title

at least down to the water's edge. *Gunderson*, 90 N.E.3d at 1185. The court disagreed with both sides.[4] It held instead, for the first time in State history, that the Indiana owns exclusive title to the shoreline of Lake Michigan up to the common law OHWM. *Id.* at 1177. The court adopted the traditional common law definition of OHWM—taken from cases involving tidal ocean waters—"the point 'where the presence and action of water are so common and usual . . . as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself.'" *Id.* at 1181, quoting *Howard v. Ingersoll*, 54 U.S. (13 How.) 381, 427 (1851) (Curtis, J., concurring); *cf. Stinson*, 4 Blackf. at 285 (rejecting the traditional common law rule because it could only be applied to tidal waters). The court left no doubt that the area below the OHWM includes "the beaches of Lake Michigan," like those Petitioners owned for decades. *See Gunderson*, 90 N.E.3d at 1188.

To reach its result, the state supreme court brushed aside its 19th-century precedents recognizing private ownership down to the low-water mark of the Ohio River, simply holding them inapplicable to Lake Michigan. *Id.* at 1183–85. It also diverged from the long-established law in other Great Lakes states, none of which has adopted Indiana's rule that the State holds exclusive title to the OHWM of a Great Lake. *See, e.g.*, *Glass*, 473 Mich. at 687–90, 703 N.W.2d at

[4] The Seventh Circuit panel mistakenly indicated that the *Gunderson* court "sided with Indiana." App.4a. It did not—DNR argued that the *administrative high-water mark* should govern, and the *Gunderson* court explicitly *rejected* that position. *See id.* at 1185–86.

69–71, 75; *Doemel v. Jantz*, 193 N.W. 393, 398 (Wis. 1923); *Seaman v. Smith*, 24 Ill. 521, 524 (1860); *State ex rel. Merrill v. Ohio Dep't of Nat. Res.*, 130 Ohio St. 3d 30, 40–41 (2011); *Pelton v. Strycker*, 28 Pa.D. 177, 179 (Pa. Ct. Common Pleas 1918). Indeed, while the court purported to rely on the Michigan Supreme Court's decision in *Glass*, it reached a far different result. *Glass*, like the lower court decisions in Indiana, recognized private ownership according to the terms of the littoral owner's deed, subject only to a limited public easement between the high- and low-water marks. *Glass*, 473 Mich. at 687–90, 697–98. *Gunderson*, on the other hand, extinguished private property rights along the Lake Michigan shoreline.

D. Petitioners Sue To Vindicate Their Property Rights

After *Gunderson* decreed their private beach to be public, Petitioners sued several Indiana officials, including the governor, attorney general, and the Director of DNR, in the Northern District of Indiana. Petitioners alleged that their beach property was taken without just compensation and sought injunctive relief prohibiting the State defendants from implementing *Gunderson*'s decree. App.81a, 83a–84a. The State Defendants moved to dismiss, arguing that Petitioners' claim was barred by sovereign immunity and that, in any event, no cause of action exists for a "judicial taking."[5]

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[5] After the initial motion to dismiss was fully briefed, the State enacted House Enrolled Act (HEA) 1385. The Act purported to codify *Gunderson*'s decree that the State holds absolute title to the beach of Lake Michigan. Ind. Code § 14-26-2.1-3(a) (2020). It also details approved public activities on the beach, regardless of the wishes of the Petitioners and other beachfront owners. *Id.*

The district court held Petitioners' claims were barred by sovereign immunity. App.41a–42a. Although the court recognized that "[t]he straightforward inquiry under *Ex parte Young*[6] would seem to result in the Court having jurisdiction," App.31a–32a, it found that the narrow exception to *Young* this Court recognized in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), required dismissal. App.41a–42a. Alternatively, the district court opined that Petitioners had not plausibly alleged a taking under the reasoning of the *Stop the Beach* plurality. App.49a–50a. In the court's view, Petitioners' Amended Complaint did no more than allege that "the area of property law was murky in Indiana, and, likely, even murkier on the shores of Lake Michigan." App.50a.

The Seventh Circuit affirmed on different grounds. The court acknowledged Petitioners' takings theory based on *Stop the Beach*, but noted that other federal courts were reluctant to acknowledge judicial takings as a viable theory. The panel ultimately followed the other courts in avoiding the question. App.11a–12a. It instead concluded that the property owners lacked standing to seek injunctive relief against the officials sued. App.12a–19a. The Court of Appeals held that the property owners alleged a sufficient injury—the taking of their property without compensation—but that they could not satisfy the

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§ 14-26-2.1-4(b). Ultimately, the statute is irrelevant to the questions presented here because the validity of the Act depends entirely on the outcome of Petitioners' judicial takings claim. After all, if *Gunderson*'s decree did not effect a taking, it follows that HEA 1385, which in relevant part simply restates *Gunderson*'s holding, did not effect a taking.

[6] 209 U.S. 123 (1908).

other two elements of Article III standing: redressability and causation. App.12a. On redressability, the panel thought that "[n]one of the defendants sued has the power to grant title to the Owners in the face of the Indiana Supreme Court's *Gunderson* decision," and so "a judgment in their favor would be toothless." App.13a. And on causation, the Court of Appeals held that the state supreme court, not the defendant executive officials, had caused Petitioners' injury. App.17a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Fractured Decision in *Stop the Beach* Has Sown Confusion in the Lower Courts

Twelve years ago, this Court granted certiorari in *Stop the Beach* to "consider a claim that the decision of a State's court of last resort took property without just compensation in violation of the Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth [Amendment]." *Stop the Beach*, 560 U.S. at 707. The petitioners there were beachfront owners who argued that the Florida Supreme Court had extinguished their littoral rights. But the Court failed to answer the central question presented. With Justice Stevens recused, a four-Justice plurality wrote that the Takings Clause "bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking." *Id.* at 715. The four remaining justices would have left the question for another day. *See id.* at 741–42 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 745 (Breyer, J., concurring in part and concurring in the judgment). Lacking a majority holding, the question remains open.

Perhaps predictably given the fractured *Stop the Beach* decision, lower courts have thrown up their hands. Rather than consider for themselves the existence and contours of "judicial takings," the courts—including the Seventh Circuit below—have chosen "avoidance." App.11a. But "[t]he theory of judicial takings existed prior to 2010." *Smith v. United States*, 709 F.3d 1114, 1117 (Fed. Cir. 2013). Indeed, history suggests that *Stop the Beach* actually paused the development of the theory and rendered lower courts unwilling to rely on it. Certiorari is needed to put an end to the uncertainty.

A. Before *Stop the Beach*, Many Courts and Commentators Recognized the Existence of Judicial Takings

Long before *Stop the Beach*, judges recognized the danger of permitting courts to alter settled property rights without compensation. Federal takings cases were rare in the Republic's first century, but the possibility of a judicial taking began to draw notice around the turn of the Twentieth Century. *See Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544, 570–71 (1905) (plurality opinion) (suggesting that a state high court that reversed a lower court decision requiring compensation to property owners adjacent to construction of elevated railroad itself committed an uncompensated taking); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 233–34 (1897). *See also* Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1463–66 (1990) (identifying these cases as the genesis of judicial takings theory); W. David Sarratt, *Judicial Takings and the Course Pursued*, 90 Va. L. Rev. 1487, 1502–07 (2004); David J. Bederman, *The Curious*

Resurrection of Custom: Beach Access and Judicial Takings, 96 Colum. L. Rev. 1375, 1435–36 (1996). Later, this Court hinted that although it lacked jurisdiction to second-guess a State's decision to recognize a particular property right in the first place, it *could* inquire into whether a state court had taken away a right that was vested under state law. *See Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 41–42 (1944); *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540 (1930) ("Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this Court.").

The issue had been percolating for more than half a century when Justice Stewart, writing about a dispute much like Petitioners' between beachfront owners and the State of Washington, warned that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967) (concurring opinion). Instead, he suggested that a state supreme court's "sudden change in state law, unpredictable in terms of the relevant precedents" would amount to an unconstitutional taking. *Id.* at 296. And, citing *Demorest* and *Broad River*, Justice Stewart argued that although a state court's interpretation of state law is not typically subject to Supreme Court review, the question "[w]hether the decision . . . worked an unpredictable change in state law . . . inevitably presents a federal question for the determination of this Court." *Id.* at 297.

Some federal courts took notice of Justice Stewart's warning. In a valuation dispute over condemned coastal lots in Hawai'i, the state supreme court determined that coastal landowners who claimed ownership down to the "seaweed line," actually owned only to the "vegetation line," depriving them of a 43-foot-deep strip of beach. *Sotomura v. Hawai'i Cnty.*, 460 F.Supp. 473, 474–76 (D. Haw. 1979). The owners sued in federal court, arguing that the state supreme court "disregard[ed] the original monument that governed the location of the seaward boundary in the judgment registering their title." *Id.* at 476. The district court agreed. Citing Justice Stewart's concurrence, the federal court held that the state court's decree was "contrary to established practice, history and precedent" and "a radical and retroactive change in state law" that took the coastal owners' property without compensation. *Id.* at 481, citing *Hughes*, 389 U.S. at 297–98. Some years later, the Ninth Circuit reached the same result in holding that a Hawai'i Supreme Court decision had unconstitutionally taken vested water rights. The court emphasized that "[n]ew law . . . cannot divest rights that were vested before the court announced the new law." *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902 (1986).

Like federal courts, state high courts of the day often recognized that a judicial decree might effect an unconstitutional taking. In some circumstances, this possibility has constrained state courts' ability to alter state property law. For example, the Michigan Supreme Court refused—by a 4-3 vote—the State Department of Natural Resources' invitation to expand public recreational access to non-navigable

inland creeks and lakes because such a decree would amount to "eliminating a property right without compensation." *Bott v. Comm'n of Nat. Res.*, 415 Mich. 45, 76–80 (1982). *Bott* also described a prior case—*Hilt v. Weber*, 252 Mich. 198 (1930)—as having overruled a series of earlier decisions "because, among other things, they worked severe injustice and constituted a judicial 'taking' without compensation." *Bott*, 415 Mich. at 82–84. Similarly, the Oregon Supreme Court declined a party's request to hold that rapid avulsion transformed private property into State property because such a ruling "would raise serious questions about the taking of private property for public use without compensation." *State v. Corvallis Sand & Gravel Co.*, 283 Or. 147, 165 (1978) (citing *Hughes*, 389 U.S. at 296–98). Other state courts explicitly suggest possible judicial takings claims, *see Dolphin Lane Assocs., Ltd. v. Town of Southampton*, 339 N.Y.S.2d 966, 975 (Sup. Ct. 1971) (a redefinition of property rights would "certainly violate the rights of plaintiff"), or apply heightened stare decisis for decisions on the scope of property rights to avoid such issues, *see McGarvey v. Whittredge*, 2011 ME 97, ¶ 64; *see also Bogle Farms, Inc. v. Baca*, 122 N.M. 422, 430 (1996) (when it comes to "rules affecting property or commercial transactions, adherence to precedent is necessary to the stability of land titles and commercial transactions entered into in reliance on the settled nature of the law."); *Giles v. Adobe Royalty, Inc.*, 235 Kan. 758, 767 (1984) (declining to give decision retroactive effect because "[s]uch action would force a re-examination of the title to all Kansas real estate"); *Bott*, 415 Mich. at 79–80 (applying stare decisis to preserve rules recognizing private property because

the doctrine had been settled "long enough to give rise to a fixed conception of the public's navigational rights").[7]

This Court's contemporary decisions also emphasize the importance of stability and reliance interests in property rights. *See Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 110 (2014) (rejecting the government's attempt to recharacterize a property interest that the Court had previously recognized, "especially given 'the special need for certainty and predictability where land titles are concerned,'" quoting *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979)); *Nordlinger v. Hahn*, 505 U.S. 1, 12–13 (1992) (sustaining California's system of property tax assessment against an Equal Protection challenge in part because "an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase"); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ."); *Roth*, 408

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[7] Similarly, three state courts and two dissenting opinions have suggested that a state court ruling that changes the definition of a "navigable" waterway so as to deprive private property owners of their exclusive use would violate the Takings Clause. *See* Maureen E. Brady, *Defining "Navigability": Balancing State-Court Flexibility and Private Rights in Waterways*, 36 Cardozo L. Rev. 1415, 1417 n.2 (2015), citing *State v. McIlroy*, 595 S.W.2d 659, 665–71 (Ark. 1980) (Fogleman, C.J., dissenting); *People v. Emmert*, 597 P.2d 1025, 1029−30 (Colo. 1979) (en banc); *Bott*, 415 Mich. at 76–84; *Kamm v. Normand*, 91 P. 448, 449–51 (Or. 1907); and *State ex rel. Cates v. W. Tenn. Land Co.*, 158 S.W. 746, 753 (Tenn. 1913) (Neil, C.J., dissenting).

U.S. at 577 ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."). Even more to the point, the Court in *Webb*'s *Fabulous Pharmacies v. Beckwith* unanimously declared that "[n]either the Florida legislature by statute, nor the Florida courts by judicial decree" could permit a county to take the interest from an interpleader account "simply by recharacterizing the principal as 'public money' because it is held temporarily by the court." 449 U.S. 155, 164 (1980). That is an apt description of a judicial taking—a state court's redefinition of private property as belonging to the public.

When this Court granted certiorari in *Stop the Beach*, a wealth of history already demonstrated the common sense of judicial takings and the need for the Court to recognize the doctrine. *See Smith*, 709 F.3d at 1116 ("Contrary to [plaintiff's] assertion that *Stop the Beach* 'created a cause of action for judicial takings,' the theory of judicial takings existed prior to 2010. The Court in *Stop the Beach* did not create this law, but applied it."); *Willits v. Peabody Coal Co., LLC*, 400 S.W.3d 442 (Mo. App. 2013), *cert. denied*, 571 U.S. 1129 (2014) (same). After all, as one commentator asked, "[w]hy should [a state] be able to avoid paying compensation simply by virtue of the fact that the judiciary, rather than the legislature, made the change in [state] law?" Sarratt, *supra*, at 1488.[8] *Stop*

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[8] This Court rejects anti-textual carve-outs from other protections in the Bill of Rights. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460, 472 (2010) (declining to "carve out from the First Amendment" any exceptions that allow censorship of "depictions of animal cruelty" which was not "historically unprotected"); *Application of Gault*, 387 U.S. 1, 49–50 (1967)

the Beach presented an opportunity to clear up the uncertainties and decide at last the "crucial question" of "[w]hether the takings protections constrain the judiciary in the same manner that they restrict the other branches of government." Thompson, *supra*, at 1451.

B. *Stop the Beach* Has Caused Confusion and Halted Development of Judicial Takings Doctrine in the Lower Courts

The confusion wrought by *Stop the Beach* stymied development of the judicial takings doctrine in the courts. As the Seventh Circuit noted, "avoidance" has been the most common reaction to judicial takings claims after *Stop the Beach*. App.11a; *see also Weigel*, 950 F.Supp.2d at 837–38 ("The Court need not determine whether a judicial takings claim is constitutionally cognizable here, because the Plaintiffs have failed to show a clear likelihood of success on their claim that a 'taking' has occurred in the first place."); *Straw v. United States*, No. 21-5300, 2022 WL 626946, at *1 (D.C. Cir. 2022) (declining to take a position on whether judicial takings claims are cognizable); *Stuart v. Ryan*, No. 18-14244-CIV, 2020 WL 7486686, at *6 (S.D. Fla. Dec. 18, 2020) ("it is unclear if such a cause of action even exists" but continuing to consider plaintiff's claim, assuming it exists). Indeed, a survey of recent cases leads to the inevitable conclusion that, "[c]ompounded by the

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(juveniles' assertion of privilege against self-incrimination will not be carved out of the Fifth Amendment's protection on the basis that juvenile proceedings are labelled "civil" rather than "criminal."). The Fifth Amendment protection of property rights stands on equal footing with other rights. *Knick v. Township of Scott*, 139 S.Ct. 2162, 2170 (2019).

weaker precedential value of a test established by a case with no majority holding, courts are simply uninterested in engaging with judicial takings in a meaningful way." Cameron M. Morrissey, *Judicial Takings: A Nothingburger?*, 52 U. Tol. L. Rev. 591, 592 (2021).

Even so, some courts have hinted at recognition of the doctrine. In a footnote, the Ninth Circuit "pause[d] to observe that any branch of state government could, in theory, effect a taking." *Vandevere v. Lloyd*, 644 F.3d 957, 963 n.4 (9th Cir. 2011). And the California Court of Appeal noted that "[t]he lesson we take from *Stop the Beach*" was "that where it has been determined that a court action eliminates an established property right and would be considered a taking if done by the legislative or executive branches of government, it must be invalidated as unconstitutional, whether under the takings or due process clauses." *Surfrider Foundation v. Martins Beach 1, LLC*, 221 Cal.Rptr.3d 382, 401–02 (2017). Even the Indiana Supreme Court, in an opinion released a few months after *Gunderson*, acknowledged the potential of a judicial taking and chose not to upend a common-law rule of property to "avoid having to consider whether [the new rule] so fundamentally alters a property right in the easement that abandoning the rule amounts to a taking of that right requiring the payment of just compensation." *Town of Ellettsville v. DeSpirito*, 111 N.E.3d 987, 996 (Ind. 2018).

At this point it is clear that "*Stop the Beach* mirrored much of the academic literature—that is, it failed to reach a consensus and left the reader arguably more confused than he was before." Trevor

Burrus, *Black Robes and Grabby Hands: Judicial Takings and the Due Process Clause*, 21 Widener L.J. 719, 721 (2012). Further percolation is futile in such an environment. Certiorari is warranted as only this Court can clear up the confusion and tell the lower federal courts—and the state courts—whether property owners have a viable cause of action and remedy for judicial redefinition of their property rights.

C. Ongoing Efforts To Expand Public Access Makes It Imperative To Address Judicial Takings Soon

Petitioners' property rights hinge on whether they can maintain judicial takings claims. It offers the *only* potential remedy for them. This situation does not arise frequently, but when it does, property owners can look only to this Court's recognition that all three branches of government are capable of violating constitutional rights and must be held to account. Absent a majority decision from this Court recognizing that a state court decree can effect a taking, Petitioners and those like them will have no ability to fight back against a judicial "landgrab." *Stevens v. City of Cannon Beach*, 114 S.Ct. 1332, 1335 (1994) (mem.) (Scalia, J., dissenting from denial of certiorari).

Similar "landgrabs" have gone without a remedy in the past. For example, in what it recognized was an "unprecedented" move, the Oregon Supreme Court in *State ex rel. Thornton v. Hay*, 254 Or. 584, 597 (1969), declared the State's entire shoreline to be encumbered with a recreational easement under the doctrine of customary use. As the Idaho Supreme Court noted ten years later, "[v]irtually all commentators" thought

"the law of custom was a dead letter in the United States" until *Thornton* "exhumed" it. *State ex rel. Haman v. Fox*, 100 Idaho 140, 148 (1979). In New Jersey, the state supreme court "stripped the private property owners of the right to exclude by dramatically extending prior precedents, citing the 'dynamic nature of the public trust doctrine.'" Sarratt, *supra*, at 1511 n.96 (quoting *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 326 (1984)). And the Arkansas Supreme Court declared that the commercial test for navigability was "a remnant of the steamboat era," holding for the first time that pleasure boating was sufficient proof of navigability to grant the public rights in the waterway. The private landowners who previously had exclusive rights to streams on their property were thus left without redress for the court's sudden change in property law. *McIlroy*, 595 S.W.2d at 660–65. A robust doctrine of judicial takings might have deterred such brazen assertions of judicial authority to redefine private property—and would have given property owners access to the federal courts to seek a federal remedy had it not.

When the potential for judicial takings claims is off the table, beach access advocacy groups often seek to accomplish through litigation what they cannot achieve through the other branches of government. For example, in Maine, activists sued several beachfront owners seeking a declaration that Maine holds title to the intertidal zone along the Atlantic Ocean—the area between the mean high-tide line and the mean low-tide line—contrary to almost four

centuries of common law.[9] *See Masucci v. Judy's Moody, LLC*, No. RE-21-0035 (Me. Super. Apr. 15, 2022).[10] The plaintiffs' case rests largely on hope that the Maine Supreme Judicial Court will overrule its precedent establishing private ownership of the intertidal zone and limiting public rights. *See Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶¶ 34–43 (Saufley, C.J., concurring) (three justices urging the Maine Supreme Judicial Court to partially overrule these precedents). An environmental advocacy organization in Washington seeks a similar result—it has sued a beachfront property owner and is urging the state courts to expand the public trust doctrine and import *Thornton*'s customary use doctrine to Washington. *See Friends of Guemes Island Shorelines v. Duncan*, Civ. No. 21-2-00234-29 (Skagit Cnty. Super. Ct. Apr. 15, 2021).[11]

Without a clear statement from this Court authorizing judicial takings claims, property owners in these States and others are left in a lurch. After all, as the Framers recognized, property rights are particularly vulnerable to majoritarian impulses. *See Cates*, 158 S.W. at 761 (redefining navigable waters to permit public access after property owners' homes and stores were set on fire, and the lower court judge and attorneys for property owners assaulted and killed, by

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[9] *See Bell v. Town of Wells*, 557 A.2d 168, 170–173 (Me. 1989) (discussing the history of private ownership of the intertidal zone in Maine).

[10] The trial court's opinion granting in part and denying in part the property owners' motions to dismiss is available at *Masucci v. Judy's Moody*, Order (Apr. 15, 2022), https://casetext.com/case/masucci-v-judys-moody-llc.

[11] The complaint is available at https://www.linetime.info/Complaint%202021%2004%2015.pdf.

a violent mob of fishermen seeking access to privately-owned Reelfoot Lake), described in Brady, *supra*, at 1454. *See also* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 855 (1995). The risk is heightened in state courts where elected judges may be sensitive to majoritarian or partisan concerns. *See* Thompson, *supra*, at 1488–89 (noting that state judges are "frequently former legislators or party activists and maintain their political allegiances after assuming the bench"); Ilya Somin, Knick v. Township of Scott*: Ending a Catch-22 That Barred Takings Cases from Federal Court*, 2019 Cato Sup. Ct. Rev. 153, 182 (state judges "have ties to broader political coalitions"). Public beach access is more popular than the property rights of beachfront landowners, which might explain why the New Jersey Supreme Court in *Matthews* was comfortable declaring that "[a]rchaic judicial responses are not an answer to a modern social problem" and redefining the public trust doctrine to greatly increase public access to formerly private beaches. 471 A.2d at 365. Undeterred by the possibility of a judicial taking, there is little to stop any court from ruling "to implement [its own] conclusion that public policy favors extension of public use and ownership of the shoreline." *Sotomura*, 460 F.Supp. at 481. If the federal courts do not recognize Petitioners' cause of action, property owners are left without access to the federal courts, much less a remedy.

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In *Webb's Fabulous Pharmacies*, this Court unanimously declared that "a State, by *ipse dixit*, may not transform private property into public property

without compensation." 449 U.S. at 164. This sort of "arbitrary use of governmental power," the Court said, is "the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.* The Court should grant certiorari to decide whether Justice Scalia was right that "[t]here is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation." *Stop the Beach*, 560 U.S. at 714; *see also* Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pub. Pol'y 91, 93 (2011) ("Judicial takings are ultimately no different from takings carried out by other government actors."). Or, put simply, whether "judicial takings are just plain takings." Somin, *supra*, at 93.

II. If Judicial Takings Are Cognizable, This Court Should Resolve the Corollary Jurisdictional Questions Raised Below

As the Seventh Circuit's decision shows, lower court doubt and indecision over judicial takings is not confined to the question whether to recognize the doctrine. It extends to the mechanics of bringing the claim and who—if anyone—has standing to sue. The Court of Appeals here avoided the question of whether to recognize the cause of action, instead holding that Petitioners lack standing to sue state officials to stop the taking. But if the Seventh Circuit panel was correct, *nobody* has standing to assert a judicial taking. After all, Petitioners followed the standard roadmap for seeking prospective injunctive relief against an unconstitutional exercise of state power—

the district court recognized that "the straightforward inquiry under *Ex parte Young* would seem to result in the court having jurisdiction over plaintiffs' claims." App.31a–32a. If property owners cannot access federal courts when a state court defines their property out of existence—if Petitioners effectively have a right without a remedy—this Court should grant certiorari to say so, saving the time and resources of both courts and property owners who would otherwise pursue judicial takings claims. But if Petitioners *do* have standing to sue the State defendants, then the Court should grant certiorari to instruct litigants and courts how property owners may properly bring a judicial takings claim.

A. The Seventh Circuit's Approach Conflicts with *Ex parte Young*, Other Lower Courts, and Traditional Takings Remedies

The Seventh Circuit held that Petitioners could not satisfy the causation and redressability requirements for Article III standing. App.12a; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The panel held that Petitioners could not establish causation because the true source of their injuries—the taking—was caused by the state supreme court. App.17a. And it thought no court could redress Petitioners' injuries because a federal court could not "grant title" to Petitioners when Indiana law says title is held by the State. App.13a. Both assertions conflict with this Court's precedent and other lower courts.

First, the panel's assertion that the state supreme court caused Petitioners' injuries turns *Ex parte Young* on its head. In a typical *Young* case, where a

plaintiff seeks prospective relief to halt enforcement of a state statute, this Court has emphasized that the defendant must be a state official with "enforcement authority." *Whole Woman's Health v. Jackson*, 142 S.Ct. 522, 534 (2021). A state legislature is responsible for enacting an offending statute, but neither it nor its members are proper defendants in a *Young* suit because the legislature has no enforcement authority; its action is complete. *See id.* Federal courts only have the power to enjoin individuals tasked with enforcing laws; they cannot enjoin state laws themselves. *California v. Texas*, 141 S.Ct. 2104, 2115–16 (2021). And a court may only enjoin future conduct—it is powerless to stop an action that has already occurred. *See Dick v. Colo. Housing Enters., L.L.C.*, 872 F.3d 709, 713 (5th Cir. 2017). Plaintiffs challenging an allegedly unconstitutional statute, therefore, sue the state officials responsible for implementing and enforcing it. *Berger v. N.C. State Conf. of the NAACP*, 142 S.Ct. 2191, 2197 (2022) ("usually a plaintiff will sue the individual state officials most responsible for enforcing the law in question and seek injunctive or declaratory relief against them").

The same should be true where the offending state action takes the form of a judicial declaration. *See Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 261 (2011) (novelty of action does not create new exceptions to "straightforwardly applying" *Ex parte Young*). The Indiana Supreme Court has no role in enforcing or implementing its decree in *Gunderson*. The political branches of Indiana's government retained the power to implement *Gunderson*—or perhaps not implement it—after the

decision was issued.[12] Petitioners did not need a court order to restrain the supreme court justices—who had already acted—but rather the executive officials who would exercise the State's ownership and control pursuant to *Gunderson* and thereby prevent Petitioners from exercising their fundamental right to exclude the public from their property. Petitioners thus properly sued the Director of DNR, the agency with the power under state law to manage and control the property taken. *See Gunderson*, 90 N.E.3d at 1185 (citing Ind. Code § 14-19-1-1(9) (2017) (assigning to DNR the "general charge of the navigable water of Indiana"); Ind. Code § 14-18-5-2 (2017) (specifying that state lands abutting a lake or stream are under "the charge, management, control, and supervision of the [DNR]")).

Second, the panel's concern about a court's power to "grant title" to Petitioners rests on a misunderstanding of this Court's takings precedent. Historically, there is nothing unusual about Petitioners' prayer for relief seeking a declaratory judgment and an injunction "prohibiting Defendants and the State of Indiana from enforcing both the *Gunderson* decision and HEA 1385's provisions on ownership of Lake Michigan below the OHWM, thus prohibiting Defendants and the State from exercising ownership over the disputed property." App.83a–84a. At common law, "[i]f a government took property

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[12] Legislators briefly considered a bill that would have repudiated *Gunderson*'s decree of State ownership and defined private property "according to the legal description of the private property in the most recent deed to the property that is recorded in the county recorder's office." HB 1031, Ch. 10, § 4 (as introduced), http://iga.in.gov/legislative/2020/bills/house/1031/#document-fd743564. The proposal died in committee.

without payment, a court would set aside the taking because it violated the Constitution and order the property restored to its owner." *Knick*, 139 S.Ct. at 2176. As this Court explained, "[a]ntebellum courts, which had no means of compensating a property owner for his loss, had no way to redress the violation of an owner's Fifth Amendment rights other than ordering the government to give him back his property." *Id.* (citing *Callender v. Marsh*, 18 Mass. 418, 430–31 (1823)). Today, the typical remedy for a taking is inverse condemnation, which renders equitable relief unavailable. *See id.* at 2176–77; *see also id.* at 2180 (Thomas, J., concurring). But injunctive relief remains available where equitable relief is not. *See Cedar Point*, 141 S.Ct. at 2070 (noting that the property owners sought injunctive relief), *id.* at 2089 (Breyer, J., dissenting) (the State could foreclose injunctive relief by providing just compensation).

The Seventh Circuit's attempt to distinguish *Cedar Point* is unconvincing and demonstrates the Court of Appeals' divergence from this Court's recent opinion. Both cases involve state assertions of authority over private property. *Cedar Point* repeatedly described the challenged union access regulation as an "appropriation" of the property owners' right to exclude union organizers. *Id.* at 2072 (majority opinion) ("The access regulation appropriates a right to invade the growers' property and therefore constitutes a per se physical taking."); *id.* at 2074 ("The regulation appropriates a right to physically invade the growers' property—to literally 'take access,' as the regulation provides."). Appropriation, the Court said, "means 'taking as one's own,' and the regulation expressly grants to labor

organizers the right to 'take access.'" *Id.* at 2077 (citations omitted). When California took an access right pursuant to the Agricultural Labor Relations Board regulation, agricultural employers obtained an injunction against future enforcement of the regulation against them. *See* Stipulated Judgment After Remand, Declaratory Judgment, and Permanent Injunction, *Cedar Point Nursery v. Hassid*, No. 1:16-cv-00185-NONE-BAM, ECF No. 39 (E.D. Cal. Sept. 1, 2021). But the Seventh Circuit held that federal courts are powerless to enjoin the Director of DNR from exercising control over property taken from Petitioners.

The Seventh Circuit insisted that *Cedar Point* was different because it did not involve *title*. But this Court's precedents have emphasized the protection of all manner of property interests short of formal, exclusive title. *See Dolan v. City of Tigard*, 512 U.S. 374, 394–95 (1994) (recreational easement); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831–32 (1987) (beach access easement); *Loretto*, 458 U.S. at 438 (installation of cable equipment); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (navigational servitude). A State must not evade review by simply declaring that it holds exclusive title to a portion of formerly private property. This Court has often said, "property rights 'cannot be so easily manipulated.'" *Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015) (quoting *Loretto*, 458 U.S. at 439 n.17). The Seventh Circuit disagreed.

Certiorari is warranted to decide whether State assertions of property rights can be challenged in federal court, or instead whether "a government's assumption of title to property is no different from its

assumption of any state authority that it may ultimately turn out not to have." *Coeur d'Alene Tribe*, 521 U.S. at 301 (Souter, J., dissenting).

B. If Petitioners in This Case Lack Standing, It Is Impossible for *Anyone* To Bring a Judicial Takings Claim

The Seventh Circuit's jurisdictional holding effectively makes it impossible for property owners deprived of their rights via judicial decree to bring a takings claim challenging that state action. The panel held that Petitioners lack standing because they did not sue the right parties, but, as noted above, an injunction against the state supreme court justices would be ineffective because only state executive officials like the Director of DNR can be ordered to provide a remedy. Yet the Seventh Circuit forecloses suit against the DNR Director, too, leaving Petitioners with nothing. If judicial takings are cognizable—as four members of the Court thought in *Stop the Beach*—then *somebody* has to be able to bring a claim.

This case presents precisely the scenario Justice Scalia envisioned in his two opinions on this subject. In *Cannon Beach*, Justice Scalia (joined by Justice O'Connor) expressed concern about granting certiorari directly from a state supreme court decision that allegedly effected a taking. He stressed that review in this Court would be difficult where no "record concerning the facts" is developed because the issue was "first injected into the case" at the state supreme court. *Cannon Beach*, 114 S.Ct. at 1335. Later joined by three other justices, Justice Scalia expanded on the mechanics of judicial takings in *Stop the Beach*—a case in the same posture as *Cannon Beach*. There, the plurality explained that where a

property owner was party to the state court litigation, he would have "to appeal a claimed taking by a lower court to the state supreme court, whence certiorari would come to this Court." *Stop the Beach*, 560 U.S. at 727. If certiorari were denied, the state-court loser "would no more be able to launch a lower-court federal suit against the taking effected by the state supreme-court opinion than he would be able to launch such a suit against a legislative or executive taking approved by the state supreme-court opinion." *Id.* at 727–28. But a property owner who, like Petitioners, "was not a party to the original suit," could "challenge in federal court the taking effected by the state supreme-court opinion to the same extent that he would be able to challenge in federal court a legislative or executive taking previously approved by a state supreme-court opinion." *Id.* at 728.

Petitioners, who were not parties to *Gunderson*,[13] followed Justice Scalia's roadmap and challenged in federal court the State's assumption of title to their property. If they do not have standing, nobody does. If a judicial taking is a cognizable cause of action, certiorari is warranted to determine whether the *Stop the Beach* plurality was correct that a property owner affected by a judicial declaration of ownership can challenge the taking directly in federal court.

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[13] For this reason, neither res judicata nor the *Rooker-Feldman* doctrine applies.

III. This Case Is the Ideal Vehicle To Address an Open Question of Great National Importance

For three reasons, this case presents a clean vehicle for the Court to answer the judicial takings question once and for all.

First, the case comes to the Court on the pleadings. Petitioners do not ask the Court to decide the merits of their judicial takings claim. Nor do Petitioners ask the Court to weigh in on whether Respondents have sovereign immunity under *Coeur d'Alene Tribe*. The district court addressed both questions, App.32a–50a, but the Seventh Circuit did not, App.19a–21a (identifying these "additional hurdles" but not addressing them). These questions are well-suited to be addressed on remand should Petitioners prevail in this Court.

Second, this Court's decision will clear the logjam that has formed after *Stop the Beach* and allow the lower federal courts to proceed with confidence on the judicial takings question. The issue has percolated in the federal courts and been the subject of voluminous academic commentary that will aid the Court in finally resolving the issue. And the case presents the opportunity to resolve the jurisdictional issues surrounding these claims and instruct courts and litigants regarding the mechanics of bringing them.

Third, state courts need guidance on this question sooner rather than later. A clear statement from this Court that property owners have a federal remedy for state judicial redefinition of their property rights may serve as a deterrent to state courts considering following Indiana's lead to expand public access to the

shoreline without compensating owners. In short, this Court should grant certiorari to ensure that "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies*, 449 U.S. at 164.

CONCLUSION

Petitioners respectfully request that the Court grant their petition for a writ of certiorari.

DATED: September 2022.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 21-1599

RANDALL PAVLOCK, *et al.*,
Plaintiffs-Appellants,

v.

ERIC J. HOLCOMB, Governor of Indiana, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 2:19-cv-00466-JD – **Jon E. DeGuilio**, *Chief Judge*.

ARGUED NOVEMBER 10, 2021 — DECIDED MAY 25, 2022

Before MANION, WOOD, and SCUDDER, *Circuit Judges*.

WOOD, *Circuit Judge*. In *Gunderson v. State*, 90 N.E.3d 1171 (Ind. 2018), the Indiana Supreme Court held that the State of Indiana holds exclusive title to Lake Michigan and its shores up to the lake's ordinary high-water mark. See *id.* at 1173. *Gunderson* was an

unwelcome development for plaintiffs Randall Pavlock, Kimberley Pavlock, and Raymond Cahnman, who own beachfront property on Lake Michigan's Indiana shores. Believing that their property extended to the low- water mark, they brought this lawsuit in federal district court alleging that the ruling in Gunderson amounted to a taking of their private property in violation of the Fifth Amendment. They would like to hold the state supreme court responsible for this alleged taking. In other words, they are asserting a "judicial taking."

The plaintiffs, whom we will call the Owners, sued a number of Indiana officeholders in their official capacities: Governor Eric Holcomb; the Attorney General, now Todd Rokita; the Department of Natural Resources Director, now Daniel Bortner; and the State Land Office Director, now Jill Flachskam. (We have identified the current officeholders, none of whom was in place when the complaint was filed, with the exception of Governor Holcomb. We have substituted the current officials for their predecessors in accordance with Federal Rule of Appellate Procedure 43(c)(2). We refer to the defendants collectively as the State.) The district court granted the State's motion to dismiss for failure to state a claim. Because none of the named officials caused the Owners' asserted injury or is capable of redressing it, we conclude that the Owners lack Article III standing and affirm the judgment of the district court, though we modify it to show that it is without prejudice.

I

A

Indiana has long held in trust the portion of Lake Michigan that lies within its borders and the submerged lands be- low the water. See *Lake Sand Co. v. State*, 120 N.E. 714, 715–16 (Ind. Ct. App. 1918). The shores of Lake Michigan are surrounded by privately-owned property. Owners of private lakeshore property, including our plaintiffs, and the State dispute where the line should be drawn between the public and private holdings. In 2014, the Pavlocks' neighbors filed a quiet-title action against Indiana in state court. That was the *Gunderson* case, in which the Indiana Supreme Court first attempted to fix that line.

The *Gunderson* plaintiffs, like the Owners here, took the position that their deeds conferred title (and thus the right to exclude the public) past the lake's ordinary high-water mark, all the way down to the low-water mark. See *Gunderson*, 90 N.E.3d at 1175. The ordinary high-water mark is a commonly used method of measuring the boundaries of non-tidal bodies of water. At common law, it was defined as "the point where the presence and action of water are so common and usual … as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself." *Id.* at 1181 (collecting authorities) (internal quotation marks omitted); compare 33 C.F.R. §328.3 (2021) (defining the ordinary high-water mark for the Army Corps of Engineers). By contrast, the low-water mark is the

lowest level reached by a lake or a river (for example, a lake's low point during a dry season). *Low-Water Mark*, OXFORD ENGLISH DICTIONARY (3d ed. 2013).

The state supreme court sided with Indiana in *Gunderson*, interpreting state law to require "that the boundary separating public trust land from privately-owned" lakefront property "is the common-law ordinary high water mark." *Gunderson*, 90 N.E.3d at 1173. The court reached its decision by tracing the history of the public-trust doctrine. It began by applying the Equal-Footing doctrine, see, *e.g.*, *PPL Montana, LLC v. Montana,* 565 U.S. 576, 590–91 (2012), under which Indiana received exclusive title to the lands underlying the Great Lakes when the state was admitted to the Union in 1816. *Gunderson,* 90 N.E.3d at 1176–77 (citing *Martin v. Waddell's Lessee*, 41 U.S. 367, 414 (1842) (holding that when the original thirteen states "became themselves sovereign" each acquired "the absolute right to all their navigable waters and the soils under them for their own common use"); *Utah v. United States*, 403 U.S. 9, 10 (1971) (holding that, under the "'equal footing' principle," later-admitted states acquired "the same property interests in submerged lands as was enjoyed by the Thirteen Original States"); *Hardin v. Jordan*, 140 U.S. 371, 382 (1891) (extending public ownership over navigable waters and underlying land "to our great navigable lakes, which are treated as inland seas.")). Following the weight of authority, the state supreme court concluded that "Indiana at statehood acquired equal-footing lands inclusive of the temporarily-exposed shores of Lake Michigan up

to the natural [ordinary high-water mark].” *Id.* at 1181.

The Indiana Supreme Court then asked whether, at some point between statehood and the present day, the state relinquished title to the land below Lake Michigan’s ordinary high-water mark. This issue, it recognized, is one of state law. See *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376–77 (1977) (explaining that, while the Equal-Footing doctrine is a matter of federal law, “subsequent changes in the contour of the land, as well as subsequent transfers of the land, are governed by the state law”). To answer that question, the court examined its own cases, the Lake Preservation Act, Ind. Code § 14-26-2-5, and other provisions of the Indiana Code. It concluded that, with the exception of discrete parcels not relevant here, Indiana has never relinquished title to Lake Michigan’s shores below the ordinary high-water mark. *Gunderson*, 90 N.E.3d at 1182–85. Thus, as a matter of state law, the court concluded that Indiana holds absolute title to the lands under Lake Michigan up to the ordinary high-water mark. Private landowners in Indiana may thus hold title only to beachfront property above (*i.e.* landward of) that boundary. *Id.* at 1182.

Shortly after *Gunderson* was decided, the Indiana General Assembly passed House Enrolled Act (HEA) 1385, which codified the *Gunderson* decision. The Act stipulates that:

> (a) Absent any authorized legislative conveyance before February 14, 2018, the state of Indiana owns all of Lake

> Michigan within the boundaries of Indiana in trust for the use and enjoyment of all citizens of Indiana.
>
> (b) An owner of land that borders Lake Michigan does not have the exclusive right to use the water or land below the ordinary high water mark of Lake Michigan.

Ind. Code § 14-26-2.1-3. The plaintiffs argue that HEA 1385 further broadened public use of the Lake Michigan shoreline. *Gunderson* held that "*at a minimum*, walking below the [ordinary high-water mark] along the shores of Lake Michigan" is a protected public use, along with commerce, navigation, and fishing. *Gunderson*, 90 N.E.3d at 1188. The statute, however, expressly recognizes public uses such as boating, swimming, and other ordinary recreational uses. Ind. Code § 14-26-2.1-4(b).

B

Because this case was resolved on a motion to dismiss, we accept all well-pleaded factual allegations in the complaint as true. *Hardeman v. Curran*, 933 F.3d 816, 819 (7th Cir. 2019).

The Owners all hold title to beachfront property on the Lake Michigan shore. None of them was a party to *Gunderson* (though Cahnman participated as *amicus curiae*). Like the Gunderson plaintiffs, the Owners here allege that their property deeds cover land that extends down to Lake Michigan's low-water mark. Therefore, they argue, when the Indiana

Supreme Court determined that the state has always held title to the land all the way up to the ordinary high-water mark, Indiana's highest court "took" (for Fifth Amendment purposes) a portion of their property without just compensation. HEA 1385, they argue, was also an uncompensated taking, because it expanded *Gunderson*'s easement to permit additional uses.

Faced with this unfavorable ruling from the state court, the Owners turned to the federal court, filing this action under 42 U.S.C. § 1983 against the state defendants we mentioned, all of whom are sued in their official capacities. The Owners want the federal court to issue a declaratory judgment stating that the Indiana Supreme Court's decision in *Gunderson* (and HEA 1385) effected an uncompensated taking of their property between the ordinary high-water mark and the low-water mark. They also seek a permanent injunction barring the state defendants from enforcing *Gunderson* and HEA 1385. The Owners concede that their challenge to HEA 1385 turns on their judicial-takings claim. If *Gunderson* stands, it follows that the Owners never held title to the land below the ordinary high-water mark, and the legislation therefore had no effect on their property rights. The Owners are not seeking compensation for the alleged taking; they want only to be able to exclude members of the public from the lands they claim.

The district court granted the State's motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). It held that the Owners' claims are functionally equivalent to a quiet-title action, and

so are barred by sovereign immunity under *Idaho v. Coeur d'Alene Tribe of Idaho*. See 521 U.S. 261 (1997) (establishing a narrow exception to the *Ex parte Young* doctrine). The court declined to reach the question whether it is possible to state a claim for a judicial taking. Even if the answer were yes, the court reasoned, the Owners could not show that they ever held an "established right" to the property allegedly taken by the state court through *Gunderson*. See *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot.*, 560 U.S. 702, 713 (2010).

II

In this court, the Owners have tried to develop their "judicial takings" theory. They contend that the Indiana Supreme Court itself took their property through its *Gunderson* decision, and no state actor has paid them for it. Before discussing this theory any further, it is helpful to provide some context for it.

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163–65 (1980), but that does not necessarily mean that it applies to the states' judiciaries. The Supreme Court last considered the judicial-takings question in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, but in that case, no majority of the Court agreed on "whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause[.]"

560 U.S. 702, 734 (2010) (Kennedy, J., concurring). Since then, neither this court nor any of our fellow circuits have recognized a judicial-takings claim.

In *Stop the Beach*, only four justices endorsed the argument that a court decision settling disputed property rights under state law could, in some circumstances, violate the Takings Clause. See *id.* at 706, 713–14. There, owners of littoral property challenged a decision of the Florida Supreme Court resolving an open question about the boundary between their private holdings and state-owned land. The case turned on a Florida statute that authorized local governments to restore eroding beaches; under the statutory scheme, the state fixed an "erosion control line" that replaced "the fluctuating mean high-water line as the boundary between" private and state property wherever the preservation projects took place. *Id.* at 709–10. Beachfront property owners sued in state court, arguing that the law deprived them of their property rights without just compensation. The Florida Supreme Court rejected that argument, holding instead that the law did not violate Florida's version of the Takings Clause (which mirrors its Fifth Amendment counterpart). See *Stop the Beach*, 560 U.S. at 712. The property owners appealed to the Supreme Court, arguing that the Florida Supreme Court took their property rights "by declaring that those rights did not exist[.]" *Stop the Beach*, 560 U.S. at 729.

Writing for four Justices, Justice Scalia urged the Court to declare that a judicial decision resolving contested property rights could be a taking. In his view, there was "no textual justification" for

"allow[ing] a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Id.* at 714. Justice Scalia's plurality opinion proposed a new test for identifying when a judicial taking occurs: "[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Id.* at 715 (emphasis in original).

Justices Kennedy and Breyer filed separate opinions concurring in part, and concurring in the judgment, in which they expressed grave doubts about the judicial-takings concept; Justice Stevens, the ninth Justice, took no part in the decision. Justice Scalia's opinion on the key point did not marshal a majority, and no "controlling principle [on the judicial takings issue] can be gleaned" from the plurality and concurring opinions. *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 615 (7th Cir. 2014). Indeed, much of the discussion about judicial takings could be regarded as *dicta*, because the Court unanimously held that in any case, the relevant state-court decision did not effect a taking because it did not "eliminate[] a right [] established under Florida law." *Stop the Beach*, 560 U.S. at 733 ("The Takings Clause only protects property rights as they are established under state law[.]").

Justice Kennedy (joined by Justice Sotomayor) took the position that the state's "vast" power to take property, so long as it acts for a public purpose and provides just compensation, belongs only to the democratically accountable legislative and executive branches. *Stop the Beach*, 560 U.S. at 734–35

(Kennedy, J., concurring in the judgment). If an arbitrary or irrational judicial decision "eliminates an established property right," he wrote, that decision could be "invalidated under the Due Process Clause" as a deprivation of a property right without due process. *Id.* at 735. The due-process constraint allows states to make reasonable "incremental modification under state common law" but bars courts from "abandon[ing] settled principles." *Id.* at 738. But, he thought, recognizing a claim for judicial takings implies that the courts have the power to take property *with* compensation—a power "that might be inconsistent with historical practice." *Id.* at 739 (discussing the Framers' view of the Takings Clause). Moreover, he wrote, the judicial-takings theory would raise vexing procedural and remedial issues. *Id.* at 740. In a second opinion concurring in the judgment, Justice Breyer (joined by Justice Ginsburg) raised comity and federalism concerns, noting that a claim for judicial takings "would create the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law." *Id.* at 744 (Breyer, J., concurring).

Since *Stop the Beach* was decided, no federal court of appeals has recognized this judicial-takings theory. What has occurred instead is avoidance: every circuit to consider the issue has expressly declined to decide whether judicial takings are cognizable. Instead, each court has assumed without deciding that *if* such a cause of action were to exist, the relevant test would be the one Justice Scalia suggested in his *Stop the Beach* plurality opinion: did some arm of the state declare that "what was once an established right of

private property no longer exists"? 560 U.S. at 715. In each of the cases that have reached our sister circuits, the courts have held that the challenged state-court decision had not erased an *established* property right. Thus, even if there were a theoretical claim for a "judicial" taking, the plaintiffs failed. See *Wells Fargo Bank v. Mahogany Meadows Ave. Tr.*, 979 F.3d 1209, 1215–16 (9th Cir. 2020) (declining to answer whether judicial-takings claims are possible when "nothing in Nevada law" showed that plaintiffs had an "established right" to disputed property); *Petrie ex rel. PPW Royalty Tr. v. Barton*, 841 F.3d 746, 756 (8th Cir. 2016) (opting not to decide whether a claim for judicial takings exists where it "would have failed" anyway); *In re Lazy Days' RV Ctr. Inc.*, 724 F.3d 418, 425 (3d Cir. 2013) (quickly discarding a claim that a bankruptcy order was a taking because "adjudication of disputed and competing claims cannot be a taking").

III

The Owners have a different, antecedent problem in the case before us: that of Article III standing. See *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) ("[T]he court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties."). The test for standing is a familiar one: "[a] plaintiff has standing only if he can allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *California v. Texas*, --- U.S. ---, 141 S. Ct. 2104, 2113 (2021) (citing cases; internal quotations omitted). The party invoking federal jurisdiction has the burden of proving each of these requirements. *Lujan v. Defs. of*

Wildlife, 504 U.S. 555, 561 (1992). We are satisfied that the Owners have alleged injury in fact, insofar as they assert that their property was taken without just compensation. They fall short, however, when it comes to causation and redressability.

A

We begin with redressability. The Owners must show that it is "likely … that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotations omitted). They have not done so. None of the defendants sued has the power to grant title to the Owners in the face of the Indiana Supreme Court's *Gunderson* decision and HEA 1385. Even if we were to agree with the Owners, therefore, a judgment in their favor would be toothless.

Redressability turns on the "connection between the alleged injury and the judicial relief requested." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984). The Owners' injury stems from the fact that, for many years, Indiana courts had not decided where the public land of Lake Michigan ends and private property begins. The *Gunderson* decision resolved that uncertainty by definitively holding that the boundary lies at the ordinary high-water mark. Essentially, the Owners think that the state supreme court erred by making that decision (either as a matter of state law or federal law), and they would like us to overturn that court's ruling. Until it is set aside, the Owners contend, they have been deprived of their asserted title to the land between the high- and low-water marks without just compensation.

There are a number of problems with this approach, not least of which is that we lack authority to overrule a state supreme court. But the straightforward point is that none of the state defendants the Owners have named—not the Governor, not the Attorney General, not the Indiana Department of Natural Resources, and not the State Land Office—has the power to confer title on the Owners to land that Indiana's highest court says belong to the state. No injunction we enter can fix that problem.

Typically, a lawsuit alleging that a plaintiff "suffered a violation of his Fifth Amendment rights" is redressable through compensation. *Knick v. Township of Scott*, --- U.S. ----, 139 S. Ct. 2162, 2168 (2019). But the Owners did not sue for compensation from the state of Indiana—and even if they had, it is not clear that federal courts could provide it. The Supreme Court's recent decision in *Knick v. Township of Scott* held that a plaintiff may "bring a 'ripe' federal takings claim in federal court," without first exhausting state remedies, "as soon as a government takes his property for public use without paying for it." *Id.* at 2167, 2170. But unlike *Knick*, which involved a suit against a town, the Owners' suit is against a state, and states enjoy sovereign immunity. See *Jinks v. Richland County*, 538 U.S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit."). Every circuit to consider the question has held that *Knick* did not change states' sovereign immunity from takings claims for damages in federal court, so long as state courts remain open to those claims. See *Zito v. N.C. Coastal Res. Comm'n*, 8 F.4th 281, 286–88 (4th

Cir. 2021); see also *Ladd v. Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020), cert. denied, --- U.S. ----, 141 S. Ct. 1390 (2021); *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019); *Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 456–57 (5th Cir. 2019), cert. denied, --- U.S. ----, 140 S. Ct. 2566 (2020). In addition, states are not "persons" for purposes of 42 U.S.C. § 1983. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), and so damages are not available using that theory. Recognizing these hurdles, the Owners seek only equitable and declaratory relief.

Specifically, the Owners want an injunction barring the State from enforcing *Gunderson* or HEA 1385. Assuming for the moment that *Ex parte Young*'s exception to sovereign immunity applies here, see Section IV.A *infra*, and that we can entertain such a request, it remains true that such an injunction would not redress the Owners' injury. Once again, that alleged injury comes from the fact that *Gunderson* recognized that the Owners' property interests end at the ordinary highwater mark on Lake Michigan's shores. An injunction barring the State from enforcing the decision would do nothing to alter the state's title to the land.

Gunderson recognized that members of the public have a right to walk on the beach in front of the Pavlocks' house as long as they stay lakeward of the high-water mark; an injunction requiring the State to refrain from any action would not grant the Pavlocks the right to exclude. If Cahnman wants to sell his beachfront property, he may convey land only from the high-water mark. The requested injunction would

not give him title to submerged lands that Indiana law (confirmed by both the state's highest court and its legislature) says belongs to the state. To the extent the Owners' deeds conflict with *Gunderson* and HEA 1385, the latter two sources govern. And if, for example, the Pavlocks tried to sue people who walked on the section of beach between the high- and low-water marks for trespass, or Cahnman tried to hoodwink a buyer by representing that he held title down to the low-water mark, an injunction against state officials would not prevent Indiana's Recorder's Offices from correcting that error, or Indiana courts from applying *Gunderson*.

In this respect, the Owners' judicial takings claim differs materially from the one at issue in *Cedar Point Nursery v. Hassid*, --- U.S. ----, 141 S. Ct. 2063 (2021), in which "the government physically [took] possession of property without acquiring title to it." *Id.* at 2071. In *Cedar Point*, California agricultural employers challenged a state regulation that guaranteed union organizers physical access to their property to organize farmworkers. *Id.* at 2069. The Supreme Court held that California's access regulation was a *per se* physical taking requiring compensation and remanded the case for further proceedings. *Id.* at 2080. The *Cedar Point* plaintiffs, like the Owners, sought only declaratory and injunctive relief. But unlike our plaintiffs, the California growers' injury was not the loss of a dispute about who held title; it was the uncompensated taking of property that they indisputably owned. A court could redress that injury prospectively by enjoining enforcement of the regulation, or retrospectively by ordering just compensation. See *id.* at 2089 (Breyer, J., dissenting).

Here, by contrast, ordering any of the named state defendants not to enforce a state property law cannot redress the Owners' injuries, because non-enforcement will not change the content of the underlying law itself.

B

The Owners have also failed to establish the related causation requirement for Article III standing. As the parties asserting federal jurisdiction, they must show that their alleged injury is "fairly traceable" to a defendant's allegedly illegal action, "and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (citing *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)) (cleaned up).

The property between the high- and low-water marks is held in public trust, but not because of any action taken by these state defendants. Rather, that property is held in public trust because the Indiana Supreme Court, an independent actor, settled the *Gunderson* dispute as a matter of state law, and the state legislature then confirmed that result. The court relied on a long line of federal and state decisions recognizing the Equal-Footing doctrine and setting the boundaries between Indiana's public trust lands and surrounding private property. See *Gunderson*, 90 N.E.3d at 1179–87. The Owners attempt to dodge this problem by suing state officials who are charged with enforcing state property law. As we already have said, however, the state's enforcement or non-enforcement has no effect on the underlying title to the land. Moreover, the Owners' complaint does not include any

allegations showing that the state defendants' enforcement of *Gunderson* has caused any further injury that they have not already experienced as a result of the decision itself. The Owners' injury is therefore traceable not to the state defendants, but to the independent actions of the Indiana Supreme Court.

C

The Owners' causation and redressability problems highlight the federalism and comity concerns that are inherent in the judicial-takings theory. In *Gunderson*, the Indiana Supreme Court resolved a state-law issue of first impression and issued a thorough decision determining where the public-private boundary lies on the shores of Lake Michigan. If the court is correct, then the property between the ordinary high-water mark and the low-water mark could not have been taken, because it was never privately owned in the first place. See *Conyers v. City of Chicago*, 10 F.4th 704, 711 (7th Cir. 2021) (noting that there is a "predicate requirement [in Takings cases] that the private property [allegedly taken] must belong to the plaintiff.") The Owners may be able to say, in good faith, that their expectations were disturbed, just as any losing party in a state court case involving disputed property rights might do. But it is the role of "the state court … to define rights in land located within the states." *Fox River Paper Co. v. R.R. Comm'n of Wis.*, 274 U.S. 651, 657 (1927) (adding that "the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts

determine to be nonexistent”). If the Owners never had title to this property under Indiana law, it could not have been “taken” by the state.

As we noted earlier, it is state property law itself, rather than any action by the state parties, that is adverse to the Owners’ claims. We would be unable to hold that their property was taken without also holding that *Gunderson* was wrongly decided. In effect, their theory of the case would have us sit in appellate review of the Indiana Supreme Court’s decision about state property law—a role that would sit uneasily next to the Supreme Court’s exclusive “statutory authority to review the decisions of state courts in civil cases.” *Milchtein v. Chisholm*, 880 F.3d 895, 897 (7th Cir. 2018) (citing 28 U.S.C. § 1257). We recognize, in this connection, that the *Rooker-Feldman* doctrine does not apply here, because the Owners were not parties to the *Gunderson* litigation. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). Nonetheless, that doctrine’s animating federalism values counsel us to proceed cautiously when a novel legal theory raises the specter of a lower federal court reviewing the merits of a state supreme court’s decision.

IV

Before concluding, we note that the district court dismissed this case for two additional reasons. First, it held that it lacked subject-matter jurisdiction because this case falls under a narrow exception to the *Ex parte Young* doctrine established by the Supreme Court’s decision in *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997). Generally, a plaintiff may

sue under *Ex parte Young*'s exception to the Eleventh Amendment's sovereign-immunity bar so long as the complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). In *Coeur d'Alene Tribe*, however, the Supreme Court announced that the *Ex parte Young* rule has a narrow exception for a "quiet title suit against [a state] in federal court" or a suit for injunctive relief that is "close to the functional equivalent of quiet title." 521 U.S. at 281–82; see also ERWIN CHEMERINSKY, FEDERAL JURISDICTION (7TH EDITION) 471, 477–78 (2016).

Pointing to some criticism of *Coeur d'Alene Tribe,* the Owners suggest that it was a one-way, one-day case with no further applicability, or alternatively, that it does not apply to suits brought by private property holders rather than Tribal nations. The State responds that *Coeur d'Alene Tribe* remains good law and squarely governs this case, because it is "close to the functional equivalent of quiet title." *Coeur d'Alene*, 521 U.S. at 282.

The district court agreed with the State. In addition, it held that even assuming the judicial-takings theory might apply somewhere, the Owners had not managed to state a claim under it here. Recall that Justice Scalia's proposed test for a judicial taking requires plaintiffs to show that "the property right allegedly taken was *established*" as a matter of state law, prior to the decision. See *Stop the Beach*, 560 U.S. at 728 (emphasis added). The district court thought that the Owners' complaint revealed on its face that no such right was established. Prior to *Gunderson*, it

noted, the status of Indiana's Lake Michigan coastline had been ambiguous at best. The Owners have not and could not show that the Indiana Supreme Court's decision was a sharp or unexpected departure from a clearly established property right. Rather, the state court in *Gunderson* settled an unclear and disputed issue of first impression. The district court therefore noted that, even if it had jurisdiction over the case, it would have dismissed the Owners' action for failure to state a claim under Rule 12(b)(6).

Because the Owners lack standing to sue the state defendants, we need not reach either the *Coeur d'Alene* issue or the alternative ruling under Rule 12(b)(6) today. We merely note that the Owners could not prevail without also overcoming these additional hurdles.

V

The Owners contend that the Indiana Supreme Court's decision in *Gunderson v. Indiana* unconstitutionally took their property without compensation. Because they have sued the Indiana Governor and several state executive officials who neither caused the asserted injury nor can redress it, they lack standing to sue under Article III of the Constitution. We therefore AFFIRM the district court's dismissal of the complaint for lack of subject-matter jurisdiction, although we modify it to a dismissal without prejudice.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

RANDALL PAVLOCK, *et al.*,	)	
	)	
Plaintiffs,	)	
v.	)	Case No.
	)	2:19-DV-00466 JD
ERIC J. HOLCOMB, in his	)	
Official capacity as Governor	)	
of the State of Indiana, *et al.*,	)	
	)	
Defendants.	)	

OPINION AND ORDER

This case arises from Plaintiffs Raymond Cahnman, Randall Pavlock, and Kimberley Pavlock's claim that the Indiana Supreme Court's decision in *Gunderson v. State*, 90 N.E.3d 1171 (Ind. 2018), resulted in a taking of private property in violation of the Fifth Amendment of the Constitution. The Amended Complaint asserts numerous claims against the Defendants Eric Holcomb, Governor of the State of Indiana; Curtis Hill, Attorney General of the State of Indiana; Cameron Clark, Director of the State of Indiana Department of Natural Resources ("DNR"); and Tom Laycock, Acting Director of the State of Indiana Land Office. [DE 37]. The Defendants have filed a motion to dismiss in which they argue that the Plaintiffs are precluded from asserting these claims against them due to sovereign immunity and due to the Amended Complaint failing to state a claim upon which relief can be granted. [DE 40].

I. Factual Background

The Plaintiffs are owners of beachfront property on the shores of Lake Michigan in the Town of Porter, Indiana. In 2018, the Indiana Supreme Court held in *Gunderson v. State*, 90 N.E.3d 1171 (Ind. 2018), that the State of Indiana has held exclusive title to the shore of Lake Michigan up to the ordinary high water mark ("OHWM") since it became a state in 1816. The Plaintiffs were not parties to the *Gunderson* case, but they hold deeds describing property that includes beachfront property below the OHWM down to the water's edge.[1] The Plaintiffs maintain that they own the property described in their deeds. Since the Indiana Supreme Court held that Indiana has always held absolute title to the land below the OHWM, the plaintiffs assert that the decision in *Gunderson* was a judicial taking of private property without just compensation in violation of the Fifth Amendment.

In 2020, the Indiana General Assembly codified the *Gunderson* decision with the passage of House Enrolled Act ("HEA") 1385. The Act states:

> (a) Absent any authorized legislative conveyance before February 14, 2018, the

[1] The Court notes that one of the Plaintiffs in this case, Raymond Cahnman, was one of the Amicus Curiae in the state case and was represented by the same legal firm—the Pacific Legal Foundation—who now represents him in this case. In the state case, the Amicus Curiae Pacific Legal Foundation argued that Indiana should limit its public trust doctrine to three public uses recognized at common law (fishing, commerce, and navigation). Anything more, they argued, would constitute an unconstitutional taking.

> state of Indiana owns all of Lake Michigan within the boundaries of Indiana in trust for the use and enjoyment of all citizens of Indiana.
> (b) An owner of land that borders Lake Michigan does not have the exclusive right to use the water or land below the ordinary high water mark of Lake Michigan.

Ind. Code Ann. § 14-26-2.1-3 (West). The plaintiffs also assert that HEA 1385 broadens the scope of public use of the property below the OHWM. The *Gunderson* decision only recognized the "traditional triad" of commerce, navigation, and fishing in addition to transitory walking along the shore below the OHWM. 90 N.E.3d at 1183. HEA 1385 expanded the public use to also allow for boating, swimming, and "[a]ny other recreational purpose for which Lake Michigan is ordinarily used, as recognized by the commission for the purposes of this section." Ind. Code Ann. § 14-26-2.1-4(b) (West).

The Plaintiffs are now seeking declaratory judgments against the Indiana Supreme Court's decision in *Gunderson* and HEA 1385 as well as permanent injunctions prohibiting the Defendants from enforcing the decision and HEA 1385's provisions. More specifically, the Plaintiffs are alleging the uncompensated taking of land below the OHWM via the *Gunderson* decision and the uncompensated taking of an easement via an expansion of the previous easement below the OHWM via HEA 1385. The Plaintiffs state that their second cause of action, based on the expanded easement established by HEA 1385, is conditional upon the

success of its first cause of action—the takings claim. [DE 45 at 29]. The Defendants moved to dismiss the plaintiffs' complaint on Eleventh Amendment immunity grounds and for failure to state a claim upon which relief could be granted. For the following reasons, the Court grants the defendants' motion under Rule 12(b)(1) and 12(b)(6).

I. Standard of Review

Federal Rule of Civil Procedure 12(b)(1) authorizes the dismissal of claims over which this Court has no subject matter jurisdiction. In analyzing a motion to dismiss, the Court must accept as true all well-pled factual allegations and must draw all reasonable inferences in favor of the plaintiff. *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1999). The burden of establishing proper federal subject matter jurisdiction rests on the party asserting it, which in this case are the plaintiffs. *Muscarello v. Ogle Cnty. Bd. of Comm'rs*, 610 F.3d 416, 425 (7th Cir. 2010). The Court may look beyond the pleadings and consider any evidence submitted to determine whether jurisdiction exists. *Long*, 182 F.3d at 554.

In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), the Court construes the complaint in the light most favorable to the plaintiff, accepts the factual allegations as true, and draws all reasonable inferences in the plaintiff's favor. *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1146 (7th Cir. 2010). A complaint must contain only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

That statement must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and raise a right to relief above the speculative level, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). However, a plaintiff's claim need only be plausible, not probable. *Indep. Trust Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 935 (7th Cir. 2012). Evaluating whether a plaintiff's claim is sufficiently plausible to survive a motion to dismiss is "'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *McCauley v. City of Chi.*, 671 F.3d 611, 616 (7th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 678).[2]

II. The Court does not have jurisdiction under *Ex parte Young*

First, the Court must determine whether it has jurisdiction over this case keeping in mind the relevant abstention doctrines and recognizing state sovereign immunity. The Eleventh Amendment to the Constitution states that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Eleventh Amendment

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[2] "When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion. Under Rule 12(b)(6), by contrast, the defendant bears the burden of demonstrating the plaintiff has not stated a claim." *J.F. New & Assocs., Inc. v. Int'l Union of Operating Eng'rs, Loc. 150, ALF-CIO*, No. 3:14-CV-1418 RLM, 2015 WL 1455258, at *7 (N.D. Ind. Mar. 30, 2015) (quoting *Rogers v. United States,* No. 1:08–CV–162, 2009 WL 482364, at *2 (N.D. Ind. Feb.23, 2009)).

immunity was also extended to protect states from suits brought by their own citizens. *See Hans v. Louisiana,* 134 U.S. 1, 13–15 (1890). A state's Eleventh Amendment immunity also normally bars suits against the state and state agencies for equitable relief. *See Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984). Moreover, Courts commonly consider state officials in their official capacities to be acting on behalf of the state, and, therefore, the Eleventh Amendment shields them from lawsuits. *See Kentucky v. Graham,* 473 U.S. 159, 165–66 (1985); *Pennhurst,* 465 U.S. at 101–02.

Here, the Plaintiffs allege that the Indiana Supreme Court's decision in *Gunderson* and its subsequent codification by the Indiana legislature were, in effect, a taking of their private property without just compensation.[3] "The Takings Clause—

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[3] The Court would first note that it may take judicial notice of the *Gunderson* decision. "The Court may take judicial notice of matters of the public record, including court records, on a motion to dismiss brought under Rule 12(b)(1) or an abstention doctrine." *Miller v. Balterman*, No. 18-CV-4353, 2018 WL 6511145, at *1 n.1 (N.D. Ill. Dec. 11, 2018) (citing *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1999) (allowing a district court ruling on a 12(b)(1) motion to " 'look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists' "); *Lumen Const., Inc. v. Brant Const. Co.*, 780 F.2d 691, 697 n.4 (7th Cir. 1985) (finding that "the official record of the parallel state case is a proper object for judicial notice" on a motion to abstain)).

The Court would then note that the Rooker-Feldman doctrine does not apply to this case as the parties are not the same as those in the *Gunderson* case: the plaintiffs in this case are similarly situated landowners who were not a party to the

nor shall private property be taken for public use, without just compensation, U.S. Const., Amdt. 5—applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010) (citing *Yates v. Milwaukee,* 10 Wall. 497, 504, 19 L.Ed. 984 (1871)). Plaintiffs seek to prohibit Indiana State officials from enforcing the boundary determined by the *Gunderson* court and the alleged expansion of the easement established by HEA 1385. In reality, by asking the Indiana State officials to not enforce the boundary determined by the *Gunderson* decision, the Plaintiffs are asking this Court for exclusive title to the property below the OHWM. Traditionally, if the state officials are acting within the authority of state law and are not violating federal law, then their actions are protected by the Eleventh Amendment. *Fla. Dep't of*

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original case, *see Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 728 (2010) (plurality), and they are not the same party who lost in state court. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005) (applying the doctrine when "the losing party in state court filed suit in federal court *after* the state proceedings ended."); *see also* Dustin E. Buehler, Revisiting Rooker-Feldman: Extending the Doctrine to State Court Interlocutory Orders, 36 Fla. St. U. L. Rev. 373, 414 (2009) ("An independent federal claim will foreclose application of the Rooker-Feldman doctrine even if it 'denies a legal conclusion that a state court has reached.'") (quoting *GASH Assocs. v. Vill. of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993)). Moreover, "[t]he *Rooker–Feldman* doctrine does not bar actions by nonparties to the earlier state-court judgment simply because, for purposes of preclusion law, they could be considered in privity with a party to the judgment." *Lance v. Dennis*, 546 U.S. 459, 466 (2006).

State v. Treasure Salvors, Inc., 458 U.S. 670, 696–97 (1982).

But the analysis changes if state officials are violating federal law. Under the narrow exception created by the Supreme Court in *Ex parte Young*, any action on the part of state officials that violates federal law cannot be attributed to the state. 209 U.S. 123, 159–60 (1908). "The *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 288 (1997) (O'Connor, J., concurrence) (citing *Ex parte Young*, 209 U.S. at 159–160). Thus, under the *Ex parte Young* exception, "a suit challenging the constitutionality of a state official's action is not one against the State." *Pennhurst*, 465 U.S. at 102. The plaintiffs argue that this case falls within the *Ex parte Young* exception and therefore this Court has jurisdiction to decide it. This Court therefore must determine whether the *Ex parte Young* exception applies here.

A. The Ex parte Young *Inquiry*

Instead of completing a case-by-case analysis to determine whether a claim falls within the *Ex parte Young* exception as was espoused by Justice Kennedy in the plurality opinion in *Coeur d'Alene*, the Supreme Court later clarified in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 645 (2002), that courts should complete a simpler assessment to determine whether the exception applies. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward

inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id*. (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring)). In cases implicating the Eleventh Amendment and *Ex parte Young*, the Seventh Circuit has applied the straightforward inquiry when determining whether a case fell within the exception. In *Ameritech Corporation v. McCann*, 297 F.3d 582, 586 (7th Cir. 2002), the Seventh Circuit noted that the Supreme Court had "helped define precisely when the *Ex Parte Young* exception applies . . ." before quoting the straightforward inquiry from *Verizon*. It again reaffirmed this approach in *Indiana Protection and Advocacy Services v. Indiana Family and Social Services*, 603 F.3d 365, 371 (7th Cir. 2010), finding that the Supreme Court had moved away from the balancing approach described in *Coeur d'Alene* and instead courts were to follow the straightforward inquiry espoused in *Verizon*.

When applying the "straightforward inquiry" clarified in *Verizon*, this case seemingly falls within the *Ex parte Young* exception. First, since the Plaintiffs are alleging an ongoing violation of a federal right, they meet the first requirement. The Plaintiffs allege that the Indiana Supreme Court's decision in *Gunderson* and the legislature's subsequent codification of the decision effectively moved their property line back to the OHWM despite their historical exclusive title to the low water mark. They argue the determination that the State of Indiana holds exclusive title below the OHWM constituted a taking of private property without just compensation in violation of the Constitution. When completing the analysis under the *Ex parte Young* exception, courts

are to look at the allegations of the claim and not consider the underlying merits. *Tindal v. Wesley,* 167 U.S. 204, 216 (1897) ("It is to be presumed in favor of the jurisdiction of the court that the plaintiff may be able to prove the right which he asserts in his declaration"); *see also*, *Verizon Maryland*, 535 U.S. at 646 ("But the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim."). Since the plaintiffs have alleged an ongoing federal violation, they meet the first requirement under *Ex parte Young*.

Second, the Plaintiffs are seeking prospective relief, and more specifically they are seeking to enjoin Indiana officials from continuing to enforce the boundary line that resulted from the *Gunderson* decision. The Plaintiffs are not seeking any damages or other retrospective relief that would result in the inapplicability of the *Ex parte Young* exception. As the Plaintiffs explain, an injunction would not entitle them to any monetary relief in state court but would prevent State officials from enforcing the *Gunderson* boundaries and permit them to resume the use of their property. [DE 45 at 24]. The Plaintiffs "simply want the Court to stop the allegedly unconstitutional taking and restore the status quo ante *Gunderson*." [*Id*.]. Thus, since the Plaintiffs seek relief that is properly characterized as prospective, they meet the second requirement under *Ex parte Young*.[4] The

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[4] The Defendants assert that only the Director of the State of Indiana Department of Natural Resources ("DNR") is a proper party to the suit under *Ex Parte Young*. The Plaintiffs respond that "[w]hether the remaining Defendants are properly sued is irrelevant to the outcome." [DE 45 at 2]. The Court agrees with the Defendants that since the Plaintiffs are seeking injunctive relief, the case may only proceed against the State employees

straightforward inquiry under *Ex parte Young* would seem to result in the Court having jurisdiction over the plaintiffs' claims.

B. *A narrow exception to* Ex parte Young

But the Plaintiffs' ultimate request—for this Court to restore the alleged status quo property boundary line on the shores of Lake Michigan—raises difficult issues of federalism and comity as it requires this Court to effectively overturn a State Supreme Court decision and grant plaintiffs exclusive title to the land below the OHWM. Here, this Court believes that this is a unique case, which parallels the issues presented in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). In *Coeur d'Alene*, the Supreme Court noted that "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction." *Id.* at 281. But they also found the *Ex parte Young* exception to be inapplicable as the Tribe's suit was "the functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* As the Supreme Court observed, it had to determine the effect of the Tribe's suit and its impact on special sovereignty interests of the state before deciding whether to apply the exception in *Ex parte Young*. The Supreme Court found that the declaratory and injunctive relief sought by the Tribe was "close to the functional equivalent of quiet title in that substantially all benefits of ownership and control would shift from the State to the Tribe." *Coeur d'Alene*, 521 U.S. at 282. The Supreme Court's holding

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with enforcement power, which in this case is the Director of the DNR.

in *Coeur d'Alene* was unique in that it found the state's special sovereignty interests in the land in dispute were significant enough for the case to be treated as an exception to the *Ex parte Young* exception. Since the plaintiffs in *Coeur d'Alene* were seeking the functional equivalent of a quiet title suit against the state, the Supreme Court found that it could not fall within the exception to a state's sovereign immunity under the Eleventh Amendment.[5] 521 U.S. at 281–82, 287–88.

Here, the Plaintiffs are seeking something similar. By requesting that this Court restore the alleged status quo and prevent Indiana state officials from enforcing a boundary line recently clarified by the Indiana Supreme Court and codified by the Indiana legislature, the Plaintiffs are effectively seeking relief equivalent to a quiet title action.[6] The Plaintiffs' suit seeks to extinguish Indiana's ownership and, as a result, diminish its control of the shores of Lake Michigan.[7] Thus, this Court believes

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[5] In her concurrence, Justice O'Connor also noted that "[w]here a plaintiff seeks to divest the State of all regulatory power over submerged lands—in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State." *Coeur d'Alene*, 521 U.S. at 296.

[6] In *Gunderson*, the Indiana Supreme Court held that "Indiana at statehood acquired equal-footing lands inclusive of the temporarily-exposed shores of Lake Michigan up to the natural OHWM." 90 N.E.3d at 1181. The Plaintiffs argue that the boundary line between the public trust along the shore of Lake Michigan and upland private property is at the low water mark. Thus, the title action relates to the land between the low water mark and the OHWM.

[7] Plaintiffs state in their brief: "Plaintiffs can no longer use and enjoy this property. They are now limited to the same rights the

that the facts of this case place it squarely within the reach of *Coeur d'Alene*. While there is some friction between the Supreme Court's direction to conduct a straightforward inquiry and the exception established in *Coeur d'Alene*, the Supreme Court has not overturned *Coeur d'Alene*. In fact, several years later, the Supreme Court affirmed *Coeur d'Alene* in *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 258 (2011) ("*VOPA*"), when it noted the case before it did not threaten an invasion of Virginia's sovereignty and recognized that "[t]he specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent . . . . [which] effectively occurs . . . when (for example) the object of the suit against a state officer is to reach funds in the state treasury or acquire state lands . . . ." Thus, the Supreme Court specifically noted that cases involving the acquisition of state lands is a unique situation where the State's dignity may be offended. Finally, in *VOPA*, the Supreme Court noted its willingness "to police abuses of the doctrine that threatens to evade sovereign immunity." *Id*. at 256.

As explained above, the Seventh Circuit recognizes the need for a straightforward inquiry under *Ex parte Young*. However, *Ameritech* and *Indiana Services* can be distinguished because they did not involve special state land interests such as those at issue in this case. The cases also pre-dated

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general public possesses. While Plaintiffs have no issue with the public walking across the beach pursuant to walking easements they have conveyed, *Gunderson*'s decree extinguished their ownership of the beach and the many rights that come with it." [DE 45 at 1].

VOPA during a time when the significance and reach of *Coeur d'Alene* may have been in doubt following the Supreme Court's statements in *Verizon*. While the Seventh Circuit stated in *Ameritech* that courts were to carry out the straightforward inquiry from *Verizon* and "not assess the precise nature of the State's sovereign interest in law enforcement—so long as [the plaintiff's] complaint seeks prospective injunctive relief to cure an ongoing violation of federal law," this Court believes that consistent with *Coeur d'Alene* and *VOPA*, it still needs to consider a state's special sovereignty interests when state land is at issue. 297 F.3d at 588. Sitting en banc in *Indiana Protection*, the Seventh Circuit distinguished *Coeur d'Alene* as an unusual case noting that "it would decide the state's ownership and legal and regulatory authority over a vast reach of lands and waters long deemed by the State to be an integral part of its territory." 603 F.3d at 372 (quotation omitted). Here, the plaintiffs are not contesting the state's legal or regulatory authority over the disputed land, but they are contesting the ownership of it. Nonetheless, their ownership of the property would, to some extent, impact the state's ability to control that property.

Moreover, neither *Ameritech* nor *Indiana Services* involved an issue related to state land. In *Ameritech*, the plaintiff sought a declaration that the defendant must comply with certain provisions of the Electronic Communications Privacy Act. 297 F.3d at 588. *Indiana Services* addressed the issue of whether the plaintiff could access the records of two mentally ill patients in a state hospital. In both cases the Seventh Circuit specifically noted the uniqueness of *Coeur d'Alene* and found it inapplicable based on the facts before it, but this Court does not find that reasoning

to be dispositive as the allegations of this case bring it considerably closer to the holding in *Coeur d'Alene*. As was demonstrated in *VOPA*, the Supreme Court itself continues to treat *Coeur d'Alene* differently and notes that its uniqueness brings it outside of the straightforward inquiry of whether a case falls under the *Ex parte Young* exception.

Additionally, other circuits have acknowledged that *Coeur d'Alene* is applied differently due to the special sovereignty issues presented in the case. In *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1074 (9th Cir. 2014), the Ninth Circuit recognized that *Coeur d'Alene* was still binding law and that Verizon did not overrule it. In *Lacano*, owners of land patents issued by the federal government before Alaska entered the Union argued that the patents gave them title to certain streambeds in Alaska. The plaintiffs sought a declaratory judgment that Alaska DNR's navigability determinations violated the Submerged Lands Act and an injunction prohibiting the defendants from claiming title to the lands beneath the waterways. The Ninth Circuit explained, "[t]o the extent there is some tension between the 'straightforward inquiry' recognized in Verizon and the 'unique' and 'narrow' circumstances of *Coeur d'Alene*, we must follow *Coeur d'Alene*, 'which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.'" *Lacano*, 765 F.3d at 1074 (citation omitted). The Ninth Circuit also found that "Federal courts lack jurisdiction over all actions where a plaintiff seeks relief that is 'close to the functional equivalent of quiet title' over submerged lands that have a 'unique status in the law' and which are 'infused with a public trust.'" *Id.* at 1076.

More recently, the Third Circuit recognized the Supreme Court's willingness "to police abuses of the [*Ex parte Young*] doctrine that threaten to evade sovereign immunity because the relief would operate against the State." *Waterfront Comm'n of N.Y. Harbor v. Governor of N.J.*, 961 F.3d 234, 239 (3d Cir. 2020) (citing *VOPA*, 563 U.S. at 256) (quotation omitted). In *Waterfront*, the Waterfront Commission sued the Governor of New Jersey to prevent him from terminating a compact made with the State of New York more than fifty years prior. The Third Circuit found that, since the State of New Jersey was the real, substantial party in interest, the federal courts did not have jurisdiction. The Third Circuit noted numerous cases where the Supreme Court found that the sovereign was the real, substantial party in interest, including in *Coeur d'Alene*, where quiet title to and preclusion of state control of territory within the State's regulatory jurisdiction would be "as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id*. at 239 (quoting *Coeur d'Alene*, 521 U.S. at 281–82). These cases from other circuits demonstrate that *Verizon* did not abrogate or limit *Coeur d'Alene* but that it continues to be applicable and it is not a good-for-one-case-only rule.[8]

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[8] This Court recognizes that the Tenth Circuit limited the reach of *Coeur d'Alene*, but again, that was following the Supreme Court's holding in *Verizon* and prior to its findings in *VOPA*. *See Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) (noting that the Supreme Court limited the reach of *Coeur d'Alene Tribe* by not including the issue of sovereignty as part of a court's analysis regarding Eleventh Amendment immunity). In *Tarrant* the plaintiff, a Texas agency responsible for supplying public water, claimed that an Oklahoma law unconstitutionally prevented it from appropriating or

C. Applying Coeur d'Alene *to the Facts of this Case*

As the Supreme Court recognized in *Coeur d'Alene*, "[t]he question before us is not the merit of either party's claim, however, but the relation between the sovereign lands at issue and the immunity the State asserts." 521 U.S. at 287. As addressed at length in the *Gunderson* decision and many federal cases before this one, the lands underlying navigable waters have historically been considered sovereign lands. Under the Equal Footing Doctrine, courts have recognized this land as an essential attribute of sovereignty. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373–74 (1977). The court found that "the boundary between the upland and tideland was to be determined by federal law" but "thereafter the role of the equal-footing doctrine is ended, and the land is subject to the laws of the State." *Id.* at 378. Moreover, the Supreme Court previously found that the Public Trust Doctrine—the common-law tradition that the state, as sovereign, acts as trustee of public rights in natural resources—applies to the Great Lakes. *Ill. Cent. R. Co. v. Ill.,* 146 U.S. 387, 436–37 (1892). In this case, the land at issue is not submerged but is the land between the low water mark and the OHWM on the shores of Lake Michigan.

While this Court recognizes that there are factual differences between this case and *Coeur d'Alene*, it finds that there are sufficient similarities for this case

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purchasing water located in Oklahoma. Since the Seventh Circuit has not clearly limited *Coeur d'Alene*'s reach, this Court still finds it to be applicable to the facts of this case.

to fall within the exception recognized in *Coeur d'Alene*. While the Tribe in *Coeur d'Alene* sought to establish ownership over a vast area of land in Idaho (the submerged lands of Lake Coeur d'Alene in addition to various rivers and streams within the boundaries of the reservation) and here the Plaintiffs are seeking a determination of a much smaller amount of land (their lots specifically, but could be expanded to potentially 45 miles of shore land), sovereignty issues are still implicated regardless of the amount of land in question. The Plaintiffs also attempt to distinguish this case from *Coeur d'Alene* by pointing out that the sovereignty issues were related to a Tribe and a State (not citizens of a State and a State) and that the Tribe sought relief that went further than the relief requested here. This Court recognizes that when tribes are involved in a dispute, there are unique sovereignty issues implicated, but other courts have applied the holding in *Coeur d'Alene* even where a tribe was not involved, i.e., *Lacano* and *Waterfront*. Given that state sovereignty issues carry over in non-tribal contexts as well, this Court does not find the absence of a tribal party decisive here.

Finally, the Plaintiffs argue that they are not seeking to completely divest Indiana of its sovereignty or jurisdiction over the disputed property as the Tribe did in *Coeur d'Alene*. The Tribe in *Coeur d'Alene* certainly went further than the plaintiffs in this case, as the plaintiffs seem to still recognize that the property below the OWHM is encumbered by the public trust. [DE 45 at 26 n.11 "Plaintiffs take no position on the existence of a public trust on privately owned land lakeward of the OWHM. Plaintiffs simply note that private ownership and the public trust can indeed be incompatible."]. But as the Plaintiffs also

recognize, the only portion of the Supreme Court's opinion in *Coeur d'Alene* "that commanded a majority held *Young* inapplicable because the Tribe's suit was 'the functional equivalent of a quiet title action which implicates special sovereignty interests.'" [DE 45 at 25 quoting *Coeur d'Alene*, 521 U.S. at 218]. The essence of this suit is a dispute between the plaintiffs and the State of Indiana over exclusive ownership of the land between the low water mark and the OHWM on the shores of Lake Michigan. Plaintiffs' request strikes at the heart of special sovereignty interests as it requires the determination of exclusive title as to where State property ends and private property begins. Even setting aside the argument that the plaintiffs aren't contesting Indiana's legal or regulatory authority over the land, this Court still finds the allegations fall within the *Coeur d'Alene* exception as their claim directly implicates ownership and control of the land. If this Court were to grant the Plaintiffs' request, the benefits of ownership and control would shift from the State of Indiana to the plaintiffs. The Eleventh Amendment bars this kind of action.

"This is especially true when, as in the case before us, the controversy involves not simply a violation of federal law, but relief impacting the validity of an asserted state property interest." *Elephant Butte Irr. Dist. of N.M. v. Dep't of Interior*, 160 F.3d 602, 608–09 (10th Cir. 1998) (recognizing that *Coeur d'Alene* imposed a new requirement on federal courts and considered whether the relief sought by the plaintiff implicated special sovereignty interests); *see also MacDonald v. Vill. of Northport,* 164 F.3d 964, 971–72 (6th Cir. 1999) (When the plaintiffs sought a declaration that they owned a right-of-way which provided access to a navigable waterway, the Sixth

Circuit applied *Coeur d'Alene Tribe* and found that "[b]ecause the state of Michigan has a great interest in maintaining public access to the Great Lakes, the MacDonalds' requested relief implicated 'special sovereignty interests.'" The Circuit abstained on other grounds under the Burford Abstention.); and *Anderson-Tully Co. v. McDaniel*, 571 F.3d 760, 763 (8th Cir. 2009) (applying *Coeur d'Alene* where the landowner sought quiet title to two bodies of water in Arkansas and concluding that the Eleventh Amendment barred the federal lawsuit). Finally, the Supreme Court has recognized "the need to promote the supremacy of federal law" while also accommodating "the constitutional immunity of the States." *Pennhurst*, 465 U.S. at 105. That balance must be struck here.

Courts must be "willing to police abuses of the [*Ex parte Young*] doctrine that threaten to evade sovereign immunity." *VOPA*, 563 U.S. at 256. This case threatens an invasion of Indiana's sovereignty, and this Court finds that it does not fall within the *Ex parte Young* exception. Allowing this suit in federal court would have a direct effect on the sovereignty and autonomy of the State of Indiana, which deprives this Court of jurisdiction to hear it. Therefore, following the Supreme Court's lead in *Coeur d'Alene*, as reaffirmed in *VOPA*, this Court finds that due to the special sovereignty interests presented by this case, most notably the exclusive title action sought by the Plaintiffs, the *Ex parte Young* exception is inapplicable here and the suit is barred by the Eleventh Amendment's state sovereign immunity protection.

III. There is no cognizable claim for which relief may be granted

Even if this Court were to find that the Plaintiffs' claim fell within the *Young* exception, the Court would find there to be no cognizable claim here.[9] While the parties more directly address the concept of judicial takings in their briefs, because the Indiana legislature codified the *Gunderson* holding in HEA 1385, the Court need not determine whether a court's decision can constitute an unjust taking of property. After all, the Plaintiffs allege that "[w]ith respect to ownership, HEA 1385 essentially codified the Gunderson rule" and adopted the court's position that they never owned the property described in their deeds. [DE 37 at 25]. But no matter through which lens this Court reviews the Plaintiffs' allegations, the complaint still fails to state a claim because the Plaintiffs cannot show a legal entitlement to the land in question.

Under the judicial takings theory, assuming the concept is a viable one, Plaintiffs have to plausibly allege "whether the property right allegedly taken was established." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 728 (2010)

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[9] District courts regularly address arguments made under Rule 12(b)(6), even after granting a motion under 12(b)(1). *See Hughes v. Chattem, Inc.*, 818 F. Supp. 2d 1112, 1120 (S.D. Ind. 2011) ("Even if Plaintiffs had established injury sufficient to confer standing, we would nevertheless dismiss this action because they have not stated any claim upon which relief can be granted."), and *Jimenez v. Illinois*, No. 11-CV-4707, 2012 WL 174772, at *5 (N.D. Ill. Jan. 18, 2012), aff'd sub nom. *Jimenez v. Waller*, 498 F. App'x 633 (7th Cir. 2012) ("Even if jurisdiction could be established, Plaintiffs' claims are dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.").

(Scalia, J., concurrence);[10] *see also Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S.Ct. 1332, 1334 (1994) (Scalia, J., dissenting from the denial of certiorari) ("As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings . . . neither may it do so by invoking nonexistent rules of state substantive law."); *Knick v. Twp. of Scott, Pennsylvania*, 139 S.Ct. 2162, 2187 (2019)[11] (Kagan, J., dissenting) (before any federal constitutional standards "can come into play, a court must typically decide whether, under state law, the plaintiff has a property interest in the thing regulated") (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)); *see also* Stewart E. Sterk, The Demise of Federal Takings Litigation, 48 Wm. & Mary L. Rev. 251, 288 (2006) ("[I]f background state law did not recognize or create property in the first instance, then a subsequent state action cannot take property."). The Court notes, of course, that no binding precedent on the concept of judicial takings was established in any of these cases as only four justices endorsed the concept in *Stop the Beach* and "because no controlling principle can be gleaned from the plurality, concurrence . . . and the dissenting opinions." *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600,

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[10] Notably, the concurrences in *Stop the Beach Renourishment* declined to address the question of whether court decisions could amount to a judicial taking. *Id.* at 737, 745.

[11] This case also over-ruled the previous requirement established in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), that takings plaintiffs must first appeal their takings claim to the state supreme court.

615 (7th Cir. 2014). Thus, a court faced with the question of whether a state supreme court effected a taking must look to the pre-existing state law and address whether the property right was established in that law. Here, this Court must consider Indiana law and whether the Plaintiffs' property right to the area of land between the low water mark and the OHWM on the shores of Lake Michigan was well-established and then changed or, if the Indiana Supreme Court merely clarified and elaborated on the preexisting property right.[12]

In *Stop the Beach,* Justice Scalia emphasized that the State cannot invoke nonexistent rules of state substantive law or change an established property right. 560 U.S. at 731. The Court finds that nothing like that happened here; rather, there is sufficient legal precedent prior to *Gunderson* that demonstrates the Indiana Supreme Court in *Gunderson* did not change the law concerning the Plaintiffs' properties in question. And, at the very least, the Court would find there was significant ambiguity in that field of property law and that the *Gunderson* decision did not represent a radical departure from a well-established or even well-understood property right. Plaintiffs submit that their deeds for the beachfront parcels include property below the OHWM and down to the water's edge. [DE 37 at 9]. The Plaintiffs assert that they conveyed walking easements along their property to the U.S. government, but explicitly

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[12] The Court focuses on the *Gunderson* decision as it is where the state defines the source of the property interest. The Supreme Court has recognized that neither the state legislature, nor the state courts may transform private property into public property without compensation. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

reserved all rights in the property other than walking. [*Id.* at 11]. The Plaintiffs provide several other historical accounts, which describe how a good portion of the Indiana shoreline was privately held. [*Id.* at 12–19]. While the Plaintiffs supply historical background on beachfront parcels in Indiana to support their assertion that they have always owned the land down to the water's edge, the Court finds these accounts only serve to demonstrate the property-owners' confusion surrounding the issue in Indiana.

As explained in *Gunderson*, "[t]he State of Indiana, upon admission to the Union in 1816, acquired title to the shores and submerged lands of all navigable waters within its borders." 90 N.E.3d at 1177 (citing *State ex rel. Ind. Dep't of Conservation v. Kivett*, 228 Ind. 623, 630 (1950)). The federal patent at the root of the Gundersons' deed did not convey any land below the OHWM. *Id.* at 1179. The Supreme Court has long recognized that title to land below the high-water mark was governed by state law:

> The new states admitted into the Union since the adoption of the constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below (the) high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the constitution.

Shively v. Bowlby, 152 U.S. 1, 57–58 (1894). *Shively* ultimately held that "[g]rants by congress of portions of the public lands within a territory to settlers

thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below [the] high-water mark, and do not impair the title and dominion of the future state." *Id*. at 58. And it was recognized that the shores or space between the OHWM and low water marks was held by the State for the benefit of the people of the state. *Lake Sand Co. v. State*, 120 N.E. 714, 716 (1918) (quoting *Ex parte Powell*, 70 Fla. 363, 372 (1915)). Moreover, American common law defined the boundary at the OHWM and not wherever the water's edge was at a given moment in time. *See Gunderson*, 90 N.E.3d at 1179. Finally, it is consistent with historical authority that "lands on the waterbody side of the OHWM pass to new states as an incident of sovereignty, whereas lands on the upland side of the OHWM are available for federal patent and private ownership." *Id*. at 1180. Thus, the *Gunderson* court found that the grant of land by Congress to the states included property up to the OHWM and that the land between the OHWM and the low water mark was held in the public trust by the State of Indiana. "But it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988).

Finding that the State of Indiana acquired exclusive title to the shores of Lake Michigan up to the natural OHWM, the *Gunderson* court then determined that the State of Indiana had not relinquished title to that land at any point in its history. The Gundersons had argued that their property extended to the water's edge because Indiana had surrendered its public trust rights in Lake

Michigan. 90 N.E.3d at 1182. But the Indiana Supreme Court found that Indiana had not relinquished its title or surrendered its public trust rights to the shores of Lake Michigan. *Id*.

The *Gunderson* court analyzed the scope of the public trust doctrine in Indiana and found that the common-law public trust doctrine still applied to Lake Michigan even though it was excluded in the 1947 Indiana Acts 1223 (codified as amended at Ind. Code § 14-26-2-5), which determined the scope of public rights on lakes in Indiana. *Id*. at 1183. The *Gunderson* court also found that, even if the Indiana legislature had intended to extinguish those public trust rights, it lacked the authority to do so. *Id*. at 1183 (quoting *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 453 (1892). ("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.").[13] Additionally, the court found that under several provisions of the Indiana Code, land bordering Lake Michigan remained encumbered by the public trust, which limited Indiana's ability to transfer or relinquish it.[14] *Id*. And it was recognized

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[13] Land that the state holds in the public trust cannot be relinquished by a transfer of the property. "It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Illinois Cent.*, 146 U.S. at 452.

[14] The Court explained that under Indiana's submerged property statute, even if a person acquired title to submerged real property adjacent to Lake Michigan and filled it in or made improvements to it, the land remained encumbered by the public

that the shores or space between the OHWM and low water marks was held by the State for the benefit of the people of the state. *Lake Sand Co. v. State*, 120 N.E. 714, 716 (1918) (quoting *Ex parte Powell*, 70 Fla. 363, 372 (1915)). The *Gunderson* court ultimately recognized that "*at a minimum*, walking below the natural OHWM along the shores of Lake Michigan is a protected public use in Indiana." 90 N.E.3d at 1188. Thus, the area in dispute in this case directly overlaps with the area that Indiana holds in the public trust for its citizens. Thus, even if the State of Indiana had ceded exclusive title to the land below the OHWM, the State still held that land in the public trust for its citizens and, therefore, at a minimum, the property owners did not have exclusive control of that area. But ultimately, the Indiana Supreme Court *did* find that Indiana had exclusive title to the land below the OHWM and that it held that land in the public trust for all citizens of Indiana to enjoy.

Notably, the *Gunderson* court did find that a set of Indiana cases addressing title to property along the Ohio River did not apply to the shores of Lake Michigan as was argued by the Gundersons.[15] The line of Indiana cases found that the title of riparian

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trust. "Before issuing a permit under Indiana Code chapter 14–29–1 (a requisite step under the submerged property statute), the DNR "shall consider [the] public trust" and the "likely impact upon the applicant and other affected persons, including the accretion or erosion of sand or sediments." 312 Ind. Admin. Code 6–1–1(f) (2017)." 90 N.E.3d at 1183.

[15] *Bainbridge v. Sherlock*, 29 Ind. 364 (1868); *Stinson v. Butler*, 4 Blackf. 285, 285 (1837); *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374, 383, 5 L.Ed. 113 (1820); *Martin v. City of Evansville*, 32 Ind. 85, 86 (1869); *Irvin v. Crammond*, 58 Ind. App. 540, 108 N.E. 539, 541 (1915).

owners along the Ohio river extended to the low-water mark. The *Gunderson* court found that the rule had "no application to other equal-footing lands within Indiana, including the shores of Lake Michigan." 90 N.E.3d at 1184. The *Gunderson* court also noted that to the extent the holding in *Bainbridge* generated reliance interests in land extending to the low water mark, the Indiana Supreme Court had subsequently narrowed it by adopting a more expansive view of public trust rights along the Ohio river in *Martin v. City of Evansville*, 32 Ind. 85, 86 (1869), finding instead that the city could regulate the area below the high-water mark. *Id.* at 1184. The *Gunderson* court concluded that "the natural OHWM is the legal boundary separating State-owned public trust land from privately-owned riparian land" on the shores of Lake Michigan. *Id.* at 1187. This Court agrees that *Gunderson* was not declaring what "had been private property under established law no longer is" but rather that its decision was clarifying property entitlements that had been previously unclear. 90 N.E.3d at 1185 (citing *Stop the Beach*, 560 U.S. at 728).[16]

In short, the *Gunderson* decision was not a sudden change in state law regarding a well-established

[16] And similar to the plaintiffs in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482 (1988), despite the reliance interests that may have developed over time as a result of the deeds and paid taxes on these parcels of land on Lake Michigan, here, Indiana law demonstrates that the state has always held title below the OHWM and has also always held the land in the public trust for its citizens. "These statements [] should have made clear that the State's claims were not limited to lands under navigable waterways. Any contrary expectations cannot be considered reasonable." *Id.* at 481.

property right. *Gunderson* recognizes that some of the rules created for property lying next to navigable water were developed over time and many were created for property sitting next to rivers and not lakes. *Gunderson* clarified that a set of cases relevant to the Ohio River in Indiana did not apply to property along Lake Michigan. The Indiana Supreme Court in *Gunderson* did not, as Justice Scalia warned in *Stevens v. City of Cannon Beach*, 114 S.Ct. 1332 (1994), invoke nonexistent rules of state substantive law, but instead reviewed the history of land grants and the presence of the public trust along the shores of Lake Michigan to determine where the boundary had always been. Thus, *Gunderson* did not transform private property into public property but clarified where the boundary of the public trust had always existed along the shores of Lake Michigan. Moreover, the *Gunderson* decision is not a radical departure from previously well-established property law in Indiana. At best, the area of property law was murky in the State of Indiana, and, likely, even murkier on the shores of Lake of Michigan. Without a clearly established property interest in the land, the subsequent state clarification—either by the judiciary or the legislature of where the boundary between state and private property and where the public trust had always existed since Indiana joined the Union in 1816—cannot be considered a taking.

Therefore, even if it had jurisdiction over this case, this Court would find that the Plaintiffs have no claim for takings following the *Gunderson* decision and would grant Defendants' motion to dismiss under Rule 12(b)(6). Since the Plaintiffs recognized in their response brief that their second cause of action, based on the expanded easement established by HEA 1385,

is conditional upon the success of its first cause of action (the takings claim) [DE 45 at 29], the Court will not address the remaining cause of action.

IV. Conclusion

For the reasons set forth above, the Court GRANTS the Defendants' motion to dismiss for lack of subject matter jurisdiction. [DE 40]. Due to this case being dismissed for the lack of subject matter jurisdiction, the remaining motion pending at DE [53] is now MOOT. Accordingly, the Plaintiffs' claims before this Court are DISMISSED.

SO ORDERED

ON: March 31, 2021

/s/JON E. DEGUILIO
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

RANDALL PAVLOCK, KIMBERLEY PAVLOCK, and RAYMOND CAHNMAN, Plaintiffs, v. ERIC J. HOLCOMB, in his official capacity as Governor of the State of Indiana; CURTIS T. HILL, in his official capacity as Attorney General of the State of Indiana; CAMERON F.	) No. 2:19-cv-00466-TLS-APR **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

CLARK, in his official)
Capacity as Director of)
the State of Indiana)
Department of Natural)
Resources; and TOM)
LAYCOCK, in his official)
capacity as Acting Director)
for the State of Indiana)
Land Office,)
)
Defendants.)
____________________________)

INTRODUCTION

1. Lake Michigan's Indiana beachfront is a beautiful natural resource, home to the Indiana Dunes National Park (the "National Park"), the State's first and only national park. The public may enjoy the beach at the National Park, the adjoining Indiana Dunes State Park (the "State Park"), and several other public beaches along the approximately 45 miles of Lake Michigan shoreline in Indiana.

2. The public shares Indiana's Lake Michigan shoreline with private property owners. Lakefront owners have great incentive to preserve their private beach bordering the lake so that they and their families can continue to enjoy Lake Michigan's natural beauty. They paid for that beach and their deeds reflect as much.

3. In February 2018, however, the Indiana Supreme Court effectively held that these lakefront owners never owned the beach despite their deeds and

despite undisputed local, state, and federal acknowledgement over the years. In *Gunderson v. State*, 90 N.E.3d 1171 (Ind. 2018), the court held the State of Indiana has held exclusive title to the shore of Lake Michigan up to the ordinary high water mark (OHWM) since it became a state in 1816.

4. Contrary to statements made by that court in its opinion, the *Gunderson* judgment changed the law of the State of Indiana, as recognized by prior Indiana court precedent as well as federal, state, and local authorities. Before *Gunderson*, these authorities all recognized, without any serious dispute, that lakefront owners could own the beach below the OHWM. In *Gunderson*, the Indiana Supreme Court effectively moved the property line. The state supreme court's judgment constituted a taking of private property without any compensation, let alone just compensation.

5. Plaintiffs are the owners of Lake Michigan lakefront parcels in the Town of Porter, Indiana. They were not parties to the *Gunderson* case. They are inholders within the boundaries of the National Park. The *Gunderson* decision effectively took their private beach and transferred it to the State. Plaintiffs Randall and Kimberley Pavlock and Raymond Cahnman hold deeds describing property that includes the beachfront below the OHWM. Indeed, their platted deeds show parcels going beyond the water's edge even in years where the lake is not at close-to-record levels.

6. Plaintiffs recognize, of course, that the public has trust rights in the waters of Lake Michigan. But

they dispute *Gunderson*'s core holding: that Indiana has always held *absolute title* up to a hard-to-define point known as the OHWM. *Gunderson* was not an uncontroversial statement of Indiana law, but a radical change that worked a taking of Plaintiffs' beachfront private property without any compensation.

7. The Indiana General Assembly then codified that radical change, passing legislation that adopted the rule of *Gunderson*. The General Assembly had the opportunity to provide compensation for the taking *Gunderson*'s decree effected, but failed to do so. Instead, House Enrolled Act (HEA) 1385 adopted the *Gunderson* court's position that Plaintiffs never owned the property described in their deeds. Since neither legislatures nor courts can transfer private property to the public without compensation, neither the *Gunderson* decree nor the challenged portions of HEA 1385 can stand.

JURISDICTION AND VENUE

8. This action arises under the Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment. This Court has jurisdiction through 42 U.S.C. § 1983 and 28 U.S.C. § 1331. Declaratory relief is authorized by the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

9. Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), actions against state officials seeking prospective injunctive relief are not barred by sovereign immunity.

10. As explained in *Gunderson*, the State of Indiana now for the first time maintains that it owns absolute title from the "low water mark" on the shoreline of Lake Michigan up to the OHWM. Indiana has now codified that result. Plaintiffs, on the other hand, maintain that they own the property described in their deeds, including the land below the OHWM, down to Lake Michigan's "low water mark," unless and until they receive just compensation for the *Gunderson* taking. Therefore, a present and concrete controversy between the parties exists.

11. Venue is proper in this District under 28 U.S.C. § 1391(b)(2). Defendants reside within this District and the property subject to this action is situated here.

PARTIES

Plaintiffs

12. Plaintiffs Randall and Kimberley Pavlock (the Pavlocks) are the fee simple owners of two parcels along the shoreline of Lake Michigan in Porter County, Indiana. Their deeds are attached as Exhibits A and B, and incorporated herein by reference. These properties are platted and legally described as Lots 13-23 in Block 13 and the east 50 feet of Lots 11-15 in Block 14 of the Lake Shore Addition to the New Stock Yards, as shown in Plat File 17-1-A at the Porter County Recorder's Office. The Plat File is attached as Exhibit C and incorporated herein by reference. The deeds describe property that at all relevant times have included part of Lake Michigan covered by water, as well as significant property between the low

water mark and the OHWM. It is this property, including the dry beach between the OHWM and the water's edge at any given time, that the *Gunderson* decision transferred to the State without compensation.

13. The Pavlocks are among a group of inholders in the Town of Porter, Indiana, whose properties are surrounded by the National Park. The lakefront setting makes the Pavlocks' property, including the previously private beach, ideal for recreation with family, friends, and neighbors. The *Gunderson* court took away this private beach from the Pavlocks, who no longer may exclude persons who use their formerly private property for recreation. In fact, by transferring the Pavlocks' property below the OHWM to the State, the *Gunderson* court put the Pavlocks in the same position as any member of the public *on their own beach*.

14. Plaintiff Raymond Cahnman (Cahnman) is the fee simple owner of one parcel along the shoreline of Lake Michigan in Porter County, Indiana. Cahnman has held this property since 2006 and, like the Pavlocks, is an inholder situated within the boundaries of the National Park. Cahnman's deed, attached as Exhibit D and incorporated herein by reference, is also platted. The legal description includes Lots 11-19 of Block 11 of the Lake Shore Addition to the New Stock Yards, shown in the Plat File attached as Exhibit C. This property includes land currently and historically covered by the water of Lake Michigan, as well as the dry beach.

15. Since Cahnman acquired the Porter beachfront property, he has used his previously private beach for recreation with family and friends, often exercising his right to exclude beachgoers who remain on his property. The *Gunderson* court took away this private beach from Cahnman, who no longer may exclude persons who use his formerly private property for recreation. In fact, by transferring Cahnman's property below the OHWM to the State, the *Gunderson* court put Cahnman in the same position as any member of the public *on his own beach*.

Defendants

16. Defendant Eric J. Holcomb is the Governor of Indiana. He is charged with enforcing the laws of the State of Indiana, which include the public trust doctrine, the *Gunderson* decision, and the legislation referenced above. He is sued in his official capacity.

17. Defendant Curtis T. Hill is the Attorney General of Indiana. Like the Governor, he also is charged with enforcing the laws of the State of Indiana, which include the public trust doctrine, the *Gunderson* decision, and the legislation referenced above. He is the State's chief legal officer and is sued in his official capacity.

18. Defendant Cameron F. Clark is the Director of the Indiana Department of Natural Resources (DNR), which manages the Lake Michigan Coastal Zone and is directly responsible for administering the State's trust property in this area. He is sued in his official capacity.

19. Defendant Tom Laycock is the Acting Director for the Indiana State Land Office, which serves as the repository for deeds and plats of land previously or currently owned by the State. He is sued in his official capacity.

HISTORY OF SHORELINE OWNERSHIP

20. Indiana was admitted to the Union in 1816 on equal footing with then existing states. At this time, much of what would become Porter County was unsettled.

21. Porter County was established in 1836 out of neighboring LaPorte County. Lake Michigan forms Porter County's northern boundary.

22. In 1837, the United States began issuing land patents to private individuals in Porter County. The General Land Office issued a total of 2,638 patents for land in Porter County. None of the land in the County was privately held before Indiana became a State.

23. That same year, the Indiana Supreme Court decided *Stinson v. Butler*, 4 Blackf. 285 (1837). In that trespass action, the court rejected the argument that the boundary between public and private lands along the Ohio River was the high water mark. Instead, the court held that private owners along navigable non-tidal water in Indiana "must be considered as *owning the soil to the ordinary low-water mark*." *Id*. at 285. The Indiana Supreme Court reaffirmed this rule several times in the nineteenth century. *See Martin v. City of Evansville*, 32 Ind. 85, 86 (1869) (property

owners own to the low water mark of the Ohio River "subject only to the easement in the public of the right of navigation"); *Sherlock v. Bainbridge*, 41 Ind. 35, 41 (1872) (describing this rule as a "settled . . . rule of property" established "as far back as 1837, and continuing in an unbroken series down to the present day").

24. Those courts did not distinguish between the waters of the Ohio River to the south and Lake Michigan to the north; to the contrary, the *Stinson* court rejected one party's reliance on the common law rule of ownership to the high water mark because the waters of the Ohio River are "non-tidal." *Stinson*, 4 Blackf. at 285. Like the Ohio River, the waters of Lake Michigan are non-tidal.

25. Upon information and belief, in 1891, Orville Hogue of Chicago platted approximately 100 acres at what would become Porter Beach. He called the section the Lake Shore Addition to the New Stock Yards, apparently to entice Chicago residents to buy one of the several hundred 100' by 25' lots he had platted. Exhibit C depicts the Lake Shore Addition.

26. Upon information and belief, the Lake Shore Addition attracted buyers, but many were apparently upset when they discovered that the land was nowhere near the Chicago stockyards. Many property owners simply abandoned their lots. Many lots were auctioned by Porter County in tax sales. Quiet title suits continued to settle disputes over the Hogue lots until 1962.

27. Today, many of these lots are entirely below any potential definition of the OHWM. Nevertheless, individuals hold title to these lots and many have been assessed with significant value in years where the lake uncovers them.[1]

28. Many other lots, such as those owned by Cahnman and the Pavlocks, are partially submerged on a near-permanent basis, even when the water reaches historic low points. These parcels include significant portions of dry beach, especially when the lake is at low points. Even when the lake is high, as it currently is, the parcels include dry sand beach below the OHWM. Before *Gunderson*, this was private beach encumbered by a walking easement granted to the federal government for the benefit of the general public. *See infra* ¶¶ 31-34.

29. The deeds for the Pavlock and Cahnman beachfront parcels indicate that the bounds of these parcels include property below the OHWM and, indeed, below the water's edge. The amount of uncovered dry beach varies with the lake levels. *See* Exhibits A, B, C, D.

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[1] Two such parcels are 64-03-14-251-002.000-026 and 64-03-14-251-003.000-026. The first parcel, owned by Daniel Wilson, has been assessed at a nominal value each year ($600 in 2019), except at $10,100 in 2013. *See* http://search.portercountyassessor.com/parcel.php?id=64-03-14-251-002.000-026 (last visited Apr. 8, 2020). The second, owned by Carole E. Coslet, tells a similar story—assessed at a nominal value each year ($500 in 2019) except in 2013 ($9,400). *See* http://search.portercountyassessor.com/parcel.php?id=64-03-14-251-002.000-026 (last visited Apr. 8, 2020). These parcels are currently almost entirely—if not entirely—submerged.

30. In 1966, Congress passed legislation providing for the creation of a National Lakeshore ("Lakeshore") along Lake Michigan, including Porter County. Pub. L. No. 89-761, 80 Stat. 309 (1966). As a result, the United States for the next several years acquired private property where the Lakeshore was to be located. *See infra* ¶ 36, *et seq*. But by the late 1970s, the federal government was running short on funds to purchase additional land.

31. In the alternative, the federal government instead sought easements to permit the public to walk on the Lake Michigan shoreline between the National Park (then Lakeshore) and the State Park, as well as along some still-private beach within the Lakeshore's boundaries.

32. Certain property owners conveyed to the United States easements "for the purpose of providing the general public a means to traverse on foot along a portion of the shores of Lake Michigan."

33. These property owners included the Pavlocks (Exhibit E), Cahnman's predecessor-in-interest Reynolds (Exhibit F), several other private property owners—Brandstetter (Exhibit G), Bremer (Exhibit H), Deters (Exhibit I), and Savage (Exhibit J)—as well as the Town of Dune Acres, situated immediately to the west of Porter Beach (also Exhibit J). These easements refer to lots described in Exhibit C. These lots—owned by private parties and the Town of Dune Acres—include significant property below the "high-water line," the "toe of the dunes," and the water's edge, all of which are defined based on a 1979 survey

depicted on Exhibit C. The easements expressly exclude the part of each lot "lying Southerly of the 'toe of the dunes'" as that term is defined in the 1979 survey and depicted on the Plat. Exhibits E, F, G, H, I, J. In other words, the walking easements refer to property lakeward of the "toe of the dunes," to the 1979 water's edge and beyond. Yet the *Gunderson* court declared that Indiana had always owned much of this property.

34. Under the terms of the easements, the United States assumed a duty to keep the easement "reasonably clean and free of debris." *Id.* The grantors, including the Pavlocks and Cahnman's predecessors-in-interest, explicitly reserved all rights in the property other than walking. Indeed, the easements made sure to state that the public had no rights to loiter, picnic, or fish on the beach. *Id.*

35. The United States separately negotiated with Indiana for rights in the first 300 feet of Lake Michigan. *See* 43 Fed. Reg. 2240, 2241 (Jan. 10, 1978); Letter from Indiana Gov. Otis Bowen to Pres. Gerald Ford, Sept. 30, 1976 (approving and endorsing House Report 1145, a House Report on the bill extending the boundaries of the National Park (then the National Seashore) to 300 feet of Lake Michigan, https://www.fordlibrarymuseum.gov/library/document/0055/1669685.pdf, page 10 of PDF; and Senate Report 94-1189, dated August 30, 1976, a companion to that House Report, explicitly endorsing extension of National Park into the first 300 feet of Lake Michigan, also available at same internet link beginning at page 34). The existence of the easements and the agreement with Indiana as to the

management of the waters of Lake Michigan demonstrate that all parties understood that private property owners could own the beach below the OHWM.

36. In 1987, Ron Cockrell of the U.S. National Park Service authored a text that is now also available online, entitled *A Signature of Time and Eternity: The Administrative History of Indiana Dunes National Lakeshore, Indiana*,[2] describing the history of how the Lakeshore (now National Park) came into existence. The book is replete with evidence that the federal government, state government, and local governments along the shore all accepted as true—for the entire twentieth century—that private individuals could own the Lake Michigan beaches to the low water mark.

37. Likewise, a non-fiction account[3] of the history of the National Lakeshore was published by the University of Illinois Press in 1983. Like the *NPS Administrative History*, *Duel for the Dunes* detailed how much of the shoreline in Indiana was privately held for the most part and how a portion of that private beach became part of the Lakeshore.

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[2] Ron Cockrell, *A Signature of Time and Eternity: The Administrative History of Indiana Dunes National Lakeshore, Indiana* (U.S. Dep't of Interior 1988), *available at* the Porter County Public Library in Valparaiso, Indiana, *and online at* https://www.nps.gov/parkhistory/online_books/indu/adhi.htm) [hereinafter *NPS Administrative History*]. The online version includes all materials cited herein within sub-links available at that first link given above.

[3] Kay Franklin & Norma Shaeffer, *Duel for the Dunes: Land Use Conflict on the Shores of Lake Michigan* (1983) [hereinafter *Duel for the Dunes*].

38. Both of these works document the historical reality that private landowners held title to the beach of Lake Michigan for almost two centuries before the *Gunderson* court declared—for the first time in the history of the State—that the State had in fact always owned it.

39. For example, in 1915-16, future National Park Service Director Stephen T. Mather noted that land acquisition of "a strip of lakeshore twenty-five miles long and one mile wide" would cost between $1.8 and $2.6 million. *NPS Administrative History* at Chapter 1. He continued:

> "Here is a stretch of unoccupied beach 25 miles in length, a broad, clean, safe beach, which in the summer months would furnish splendid bathing facilities for thousands of people at the same instant. Fishing in Lake Michigan directly north of the dunes is said to be exceptionally good. There are hundreds of good camp sites on the beach and back in the dunes."

Id. Had the State held title to the beach since 1816, Mather would not have had to speculate about the cost to acquire it.

40. Such an effort was necessary because—as *Duel for the Dunes* recognizes—"The land under consideration [for conservation] stretched twenty-five miles from Gary to Michigan City, and all of it belonged to private owners." *Duel for the Dunes* at 32. Conservationists tried to find private purchasers, but

"became convinced that only governmental purchase could ensure success." *Id.*

41. In 1918, a newspaper columnist wrote: "Unless the State of Indiana or the United States takes the matter in hand, commercial plants will crowd the entire lake frontage." *NPS Administrative History* at Chapter 1. Commercial plants would have had no authority to crowd the lake if the State held absolute title up to the OHWM. But the State did not. U.S. Steel owned and developed lakefront property in Gary, Indiana, beginning in the early 1900s. This development is documented in Indiana University's U.S. Steel Photo Collection,[4] examples of which are pictured below. Both U.S. Steel in Gary and Northern Indiana Public Service Company (NIPSCO) in Michigan City continue to own lakefront property on Lake Michigan in Indiana. The *Gunderson* court ignored this historical reality.

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[4] *Available at* http://webapp1.dlib.indiana.edu/ussteel/index.jsp (last visited Apr. 8, 2020).

Appendix 67a

42. Significant land acquisition allowed the State to create the State Park just to the east of what is now the National Park. As explained in *Duel for the Dunes*, "[i]n 1927 the State of Indiana gobbled up three miles of Porter County lakefront for the State Park, removing them from the tax rolls and making them perpetually unavailable for industrialization." *Duel for the Dunes* at 53. Much of this land was dry beach below the OHWM, which the *Gunderson* court declared in 2018 that the State had already owned. This history documents that buyers and sellers in 1927 had a contrary understanding to that expressed by the Indiana Supreme Court in *Gunderson* as to who owned the dry beach below the OHWM.

43. In the 1950s, the Governor of Indiana proposed a harbor for ocean-going ships between Ogden Dunes and Dune Acres, and the state legislature approved funding to buy 1,500 acres at Burns Ditch. Burns Ditch sits on the waterfront and, if owned by the State of Indiana, then the purchase of at least a portion of these 1,500 acres was superfluous. *NPS Administrative History* at Chapter 2.

44. In 1958-59, a bill was developed to create the Lakeshore. This Lakeshore would exclude the towns of Dune Acres, Ogden Dunes, and Johnson Beach because it was understood that those towns or private property owners within those towns owned those beaches, but otherwise the national Lakeshore was to include "unspoiled" areas of Johnson Beach. *NPS Administrative History* at Chapter 2.

45. Around this same time, Midwest Steel began building again at Burns Ditch and NIPSCO started a coal plant west of Dune Acres. Again, neither Midwest Steel nor NIPSCO purchased the beach from the State of Indiana for these plants—because the State did not own the beach at these locations (or any other). *Id.*

46. To the contrary, as detailed in *Duel for the Dunes*, "[i]n 1958, the year [U.S. Senator Paul] Douglas introduced his first Dunes bill (S3898), a little less than half of Porter County's total shoreline remained undeveloped and in private ownership. The principal site, called the Central Dunes, lay between the towns of Ogden Dunes and Dune Acres. It consisted of four-and-three quarters contiguous miles of beach and high dunes considered by conservationists as the most desired parcel in the

entire Dunes region for preservation. Midwest Steel, Bethlehem Steel, and [NIPSCO] divided its ownership." *Duel for the Dunes* at 159.

47. In 1960, a U.S. Army Corps of Engineers report recommended building a harbor at Burns Ditch. "The report called for dredging the lake approach channel to a depth of thirty feet and the outer harbor to twenty-seven feet." *NPS Administrative History* at Chapter 3. A 1930 Corps report had actually opposed a harbor on the grounds that it would "be entirely surrounded by the plant of the Midwest Steel Corporation, which would make its use by the general public impracticable." *Id.* Again, if the State owned the beach, then Indiana—not Midwest Steel—would have owned the beach at Burns Ditch.

48. In 1963, compromise bills were introduced in Congress to create a national lakeshore and a harbor at Burns Ditch. *Id.* The lakeshore would be in four distinct units, a total of 8.75 miles, excluding Burns Ditch and the Bethlehem Steel area. *Id.* But this effort was blocked by opposition from local politicians and the steel companies. *Id.* There is no discussion in the *NPS Administrative History* that this beach was already state-owned.

49. In 1966, after Congress approved a bill to create the Indiana Dunes National Lakeshore, the Department of Interior commissioned a report on the area. *Id.* at Chapter 4. The report provided that the State of Indiana only owned a quarter of the area marked for the National Lakeshore, and that the beach held by beachfront owners, including the

Bethlehem Steel and National Steel mills, would have to be purchased for an estimated $23 million. *Id.*

50. To further underscore that the public and the government understood that the beach could be privately owned, opponents of the creation of Indiana Dunes National Lakeshore inserted Ogden Dunes beach into the proposed National Lakeshore; this was done because, according to Cockrell and the *NPS Administrative History*, opponents "were convinced that [park supporters] were interested in protecting the private beaches of their communities." *Id.* Those park supporters, who were members of the same Save the Dunes organization that intervened in the *Gunderson* litigation, said (by way of Save the Dunes member Herbert Read): "We had a Save the Dunes Council Board meeting and unanimously passed a resolution in support of including not only the Ogden Dunes beach, but all the remaining privately owned beaches as well." *Id.* Since the 1960s, Save the Dunes appears to have changed its approach, as it now contends (as it did in *Gunderson*) that much of this beach has *always* been state-owned.

51. In 1966, the bill to create the Lakeshore passed, and Congress appropriated $28 million and designated 8,100 acres to create the Lakeshore. *Id.* President Johnson himself described the bill: "The bill to establish the Indiana Dunes National Lakeshore has been 50 years in the making. In 1916, the National Park Service first cited the need to preserve for public use the strip of uninhabited, tree-covered dunes, and white sandy beaches stretching along the south shore of Lake Michigan from East Chicago to Michigan City." *Id.* There would have been no need for

the federal government to preserve the beach for the public if the State of Indiana already owned the beach, as the *Gunderson* court inexplicably contended.

52. The *NPS Administrative History* notes that "[t]he park's legislative history indicates the Congressional subcommittees wanted an uninterrupted eleven-mile stretch of shoreline from the west end of Dune Acres to Michigan City upon which visitors would not trespass on private property. Whereas a series of dunes separated Lake Michigan from Ogden Dunes and Dune Acres, no barriers existed at Beverly Shores. Homes appeared on the front line of dunes, some even were built over the beach. The boundary designation in the beach areas, 'from the toe of the dune to the water's edge,' was not feasible at Beverly Shores and therein lay the controversy." *Id.* at Chapter 5. The "controversy" was over which part of the shoreline NPS needed to acquire to ensure that "uninterrupted" stretch of beach and what to do with shoreline owners there. The solution was to permit owners to sell their homes and property to the government and reserve an occupancy right for 15 years. *Id.*

53. The conclusion of *Gunderson* was that these owners *never owned* much of the property that NPS wanted to acquire for the uninterrupted shoreline—between the toe of the dunes and the water's edge at any given time. But the historical record before and since demonstrates that *Gunderson* was simply wrong, and that private ownership to the low water mark has always been the case in Indiana, as explicitly held in the 1837 *Stinson* decision.

54. After President Johnson signed the bill to create the National Lakeshore, the federal government began buying private lots along the beach, including a 385-acre parcel owned by Inland Steel and 79 tracts (442 acres) in Porter. *Id.*

55. Disputes between private beachfront lot owners and the public in the bounds of the National Lakeshore erupted when the park opened. *Id.* at Chapter 6. In 1969, "[f]ollowing the lakeshore's acquisition of the West Beach unit, problems with trespass on the yet-to-be-opened public lands were prevalent. Numerous complaints from Ogden Dunes residents resulted in the Park Service contracting with the Portage Police Department to patrol the area," and later—in 1970—"signs were needed in West Beach to mark the lakeshore boundaries clearly. Second, beach access for emergency and service vehicles was difficult for they had to cross two private tracts, the owners of which were hostile toward the lakeshore." *Id.*

56. By 1970, the nearly $28 million appropriated for land acquisition had been spent, but it was estimated that another $4 million might be needed. "As of August, we were projecting a total cost of $27,180,226 against a ceiling of $27,900,000. However, since then some of the [condemnation] cases tried have resulted in awards exceeding that set aside by some 495 percent. Whether this adversity will continue or not is most difficult to say since each enclave there represents a completely different situation." *Id.*

57. In 1971, a proposal was considered to expand the Lakeshore—"The Save the Dunes Council devoted intense scrutiny to the three populated 'islands' within the national lakeshore's boundaries: Dune Acres/Porter Beach, Ogden Dunes, and Beverly Shores. It decided to endorse inclusion of the 'Beverly Shores Island' over the other two for a number of reasons. Primarily because Beverly Shores had a lower population density per acre and had clearly outstanding natural values, the Council believed its inclusion could be justified before Congress more easily. Population density differed from town to town. Because three-quarters of the developed portion of Dune Acres was in its northeast quadrant, the 'empty' three segments were targeted for inclusion. On the other hand, Beverly Shores' population was scattered throughout its limits and no significant area could be acquired without claiming private homes." *Id.*

58. In 1975, the Ogden Dunes Home Association, Inc.—a collection of property owners in Ogden Dunes, Indiana—sold its beach to the Town of Ogden Dunes, which maintains ownership to this day. *See* Exhibit K.[5] By a 1974 Town resolution, Ogden Dunes declared that the "real estate commonly known as Ogden Dunes Beach," acquired from the Home Association, would be reserved "solely for the use and benefit of residents of the Town of Ogden Dunes and their guests." *Id.* Such exclusivity would of course be inconsistent with absolute State ownership below the OHWM. And Ogden Dunes could not own—and exclude non-residents from—property that the State

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[5] "Parcel A" referenced in Exhibit K is shown on the plat attached at Exhibit L obtained from the Porter County Surveyor.

purportedly owned since 1816. The *Gunderson* court simply failed to account for this historical reality when it rewrote Indiana property law.

59. In 1979, the NPS completed a Memorandum of Understanding with Ogden Dunes to provide for public access to the beach—beach that is otherwise privately held by Ogden Dunes for the benefit of its residents, *see supra* ¶ 58. *NPS Administrative History* at Chapter 10. Ogden Dunes agreed to this MOU around the same time other property owners, including the Pavlocks, Cahnman's predecessors-in-interest, and the Town of Dune Acres, granted walking easements across their portions of the Lake Michigan beach. If the State of Indiana owned this beach, then the NPS would have negotiated *with the State* for these walking rights.

The Effect of *Gunderson*

60. Because it was universally recognized that private owners like the Pavlocks and Cahnman owned the dry beach below the OWHM, there was little controversy over inholder beach ownership in the three decades following the grant of these easements to the United States.

61. That situation changed in 2010, when the town of Long Beach, Indiana, in neighboring LaPorte County, passed an ordinance purporting to declare that DNR's administrative high water mark of 581.5 feet above sea level established the boundary between public and private property. The Gundersons, lakefront owners in Long Beach (about 15 miles east of Porter), sued DNR and sought declaratory relief

and to quiet their title down to the water's edge, where their deed indicated ownership.

62. Nevertheless, the Indiana Supreme Court held that Indiana has always maintained absolute title to the shore of Lake Michigan below the OHWM. While the court acknowledged its 1837 *Stinson* precedent, the court changed Indiana law when it concluded that this precedent did not apply to Lake Michigan.

63. Other state courts in the Great Lakes have followed *Stinson*'s distinction between tidal and non-tidal waters and applied it to Lake Michigan. For example, the Wisconsin Supreme Court explained the rule for non-tidal waters: "when nature in pursuance to natural laws holds in its power portions of the land which at periods of the year are free from flowage, then during such periods the strip referred to is subject to all the rights of the public for navigation purposes. On the other hand, when the waters recede, these rights are succeeded by the exclusive rights of the riparian owner." *Doemel v. Jantz*, 193 N.W. 393, 398 (Wis. 1923). The Illinois Supreme Court rejected the OHWM as the boundary for a similar reason, writing that "[t]he portion of the soil which is only seldom covered with water may be valuable for cultivation or other private purposes. And the line at which it usually stands unaffected by storms and other causes, represents the ordinary high water mark on the ocean, and the point between the highest and lowest water marks produced by the tides." *Seaman v. Smith*, 24 Ill. 521, 524 (1860); *see also Glass v. Goeckel*, 703 N.W.2d 58, 93 (Mich. 2005) (Markman, J., dissenting) (noting that "the 'ordinary

high water mark' is a term used to define the scope of the public trust doctrine in tidal waters" and criticizing the majority's "attempt to graft this tidal-based term upon the nontidal Great Lakes"). The Indiana Supreme Court later cited *Seaman* as an authority "upon the general subject of grants of lands bordering upon natural lakes." *State v. Portsmouth Sav. Bank*, 7 N.E. 379, 390 (Ind. 1886).

64. The *Gunderson* decision thus made Indiana the first Great Lakes bordering state to establish the OHWM on a Great Lake as the boundary between public and private property.[6]

65. By its terms, *Gunderson* applies to the entire shoreline of Lake Michigan in Indiana, so long as an individual's title does not predate statehood.

66. More than simply interpreting unclear state law, the *Gunderson* decision was an abrupt change in state law that unsettled Plaintiffs' property rights. The Indiana Supreme Court ignored not only its own precedent, but Indiana's history. Before *Gunderson*, all the relevant actors—private property owners, local governments, Indiana, and the United States—treated the dry beach below the OHWM as private property. *Duel for the Dunes* and the *NPS Administrative History* both document this real-time

[6] While the majority of the Michigan Supreme Court in *Glass* adopted the OHWM as the boundary of the public trust lands on Lake Michigan in the State of Michigan, it held that private property could extend to the low water mark, encumbered by an extremely limited public easement below the OHWM. *See Glass*, 703 N.W.2d at 68-71 (majority opinion) (describing overlapping title between the low and high water marks) & 75 (describing the limited nature of public rights below the OHWM).

historical reality, as do historical photographs and the walking easements granted to the United States in 1979 and 1980. If the beach below the OHWM were exclusive property of Indiana, then the United States would not have purchased land or sought easements from private property owners to ensure public walking rights. Nor would local jurisdictions tax entirely submerged lots below the OHWM.

67. By moving the property line along the lake from the low water mark to the OHWM, *Gunderson* transferred private beach property to the State. This effected an uncompensated government taking of private property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The Effect of House Enrolled Act 1385

68. On March 21, 2020, Defendant Governor Holcomb signed House Enrolled Act 1385, which goes into effect on July 1, 2020.[7] The Act declares that, with the exception of authorized legislative transfers before the date *Gunderson* was handed down, the State of Indiana owns the shoreline of Lake Michigan below the OHWM. HEA 1385, § 57, *codified at* Ind. Code § 4-26-2.1-3(a) (in effect July 1, 2020). With respect to ownership, HEA 1385 essentially codified the *Gunderson* rule. Like *Gunderson*, HEA 1385 is contrary to the prior common law of Indiana, the

[7] The text of the law can be found here: http://iga.in.gov/legislative/2020/bills/house/1385#document-1b7a2d6e.

common law of other Great Lakes States, and the history of coastal ownership along Lake Michigan.

69. HEA 1385 offers no compensation for private property owners like Plaintiffs who own property below the OHWM. Instead, like the *Gunderson* court, HEA 1385 takes the position that Plaintiffs never owned the property described in their deeds.

70. HEA 1385 also potentially broadens the scope of public use of the property below the OHWM. The Act permits the public to use the shore below the OHWM for walking, fishing, boating, swimming, and "[a]ny other recreational purpose for which Lake Michigan is ordinarily used, as recognized by the commission for the purposes of this section." HEA 1385, § 57, *codified at* Ind. Code § 14-26-2.1-4(b) (in effect July 1, 2020). *Gunderson* permitted only the traditional triad of commerce, navigation, and fishing, as well as transitory walking. *Gunderson*, 90 N.E.3d at 1188.

71. As a result of HEA 1385, even if Plaintiffs succeed in obtaining an injunction against enforcement of the *Gunderson* decision, the Defendants would still claim ownership over the disputed beachfront below the OHWM pursuant to HEA 1385.

72. If done independently, HEA 1385's declaration of ownership would constitute an uncompensated taking of Plaintiffs' property below the OHWM. Neither legislatures nor courts may transfer private property to the public without compensation.

First Cause of Action

(Uncompensated Taking of Land Below Lake Michigan's OHWM)

73. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1 through 72 as though fully set forth herein.

74. The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, prohibits the government from taking "private property for public use, without just compensation."

75. Defendants are charged with enforcing Indiana's property interests and law, including the public trust doctrine as expounded by the Indiana Supreme Court. They do so under color of state law within the meaning of 42 U.S.C. § 1983.

76. Defendants Governor Holcomb and Attorney General Hill are charged with the enforcement of the duly enacted statutes of the State of Indiana. Defendant Director Clark is charged with managing Indiana's Lake Michigan shoreline.

77. The U.S. Supreme Court has held that, consistent with the Fifth Amendment, "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980). This holds true whether the state actor is the legislature, an administrative agency, a local government, or a court. *See id.*; *see also Stop the Beach*

Renourishment, Inc. v. Fla. Dep't of Envtl. Protection, 560 U.S. 702, 713-15 (2010) (plurality opinion).

78. *Gunderson* transformed the established law by moving Plaintiffs'—and all other Indiana lakefront property owners'—property lines to the OHWM, irrespective of their deeds or titles. This change in established state law effected a taking of Plaintiffs' property, particularly their previously private dry beach.

79. If done independently, HEA 1385's declaration of State ownership below the OHWM would constitute an uncompensated taking in violation of the Fourteenth Amendment. Like the Indiana Supreme Court, the Indiana General Assembly cannot simply declare private property public without compensation. *Webb's Fabulous Pharmacies*, 449 U.S. at 164. The only reason HEA 1385's declaration of ownership did not decree an unconstitutional taking is because *Gunderson* had already done so.

80. Because Indiana is immune from suits for damages in federal court and the Indiana Supreme Court has already declared that a decree of State ownership below the OHWM is not a taking, Plaintiffs lack a remedy at law in either federal or state court. Therefore, Plaintiffs may seek declaratory and injunctive relief against the enforcement of *Gunderson*'s boundary and the ownership provision of HEA 1385 that codified it.

Second Cause of Action

(Uncompensated Taking of Expanded Easement Below Lake Michigan's OHWM)

81. Plaintiffs hereby re-allege each and every allegation contained in Paragraphs 1 through 72 as though fully set forth herein.

82. The Fifth Amendment to the Constitution, made applicable to the states by the Fourteenth Amendment, prohibits the government from "taking private property for public use, without just compensation."

83. Defendants Governor Holcomb and Attorney General Hill are charged with enforcing the duly enacted statutes of the State of Indiana. Defendant Director Clark, as Director of DNR, is directly charged with enforcement of the challenged portion of HEA 1385. All Defendants are acting under color of state law within the meaning of 42 U.S.C. § 1983.

84. The U.S. Supreme Court has held on multiple occasions that even an easement may not be taken without just compensation. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987).

85. HEA 1385's definition of "recreational purpose" includes a broad catch-all provision that permits Indiana to expand the permitted public uses of the Lake Michigan shore below the OHWM.

86. Should Plaintiffs prevail on their First Cause of Action, further expansion of public activities beyond

the already-granted walking easements and, perhaps, the traditional public trust activities, would constitute the taking of an easement without compensation.

87. This Second Cause of Action is conditional upon the success of the First Cause of Action. Should the Court reject Plaintiffs' First Cause of Action, Plaintiffs could no longer allege that expanding public rights to the shore constitutes an additional taking.

88. Because Indiana is immune from suits for damages in federal court, and the Indiana Supreme Court has already determined that Indiana will not compensate Plaintiffs, Plaintiffs lack any remedy at law and thus are entitled to seek injunctive and declaratory relief in federal court.

PRAYER FOR RELIEF

Plaintiffs pray for judgment from this Court as follows:

A. An entry of judgment declaring that the Indiana Supreme Court's decision in *Gunderson v. State*, which purported to declare that lakefront owners could hold title only above the OHWM, effected an uncompensated taking of Plaintiffs' property below the OHWM, including the dry beach.

B. An entry of judgment declaring that HEA 1385's provision declaring State ownership of Lake Michigan below the OHWM, essentially codifying the taking decreed in *Gunderson*, is also unconstitutional.

C. An entry of a permanent injunction prohibiting Defendants and the State of Indiana from enforcing

both the *Gunderson* decision and HEA 1385's provisions on ownership of Lake Michigan below the OHWM, thus prohibiting Defendants and the State from exercising ownership over the disputed property.

D. An entry of a permanent injunction prohibiting Defendants from enforcing HEA 1385's expansion of public rights to the shore of Lake Michigan below the OHWM beyond the traditional public trust triad and transitory walking.

E. An award of attorneys' fees and costs in this action pursuant to 42 U.S.C. § 1988.

F. An award of any further legal or equitable relief this Court may deem just and proper.

DATED: April 9, 2020.

Respectfully submitted,

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By /s/ Mark Miller

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Attorneys for Plaintiffs

No. ________

In The

Supreme Court of the United States

RANDALL PAVLOCK, KIMBERLEY PAVLOCK, and RAYMOND CAHNMAN,

Petitioners,

v.

ERIC J. HOLCOMB, in his official capacity as Governor of the State of Indiana, et al.,

Respondents.

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

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR A WRIT OF CERTIORARI contains 8,979 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 20, 2022.

s/ Christopher M. Kieser

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No. _________

RANDALL PAVLOCK, KIMBERLEY PAVLOCK,
and RAYMOND CAHNMAN,
Petitioners,
v.
ERIC J. HOLCOMB, in his official capacity as
Governor of the State of Indiana, et al.,
Respondents.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 22nd day of September, 2022, send out from Omaha, NE 1 package(s) containing 6 copies of the PETITION FOR A WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

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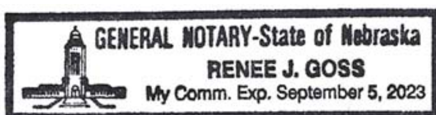
Subscribed and sworn to before me this 22nd day of September, 2022.
I am duly authorized under the laws of the State of Nebraska to administer oaths.



Renee J. Goss
Notary Public

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42712

Pavlock v. Holcomb

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