No. 21-1599

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RANDALL PAVLOCK, KIMBERLEY PAVLOCK,
and RAYMOND CAHNMAN,

Plaintiff-Appellants,

v.

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

Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division
No. 2:19-cv-466-JD-APR
The Honorable Jon E. Deguilio, Chief Judge

PLAINTIFF-APPELLANTS' OPENING BRIEF AND REQUIRED APPENDIX

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Consistent with counsel's previously filed disclosure statements (ECF 5 & 7), the undersigned certifies that Pacific Legal Foundation is the only law firm that has represented Appellants Randall Pavlock, Kimberley Pavlock, and Raymond Cahnman in this case. Appellants are not corporations and have not used pseudonyms.

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JURISDICTIONAL STATEMENT

The district court had original jurisdiction over this case under 28 U.S.C. § 1331 (federal question) and 42 U.S.C. § 1983 (cause of action for violation of the Constitution or federal law). The constitutional provision at issue is the Fifth Amendment's Takings Clause (incorporated against the States by the Fourteenth Amendment), which provides in relevant part "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The district court dismissed the case on ground of sovereign immunity, holding that it lacked subject matter jurisdiction because the defendant Indiana state officials sued in their official capacities were immune from suit under *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). Plaintiffs challenge this holding on appeal, along with the district court's alternative disposition under Rule 12(b)(6).

This appeal is taken from the final decision of the United States District Court for the Northern District of Indiana entered on March 31, 2021, by the Honorable Jon. E. DeGuilio, Chief Judge. Appellants filed their notice of appeal on April 5, 2021, and the case was docketed April 6, 2021. The Court of Appeals has jurisdiction under 28 U.S.C. § 1291 (final decisions of district courts).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether sovereign immunity bars a takings claim against state officials in their official capacity where the property owners seek only prospective injunctive relief to restrain enforcement of an unconstitutional taking without compensation.

2. Whether a viable cause of action exists for a judicial taking.

3. Whether Appellants plausibly alleged that an Indiana Supreme Court decree that the State holds exclusive title to the shore of Lake Michigan below the ordinary high-water mark effected an uncompensated taking their beach property below that mark.

INTRODUCTION

Appellants Randall Pavlock, Kimberley Pavlock, and Raymond Cahnman own lakefront property in Porter County, Indiana. Their recorded plats extend below any conceivable definition of the "ordinary high-water mark" (OHWM) on Lake Michigan. App. 030–31 (Amended Complaint ¶¶ 12, 14). For years, the dry beach behind their lakefront homes was their private property, ideal for recreation with friends and family. *Id.* (Amended Complaint ¶¶ 13–15). Aside from a public easement for walking along the shore of Lake Michigan, the Pavlocks and Cahnman exercised their right to exclude the public from their property. *Id.*

That all changed in February 2018 when the Indiana Supreme Court declared that the State holds "exclusive title" to the Lake Michigan shoreline below the OHWM. *Gunderson v. State*, 90 N.E.3d 1171, 1173 (Ind. 2018), *cert. denied* 139 S. Ct. 1167 (2019). The *Gunderson* decree effectively transferred the Pavlocks' and

Cahnman's backyard beach property to the State of Indiana without compensation. They now have no more rights to it than any member of the public—even their recreation below the OHWM is subject to the whims of the General Assembly. App. 030–31 (Amended Complaint ¶¶ 13, 15).

The Pavlocks and Cahnman (Appellants) brought this lawsuit to defend their property rights and enjoin Indiana officials from enforcing *Gunderson*'s declaration that Indiana holds exclusive title to the beach below the OHWM of Lake Michigan. They alleged that the *Gunderson* decree went against Indiana precedent, historical practice, and the common law of similarly situated states. *See id.* 032–46 (Amended Complaint describing the historical practice along Lake Michigan). But the district court dismissed Appellants' Amended Complaint on ground of sovereign immunity, effectively depriving them of any forum in which to press their claim that the Indiana Supreme Court unconstitutionally transformed their private property into public property without compensation. And the court indicated that it would have dismissed the takings claim anyway because—despite their deeds and decades of historical practice—it thought Appellants had only alleged that property rights in the shoreline of Lake Michigan were "murky." App. 023.

This Court should reverse on both grounds. The district court's decision to extend *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), beyond its facts was contrary to later decisions of the Supreme Court and this Court. If adopted, such an extension would unnecessarily deprive property owners of their guaranteed federal forum to seek redress when a State has taken their property without

compensation. And on the merits, a taking through judicial decree is just like any other. Appellants alleged that *Gunderson*'s decree transformed their private property into public property. At the pleading stage, the district court should not have dismissed that claim because property ownership in the area was "murky"—that is a factual question to be decided on a full record. The judgment below should be reversed and the case remanded.

STATEMENT OF THE CASE

Appellants own several lots in what the Porter County Recorder's Office describes as the "Lake Shore Addition to the New Stock Yards." App. 030–31, 057–70 (Amended Complaint ¶ 12, 14 & Exhibits A–D). Their plats include some land that is usually covered by Lake Michigan, the shoreline that is periodically covered but often dry beach, and land upland of the shore, including portions of the famed Indiana Dunes.[1] *Id.* 034, 057–70 (Amended Complaint ¶¶ 28–29 & Exhibits A–D). Appellants use the beach portion of their property for recreation with family, friends, and neighbors. *Id.* 030–31 (Amended Complaint ¶¶ 13, 15). Aside from permitting members of the public to walk across their beaches under a 1980 public walking easement granted to the federal government, *see* App. 035–36 (Amended Complaint ¶¶ 32–33), Appellants exercised the right to exclude the public from their beach, *id.* 030–31 (Amended Complaint ¶¶ 13, 15).

[1] Appellants are inholders—their properties are surrounded by the Indiana Dunes National Park. App. 030 (Amended Complaint ¶ 13).

Appellants' property rights in the Lake Michigan shoreline went unchallenged until 2010. *Id.* 047 (Amended Complaint ¶¶ 60–61). That year, the lakefront Town of Long Beach in neighboring LaPorte County passed an ordinance purporting to declare that the existing Indiana Department of Natural Resources (DNR) "administrative high-water mark" of 581.5 feet above sea level established the boundary line between public and private property. *Id.* (Amended Complaint ¶ 61); *Gunderson*, 90 N.E.3d at 1174. Long Beach lakefront owners sued DNR seeking a declaratory judgment that they owned to the water's edge. *Gunderson*, 90 N.E.3d at 1174. Both the trial court and the Indiana Court of Appeals held that private title to the shore of Lake Michigan extends to the low-water mark, subject to public trust rights up to the OHWM. *See Gunderson v. State*, 67 N.E.3d 1050, 1052–53 (Ind. Ct. App. 2016) (describing the trial court holding); *id.* at 1060 (Court of Appeals holding that "the northern boundary of Gunderson's property is the ordinary low water mark, subject to the public's rights under the public trust doctrine up to the OHWM").[2]

The Indiana Supreme Court granted petitions for transfer. It then held—for the first time in State history—that Indiana holds absolute title to the shores of Lake Michigan up to the OHWM.[3] *Gunderson*, 90 N.E.3d at 1173. For Appellants, that meant that their private beach property was now the State's. *See id.* at 1188

[2] The trial court and the Court of Appeals disagreed about the location of the OHWM, but that disagreement is irrelevant to the questions presented here.

[3] The holding was so unanticipated that Appellant Raymond Cahnman, who participated as *amicus* in support of the Gundersons, did not even argue the property line question in his *amicus* brief. Cahnman instead focused his brief on urging the court to limit public trust activities to the traditional triad of fishing, commerce, and navigation. *See Gunderson*, 90 N.E.3d at 1188 (noting Pacific Legal Foundation's argument representing Cahnman).

(referring to the land below the OHWM as "the beaches of Lake Michigan"). Appellants, who do not live in Long Beach and were not parties to *Gunderson*, sued several Indiana officials ("the State Defendants") alleging that the *Gunderson* decree took their property below the OHWM of Lake Michigan without compensation. *See* Doc. 1 in case 2:19-cv-00466-JD-APR (N.D. Ind. filed Dec. 5, 2019). Appellants sought only prospective relief prohibiting the State Defendants from enforcing the Indiana Supreme Court's decree. *Id.*

The State Defendants moved to dismiss. Doc. 23 in case 2:19-cv-00466-JD-APR (N.D. Ind. filed Jan. 28, 2020). But after briefing was complete, the General Assembly passed and Governor Holcomb signed House Enrolled Act (HEA) 1385. App. 049 (Amended Complaint ¶ 68). The law codified *Gunderson*'s holding that the State holds absolute title to the shores of Lake Michigan up to the OHWM. App. 049–50 (Amended Complaint ¶ 68 (citing Ind. Code § 14-26-2.1-3(a))). It offered no compensation to property owners like Appellants whose deeds describe property below the OHWM. App. 050 (Amended Complaint ¶ 69). HEA 1385 also vastly expanded public rights on the shore—it 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." App. 050 (Amended Complaint ¶ 70 (quoting Ind. Code § 14-26-2.1-4(b))). These public rights go far beyond the commerce, fishing, navigation, and transitory walking that the Indiana Supreme Court recognized as protected public uses. *Id.* (citing *Gunderson*, 90 N.E.3d at 1188).

Appellants amended their complaint to seek prospective relief against HEA 1385's declaration of exclusive State ownership below the OHWM. Appellants also asserted a separate takings claim with respect to the law's expansion of protected public uses below the OHWM. App. 052 (Amended Complaint ¶ 79) (ownership declaration); *id.* 053 (Amended Complaint ¶¶ 84–86) (expansion of public uses). But as both parties recognized below, Appellants' challenges to HEA 1385 are dependent on the success of their original challenge to the *Gunderson* decree. *See* App. 053 (Amended Complaint ¶ 87). That is because absent a successful claim that *Gunderson*'s decree effected a taking, *Gunderson* stands as Indiana law. Put another way, if *Gunderson*'s decree did not take Appellants' property, neither did the General Assembly's codification of that decree. But if *Gunderson* did effect a taking, then the General Assembly similarly lacks the power to declare their property public without compensation.[4]

The State Defendants renewed their motion to dismiss. Doc. 40 in case 2:19-cv-00466-JD-APR (N.D. Ind. filed May 28, 2020). It made the same two arguments as the original motion: (1) that a special application of sovereign immunity the Supreme Court described in *Idaho*, barred Appellants' takings claims; and (2) that there is no

[4] HEA 1385's expansion of public uses below the OHWM presents much the same issue. If *Gunderson* did not effect a taking, then the beach below the OHWM is exclusive State property and the General Assembly may decree whatever uses it wants (perhaps limited by the public trust doctrine). But if it did, then Appellants contend the expansion of public rights is akin to the taking of an easement without compensation, which the General Assembly may not do. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987). The resolution of that question would also depend on the scope of pre-existing public trust rights in Indiana. It is beyond the scope of this appeal.

viable cause of action for a judicial taking.[5] The district court granted the motion. It held that sovereign immunity barred even a request for prospective relief because the relief sought was the "functional equivalent of a quiet title action which implicates special sovereignty interests" under *Idaho*. App. 009, 016. Alternatively, the district court indicated that it would have dismissed the Amended Complaint for failure to state a claim on the ground that the alleged facts did not establish "a sudden change in state law regarding a well-established property right." *Id.* 022. Even assuming that a judicial taking may occur, the district court thought Appellants had "at best" established that "the area of property law was murky in Indiana, and, likely even murkier on the shores of Lake Michigan." *Id.* 023.

Appellants timely appealed.

SUMMARY OF ARGUMENT

Appellants seek prospective relief to restrain an allegedly unconstitutional taking without compensation. As the district court recognized, Appellants' claims fall within the typical ambit of *Ex parte Young*, 209 U.S. 123 (1908). App. 008. Nevertheless, the court held the claims were barred by sovereign immunity under the Supreme Court's one of a kind decision in *Idaho*. But, for the several reasons that follow, *Idaho* does not control and the district court's decision to dismiss the case for lack of jurisdiction should be reversed.

[5] The State Defendants focused on the availability of a cause of action for a judicial taking *generally*. They did not develop an argument that even if a judicial taking may occur, Appellants had failed to allege one.

First, *Idaho* was an exceptional case in every respect. It involved an Indian tribe plaintiff seeking to deprive a State not only of ownership over a disputed tract of land, but of *all sovereignty and regulatory jurisdiction* over a vast swath of lands long recognized as part of Idaho's territory. *See Idaho*, 521 U.S. at 282–83. The "special sovereignty interests" presented in such a case, *see id.* at 281, simply cannot be replicated where the plaintiff is not a separate sovereign contesting a State's sovereignty over disputed territory, *see Verizon Maryland, Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 648 (2002) (Kennedy, J., concurring).

Second, the Supreme Court has since limited the effect of *Idaho*'s "special sovereignty interests" test and emphasized a return in *Young* cases to a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* at 645 (majority opinion); *see also Ind. Prot. & Advoc. Servs. v. Ind. Fam. & Soc. Servs. Admin.*, 603 F.3d 365, 371 (7th Cir. 2010) (en banc) ("IPAS"). While the unique threat to State sovereignty at issue in *Idaho* would still likely garner special treatment, the Supreme Court has made it clear that lower courts are not to conduct a freewheeling inquiry into sovereignty interests outside that narrow context. Since Appellants seek only to restrain State officials from enforcing an unconstitutional taking, this case presents no greater threat to Indiana's sovereignty than the typical constitutional case.

Third, *Idaho* depended in part on the state courts' continued availability to hear the Tribe's claim on the merits. *Idaho*, 521 U.S. at 288–89; *id.* at 274 (opinion of

Kennedy, J.). By contrast, the Indiana courts are effectively closed to Appellants because the state's highest court has already said it did not decree a taking. *See Gunderson,* 90 N.E.3d at 1185; *Kolton v. Frerichs*, 869 F.3d 532, 535 (7th Cir. 2017). The *Young* rule takes on "special significance" when there is no available state forum to vindicate a federal right. *Idaho*, 521 U.S. at 271. The district court's refusal to permit this case to proceed under *Young* ultimately deprived Appellants of *any forum* in which to seek redress for violation of their constitutional rights.

The district court also erred in its alternative holding that Appellants did not state a plausible judicial takings claim. More than 40 years ago, a unanimous Supreme Court made clear that "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). And the Court confirmed that remains true whether the transformation is accomplished "by statute" or "by judicial decree." *Id.* Because a judicial decree can take property just as effectively as an act of the executive or legislature, there is no reason to exempt state court decisions from takings scrutiny.

Appellants plausibly alleged that the Indiana Supreme Court's *Gunderson* decision decreed a taking of their property below the OHWM of Lake Michigan. Appellants alleged that they have deeds describing beach property below the OHWM. App. 034 (Amended Complaint ¶ 29). They further alleged that all relevant actors throughout the 20th century recognized that the shoreline was subject to private ownership. *Id.* 034–46 (describing the history of shoreline ownership in Indiana). Lots

below the OHWM have been taxed. *Id.* 034 (Amended Complaint ¶ 27 & n.1). Municipalities who held title to the beach restricted access to their residents. *Id.* 046 (Amended Complaint ¶ 58). State and federal governments purchased shoreline property that would have already been public under *Gunderson*. *See id.* 037–44. And Appellants and others, including municipalities, deeded easements to the federal government permitting the public to walk along their beach properties. *Id.* 035, 066–67, 072–94 (Amended Complaint ¶ 33 & Exhibits C, E–J). At the very least, these allegations *plausibly* establish that Appellants owned the property described in their deeds before *Gunderson*.

The legal environment, too, lends credence to Appellants' claims. *Gunderson*'s decree contradicted the only relevant Indiana precedent, which since 1837 has recognized private ownership down to the low-water mark of the navigable Ohio River. *Stinson v. Butler*, 4 Blackf. 285 (Ind. 1837). It was also unique among Great Lakes States, none of which adhere to Indiana's new exclusive-title rule. It follows that Appellants plausibly alleged that *Gunderson*'s first-of-its-kind decision was a "sudden change in state law, unpredictable in terms of the relevant precedents." *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring). And even under the test proposed in Justice Scalia's four-justice plurality opinion in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 715 (2010), Appellants plausibly alleged that the sudden decree deprived them of "an established right of private property." That is enough to state a plausible takings claim.

ARGUMENT

I. Sovereign Immunity Does Not Bar Appellants' Takings Claim

This case involves an idiosyncratic application of sovereign immunity to bar a constitutional claim seeking only prospective injunctive relief against State officials. The Eleventh Amendment bars a federal action against a State official in his official capacity only where the relief sought would "impose a liability which must be paid from public funds in the state treasury." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). But sovereign immunity is usually no bar where a suit seeks only prospective injunctive relief to halt enforcement of an allegedly unconstitutional state action. *See Verizon*, 535 U.S. at 645. That is precisely what Appellants have done. The Amended Complaint alleged that *Gunderson* decreed a taking of their property without compensation and seeks to enjoin the continued enforcement of that taking. App. 052 (Amended Complaint ¶¶ 78–80). As the district court recognized, such a complaint typically falls squarely within the *Ex parte Young* "exception" to sovereign immunity. *Id.* 008.

But the district court rejected the straightforward application of *Young*. Instead, ignoring cautionary notes both from this Court and from Justice Kennedy, *see Verizon*, 535 U.S. at 648 (Kennedy, J., concurring); *IPAS*, 603 F.3d at 371, the district court extended *Idaho* to preclude a takings claim brought through 42 U.S.C. § 1983. For the reasons stated, *Idaho* should be confined to its extraordinary facts. This Court should reverse the judgment below and permit this case to proceed under *Young*.

A. Standard of review

This Court reviews de novo a dismissal on the ground of sovereign immunity. *UWM Student Ass'n v. Lovell*, 888 F.3d 854, 859 (7th Cir. 2018).

B. *Ex parte Young* secures Appellants a federal forum to contest Indiana's violation of their constitutional rights

In *Young*, shareholders of railroad companies sued the Minnesota attorney general and several members of a state commission seeking to enjoin the enforcement of a Minnesota law that fixed railroad prices in the state. *Young*, 209 U.S. at 127–29. The attorney general argued that the action was effectively against the State and thus barred by sovereign immunity. *Id.* at 149. But the Supreme Court disagreed. The Court held "the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." *Id.* at 159. Put simply, when a state official is assigned to carry out official policy contrary to the United States Constitution, "[t]he state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.* at 160.

Young is often described as an "exception" to the general rule that actions effectively against the State are barred by sovereign immunity. *See Va. Off. for Protection & Advocacy v. Stewart*, 563 U.S. 247, 260 (2011) (*VOPA*). But this shortchanges both the importance of the *Young* doctrine and its grounding in early American law. In truth, *Young* requires "no exception, no fiction, no new cause of action, and no paradox, and all for the same reason." John Harrison, Ex Parte Young, 60 Stan. L. Rev. 989, 990 (2008). Indeed, by 1908 it was already "a familiar feature of

American constitutional law that a government officer who was carrying out an unconstitutional statute was not entitled to the privileges to act and protections from judicial remedies, accorded to officers when they executed valid laws." *Id.* at 996. *Young* itself cited *Pennoyer v. McConnaughy*, 140 U.S. 1, 12 (1891), which traced the doctrine back to Chief Justice Marshall's opinion in *Osborn v. Bank of U.S.*, 22 U.S. 738 (1824). The *Pennoyer* Court emphasized that the "general doctrine" that "the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state . . . *has never been departed from*." 140 U.S. at 12 (emphasis added).

Accordingly, despite the "exception" nomenclature, the Supreme Court has consistently recognized that *Young*'s result is "necessary to 'permit the federal courts to vindicate federal rights.'" *VOPA*, 563 U.S. at 255 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)). "[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause" and is "necessary to vindicate the federal interest in assuring the supremacy of [federal] law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). Exception or not, *Young* is no quirky relic of a bygone era. The doctrine is essential to a system that expects federal courts to police violations of federal rights.

The basic premise of *Young* is that a plaintiff is entitled to "a federal forum for claims of unconstitutional treatment at the hands of state officials." *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). That right traces to the Civil Rights Act of 1871, which Congress enacted out of "grave . . . concern that the state courts had been

deficient in protecting federal rights." *Allen v. McCurry*, 449 U.S. 90, 98–99 (1980). Codified today at 42 U.S.C. § 1983, the Act places the "federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). It amounts to a Congressional declaration that while state courts are *competent* to hear federal constitutional cases, federal courts should always be *available*. *Young* ensures that guarantee is neither illusory nor dependent on whether the defendant is a state official or a municipality.[6]

The right to a federal forum is particularly important in takings cases. The Framers recognized that private property is particularly vulnerable to majoritarian decisionmaking. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 855 (1995). That's why the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). But a property owner cannot bring an inverse condemnation action against a State in federal court. *Kolton*, 869 F.3d at 535–36.[7] Prospective relief through *Young* is the only federal relief available to such a plaintiff. A property owner could of course go to state court, but

[6] Municipalities lack sovereign immunity and may be directly sued for damages through 42 U.S.C. § 1983. *See Owen v. City of Independence*, 445 U.S. 622, 646–47 (1980). Without *Young*, a plaintiff would have no federal remedy against a State's violation of his constitutional rights, but could proceed against a municipality for the same violation.

[7] There is some disagreement about why these claims are precluded. This Court has said that it is because state officials sued for monetary damages are not "persons" under Section 1983. *See id.* Others consider such claims barred by sovereign immunity. *See Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527–28 (6th Cir. 2004).

often has good reason to seek a federal forum—state courts, largely staffed by elected judges who "have ties to broader political coalitions," are at risk of bias in favor of their own state governments. *See* 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. Recognizing the importance of providing a federal forum in takings cases, the Supreme Court recently overruled a nearly 35-year-old decision that required almost all takings plaintiffs to litigate their claims in state court. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2179 (2019) (overruling *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)). In so doing, the Court "restor[ed] takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights." *Id.* at 2170.

This case is exemplary of the need for a federal forum. Appellants allege that the Indiana Supreme Court decreed a taking of their property without compensation. Lakefront property owners have lost at every step of the political process—from the Long Beach Town Council to the Indiana Supreme Court to the General Assembly.[8] Appellants cannot seek just compensation in federal court. An action against state

[8] Legislators briefly considered a bill that would have effectively reversed the *Gunderson* decree 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, Sec. 4 (as introduced), *available at* http://iga.in.gov/legislative/2020/bills/house/1031/#document-fd743564. In fact, Section 6 of the bill would have repudiated *Gunderson* and relinquished any ownership of the shore of Lake Michigan inconsistent with private deeds. The bill would also have limited public recreational rights to the first five feet of dry beach at any given time. *Id.* Ch. 10, Sec. 5. But the favorable language was amended out by the House Judiciary Committee.

officials for prospective relief under *Young* is the only remedy for the deprivation of Appellants' constitutional rights.

The district court recognized that "[t]he straightforward inquiry under *Ex parte Young* would seem to result in the Court having jurisdiction over [Appellants'] claims." App. 008. That should have been the end of it. *See IPAS*, 603 F.3d at 371 ("A court applying the *Ex parte Young* doctrine now 'need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" (quoting *Verizon*, 535 U.S. at 645)) (internal quotation marks omitted). Appellants' Amended Complaint should properly proceed under *Young*.

C. *Idaho* is a unique exception to *Young* and does not apply here

The district court saw it differently. It thought this case implicated the type of "special sovereignty interests" the Supreme Court described in *Idaho*. App. 016. But *Idaho* was a special case involving a dispute between a Tribe and a State over sovereignty. Outside of that particular factual context, *Idaho* does not displace *Young*. Both the Supreme Court and this Court have emphasized the bounds of *Idaho*'s holding and refused to extend it. The Court should follow suit here.

1. *Idaho* was a fractured decision that produced a limited holding

In *Idaho*, the Coeur d'Alene Tribe alleged that the submerged lands of Lake Coeur d'Alene and various rivers and streams were within its sovereign territory. 521 U.S. at 265. The Tribe sued Idaho in federal court, arguing that State officials' regulation of the land was ultra vires and in violation of the Tribe's rights under an 1873 executive order (later ratified by Congress) that established its reservation. *See*

id. at 299–300 (Souter, J., dissenting). It sought relief breathtaking in its scope—a declaration "to establish its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands" and "the invalidity of all Idaho statutes, ordinances, regulations, customs, or usages which purport to regulate, authorize, use, or affect in any way the submerged lands." *Id.* at 265 (majority opinion).

Faced with this peculiar scenario, the Supreme Court produced a fractured decision. Writing for a majority in Part III, Justice Kennedy reasoned that although the Tribe's claim of "an ongoing violation of its property rights in contravention of federal law" would ordinarily suffice to invoke *Young*, *Idaho* was "unusual" because "the Tribe's suit [was] the functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281. The unusual nature of the suit demanded a more complex inquiry into "the effect of the Tribe's suit and its impact on these special sovereignty interests" to determine whether it could invoke *Young*. *Id.*

The Supreme Court ultimately determined that the Tribe could not maintain its suit. Yet the "special sovereignty interests" that ultimately tipped the scales in favor of immunity were peculiar to that case. The Tribe sought "far-reaching and invasive relief . . . with consequences going well beyond the typical stakes in a real property quiet title action." *Id.* at 282; *see also id.* at 290 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]his case does not concern ownership and possession of an ordinary parcel of real property."). It wanted "a determination that

the lands in question are not even within the regulatory jurisdiction of the State," a remedy which would "diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory." *Id.* at 282 (majority opinion); *see also id.* at 283 ("Not only would the relief block all attempts by these officials to exercise jurisdiction over a substantial portion of land but also *would divest the State of its sovereign control over submerged lands*, lands with a unique status in the law and infused with a public trust the State itself is bound to respect." (emphasis added)). Under these "particular and special circumstances," the Supreme Court reasoned that a judgment in favor of the Tribe would have affected "Idaho's sovereign interest in its lands and waters . . . in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id.* at 287.

2. *Idaho* does not apply outside the "particular and special circumstances" of that case

For many reasons, this Court should not extend *Idaho* outside the narrow confines of a dispute between a State and an Indian tribe over sovereignty. *First*, as emphasized above, the five justices in the majority agreed that the extraordinary nature of the relief sought demanded an exception from the usual operation of *Young*. Of course, only another sovereign, like an Indian tribe or another State, may challenge a State's sovereignty—rather than its mere ownership—over particular territory. As the Court itself recognized, a comparison of the Tribe's suit to a quiet title action did not fully capture the reasons why the Tribe's particular request for relief was so troublesome. "[T]he typical stakes in a real property quiet title action,"

id. at 282, are ownership and possession of real property, not any contention that "lands are not within the State's sovereign jurisdiction," *id.* at 291 (O'Connor, J., concurring in part and concurring in the judgment). It was the potential *loss of sovereignty* over territory—not a mere dispute over ownership—that drove the *Idaho* Court to carve out a narrow exception to *Young*.

Justice Kennedy, who wrote the lead opinion in *Idaho*, later affirmed this view, noting that sovereign immunity was appropriate "where the plaintiffs tried to use *Ex parte Young* to divest a State of *sovereignty over territory within its boundaries*." *Verizon*, 535 U.S. at 648 (Kennedy, J., concurring) (emphasis added). Not being sovereigns themselves, Appellants could not seek such a drastic remedy. They do not contest Indiana's regulatory jurisdiction over the shoreline, nor the potential existence public trust rights below the OHWM. The equitable relief they seek would not offend Indiana's sovereignty any more than would losing an ordinary constitutional case.

Second, the *Idaho* majority depended on the fact that Idaho's courts were "open to hear the case" and the State had pledged not to assert an immunity defense in state court. *Idaho*, 521 U.S. at 288 (majority opinion). Without that qualification, the Court likely would not have had a majority for a judgment in favor of Idaho. *Idaho* was 5-4 in the result—the dissenting justices would have simply permitted the Tribe's suit to proceed under *Young*, but the five justices in the majority fractured along two distinct lines. Justice Kennedy, joined by Chief Justice Rehnquist, emphasized that "the most important application" of *Young* is "where there is no state forum available

to vindicate federal interests, thereby placing upon Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional law." *Id.* at 270 (opinion of Kennedy, J.). Where the plaintiff lacks a state forum, "the *Young* rule has special significance" as "a specific application of the principle that the plan of the Convention contemplates a regime in which federal guarantees are enforceable so long as there is a justiciable controversy." *Id.* at 271 (citing The Federalist No. 80, p. 475 (C. Rossiter ed. 1961) (A. Hamilton)). Justices Kennedy and Rehnquist would have applied a "case-by-case approach to the *Young* doctrine," *id.* at 280, and refused to permit the Tribe's suit in large part because, with the state courts open and ready, there was "neither warrant nor necessity to adopt the *Young* device to provide an adequate judicial forum for resolving the dispute between the Tribe and the State," *id.* at 274.

Justice O'Connor, along with Justices Scalia and Thomas, rejected Justice Kennedy's case-by-case approach *and* his reliance on the availability of a state forum. *Id.* at 291–92 (O'Connor, J., concurring in part and concurring in the judgment). But Justice Kennedy's and Chief Justice Rehnquist's votes were essential to the judgment against the Tribe, and so the majority opinion relied in part on the availability of a state forum. Since Justice Kennedy's lead opinion emphasized the importance of *Young* in cases where there is no available state forum and the case calls for interpretation of federal law, *see id.* at 274 (opinion of Kennedy, J.), *Idaho*'s holding must be viewed even more narrowly. In essence, the case stands only for the proposition that a federal court will not subject a State to its jurisdiction where the

plaintiff seeks to deprive the State of sovereignty over its territory *and* the state courts are open to hear the action. Here, of course, the Indiana courts are effectively closed to an attack on the Indiana Supreme Court's decree. *See Kolton*, 869 F.3d at 535 ("someone else has asked [for compensation], and the highest state court has answered. . . . This leaves [the plaintiff] with a federal forum . . ."). And the case calls for an interpretation of the Takings Clause that the State Defendants vigorously contest. Therefore, under both the dissenting opinion in *Idaho* (four votes) and Justice Kennedy's lead opinion (two votes), Appellants' case could proceed under *Young*.

Third, subsequent Supreme Court decisions confirm that *Idaho* should be constrained to its facts. The Court has twice rejected appeals to "special sovereignty interests" and emphasized the straightforward nature of the *Young* inquiry. In *Verizon*, the Court permitted a suit by a telecom company against members of a state commission to proceed under *Young*. 535 U.S. at 640. The majority emphasized that "[i]n 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.* at 645 (quoting *Idaho*, 521 U.S. at 296 (O'Connor, J., concurring in the judgment)). Justice Kennedy wrote separately to defend his theory that the application of *Young* "requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal law." *Id.* at 649 (Kennedy, J., concurring). He thought—perhaps correctly—the result in *Idaho* only made sense under such an ad hoc

approach. But *Idaho* is an outlier whether one applies the Court's straightforward inquiry or Justice Kennedy's case-by-case approach. Only the extraordinary facts of the case can explain the result—a clear signal that the case did not set a rule fit for broad application.

The Supreme Court reaffirmed *Verizon*'s rule in *VOPA*, even where a state agency sued other state actors of the same state. The defendant officials there sought to bar a suit by a state agency seeking production of records as required by federal law. *VOPA*, 563 U.S. at 257. The Court rejected their *Idaho* argument—since the relief sought could have been obtained by a private party, it was by definition not the sort of infringement on state sovereignty seen in *Idaho*. *Id.* In the process, the Court again emphasized the extraordinary nature of the relief sought in Idaho, noting the Tribe there tried "to use *Ex parte Young* to obtain injunctive and declaratory relief establishing its exclusive right to the use and enjoyment of certain submerged lands in Idaho and the invalidity of all state statutes and regulations governing that land." *Id.* That describes state sovereignty, not mere ownership.

Given two opportunities to extend *Idaho*'s holding into new contexts, the Supreme Court has emphatically declined while emphasizing the uniqueness of the *Idaho* rule. The Court has sent as clear a signal as possible that *Idaho*'s holding is limited to the extraordinary facts presented in that case.

Fourth, this Court has followed the Supreme Court's lead. In an opinion joined by eight of the nine judges sitting *en banc*, Judge Hamilton explained that the Supreme Court "treated [*Idaho*] as an unusual case that was an exception to the

Young doctrine because 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.'" *IPAS*, 603 F.3d at 372 (emphasis added) (quoting *Idaho*, 521 U.S. at 282 (majority opinion)). *IPAS* also recognized that *Verizon* "turned away from" any new test *Idaho* might have introduced and returned to the "straightforward inquiry" into the effect of the relief sought. *Id.* And even before *IPAS*, a panel of this Court had held that *Verizon* abrogated *Idaho*'s "special sovereignty interests" inquiry. *Ameritech Corp. v. McCann*, 297 F.3d 582, 588 (7th Cir. 2002) ("As a result, we need not assess the precise nature of the State's sovereign interest in law enforcement—so long as Ameritech's complaint seeks prospective injunctive relief to cure an ongoing violation of federal law, the Eleventh Amendment poses no bar.").[9] This Court is bound to follow *IPAS* and *Ameritech*—and thus to hold that Appellants' suit may proceed under the straightforward *Young* inquiry.

And fifth, *Young* must have special force in the context of a takings claim. A holding that the officials here are immune from suit would effectively deprive property owners in this circuit of their guaranteed federal forum any time the State claims an interest in their property without paying for it. While in some cases a state remedy might be sufficient, a property owner has a right to federal forum for a federal

[9] The *en banc* Court in *IPAS* also favorably cited a Tenth Circuit case for the same proposition. *See Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 912 (10th Cir. 2008) ("[T]o the extent that our decision in *ANR Pipeline [Co. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998)] read [*Idaho*] as requiring federal courts [to] examine whether the relief sought against a state official implicates special sovereignty interests, we recognize today that *Verizon Maryland* abrogated this step." (quoting *Hill v. Kemp*, 478 F.3d 1236, 1259 (10th Cir. 2007) (internal quotation marks omitted)).

takings claim. *Knick*, 139 S. Ct. at 2172. Reading *Idaho* to bar all such claims in federal court would not only directly contradict *Knick*'s guarantee of a federal forum, but would substantially increase the power of the States to "transform private property into public property without compensation." *Webb's*, 449 U.S. at 164.

3. The district court erred by extending *Idaho* into a new context

The district court recognized several distinctions between *Idaho* and this case, most notably the lack of a Tribal plaintiff contesting sovereignty and regulatory jurisdiction over a vast amount of land. App. 013–14. But because it misunderstood the binding precedent, it failed to appreciate the effect of these distinctions. The root of the problem is the court's pronouncement that "*Verizon* did not abrogate or limit" *Idaho* and thus that *Idaho* "continues to be applicable and is not a good-for-one-case-only rule." *Id.* 013. *Ameritech* and *IPAS* say otherwise—both that the "special sovereignty interests" inquiry is no longer, *Ameritech*, 297 F.3d at 588, *and* that *Idaho*'s result was simply a function of the "unusual" facts of that case, *IPAS*, 603 F.3d at 372. So while it is true that *Idaho* has not been overruled, it is also clear that courts should not extend it into new contexts.

In a similar vein, the district court described *VOPA* as having "reaffirmed" *Idaho*. App. 010. But while *VOPA* certainly acknowledged *Idaho*'s result and did not overrule it, it also confined *Idaho* to its particular facts. *VOPA* applied the straightforward *Young* inquiry from *Verizon* and recognized that *Idaho* was an exceptional case where the straightforward inquiry was insufficient because the relief sought would have actually deprived Idaho of sovereignty and control over a large swath of its territory. *VOPA*, 563 U.S. at 257. The implication of *Verizon* and *VOPA*'s

rejection of the "special sovereignty interests" inquiry is that a State's sovereignty interests are insufficient to avoid *Young* unless they rise to the level of an actual threat to the State's control and jurisdiction over land. Appellants, of course, do not seek to deprive Indiana of sovereignty over their shoreline parcels. No order enjoining the enforcement of a taking committed without just compensation can deprive the State of jurisdiction over its territory. Such an order would simply prohibit State officials from enforcing a law that violates the plaintiff's constitutional rights. *See Knick*, 139 S. Ct. at 2172 ("a taking without compensation violates the self-executing Fifth Amendment at the time of the taking").

True enough, the district court did point to a few out-of-circuit cases that extended *Idaho* beyond the context of a dispute between two sovereigns over sovereignty. *See, e.g.*, *Anderson-Tully Co. v. McDaniel*, 571 F.3d 760, 763–64 (8th Cir. 2009); *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1072–76 (9th Cir. 2014).[10] In *Anderson-Tully*, the plaintiff brought a takings claim and sought injunctive relief to prevent state officials from asserting ownership over a lake and chute it claimed as private property. *Anderson-Tully*, 571 F.3d at 761. The Eighth Circuit dismissed on the ground of sovereign immunity under *Idaho*—it rejected the plaintiff's distinction that "the Coeur d'Alene Tribe was suing to obtain recognition of its

[10] The district court also cited *Elephant Butte Irrigation District of New Mexico v. Department of Interior*, 160 F.3d 602, 608–09 (10th Cir. 1998), and *MacDonald v. Village of Northport*, 164 F.3d 964, 971–72 (6th Cir. 1999). But both cases predate *Verizon*, and the Tenth Circuit abrogated *Elephant Butte*'s "special sovereignty interests" discussion on that ground. *See Hill*, 478 F.3d at 1259 (recognizing that *Verizon* abrogated the "special sovereignty interests" test. And the Third Circuit's decision in *Waterfront Commission of New York Harbor v. Governor of New Jersey*, 961 F.3d 234, 239 (3d Cir. 2020), simply restated *Idaho*'s result but did not suggest expanding it to takings claims.

ownership of the lake bed and submerged lands, whereas in this case [the plaintiff] is suing to *retain* recognition of its ownership of the disputed waters." *Id.* at 763. In *Lacano*, the Ninth Circuit recognized that *Idaho* is a "unique" and "narrow" exception to *Young*, but applied it anyway and rejected any distinction between ownership and sovereignty. *Lacano*, 765 F.3d at 1072–76. That was despite a previous Ninth Circuit decision that acknowledged that *Idaho* was unique because it threatened "divestiture of a state's sovereignty." *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1048 (9th Cir. 2000).

Anderson-Tully and *Lacano* are simply inconsistent with this Court's *en banc* decision in *IPAS*. While *IPAS* did not involve a land dispute, it did clearly limit the "unusual" *Idaho* case to its facts "because it would decide the state's ownership and *legal and regulatory authority*" over a vast swath of lands. *IPAS*, 603 F.3d at 372 (emphasis added). What is more, neither *Anderson-Tully* nor *Lacano* considered whether the state courts would have been open to hear the plaintiff's claim—an integral part of the result in *Idaho*. And *Anderson-Tully* in particular shows the danger of importing *Idaho*'s sovereign immunity rule into the takings context. The plaintiff in that case was left with no recourse after the Arkansas attorney general advised a hunter that the plaintiff's claimed private land was actually public. *See Anderson-Tully*, 571 F.3d at 761. It is one thing to preclude federal courts from deciding challenges to state sovereignty, but quite another to deny a necessary federal forum to a plaintiff who alleges that a State unconstitutionally transformed his private property into public property without compensation.

A result like *Anderson-Tully* also underscores the problem with overemphasizing *Idaho*'s reference to quiet title actions. To be sure, a takings claim seeking injunctive relief might at first blush appear much like a quiet title action. But courts deciding takings claims often must "decide title." *Katzin v. United States*, 908 F.3d 1350, 1366 (Fed. Cir. 2018). In most cases, the available just compensation remedy means that a court that "decides" title does not enter an order declaring title to the disputed property, but instead will grant compensation when it finds an owner's property was taken. *See id.* Yet where no "adequate provision for obtaining just compensation exists," *Knick*, 139 S. Ct. at 2176, injunctive relief is available and the court that "decides" title would then have to enjoin the defendant from enforcing that taking. A holding that such relief is unavailable because the unavailability of just compensation forced the plaintiff to seek an injunction would effectively deprive a set of property owners, including Appellants, *any* forum to contest a takings claim. To the extent *Anderson-Tully* endorses extension of *Idaho* into the takings context, this Court should reject it.

In sum, the district court relied too heavily on *Idaho*'s "special sovereignty interests" inquiry. The Supreme Court and this Court have since moved in a different direction, in favor of a straightforward inquiry into whether the complaint seeks prospective relief from an ongoing violation of federal law. If special sovereignty interests matter at all, it is in evaluating whether the requested relief would impinge upon a state's sovereignty to the same extent as the Tribe's suit in *Idaho*. Nothing

short of a dispute between two sovereigns over sovereignty justifies departing from the straightforward *Young* inquiry endorsed in *Verizon* and *VOPA*.

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Idaho was an exceptional case. It involved a real threat to state sovereignty in the form of a lawsuit by a separate sovereign asking a federal court to declare land outside the territorial jurisdiction of a state. In that special context, the Supreme Court departed from the typical *Young* inquiry and held that a federal court should not entertain such a complaint, at least where a state forum is available. Here, Appellants lack a state forum and do not contest Indiana's regulatory power and sovereignty over the disputed land. This Court should not countenance an extension of *Idaho*'s rule into the takings context. It should instead reverse the judgment below dismissing the case for lack of subject matter jurisdiction.

II. Appellants Have Stated a Plausible Judicial Takings Claim

Turning to the merits of Appellants' Amended Complaint, this appeal presents two questions: (1) whether a cause of action for a judicial taking is cognizable; and (2) whether Appellants pleaded a plausible judicial takings claim. The district court sidestepped the first question—it assumed without deciding that the *Stop the Beach* plurality opinion stated the proper judicial takings test. App. 017. The court then held that Appellants failed to plausibly allege that their property rights in the beach were not "clearly established" before *Gunderson*. *Id.* 023.

Because this district court answered the second question incorrectly, this Court cannot sidestep the threshold question of whether judicial takings theory is

viable. For the reasons stated below, this Court should reverse the judgment below and remand this case for further factual development.

A. Standard of review

This Court reviews de novo the district court's grant of a Rule 12(b)(6) motion. *UWM Student Assoc.*, 888 F.3d at 859. Like the district court, this Court must assume the truth of Appellants' well-pleaded factual allegations and draw all reasonable inferences in Appellants' favor. *Calderone v. City of Chicago*, 979 F.3d 1156, 1161 (7th Cir. 2020). To survive a motion to dismiss for failure to state a claim. Appellants need only "plead 'enough facts to state a claim to relief that is plausible on its face.'" *Cheli v. Taylorville Cmty. Sch. Dist.*, 986 F.3d 1035, 1038 (7th Cir. 2021) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The standard is "quite forgiving." *Ray v. City of Chicago*, 629 F.3d 660, 662 (7th Cir. 2011). A complaint's allegations need only "raise a right to relief above the speculative level." *Maddox v. Love*, 655 F.3d 709, 718 (7th Cir. 2011) (quoting *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs.*, 536 F.3d 663, 668 (7th Cir. 2008)).

B. Judicial takings are cognizable

"Judicial takings are ultimately no different from takings carried out by other government actors." Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pub. Pol'y 91, 93 (2011). The theory is not new, either. *See Smith v. United States*, 709 F.3d 1114, 1117 (Fed. Cir. 2013) ("[T]he theory of judicial takings existed prior to 2010."); *see generally* Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990). A unanimous Supreme Court recognized four decades ago that a State, even by "judicial decree," "may not

transform private property into public property without compensation." *Webb's*, 449 U.S. at 164. And even before that, Justice Stewart 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*, 389 U.S. at 296–97 (concurring opinion). Judicial takings theory is based on the simple truth that when a state court decrees that what once was private property is now public, the state has taken that property just as surely as if it had done so by decree of the legislature or executive.

There is no principled reason to exempt the decisions of state courts—but not state legislatures or administrative agencies—from takings scrutiny. *See* Thompson, *supra*, at 1541. As Professor Thompson correctly observed, "while the legislative, administrative, and judicial processes are different, they suffer in varying degrees from many of the same political imperfections." *Id.* The problems with the doctrine that some commentators have identified are not unique to judicial takings and offer no "special reason" to reject the doctrine. *Id.* at 1506; *see also id.* at 1510 ("There is also no obvious federalism rationale supporting more deference to one state governmental body than to another."). Ultimately, since "legislative or popular opinion can influence judicial decisions to reallocate property rights, the same fears of majoritarian exploitation that lead us to constrain legislative and executive takings discourage us from granting the courts a wholesale exemption from the same constraints." *Id.* at 1489.[11]

[11] As discussed briefly above, state courts are not as institutionally apolitical as federal courts. *See* Somin, *Catch-22*, *supra*, at 182; Thompson, *supra*, at 1488–89 ("State judges are

Admittedly, judicial takings cases have been rare, and successful ones even rarer. But the Ninth Circuit endorsed the theory in *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), when it held that the Hawaii Supreme Court had decreed a taking of the plaintiffs' vested water rights by discarding traditional Hawaiian territorial law in favor of English common law riparian rights. *See id.* at 1470. Citing Justice Stewart's *Hughes* concurrence, the Ninth Circuit declared that "[n]ew law, however, cannot divest rights that were vested before the court announced the new law." *Id.* at 1474. The *Robinson* opinion was ultimately vacated by the Supreme Court on procedural grounds, *see* 477 U.S. 902 (1986), but its analysis stands as a persuasive argument in support of judicial takings theory.

Another case out of Hawaii provides an illuminating example of how the doctrine applies in a shoreline property case. In *Sotomura v. Hawaii County*, 460 F. Supp. 473 (D. Haw. 1978), the county condemned the plaintiffs' coastal lots, but a dispute arose at the valuation stage: where did the plaintiffs' property end and the State's begin? *Id.* at 474–75. The Hawaii Supreme Court held the boundary was the "vegetation line" and directed the trial court to locate that line and reduce its valuation accordingly. *Id.* at 476. The property owners then sued the County and several officials in federal court,[12] arguing that the Hawaii Supreme Court

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frequently former legislators or party activists and maintain their political allegiances after assuming the bench."). There is little reason to assume that state courts are immune to political realities.

[12] *Sotomura* did not address the *Rooker-Feldman* doctrine, which normally bars plaintiffs from collaterally attacking a state court judgment in federal district court. *See Reynolds v. Georgia*, 640 F.2d 702, 706 n.2 (5th Cir. 1981). But as the district court recognized, *Rooker-Feldman* is no bar here because Appellants were not parties to *Gunderson*. *See* App. 005 n.3.

"disregard[ed] the original monument that governed the location of the seaward boundary in the judgment registering their title." *Id.* That monument was the "seaweed line" that marked the mean high-tide line, which was 43 feet seaward of the vegetation line. *Id.* at 475–76.

The federal court held that the Hawaii Supreme Court's decision effected a taking of 43 feet of beach without compensation. The district court deemed the state court's decision not only "contrary to established practice, history and precedent," but "intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline." *Id.* at 481. That is, the Hawaii Supreme Court privileged the public right of beach access over established private property—precisely the type of majoritarian decisionmaking one would expect from a state legislature. In the process, it decreed "a radical and retroactive change in state law" that deprived the plaintiffs of their property without just compensation. *See id.* (citing *Hughes*, 389 U.S. at 297–98).

Sotomura shows how a state's highest court might simply decree that private property is actually public. In other cases, though, state high courts have cabined rulings affecting property rights in recognition that failure to do so might amount to a taking. The Michigan Supreme Court refused to expand public recreational access to lakes because to do so would risk upsetting well-settled property expectations and amount to "eliminating a property right without compensation." *Bott v. Comm'n of Nat. Res.*, 327 N.W.2d 838, 849–50 (Mich. 1982); *see also id.* at 852 (noting that the Michigan Supreme Court in *Hilt v. Weber*, 233 N.W. 159 (Mich. 1930), overruled a

previous series of cases "because, among other things, they worked severe injustice and constituted a judicial 'taking' without compensation"). And the Oregon Supreme Court refused the State's invitation to hold that rapid avulsion transformed private land into State property because such a decision "would raise serious questions about the taking of private property for public use without compensation." *State v. Corvallis Sand & Gravel Co.*, 582 P.2d 1352, 1363 (Or. 1978) (citing *Hughes*, 389 U.S. at 296–98).[13] These cases recognized that the traditional doctrine of *stare decisis* must "be strictly observed where past decisions establish rules of property that induce extensive reliance." *Bott*, 327 N.W.2d at 849 (internal quotation marks omitted). Otherwise, a state court would run the risk of "recharacterizing" private property as public, which is exactly what the Supreme Court has said a State cannot do. *Webb's*, 449 U.S. at 164.

Justice Scalia's four-justice *Stop the Beach* plurality recognized this, citing *Webb's* for the proposition 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." *Stop the Beach*, 560 U.S. at 715 (plurality opinion). But *Stop the Beach* ultimately produced no precedent on judicial takings. While the Supreme Court granted certiorari to address whether a judicial taking could ever occur, it did not answer that question—ultimately, four justices said yes and the remaining four

[13] A New York trial court similarly cited Justice Stewart's concurrence in refusing to change the definition of "beach" as referring to the intertidal zone because doing so would "certainly violate the rights of plaintiff." *Dolphin Lane Assocs., Ltd. v. Town of Southampton*, 339 N.Y.S.2d 966, 975 (Sup. Ct. 1971).

demurred,[14] leaving 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).[15] That leaves this Court to apply *Webb's* and consider the *Stop the Beach* plurality as persuasive authority alongside Justice Stewart's *Hughes* concurrence. This Court need not—and should not—wait for the Supreme Court to grant another judicial takings petition. Instead, the Court should simply hold that the Takings Clause prohibits *any* branch of state government from taking property without just compensation.

C. Appellants plausibly alleged a judicial taking

The question then becomes whether Appellants pleaded sufficient facts to survive a motion to dismiss. According to the *Stop the Beach* plurality, a judicial taking occurs when a judicial decree deprives a property owner of a right "established" by state law. *See* 560 U.S. at 715. Justice Stewart's *Hughes* concurrence offered an "expectations" approach based on the predictability of the state court's change in the law. *See Hughes*, 389 U.S. at 296–97; *see also* Thompson, *supra*, at 1538–41. Justice Stewart has the better end of this point—significant reliance interests militate against requiring that a property right be *established* before a

[14] Justice Kennedy, joined by Justice Sotomayor, did assert that "[i]f a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law." *Id.* at 735 (Kennedy, J., concurring in part and concurring in the judgment). The plurality harshly criticized this approach, arguing that the Due Process Clause could not do the job of the Takings Clause. *Id.* at 719–25 (plurality opinion).

[15] The *Stop the Beach* Court ultimately ruled against the petitioner, 8-0. The unanimous Court held that the state court decision challenged in that case was "consistent with these background principles of state property law." *Id.* at 731 (majority opinion).

judicial decree can be said to take it. This case is a prime example, as even if the Court were to find that the Appellants had no established rights to the beach, they certainly had every expectation, buttressed by reality and law, that the property was theirs. But it ultimately does not matter which standard the Court chooses, because as shown below, the Amended Complaint's allegations combined with the background precedent are sufficient to *plausibly* state that Appellants owned the property described in their deeds before *Gunderson* took it. That is because *Gunderson*'s decree was "contrary to established practice, history and precedent." *Sotomura*, 460 F. Supp. at 481

First, under the Equal Footing doctrine, each State obtained title to the land up to the OHWM of navigable waters within its jurisdiction at the time of statehood. *See PPL Montana, LLC v. Montana*, 565 U.S. 576, 588–91 (2012). Thereafter, however, each State may "allocate and govern" these lands "according to state law." *Id.* at 591; *see also Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) ("[I]t 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."). And in 1837, the Indiana Supreme Court held that because of the Ohio River's non-tidal nature, property owners along that river own title down to the river's ordinary *low-water* mark. *Stinson*, 4 Blackf. at 285. *Stinson* explicitly rejected "[t]he English authorities relied on by the defendants, to show that high-water mark is the boundary," because they were "all cases respecting waters which

ebb and flow with the tide." *Id.* By 1872, the court described *Stinson*'s rule as "settled." *Sherlock v. Bainbridge*, 41 Ind. 35, 41 (1872).

Second, title to the bed of Lake Michigan similarly passed to Indiana in 1816. *See PPL Montana*, 565 U.S. at 588–91 (describing the Equal Footing doctrine as equally applicable to navigable lakes and rivers). Like the Ohio River, the Great Lakes are "nontidal waters." *Glass v. Goeckel*, 703 N.W.2d 58, 71 (Mich. 2005). The history of ownership along Lake Michigan strongly suggests that the *Stinson* rule did not apply solely to the banks of the Ohio River, but to all Equal Footing lands in the State.

The Amended Complaint detailed facts that, taken together, plausibly establish that Appellants maintained ownership of the land described in their deeds until 2018.

- Appellants' deeds show ownership of land below the OHWM. App. 034, 057–70 (Amended Complaint ¶¶ 28–29 & Exhibits A–D). These lots were first platted in 1891. *Id.* 033 (Amended Complaint ¶ 25). After many were abandoned, quiet title suits over lot ownership persisted in Porter County circuit court until 1962. *Id.* 034 (Amended Complaint ¶ 26).
- Property owners hold title to submerged plats below the OHWM. These properties are assessed with nominal value in years when the lake covers them, but much more significant value when they are uncovered. *Id.* (Amended Complaint ¶ 27 & n.1).

- Lakefront owners, including Appellants and a municipality, granted easements to the federal government "for the purpose of providing the general public a means to traverse on foot along a portion of the shores of Lake Michigan." *Id.* 035, 072–094 (Amended Complaint ¶ 32 & Exhibits E–J). The grants of easement refer to the 1979 Porter County plat map, *see id.* 066–67, and specifically exclude those portions of the lots "lying Southerly of the 'toe of the dunes'" as that term is defined in the 1979 survey and depicted on the plat, *id.* 035, 066–67, 072–94 (Amended Complaint ¶ 33 & Exhibits C, E–J). That means the walking rights apply only to the shoreline portions of these lots, which include significant property below the line marked as the "high water line" in the 1979 survey as well as any conceivable definition of the OHWM today. *Id.* 036, 066–67 (Amended Complaint ¶ 33 & Exhibit C).
- Federal and State land acquisition demonstrated a clear understanding that the lakeshore was private. It began in 1916 when future National Park Service head Steven Mather proposed federal acquisition of "a strip of lakeshore twenty-five miles long and one mile wide" for an estimated $1.8 to $2.6 million. *Id.* 037 (Amended Complaint ¶ 39). There was no doubt he was talking about the beach, as he noted its desirability for "bathing facilities" and "[f]ishing in Lake Michigan directly north of the dunes." *Id.* 038 (Amended Complaint ¶ 39). As the high price tag

suggests, this entire area was privately owned. *Id.* (Amended Complaint ¶ 40).

- Indiana acquired three miles of Porter County lakefront in 1927 and established the Indiana Dunes State Park. *Id.* 040 (Amended Complaint ¶ 42).
- When Congress in the 1950s began discussing the possibility of an Indiana Dunes National Lakeshore, the initial bill excluded the lakefront towns of Dune Acres, Ogden Dunes, and Johnson Beach because those municipalities or private owners owned the beaches. *Id.* 041 (Amended Complaint ¶ 44). When National Lakeshore opponents sought to include Ogden Dunes as a poison pill, Lakeshore supporters organized as Save the Dunes supported the inclusion of Ogden Dunes *and all the remaining privately owned beach*. *Id.* 042–43 (Amended Complaint ¶ 50). The cost of this land was steep—a Department of Labor report estimated that Indiana owned only a quarter of the land proposed for the Lakeshore and the remaining private beachfront land held by individuals and steel mills would cost $23 million to acquire. *Id.* 042 (Amended Complaint ¶ 49).
- Federal land acquisition for the Lakeshore likewise confirmed private ownership of the shore. Members of Congress wanted an eleven-mile uninterrupted shoreline, *id.* 043 (Amended Complaint ¶ 52), but the dunes in the town of Beverly Shores did not provide a clear boundary

between homes and shoreline—so much so that some homes were built out onto the dunes or even the beach. *Id.* 044 (Amended Complaint ¶ 52). These homes made it even harder for the government to acquire, as it wanted, the land "from the toe of the dune to the water's edge." *Id.* The government's solution was to permit these owners to sell their homes and property to the government but reserve an occupancy right for 15 years. *Id.* This made it clear that property owners owned at least to the water's edge.

- In Ogden Dunes, when residents complained about trespassing from newly acquired Lakeshore lands, the federal government put up signs to mark the Lakeshore boundary and contracted with a local police force to patrol the area. *Id.* 044–45 (Amended Complaint ¶ 55). According to the *NPS Administrative History* cited throughout the Amended Complaint, "[b]each 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.* 045 (Amended Complaint ¶ 55).
- The Town of Ogden Dunes also maintained its beach for Town residents only. In 1975, the Ogden Dunes Home Association sold "the real estate commonly known as Ogden Dunes Beach" to the Town of Ogden Dunes, while the Town passed a resolution "solely for the use and benefit of residents of the Town of Ogden Dunes and their guests." *Id.* 046, 096–97 (Amended Complaint ¶ 58 & Exhibit K). Four years later, the federal

> government completed a memorandum of understanding with Ogden Dunes which permitted public access to that portion of the shoreline. *Id.* 046 (Amended Complaint ¶ 59). Ogden Dunes could not have restricted beach access to its residents if the State had owned that beach.

Viewing these facts, as the Court must, in the light most favorable to Appellants, they demonstrate a consistent line of private ownership of the shoreline throughout the 20th century.

Third, there is no indication in pre-*Gunderson* precedent that *Stinson* did not apply to Lake Michigan. On the contrary, the Court of Appeals has referred to the low-water mark as the boundary of lakefront property owned by the City of Whiting. *Spurrier v. Vater*, 113 N.E. 732, 733 (Ind. Ct. App. 1916) (the plaintiff had alleged that "[b]y the removal of the sand and gravel the low-water mark of the lake in this locality is being extended, reducing the number of acres of the park"). And the Court of Appeals in *Shedd v. American Maize Products Co.*, 108 N.E. 610 (Ind. Ct. App. 1915), even adjudicated a dispute over an easement that appears to have extended into a submerged portion of the lake. The *Gunderson* court cited another Court of Appeals decision from this era, *Lake Sand Co. v. State*, 120 N.E. 714 (Ind. Ct. App. 1918), to support its claim that the State has maintained exclusive title to the shore. But *Lake Sand* did not purport to determine ownership of the dry beach below the OHWM—at most it recognized that a portion of the lakebed is subject to a public trust, something nobody disputes. The out-of-state authority in *Lake Sand* was cited

only to establish the principle that citizens of Indiana, not those of other States, may benefit from public trust lands in Indiana. *See id.* at 716.[16]

Fourth, Indiana's sister Great Lakes states have rejected *Gunderson*'s exclusive-title rule. The highest courts of several states have all recognized that a lakefront owner's title may extend beyond the OHWM. The Michigan Supreme Court adopted an overlapping title approach, recognizing private title as demonstrated by deed down to Lake Michigan's low-water mark along with a limited public trust easement up to the OHWM. *Glass*, 703 N.W.2d at 70–71, 75. In Wisconsin, a lakefront owner's title moves with the water's edge at any given time. *Doemel v. Jantz*, 193 N.W. 393, 398 (Wis. 1923). The Ohio Supreme Court has rejected the OHWM in favor of "the line where the water usually stood when unaffected by storms or other disturbing causes." *State ex rel. Merrill v. Ohio Dep't of Nat. Res.*, 955 N.E.2d 935, 947 (Ohio 2011). The rule in Illinois is similar, as the state high court explained that the boundary "should be at that line where the water usually stands when unaffected by any disturbing cause" because "[t]he portion of the soil which is only seldom covered with water may be valuable for cultivation or other private purposes." *Seaman v. Smith*, 24 Ill. 521, 524 (1860). The Indiana Supreme Court itself once 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).

[16] Indeed, these decisions could not have been cited for the proposition that the State owns exclusive title up to the OHWM of the lake, as the states relied on (including Illinois and Wisconsin, as described below) did not all maintain such a rule.

Gunderson's rule appears nowhere in the common law of the other Great Lakes states.[17]

And fifth, reflecting this history and precedent both within and outside Indiana, the lower courts in *Gunderson* both held that private title could extend to Lake Michigan's ordinary low-water mark with a public trust easement up to the OHWM. *Gunderson*, 67 N.E.3d at 1052–53, 1060. The Indiana Supreme Court's partial reversal of the Court of Appeals' judgment was, as far as Appellants can tell, the *first time in Midwest history* that a court had declared a state maintained exclusive title to one of the Great Lakes up to the OHWM.

* * *

Principally, the district court erred in conflating the existence of the public trust with *Gunderson*'s decree of exclusive title. This case is not about the public trust. The existence of public trust rights does not depend on whether the State has exclusive title to the beach. *See Glass*, 703 N.W.2d at 70 (majority opinion) ("Because the public trust doctrine preserves public rights separate from a landowner's fee title,

[17] Like *Stinson*, some high courts of sister Great Lakes states relied on the non-tidal nature of the lakes in establishing the boundary between private and public property. *See, e.g.*, *Doemel*, 193 N.W. at 398 ("Upon the seashore, where the waters are affected by the tide, [water coverage] is intermittent. As to inland lakes and rivers, such assertion of dominion on the part of nature is periodical. So that it would appear but logical to hold that, 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."). Yet even some of the original coastal States adopted the low-water mark as the boundary on their tidal waters. *See Glass*, 703 N.W.2d at 86 (Markman, J., concurring in part and dissenting) ("While a majority of the original thirteen colonies followed the English common-law rule, *Shively* noted that four of the original colonies held that the littoral owner holds title to the 'low water mark,' subject only to the public's right to use the water for navigation and fishing when it is above that point." (citing *Shivley v. Bowlby*, 152 U.S. 1, 18–25 (1894))).

the boundary of the public trust need not equate with the boundary of a landowner's littoral title. Rather, a landowner's littoral title might extend past the boundary of the public trust."). So the district court's worry (and *Gunderson*'s conclusion) that later 19th century Indiana cases "narrowed" the *Stinson* low-water mark rule was misplaced. App. 022. Those later cases merely recognized the existence of a public trust easement below the OHWM. *See Martin v. City of Evansville*, 32 Ind. 85, 86 (1869) (holding that 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"). The extent of public trust rights on the shore is irrelevant to Appellants' claim that *Gunderson*'s exclusive title decree took their property below the OHWM.[18] Whether or not that property was encumbered by a public trust, it was taken all the same.

The district court's other mistake was that it required Appellants to plead too much to survive a motion to dismiss. The court said Appellants only managed to show that property rights near Lake Michigan were "murky" before *Gunderson*. App. 023. But if the facts alleged are subject to multiple interpretations—if the facts are "murky"—then the facts in the light most favorable to Appellants must be enough to prevail at the pleading stage. Whether or not Appellants might be able to summon enough evidence to prevail at summary judgment or trial, at this stage they have *pleaded* sufficient facts to raise the chances of ultimate success "above the speculative

[18] The district court tacitly recognized this when it noted that "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." App. 021.

level." *Maddox*, 655 F.3d at 718 (quoting *Windy City Metal Fabricators*, 536 F.3d at 668). The district court should have allowed Appellants' takings claim to proceed.

Ultimately, the district court placed far too much weight on the *Gunderson* court's assurance that it was merely clarifying unsettled Indiana law. *See* App. 022. "Courts seldom confess to changing the law, claiming instead to clarify, integrate, or correct prior precedents." Thompson, *supra*, at 1478. It is for this Court to decide whether Appellants have plausibly alleged such a change in derogation of Appellants' property rights. Because Appellants have done so, the judgment below should be reversed and the case remanded for further proceedings.

CONCLUSION

Appellants respectfully ask the Court to reverse the judgment below and remand the case for further proceedings.

DATED: May 17, 2021.

Respectfully submitted,

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DATED: May 17, 2021.

s/ Christopher M. Kieser
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Attorney for Plaintiffs – Appellants

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2021, I filed the foregoing PLAINTIFF-APPELLANTS' OPENING BRIEF AND REQUIRED APPENDIX with the Court via CM/ECF. I further certify that all participants in the case (listed below) are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) is included in this Appendix. Counsel further certifies pursuant to Circuit Rule 30(b)(7) that the remaining material required by Rule 30(b) is included in a Separate Appendix.

DATED: May 17, 2021.

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APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

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

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 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).

[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.

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 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

[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)).

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—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

[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 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).

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 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 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

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

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 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

[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.

extinguish Indiana's ownership and, as a result, diminish its control of the shores of Lake Michigan.[7] Thus, this Court believes 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 *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

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

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]

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 to fall within the

[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 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.

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

[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.").

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) (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, 615 (7th Cir. 2014). Thus, a court faced

[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.

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 pre-existing 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 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

[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).

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,

[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.

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 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 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*

[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 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).

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 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

[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.

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

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Indiana

RANDALL PAVLOCK,

KIMBERLEY PAVLOCK,

RAYMOND CAHNMAN

Plaintiffs

v. **Civil Action No.** 2:19-cv-466

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 CLARK
in his official capacity as Director of the State of Indiana Department of Natural Resources,

TOM LAYCOCK
in his official capacity as Acting Director for the State of Indiana Land Office

Defendants

v.

SAVE THE DUNES
Movant for intervention

Movant

JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one):*

☐ the Plaintiff(s),_____recover from the Defendant(s)_____ damages in the amount of _____, plus post-judgment interest at the rate of ____ %

☐ the plaintiff recover nothing, the action is dismissed on the merits, and the defendant _____ recover costs from the plaintiff _____.

X Other: This case is DISMISSED.

This action was (*check one):*

☐ tried to a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

X decided by Chief Judge Jon E. DeGuilio on a Motion to Dismiss.

DATE: March 31, 2021

ROBERT TRGOVICH, CLERK OF COURT

by s/N. Long
Signature of Clerk or Deputy Clerk

Kiren Mathews

From: CA07_CMECFMail@ca7.uscourts.gov
Sent: Monday, May 17, 2021 12:50 PM
To: Incoming Lit
Subject: 21-1599 Randall Pavlock v. Eric Holcomb, et al "Brief filed"

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Seventh Circuit Court of Appeals

Notice of Docket Activity

The following transaction was entered on 05/17/2021 at 2:50:15 PM CDT and filed on 05/17/2021

Case Name:	Randall Pavlock v. Eric Holcomb, et al
Case Number:	21-1599
Document(s):	Document(s)

Docket Text:
Appellant's brief filed by Appellants Raymond Cahnman, Kimberley Pavlock and Randall Pavlock. Paper copies due on 05/24/2021. Appellee's brief due on or before 06/16/2021 for Cameron Clark, Eric J. Holcomb, Tom Laycock and Theodore E. Rokita. Electronically Transmitted. [16] [7160787] [21-1599] (GW)

Notice will be electronically mailed to:

Aaron T. Craft, Attorney
Benjamin M. L. Jones, Attorney
Mr. Christopher M. Kieser, Attorney
Ms. Kathryn Daly Valois, Attorney

The following document(s) are associated with this transaction:
Document Description: Brief filed
Original Filename: 21-1599.pdf
Electronic Document Stamp:
[STAMP acecfStamp_ID=1105395651 [Date=05/17/2021] [FileNumber=7160787-0] [7ae8d793c2e85135f3e6ce7f7a0e3f068feb276866995b698ee2cf9f2caf4830f017cf1d2d7aa2753607884ab995455481085710da8ab6d61f966e040a76ea6b]]