No. 18-462

IN THE

# Supreme Court of the United States

BOBBIE GUNDERSON, *et vir,*

*Petitioners,*

*v.*

STATE OF INDIANA, *et al.*,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

## MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE* AND BRIEF FOR THE CATO INSTITUTE, NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, SAVE OUR SHORELINE, AND WHALESBACK PRESERVATION FUND, LLC, IN SUPPORT OF PETITIONERS


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Pursuant to this Court's Rule 37.2(b), these *amici* respectfully request leave to file this *amici curiae* brief in support of the petition for writ of certiorari to the Supreme Court of Indiana supporting Petitioners Bobbie Gunderson, *et vir.* Counsel for *amici* timely sent letters indicating their intent to file an *amicus* brief to all counsel of record pursuant to Rule 37.2(a). Petitioner Bobbie Gunderson and Respondent State of Indiana granted consent for *amici* participation. The remaining respondents have neither granted nor withheld consent.

This brief will assist the Court in determining whether to grant certiorari because these *amici* are experts in the field of property rights and are specifically knowledgeable in the specific issue in this case, the new and sudden assertion of state and federal governments to acquire control over beaches. *Amicus curiae* Save Our Shoreline participated in this case when it was before the Indiana Court of Appeals.

*Amici* have also participated in similar litigation in this Court and across the country. See *PPL Montana, LLC* v. *Montana*, 565 U.S. 576 (2012); *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U.S. 702 (2010); *Borden Ranch Partnership* v. *U.S. Army Corps of Engineers*, 536 U.S. 903 (2002); *United States* v. *Marian L. Kincaid Trust*, 463 F. Supp. 680 (E.D. Mich. 2006); *Glass* v. *Goeckel*, 703 N.W.2d 58 (Mich. 2005); *State ex. rel. Merrill* v. *Ohio Department of Natural Resources*, 955 N.E.2d 935 (Ohio 2011); *LBLHA, LLC* v. *Town of Long Beach*, 28 N.E.3d 1077 (Ind. Ct. App. 2015).

Accordingly, *amici* respectfully request that the Court grant them leave to file the attached brief.

Respectfully submitted,

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## QUESTIONS PRESENTED

1. May a state redefine the boundary between privately-owned land and "submerged lands" subject to the public trust doctrine and thereby increase the land subject to public use and state control?

2. Does the public trust doctrine allow the public to use property subject to the public trust doctrine for uses other than navigation, commerce, and fishing?

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## INTEREST OF *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review.*

**National Association of Reversionary Property Owners** is a non-profit 501(c)(3) educational foundation, whose primary purpose is to assist property owners in the education and defense of their property rights, particularly their ownership of property subject to right-of-way easements. See, *e.g.*, *National Ass'n of Reversionary Property Owners* v. *Surface Transp. Bd.*, 158 F.3d 135 (DC Cir. 1998), and *amicus curiae* in *Preseault* v. *I.C.C.*, 494 U.S. 1 (1990), and *Marvin M. Brandt Rev. Trust* v. *United States*, 134 S.Ct. 1257 (2014).

**Save Our Shoreline** (SOS) is a Michigan non-profit membership corporation composed of hundreds of families who own a home or cottage, or live, along the Great Lakes shoreline. The organization's mission is to preserve and maintain riparian rights, including the right to maintain

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1. All parties' counsel were timely informed of *amici's* intent to file this brief. Petitioner Bobbie Gunderson and Respondent State of Indiana granted consent for *amici* participation. The remaining respondents have neither granted nor withheld consent. No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief.

safe recreational beaches and waterfront areas, both public and private. SOS participated as an *amicus* party in this case before the Indiana Court of Appeals. SOS participated as an *amicus* in *Borden Ranch Partnership* v. *U.S. Army Corps of Engineers*, 536 U.S. 903 (2002), and in *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U.S. 702 (2010). SOS also supported the landowner in *United States* v. *Marian L. Kincaid Trust*, 463 F. Supp. 680 (E.D. Mich. 2006).

SOS participated as *amicus* in *Glass* v. *Goeckel*, 703 N.W.2d 58 (2005), and supported the Ohio Lakefront Group in a declaratory action determining Lake Erie riparian ownership extends to the water's edge. See *State ex. rel. Merrill* v. *Ohio Dept. of Natural Resources*, 955 N.E.2d 935 (Oh. 2011). SOS was also an *amicus* in *LBLHA, LLC* v. *Town of Long Beach*, 28 N.E.3d 1077 (Ind. Ct. App. 2015).

**Whalesback Preservation Fund, LLC**, owns more than forty acres of land in Leelanau County, Michigan, including almost a quarter-mile of shoreline on Lake Michigan. The Whalesback property is some of the last undeveloped beachfront property in the Village of Leland, Michigan. Whalesback is an iconic landmark that defines the Lake Michigan coastline in Leelanau County. See Addendum (photographs). Whalesback Preservation Fund seeks to responsibly protect the unique features of this property and preserve the Lake Michigan shoreline in harmony with the traditions and character of the community. Toward this end, portions of the Whalesback property are encumbered with conservation easements.

## BACKGROUND

The Great Lakes coastline is almost ten thousand miles long and includes shoreline in Michigan, Indiana, Minnesota, Wisconsin, Ohio, Pennsylvania, and New York.[2] Most of the Great Lakes shoreline is privately-owned property.[3] Under the public trust doctrine, the king retained title to submerged lands for navigation, commerce, and fishing. See *Shively* v. *Bowlby*, 152 U.S. 1, 17 (1894), and *Martin* v. *Waddell's Lessee*, 41 U.S. 367, 414 (1842) (holding that the states acquired title to the "navigable waters and the soils under them" in trust for the public).

The water's edge has been the traditional demarcation between the *jus publicum* (submerged lands subject to the public trust doctrine) and *jus privatum* (land subject to the private owner's exclusive right of possession). Under the public trust doctrine, the state's interest in submerged lands does not extend to uplands and beaches that are

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2. See National Oceanic and Atmospheric Administration website at: https://bit.ly/2QwP7Vp.

3. The state and federal government acquired title to some of the Great Lakes' shoreline by eminent domain. See, *e.g.*, Brian C. Kalt, *Sixties Sandstorm: The Fight over Establishment of a Sleeping Bear Dunes National Lakeshore, 1961-1970* (2001). "Owners of land abutting a lake or pond acquire 'littoral' rights, whereas owners of land adjacent to a river or stream possess 'riparian' rights." *Gunderson* v. *Indiana Department of Natural Resources*, 90 N.E.3d 1171, 1174 (Ind. 2018) (citing *Bass* v. *Salyer*, 923 N.E.2d 961, 970 n.11 (Ind. Ct. App. 2010); 78 Am. Jur.2d § 33 (2018)). We favor *littoral* to describe the interest of owners of Great Lakes shorefront land. But, as *riparian* is often used to describe the landowner's interest, the terms are effectively interchangeable for purposes of this appeal.

not submerged. The littoral landowner enjoys the right to exclusive possession of dry upland, and the state holds title to the submerged lands, which may be used by the public for navigation, commerce, and fishing.

Bobbie and Don Gunderson own three lakefront lots on the shore of Lake Michigan. The deed by which they acquired title to their land references a survey and plat map showing the Gunderson's property "extending to the 'Lake Edge.'" *Gunderson* v. *Indiana Dept. of Natural Resources*, 90 N.E.3d 1171, 1174 (Ind. 2018). "At the root of the Gunderson's deed is a 1837 federal land patent [that] *** originates from an 1829 federal survey showing Lake Michigan as the northern boundary of [the platted land] and [t]he original survey notes indicate the northern boundary extends 'to Lake Michigan and set post.'" *Id.*

In 2017 the Indiana Department of Natural Resources adopted an "administrative boundary which separates state-owned beaches from private upland portions of the shore." *Gunderson*, 90 N.E.3d at 1174.[4] Indiana's new "administrative boundary" shifted the boundary between privately-owned land and land subject to the public trust doctrine shoreward. In effect, the "administrative boundary" Indiana adopted allowed the public to use the Gundersons' (and other Indiana landowners') upland property. The Town of Long Beach Indiana adopted the Department of Natural Resources' administrative boundary as the boundary between privately-owned littoral land and the "state-owned" beaches subject to the public trust doctrine. *Id.* at 1174.

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4. Citing 312 Ind. Admin. Code 1-1-26 ("Ordinary high watermark" defined).

The Indiana Supreme Court affirmed this new "administrative boundary" holding, "the boundary separating public trust land from privately-owned riparian land along the shores of Lake Michigan is the common-law ordinary high water mark and *** the State retains exclusive title up to that boundary." *Gunderson*, 90 N.E.3d at 1173. "We hold that the natural [ordinary high water mark] is the legal boundary separating State-owned public trust land from privately-owned riparian land." *Id.* at 1187.

## SUMMARY OF ARGUMENT

The "ordinary high water mark" Indiana adopted as an "administrative boundary" redefined the boundary between private and public property and unsettled established property interests contrary to the rule-of-property doctrine. Indiana's adoption of this new property boundary is also: *(a)* contrary to the historic understanding – that the water's edge is the boundary between private and public land on the Great Lakes; and *(b)* creates an arbitrary, ambiguous and unworkable rule that depends upon factors such as "the absence of terrestrial vegetation" or the "presence of litter or debris." *Gunderson*, 90 N.E.3d at 1185.

This Court should grant the Gundersons' petition for certiorari because the Indiana Supreme Court's decision unsettles the private property interests of thousands of Indiana landowners whose property borders Lake Michigan and implicates the property boundary for tens of thousands of other families who own property on the shores of the Great Lakes.

## ARGUMENT

*"[I]n questions which respect the rights of property, it is better to adhere to principles once fixed *** than to unsettle the law ***."*

*Marine Ins. Co. of Alexandria* v. *Tucker*, 7 U.S. 357, 388 (1806).[5]

### I. Established rules governing private property are entitled to heightened stare decisis.

Indiana desires Lake Michigan beaches to be freely available for public recreation. And Indiana would like to accomplish this result without having to pay the owners for what had heretofore been understood to be privately-owned land. But having an Indiana regulatory agency issue an edict redefining established property boundaries by *ipse dixit* is not constitutional. If Indiana wanted to make the shoreline of Lake Michigan a public beach, it could have done so by explicitly exercising its power of eminent domain and justly compensating the landowners as the Just Compensation clause of the Fifth Amendment requires. See U.S. Const. Amend. V.

What Indiana cannot do, however, is to convert private property to public property by judicial or administrative fiat. See generally, *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Envtl. Prot.*, 560 U.S. 702, 714 (2010)

5. See also *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (Justice Breyer noted, "Justice Brandeis once observed that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'") (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932).

("There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation.").

In *The Law of Judicial Precedent*, the authors observe, "[s]tability in rules governing property interests is particularly important because those rules create unusually strong reliance interests: *** Judicial decisions overruling rules of property almost always interfere with those established interests." Bryan Garner, *et al.*, *The Law of Judicial Precedent* (2016), pp. 421-22. Referencing Justice Scalia's opinion in *Stop the Beach*, the authors noted, "a decision overturning an established rule of property *would* constitute a taking precisely because established rules of property are generally taken to settle property rights." *Id.* at 439 (emphasis in original). See also *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 667-88 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accomodate some ill-defined power to construct public thoroughfares without compensation.").

Justice Stephen Markman of the Michigan Supreme Court likewise noted, "[t]his Court has recognized the importance of maintaining the security of private property by 'declar[ing] that stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance." *Glass* v. *Goeckel*, 703 N.W.2d 58, 83 (Mich. 2005) (Markman, J., concurring in part and dissenting). Justice Markman explained that the court had previously "noted that '[j]udicial 'rules of property' create value, and the passage of time induces a belief in

their stability that generates commitments of human energy and capital.'" *Id.* (citing and quoting *Bott* v. *Natural Resources Comm'n*, 327 N.W.2d 838 (Mich. 1982)).

## II. Indiana's new "administrative boundary" overturned established law and unsettled existing property interests.

### A. Indiana unsettled historic property boundaries.

Under English common law, the land beneath the seabed was held by the sovereign in trust for public navigation and fishing. See Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 Ala. L. Rev. 623, 628 (1998). Since the public trust doctrine was articulated in Roman law in the Institutes of Justinian, public trust lands were understood to be limited to the submerged land subject to the limited uses for public navigation and fishing. See David C. Slade, *Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine to the Management of Lands, Waters, and Living Resources of the Coastal States* xvii (National Public Trust Study 1990), p. xvii; and George C. Smith, II, and Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. Envtl. Aff. L. Rev. 307, 310 (2006). Under this common law tradition, the original thirteen colonies asserted sovereignty over the sea beds. *Martin* v. *Lessee of Waddell*, 41 U.S. 367, 432-33 (1842) (the crown's interest in tidelands passed to New Jersey following independence).

As to tidal bodies of water, the boundary between submerged lands subject of the public trust and privately-

owned shoreland was defined by the mean high-tide mark to account for the full lunar cycle governing the ebb and flow of the tide. See Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L. Rev. 1, 23 (2010).

In *Illinois Cent. R.R.* v. *Illinois*, 146 U.S. 387, 434 (1892), this Court held that there was no reason to distinguish between tidal bodies of water and the Great Lakes given the underlying rationale upon which the public trust doctrine was premised – protecting fishing, commerce and navigation. For navigable waters like the Great Lakes that are not tidal, the boundary of the submerged lands subject to the public trust was defined as the water's edge "where the presence and action of the water are so common and usual as to leave a distinct mark." Kilbert, 58 Clev. St. L. Rev. at 23 (citing *Howard* v. *Ingersoll*, 54 U.S. 381, 427 (1852) (Curtis, J., concurring); Henry Farnham, *The Law of Water & Water Rights* (1904), v. 2 § 417, p. 1461; A. Dan Tarlock, *Law of Water Rights and Resources* § 3.09(3)(d) (1988).

> The water's edge on the shore of the Great Lakes is "influenced by number of factors that influence lake level and shore-line ***.*** Wind friction may drive or drag water from one side of a lake to the other. *** High evaporation during an exceptionally dry summer or high precipitation during an exceptionally rainy period may cause changes in water level ***.*** Lake levels tend to drop in the winter when much precipitation is frozen in the form of ice and snow on land and then rise in the spring with the inflow of melt-water. Summer droughts tend to lead to lowered lake levels. *** [I]t is

> clear that lake levels are controlled by a wide variety of complexly interrelated factors not all of which are well understood.
>
> John A. Dorr, Jr. & Donald F. Eschman, *Geology of Michigan* (1970), p. 224.

The boundary between privately-owned dry uplands bordering the Great Lakes and "submerged lands" subject to the public trust doctrine is the water's edge – not (as Indiana redefined the concept) some vague upland region defined by litter and vegetation. This understanding has informed owners, courts and public officials for hundreds of years. Justice Markman explained this point in his dissenting opinion in *Glass* v. *Goeckel*, 703 N.W.2d 58, 81-107 (Mich. 2005). Justice Markman, joined by Justice Robert Young, provides a tour de force rebuttal of the false predicate underlying the Indiana Supreme Court's decision. Justice Markman's analysis is consistent with the holdings of other Great Lakes states.

In *Seaman* v. *Smith*, 24 Ill. 521, 525 (Ill. 1860), the Illinois Supreme Court held, "[w]e are therefore clearly of the opinion, that the line at which the water usually stands, when free from disturbing causes, is the boundary of land in a conveyance calling for the lake as a line." The court reasoned that, since ocean tides regularly covered the shore between high and low tide, the land between these points could not be used for "cultivation or other private use." *Id.* at 524. But, on the Great Lakes, "[t]he portion of the soil which is seldom covered with water may be valuable for cultivation or other private purposes." In *Seaman*, the Illinois Supreme Court concluded the division between privately-owned land and land subject to public use for

navigation and fishing is the water's edge. *Id.* Illinois has consistently reaffirmed this rule. See *Brundage* v. *Knox*, 117 N.E. 123, 131 (Ill. 1917) (holding the trial court "rightly fixed [landowner's] easterly boundary as the edge of Lake Michigan when free from disturbing causes").

So too in Ohio. In *Sloan* v. *Biemiller*, 34 Ohio St. 492, 513 (Ohio 1878), the Ohio Supreme Court held the boundary line for property on the Great Lakes was "the line at which the water usually stands, when free from disturbing causes ***."[6] Ohio reaffirmed that holding in *State ex. rel. Merrill* v. *Ohio Dept. of Natural Resources*, 955 N.E.2d 935 (Ohio 2011).

Michigan likewise held the boundary between public submerged lands and private land was the water's edge. See *LaPlaisance Bay Harbor Co.* v. *Monroe City Council*, Walker Chancery 155 (Mich. 1843) ("The proprietor of the adjacent shore has no property in the land covered by the water of the lake.").

In the 1920s, dicta in decisions involving a title dispute between two private landowners concerning property on Saginaw Bay caused some to believe that Michigan changed the boundary between private land and the submerged lake bed from the water's edge to a surveyor's "meander line." See *Kavanaugh* v. *Rabior*, 192 N.W. 623 (Mich. 1923), and *Kavanaugh* v. *Baird*, 217 N.W. 2, 7 (Mich. 1928), *rev'd* 235 N.W. 871 (Mich. 1930). The Michigan Supreme Court, however, reaffirmed the rule that the boundary was the water's edge. See *Hilt* v. *Weber*, 233 N.W. 159, 163 (Mich. 1930) (holding the boundary between private and public rights "was where nature had placed it – at the water's edge.").

6. Citing *Seaman*, 24 Ill. at 521.

*Hilt* surveyed the opinions of other states, including the earlier Indiana decision in *Sizor* v. *Logansport*, 50 N.E. 377 (1898), and affirmed the water's-edge rule as a boundary line. See also *Bainbridge* v. *Sherlock*, 29 Ind. 364, 1868 WL 2977 (Ind. 1868) (concerning riparian rights to land under the Ohio River), and *Parkinson* v. *McCue*, 831 N.E.2d 118 (Ind. Ct. App. 2005) (following *Hilt*).[7]

*Hilt* brought Michigan back into harmony with the "general rule" that the boundary between public and private land bordering the Great Lakes is the water's edge. One commentator noted, "[f]rom a geological standpoint [the *Hilt* decision] seems to be more satisfactory. It should lessen the litigation on this subject as the water's edge is certainly a visible and practical boundary." *Case Notes, Meander Lines – Relicted Lands*, 1 Det. L. Rev. 48 (1931).

In his dissent in *Glass*, Justice Markman explained,

> The public's right to use property abutting the Great Lakes under the public trust doctrine has traditionally been limited to 'submerged lands.' i.e. those lands covered by the Great Lakes, including their wet sands. The 'water's edge' is that point at which wet sands give way to dry sands, thus marking the limit of the public's rights under the public trust doctrine. This has been the rule in [Michigan] since the

7. See also Theodore Steinberg, *God's Terminus: Boundaries, Nature, and Property on the Michigan Shore*, 37 Am. J. Legal Hist. 65-90 (1993). Steinberg provides an excellent account of the *Kavanaugh* and *Hilt* opinions and the underlying historical and political context.

> [Michigan Supreme Court's] decision in *Hilt* v. *Weber*, 233 N.W. 159 (1930) ***.
>
> 703 N.W.2d at 83.

In the 2005 *Glass* decision, the Michigan Supreme Court changed course and adopted a different rule. But as Justices Markman's and Young's dissent noted, this was an aberration from the general rule and contrary to the Court's prior holding in *Hilt*.

The water's-edge rule makes eminent practical sense. The water's edge is easily discerned without requiring a professional surveyor or the opinion of a state bureaucrat. Anyone who has ever walked along a beach knows where the waterline is. Replacing the water's-edge rule with a new "administrative boundary" tied to "the absence of terrestrial vegetation" or the "presence of litter or debris" is arbitrary and unworkable. *Gunderson*, 90 N.E.3d at 1185.

Photographs of the Lake Michigan shoreline demonstrate this point. See Addendum.[8] What is "terrestrial vegetation?" Dune grass is certainly "terrestrial" even though dune grass commonly grows to the water's edge. And what of "litter and debris?" Litter and debris, to the extent they exist, are affected by waves, storms, wind, and people. Premising the boundary of property ownership upon these mercurial factors provides a far less certain or stable standard than the physically observable boundary of the water's edge.

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8. The photographs of the Lake Michigan shoreline in the Addendum were taken by counsel for *amici*. The shoreline is in Leelanau County, Michigan, near the Whalesback property.

The proposition is quite simple. Are your feet wet? If so, you are on land subject to the public trust doctrine. Are your feet dry? If so, you are on privately-owned land. It need not be more complex than this.

### B. Indiana redefined the established uses and location of property subject to the public trust doctrine.

The public trust doctrine was adopted to protect the public's interest in commerce and fishing on navigable waterways. The doctrine was adopted because ownership of the land under a navigable waterway would interfere with the sovereign's interest in maintaining the use of the navigable waterway for commerce and fishing.

The public trust doctrine is premised upon English common law. Under English common law the doctrine only existed to accomplish two limited purposes – fishing and navigation. See Smith, 33 B.C. Envtl. Aff. L. Rev. at 312 ("[T]he public trust doctrine officially emerged as an instrument of federal common law to preserve the public's interest in free navigation and fishing."). This was understood to be tied to commerce generally. See Janice Lawrence, Lyon *and* Fogerty*: Unprecedented Extensions of the Public Trust*, 70 Cal. L. Rev. 1138, 1140 (1982) ("Traditionally, the [public trust] doctrine allowed the public to use trust lands, even if privately owned, for navigation, commerce and fisheries.").

But the public trust doctrine was never understood to provide for use of land subject to the doctrine for anything other than commerce, fishing, and navigation. The public trust doctrine does not grant the public an unlimited

right to use the land for any purpose. Public recreation including picnics, campfires, beach parties, sunbathing, hot dog stands, and other public activities unrelated to navigation and fishing were never understood to be within the compass of those uses permitted under the public trust doctrine.

Indiana seeks to redefine the public trust doctrine by expanding the physical boundaries of the property subject to this doctrine to include upland property. Indiana also seeks to expand the uses to include activities such as public recreation that are beyond the traditional navigation, commerce and fishing uses for which the public trust doctrine was created.

## III. Indiana's redefinition of the boundary between public and private property undermines the interest of all Great Lakes shoreline landowners.

The right to exclude others from entering one's land is an essential feature of property ownership and one of the most fundamental rights associated with private property. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights."). See also *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831 (quoting *Loretto*, 458 U.S. at 433, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979), and *Lingle* v. *Chevron USA, Inc.*, 544 U.S. 528, 539 (2005) ("A physical invasion

of private property will always effect a taking because it eviscerates the owner's right to exclude others from entering upon and using his property which is "perhaps the most fundamental of all property interests.")). And see generally, James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 2008).

Creating an easement over private property or granting the public a right to use private property, as Indiana has done here, is a taking for which the Fifth Amendment requires the government to justly compensate the owner. See, *e.g.*, *Loretto* and *Kaiser Aetna*.

In *Bell* v. *Town of Wells*, 557 A.2d 168, 180 (Me. 1989), the Maine Supreme Court held that an attempt to expand the state's public trust doctrine to allow the public to traverse private lands to reach public land for a recreational purpose was a taking of private property.

The Massachusetts Supreme Court likewise refused to expand statutory definitions of the public trust doctrine to grant the public access to private land in order to reach intertidal lands. The court explained,

> The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of the phrase possible under the Constitution of the Commonwealth and the Unites States ***. The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest

> in real property has any meaning at all it must include the general right to exclude others.
>
> *Opinion of Justices to the House of Representatives*, 313 N.E.2d 561, 568 (Mass. 1974).

New Hampshire has similarly resisted expansions of the public trust doctrine. Responding to a statute that provided access to a public trust shoreline across abutting private land the court held,

> When the government unilaterally authorized a permanent, public easement across private lands, this constitutes a taking requiring just compensation. *** Because the bill provides no compensation for the landowners whose property may be burdened by the general recreational easement established for public use, it violates the prohibition contained in our State and Federal Constitution against the taking of private property for public use without just compensation. Although the State has the power to permit a comprehensive beach access and use program by using its eminent domain power and compensating private property owners, it may not take property rights without compensation through legislative decree.
>
> *Opinion of the Justices (Public Use of Coastal Beaches) to the House of Representatives*, 649 A.2d 604 (N.H. 1994)[9]

9. Citations omitted. See also *Purdie* v. *Attorney General*, 732 A.2d 442 (N.H. 1999). In *Purdie* forty beachfront landowners sued

## CONCLUSION

Justice Markman observed, "millions of interactions *** occur each year between the public and property owners along the Great Lakes, the majority [opinion in *Glass*, which the Indiana Supreme Court followed in *Gunderson*] instead creates new rules on the basis of an isolated and aberrational dispute." *Glass*, 703 N.W.2d at 82. Justice Markman continued, "there is no realm of the law in which there is a greater need to maintain stability and continuity than with regard to property rights." *Id.*

Justice Markman noted the *Glass* majority (embraced by Indiana in *Gunderson*) "replace[d] clear and well-understood rules – rules that have produced reasonable harmony over the decades in Michigan – with obscure rules." 703 N.W.2d at 82. "In the place of a boundary that can be determined by simple observation, the majority's new rules would require property owners and the public to bring 'aerial photographs,' a 'government survey map[ ]' and 'stereo [three-dimensional] photographs,' in order to determine where their rights begin and end." *Id.* (citation omitted).

Justice Markman's point is demonstrated by the photographs in the addendum. The water's edge is a clear, traditional, and readily discernable boundary between public and private property. To replace this rule with an obtuse, obscure concept subject to manipulation by government bureaucrats will undermine established property interests and unsettle established land title.

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the state alleging a compensable taking of their property when the state established a statutory boundary line defining the public trust lands as further inland from the waterline. The court held this to be a compensable taking. *Id.* at 447.

This Court should grant certiorari because the Indiana Supreme Court's decision unsettles and undermines the private property interests of hundreds of property owners who own land on the Indiana Lake Michigan shoreline. This Court should affirm the principle that the water's edge defines the boundary between public trust submerged land and privately-owned upland.

Respectfully submitted,

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# ADDENDUM

# ADDENDUM

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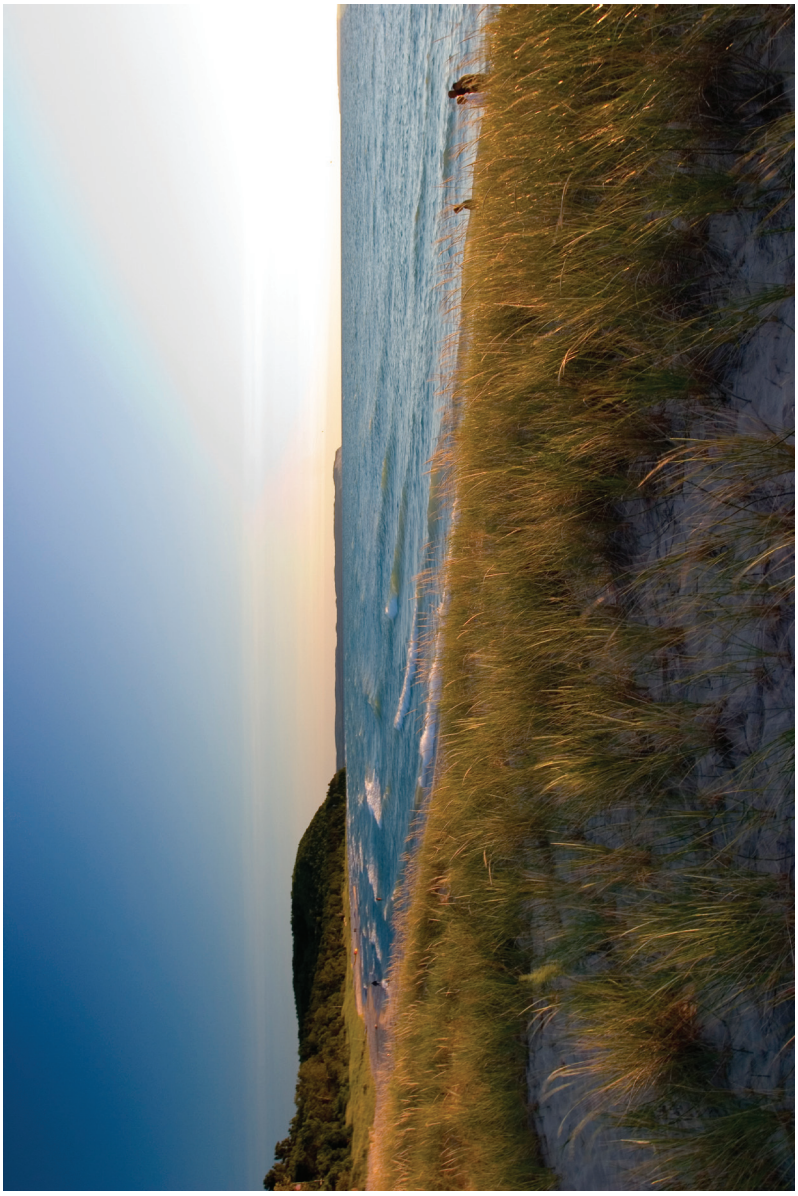
*Addendum*



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*Addendum*