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 Writ Of Certiorari To The Indiana Supreme Court

BRIEF IN OPPOSITION OF LONG BEACH COMMUNITY ALLIANCE, PATRICK CANNON, JOHN WALL, DORIA LEMAY, MICHAEL SALMON, AND THOMAS KING

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COUNTER STATEMENT OF QUESTION PRESENTED

The federal question presented by the Petition for Writ of Certiorari in this case is:

> Is the Indiana Supreme Court's adoption of the common law Ordinary High Water Mark, as determined by physical characteristics, as the landward boundary of the Lake Michigan lakebed acquired by Indiana upon statehood in conflict with this Court's Equal Footing Doctrine?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent-Intervenor Long Beach Community Alliance is a non-profit organization that has no parent corporation, and no publicly-held company has any ownership interest in it.

Respondent-Intervenors Patrick Cannon, John Wall, Doria Lemay, Michael Salmon, and Thomas King are individual residents of the Town of Long Beach, Indiana.

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STATEMENT OF FACTS

The shore at issue in this case is located adjacent to the Town of Long Beach in northwest Indiana, a beachside hamlet on the long sandy southern shore of Lake Michigan. The Town was platted in 1914 as a residential subdivision of lakeside and hillside lots, with multiple platted beach access lots owned by the Town providing hillside residents and members of the public with access to the Lake Michigan beach.[1] As shown by thirteen affidavits in the record, the beach had been peacefully shared by all Long Beach residents and members of the public for generations prior to this lawsuit. Ind. Ct. App. Appellants Appx. 632-65.

The controversy in this case was not initiated by the State of Indiana, the Town of Long Beach, or any other unit of government, contrary to Amicus Minnesota Association of Realtor's misstatement of the facts. It was initiated by the Petitioner, Don H. Gunderson and Bobbie J. Gunderson, as Trustees of The Don H. Gunderson Living Trust (referred to herein as the "Gunderson Trust" or "Trust"). The Trust formerly owned three lakefront lots[2] and beginning in approximately 2012 the Trust sought to exclude other Long Beach residents from the Lake Michigan beach located

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[1] Importantly, hillside residents and members of the public access the beach by way of stairs maintained by the Town on these Town-owned lots. This case does not involve a question of trespass upon or a claim of a public right-of-way across any portion of the Gunderson property above the Ordinary High Water Mark.

[2] Gunderson Trust sold these lots while this case was pending in the Indiana trial court.

lakeward of the Trust's lots. The Trust claimed to own the beach and demanded that the Town and the Indiana Department of Natural Resources ("Indiana DNR") police and regulate the Lake Michigan beach as private property.

Not receiving satisfaction from the Town or the Indiana DNR, the Trust initiated two quiet title lawsuits in the Indiana courts: first against the Town[3] and subsequently against the State of Indiana and the Indiana DNR. In both suits the Trust sought a declaration that the Trust owns the shore of Lake Michigan lakeward of the Trust lots to the water's edge and that the Trust has a right to exclude others from use of that shore.

Respondent-Intervenor Long Beach Community Alliance ("LBCA") is a non-profit community organization dedicated, in part, to the preservation of the Lake Michigan beach and its traditional use by the entire community. LBCA and Patrick Cannon, John Wall, Doria Lemay, Michael Salmon, and Thomas King, all individual Long Beach hillside residents who have traditionally used the beach, (collectively referred to herein as "LBCA") were granted intervention in these lawsuits at the trial court level. The Alliance for the Great Lakes and Save the Dunes (collectively referred to herein as "Alliance-Dunes"), who represent the

[3] The Indiana trial court in the initial lawsuit dismissed the action against the Town and ruled that the State of Indiana, which owned the lakebed, was an indispensable party to the claims made. While that ruling was on appeal the Trust filed this second lawsuit against the State and the Indiana DNR.

broader public's regional and statewide interest, were also granted intervention.

STATEMENT OF THE CASE

Indiana Supreme Court's Holding

As eloquently stated by the Indiana Supreme Court in the decision on petition here:

> A century ago, our Court of Appeals recognized that, among those rights acquired upon admission to the Union, the State owns and holds "in trust" the lands under navigable waters within its borders, "including the shores or space between ordinary high and low water marks, for the benefit of *the people of the state*." *Lake Sand Co. v. State*, 68 Ind. App. 439, 445, 120 N.E. 714, 716 (1918) (quoting *Ex parte Powell*, 70 Fla. 363, 372, 70 So. 392, 395 (1915)). And Indiana "in its sovereign capacity is without power to convey or curtail the right of its people in the bed of Lake Michigan." *Id.* at 446, 120 N.E. at 716. This Court has since affirmed these principles. *See State ex rel. Indiana Department of Conservation v. Kivett*, 228 Ind. 623, 630, 95 N.E.2d 145, 148 (1950).

Gunderson v. State, 90 N.E.3d 1171, 1173 (Ind.2018).

The question before the Indiana Supreme Court, as stated by the Court itself, was: "What is the precise boundary at which the State's ownership interest ends and private property interests begin?" *Id.* The Court held: "[T]he 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 that, absent an authorized legislative conveyance, the State retains exclusive title up to that boundary." *Id.*

Based on this holding, the Indiana Supreme Court denied the Gunderson Trust's private property claims and held that the State of Indiana holds title to the shore of Lake Michigan below the Ordinary High Water Mark ("OHWM"), as defined under federal common law, in trust for the public based on the federal Equal Footing Doctrine and the federal Public Trust Doctrine and also found that the State has never relinquished that title to littoral owners generally or transferred any portion of its title below the OHWM to the Trust.

The Indiana Supreme Court's opinion meticulously reviews the federal common law articulating the Equal Footing Doctrine and the Public Trust Doctrine, the decisions of other state supreme courts applying these doctrines, federal statutes, including the federal Submerged Lands Act (which codified the common law), federal surveying practices for meandering navigable waters, and the nature of the Trust's deed.

The Court concurs in the Michigan Supreme Court's articulation of the term OHWM saying:

> Perhaps the Michigan Supreme Court articulated it best: The term OHWM "attempts to encapsulate the fact that water levels in the Great Lakes fluctuate. This fluctuation

> results in temporary exposure of land that may then remain exposed above where water currently lies." *Glass v. Goeckel*, 703 N.W.2d 58, 71 (Mich.2005). And "although not immediately and presently submerged," this land "falls within the ambit of the public trust because the lake has not permanently receded from that point and may yet again exert its influence up to that point." *Id.*

Gunderson, Id. at 1180.

The Court explains that "the common-law OHWM is a moveable boundary subject to the natural variability of the shoreline" and changing with shoreline dynamics as do the "adaptive doctrines of accretion and erosion." The Court cites the U.S. Dep't of Interior Bureau of Land Mgmt., *Manual of Surveying Instructions for the Survey of Public Lands of the United States* (2009) *("BLM Survey Manual")* at 81 ("When by action of water the bed of the body of water changes, the OHWM changes, and the ownership of adjoining land progresses with it."). The Court points out that "[w]hile the physical boundary shifts (e.g., shelving or terrestrial vegetation) the legal relationships—private riparian ownership and public trust title—remain the same. In other words, while accretion or erosion may change the actual location of the OHWM, the legal boundary remains the OHWM. *State Land Bd. v. Corvallis Sand & Gravel Co.*, 283 Ore. 147, 582 P.2d 1352, 1361 (Or.1978)." *Gunderson*, *Id.* at 1186-87.

The fact that the Indiana Supreme Court's opinion adopts the common law OHWM as articulated in the Michigan Supreme Court's decision in *Glass* is important because this Court denied a petition for writ of certiorari challenging that very holding in the *Glass* case in 2006. *Glass, Id.*, *cert. denied*, 546 U.S. 1174 (2006). This is also important because Petitioner is asking the Court to review not only the 2017 Indiana *Gunderson* decision, but also what they refer to as a "trend" in the Great Lakes states started by the 2005 *Glass* decision. Indeed, Petitioner is effectively seeking a *second bite* at the *Glass* decision before this Court, relying upon other states' case law and a *dissent* in *Glass* as justification.

Petitioner's Position

Petitioner claims that the Indiana Supreme Court's holding deprived it of its private property lying between the OHWM and the water's edge on the Lake Michigan shore lakeward of its lots. Petitioner does not dispute that the federal common law prescribes the OHWM, as defined by the physical evidence of the navigable water's action on the shore, as the boundary of some Equal Footing shore, such as river beds. (Petitioner's Br. 10-11) But, Petitioner contends lakes are different. It claims: (1) that this Court has never addressed the question of whether this same OHWM boundary applies to the bed of the *Great Lakes*, and (2) that there is a conflict between the Great Lakes states' supreme courts as to this question which is causing confusion. To resolve this purported conflict

and confusion, Petitioner argues that this Court should fashion a new and different standard as the boundary between public and private property on the shore of the Great Lakes generally.

Specifically, Petitioner and Amici argue that this Court should adopt the "water's edge", wherever it may be at any time, as the boundary of the shore received by the Great Lakes states pursuant to the federal Equal Footing Doctrine. This plea for a special rule for the Great Lakes is a new argument that was not made in the Indiana courts. Although not discussed directly by Petitioner, this shrinking of the shore granted to the states at statehood under the Equal Footing Doctrine would also shrink the shore subject to the Public Trust Doctrine established by this Court in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892). As stated by Amici Cato et al., it would require that members of the public "keep their feet wet" whenever using the shore of the Great Lakes. (Cato Br. 14)

Respondent-Intervenor LBCA's Position

Respondent-Intervenor LBCA responds that the Indiana Supreme Court properly applied the federal common law OHWM, as reflected by physical characteristics and that the common law OHWM has been recognized to apply to the Great Lakes for over 100 years. It points out that it is undisputed that Indiana never relinquished its Equal Footing title to the Lake Michigan shore below the OHWM to littoral owners in general or transferred any portion of such title to

Petitioner. Therefore, LBCA contends Petitioner's private property claims are baseless.

LBCA contends that the writ should be denied here because there is no conflict in the Great Lakes states' Equal Footing Doctrine decisions or any confusion regarding application of the common law OHWM on the shore of the Great Lakes. LBCA points out that Petitioner's mistaken contention that there is a conflict in the states' supreme courts' interpretation of the Equal Footing Doctrine is based on different state laws and Petitioner's failure to recognize that some states relinquished their Equal Footing shore to littoral owners post-statehood and some did not. Indiana is a state that did not. LBCA contends this is a matter of state law, not inconsistent application of federal law.

REASONS FOR DENYING THE WRIT

Petitioner frames this case as one in which the State of Indiana has laid claim to its private backyard on the Lake Michigan shore. In fact, the opposite is the case. Petitioner initiated the lawsuit here seeking to privatize the publicly owned shore of Lake Michigan—shore just down the road from the Lake Michigan shore at issue in this Court's seminal Equal Footing Doctrine case establishing the Public Trust Doctrine, *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892). Affidavits in the record demonstrate that before the Trust began trying to exclude other residents and members of the public from the Lake Michigan

beach in approximately 2012, Long Beach residents had peacefully used and enjoyed the beach together for generations.

Contrary to Petitioner's contention, the Indiana Supreme Court's decision does not misapply federal law as to the boundary of the Lake Michigan shore received by Indiana under the Equal Footing Doctrine. Indeed, in 2006, this Court denied a petition for writ of certiorari challenging the same articulation of the OHWM as the Equal Footing Doctrine boundary on Lake Huron in a decision by the Michigan Supreme Court. *Glass*, *Id., cert. denied*, 546 U.S. 1174 (2006).

There is also no split in state supreme courts' interpretation of federal law creating confusion which requires this Court's review. In fact, the opposite is true. If this Court were to adopt the new standard proposed by Petitioner, it would throw into question an array of established boundaries: the historic survey of the State of Indiana's Lake Michigan border (which was meandered at the physical characteristics OHWM); the federally meandered boundary of the other Great Lakes; and possibly many other navigable waters; and many federal agencies' decisions regulating and permitting activity on the Great Lakes. All of these are based on the long-recognized physical characteristics OHWM. This Court should refrain from exercising its jurisdiction to adopt Petitioner's radical proposal to alter the quantum of Lake Michigan shore Indiana and every other Great Lakes state received at statehood.

A. Contrary To Petitioner's Contention, The State Of Indiana Supreme Court Decision Does Not Present A New Or Unsettled Question Of Law

1. Well-Established Common Law Holds That The OHWM, As Shown By Physical Characteristics, Is The Boundary Of The Shore Conveyed To The States Under The Equal Footing Doctrine

The Indiana Supreme Court carefully, fully, and properly analyzed this Court's long-standing Equal Footing Doctrine decisions governing ownership of the shore of non-tidal navigable waters on the United States, as well as state and lower federal court decisions pertaining to Indiana's Lake Michigan shore. *Gunderson v. State*, 90 N.E.3d 1171, 1177-87 (Ind.2018).

As far back as 1876, this Court in *Barney v. Keokuk*, 94 U.S. 324, 336 (1876) recognized the OHWM as the boundary of the Equal Footing shore, holding that "[T]itle of the riparian proprietors on the banks of Mississippi extends only to the *ordinary high water mark*, and that the *shore* between high and low water marks, as well as the bed of the river, belongs to the State." [emphasis added] In 1894, this Court in *Shively v. Bowlby*, 152 U.S. 1, 12 (1894) recognized that what is referred to as the *shore* is "that ground that is between the ordinary high-water and low-water mark." In 1897, *Gibson v. United States*, 166 U.S. 269, 272 (1897) confirmed that "the title to the *shore* and submerged soil is in the various states." [emphasis added]

As the Indiana Supreme Court noted, the physical characteristics of the common law OHWM used today and adopted by the Indiana Supreme Court were articulated by this Court even earlier, in 1871, in *Howard v. Ingersoll*, 54 U.S. (13 How.) 381, 427 (1851) (Curtis, J., concurring):

> "the point 'where the presence and action of water are so common and usual . . . as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself.' "

Contrary to Petitioner's argument, *Howard* and the common law OHWM and physical characteristics test have not been interpreted as limited to rivers. Indeed, the OHWM is well-established as the common law boundary of the Great Lakes states' Equal Footing shore and should come as no surprise to Petitioner. As early as 1891, this Court articulated the Equal Footing Doctrine and OHWM as applying "to our great navigable lakes, which are treated as inland seas." *Hardin v. Jordan*, 140 U.S. 371, 382 (1891). In 1892, this Court found the Public Trust applies to the Equal Footing Doctrine "lands adjacent to the *shore* of Lake Michigan" in the historic *Illinois Central Railroad* case involving Chicago's lakefront. *Id.* at 451. [emphasis added]

Although this issue didn't reach the Indiana Supreme Court until the *Gunderson* case, in 1918 the Indiana Court of Appeals found that Indiana's Lake

Michigan Equal Footing Doctrine rights included "the right to own and hold the lands under navigable waters within the state *including the shores or space between ordinary high and low water marks. . . .*" *Lake Sand Co.*, *Id.* at 716 (quoting the Florida Supreme Court's decision in *Ex parte Powell*, 70 So. 392, 395 (Fla.1915)). [emphasis added] Also as discussed above, in 2005 the Michigan Supreme Court in *Glass v. Goeckel*, *Id.* at 71, applied the common law OHWM to the shore of Lake Huron recognizing that "although not immediately and presently submerged," this land "falls within the ambit of the public trust because the lake has not permanently receded from that point and may yet again exert its influence up to that point." Notably, this articulation of the Equal Footing shores was derived from a Wisconsin Supreme Court decision, *Wisconsin v. Trudeau*, 408 N.W. 2d 337, 342 (Wis.1987), which Petitioner admits applies a "soil-and-vegetation test to determine its Great Lakes shoreline." (Petitioner's Br. 16) Contrary to Petitioner's contention[4], the Wisconsin Supreme Court has long recognized the OHWM as the boundary of its Equal Footing Great Lakes shore. Finally, that the OHWM is the boundary of the Indiana Equal Footing *shore* on Lake Michigan

[4] Petitioner's contention is that the Wisconsin Department of Natural Resources is not following the Wisconsin Supreme Court's ruling in *Trudeau* in administering Wisconsin's Great Lakes shore. (Petitioner's Br. 16) If this is true, the legitimacy of the Department's interpretation is questionable and certainly should not be the basis for concluding there is a "split" in the Great Lakes states' highest courts' interpretation of how the Equal Footing Doctrine applies on the Great Lakes.

was confirmed by the Northern District of Indiana U.S. District Court as recently as 2013 in *United States v. Carstens*, 982 F. Supp. 2d 874, 878 (N.D.Ind.2013) which held "[t]he *land between the edge of the water of Lake Michigan and the ordinary high water mark* is held in public trust by the State of Indiana." [emphasis added]

Given the great weight of authority supporting the Indiana Supreme Court's decision, it is clear that Petitioner's argument is simply wrong. In fact, Petitioner cites no on point contrary case law. Indeed, the only cases cited by Petitioner and Amici involve different facts and state law, e.g., cases involving tidal waters, not non-tidal waters; cases involving claims of trespass and "taking" on uplands, not the shore; and states that have relinquished their original Equal Footing shore to private parties, an entirely different predicate than exists in Indiana.

As is discussed below, this Court very early on recognized that after statehood the states could relinquish title to their Equal Footing shore. *Hardin*, *Id.* at 381-82. ("Such title being in the State, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The State may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce.")

While some states have relinquished their title to littoral owners generally, others have not. As this is a matter of state, not federal law, no state is required to relinquish its Equal Footing title to littoral owners and, as is discussed below, Indiana has not done so. Indeed, precisely because this is a matter of state law, this Court has no power to grant the writ sought in this case which asks this Court to infringe Indiana's sovereign right to manage its Equal Footing shore.

The "taking" cases cited by Petitioner are also off-point and don't support Petitioner's contention. Indeed, they recognize that a "taking" cannot occur below the common law boundary between public and private property. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), relied upon by Petitioner (Petitioner's Br. 10) and Amicus Minnesota Association of Realtors (MAR Br. 2-7) involves *California ocean-side* land *above* the Mean High Tide. Significantly, the *Nollan* Court recognized that the boundary of the ocean front private property was the Mean High Tide ("MHT")—the different, but tidal waters equivalent of the common law OHWM for non-tidal waters. *Id.* at 827-28. *Purdie v. Attorney General*, 732 A.2d 442 (N.H.1999) (Petitioner's Br. 10) and the dicta cited in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Protection*, 560 U.S. 702, 732 (2010) (Petitioner's Br. 10) both involved ocean front property and MHT and a governmental entity imposing a new boundary landward of the recognized common law boundary. The Indiana Supreme Court is not creating a new boundary

between public and private property, it is simply applying the original common law boundary.

There is no scholarly support for adopting Petitioner's "water's edge" standard either. In what can only be interpreted as an attempt to mislead this Court, Amicus Cato, et al. includes a partial, out of context quote from Kenneth K. Kilbert's well-known law review article, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L. Rev. 1 (2010), suggesting that it supports use of the "water's edge" as the boundary of the Public Trust. (Cato Br. 3, 5, 10) A reading of that article demonstrates the *opposite* to be the case. Kilbert clearly states that the common law OHWM physical characteristics test (vegetation and soil) defines the boundary of Equal Footing title and also repeatedly uses the "water's edge" as an example of what is *not a valid indicator* of the boundary of title on the Great Lakes shore. *See*, for example, Kilbert, *Id.* at 9-12. This and other misleading and false statements by Amici are not helpful to the Court's understanding of this Petition.

The writ here should be denied because Petitioner has failed to demonstrate that the Indiana Supreme Court's *Gunderson* decision presents a new or unsettled question of law or is in conflict with this Court's Equal Footing Doctrine generally and as historically applied to the Great Lakes.

2. The State Of Indiana Has Never Relinquished Its Title To The Equal Footing Shore Of Lake Michigan To Littoral Owners Generally Or Otherwise Transferred Any Portion Thereof To Petitioner

The writ should also be denied for the simple reason that as a matter of established federal law Petitioner does not hold title to the shore of Lake Michigan below the OHWM.

The Indiana Supreme Court properly found that Indiana acquired title to the shore of Lake Michigan pursuant to the Equal Footing Doctrine at statehood, and that, unlike some other Great Lakes states, *Indiana has not relinquished its title* to the Equal Footing lakebed it received at statehood—either to littoral landowners generally or to Petitioner specifically as to the portion of that shore located lakeward of its former lots.[5] Thus, Indiana retains its original title to the Equal Footing shore of Lake Michigan up to the OHWM boundary as defined by federal common law.

The "determination of the initial boundary between [the beds of navigable waters] acquired under the equal-footing doctrine, and riparian fast lands [is] a matter of federal law . . . [whereas] subsequent changes in the contour of the land, *as well as subsequent transfers*

[5] The Indiana General Assembly has enacted a statutory mechanism whereby a littoral property owner may obtain a permit patent to fill portions of the Lake Michigan lakebed and obtain a patent to that filled area. Ind. Code §14-18-6-4(1)(A). But, it is undisputed that Petitioner has never applied for or been granted such a permit and patent.

of the land, are governed by the state law." *Gunderson*, *Id.* at 1176. [emphasis added] *citing Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376-77 (1977). *See also PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012) ("Upon statehood, the state gains title within its borders to the beds of waters then navigable . . . It may allocate and govern those laws according to state law. . . ."); *Shively*, 152 U.S. at 57-58 ("The title and rights of riparian or littoral proprietors in the soil below high-water mark . . . are governed by the laws of the several states, subject to the rights granted to the United States by the constitution."). But, *Lake Sand*, *Id.* at 716, makes it clear that Indiana holds the "shores or space between the ordinary and low water marks for the benefit of the people of the state." Based on Indiana case law and Indiana statutory provisions authorizing State patents of the Indiana shore for limited purposes (Ind. Code §14-18-6-4(1)(A)), the Indiana Supreme Court in *Gunderson* concluded that Indiana has not generally relinquished its title to its Equal Footing Lake Michigan shore to littoral owners. *Gunderson*, *Id.* at 1182. As mentioned above, because this is a matter of state law, this Court has no power to grant the writ sought in this case which asks this Court to require Indiana to relinquish its sovereign right to the title of its Equal Footing shore to littoral.

Notably, the fact that Indiana never relinquished its title to the Lake Michigan shore generally or any portion of that shore to Petitioner was never disputed by Petitioner in the Indiana courts and is not disputed

here. Rather, the Trust simply maintained that it held a deed to littoral lots which extend to the water's edge.[6]

Whether Gunderson's deed conveys lots that extend to the water's edge was a disputed fact raised in the Trial Court on the Trust's Motion for Summary Judgment and as such is not before this Court. However, that question is irrelevant because it is undisputed that the Trust's deed was not issued by the State of Indiana, but rather derives from an 1837 federal patent. (Petitioner's Br. 18) As such, the Indiana Supreme Court properly followed this Court's long-standing rule that a federal patent cannot convey Equal Footing lands owned by a state. Specifically, *Shively* held:

> "[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 high-water mark, and do not impair the title and dominion of the future state." 152 U.S. at 58 (1894).

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[6] Petitioner misleadingly suggests its deed derives from a federal survey that identified lots as extending to the water itself. In fact, the 1837 federal survey underlying the original federal patent for what became the 128+ acre Long Beach subdivision was placed in the record in the Trial Court record and undisputed. Notably, it includes surveying calls to specific "trees" and the "bank of Lake Michigan," as well as "the Lake," all of which indicates the surveyors meandered the Lake shore to the OHWM, as prescribed by federal surveying protocol which provides that meanders are to be run along the OHWM for inland lakes. *See U.S. Survey Manual* at Section 3-162.

See also Barney, 94 U.S. at 338 (stating that the bed of a navigable water "properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water"). *Cited in Gunderson*, *Id*. at 1179.

Under this Court's Equal Footing case law, Petitioner's deed is *void ab initio* to the extent that it purports to convey shore below the common law OHWM. Thus, despite Petitioner's fervent claims of private property rights, Petitioner does not have a valid deed to any portion of the shore below the OHWM.

B. There Is No Split In State Supreme Courts' Decisions On This Issue.

There is no split in the Great Lakes states' supreme courts as to the boundary of the Equal Footing shore that was granted to the states at statehood. While claiming there was a "consensus" in state court decisions that the "water's edge" is the boundary of state's Equal Footing shore before the *Glass* decision, Petitioner cites no cases holding that *at statehood* a state received Equal Footing lakebed to the "water's edge" of the Great Lakes. Rather, Petitioner muddles this point by citing cases where the state involved had relinquished its Equal Footing title *after statehood* to littoral or riparian owners as a matter of state law. *See Seaman v. Smith*, 24 Ill. 521 (Ill.1860); *Brundage v.*

Knox, 117 N.E. 123 (Ill.1917); *State ex rel. Merrill v. Ohio Dep't of Nat. Res.*, 955 N.E.2d 935 (Ohio 2011).

The Indiana Supreme Court responded to Petitioner's contention that various other Great Lakes states have extended ownerships to the "water's edge" citing this Court's holding in *Shively* on states' rights under the Equal Footing Doctrine:

> The Gundersons cite various cases from other Great Lakes states for their argument that private riparian ownership extends to the water's edge . . . However, each state has dealt with its public trust lands "according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public." *Id.* at 26 quoted at *Gunderson* at Footnote 7.

The Illinois and Ohio cases cited by Petitioner involve a predicate that does not exist in this case. Petitioner ignores the underlying difference that Indiana has not relinquished its title to littoral owners and erroneously claims there is a "conflict" or "split" in the state courts.

As noted by the Indiana Supreme Court, federal common law has long recognized that after statehood the states have the prerogative to patent, sell or otherwise relinquish title to the Equal Footing shore they received at statehood and many states have done so. States may also determine and regulate the activities

that are permissible on the state owned Equal Footing lands, subject to the limitation that such lands are held in trust for the public under the Public Trust Doctrine. *Illinois Central R.R.*, *Id.*; *Shively*, *Id.* at 57-58; *PPL Montana*, *Id.* at 591. The Indiana Supreme Court adhered to the Court's caution in *Shively* against "applying precedents in one state to cases arising in another." *Gunderson*, *Id.* at Footnote 7 *citing Shively, Id.* at 26.

The fact that the states across the country (not just the Great Lakes) have or have not transferred their Equal Footing title or have regulated activities on Equal Footing land differently should not be a cause for concern or for this Court's issuance of a writ in this case. It is simply the nature of our federalist government.

C. Contrary To Petitioner's Contention, The Indiana Supreme Court's Decision Is Not "Novel", "Aggressive", Or "Unworkable".

Petitioner and Amici mislead the Court in making the claim that the physical characteristics test is "novel", "aggressive", or "unworkable". As shown above, the physical characteristics test is far from new or novel. Also, rather than being unworkable, the common law OHWM physical characteristics test is routinely used in many contexts, e.g., surveying the boundary of federal lands on navigable waters; determining the boundary of federal jurisdiction on

navigable waters; and establishing the boundary of public rights on public trust lands.

For example, the Indiana Natural Resources Commission has defined OHWM and prescribed that a physical characteristics OHWM standard is to be used in determining the boundary of Indiana's statutory public trust on the shores of Indiana's inland fresh water lakes.

> Sec. 26. "Ordinary high watermark" means the following:
>
> (1) The line on the shore of a waterway established by the fluctuations of water and indicated by physical characteristics. Examples of these physical characteristics include the following:
>
> (A) A clear and natural line impressed on the bank.
>
> (B) Shelving.
>
> (C) Changes in character of the soil.
>
> (D) The destruction of terrestrial vegetation.
>
> (E) The presence of litter or debris.

312 Ind. Admin. Code 1-1-26.

At the federal level, the United States Department of Interior's Bureau of Land Management expressly requires use of the OHWM as shown by changes in vegetation and soil types for meandering non-tidal navigable lakes and rivers. United States Dep't of Interior, Bureau of Land Management, *Manual of Surveying*

Instructions for the Survey of Public Lands of the United States (2009), §3-167-168. As recognized by this Court in *Utah Div. of State Lands v. United States*, 482 U.S. 193, 205 (1987), the meandering of the OHWM "probably had been the [Department of Interior's surveying] practice since the inception of the public land surveys."

Further, both the United States Army Corps of Engineers ("Corps of Engineers") and United States Environmental Protection Agency ("USEPA") use a regulatory definition of OHWM based on physical characteristics to determine the boundary of navigable waters subject to their jurisdiction under the federal Clean Water Act, including their jurisdiction on the Great Lakes:

> The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

33 C.F.R. 328.3(e).

While Petitioner and Amici deride the physical characteristics parameters as being "obscure" and "unworkable," the people who implement this definition don't think so. The Corps of Engineers issued *Regulatory Guidance Letter No. 05-05* (Dec. 7, 2005)

expressly requiring its district offices to "give priority to evaluating the physical characteristics of the area that are determined to be reliable indicators of the OHWM," including "[c]hanges in the character of soil" and "[d]estruction of terrestrial vegetation." *Id.* at 2-3.

Contrary to Petitioner's contention, if this Court were to abandon the established common law OHWM boundary and adopt Petitioner's proposed new, different and ephemeral standard for the Great Lakes it would up-end established administrative practices as well as property rights across a huge region of the country.

D. Contrary To Petitioner's Contention, The OHWM Is Well-Suited To The Dynamics Of The Great Lakes.

While pointing out that the Great Lakes are not tidal waters and differ from rivers in some respects, Petitioner provides no legitimate argument for why the nature of the Great Lakes makes it inappropriate to apply the OHWM as the boundary of public and private property. Petitioner asserts that the vegetation test "works well for determining the boundaries of rivers," but contends it does not work well for larger bodies of water that are pounded by storm waves. (Petitioner's Br. 27) This rationale fails to recognize that the common law OHWM is not affected by occasional avulsive events, but rather is indicated by changes that are the result of recurring high water that actually changes the composition of the soil and

vegetation. The law of accretion and erosion rely on this same evidence to distinguish uplands from lakebeds. As the Indiana Supreme Court correctly held, "[r]iparian boundary law relies on the adaptive doctrines of accretion and erosion to account for these shoreline dynamics . . . In other words, while accretion or erosion may change the actual location of the OHWM, the legal boundary remains the OHWM." *Gunderson*, *Id*. at 1186.

Petitioner's factual contentions on this point are unsupported by any evidence in the record, studies, or law. The science of distinguishing terrestrial and aquatic environments is well-established and is used in many contexts, *including on the Great Lakes*. Indeed, as discussed above, it is precisely the dynamics of the Great Lakes that make the physical characteristics impressed on the shore the best test for identifying the boundary of Lake Michigan's recurring interaction with the upland.

CONCLUSION

The petition for writ of certiorari in this case should be denied. The only federal question before the Court in this case is what standard defines the boundary of Indiana's Equal Footing title on the Lake Michigan shore. The Indiana Supreme Court properly decided that question in accord with this Court's Equal

Footing Doctrine. There is no reason for this Court to revisit this well-established rule of law in this case.

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Respectfully submitted,

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