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 Supreme Court Of Indiana

REPLY IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

Respondents do not dispute that the Great Lakes' equal-footing boundary is an important federal question that this Court has never addressed. They contend that review is unnecessary, but the confusion that has arisen in the absence of this Court's guidance belies the argument. Michigan broke long decades of consensus on Great Lakes boundaries in 2005, by repudiating its previous federal-law rule and claiming public rights to the beach. Now that Indiana has followed suit, the need for this Court's guidance is undeniable.

Indiana's attempt to evade review by claiming a mootness problem is baseless. The Federal Rules codify the ancient and uncontroversial rule that a transferor of property *pendente lite* continues litigating as representative of the successor-in-interest, allowing the claim to be resolved. That is precisely the situation here. Nothing will hinder the Court's resolution of the important federal question.

I. Petitioners Represent The Current, Live Interest In Resolving The Boundary Dispute.

Although Petitioners sold the property in question, their successors-in-interest undisputedly have standing to assert this boundary claim. Whether or not Petitioners remain the real-parties-in-interest, long-established law provides that their successors' interests—and therefore a live case and controversy—remain before the courts.

A. Rule 25(c) Continues Cases Based on Representative Standing.

When property is sold during litigation and the buyer succeeds to the dispute, well-established rules provide that the case proceeds to judgment. Federal Rule of Civil Procedure 25(c) provides that

> If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party.

This "allow[s] the action to continue unabated when an interest in the lawsuit changes hands," regardless whether the case caption is amended. *In re Bernal*, 207 F.3d 595, 598 (9th Cir. 2000) (quoting *Collateral Control Corp. v. Deal*, 638 F.2d 1362, 1364 (5th Cir. 1981)).

Rule 25(c) has remained substantially unchanged since its adoption in 1937, and it codifies an even older doctrine. As this Court put it, "[p]ersons acquiring an interest in property that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment, despite a lack of knowledge. This principle has not been limited to in rem or quasi in rem proceedings." *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 179 (1973) (citing Restatement of Judgments § 89 & cmts. c-d (1942); J. Story, *Equity Jurisprudence* § 536 (1918)); *see Lamb v. Cramer*, 285 U.S. 217, 219 (1932) ("So far as [petitioner] acquired, pendente lite, any interest in the property involved ... he was ... bound by

any decree"). In short, "[o]rdinarily a judgment is binding on a nonparty who took by transfer from a party ... while suit was pending". Wright & Miller, *Federal Practice & Procedure* § 4462.

These rules create no jurisdictional problems. They expand neither the transferor's nor the transferee's substantive rights—rather, they are long-standing, pragmatic exceptions to the procedural real-party-in-interest rule, that allow the transferor to litigate as "representative" of the successor. Restatement (Second) of Judgments § 44, cmts. a-b. Rule 25(c) thus "permits [transferors] to continue in an action, even if they do not remain the real party in interest, as long as the cause of action *itself* survives the transfer to the new party." *ELCA Enterprises, Inc. v. Sisco Equip. Rental & Sales, Inc.*, 53 F.3d 186, 191 (8th Cir. 1995) (considering plaintiff's real-estate transfer). If the transferee succeeds to the cause of action "as a matter of substantive law," then "the original party continues the action unless the new party in interest is substituted on motion." *Hilbrands v. Far E. Trading Co.*, 509 F.2d 1321, 1323 (9th Cir. 1975). Similar representative standing is uncontroversial in other contexts. For instance, a party to a contract may litigate a third-party beneficiary's rights despite having no personal stake, Fed. R.Civ. P. 17(a)(1)(F), and class representatives often may press class members' claims after the representative's personal interest is moot. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980); *Sosna v. Iowa*, 419 U.S. 393, 402 (1975).

Indiana apparently contends that Rule 25(c) and the *pendente lite* rule are unconstitutional in many applications. (BIO 7.) To our knowledge, no court or commentator has ever suggested that. Even critics of other aspects of Rule 25 recognize that it "is universally viewed as ... entirely unproblematic". Martin, *Substitution*, 73 Tenn. L.Rev. 545, 545 (2006).

To be sure, a case is indeed moot (and Rule 25(c) inapplicable) when a transferor loses its interest in the litigation *without* the transferee succeeding to it. Indiana points to district-court cases reflecting that principle. (BIO 7-9.) In those cases, patent transfers mooted actions for declaratory judgments of non-infringement where, for various reasons, the plaintiffs had no quarrel with the transferees. *See Trend Micro Corp. v. Whitecell Software, Inc.*, 2010 WL 4722504, at *3 (N.D. Cal. Nov. 15, 2010) (transferee covenanted not to sue plaintiff), 2011 WL 499951, at *5 (Feb. 8, 2011); *Reibman v. Renesas Elecs. Am., Inc.*, 2014 WL 251955, at *6-7 (N.D.Cal. Jan. 7, 2014).[1]

But in this case, Petitioners' transferees succeeded to the boundary claims that Petitioners were litigating. Rule 25(c) and Indiana's equivalent thus provide that, with or without formal amendment of the caption, the transferees' claims remain before the Court and present a live case and controversy.

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[1] *E.J. Breneman, LP v. Road Science LLC* declined to force an *unwilling* transferor to continue litigating, but considered joinder of the transferee separately. 2012 WL 406346, at *2-5 (E.D.Pa. Feb. 9, 2012). That is inapposite here.

B. The Dispute has Always been Concretely Presented.

Indiana nonetheless suggests that Petitioners did something nefarious by "not alert[ing] the trial court or the State to th[e] change of ownership" (BIO 2-3), and that there is some mystery why this case is still being litigated (*id.* 5, 9). The law and facts are otherwise.

First, "Rule 25(c) does not require that anything be done after an interest has been transferred." *Blachy v. Butcher*, 221 F.3d 896, 911 (6th Cir. 2000) (quoting *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71 (3d Cir. 1993)); *see* Wright & Miller § 1958 (identifying this as Rule 25(c)'s "most significant feature"). Hence, no "trial court involvement and fact-finding" (Indiana BIO 10) are needed. "[I]n the absence of a motion to substitute," the parties "have waived this issue." *F.D.I.C. v. Deglau*, 207 F.3d 153, 159 n.2 (3d Cir. 2000). Indiana has never pointed to any different state-law rule.

Second, the record contradicts Indiana's suggestion that Petitioners hid the sale. The trial-court summary-judgment briefing discussed Petitioners' for-sale listing. Ind. Ct.App. App'x 537, 547, 604-607. Within two weeks of the sale, Petitioners' trial counsel informed Intervenors' counsel of it by telephone and explained that no formal substitution was required. Ind. S.Ct. S.App. 115-116, 119-120. Later that year Intervenors' counsel referred to the sale in open court with Indiana's counsel present, *id.* 65, but no party

requested any court action based on the transfer. When Indiana first raised the issue in the state appellate courts, the property's then-current owner filed a ratification of this litigation and consented to joinder as a plaintiff. *Id.* 117-118. The state courts did not direct joinder.

Third, any questions about the continuing motivation for this litigation are easily dispelled. All the successive property owners, from Petitioners to the present, have been members of the Long Beach Lakefront Homeowners' Association. In the interests of its members the Association has overseen and funded this litigation from its inception, and will continue doing so until its conclusion. At every stage Petitioners have cooperated and coordinated with the Association, ensuring a concrete and consistent presentation of the issues.[2]

II. The Great Lakes' Equal-Footing Boundary Is An Important Federal Question That This Court Should Decide.

Respondents wisely do not dispute the importance of the question presented. They contend instead that there is no need for the Court to address it. They are mistaken.

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[2] Although amending the caption is unnecessary, should the Court direct it the Association will promptly move to join or substitute as Plaintiff-Petitioner. As the motion would explain, the Court has permitted similar substitution in numerous previous cases.

A. This Court has Given Little Guidance on this Question.

As the Petition explained, this Court has carefully tailored equal-footing boundary criteria for the physical characteristics of the seashore and riverbanks—but it has never considered what criteria should govern the boundaries of the Great Lakes (or any lake).

Respondents do not dispute this. Indiana cites decisions confirming that states own lakebeds to the high-water mark (BIO 14-16), but it does not argue that the Court has defined where the high-water mark lies.[3] Instead, Respondents suggest that the Court need not address the Great Lakes specifically because the criteria for river boundaries apply well enough. (*E.g.*, Indiana BIO 16-18.) That is wrong.

Anyone who has seen the Great Lakes knows that, as this Court has said, they are much more like "inland seas" than rivers. *The Genesee Chief*, 53 U.S. at 453. Like the oceans, the Lakes are incomparably larger than rivers, and their surface areas fluctuate less. Also like the oceans, the Lakes have wide beaches extending well inland, on which the soil (sand or stone) and vegetation (none) are the same as they are under the water. As a result, on lake and ocean beaches alike, the soil-and-vegetation test does not reflect where "recurring high water ... actually changes the composition of the soil and vegetation," which Respondents concede is

[3] The Court's *Illinois Central* decision (*see* LBCA BIO 11) addressed the alienability of public-trust lands, not their boundaries.

the relevant question. LBCA BIO 24-25; *see* Alliance-Dunes BIO 21.[4] Of course the Lakes fluctuate seasonally rather than tidally, but that only raises the question: since the Lakes are neither rivers nor oceans, what equal-footing boundary criteria best suit them?

Intervenor-Respondents are incorrect in suggesting that the Court previously found this issue unworthy of certiorari. (LBCA BIO 6, 9.) Michigan's supreme court decided the equal-footing boundary in *Glass v. Goeckel*, but the petition for certiorari did not present that issue—instead it asserted a takings claim that had not been litigated. No. 05-764, Pet. for Cert., 2005 WL 3438569. This Petition, by contrast, squarely presents the equal-footing issue.

B. Without Guidance from this Court, the States' Rulings are Confused.

Indiana concedes that equal-footing states currently take inconsistent approaches to Great Lakes boundaries. (BIO 23.) (Earlier, from 1930 until 2005, the states had agreed that private rights extended to the normal waterline.) Respondents protest that the recent turmoil reflects not a "disagreement over the initial boundary of equal footing land acquired by new states," but rather "differences among states in the degree to which they have relinquished equal footing shoreland." (Alliance-Dunes BIO 3-4; *see* Indiana BIO 18-23.) That reading is strained at best—and even if it

[4] Similarly, tides often make ocean beaches *more* "ephemeral" than lake beaches. (*Cf.* Alliance-Dunes BIO 23.)

were technically correct, it would not vitiate either the states' confusion or the need for this Court's clarification. A historical review illustrates.

Illinois' supreme court addressed the issue first, applying common-law principles in 1860 to decide "what answers the call for Lake Michigan, as a boundary line". *Seaman v. Smith*, 24 Ill. 521, 523. It held that "[t]he principle ... which requires that the usual high water mark is the boundary on the sea ... applies in this case". *Id.* at 524. Seeking the Great-Lakes analog for "the ordinary high water mark on the ocean, and the point between the highest and lowest water marks produced by the tides", the Court held that the boundary is "the line at which [the Lakes' water] usually stands unaffected by storms and other causes." *Ibid.*

Ohio soon adopted the same rule. *Sloan v. Biemiller*, 34 Ohio St. 492, 512 (1878). While the *Sloan* court recognized "contrariety of decision" regarding common-law river boundaries, *id.* at 511-512, it said nothing to suggest (as Indiana claims, BIO 22) that those differences were matters of state law.

Indeed, as Indiana notes (BIO 21), at the time the common law was regarded as an "omnipresence" rather than "the articulate voice of some sovereign". *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). As a result, *Seaman* and *Sloan* did not specify whether they rested on state or federal law. But they applied precisely the kind of common-law

analysis that this Court later clarified "assumed federal constitutional significance under the equal-footing doctrine." *PPL Montana*, 565 U.S. at 590.[5]

Michigan joined the consensus in 1930 and grounded its ruling in federal law.[6] In *Hilt v. Weber*, the state's supreme court held that, "[o]n its admission to the Union, the state, as a sovereign, took title only to such land on the Great Lakes as was then submerged and was, in fact, lake bed." 233 N.W. 159, 206. Thus, "[u]nder the federal law ... the purchaser from the government of public land on the Great Lakes took title to the water's edge." *Ibid.*

This consensus governed for the next 75 years. No state adopted a materially conflicting approach (*see* Pet. 16)[7] or questioned Michigan's grounding of the rule in federal law.

Since 2005, however, Michigan and now Indiana have adopted a sharply conflicting approach. Michigan's *Glass* decision abandoned the federal waterline

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[5] Nor do later decisions reveal state-law bases for *Seaman* or *Sloan*. (*See* Indiana BIO 22.) In *Fuller v. Shedd* Illinois's supreme court considered the boundary of a "*non*navigable lake," which does not implicate the equal-footing doctrine. 44 N.E. 286, 296 (1896) (emphasis added). Similarly, the fact that the "Ohio legislature ... codif[ied] *Sloan*" (Indiana BIO 22) does not suggest that it lacked a federal basis.

[6] Earlier Michigan decisions vacillated on this issue. *Michigan v. Warner*, 74 N.W. 705, 710 (Mich. 1898); *Kavanaugh v. Rabior*, 192 N.W. 623, 624 (Mich. 1923).

[7] Indiana cites no Minnesota decision defining Lake Superior's high-water mark. (*See* BIO 20.)

boundary set by *Hilt*, substituted a soil-and-vegetation boundary, and held that the state retained public-trust rights in lands between that mark and the waterline even though it had "conveyed" them to private ownership. 703 N.W.2d 58, 62, 72 (2005). In this case, Indiana's supreme court *both* adopted a federal soil-and-vegetation boundary *and* held that the state never relinquished fee ownership below that mark.

Thus, Respondents' denial of any conflict on the federal question is at best hypertechnical. *Seaman* and *Sloan* can only reasonably be read as grounded in the federal Constitution, and Michigan and Indiana now expressly follow a contrary rule. Even if an imaginative reading of the caselaw could avoid a clear-cut federal-law conflict, there still is an urgent need for this Court's guidance. At minimum, in the last 15 years some states have abandoned the longstanding consensus on Great-Lakes property rights, repudiating the previous leading decision on the Lakes' federal equal-footing boundary and claiming sweeping public rights in the Lakes' beaches. Whether the Constitution permits that revolution should be decided by this Court.

C. This Court's Review Would Clarify Related Areas of Law.

Respondents caution against unsettling federal agencies' administrative boundaries and lower courts' tests for boundaries on smaller lakes. (*E.g.*, Alliance-Dunes BIO 14-16.) These concerns are illusory. Nothing

requires that administrative boundaries be determined by the same standards as property lines. Indeed that is currently impossible, since the states use conflicting property-line standards, and Indiana itself now uses inconsistent property-line and administrative boundaries for Lake Michigan. (App.35-36.)

In any event, review by this Court can only clarify the law. The lack of guidance on lakeshore boundaries has forced many agencies and states to adopt vague high-water-mark criteria, including catch-all factors such as "other appropriate means that consider the characteristics of the surrounding areas." (*See* Indiana BIO 21 (quoting 33 C.F.R. § 328.3.))[8] Just as the *Howard* test proved influential for river boundaries, this Court's clarification of lakeshore boundaries may allow these definitions to be sharpened.

Similarly, Alliance-Dunes's references to a few decisions using soil-and-vegetation tests on smaller, beachless lakes, or to the difficulty of finding the high-water mark in deserts and swamps, are inapposite. (BIO 12, 15-16, 25-26.) Ponds and lakes that are too small, ephemeral, or swampy to generate beaches do not pose the boundary problems presented here.

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[8] *Cf. Miller v. United States*, 480 F.Supp. 612, 619 (E.D.Mich. 1979) ("[any] appropriate means"); *United States v. Cameron*, 466 F.Supp. 1099, 1111-12 (M.D.Fla. 1978) ("variety of methods"); *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Impl. Dist.*, 17 P.3d 260, 265 (2000) (use of vegetation depends on "circumstances").

III. Waiting For Indiana To Draw A Literal Line In The Sand Will Not Clarify The Issues.

Finally, Respondents are wrong to suggest that this Court's review is premature because "the OHWM's location" on any particular property "is a matter of fact" (Alliance-Dunes BIO 11) that "has yet to be determined". (Indiana BIO 14.) The court below undisputedly held that the boundary is not the waterline but is defined by changes in soil and vegetation. For the reasons explained, that change in the rule warrants certiorari.[9] Moreover, since much of the Great Lakes shore is sandy and vegetation-free, Respondents identify no easy way to interpret the soil-and-vegetation test as other than a claim to the entire beach.

* * *

Alliance-Dunes illustrates the need for certiorari by noting that public ownership of submerged lands should not be based on a "preconceived allocation of public and private property" on the beach. (BIO 24.) That is true—but Respondents identify no impairment to navigation or fishing that required the recent dramatic change in Great-Lakes boundaries. Instead, there is great risk that the change was motivated precisely by a "preconceived allocation" of the beach to the public. This Court should settle whether the Constitution permits that.

[9] Contrary to Intervenors' puzzling statements (*E.g.*, LBCA BIO 7), Petitioners have consistently argued for a waterline equal-footing boundary.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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