No. _____

In The
Supreme Court of the United States

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

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

PARTIES TO THE PROCEEDING

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

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

STATEMENT OF RELATED PROCEEDINGS

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

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

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

CONSTITUTIONAL PROVISION AT ISSUE

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

INTRODUCTION

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

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

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. *Gunderson* Upends Property Owners' Settled Expectations

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

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

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

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

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

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

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

D. Petitioners Sue To Vindicate Their Property Rights

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

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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Respectfully submitted,

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