No. _____

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

PETITION FOR A WRIT OF CERTIORARI

ERNEST SUMMERS
SHAWN M. DOORHY
FAEGRE BAKER DANIELS LLP
311 S. Wacker Dr.
Suite 4300
Chicago, IL 60606

AARON D. VAN OORT
Counsel of Record
NICHOLAS J. NELSON
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Ctr.
90 S. Seventh St.
Minneapolis, MN 55402
(612) 766-8138
aaron.vanoort@faegrebd.com

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Counsel for Petitioners Bobbie and Don Gunderson

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Under federal law, on admission to the Union a state takes title to lands underlying navigable waters, up to the "ordinary high water mark." On the seashore this mark is the average high-tide line, which typically falls partway up the beach. But this Court has yet to clarify how the high-water mark is defined on non-tidal lakes, such as the Great Lakes.

The question presented is whether—in conflict with the rule on the seashore—the newly-admitted states took title to the entire beach surrounding the Great Lakes.

PARTIES TO THE PROCEEDING

Petitioners Bobbie and Don Gunderson were the Plaintiffs and the Appellants/Cross-Appellees in the Indiana courts.

Respondents the State of Indiana and the Indiana Department of Natural Resources were the Defendants and the Appellees in the Indiana courts.

Respondents Alliance for the Great Lakes and Save the Dunes, the Long Beach Community Alliance, Patrick Cannon, John Wall, Doria Lemay, Michael Salmon, and Thomas King were Intervenor-Defendants and Appellees/Cross-Appellants in the Indiana courts.

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PETITION FOR A WRIT OF CERTIORARI

This case presents the question of who owns thousands of miles of beaches on the Great Lakes. Do the beaches belong to the government or instead to the private landowners whose deeds include the beaches, and who have long looked after them and paid taxes on them? The Indiana Supreme Court now has joined a recent trend of some Great Lakes states applying a "soil and vegetation" test to define the boundary of public rights in the lakebed—in an apparent attempt to justify government claims to every inch of sand on the beach. In doing so, Indiana has claimed title to a huge swathe of scenic and valuable real estate that private landowners had thought was theirs.

This aggressive theory cries out for this Court's intervention. Under the federal equal-footing doctrine, when a state joins the Union it takes title to submerged lands up to the "ordinary high water mark" of each waterbody. This Court has carefully defined where the high-water mark is located on the seashore: it is the average high-tide line, which typically falls partway up the beach. This Court has also clarified where the high-water mark can be found on rivers: it is the line where soil and vegetation change from primarily aquatic to primarily terrestrial. But the Court has yet to address the location of the high-water mark

of large lakes that have beaches of their own, such as the Great Lakes.[1]

The Indiana Supreme Court's approach to that issue cannot be squared with the federal common-law principles that govern the equal-footing doctrine. Even on the ocean, public title does not run all the way up the beach but stops at the mean high-tide line—which the tides submerge on roughly half of all days. By contrast, applying the "soil and vegetation" test to lakes would appear to give the state title to the *entire beach*, including parts that are almost never submerged. The soil-and-vegetation standard is inappropriate on the Great Lakes for the same reasons it does not work on the ocean: these large waterbodies affect the soil and plant life well beyond their actual waterlines.

The decision below is not only unjustified in law, but is extraordinarily unfair in fact, as it has literally taken away the backyards of many homeowners.

The time for this Court's review is now. Although Great Lakes states historically have respected private property rights in beaches, Michigan and Indiana recently have claimed the beaches for the public by applying the "soil and vegetation" test. As a result, developments in the coming years likely will shape public expectations about what is and is not permitted on Great Lakes beaches. But as the Indiana Supreme Court recognized below, the federal equal-footing

[1] This Petition primarily focuses on the five Great Lakes and the law governing them, but other large non-tidal lakes likely will be governed by many of the same legal principles.

doctrine is the indispensable starting point for anything the states do in this area of great importance. This Court should grant review to ensure that developments in the law governing Great Lakes beaches are firmly grounded in a correct understanding of those constitutional principles.

OPINIONS BELOW

The Indiana Supreme Court's denial of rehearing is not reported but is reproduced in the Appendix at App.91. The opinion of the Supreme Court of Indiana is reported at 90 N.E.3d 1171 and reproduced at App.1. The opinion of the Court of Appeals of Indiana is reported at 67 N.E.3d 1050 and reproduced at App.41. The opinion of the Superior Court of Indiana is not reported but is available at 2015 WL 11145128 and reproduced at App.64.

JURISDICTION

The Supreme Court of Indiana issued its opinion on February 14, 2018, and denied Petitioners' timely petition for rehearing on May 9, 2018. On July 31, Justice Kagan extended the time in which to file this Petition to October 5.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Admission to the Union Clause of the Constitution, Art. IV, Sec. 3, cl. 1, provides in relevant part that "New States may be admitted by Congress into this Union".

The Submerged Lands Act provides in relevant part that "(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof." 42 U.S.C. § 1311(a).

The Submerged Lands Act further provides that "The term 'lands beneath navigable waters' means ... all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as

heretofore or hereafter modified by accretion, erosion, and reliction". *Id*. § 1301(a)(1).

STATEMENT OF THE CASE

A. Federal Law Grants States Title In Submerged Lands.

The states have always owned lands that are submerged under navigable waters. Before this Nation's independence, "the title in the soil of the sea, or of arms of the sea, below ordinary high-water mark, [was] in the king". *Shively v. Bowlby*, 152 U.S. 1, 13 (1894). "Because title to such land was important to the sovereign's ability to control navigation, fishing, and other commercial activity ... ownership of this land was considered an essential attribute of sovereignty" and "was therefore vested in the sovereign for the benefit of the whole people." *Utah Division of State Lands v. United States*, 482 U.S. 193, 195-196 (1987). Then, "when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them". *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842).

This rule applies to navigable lakes and rivers as well as to the ocean. *Utah Div. of State Lands*, 482 U.S. at 195. At English common law, public title was "confined to such navigable rivers as are affected by the tides," because few if any non-tidal English rivers "are navigable in fact". *Packer v. Bird*, 137 U.S. 661, 667

(1891). But "[t]he tidal rule ... was ill suited to the United States with its vast number of major inland rivers upon which navigation could be sustained." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590 (2012); *see The Genesee Chief*, 53 U.S. (12 How.) 443, 454-455 (1851) (discussing similar principles for purposes of admiralty jurisdiction). Therefore, early in our Nation's history, this "Court extended the doctrine to waters which were nontidal but nonetheless navigable". *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). The Court clarified that "the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide," "belong[] to the States by their inherent sovereignty". *Barney v. City of Keokuk*, 94 U.S. (4 Otto) 324, 338 (1876).

As new states were added to the Union, the rules about public ownership of submerged lands "assumed federal constitutional significance under the equal-footing doctrine." *PPL Montana*, 565 U.S. at 590. Under that doctrine, "new States have the same right of sovereignty and jurisdiction over the navigable waters within their limits as the original ones". *Barney*, 94 U.S. at 333. The result is that "[u]pon statehood, the [new] State gains title within its borders to the beds of waters then navigable (or tidally influenced ...)". *PPL Montana*, 565 U.S. at 591; *see United States v. Texas*, 339 U.S. 707, 717 (1950).

Thus, just as "the boundary between the upland and tideland [is] to be determined by federal law," so also for inland waters: "determination of the initial

boundary between a riverbed, which the State acquired under the equal-footing doctrine, and riparian fast lands likewise [must] be decided as a matter of federal law". *Corvallis Sand & Gravel Co.*, 429 U.S. at 376. After statehood, the water boundary is governed by principles of state property law, such as accretion and reliction. *Id*. at 376-377. But the starting point—the original boundary of the submerged lands that the state acquired on admission—is a federal question. *Id.* at 376.

Even when states surrender ownership in parcels of submerged land, they often continue to reserve certain public rights in it. At common law "an individual or a corporation" could acquire rights to the seabed "by express grant" from the King, "or by prescription or usage". *Shively*, 152 U.S. at 13. But "this title, *jus privatum*," was "held subject to the public right, *jus publicum*, of navigation and fishing." *Ibid.*; *see Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 458-459 (1892). Some states continue to follow a similar rule. Specifically, some states have "limited their title" in submerged lands to a point below the high-water line, which "effectively convey[s] land above the [new boundary] to the upland owner". Dellapenna, 1-6 *Waters and Water Rights* § 6.03(a)(1.01) (Robert E. Beck ed. 2018). But when states do this, many of them continue to assert a public trust—the *jus publicum*—in the transferred lands. *Id.* § 6.03(a)(2); *see* Scanlan, *Shifting Sands: A Meta-Theory for Public Access and Private Property Along the Coast*, 65 S.C. L.Rev. 295, 309, 321-322 (2013).

B. The Federal Equal-Footing Grant Ends At The High-Water Mark.

While the states thus received title to submerged lands, most littoral or riparian property was conveyed to private landowners—many of whom naturally are attracted by the scenic and economic value of the waterbodies, and use the property to enjoy them. Thus, the precise boundary of submerged lands often has great importance both for the states and for neighboring landowners.

1. High-water mark on the seacoast. In light of the high-water mark's central importance to the equal-footing doctrine, this Court has carefully explained how to discern the high-water mark on the seacoast. There, the high-water mark "does not mean ... a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides"—that is, the state took title to "the land over which the daily tides ebb and flow." *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 22-23 (1935) (citation omitted). Specifically, the boundary of the equal-footing grant is "the line of *ordinary* high water," excluding times when "[t]he range of the tide ... is greater than average." *Id.* at 23 (quotation marks omitted; emphasis supplied). And since "[t]he range of the tide at any given place varies from day to day" according to the positions of the Sun and Moon, *ibid.*, the Court has been even more precise: the high-water line is "the mean of all the high tides" over an entire astronomical cycle "of 18.6 years." *Id.* at 26-27 (citation omitted). Because this point is the average of the

highest marks reached by the tides on each day during the cycle, it will be underwater for some period of time on roughly half of all days. *See id.* at 24. The rest of a state's equal-footing grant in the tidal zone is lower in elevation than the high-water mark, and therefore is underwater even more frequently.

The equal-footing grant is rooted in the Constitution, but Congress confirmed the grant—and its high-water-mark limit—in the Submerged Lands Act. The Act reaffirms the states' title in "all lands within [their] boundaries ... which are covered by nontidal waters that were navigable ... at the time such State ... acquired sovereignty ... up to the ordinary high water mark," and in "all lands ... covered by tidal waters up to but not above the line of mean high tide". 42 U.S.C. § 1301(a).[2]

Under the mean-high-tide rule, the oceanfront states own part—but not all—of many beaches. "Wet-sand" beaches that are within the average daily tidal zone passed to the states under the equal-footing doctrine. On the other hand, "dry-sand" beaches—those that are above the average high-tide line—did not pass to the states, and generally remain in private ownership.[3] A change to state property-law rules that

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[2] The Submerged Lands Act also extended the seaward boundary of state title: while the equal-footing grant extended only to the low-tide mark, the Act extended state title to three miles from the shore. *See United States v. Alaska*, 521 U.S. 1, 5-6 (1997). As this case involves inland waters, that extension is not relevant here.

[3] *See Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 190 (N.C. Ct. App. 2015); *Trepanier v. Cnty. of Volusia*, 965 So.2d 276, 284

extends public holdings farther up the beach is a compensable taking of that private property. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 826, 831 (1987) (mandated public-beach-access easement above "[t]he historic mean high tide line" was a taking); *Purdie v. Attorney General*, 732 A.2d 442, 447 (N.H. 1999) ("expand[ing] public beaches" by moving property line from "mean high water mark ... to the highest water mark" was a taking); *see Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Protection*, 560 U.S. 702, 732 (2010) (finding no taking where "petitioner does not allege that the State relocated the property line ... *landward* of the old mean high-water line").[4]

2. High-water mark on rivers. This Court has defined different high-water-mark criteria for inland rivers, which rise and fall not with the tides but "periodical[ly] with the wet and dry seasons of the year." *Howard v. Ingersoll*, 54 U.S. (13 How.) 381, 417 (1851). In *Howard* the Court explained that "the outer line on the bed of a river" is where the bank "is fairly marked by the water." *Id.* at 415, 420. The Court stated that drawing this line "requires no scientific exploration" because "[t]he eye traces it ... in any stage of water." *Id.* at 416.

(Fla. Ct. App. 2007) ("The 'beach' ... includes more land than what is set aside for the people.... The area above the mean high water line is subject to private ownership".).

[4] Although the high-water mark is less well defined as to inland lakes, *see infra*, a state also commits a taking if it expands the public lakebed by changing the definition of the high-water mark. *See Zinn v. Wisconsin*, 334 N.W.2d 67, 71-72 (Wis. 1983).

Justice Curtis's concurring opinion in *Howard* provided the most influential standard. He explained that a river's high-water mark "is to be found by ... ascertaining where the presence and action of water are so common and usual ... and so long continued in all ordinary years, 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 427. According to Justice Curtis, lands outside the river's high-water mark support plants "appropriate to such land in the particular locality," while inside the high-water mark is "soil of a different character and having no vegetation, or only such as exists when commonly submerged in water." *Id.* at 428.

Howard was not strictly an equal-footing case; it involved the boundary of Georgia's cession of its unsettled western lands to the young United States. *Id.* at 397-398 (opinion of the Court). But its "soil and vegetation" test has been widely adopted by courts across the country to determine the boundaries of state title in riverbeds. *See* Maloney, *The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line*, 13 Land & Water L.Rev. 465, 468-476 (1978).[5]

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[5] *See also*, *e.g.*, *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1505-06 (9th Cir. 1991); *South Dakota Wildlife Fed. v. Water Mgmt. Bd.*, 382 N.W.2d 26, 31 (S.D. 1986); *Heckman Ranches, Inc. v. Idaho ex rel. Dep't of Public Lands*, 589 P.2d 540, 553 (Idaho 1979); *Alaska Dept. of Natural Resources v. Pankratz*, 538 P.2d 984, 988-989 (Alaska 1975); *City of Little Rock v.*

3. High-water mark on lakes. The only remaining category of waterbodies subject to the equal-footing doctrine is non-tidal lakes—the largest of which are of course the Great Lakes. This Court has always applied the general principles governing navigable waterbodies to lakes,[6] including the Great Lakes. (*E.g.*, *The Genesee Chief*, 53 U.S. 443.) But it has not defined a specific test for delimiting the equal-footing grant of a lake bed.[7] Nor, in the absence of guidance from this Court, have the lower courts reached any discernible consensus. *See* B. Flushman, *Water Boundaries*, at 299 (2002) (for lakes, "[c]ourts have provided no clear ... instructions or guidelines" to identify "the ordinary high-water mark property boundary or where [it] should be physically located").

C. The Great Lakes And Their Water Levels.

In many respects the Great Lakes "are in truth inland seas." *The Genesee Chief*, 53 U.S. at 453. Like the oceans, the Great Lakes feature thousands of miles of wide sandy beaches. Like the oceans, the Great Lakes

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Jeuryens, 202 S.W. 45, 47-48 (Ark. 1918); *Sun Dial Ranch v. May Land Co.*, 119 P. 758 (Or. 1912).

[6] *E.g.*, *Idaho v. United States*, 533 U.S. 262 (2001); *Utah Div. of State Lands*, 482 U.S. 193; *Utah v. United States*, 403 U.S. 9, 10-11 (1971) (Great Salt Lake); *McGilvra v. Ross*, 215 U.S. 70 (1909).

[7] In *Hardin v. Jordan*, 140 U.S. 371, 391 (1891), the Court held that at common law, boundaries running through *non*-navigable lakes or ponds follow "the line equidistant from the land on either side." But the Court noted that "these observations do not apply to our great navigable lakes ... to which all those reasons apply which apply to the sea itself." *Ibid.*

generate large waves that push water far up these beaches. And like the oceans, the Great Lakes attract many people to their beaches for swimming, walking, sunbathing, picnicking, and other outdoor activities.

But unlike the oceans, the Great Lakes are non-tidal.[8] The Lakes' water levels vary considerably, but on much longer timeframes than the daily cycle of the tides. Rainfall and snowfall are the largest factors: the Lakes reach their highest annual levels in the summer, after snowmelt and rainfall have flowed into them; and they recede to their lowest annual levels in winter when most of their watershed is frozen. This yearly cycle causes the water level of the Lakes to vary by more than one foot in elevation. U.S. Army Corps of Engineers and Great Lakes Commission, *Living with the Lakes: Understanding and Adapting to Great Lakes Water Level Changes* at 16 (1999).[9]

The Great Lakes are unlike the ocean in another way: their water-level fluctuations are less predictable than the tides. Because some years see more rainfall and snowfall than others, the Lakes' annual water-level cycle can vary significantly. And a series of wetter

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[8] The gravities of the Sun and Moon of course pull on the waters of the Great Lakes, but they "are considered to be non-tidal" because the resulting variation in water levels "is less than five centimeters in height" and is "masked by the greater fluctuations in lake levels produced by wind and barometric pressure changes." NOAA, *Do the Great Lakes have tides?* https://oceanservice.noaa.gov/facts/gltides.html (June 25, 2018).

[9] http://ijc.org/files/tinymce/uploaded/ILSBC/Living%20with%20the%20Lakes_1999_e.pdf.

or dryer years can impact water levels beyond the yearly cycle. *Id.* at 17. Human intervention also affects lake levels. Dams and control structures can impound water in the upper Lakes or release it to the lower ones, and engineering projects allow variable diversions of water into or out of the Lakes.[10] Moreover, ship channels dredged into the rivers flowing out of Lake Huron have permanently lowered its and Lake Michigan's water levels by about 16 inches.[11] Due to these phenomena, in the 100-odd years that Great Lakes water levels have been recorded, they have varied in most of the Lakes by six to seven feet. *Living with the Lakes*, *supra*, at 17-18.

D. States Have Recently Taken Conflicting Approaches To Public Rights In Great Lakes Beaches.

With respect to beach ownership and access, "most of the Great Lakes shoreline [is] under a cloud of uncertainty regarding the expectations of private property owners and the public." Scanlan, *supra*, at 306.

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[10] Int'l Joint Comm'n, *Great Lakes Diversions and Consumptive Uses: A Report to the Governments of the United States and Canada under the 1977 Reference* (Jan. 1985), *available at* http://www.ijc.org/files/publications/ID279.pdf. *See also*, *e.g.*, *Wisconsin v. Illinois*, 388 U.S. 426 (1967) (consent decree regarding management of Chicago Sanitary and Ship Canal diversion from Lake Michigan), 449 U.S. 48 (1980) (modifying same).

[11] Int'l Joint Comm'n, *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States* at 20 (Feb. 22, 2000), *available at* http://www.ijc.org/files/publications/C129.pdf.

The primary reason is that in recent years, Michigan and Indiana (in this case) have asserted a novel public right to access the entire beach. In the process, these states have eliminated or drastically pared back countless propertyholders' rights in land that they thought was their own.

Since the 1800s, the consensus among many Great Lakes states[12] has been that private ownership of the lakeshore "extends ... to the water's edge," which is "the line at which the water usually stands when free from disturbing causes." *Seaman v. Smith*, 24 Ill. 521, 524-525 (1860). Illinois first articulated this rule, and Ohio quickly adopted it as well. *Ohio ex rel. Merrill v. Ohio Dep't of Natural Resources*, 955 N.E.2d 935, 947 (Ohio 2011) ("[I]n *Sloan v. Biemiller* (1878), 34 Ohio St. 492," Ohio "adopted the position taken by the Supreme Court of Illinois in *Seaman*"). In reaffirming the rule, the Illinois Supreme Court expressly rejected a vegetation test of the kind Justice Curtis applied to rivers in *Howard*. *Brundage v. Knox*, 117 N.E. 123, 131 (Ill. 1917). The Supreme Court of Ohio has reaffirmed its rule as recently as 2011. *Merrill*, 955 N.E.2d 935.

Michigan, which has the most Great-Lakes coastline of any state, long followed a similar standard: "[o]n its admission to the Union, the state ... took title only to such land on the Great Lakes as was then submerged and was, in fact, lake bed," while private

[12] Because New York and Pennsylvania were among the original 13 states, they did not receive their Great Lakes shoreline pursuant to the equal-footing doctrine and so are not discussed here.

landowners held "title to the water's edge." *Hilt v. Weber*, 233 N.W. 159, 161 (Mich. 1930). The Michigan Supreme Court even referred to this as a "settled rule of property." *Id.* at 164.

Wisconsin follows a different theory, but with similar practical result. It applies a soil-and-vegetation test to determine its Great Lakes shorelines. *See Wisconsin v. Trudeau*, 408 N.W.2d 337, 342, 344 (Wis. 1987). But its Department of Natural Resources interprets the rule to give "the riparian property owner ... exclusive use of the exposed lake or river bed"; non-owners who use the waterbody must stay below the waterline, and are trespassing unless "they 'keep their feet wet.' "[13]

This long consensus began to crack in 2005, when the Michigan Supreme Court held that "the public has a right to walk along the shores of the Great Lakes." *Glass v. Goeckel*, 703 N.W.2d 58, 61 (Mich. 2005). The

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[13] Wis. Dept. of Natural Resources, *Ordinary High Water Mark*, https://dnr.wi.gov/topic/waterways/documents/OrdinaryHighWaterMark.pdf. The remaining Great Lakes state is Minnesota, which has perhaps the least-developed law with respect to Great Lakes beach access. Littoral landowners in Minnesota hold title to Lake Superior's *low*-water mark, but subject to unspecified public-trust uses up to the high-water mark. *Minnesota v. Korrer*, 148 N.W. 617 (Minn. 1914); *see Minnesota ex rel. Head v. Slotness*, 185 N.W.2d 530 (Minn. 1971) (building highway between high- and low-water marks of Lake Superior was a taking). Minnesota applies a soil-and-vegetation test to determine the high-water mark on smaller inland lakes, *e.g.*, *Mitchell v. City of St. Paul*, 31 N.W.2d 46, 48-50 (Minn. 1948); *Carpenter v. Bd. of Comm'rs of Hennepin Cty.*, 58 N.W. 295, 297 (Minn. 1894), but does not appear to have considered the application of this test to Lake Superior.

court apparently overruled its previous holding that Michigan's equal-footing grant "included only ... such land on the Great Lakes as was then submerged." (*Hilt*, 233 N.W. at 161). Instead, it held in *Glass* that the land below the high-water mark includes areas that are "not ... presently submerged" but from which "the lake has not permanently receded" and over which the water "may yet again exert its influence." *Id.* at 71. The court held that this high-water mark should be determined using a soil-and-vegetation test similar to the one from *Howard v. Ingersoll*. *Id.* at 72. The court acknowledged that the water's edge is "the boundary of a littoral landowner's *private* title." *Id.* at 71. But it held that lands above the water's edge had been "conveyed [to private ownership] subject to specific public trust rights in Lake Huron and its shores up to the ordinary high water mark," as defined by soil and vegetation. *Id.* at 62 (emphasis omitted). Those public rights, according to the *Glass* court, included walking on the beach.

The *Glass* majority did not explain further how to apply its soil-and-vegetation standard to a sandy or pebbly beach. But Justice Young, concurring in part and dissenting in part, did. He noted that the majority appeared to be holding that the high-water mark was "the vegetation line" on the landward side of the beach. *Id.* at 80 (Young, J.). Justice Young further identified the majority's high-water mark as "the point where sand gives way to vegetation in the upper right-hand

corner" of the following photo, which he included in his opinion:

Ibid. (crediting David Hansen, Minnesota Agricultural Experiment Station, University of Minnesota). The *Glass* majority did not object to that description.

As a result, beaches that landowners thought were part of their backyards one day were open to the public the next day. And in this case, Indiana adopted a public-beach-access posture that is even more aggressive than Michigan's.

E. Indiana Claims Title To The Lake Michigan Beach.

Bobbie and Don Gunderson's title to a lakefront lot in Long Beach, Indiana originated in a 19th-century federal land patent and survey. App.4. These

identify the lot as extending to "Lake Michigan and set post." App.4, 16. As is common along the Great Lakes, many lakefront homeowners in Long Beach allow swimmers, sunbathers, and others to use their lots with few restrictions.[14] But the Gundersons understood that, regardless of who used their beach, the land still belonged to them.[15]

Indiana disagreed. For administrative purposes, the state Department of Natural Resources defines the high-water mark of Lake Michigan at 581.5 feet above sea level. App.30-31 (discussing 312 Ind. Admin. C. § 1-1-26(2)). In 2010 the City of Long Beach took the position that this also is the boundary between public and private ownership of the beach. App.4. That encroached significantly on the property the Gundersons had thought was their backyard.

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[14] *See* Ind. Ct. App. Appellants' Appx. pp.632-665 (affiants describing their use of beach without interference from landowners).

[15] The Gundersons sold the property while this case was in the state courts. App.8 n.3. Federal Rule of Civil Procedure 25(c) provides that "[i]f 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." Indiana Rule of Trial Procedure 25(c) is identical in substance. This allows the suit to "be continued by or against the original party, and the judgment will be binding on the successor in interest even though the successor is not named." Wright & Miller, *Federal Practice & Procedure* § 1958 (collecting caselaw). So although the court below declined to inquire into mootness by noting a state-law exception for "questions of great public interest," App.8 n.3, that was unnecessary. The Indiana courts did not order substitution, so under both state and federal Rule 25 the Gundersons remain proper plaintiffs.

The Gundersons tried unsuccessfully to persuade the city to change its position. App.5. They ultimately brought this suit against Indiana and its DNR "for a declaratory judgment on the extent of their littoral rights to the shore of Lake Michigan and to quiet title". *Ibid.* "The State, in turn, [argued] that Indiana owns the disputed beach" up to the administrative high-water mark. *Ibid.* Several private parties intervened as defendants. *Ibid.* They went even further than the state: they argued that public rights extended to the common-law high-water mark, and that this was even higher on the beach than the DNR's administrative line.[16]

The Supreme Court of Indiana agreed with the intervenors as to the boundary line, and ruled that "the State retains exclusive title" to the beach. App.3. The court acknowledged that "this case entails a two-part analysis": first the federal question of defining "the boundary of the bed of Lake Michigan that originally passed to Indiana at statehood in 1816"; and second the state-law question "whether [Indiana] has since relinquished title to land within that boundary." App.8-9.

The court first addressed the federal question of the original equal-footing boundary. It noted that this question turns on whether "the precise location of th[e] OHWM" is "wherever the water meets the land," or

[16] The intervenors submitted affidavits from individuals asserting that they have the right to use the beach "to the vegetation line" (Ind. Ct. App. Appellants' Appx. p.633) or up to or even into the dune grass (*id.* pp.644, 646-649, 654, 656; *see id.* p.658).

instead "include[s] the exposed shore." App.8. To answer that question, the court adopted Michigan's recent *Glass v. Goeckel* rule: the original lakebed, bounded by the high-water mark, includes lands that are "not immediately ... submerged" if "the lake has not permanently receded from that point and may yet again exert its influence up to that point." App.20. To further define the high-water mark, the Supreme Court of Indiana quoted and adopted Justice Curtis's soil-and-vegetation rule from *Howard v. Ingersoll*. *Ibid.*

Turning to the state-law question, the court held that "with the exception of select parcels of land not in dispute here, Indiana has [never] relinquished its title to the shores and submerged lands of Lake Michigan." App.23. Finally, the court addressed the Indiana DNR's high-water definition that had instigated the litigation. The court held that the regulation is valid for certain administrative purposes, but does not change "the legal boundary" between the state's beaches and "privately-owned riparian land." App.35-36.

In conclusion, the Supreme Court of Indiana held that the public has the right to "walk[] below the natural OHWM along the shores of Lake Michigan." App.38. The court also held that Indiana's Legislature has the power to authorize additional public uses of the state's beaches, App.38-39, and suggested that potential new uses might include "picnicking," "beach sports," and "nature tourism." App.36.

Describing the court's decision, Indiana media announced "that Lake Michigan's shoreline is open to all," up to "essentially the edge of the beach" or "the point where the beach becomes soil," and that "property owners cannot exercise exclusive control of the beach between their homes and the water."[17]

The Indiana Supreme Court denied the Gundersons' petition for rehearing. App.91. This Petition followed.

REASONS FOR GRANTING THE WRIT

"The shores of the Great Lakes may look serene, but they are a battleground." Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L.Rev. 1, 2 (2010). While some of this battle turns on the peculiarities of state law, the states must start from the same federal equal-footing principles. Michigan's newly-aggressive approach in *Glass*, and Indiana's in this case, take those principles far beyond anything supported by this Court's precedents—or by the constitutional rationale for giving states sovereignty over submerged lands.

How to define the boundaries of the states' equal-footing title in the beds of the Great Lakes is an

[17] D. Carden, *Indiana Supreme Court rules Lake Michigan shoreline belongs to all Hoosiers*, Northwest Indiana Times (Feb. 14, 2018), *available at* https://www.nwitimes.com/news/local/govt-and-politics/indiana-supreme-court-rules-lake-michigan-shoreline belongs-to-all/article_1cd6f4da-f776-5b48-90df-1088e92e8d1c.html.

important question of federal law that has not been, but should be, settled by this Court. *See* R. 10(c). With thousands of miles of Great Lakes beaches hosting millions of visitors every summer—and with thousands of private owners facing that public influx to land they thought was their own—the stakes are unquestionably high. This Court should intervene now, to clarify the foundational legal principles before public expectations harden in response to decisions like the one below.

I. The Great Lakes States Take Conflicting Approaches To Public Beach Access Because They Have Conflicting Views Of The Equal-Footing Doctrine.

As described above, "[c]ourts have been inconsistent, in approach and result, when determining the rights of the public to use the Great Lakes shores." Kilbert, 58 Clev. St. L.Rev. at 2. Consequently, a stroll along the beach that now is lawful in Indiana or Michigan could be trespassing if done in Illinois, Wisconsin, or Ohio.

This is not simply a matter of diverging state laws. Both the Indiana decision in this case and the Michigan decision in *Glass* dealt with the original boundaries set by the federal equal-footing grant. In this case the Supreme Court of Indiana purported to "determine the boundary of the bed of Lake Michigan that originally passed to Indiana at statehood," which it acknowledged "is a matter of federal law." App.8-9.

And the *Glass* decision applied the public-trust doctrine to land that Michigan or its predecessors once owned, but "conveyed ... to private parties ... subject to the public trust." 703 N.W.2d at 62. In doing so, the Michigan court cited this Court's definition of the equal-footing high-water mark in *Borax Consolidated*. *Id.* at 69.

None of the other Great Lakes states have defined the equal-footing boundaries as expansively as Indiana and Michigan. Both *Glass* and the decision below can reasonably—perhaps most reasonably—be read as asserting equal-footing rights to all the sandy or pebbly areas on Great Lakes beaches. In this case, the Supreme Court of Indiana defined the edge of the public beach as the point, usually above the waterline, where the soil becomes "distinct ... in respect to vegetation, as well as in respect to the nature of the soil itself." App.20. Similarly, the *Glass* court defined the high-water line as "a distinct mark [left] either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic." 703 N.W.2d at 62, 72 (citation omitted). But on a typical beach, the areas both above and below the waterline are identical sand or pebbles. The vegetation does not change until the point where dune grass or scrub begins growing, and the soil does not change until even farther inland.

The beach around the Gundersons' property is a good example. The intervenor-defendants in this case submitted photos of the Long Beach lakeshore, showing that the beach is wide and undifferentiated:

Ind. Ct. App. Add. for Alliance for the Great Lakes and Save the Dunes, pp.36-37. The most "distinct" natural marks in this landscape are the waterline, the edge of the dune grass, and the treeline—and Indiana (following Michigan) has rejected the waterline as the

boundary. Whatever precise boundary Indiana and Michigan would choose, there is not a hint that the other Great Lakes states would place the line in the same location.

In short: confusion about this question of federal law is translating to confusion on the ground in the Great Lakes states, and confusion will continue until this Court clarifies the rule. Certiorari is appropriate.

II. Indiana's Aggressive Approach To Equal-Footing Boundaries Is Unjustified.

Indiana's and Michigan's novel approach has not only generated practical conflict and confusion; it also is wrong as a matter of federal law. Neither the logic nor the purpose of the equal-footing doctrine supports these states' claim to dry-sand beaches on the Great Lakes.

Logically, the decision below pushes the equal-footing boundary much farther inland than common-law principles support. As discussed above, those principles were first developed to define boundaries on the seashore. Even on the oceans, the equal-footing grant typically covers only part of the beach—and it excludes even sand that is actually covered by water on half of all days. *Supra* at 8-9. Since the Great Lakes are far smaller than the ocean, there is no conceivable reason why the equal-footing grant should include a *greater* portion of their beaches. *See Glass*, 703 N.W.2d at 99 (Markman, J., dissenting) ("unsubmerged lands that are only covered by [Great Lakes] water on an

infrequent basis" "should be treated in a manner similar to lands covered by the spring tides, i.e., they are not subject to the public trust doctrine").

For similar reasons, the rule adopted below is far removed from the *purposes* for state sovereignty over submerged lands—the facilitation of navigation, commerce, and fishing. *See Utah Div. of State Lands*, 482 U.S. at 195-196. These purposes do not suggest a state claim to dry-sand beaches at all, for boats do not float on sand and fish do not swim in it. Nor do these purposes require, or even recommend, public title in land that "may yet" be under the Lakes *someday*. *See* App.20 (quoting *Glass*, 703 N.W.2d at 71). No matter where the current boundary may be, if water levels rise past it in the future, the property line may follow it as a "movable freehold." *See Glass*, 703 N.W.2d at 90-91; *id.* at 99, 106 (Markman, J., dissenting) (under the "water's edge" rule, "the littoral owner's title follows the shoreline" as it moves).

All of these incongruities arise because the court below applied *Howard v. Ingersoll*'s soil-and-vegetation test to a geographic setting that it does not fit. That test works well for determining the boundaries of rivers—which is what this Court developed it for. Riverbanks are not pounded by storm waves, and so the lines where the soil and vegetation around them change character reflect their actual average high-water lines. But matters are different on the oceans and "inland seas" such as the Great Lakes. *The Genesee Chief*, 53 U.S. at 453. These larger waterbodies change the character of the soil and vegetation well above

their high-water levels. Soil and vegetation characteristics therefore do not demonstrate where their high-water levels can be found.

Thus, the correct rule is the one reflected in the law of Illinois and Ohio, used in practice by Wisconsin, long recognized in Michigan, and re-proposed by the *Glass* dissent: the boundary of the states' equal-footing title on Great Lakes beaches is simply the water's edge. Because the Great Lakes have minimal daily tidal fluctuations, this definition comports with the common-law rule governing the seashore. Because the Great Lakes affect the character of the soil and vegetation well above their water levels, this definition fits reality better than the riverine *Howard* test. And because this rule preserves state title in the submerged lands needed for shipping and fishing, it properly balances the benefits of state sovereignty in the lakebed with the rights of littoral property owners.

This Court should grant certiorari to clarify this important matter.

III. Now Is The Time For This Court's Review.

The sides in this jurisprudential debate are well developed. Delay would bring only further confusion—and would risk hardening public expectations in favor of a public-access rule that this Court may eventually have to overturn. So the right time for this Court's review is now.

Further review in the state courts is not likely to solve this problem. Rather, the trend is toward greater confusion. In the last 13 years two Great Lakes states (Michigan and Indiana) have reversed the traditional rule of private beach status, one state (Ohio) has reaffirmed it, and others have avoided the question. Nor have recent decisions developed the legal doctrines at issue: Ohio in *Merrill* simply reaffirmed its age-old rule of private ownership, 955 N.E.2d 935, while Indiana in this case largely imported *Glass*'s 13-year-old definition of the high-water mark.

Moreover, even if there were some likelihood that the other Great Lakes states would join Indiana in abandoning the private-ownership rule, this Court's review would still be needed. A movement of that kind would mean that several states were significantly changing private and public rights in thousands of miles of beaches—based on a legal regime whose foundations in federal law are highly questionable, at best. Whether the equal-footing doctrine really supports that kind of sea change should be determined once and for all by this Court as the ultimate arbiter of federal law, not piecemeal by the various state courts.

Finally, this Court should address the status of Great Lakes beaches before public expectations harden around the more aggressive rules announced by Michigan and Indiana. If a perception that Great Lakes beaches are public becomes widespread, that would make it much more difficult as a practical matter to unwind Indiana's new rule. That practical difficulty, in turn, would hamper future review by this

Court. Far better to take up the question now, while the new, erroneous approach applies in only a minority of Great Lakes states and is widely viewed as unsettled.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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AARON D. VAN OORT
Counsel of Record
ERNEST SUMMERS
SHAWN M. DOORHY
NICHOLAS J. NELSON

Counsel for Petitioners
Bobbie and Don Gunderson