

No. 17A_____

Supreme Court of the United States

BOBBIE GUNDERSON, *et vir.*, applicants,

v.

STATE OF INDIANA, *et al.*, respondents.

On application to extend the time to file a petition for a writ of certiorari to the
Indiana Supreme Court.

**APPLICATION OF BOBBIE AND DON GUNDERSON
TO EXTEND THE TIME TO FILE A PETITION
FOR A WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT**

To the Honorable Elena Kagan, Associate Justice of the United States
Supreme Court and Circuit Justice for the United States Court of Appeals for the
Seventh Circuit:

Bobbie and Don Gunderson respectfully apply for an extension of time to file a Petition for Certiorari for 59 days, to and including Friday, October 5, 2018. The Indiana Supreme Court decided the case on February 14, 2018, and denied the Gunderson's timely petition for rehearing on May 9, 2018. A petition for certiorari in this Court would currently be due on August 7, 2018. This application is filed more than 10 days in advance of that date, pursuant to this Court's Rule 13.5.

This case presents an important, and unsettled, question of federal law that merits this Court's consideration. In the decision below, Indiana has joined a recent trend of Great Lakes states asserting, for the first time in our Nation's history, that they have property rights in every square foot of beach along the Great Lakes. Doing so has required those States to adopt the most aggressive interpretation

possible of how the federal “equal footing doctrine” applies to non-tidal waterbodies—an important question of federal law that has not been, but should be, decided by this Court.

Under the “equal footing doctrine,” when States are admitted to the Union, as a matter of federal law they receive title to submerged lands, up to the “ordinary high water mark” of the waterbody in question. This boundary becomes very important in demarcating where private property ends, and where public rights to navigation, fishing, and the like begin. With respect to the ocean, the law has developed a clear test for where the “ordinary high water mark” lies: it includes all the land that is covered by the tides at their highest ebb. With respect to rivers and small inland lakes, which rise and fall seasonally rather than tidally, state courts have developed a different test: the ordinary high water mark is where the soil and vegetation change from aquatic to terrestrial in nature.

This case presents the crucial, unsettled question of how the “ordinary high water mark” is defined for large non-tidal lakes with extensive beaches—such as the Great Lakes. For centuries, the Great Lakes states have mostly respected private property rights on beaches that are not covered by water. Recently, however, such States have started applying the “terrestrial vegetation and soil” criterion to the Great Lakes, making the remarkable assertion that the State’s property rights extend all the way up to the landward edge of the beach—that is, further inland even than on the ocean, where the “ordinary high water mark” reaches only to tidal areas of the beaches. The practical result has been States

asserting rights, often for the first time, in thousands of miles of Great Lakes beachfront that private landowners had thought were their own (and often paid property taxes on).

In this case, the Indiana Supreme Court joined other Great Lakes states that have recently adopted this rule. But the States cannot assert property rights in Great Lakes beaches if, as a matter of federal law, they never received those rights in the first place. This Court has never settled the question of how to discern the ordinary high water mark on non-tidal waterbodies, and in particular on large lakes. A petition for certiorari in this case would present that question for the Court's review.

An extension is warranted because the undersigned counsel have very recently been retained to represent the Gundersons in this Court, and need additional time to familiarize themselves with the record in the case and to prepare the petition. Accordingly, the Gundersons respectfully request that the time to file a petition for certiorari be extended by 59 days, to and including Friday, October 5, 2018.

Respectfully submitted,

Aaron D. Van Oort

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A handwritten signature in black ink, appearing to read "Nicholas J. Nelson" with a stylized flourish at the end.

*Attorneys for Applicants Bobbie and
Don Gunderson*