ADLER POLLOCK & SHEEHAN P.C.

One Citizens Plaza, 8th floor
Providence, RI 02903-1345
Telephone 401-274-7200
Fax 401-751-0604 / 351-4607

175 Federal Street
Boston, MA 02110-2210
Telephone 617-482-0600
Fax 617-482-0604

www.apslaw.com

March 24, 2023

VIA FEDEX & EMAIL **(HouseJudiciary@rilegislature.gov)**

The House Judiciary Committee
c/o Roberta DiMezza
State House
82 Smith Street
Providence, RI 02903

Re: Written Testimony Concerning House Bill 5174 An Act Relating to Waters and Navigation – Coastal Resources Management Council

Dear Honorable Members of the House Judiciary Committee:

Please accept this correspondence as written testimony concerning H 5174, An Act Relating to An Act Relating to Waters and Navigation – Coastal Resources Management Council, on behalf of the Shoreline Taxpayers Association for Respectful Traverse, Environmental Responsibility and Safety, Inc. ("STARTERS").

H 5174 proposes a radical change to rights of public access along Rhode Island's shoreline. The bill eliminates fundamental property rights of shoreline landowners by establishing a new boundary—"the recognizable high tide line"—and mandating public access to private property 24 hours a day, 365 days per year. It does so without providing any compensation to affected landowners and commits an unconstitutional taking in violation of the state and federal constitutions. Consequently, H 5174 creates a clear legal and financial liability for the State that may grow to tens of millions of dollars.

I have provided testimony and written analyses in past legislative sessions concerning the prior incarnations of this bill. I have attached those submissions here and incorporate them by reference.[1] Unlike prior versions of this legislation, H 5174 establishes that "the wet line on sandy or rocky beach" shall serve as the default feature for defining the new "recognizable high tide line" boundary. These changes do nothing of substance to address the flaws of H 5174's antecedents.

[1] **Attachment 1** (Policy Brief, *Hazard Ahead: The Risk of Seizing the Shoreline of Public Access*); **Attachment 2** (April 11, 2022 Letter to the Hon. Robert E. Craven); **Attachment 3** (May 31, 2022 Letter to the Hon. Robert E. Craven).

As the Committee has heard, Section 17 of the Rhode Island Constitution establishes that the public has the right to exercise certain "privileges of the shore." The constitution has never defined where "the shore" begins and ends. In 1982, the Rhode Island Supreme Court adopted the much debated "mean high tide line"[2] as the dividing line defining where the public had a right to exercise the "privileges of the shore." *See State v. Ibbison*, 448 A.2d 728 (1982). H 5174 moves the boundary established in *Ibbison* to six feet (6') landward of the "recognizable high tide line"—a feature that bears no relationship to the mean high tide line.

In 2021, the United States Supreme Court held unequivocally that compelling a private landowner to allow unauthorized third parties onto their private property was a *per se* physical taking. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021). When a government "appropriate[s] a right of access" it creates "a right to physically invade" the property of another. *Id.* "[G]overnment-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation." *Id.* Just as the regulation in *Cedar Point* prohibited agricultural employers from barring union organizers from their properties, H 5174 prevents shoreline landowners from controlling who can occupy their properties landward of the mean high tide line.

The substantive effect of H 5174 is not its only flaw. In addition, it purports to incorporate as a "legislative finding" an eyebrow-raising assertion:

> In 1982, our state supreme court, acknowledging that it was acting in the absence of guidance from the general assembly, defined the public's rights to the shore by the mean high water (MHW) line, derived from an arithmetic average of high-water heights measured over an 18.6-year metonic cycle. *The 1986 Constitutional Convention considered and rejected defining the mean high tide line for purposes of public access by this means and, accordingly, amended the constitution.*

This latter statement is irreconcilable with the record of the Constitutional Convention. As described and documented in my April 11, 2022 correspondence, with full knowledge of the Supreme Court's ruling in *Ibbison*, the Convention explicitly rejected multiple attempts to define the "shore," including at least one proposal that was nearly identical to H 5174 in substance. The amendments to Section 17 of the state constitution adopted by the Convention concern what "privileges of the shore" citizens may exercise, not where they may exercise them.

[2] The mean high tide is the arithmetic average of high-water heights observed over an 18.6-year Metonic cycle.

The intent behind H 5174 may be commendable, but the law is clear and the consequences are far-reaching. This is not a close call. There are better means to achieve the same ends that do not present the risk of an uncompensated taking. Accordingly, I respectfully urge the Committee not to recommend passage of H 5174.

Respectfully submitted,

Daniel J. Procaccini
dprocaccini@apslaw.com

Enclosures

4871-7861-7687, v. 1

ATTACHMENT 1

Hazard Ahead: The Risk of Seizing the Shoreline for Public Access

Daniel J. Procaccini, Esq.[1]

Shoreline Taxpayers Association for Respectful Traverse, Environmental Responsibility and Safety, Inc.

INTRODUCTION

House Bill No. 8055 proposes to redefine public access to Rhode Island's shoreline. The proposed statute declares that a fundamental right of property ownership—the right to exclude others from private land—no longer exists below the "recognizable high tide line." The proposal changes state law and appropriates a physical interest in private property for the public at large.

Under settled state and federal law, the proposed legislation will affect a *per se* taking without just compensation and subject the State to immense legal and financial liabilities. Simply put, when the government gives with one hand, it may also take with the other, and the law compels it to pay for what it takes.

BACKGROUND

The Rhode Island Supreme Court has consistently affirmed at least three core principles defining the scope of citizens' rights in Rhode Island's shoreline:

(1) Under the public trust doctrine, the State holds title to all land "below the high-water

---

[1] Daniel J. Procaccini is an attorney at ADLER, POLLOCK & SHEEHAN, P.C. Attorney Stephen D. Lapatin provided valuable research and assistance for this analysis.

mark in a proprietary capacity for the benefit of the public,"[2]

(2) The "public rights" secured in trust by the state, including the rights of "passage, navigation, and fishery," extend to "all lands below the high-water mark,"[3] and

(3) The landward boundary of the "shore" for the public's exercise of its rights and the "privileges of the shore" under Article I, § 17 of the state constitution is the "mean high tide line," which is the average height of all the high waters over the astronomical cycle of 18.6 years.[4]

The Rhode Island Supreme Court established the mean high tide line boundary in *State v. Ibbison*.[5] Four years later, Rhode Island held a constitutional convention, and the delegates considered a proposal to redefine the shore to include—among other things—land "one rod above the daily high water mark made by the flux of the sea at high tide . . . ."[6] This proposal (echoes of which can been heard in House Bill No. 8055) was rejected based on concern that it would constitute a taking without just

[2] *See, e.g.*, *Champlin's Realty Assocs., L.P. v. Tillson*, 823 A.2d 1162, 1165 (R.I. 2003); *Greater Providence Chamber of Com. v. State*, 657 A.2d 1038, 1041 (R.I. 1995)

[3] *Allen v. Allen*, 19 R.I. 114, 32 A. 166, 166 (1895)

[4] *State v. Ibbison*, 448 A.2d 728, 732 (R.I. 1982).

[5] *Ibbison*, 448 A.2d at 732.

[6] Resolution 88-00217, A Resolution Relating to Shore Access and Preservation.

compensation.[7] Instead, the delegates made a conscious decision to leave further refinements for "judicial determination."[8]

ANALYSIS

I. The Proposed Legislation Changes Settled State Law and Permits the Public to Invade Private Property.

House Bill No. 8055 ("Proposed Legislation") takes aim at the boundary established by *Ibbison* and its progeny. The bill proposes to amend the General Laws to extend the area wherein the public may exercise the "rights and privileges of the shore" from the mean high tide line up to the "recognizable high tide line." The "recognizable high tide line" is defined as "a boundary which is ten feet (10') landward from the line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface level at the maximum height reached by a rising tide." The bill then lists a set of non-exclusive indicia of the rising tide mark, including "a lien of seaweed, oil or scum" or "a more or less continues deposit[] of fine shell or debris . . . ."

The public is entitled to exercise the "rights and privileges of the shore" under Article I, Sections 16 and 17 of the state constitution anywhere this zone. Although the statute suggests that title to the land remains in the littoral landowner, there is no other limitation on permissible public activities. The public-at-large would thus be entitled to enter, occupy, and use private property on any day, at any time, for uncertain purposes.[9]

---

[7] Patrick T. Conley & Robert G. Flanders, Jr., The Rhode Island State Constitution: A Reference Guide 103 (1999) (hereinafter "Conley & Flanders"). Notably, as described in *Cavanaugh v. Town of Narragansett*, No. WC 91-0496, 1997 WL 1098081, at *5 (R.I. Super. Ct. Oct. 10, 1997), there was an abundance of testimony at the convention that the amendments to Section 16 were not intended to encompass trespass on the land of others.

[8] *Id.*

[9] Article I, Section 17 is not exhaustive, although the four classic privileges of the shore are fishing, gathering seaweed, swimming, and passage along the shore.

II. The Proposed Legislation Will Cause a Physical Taking of Private Property Without Just Compensation.

The Takings Clause of the Fifth Amendment to the United States Constitution states: "[N]or shall private property be taken for public use, without just compensation." This necessary condition of property acquisition applies not only to the federal government, but also to the states through the Fourteenth Amendment.[10] The Takings Clause is one of only two provisions "that dictate a particular remedy,"[11] and the failure to pay what is owed at the time of the taking violates a landowner's constitutional rights.[12] The Rhode Island Supreme Court has consistently looked to federal precedents to interpret state constitution's takings clause in Article I, Section 16.[13]

Takings fall into two broad classes of appropriations: physical and regulatory. Physical takings are "as old as the Republic"[14] and occur when the government physically acquires real or personal property for itself or a third party.[15] The taking can occur in a multitude of ways. The state may directly condemn land; take physical possession of property, but not acquire legal title; or it could simply occupy property.[16] The "essential question" is "whether the government has physically taken property for itself or

---

[10] *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897). It is similarly beyond question that state laws—and even state constitutional provisions—cannot prevail if they conflict with the federal constitution. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 584 (1964).

[11] *Allen v. Cooper*, No. 5:15-CV-627-BO, 2021 WL 3682415, at *8 (E.D.N.C. Aug. 18, 2021) (citing Richard H. Fallon et al., *Hart & Wechsler's Federal Courts and the Federal System* 849 (4th ed. 1996)).

[12] *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, No. 17 BK 3283-LTS, 2022 WL 504226, at *43 (D.P.R. Jan. 18, 2022).

[13] *See, e.g.*, *Andrews v. Lombardi*, 231 A.3d 1108, 1128 (R.I. 2020); *Alegria v. Keeney*, 687 A.2d 1249, 1252 (R.I. 1997).

[14] *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency,* 535 U.S. 302, 322 (2002).

[15] *See Cedar Point Nursery*, 141 S. Ct. at 2072

[16] *Id.* (citing cases).

someone else—by whatever means—or has instead restricted a property owner's ability to use his own property."[17] Any physical acquisition of property—including an appropriation of the "right to invade"—is a *per se* taking that triggers a state's constitutional obligation of just compensation.[18]

How the government takes private property is largely irrelevant. A legislature can take land by statute as easily as an executive agency may do so by rule or a court by judicial decision. "[T]he particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."[19] The size or duration bears only on the amount of compensation, not whether compensation is due.[20]

A "regulatory taking" occurs "when some significant restriction is placed upon an owner's use of his property for which justice and fairness require that compensation be given."[21] To assess whether a regulatory restriction constitutes a taking, courts typically look to the three factors articulated in *Penn Central Transp. Co. v. New York City*: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[22]

---

[17] *Id.*

[18] *Id.* at 2071-72.

[19] *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010).

[20] *See, e.g.*, *Cedar Point Nursery*, 141 S. Ct. at 2074; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (appropriating part of a rooftop in order to provide cable TV access for apartment tenants is a taking); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (compensation required even when government appropriation is temporary).

[21] *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 33 (1st Cir. 2002) (quotation marks omitted).

[22] *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978)).

The Rhode Island Supreme Court has consistently applied these federal precedents when interpreting the state constitution's takings clause. As is the case under federal law, a categorical right to compensation exists under the state constitution "when the government physically takes possession of an interest in property for some public purpose."[23] A potential regulatory taking is likewise analyzed under the *Penn Central* balancing test.[24]

There is a high likelihood that a court would find that Proposed Legislation is a categorical, physical taking. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the U.S. Supreme Court considered whether conditioning a land-use permit on an uncompensated conveyance of a public easement constituted an unconstitutional exaction. In that case, the California Coastal Commission required a landowner, as a condition of approval for a building permit, to convey to the state an easement allowing the public to traverse across a strip of their beachfront property.[25] The Court found that the Commission's condition was a taking and that there was no "essential nexus" to a legitimate state interest. Accordingly, if the commission wanted a public easement, it had to pay for it.[26] As Justice Scalia explained:

> A "permanent physical occupation" has occurred, for purposes of [the Takings Clause], where individuals are given *a permanent and continuous right to pass to and fro*, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[27]

---

[23] *See Andrews v. Lombardi*, 231 A.3d 1108, 1128 (R.I. 2020); *Cranston Police Retirees Action Comm. v. City of Cranston by & through Strom*, 208 A.3d 557, 581 (R.I. 2019).

[24] *Cranston Police Retirees Action Comm.*, 208 A.3d at 582.

[25] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987).

[26] *Id.* at 841-42.

[27] *Id.* at 832 (emphasis added).

The Court moreover observed "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, *we have no doubt there would have been a taking*."[28] Such intrusions impose a categorical duty to provide just compensation "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[29]

The Court reached a similar conclusion in *Dolan v. City of Tigard*.[30] In that case, the government conditioned a permit to expand a store and parking lot on the dedication of a portion of the property to the public for recreation.[31] As in *Nollan*, the Court concluded "[w]ithout question, had the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred."[32] Compelling public access would "deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[33]

Cedar Point Nursery eliminates any lingering uncertainty. The law before the Court was a California regulation granting union organizers access to agricultural employers' properties for three hours per day, 120 days per year to solicit support for unionization.[34] The fundamental question was whether the regulation was a *per se* physical acquisition of the right to enter

---

[28] *Id.* at 831 (emphasis added).
[29] *Id.* at 831-32.
[30] *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).
[31] *Id.* at 379-80.
[32] *Id.* at 384.
[33] *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))
[34] *Cedar Point Nursery*, 141 S. Ct. at 2069-70.

property, or a permissible exercise of regulatory authority that did not rise to the level of a taking under *Penn Central*.[35]

The Court's ruling was decisive. "[G]overnment-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation."[36] The "right to exclude" is not just one of the "bundle of rights" associated with property ownership—it is "universally held to be *a fundamental element* of the property right."[37] It is an essential condition of ownership that is absolutely necessary for it to exist at all.[38] Accordingly, a law that "appropriates a right to physically invade [a landowner's] property" and grants it to others as an entitlement is a *per se* taking.[39] The state's failure to provide compensation violated the Takings Clause.

Under *Ibbison*, a person's right to exercise the "privileges of the shore" ends at the mean high tide line. This has been the law of the state of Rhode Island since 1982. The 1986 constitutional convention declined to change it, and it has been enforced to the present day.[40] Consistent with *Cedar Point Nursery*, eliminating a shoreline property owner's right to exclude "beachcombers" eliminates a fundamental right of ownership and conveys an entitlement to the public at large. It is not merely a regulation aimed a "reasonable use of the shore"—it is a *per se* taking and the State will be obliged to pay for it.

---

[35] *Id.*

[36] *Id.* at 2074.

[37] *Id.* at 2072.

[38] *Id.*; *see also Opinion of the Justices*, 365 Mass. 681, 689 (1974) ("The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest in real property has any meaning at all it must include the general right to exclude others.")

[39] *Id.* (emphasis added).

[40] *See, e.g., Ne. Corp. v. Zoning Bd. of Rev. of Town of New Shoreham*, 534 A.2d 603, 606 (R.I. 1987) ("[I]n this jurisdiction the line of demarcation that separates the property interests of the waterfront owners from the remaining populace of this state is the mean high-tide line.")

Ibbison was not, as some have suggested, a de facto taking from the public.[41] The Rhode Island Constitution does not define "the shore" for the purposes of Article I, Sections 16 and 17. The delegates to the 1986 constitutional convention expressly declined to define the boundaries of the shore in the constitution itself. In the absence of guidance from the Constitution or the General Assembly, the Supreme Court exercised its authority to interpret "the shore" as the land below the mean high tide line. If the intention behind the Proposed Legislation is to expand the Court's definition, it is—without question—a taking.[42]

The Proposed Legislation arguably tries to pass as an access regulation by, for instance, acknowledging that landowners "may" still hold title to the shore above the mean high tide line. But this is exactly the chicanery the Supreme Court rejected in *Cedar Point Nursery*. If the Proposed Legislation is enacted, the State will acquire a fundamental, physical interest in property for the benefit of the public even if the legal boundary of the "shore" remains fixed at the mean high tide line. Cloaking the statute in the trappings of the State's "police power" does not change this reality.[43] Thus, upon

---

[41] This argument is based on the assertion that the mean high tide line is often under water, thus the public cannot exercise its privileges of the shore unimpeded.

[42] *See Purdie v. Att'y Gen.*, 732 A.2d 442 (N.H. 1999) (holding state statute the expanded public right in the shore beyond common law limits was an unconstitutional taking) ("Although the legislature has the power to change or redefine the common law to conform to current standards and public needs, . . . property rights created by the common law may not be taken away legislatively without due process of law[.]"); *see also Opinion of the Justices to the House of Representatives*, 313 N.E.2d 561 (Mass. 1974) (advisory opinion rejecting proposed bill creating a public "on-foot free right-of-passage" along the shore of the Massachusetts coastline between the mean high water line and the extreme water line as private property extends to the low-water line, thus the legislation would constitute a taking).

[43] In *Alegria v. Keeney*, 687 A.2d 1249, 1252 (R.I. 1997), the Rhode Island Supreme Court held that Section 16 "evinces a strong Rhode Island policy favoring the preservation and the welfare of the environment," but that those terms "cannot be interpreted . . . to defeat the mandates of the Federal Constitution." *See also* Annotated Const. of the State of Rhode Island 8 (1988) ("The Committee intended that the powers of the state in such regulation shall be 'liberally construed' *to the limits allowed by the federal constitution* when constitutional challenges are posited.")

enactment, shoreline property owners will be entitled to the fair market value of their land.

Property owners may have additional grounds to seek declaratory and injunctive relief in federal court.[44] Furthermore, the Supreme Court's ruling in *Knick v. Township of Scott* casts serious doubt on any defense that the State is immune from suit for an uncompensated taking under the Fifth Amendment in federal court. Indeed, at least two federal courts have recently found that, in the wake of *Knick*, the federal constitution furnishes a remedy for money damages against a state such as Rhode Island, which is not insulated by immunity.[45]

CONCLUSION

House Bill No. 8055 redraws the line between private and public property established by the Rhode Island Supreme Court in 1982. While the bill may be motivated by salutary goals, licensing the public-at-large to use private lands appropriates a fundamental right of ownership and takes private property for public use. Consequently, if the legislation is enacted, the State of Rhode Island will be exposed to a clear risk of substantial legal and financial liability.

(emphasis added); *Opinion of the Justices*, 365 Mass. 681, 689 (1974) (rejecting argument that state's "police power" could justify an uncompensated taking).

[44] The statute appears to envision an enforcement scheme carried out by the Coastal Resources Management Council, the Department of Environmental Management, and the Rhode Island Attorney General. The Supreme Court's opinion in *Ex Parte Young*, 209 U.S. 123 (1908), allows suits in federal court for declaratory and prospective injunctive relief against state officials when the state acts contrary to any federal law or the constitution. Damages and attorneys' fees may also be available under 42 U.S.C. § 1983.

[45] *Allen v. Cooper*, No. 5:15-CV-627-BO, 2021 WL 3682415 (E.D.N.C. Aug. 18, 2021); *Devillier v. Texas*, No. 3:20-cv-00223, 2021 WL 3889487 (S.D. Tex. July 30, 2021).

ATTACHMENT 2

ADLER POLLOCK & SHEEHAN P.C.

One Citizens Plaza, 8th floor
Providence, RI 02903-1345
Telephone 401-274-7200
Fax 401-751-0604 / 351-4607

175 Federal Street
Boston, MA 02110-2210
Telephone 617-482-0600
Fax 617-482-0604

www.apslaw.com

April 11, 2022

VIA EMAIL & REGULAR MAIL

The Hon. Robert E. Craven
Chair, House Judiciary Committee
State House
82 Smith Street
Providence, RI 02903

Re: House Bill 8055, An Act Relating to Waters and Navigation – Coastal Resources Management Council

Dear Chairman Craven:

On April 5, 2022, I provided a written legal analysis and oral testimony to the House Judiciary Committee concerning House Bill 8055, which proposes to reduce the area along Rhode Island's shoreline that constitutes private property without compensation to current landowners. Please accept this brief correspondence in reply to arguments raised during the Committee's hearing.

Several witnesses testified that an amendment to our state constitution proposed by the 1986 Constitutional Convention was intended to overrule the 1982 decision in *State v. Ibbison*. **This is incorrect. This interpretation is not only inconsistent with the amendment's plain language, but also with records showing that the Convention explicitly rejected multiple attempts to define the "shore." The amendment means what it says: it defines the "privileges" of the shore—*what* rights citizens may exercise, not *where* they may exercise them. It did not make *Ibbison* "obsolete."**

Under the 1843 state constitution, Section 17 stated, in pertinent part, "[t]he people shall continue to enjoy and freely exercise all the rights of fishery, and privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state . . . ." The 1843 constitution did not define "the privileges of the shore" or "the shore" itself.

The General Assembly did not define "the shore" in the years that followed. The Rhode Island Supreme Court exercised its core duty of interpreting the law in *Ibbison* to fill the void. As the Committee has heard at length, the Court construed the line between "the shore" and private

property—the "boundary . . . at which the land held in trust by the state for the enjoyment of all its people ends"—as the mean high tide line.[1]

In 1986, Rhode Island held a Constitutional Convention. The text of Section 17 was amended to read as follows: "The people shall continue to enjoy and freely exercise all the rights of fishery, and privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, *including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore.*"

The best source of a law's meaning is its plain language. In addition, however, the Convention staff prepared an annotated version of the newly amended Constitution explaining why the convention adopted particular amendments.[2] As the commentary explains, *Ibbison* and the mean high tide line were the subject of "long deliberation." The Committee on Executive and Independent Agencies understood that *Ibbison* "determined that the landward boundary of the shore is the mean high tide line" as determined over an 18.6-year cycle.[3] After considering several alternatives, "the [C]ommittee left the definition of the term 'shore' for judicial determination."[4]

What the Committee was actually concerned about was "the absence of a constitutional definition of the 'privileges of the shore' to which Rhode Islanders are entitled."[5] The Committee thus recommended defining the "privileges of the shore" to reflect at least four particular rights: (1) fishing from the shore; (2) gathering seaweed; (3) leaving the shore to swim; and (4) passage along the shore. Nowhere in this commentary does it suggest the Convention meant "passage along the shore" to have anything other than its ordinary meaning—i.e., the right to move over or across "the shore." The Committee knew exactly what land constituted "the shore" in 1986 based on *Ibbison* and did nothing to change it.

Primary source records documenting the Convention's work support this commentary. The Committee considered at least two resolutions defining the "shore" in a manner that is remarkably like House Bill 8055. On March 5, 1986, Resolution 86-00069 was introduced to define "the shore" as "that area below the tidal high water or vegetation line . . . ." The Resolution was considered by the Committee and defeated.[6]

---

[1] Professor Sean Lyness has argued that *Ibbison* is inconsistent with at least one earlier decision of the Rhode Island Supreme Court and that it was wrongly decided. He does not appear to dispute, however, that *Ibbison* in fact decided exactly where the public right of access begins and ends on Rhode Island's shoreline and that our Supreme Court's ruling remains "undisturbed" to this day.

[2] *Annotated Constitution of the State of Rhode Island and Providence Plantations* (1988).

[3] *Id.* at 9.

[4] *Id.* at 10.

[5] *Id.* at 9.

[6] Resolution 86-00069 (attached hereto as Exhibit A).

On March 31, 1986, the President of the Convention, Kevin H. McKenna, introduced Resolution 86-00217 to make another attempt at defining the shore. The resolution proposed to amend Section 17 to state:

> The shore shall hereby be defined as those lands over which the daily tides ebb and flow: those lands below the mean high water line. The State shall hereby hold these lands in trust for the use and enjoyment of its citizens, but the rights of the shore shall not be denied on those lands which extend to one rod above the daily high water mark made by the flux of the sea at high tide or which extend from the sea to the mean high water line, whichever is greater . . .[7]

Mr. McKenna's proposal was "considered and tabled" on May 20, 1986. In other words, it was postponed indefinitely and never passed.

The Convention had at least two opportunities to overrule *Ibbison*. It chose not to do so. The idea that the Convention rejected these resolutions but nonetheless intended to secretly render *Ibbison* a nullity by using the phrase "passage along the shore" strains credulity. It is a tortured reading that should be accorded no weight.

As the United States Supreme Court recently made clear, a state cannot remove the right to exclude others from private land and simultaneously contend that there has been no compensable taking. House Bill 8055 would have precisely that effect. Again, I urge the Judiciary Committee to not recommend passage.

Very truly yours,

Daniel J. Procaccini
dprocaccini@apslaw.com

Enclosures

cc: Roberta DiMezza, Clerk, House Judiciary Committee
Members of the House Judiciary Committee

[7] Resolution 86-00217 (emphasis added) (attached hereto as Exhibit B). A rod is a unit of measurement equal to 16 ½ feet.

Exhibit A

86-00069

STATE OF RHODE ISLAND

IN CONSTITUTIONAL CONVENTION

JANUARY SESSION, A.D. 1986

A RESOLUTION
RELATING TO SHORE ACCESS AND
PRESERVATION

Introduced By: David M. Chmielewski

Date Introduced: March 5, 1986

Referred To: Executive Branch and Independent Agencies

David M. Chmielewski, District 79

86-00069

86-00069
(1)

STATE OF RHODE ISLAND

IN CONSTITUTIONAL CONVENTION

JANUARY SESSION, A.D. 1986

A RESOLUTION
RELATING TO SHORE ACCESS AND PRESERVATION

Introduced By: David M. Chmielewski

Date Introduced: March 5, 1986

Referred To: Executive Branch and Independent Agencies

It is resolved by the Constitutional Convention as follows:

SECTION 1. Section 1 of Article XXXVII of the Amendments to the Rhode Island Constitution entitled, "Conservation" is hereby amended to read as follows:

"Sec. 1. PRESERVATION OF NATURAL RESOURCES. - Article I, § 17 of the state constitution is hereby amended by striking out this said section as it now appears and inserting in place thereof the following new section:

"§ 17. The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state~~; and they~~ including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea, and passage along the shore. The shore, that area below the tidal high water or vegetation line, is to be held in trust by the state for the access, use and enjoyment of the people of the state. The people of the state

shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state."

SECTION 2. This resolution shall take effect upon voter approval.

E X P L A N A T I O N

By

Convention Legal Services

This resolution would preserve to the citizens of Rhode Island certain shore access rights: fishing or swimming from the shore, gathering of seaweed, and passage along the shore.

This resolution would take effect upon voter approval.

****
JM-050 *
****

Exhibit B

86-00217

STATE OF RHODE ISLAND

IN CONSTITUTIONAL CONVENTION

JANUARY SESSION, A.D. 1986

A RESOLUTION

RELATING TO SHORE ACCESS AND PRESERVATION

Introduced By:

Date Introduced:

Delegate Name: Kevin H McKenna

District Number: #10

by request of Wickford Fishermen's Alliance and Gerald M. Carvalho and John Finneran ~~Wiley~~

Referred To:

It is resolved by the Constitutional Convention as follows:

RESOLVED, That a majority of all the delegates elected to the Rhode Island Constitutional Convention voting therefor, the following Amendment to the Constitution of the State be proposed to the qualified electors of the State in accordance with the provisions of Article XLII of Amendments to the Constitution, for their approval to be denominated as follows:

SECTION 1. Article XXXVII, Section 1 of the Amendments to the Rhode Island Constitution is hereby amended to read as follows:

"§1. Preservation of natural resources. -- Article I, §17 of the State Constitution is hereby amended by striking out this said Section as it now appears and inserting in place thereof the following new Section:

"§17. The people shall continue to enjoy and freely exercise all the rights of *the free and common* fishery, and the *rights and/or* privileges of the shore, to which they have been heretofore entitled under the Charter *granted by King Charles II* and usages of this State *including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea, passage along the shore, and access to the shore. The shore shall hereby be defined as those lands over which the daily tides ebb and flow: those lands below the mean high water line. The State shall hereby hold these lands in trust for the use and enjoyment of its citizens, but the rights of the shore shall not be denied on those lands which extend to one rod above the daily high water mark made by the flux of the sea at high tide or which extend from the sea to the mean high water line, whichever is greater, provided that in exercising these rights, a person shall assume all risk for his actions and shall be held responsible so as not to cause harm to the littoral land owner or his private property; nor shall the exercise of these rights create an easement or be construed as an 'adverse use' of said private property. Let nothing herein confer upon any person any right which is greater or less than those that are free and common to all the people of the State;* and they shall be secure in their rights to the use and enjoyment of the natural resources of the State with due regard for the preservation of their values; and it shall be the duty of the General Assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the State, and to adopt all means necessary and proper by law to protect the natural environment of the people of the State by providing adequate resource planning for the control and regulation of the use of the natural resources of the State and for the preservation, regeneration and restoration of the natural environment of the State."

RESOLVED, That the said proposition of amendment shall be submitted to the electors for their approval or rejection at the next state wide general election. The voting places in the several cities and towns shall be kept open during the hours required by law for voting therein for general officers of the State, and be it further

RESOLVED, That the Secretary of State shall cause the said proposition of amendment to be published as a part of this resolution in the newspapers of the State prior to the day of the said meetings of the said electors; and the said proposition shall be inserted in the warrants or notices to be issued previous to said meetings of the electors for the purpose of warning the town, ward, or district meetings, and said proposition shall be read by the town, ward, or district meetings to be held as aforesaid; and be it further

RESOLVED, That the town, ward, and district meetings to be held as aforesaid shall be warned, and the list of voters shall be canvassed and made up, and the said town, ward, and district meetings shall be conducted in the same manner as now provided by law for the town, ward, and district meetings for the election of general officers of the State.

FINDINGS
AND
EXPLANATION OF INTENT
BY

The authors of this resolution

The following is a footnoted version of the foregoing amended sections of the Constitution of the State. Each footnote contains the authors intent of each passage to which a footnote refers.

"§1. Preservation of natural resources. -- Article I, §17 of the State Constitution is hereby amended by striking out this said Section as it now appears and inserting in place thereof the following new Section:

"§17. The people shall continue to enjoy and freely exercise all the rights of *the free and common*[1] fishery, and the *rights and/or*[2] privileges of the shore, to which they have been heretofore entitled under the Charter *granted by King Charles II* [1.1] and usages of this State *including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea, passage along the shore, and access to the shore.*[3] *The shore shall hereby be defined as those lands over which the daily tides ebb and flow: those lands below the mean high water line.*[4] *The State shall hereby hold these lands in trust for the use and enjoyment of its citizens, but the rights of the shore shall not be denied on those lands which extend to one rod above the daily high water mark made by the flux of the sea at high tide or which extend from the sea to the mean high water line, whichever is greater,*[5] *provided that in exercising these rights, a person shall assume all risk for his actions and shall be held responsible so as not to cause harm to the littoral land owner or his private property; nor shall the exercise of these rights create an easement or be construed as an 'adverse use' of said private property .*[6] *Let nothing herein confer upon any person any right which is greater or less than those that are free and common to all the people of the State,*[7] and they shall be secure in their rights to the use and enjoyment of the natural resources of the State with due regard for the preservation of their values; and it shall be the duty of the General Assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the State, and to adopt all means necessary and proper by law to protect the natural environment of the people of the State by providing adequate resource planning for the control and regulation of the use of the natural resources of the State and for the preservation, regeneration and restoration of the natural environment of the State."

[1]In the Charter granted by King Charles II (1663), therein it so states "*Provided also,* and our express will and pleasure is, and we do, by those presents, for us, our heirs and successor, ordain and appoint that these presents, shall not, in any manner, hinder any of our loving subjects, whatsoever, from using and exercising the trade of fishing upon the coast of New England, in America; but that they, and every or any of them, shall have full and free power and liberty to continue and use the trade of fishing upon the said coast." Therefore, the rights of the marine fishery belong freely, without purchase, and equally to all the citizens.

[1.1]This clarifies the historical reference "charter and usages" so that the antiquity of these rights is self-evident in that they stem from the creation of the Colony of Rhode Island in 1663.

[2]In Jackvony vs. Powel (1941), 67 RI 218, the court so recognized "that there must have been some such 'privileges' which were then recognized as belonging to the people and which the framers and adopters of the constitution intended to change into 'rights' beyond the power of the general assembly to destroy." This addition more clearly defines that intent.

[3]This lists some of the common law rights of the shore belonging to the public which have been frequently claimed by the public or have been described by authors who have discussed the law pertaining to the rights of the shore, Jackvony vs. Powel (1941), 67 RI 218.

[4]In the State vs. Ibbison III (1982), 442 A. 2d 728, therein, is defined the point to which the shore extends on its landward boundary. The setting of this boundary fixes the point at which the land held in public trust by the State for the enjoyment of all its people ends and private property belonging to littoral land owners begins.

[5]This guarantees to the people the rights of the fishery and the rights of the shore when taking into consideration that according to the State vs. Ibbison III (1982), 448 A. 2d 728, "the range of the tide at any given place varies from day to day." The exercise of these rights by the people is and shall be a valid exercise of the police powers of the sovereign and does not constitute a "taking" as in the exercise of the power of eminent domain. According to Pitsenberger vs. Pitsenberger, 410 A. 2d 1052, "To constitute a taking in the constitutional sense, so that the State must pay compensation, the state must deprive the owner of all beneficial use of the property. ...it is not enough for the property owner to show that the state action causes substantial loss or hardship. ...In sum, the use and possession order does not amount to a 'taking' of private property in violation of the federal or state constitutions." Further, in Andrus vs. Allard (1979), 444 US 51, "government regulation - by definition - involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*. 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.' ... The Takings clause, therefore, preserves governmental power to regulate, subject only to the dictates of ' ' justice and fairness.' '... But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety. ... a reduction in the value of property is not necessarily equated with a taking." **More simply stated, this provision of our Constitution which allows the people to use the littoral land owner's private property, which lies above the mean high tide line, when the lands below the mean high tide line are covered with tide water, making them practically useless for the exercise of the rights of the shore, is constitutional in the eyes of the US Supreme Court. Since, it limits only one of the "bundle" of traditional property rights; diminishing "one 'strand' of the bundle is not a taking."**

[5cont.] Additionally, in C.B. & Q. Railway vs. Drainage Commissioners (1905), 200 US 561, "...this court recognized the principle that injury may often come to private property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guarantee against the deprivation of property without due process of law, or against the taking of private property for public use without compensation. ... If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. ... the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police power regulations, although they may interfere with the full enjoyment of private property and though no compensation is given.'" See also Annicelli vs. Town of South Kingstown et al. (1983), 463 A. 2d 133. Furthermore, the US Supreme Court held in Lake Shore & M. S. R. vs. Ohio (1898), 173 US 285, that "The power of the State by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals or the public safety. Whether legislation of either kind is inconsistent with any power granted to the General Government is to be determined by the same rules." See also Milardo vs. CRMC (1981), 434 A. 2d 266. **Simply stated, the State may use its police power's to protect the rights of the people "for the public good" and even "for the public convenience" without a "taking" of private property occuring.**

[6] This protects the littoral property owner from damage by any person exercising these rights, by making that person answerable or liable for his actions. This reasonably protects the littoral property owner from liability should accident or injury occur in the exercising of the people's rights of the shore.

[7] In the State vs. Cozzens (1850), 2 RI 561, "In other words, the constitutional right is so regulated as to reserve to the public the greatest benefit." as in the licensing of commercial fishermen. Where, in the State vs. Kofines (1911), 33 RI 211, "...it is manifest that if the interest of all are to be conserved the fishing must be carried on for the ultimate benefit of the people of the state and not merely for the profit and emolument of the fishermen engaged in the business."

ADDITIONAL FINDINGS

According to the Charter of King Charles II, all lands of what is now the State of Rhode Island and Providence Plantations were originally of his dominion[8] and were "grant[ed] and confirm[ed], unto the said Governor and Company and their successors." But in granting these lands, King Charles created a prior easement of use of those lands along the shore to his "loving subjects." "*Provided also,* and our express will and pleasure is, and we do, by those presents, for us, our heirs and successor, ordain and appoint that these presents, shall not, in any manner, hinder any of our loving subjects, whatsoever, from using and exercising the trade of fishing upon the coast of New England, in America; but that they, and every or any of them, shall have full and free power and liberty to continue and use the trade of fishing upon the said coast,". Therefore, all shore front property in the State of Rhode Island is subject to that prior easement and the burden of proof to title in fee simple, free and clear of the restraint imposed by this prior easement, lies with an aggrieved littoral land owner who should seek to deny the decendents of and/or the successors of King Charles II's "loving subjects" their historical rights to the shore.

The State has the soveriegn right to determine the balance of the public rights vs. the private rights among its citizens. "To deny the right of every state to make such distinction would be to annihilate the sovereignty of the States, and to establish a consolidated government in their sted," State vs. Medbury (1855), 3 RI 138. Further stated in Gilman vs. Philadelphia (1865), 70 US 713, "Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation the reserved power of the States is plenary, and its exercise in good faith cannot be made the subject of review by this court."

[8]From the Charter granted by King Charles II, "And further, know ye, that we, of our more abundant grace, certain knowledge, and mere motion, have given, granted and confirmed, and by these presents, for us, our heirs and successors, do give, grant and confirm, unto the said Governor and Company and their successors, all that part of our dominions in New England; in America,".

ATTACHMENT 3

ADLER POLLOCK & SHEEHAN P.C.

One Citizens Plaza, 8th floor
Providence, RI 02903-1345
Telephone 401-274-7200
Fax 401-751-0604 / 351-4607

175 Federal Street
Boston, MA 02110-2210
Telephone 617-482-0600
Fax 617-482-0604

www.apslaw.com

May 31, 2022

VIA EMAIL & REGULAR MAIL

The Hon. Robert E. Craven
Chair, House Judiciary Committee
State House
82 Smith Street
Providence, RI 02903

Re: House Bill 8055, An Act Relating to Waters and Navigation – Coastal Resources Management Council

Dear Chairman Craven:

I write in response to the recent submissions concerning a ruling of the United States Court of Appeals for the Seventh Circuit in *Pavlock v. Holcomb*, 2022 WL 1654038 (7th Cir., May 25, 2022) (enclosed herein) and its relationship to the above-referenced legislation.

The Seventh Circuit's *Pavlock* ruling is irrelevant. Contrary to the characterizations of others, the facts of that case are wholly distinguishable from the taking proposed in House Bill 8055.[1] *Pavlock* concerns a Fifth Amendment takings claim based on a ruling by the Indiana Supreme Court declaring *for the first time* where the public land of Lake Michigan ends and private property beings. *See Gunderson v. State,* 90 N.E.3d 1171 (Ind. 2018). In *Gunderson*, the Indiana Supreme Court held in a case of first impression that the boundary was the ordinary high-water mark. The Seventh Circuit held, among other things, that because there was no established property right, there was no taking from the *Pavlock* plaintiffs. Furthermore, the remedy the plaintiffs sought would not achieve their desired outcome—changing title to the land.

The state of Rhode Island law is nothing like that of Indiana. Here, the boundary between public and private shoreline property was—at a minimum—firmly established in 1982 when our Supreme Court decided *State v. Ibbison.* It is the mean high tide line. House Bill 8055 does not propose to alter title to property landward of that line; instead, it eliminates the right to exclude the public from any portion of a landowner's property between the mean high tide line and the new boundary,

[1] I understand that the bill was recently amended to reduce the number of feet above the high tide line that members of the public my enter private property from 10 feet to 6 feet. This amendment does not alter whether the bill proposes an uncompensated taking in any way.

just as California attempted to eliminate the right to exclude union organizers in *Cedar Point v. Hassid*, 141 S. Ct. 2063 (2021).

In *Pavlock,* the plaintiffs' sought to recapture title to land they claimed was taken that "was never privately owned in the first place." *Pavlock*, 2022 WL 1654038 *7. There is no dispute that Rhode Island's shoreline property owners currently own the land above the mean high tide line. They would continue to own it (and be taxed on it) if the General Assembly enacts the proposed legislation, but they will be forced to allow any member of the public access to that land 24 hours a day, 365 days per year.[2]

Pavlock does not change the pertinent legal analysis in any way. House Bill 8055 proposes to take away an established right of private property without compensation.

Very truly yours,

Daniel J. Procaccini
dprocaccini@apslaw.com

Enclosure

cc: Roberta DiMezza, Clerk, House Judiciary Committee

[2] For the same reasons, a Rhode Island plaintiff would not have the same redressability or causation issues that the *Pavlock* plaintiff's encountered.

2022 WL 1654038
Only the Westlaw citation is currently available.
United States Court of Appeals, Seventh Circuit.

Randall PAVLOCK, et al., Plaintiffs-Appellants,

v.

Eric J. HOLCOMB, Governor of Indiana, et al., Defendants-Appellees.

No. 21-1599

Argued November 10, 2021

Decided May 25, 2022

Synopsis

Background: Beachfront property owners brought § 1983 action against state officials, including Governor, Attorney General, Department of Natural Resources Director, and Acting Director of Land Office, alleging that decision of Indiana Supreme Court, that State held exclusive title in public trust to Lake Michigan and its shores up to lake's ordinary high-water mark, resulted in taking of their property in violation of the Fifth Amendment. The United States District Court for the Northern District of Indiana, Jon E. DeGuilio, Chief Judge, dismissed the action. Property owners appealed.

Holdings: The Court of Appeals, Wood, Circuit Judge, held that:

owners' alleged injury from taking without just compensation was not redressable, as required to support standing, in § 1983 action, and

property owners' alleged injury was not traceable to or caused by any misconduct by named defendants, as required to support standing.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 2:19-cv-00466-JD — **Jon E. DeGuilio**, *Chief Judge.*

Attorneys and Law Firms

Christopher M. Kieser, Attorney, Pacific Legal Foundation, Sacramento, CA, Kathryn Daly Valois, Attorney, Pacific Legal Foundation, Palm Beach Gardens, FL, for Plaintiffs-Appellants.

Aaron T. Craft, Benjamin M. L. Jones, Attorneys, Office of the Attorney General, Indianapolis, IN, for Defendant-Appellees.

Before Manion, Wood, and Scudder, Circuit Judges.

Opinion

Wood, Circuit Judge.

***1** In *Gunderson v. State*, 90 N.E.3d 1171 (Ind. 2018), the Indiana Supreme Court held that the State of Indiana holds exclusive title to Lake Michigan and its shores up to the lake's ordinary high-water mark. See *id.* at 1173. *Gunderson* was an unwelcome development for plaintiffs Randall Pavlock, Kimberley Pavlock, and Raymond Cahnman, who own beachfront property on Lake Michigan's Indiana shores. Believing that their property extended to the *low*-water mark, they brought this lawsuit in federal district court alleging that the ruling in *Gunderson* amounted to a taking of their private property in violation of the Fifth Amendment. They would like to hold the state supreme court responsible for this alleged taking. In other words, they are asserting a "judicial taking."

The plaintiffs, whom we will call the Owners, sued a number of Indiana officeholders in their official capacities: Governor Eric Holcomb; the Attorney General, now Todd Rokita; the Department of Natural Resources Director, now Daniel Bortner; and the State Land Office Director, now Jill Flachskam. (We have identified the current officeholders, none of whom was in place when the complaint was filed, with the exception of Governor Holcomb. We have substituted the current officials for their predecessors in accordance with Federal Rule of Appellate Procedure 43(c)(2). We refer to the defendants collectively as the State.) The district court granted the State's motion to dismiss for failure to state a claim. Because none of the named officials caused the Owners' asserted injury or is capable of redressing it, we conclude that the Owners lack Article III standing and affirm the judgment of the district court, though we modify it to show that it is without prejudice.

I

A

Indiana has long held in trust the portion of Lake Michigan that lies within its borders and the submerged lands below the water. See *Lake Sand Co. v. State*, 68 Ind.App. 439, 120 N.E. 714, 715–16 (1918). The shores of Lake Michigan are surrounded by privately-owned property. Owners of private lakeshore property, including our plaintiffs, and the State dispute where the line should be drawn between the public and private holdings. In 2014, the Pavlocks' neighbors filed a quiet-title action against Indiana in state court. That was the *Gunderson* case, in which the Indiana Supreme Court first attempted to fix that line.

The *Gunderson* plaintiffs, like the Owners here, took the position that their deeds conferred title (and thus the right to exclude the public) past the lake's ordinary high-water mark, all the way down to the low-water mark. See *Gunderson*, 90 N.E.3d at 1175. The ordinary high-water mark is a commonly used method of measuring the boundaries of non-tidal bodies of water. At common law, it was defined as "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 (collecting authorities) (internal quotation marks omitted); compare 33 C.F.R. § 328.3 (2021) (defining the ordinary high-water mark for the Army Corps of Engineers). By contrast, the low-water mark is the lowest level reached by a lake or a river (for example, a lake's low point during a dry season). *Low-Water Mark*, OXFORD ENGLISH DICTIONARY (3d ed. 2013).

***2** The state supreme court sided with Indiana in *Gunderson*, interpreting state law to require "that the boundary separating public trust land from privately-owned" lakefront property "is the common-law ordinary high water mark." *Gunderson*, 90 N.E.3d at 1173. The court reached its decision by tracing the history of the public-trust doctrine. It began by applying the Equal-Footing doctrine, see, *e.g.*, *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590–91, 132 S.Ct. 1215, 182 L.Ed.2d 77 (2012), under which Indiana received exclusive title to the lands underlying the Great Lakes when the state was admitted to the Union

in 1816. *Gunderson*, 90 N.E.3d at 1176–77 (citing *Martin v. Waddell's Lessee*, 41 U.S. 367, 414, 16 Pet. 367, 10 L.Ed. 997 (1842) (holding that when the original thirteen states "became themselves sovereign" each acquired "the absolute right to all their navigable waters and the soils under them for their own common use"); *Utah v. United States*, 403 U.S. 9, 10, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971) (holding that, under the " 'equal footing' principle," later-admitted states acquired "the same property interests in submerged lands as was enjoyed by the Thirteen Original States"); *Hardin v. Jordan*, 140 U.S. 371, 382, 11 S.Ct. 808, 35 L.Ed. 428 (1891) (extending public ownership over navigable waters and underlying land "to our great navigable lakes, which are treated as inland seas.")). Following the weight of authority, the state supreme court concluded that "Indiana at statehood acquired equal-footing lands inclusive of the temporarily-exposed shores of Lake Michigan up to the natural [ordinary high-water mark]." *Id.* at 1181.

The Indiana Supreme Court then asked whether, at some point between statehood and the present day, the state relinquished title to the land below Lake Michigan's ordinary high-water mark. This issue, it recognized, is one of state law. See *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376–77, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977) (explaining that, while the Equal-Footing doctrine is a matter of federal law, "subsequent changes in the contour of the land, as well as subsequent transfers of the land, are governed by the state law"). To answer that question, the court examined its own cases, the Lake Preservation Act, Ind. Code § 14-26-2-5, and other provisions of the Indiana Code. It concluded that, with the exception of discrete parcels not relevant here, Indiana has never relinquished title to Lake Michigan's shores below the ordinary high-water mark. *Gunderson*, 90 N.E.3d at 1182–85. Thus, as a matter of state law, the court concluded that Indiana holds absolute title to the lands under Lake Michigan up to the ordinary high-water mark. Private landowners in Indiana may thus hold title only to beachfront property above (*i.e.* land-ward of) that boundary. *Id.* at 1182.

Shortly after *Gunderson* was decided, the Indiana General Assembly passed House Enrolled Act (HEA) 1385, which codified the *Gunderson* decision. The Act stipulates that:

> (a) Absent any authorized legislative conveyance before February 14, 2018, the state of Indiana owns all of Lake Michigan within the boundaries of Indiana in trust for the use and enjoyment of all citizens of Indiana.
>
> (b) An owner of land that borders Lake Michigan does not have the exclusive right to use the water or land below the ordinary high water mark of Lake Michigan.

Ind. Code § 14-26-2.1-3. The plaintiffs argue that HEA 1385 further broadened public use of the Lake Michigan shoreline. *Gunderson* held that "***at a minimum***, walking below the [ordinary high-water mark] along the shores of Lake Michigan" is a protected public use, along with commerce, navigation, and fishing. *Gunderson*, 90 N.E.3d at 1188. The statute, however, expressly recognizes public uses such as boating, swimming, and other ordinary recreational uses. Ind. Code § 14-26-2.1-4(b).

B

Because this case was resolved on a motion to dismiss, we accept all well-pleaded factual allegations in the complaint as true. *Hardeman v. Curran*, 933 F.3d 816, 819 (7th Cir. 2019).

The Owners all hold title to beachfront property on the Lake Michigan shore. None of them was a party to *Gunderson* (though Cahnman participated as *amicus curiae*). Like the Gunderson plaintiffs, the Owners here allege that their property deeds cover land that extends down to Lake Michigan's low-water mark. Therefore, they argue, when the Indiana Supreme Court determined that the state has always held title to the land all the way up to the ordinary high-water mark, Indiana's highest court "took" (for Fifth Amendment purposes) a portion of their property without just compensation. HEA 1385, they argue, was also an uncompensated taking, because it expanded *Gunderson*'s easement to permit additional uses.

*3 Faced with this unfavorable ruling from the state court, the Owners turned to the federal court, filing this action under 42 U.S.C. § 1983 against the state defendants we mentioned, all of whom are sued in their official capacities. The Owners want the federal court to issue a declaratory judgment stating that the Indiana Supreme Court's decision in *Gunderson* (and HEA 1385) effected an uncompensated taking of their property between the ordinary high-water mark and the low-water mark. They also seek a permanent injunction barring the state defendants from enforcing *Gunderson* and HEA 1385. The Owners concede that their challenge to HEA 1385 turns on their judicial-takings claim. If *Gunderson* stands, it follows that the Owners never held title to the land below the ordinary high-water mark, and the legislation therefore had no effect on their property rights. The Owners are not seeking compensation for the alleged taking; they want only to be able to exclude members of the public from the lands they claim.

The district court granted the State's motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). It held that the Owners' claims are functionally equivalent to a quiet-title action, and so are barred by sovereign immunity under *Idaho v. Coeur d'Alene Tribe of Idaho*. See 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (establishing a narrow exception to the *Ex parte Young* doctrine). The court declined to reach the question whether it is possible to state a claim for a judicial taking. Even if the answer were yes, the court reasoned, the Owners could not show that they ever held an "established right" to the property allegedly taken by the state court through *Gunderson*. See *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot.*, 560 U.S. 702, 713, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010).

II

In this court, the Owners have tried to develop their "judicial takings" theory. They contend that the Indiana Supreme Court itself took their property through its *Gunderson* decision, and no state actor has paid them for it. Before discussing this theory any further, it is helpful to provide some context for it.

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The Takings Clause applies to the states through the Fourteenth Amendment, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163–65, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), but that does not necessarily mean that it applies to the states' judiciaries. The Supreme Court last considered the judicial-takings question in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, but in that case, no majority of the Court agreed on "whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause[.]" 560 U.S. 702, 734, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010) (Kennedy, J., concurring). Since then, neither this court nor any of our fellow circuits have recognized a judicial-takings claim.

In *Stop the Beach*, only four justices endorsed the argument that a court decision settling disputed property rights under state law could, in some circumstances, violate the Takings Clause. See *id.* at 706, 713–14, 130 S.Ct. 2592. There, owners of littoral property challenged a decision of the Florida Supreme Court resolving an open question about the boundary between their private holdings and state-owned land. The case turned on a Florida statute that authorized local governments to restore eroding beaches; under the statutory scheme, the state fixed an "erosion control line" that replaced "the fluctuating mean high-water line as the boundary between" private and state property wherever the preservation projects took place. *Id.* at 709–10, 130 S.Ct. 2592. Beachfront property owners sued in state court, arguing that the law deprived them of their property rights without just compensation. The Florida Supreme Court rejected that argument, holding instead that the law did not violate Florida's version of the Takings Clause (which mirrors its Fifth Amendment counterpart). See *Stop the Beach*, 560 U.S. at

712, 130 S.Ct. 2592. The property owners appealed to the Supreme Court, arguing that the Florida Supreme Court took their property rights "by declaring that those rights did not exist[.]" *Stop the Beach*, 560 U.S. at 729, 130 S.Ct. 2592.

***4** Writing for four Justices, Justice Scalia urged the Court to declare that a judicial decision resolving contested property rights could be a taking. In his view, there was "no textual justification" for "allow[ing] a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Id.* at 714, 130 S.Ct. 2592. Justice Scalia's plurality opinion proposed a new test for identifying when a judicial taking occurs: "[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Id.* at 715, 130 S.Ct. 2592 (emphasis in original).

Justices Kennedy and Breyer filed separate opinions concurring in part, and concurring in the judgment, in which they expressed grave doubts about the judicial-takings concept; Justice Stevens, the ninth Justice, took no part in the decision. Justice Scalia's opinion on the key point did not marshal a majority, and no "controlling principle [on the judicial takings issue] can be gleaned" from the plurality and concurring opinions. *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 615 (7th Cir. 2014). Indeed, much of the discussion about judicial takings could be regarded as *dicta*, because the Court unanimously held that in any case, the relevant state-court decision did not effect a taking because it did not "eliminate[ ] a right [ ] established under Florida law." *Stop the Beach*, 560 U.S. at 733, 130 S.Ct. 2592 ("The Takings Clause only protects property rights as they are established under state law[.]").

Justice Kennedy (joined by Justice Sotomayor) took the position that the state's "vast" power to take property, so long as it acts for a public purpose and provides just compensation, belongs only to the democratically accountable legislative and executive branches. *Stop the Beach*, 560 U.S. at 734–35, 130 S.Ct. 2592 (Kennedy, J., concurring in the judgment). If an arbitrary or irrational judicial decision "eliminates an established property right," he wrote, that decision could be "invalidated under the Due Process Clause" as a deprivation of a property right without due process. *Id.* at 735, 130 S.Ct. 2592. The due-process constraint allows states to make reasonable "incremental modification under state common law" but bars courts from "abandon[ing] settled principles." *Id.* at 738, 130 S.Ct. 2592. But, he thought, recognizing a claim for judicial takings implies that the courts have the power to take property *with* compensation—a power "that might be inconsistent with historical practice." *Id.* at 739, 130 S.Ct. 2592 (discussing the Framers' view of the Takings Clause). Moreover, he wrote, the judicial-takings theory would raise vexing procedural and remedial issues. *Id.* at 740, 130 S.Ct. 2592. In a second opinion concurring in the judgment, Justice Breyer (joined by Justice Ginsburg) raised comity and federalism concerns, noting that a claim for judicial takings "would create the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law." *Id.* at 744, 130 S.Ct. 2592 (Breyer, J., concurring).

Since *Stop the Beach* was decided, 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. Instead, each court has assumed without deciding that *if* such a cause of action were to exist, the relevant test would be the one Justice Scalia suggested in his *Stop the Beach* plurality opinion: did some arm of the state declare that "what was once an established right of private property no longer exists"? 560 U.S. at 715, 130 S.Ct. 2592. In each of the cases that have reached our sister circuits, the courts have held that the challenged state-court decision had not erased an *established* property right. Thus, even if there were a theoretical claim for a "judicial" taking, the plaintiffs failed. See *Wells Fargo Bank v. Mahogany Meadows Ave. Tr.*, 979 F.3d 1209, 1215–16 (9th Cir. 2020) (declining to answer whether judicial-takings claims are possible when "nothing in Nevada law" showed that plaintiffs had an "established right" to disputed property); *Petrie ex rel. PPW Royalty Tr. v. Barton*, 841 F.3d 746, 756 (8th Cir. 2016) (opting not to decide whether a claim for judicial takings exists where

it "would have failed" anyway); *In re Lazy Days' RV Ctr. Inc.*, 724 F.3d 418, 425 (3d Cir. 2013) (quickly discarding a claim that a bankruptcy order was a taking because "adjudication of disputed and competing claims cannot be a taking").

III

*5 The Owners have a different, antecedant problem in the case before us: that of Article III standing. See *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009) ("[T]he court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties."). The test for standing is a familiar one: "[a] plaintiff has standing only if he can allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *California v. Texas*, —— U.S. ——, 141 S. Ct. 2104, 2113, 210 L.Ed.2d 230 (2021) (citing cases; internal quotations omitted). The party invoking federal jurisdiction has the burden of proving each of these requirements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). We are satisfied that the Owners have alleged injury in fact, insofar as they assert that their property was taken without just compensation. They fall short, however, when it comes to causation and redressability.

A

We begin with redressability. The Owners must show that it is "likely ... that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 (internal quotations omitted). They have not done so. None 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 HEA 1385. Even if we were to agree with the Owners, therefore, a judgment in their favor would be toothless.

Redressability turns on the "connection between the alleged injury and the judicial relief requested." *Allen v. Wright*, 468 U.S. 737, 753 n.19, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The Owners' injury stems from the fact that, for many years, Indiana courts had not decided where the public land of Lake Michigan ends and private property begins. The *Gunderson* decision resolved that uncertainty by definitively holding that the boundary lies at the ordinary high-water mark. Essentially, the Owners think that the state supreme court erred by making that decision (either as a matter of state law or federal law), and they would like us to overturn that court's ruling. Until it is set aside, the Owners contend, they have been deprived of their asserted title to the land between the high-and low-water marks without just compensation.

There are a number of problems with this approach, not least of which is that we lack authority to overrule a state supreme court. But the straightforward point is that none of the state defendants the Owners have named—not the Governor, not the Attorney General, not the Indiana Department of Natural Resources, and not the State Land Office—has the power to confer title on the Owners to land that Indiana's highest court says belong to the state. No injunction we enter can fix that problem.

Typically, a lawsuit alleging that a plaintiff "suffered a violation of his Fifth Amendment rights" is redressable through compensation. *Knick v. Township of Scott*, —— U.S. ——, 139 S. Ct. 2162, 2168, 204 L.Ed.2d 558 (2019). But the Owners did not sue for compensation from the state of Indiana—and even if they had, it is not clear that federal courts could provide it. The Supreme Court's recent decision in *Knick v. Township of Scott* held that a plaintiff may "bring a 'ripe' federal takings claim in federal court," without first exhausting state remedies, "as soon as a government takes his property for public use without paying for it." *Id.* at 2167, 2170. But unlike *Knick*, which involved a suit against a town, the Owners' suit is against a state, and states enjoy sovereign immunity. See *Jinks v. Richland County*, 538 U.S. 456, 466, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit."). Every circuit to

consider the question has held that *Knick* did not change states' sovereign immunity from takings claims for damages in federal court, so long as state courts remain open to those claims. See *Zito v. N.C. Coastal Res. Comm'n*, 8 F.4th 281, 286–88 (4th Cir. 2021); see also *Ladd v. Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020), cert. denied, —— U.S. ——, 141 S. Ct. 1390, 209 L.Ed.2d 129 (2021); *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019); *Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 456–57 (5th Cir. 2019), cert. denied, —— U.S. ——, 140 S. Ct. 2566, 206 L.Ed.2d 497 (2020). In addition, states are not "persons" for purposes of 42 U.S.C. § 1983. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), and so damages are not available using that theory. Recognizing these hurdles, the Owners seek only equitable and declaratory relief.

***6** Specifically, the Owners want an injunction barring the State from enforcing *Gunderson* or HEA 1385. Assuming for the moment that *Ex parte Young*'s exception to sovereign immunity applies here, see Section IV.A *infra*, and that we can entertain such a request, it remains true that such an injunction would not redress the Owners' injury. Once again, that alleged injury comes from the fact that *Gunderson* recognized that the Owners' property interests end at the ordinary high-water mark on Lake Michigan's shores. An injunction barring the State from enforcing the decision would do nothing to alter the state's title to the land.

Gunderson recognized that members of the public have a right to walk on the beach in front of the Pavlocks' house as long as they stay lakeward of the high-water mark; an injunction requiring the State to refrain from any action would not grant the Pavlocks the right to exclude. If Cahnman wants to sell his beachfront property, he may convey land only from the high-water mark. The requested injunction would not give him title to submerged lands that Indiana law (confirmed by both the state's highest court and its legislature) says belongs to the state. To the extent the Owners' deeds conflict with *Gunderson* and HEA 1385, the latter two sources govern. And if, for example, the Pavlocks tried to sue people who walked on the section of beach between the high-and low-water marks for trespass, or Cahnman tried to hoodwink a buyer by representing that he held title down to the low-water mark, an injunction against state officials would not prevent Indiana's Recorder's Offices from correcting that error, or Indiana courts from applying *Gunderson*.

In this respect, the Owners' judicial takings claim differs materially from the one at issue in *Cedar Point Nursery v. Hassid*, —— U.S. ——, 141 S. Ct. 2063, 210 L.Ed.2d 369 (2021), in which "the government physically [took] possession of property without acquiring title to it." *Id.* at 2071. In *Cedar Point*, California agricultural employers challenged a state regulation that guaranteed union organizers physical access to their property to organize farmworkers. *Id.* at 2069. The Supreme Court held that California's access regulation was a *per se* physical taking requiring compensation and remanded the case for further proceedings. *Id.* at 2080. The *Cedar Point* plaintiffs, like the Owners, sought only declaratory and injunctive relief. But unlike our plaintiffs, the California growers' injury was not the loss of a dispute about who held title; it was the uncompensated taking of property that they indisputably owned. A court could redress that injury prospectively by enjoining enforcement of the regulation, or retrospectively by ordering just compensation. See *id.* at 2089 (Breyer, J., dissenting). Here, by contrast, ordering any of the named state defendants not to enforce a state property law cannot redress the Owners' injuries, because non-enforcement will not change the content of the underlying law itself.

B

The Owners have also failed to establish the related causation requirement for Article III standing. As the parties asserting federal jurisdiction, they must show that their alleged injury is "fairly traceable" to a defendant's allegedly illegal action, "and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (citing *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)) (cleaned up).

The property between the high- and low-water marks is held in public trust, but not because of any action taken by these state defendants. Rather, that property is held in public trust because the Indiana Supreme Court, an independent actor, settled the *Gunderson* dispute as a matter of state law, and the state legislature then confirmed that result. The court relied on a long line of federal and state decisions recognizing the Equal-Footing doctrine and setting the boundaries between Indiana's public trust lands and surrounding private property. See *Gunderson*, 90 N.E.3d at 1179–87. The Owners attempt to dodge this problem by suing state officials who are charged with enforcing state property law. As we already have said, however, the state's enforcement or non-enforcement has no effect on the underlying title to the land. Moreover, the Owners' complaint does not include any allegations showing that the state defendants' enforcement of *Gunderson* has caused any further injury that they have not already experienced as a result of the decision itself. The Owners' injury is therefore traceable not to the state defendants, but to the independent actions of the Indiana Supreme Court.

C

*7 The Owners' causation and redressability problems high-light the federalism and comity concerns that are inherent in the judicial-takings theory. In *Gunderson*, the Indiana Supreme Court resolved a state-law issue of first impression and issued a thorough decision determining where the public-private boundary lies on the shores of Lake Michigan. If the court is correct, then the property between the ordinary high-water mark and the low-water mark could not have been taken, because it was never privately owned in the first place. See *Conyers v. City of Chicago*, 10 F.4th 704, 711 (7th Cir. 2021) (noting that there is a "predicate requirement [in Takings cases] that the private property [allegedly taken] must belong to the plaintiff.") The Owners may be able to say, in good faith, that their expectations were disturbed, just as any losing party in a state court case involving disputed property rights might do. But it is the role of "the state court ... to define rights in land located within the states." *Fox River Paper Co. v. R.R. Comm'n of Wis.*, 274 U.S. 651, 657, 47 S.Ct. 669, 71 L.Ed. 1279 (1927) (adding that "the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be nonexistent"). If the Owners never had title to this property under Indiana law, it could not have been "taken" by the state.

As we noted earlier, it is state property law itself, rather than any action by the state parties, that is adverse to the Owners' claims. We would be unable to hold that their property was taken without also holding that *Gunderson* was wrongly decided. In effect, their theory of the case would have us sit in appellate review of the Indiana Supreme Court's decision about state property law—a role that would sit uneasily next to the Supreme Court's exclusive "statutory authority to review the decisions of state courts in civil cases." *Milchtein v. Chisholm*, 880 F.3d 895, 897 (7th Cir. 2018) (citing 28 U.S.C. § 1257). We recognize, in this connection, that the *Rooker-Feldman* doctrine does not apply here, because the Owners were not parties to the *Gunderson* litigation. See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). Nonetheless, that doctrine's animating federalism values counsel us to proceed cautiously when a novel legal theory raises the specter of a lower federal court reviewing the merits of a state supreme court's decision.

IV

Before concluding, we note that the district court dismissed this case for two additional reasons. First, it held that it lacked subject-matter jurisdiction because this case falls under a narrow exception to the *Ex parte Young* doctrine established by the Supreme Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). Generally, a plaintiff may sue under *Ex parte Young*'s exception to the Eleventh Amendment's sovereign-immunity bar so long as the complaint "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon*

Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). In *Coeur d'Alene Tribe*, however, the Supreme Court announced that the *Ex parte Young* rule has a narrow exception for a "quiet title suit against [a state] in federal court" or a suit for injunctive relief that is "close to the functional equivalent of quiet title." 521 U.S. at 281–82, 117 S.Ct. 2028; see also ERWIN CHEMERINSKY, FEDERAL JURISDICTION (7TH EDITION) 471, 477–78 (2016).

Pointing to some criticism of *Coeur d'Alene Tribe*, the Owners suggest that it was a one-way, one-day case with no further applicability, or alternatively, that it does not apply to suits brought by private property holders rather than Tribal nations. The State responds that *Coeur d'Alene Tribe* remains good law and squarely governs this case, because it is "close to the functional equivalent of quiet title." *Coeur d'Alene*, 521 U.S. at 282, 117 S.Ct. 2028.

The district court agreed with the State. In addition, it held that even assuming the judicial-takings theory might apply somewhere, the Owners had not managed to state a claim under it here. Recall that Justice Scalia's proposed test for a judicial taking requires plaintiffs to show that "the property right allegedly taken was *established*" as a matter of state law, prior to the decision. See *Stop the Beach*, 560 U.S. at 728, 130 S.Ct. 2592 (emphasis added). The district court thought that the Owners' complaint revealed on its face that no such right was established. Prior to *Gunderson*, it noted, the status of Indiana's Lake Michigan coastline had been ambiguous at best. The Owners have not and could not show that the Indiana Supreme Court's decision was a sharp or unexpected departure from a clearly established property right. Rather, the state court in *Gunderson* settled an unclear and disputed issue of first impression. The district court therefore noted that, even if it had jurisdiction over the case, it would have dismissed the Owners' action for failure to state a claim under Rule 12(b)(6).

***8** Because the Owners lack standing to sue the state defendants, we need not reach either the *Coeur d'Alene* issue or the alternative ruling under Rule 12(b)(6) today. We merely note that the Owners could not prevail without also overcoming these additional hurdles.

V

The Owners contend that the Indiana Supreme Court's decision in *Gunderson v. Indiana* unconstitutionally took their property without compensation. Because they have sued the Indiana Governor and several state executive officials who neither caused the asserted injury nor can redress it, they lack standing to sue under Article III of the Constitution. We therefore AFFIRM the district court's dismissal of the complaint for lack of subject-matter jurisdiction, although we modify it to a dismissal without prejudice.

All Citations

--- F.4th ----, 2022 WL 1654038

End of Document