Lines in the Sand: How Amending the Criminal Trespass Statutes Affects Rhode Islanders' Coastal Property Rights

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INTRODUCTION

Despite being the smallest state in land area, Rhode Island's bays, coves and islands unfold nearly 400 miles of picturesque shoreline. The shore is a vital crossroads for life in the Ocean State. Its waterfront has supported the commercial and domestic lives for

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its citizens from its first days as a colony. Today, it plays host to an abundance of public beaches, parks, resorts, recreational facilities, restaurants, and private homes in addition to fisheries, aquaculture, and other marine industries in the "blue economy." Tourism continues to be a critical driver of local commerce, pouring millions of visitors and billions of dollars into the State annually. Accordingly, since its founding, the State has endeavored to craft laws and policies that strike an equitable balance between competing uses of this shared natural resource.

The General Assembly is presently weighing legislation that would transform the relationship between public and private use of waterfront property. House Bill No. 5469 and Senate Bill No. 521 each propose amending the state's penal statutes to eliminate criminal culpability for trespass on shoreline properties so long as a person is exercising "privileges of the shore" within 10 feet of the "most recent high tide line." ("Proposed Amendments"). The motive underlying these bills is salutary. The means, however, are legally dubious and deeply troubling.

First, the Proposed Amendments are incompatible with bedrock Rhode Island law establishing the *mean high tide line*—a precise, scientifically measured boundary—as the landward limit of public access to littoral property. The legislation sweeps so broadly that, for all practical purposes, it grants the public at large a continuous right to traverse someone else's land 24 hours a day, 365 days a year without consent and without shielding landowners from liability. The legislation accordingly constitutes an uncompensated taking under the federal and state constitutions, obliging the State to pay littoral landowners fair market value for any affected property.

Second, irrespective of any taking, the Proposed Amendments render the trespass statutes unconstitutionally vague. A reasonable person trying to interpret the statute would not understand

where they may exercise the "privileges of the shore" it refers to or *what* conduct is actually permitted. The legislation's ambiguity would likewise provide responding officers with unbridled discretion, promoting arbitrary and discriminatory enforcement of the law. The proposal is therefore fundamentally unfair and does not pass constitutional muster.

BACKGROUND

I. Waterfront Property in the Ocean State

Rhode Island's shoreline is defined by its dynamic character. As land at the junction of dry earth and tidal waters, it is subject to forces that continually alter its size, shape, and composition (erosion, sedimentation, sea level rise, and human engineering just to name a few). In addition to its peculiar natural features, our State's shoreline is also *legally* idiosyncratic: it is a class of property that—unlike any other—reflects a convergence of competing public and private rights of use and ownership. Consequently, the law has evolved to harmonize these historic privileges and responsibilities.

A. The Line Between Public and Private Shoreline

Public and private rights appurtenant to waterfront property have an extensive developmental history in the Ocean State and beyond. Tidal lands have occupied a unique legal status for centuries.[2] Under English common law, all land below the "ordinary high water mark" was held by the King subject to the public rights of navigation and fishing.[3] The original colonies inherited the "public trust doctrine," and it has been applied and refined by state courts ever since. Rhode Island is no exception. Our Supreme Court has repeatedly affirmed the public trust doctrine's core principles, which include that:

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[2] *See Champlin's Realty Assocs., L.P. v. Tillson*, 823 A.2d 1162, 1166 (R.I. 2003)

[3] *Id.*

(1) The State holds title to all land "below the high-water mark in a proprietary capacity for the benefit of the public,"[4]

(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,"[5] 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.[6]

The framers of the current Rhode Island Constitution made a conscious decision not to define the term "shore" in its text, leaving it instead for "judicial determination."[7] Although the mean high tide line is not always "readily identifiable by the casual observer," the Supreme Court found it has the advantage of being a precise scientific determination that "best balances the interests between littoral owners and all the people of the state."[8] The Court has held steadfast to this ruling for nearly three decades.

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

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

[6] *State v. Ibbison*, 448 A.2d 728, 732 (R.I. 1982); *see also 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.")

[7] Office of the Sec. of State, Constitution of the State of Rhode Island and Providence Plantations: Annotated Edition 10 (1988); *see also* Patrick T. Conley & Robert G. Flanders, Jr., The Rhode Island State Constitution: A Reference Guide 105 (1999) (hereinafter "Conley & Flanders").

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

B. Rhode Island's "Privileges of the Shore"

The Rhode Island Constitution reflects the importance of conserving the State's natural resources, including its shoreline. This is embodied principally in Article 1, § 17, which states in pertinent part:

> 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, 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; 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 . . . .

Section 17's history illuminates the breadth of the conduct encompassed by the phrase "privileges of the shore." The State's 1843 constitution contained the following corresponding language:

> 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. *But, no new right is intended to be granted, nor any existing right impaired, by this declaration.*" (emphasis added.)

In 1970, the rights-limiting terms emphasized above were deleted by amendment. The present language listing the four activities of fishing, gathering of seaweed, swimming, and passing along the

shore was supplied later during the 1986 constitutional convention, but the phrase "privileges of the shore" is not further defined.[9] A resolution from the convention's Committee on the Executive Branch and Independent Agencies confirms this was no accident: while the section enumerated four classic rights, the committee "intended that shore privileges should not be construed as limited . . . but should include all other privileges which the people historically enjoyed."[10]

II. Proposed Amendments to the Trespass Statutes

Rhode Island's willful trespass statute makes it a misdemeanor offense to "remain[] upon the land of another or upon the premises or curtilage of the domicile" once the owner or their agent has forbidden the intruder from doing so.[11] A separate statute similarly makes it a misdemeanor for a person to remain on the land of a private recreational facility (*e.g.*, a sporting or entertainment venue, including a golf course, beach, or bathing facility) if the owner or the facility's agent has forbidden the person from doing so, except that "the existing rights of fishers shall not be infringed."[12] Both statutes embody an "essential stick" in the bundle of common law property rights: the right of any landowner to control who occupies their property.[13]

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[9] Conley & Flanders at 103.

[10] *See* Office of the Sec. of State, Constitution of the State of Rhode Island and Providence Plantations: Annotated Edition 9 (1988); *see also* Conley & Flanders at 103.

[11] R.I. Gen. Laws § 11-44-26. This statute has an exception for holdover residential tenants.

[12] R.I. Gen. Laws § 11-44-28

[13] *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S. Ct. 2074, 2082, 161 L. Ed. 2d 876 (2005) (describing "the owner's right to exclude others from entering and using her property" as "the most fundamental of all property interests"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

House Bill No. 5469 and Senate Bill No. 521 propose to amend these statutes by carving out two broad exceptions for certain activities on coastline property. The proposed amendments (which are identical) state:

> No person shall be prosecuted, punished or subject to any penalty or forfeiture for or on account of conduct or an attempt to engage in conduct protected in the Rhode Island Constitution, Art. 1 § 17, when the conduct or attempted conduct occurs on a sandy or rocky shore and within ten feet (10') of the most recent high tide line. Protected conduct shall include, but not be limited to, fishing, gathering seaweed, swimming, and passage along the shore.

ANALYSIS

The Proposed Amendments collide head-on with at least two unavoidable legal hazards: (1) the takings clauses of the federal and state constitutions, which compel the State to provide just compensation whenever private property is taken for public use; and (2) the constitutional command that criminal statutes reasonably define what conduct is punishable.

If enacted, the Proposed Amendments will, for all practical purposes, give the public a permanent right to enter, occupy, and use private property at all times for uncertain purposes. Waterfront landowners across the State will accordingly have the right to just compensation, which will subject the State to incalculable financial liabilities. What's more, the Proposed Amendments are hopelessly ambiguous. They do not sufficiently define what conduct is permitted or prohibited, encouraging arbitrary enforcement of the law and rendering the statute unconstitutionally vague.

In sum, the Proposed Amendments conflict with state law and upset the balance of rights concerning Rhode Island's shoreline.

They only multiply the complexities surrounding unique land, subject the State to enormous financial liabilities, and increase the risk of arbitrary enforcement of the law.

I. Settled U.S. Supreme Court Law Establishes that the Proposed Amendments Are Uncompensated Takings.

The takings clauses of the United States Constitution and the Rhode Island Constitution provide that private property shall not be taken for public use without just compensation.[14] As the U.S. Supreme Court has emphasized, this mechanism "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[15]

Takings fall into two broad classes: physical and regulatory. A "physical taking" occurs when there is a physical appropriation of an interest in real or personal property.[16] 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."[17] The U.S. Supreme Court has carved out two sub-categories of regulatory action that comprise *per se* takings under the Fifth Amendment: (1) where a regulation compels a property owner to "to suffer a permanent physical invasion of her property—however minor," and (2) when regulations wipe out "all

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[14] *See* U.S. Const. Amend. V; R.I. Const. Art. I, § 17.

[15] *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). This analysis focuses principally on federal jurisprudence under the U.S. Constitution's Takings Clause as federal laws prevail over contrary state laws or constitutional provisions. The history of the state constitution's takings clause itself suggests that it should be construed to the limits allowed by the federal constitution. *See, e.g.*, Conley & Flanders at 100.

[16] See Horne v. Department of Agriculture, 576 U.S. 350, 363-64 (2015).

[17] *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 33 (1st Cir. 2002) (quotation marks omitted); *see also Andrews v. Lombardi*, 231 A.3d 1108, 1128 (R.I. 2020)

economically beneficial us[e]" of a property."[18] Under other circumstances, the three factors articulated in *Penn Central Transp. Co. v. New York City* govern whether there has been a compensable taking: (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.[19]

If challenged, a court would likely find that the Proposed Amendments effect a *per se* taking under settled law. Accordingly, if the legislation is adopted, the State will be categorically liable to all owners of littoral land in Rhode Island for the fair market value of any property taken.

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.[20] 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.[21] The Court found that the Commission's condition was a taking and that there was no "essential nexus" to a legitimate state interest. Accordingly, the Court held that if the commission wanted a public easement, it had to pay for it.[22]

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[18] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005); *see also Petworth Holdings, LLC v. Bowser,* 308 F. Supp. 3d 347, 354 (D.D.C. 2018).

[19] Id. at 539 (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)).

[20] Put another way, the specific question presented by *Nollan* was whether the state could—without paying constitutionally-required compensation for effecting a taking—demand the public easement as a condition for granting a development permit the state was entitled to deny.

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

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

The Court's analysis in *Nollan* reveals the hidden danger posed by the Proposed Amendments. *Nollan* concerned a regulation that had the effect of causing a *per se* physical taking. 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.[23]

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*."[24] 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."[25]

The Supreme Court reached the same conclusion in *Dolan v. City of Tigard*.[26] 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.[27] 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

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

[24] *Id.* at 831 (emphasis added).

[25] *Id.* at 831-32.

[26] *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

[27] *Id.* at 379-80.

a dedication, a taking would have occurred."[28] 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.'"[29]

The Proposed Amendments demolish littoral landowners' essential rights as surely as the easements in *Nollan*, *Dolan*, and other cases. The legislation will, for all practical purposes, give the public-at-large a permanent right to enter, occupy, and use private property (that is, any land above the mean high tide line that is nevertheless within 10 feet of the "most recent high tide") on any day, at any time, for uncertain purposes.[30] It is hard to conceive of a scheme that could provide the public with a more "permanent and continuous right to pass to and fro" across the land of another.[31] Civil legal remedies such as temporary restraining orders or preliminary injunctions are, on their face, inherently inadequate for the task of protecting property under these circumstances. Such extraordinary measures are necessarily time-sensitive and highly individualized as well as expensive. Regardless, it is unimaginable that a littoral landowner could navigate an overburdened state legal system with sufficient alacrity to obtain timely injunctive relief on a daily basis against individuals who had to be compelled to leave their property. Thus, the Proposed Amendments do not merely regulate littoral landowners' property rights—they eviscerate them.[32]

If the Supreme Court's precedents leave any room for doubt—they do not—the Court will soon decide *Cedar Point Nursery v. Hassid*, which concerns whether a state's uncompensated appropriation of an easement that is limited in time effects a *per se* physical taking under the Fifth Amendment. The California law at issue forces

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[28] *Id.* at 384.

[29] *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))

[30] The ambiguity inherent in the statutory language is discussed, *infra.*

[31] *Nollan*, 483 U.S. at 832.

[32] *See Dolan*, 512 U.S. at 394

agricultural businesses to allow labor organizers onto their property three times a day for 120 days each year.[33] There is no mechanism for compensating the businesses. A divided panel of the Ninth Circuit declined to find the regulation effects a *per se* taking of private property because, among other things, the regulation "does not allow random members of the public to unpredictably traverse their property 24 hours a day, 365 days a year."[34]

Here, the Proposed Amendments are broader than the regulation in *Cedar Point Nursery*. Without a doubt, the legislation would permit the public to use, occupy, or traverse private property all day, every day.[35] What's more, it is far from clear that a landowner who is *forced* to accept the public on their property will be shielded by Rhode Island's recreational use statute, which is expressly limited to those who *invite* the public on to their land.[36] The Proposed Amendments thus effect a "permanent physical occupation" by eliminating the fundamental right to exclude. Upon passage, a littoral landowner's rights to compensation will be categorical. The only question will be how much they are owed.[37]

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[33] *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 528 (9th Cir. 2019), cert. granted sub nom. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 844 (2020).

[34] The panel's additional grounds for declining to find a *per se* taking—that "the sole property right affected by the regulation is the right to exclude," *id.* at 532—arguably misconstrues the fundamental nature of this right.

[35] It cannot go unremarked that the delegates to the 1986 convention expressly declined to define the term "shore" based on the likelihood that it would be found to be a taking without just compensation. *See* Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island's Shore* 24 Suffolk U. L. Rev. 313, 326 (1990).

[36] *See* R.I. Gen. Laws § 32-6-3.

[37] Furthermore, as the Supreme Court recently clarified, litigants seeking just compensation may immediately bring a civil rights claim under 42 U.S.C. § 1983, which may entitle them to attorneys' fees under 42 U.S.C. § 1988. *See Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) (holding claims under § 1983 are ripe as soon as the government takes private property without just compensation).

II. The Proposed Amendments Do Not Provide Potential Defendants or Law Enforcement with Reasonable Notice of Prohibited Conduct.

The ambiguity of the Proposed Amendments is an independent shortcoming. As amended, the trespass statutes would not enable a reasonable person to understand (1) where conduct within the scope of the proposed exceptions could occur; and (2) what conduct is actually prohibited. On top of that, the new terms introduce internal inconsistencies that compound the lack of clarity. The Proposed Amendments would thus render the statutes unconstitutionally vague.

As the Rhode Island Supreme Court explained in *State v. Russell*, a penal statute is void for vagueness under Fourteenth Amendment Due Process Clause if it (1) "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or (2) "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement."[38] Fairness is key; an innocent party should not be "trapped by inadequate warning of what the state forbids."[39] The General Assembly is accordingly obliged to "draft a criminal statute 'to provide an ordinary citizen with the information necessary to conform his or her conduct to the law.'"[40] "These minimal requirements for enforcement of penal laws 'prevent standardless sweep[s that] allow[] policemen, prosecutors, and juries to pursue their personal predilections.'"[41] To gauge a challenged statute, a court must ask "whether the disputed verbiage

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[38] *State v. Russell*, 890 A.2d 453, 459 (R.I. 2006).

[39] *State v. Authelet*, 385 A.2d 642, 644 (R.I. 1978) (citing *State v. Picillo*, 252 A.2d 191 (R.I. 1969)).

[40] *State v. Russell*, 890 A.2d 453, 459 (R.I. 2006) (quoting *State ex rel. Town of Westerly v. Bradley*, 877 A.2d 601, 605 (R.I.2005)) (cleaned up).

[41] *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

provides adequate warning to a person of ordinary intelligence that his conduct is illegal by common understanding and practice."[42]

The Proposed Amendments do not satisfy this standard of fairness. First, putting aside its other shortcomings, a reasonable person would not be able to locate the "most recent high tide line" with even a modicum of precision. The legislation offers no explanation of what the "most recent high tide line" is or how an observer standing on "sandy or rocky shore" might determine its location. Common sense teaches that wet sand or rocks are *not* reasonably reliable indicators of the "most recent high tide." Sand and stone dry at different rates under different conditions (or not at all in inclement weather). Water may have traveled further upland for reasons that have nothing whatsoever to do with the tide, including the passage of marine vessels or strong winds. The so-called "wrack" line (the stretch of organic debris left behind by the tide) is a similarly unreliable indicator. Seaweed or other material on the shore deposited by the tide may linger long after waters recede. Some beaches may have multiple wrack lines showing a normal high tide, a spring tide, and a storm tide. Is the ten foot buffer zone measured from the piece of seaweed farthest upshore or closer to the water?

The failure of the Proposed Amendments to resolve these issues also creates an internal inconsistency: If the ten-foot zone falls within the "curtilage" of a residence, is someone within the zone nevertheless a trespasser?[43] Comparable concerns exist regarding environmentally sensitive coastal features. There is no limitation, for example, if the ten-foot zone encroaches on a protected wildlife

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[42] *Authelet*, 120 R.I. 42, 45, 385 A.2d 642, 644 (1978).

[43] The "curtilage" is itself not easily defined. *See, e.g.*, *U.S. v. Acosta, 965 F.2d 1248* (3d Cir. 1992) (relevant factors that cannot be "mechanically applied" include (1) the area's proximity to the main residence; (2) any enclosure of the property or area; (3) use of the property or area; and (4) steps taken to protect the property or area from view).

conservation area, such as bird nesting grounds. State regulations make it unlawful for individuals to occupy certain waterfront parks after sunset. Would individuals exercising their "privileges of the shore" nevertheless be entitled to remain?

Compounding the ambiguity over where a person may exercise "privileges of the shore" is the uncertainty hovering over *what* they may do. On its face, the phrase "privileges of the shore" does not provide "fair warning" about what conduct is forbidden. This ambiguity was intentional. The delegates to the constitutional convention knowingly adopted an imprecise phrase to capture a broad swath of indeterminate conduct.

To be sure, the Proposed Amendments refer to four classic "privileges" as referenced in Article I, § 17 of the state constitution: fishing, gathering seaweed, swimming, and passage along the shore. The list, however, is neither exhaustive nor provides law enforcement with "objective criteria" against which possible violations may be measured.[44] Does "swimming" or "passage along the shore" necessarily permit sunbathing? Picnicking? Outdoor cooking? Recreational sports? Reasonable persons (beachgoers, landowners, and law enforcement officers) are left to guess. Even worse, the Proposed Amendments provide camouflage for discriminatory motives, which one could plausibly paper over using the statutes' "vague and pliable" language.[45]

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[44] *See Evergreen Association, Inc. v. City of New York*, 740 F.3d 233, 244 (2d Cir. 2014) (quoting *United States v. Schneiderman*, 968 F.2d 1564,1568 (2d Cir.1992) (reversing vagueness finding as statute provided six enumerated factors for considering whether a facility had "the appearance of a licensed medical facility" and was therefore subject to particular regulations); *Austin LifeCare, Inc. v. City of Austin, No. A-11-CA-875-LY,* 2014 WL 12774229, at *1 (W.D. Tex. June 23, 2014) (finding list of two nonexclusive factors allowed enforcement based on "unspecified criteria").

[45] *See Amidon v. Student Ass'n of State Univ. of New York at Albany*, 508 F.3d 94, 104 (2d Cir. 2007) (holding non-exclusive criteria guiding use official discretion did not curve vagueness as, *inter alia* some criteria were "indefinite as to be meaningless and thus incapable of providing guidance . . . ."); *see also Austin LifeCare*, 2014 WL

U.S. District Judge William E. Smith's ruling in *URI Student Senate v. Town of Narragansett* provides an illustrative counterexample.[46] In that case, state university students and rental property owners challenged a town nuisance ordinance banning "unruly gatherings" as, among other things, unconstitutionally vague.[47] The ordinance stated, in pertinent part:

> It shall be a public nuisance to conduct a gathering of five or more persons on any private property in a manner which constitutes a substantial disturbance of the quiet enjoyment of private or public property in a significant segment of a neighborhood, *as a result of conduct constituting a violation of law*. Illustrative of such unlawful conduct is excessive noise or traffic, obstruction of public streets by crowds or vehicles, illegal parking, public drunkenness, public urination, the service of alcohol to minors, fights, disturbances of the peace, and litter.[48]

The Court found that, although the phrase "substantial disturbance" was vague, "a key precondition of enforcement" was that the conduct necessitating legal intervention was "a violation of the law," specific examples of which were provided.[49] The plaintiffs did not even argue that the ordinance's reference to unspecified crimes (a nonexclusive category) or the enumerated offenses were, in and

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12774229, at *1 (finding, *inter alia*, the undefined phrase "full time [medical] practice" was not "sufficiently definite to enable an ordinary person to determine what is required" and did not safeguard against arbitrary enforcement).

[46] 707 F. Supp. 2d 282 (D.R.I. 2010).

[47] *Id.* at 288, 292.

[48] *Id.* at 288 (emphasis added).

[49] *Id.* at 294.

of themselves, ambiguous.[50] Indeed, the examples provided in the ordinance only sharpened an already reasonably specific predicate requirement—a "violation of the law."[51]

The Proposed Amendments' terms are quite different. Unlike "violation of the law," the phrase "privileges of the shore" has no obvious meaning. Its ambit is not defined *anywhere*, including in Article I, § 17. There are no objective criteria provided to guide shore-going individuals or law enforcement; the few enumerated examples are themselves ambiguous and do little—if anything—to delineate the line between permissible and prohibited conduct.

The proposed scheme in fact resembles the unconstitutional ordinance in *Austin LifeCare, Inc. v. City of Austin,* wherein plaintiffs challenged a law compelling unlicensed pregnancy service centers to comply with a signage requirement or face criminal penalties.[52] The law at issue required the service center to display a sign disclosing whether the facility performed "medical services," which was defined as "includ[ing], without limitation, diagnosing pregnancy or performing a sonogram."[53] "Although perfect clarity and precise guidance have never been required," the Court wrote, "[the law's] list of only two nonexclusive factors allows the City to classify a 'medical service' based solely on unspecified criteria" and found the ordinance facially vague.[54] The same is true here. If adopted, the Proposed Amendments would enable police officers or prosecutors to limit or expand the "privileges of the shore" based on uncertain criteria. The amended statutes would be fundamentally unfair and would encourage—not curb—arbitrary legal enforcement.

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[50] *Id.*

[51] *Id.*

[52] *Austin LifeCare*, 2014 WL 12774229, at *1.

[53] *Id.* at *2.

[54] *Id.* at *7.

CONCLUSION

House Bill No. 5469 and Senate Bill No. 521 are unprecedented. No state has attempted to enact legislation that attempts to carve out a shoreline zone from private property where the laws of trespass are not enforced. The absence of similar statutes is telling in and of itself, as are the frequent legal rulings rejecting unilateral legislative attempts to sculpt "rights of passage" on littoral property without compensation.[55]

As currently constructed, the Proposed Amendments are neither an effective nor an equitable means of reconciling the public and private rights over Rhode Island's shared shoreline. The legislation's vague terms fail to provide fair notice concerning what conduct is permitted where, and supply no reasonably guidance for enforcement. Furthermore, by licensing the public-at-large to use and traverse private lands at will and failing to redress those who will bear the burden of this decision, the General Assembly will have effected an uncompensated taking, subjecting the State to an extraordinary financial liability of untold millions.

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[55] *See, e.g.*, *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); *Purdie v. Att'y Gen.*, 732 A.2d 442 (N.H. 1999) (holding New Hampshire legislature exceeded the common law limits of the public trust doctrine by extending public trust rights to the highest high water mark rather than the mean high water mark without compensation); *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) (holding statute subjecting intertidal lands to public trust would constitute an uncompensated taking).