

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.	:	
ROBERT MERRILL, Trustee, et al.,	:	Case No. 2009-1806
	:	
Plaintiffs-Appellees	:	On Appeal from the
	:	Lake County Court of Appeals
and	:	Eleventh Appellate District
	:	
HOMER S. TAFT, et al.,	:	
	:	
Intervening Plaintiffs-	:	
Appellees-Cross-Appellants	:	Court of Appeals Case Nos.
	:	2008-L-007, 2008-L-008
v.	:	Consolidated
	:	
STATE OF OHIO, DEPARTMENT	:	
OF NATURAL RESOURCES, et al.,	:	
	:	
Defendants-Appellants-	:	
Cross-Appellees,	:	
	:	
and	:	
	:	
STATE OF OHIO,	:	
	:	
Defendant-Appellant-	:	
Cross-Appellee	:	
	:	
and	:	
	:	
NATIONAL WILDLIFE FEDERATION, et al.,	:	
	:	
Intervening Defendants-	:	
Appellants-Cross-Appellees.	:	

BRIEF OF AMICUS CURIAE SAVE OUR SHORELINE
IN SUPPORT OF CLASS PLAINTIFFS-APPELLEES

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INTEREST OF AMICI CURIAE

Formed in August of 2001, Save Our Shoreline (“SOS”) is a grassroots Michigan nonprofit membership corporation committed to the preservation of riparian rights. In Michigan those rights include the right of ownership (including exclusive use) of Great Lakes riparian lands to the water’s edge, wherever that may be at any given time. Since its formation in 2001, the grassroots group rapidly grew to over 3,000 households. The organization is responding to what it perceives as an organized effort of state and federal government, and others, to increase public control of the lakeshores, to the prejudice of private owners and the principle of private property.

As a result, the organization has participated by way of amicus brief or financial support in numerous state and federal actions, including *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 536 U.S. 903, 122 S.Ct. 2355 (mem), 153 L.Ed.2d 178 (2002) (regarding reach of Clean Water Act jurisdiction); *U. S. v. Marion L. Kincaid Trust*, 463 F.Supp. 680 (E.D. Mich. 2006) (alleged violation of Clean Water Act on Lake Huron beach); *Glass v. Goeckel*, 683 N.W.2d 719, 262 Mich. App. 29 (2004); *Glass v. Goeckel*, 703 N.W.2d 58, 473 Mich. 667 (2005); *Goeckel v. Glass*, 546 U.S. 1174, 126 S.Ct. 1340, 164 L.Ed.2d 54 (2006); and *Stop the Beach Renourishment, Inc. v. Florida*, ___U.S.___, 130 S.Ct. 2592, 177 L. Ed.2d 184 (2010) (alleged judicial taking). In addition to its amicus efforts, Save Our Shoreline has pursued and obtained passage of Michigan’s beach grooming law, 2003 P.A. 14, and successfully obtained legislation banning propagation of the invasive, nonnative wetland (and beach) plant *phragmites* in Michigan.

Save Our Shoreline opposes the recent actions of some courts to confiscate constitutionally protected riparian rights by judicial decision.

INTRODUCTION

In recent decades, the rights of riparian owners have been under siege. Increasingly, governments and others seek to acquire for the public substantial rights previously sold to, and bought and paid for by, waterfront owners—but without paying for them. The new battlefield is the courts, which governments and others invite to use their power to simply deny rights that their predecessors had clearly acknowledged. The battle between Great Lakes riparians trying to protect their property rights and those seeking to take them was recently fought in Michigan. In *Glass v. Goeckel*, 683 N.W.2d 719, 262 Mich. App. 29 (2004), the Michigan Supreme Court sidestepped the issue of legal title more squarely before this Court. Nevertheless, the *Glass* court suddenly and unpredictably took away the most essential element of title—exclusive-use rights of Great Lakes riparians—and gave to the public beach-walking rights upon the riparian’s dry shore, in violation of the riparian’s constitutional rights under the 5th Amendment to the U.S. Constitution.

In his extensive and scholarly opinion in this case, Judge Lucci agreed with an “assessment of the Michigan case of *Glass v. Goeckel* as being poorly decided.” Opinion, p. 67. Amicus Save Our Shoreline (“SOS”) submits this brief in support of Judge Lucci’s conclusion, and to convince this Court that the travesty of justice committed by the Michigan Supreme Court in *Glass* should not be repeated in Ohio.

I. THE TRIAL JUDGE PROPERLY CONCLUDED THAT *GLASS v. GOECKEL* WAS “POORLY DECIDED.”

At least three briefs submitted to this Court urge that this Court follow the Michigan Supreme Court’s decision in *Glass v. Goeckel, supra*. In that case, the Michigan Supreme Court ostensibly declined to determine the extent or limit of riparian ownership on the Great Lakes in Michigan. Instead, without admitting it was doing so, the court took away the property owners’ most important right—exclusive use—and gave rights of use to the public:

Because walking along the lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting, and navigation, our public trust doctrine permits pedestrian use of our Great Lakes, up to and including land below the ordinary high water mark.

Glass, supra, at 674. This conclusion of the *Glass* court ignores, misstates, and mischaracterizes longstanding Michigan precedent putting exclusive use to the water’s edge in the riparian. As a result, this Court should follow the lead of Judge Lucci and decline to consider *Glass* as instructive.

A. THE *GLASS* COURT IGNORED CLEAR AND LONG-ACCEPTED MICHIGAN PRECEDENT.

The right to exclude others is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994). The right to exclude others “is inherent in the concept of private property.” *Bott v. Department of Natural Resources*, 327 N.W.2d 838, 415 Mich. 45 (1982). Because ownership is the basis for exclusive-use rights, any discussion of those rights should first be premised on a discussion of ownership. The Michigan Supreme Court improperly omitted such an analysis in *Glass*. Had it done so, it could have only concluded that Great Lakes riparians own and have exclusive use to the water’s edge.

1. The Michigan Supreme Court Long Ago Found that Great Lakes Riparians Own and Have Exclusive Use of the Shore to the Water's Edge.

As explained in the landmark decision of *Hilt v. Weber*, 233 N.W. 159, 252 Mich. 198 (1930), the Michigan Supreme Court had long observed that riparians own, and have the concomitant right of exclusive use, to the water's edge. *Id.* at 222, citing *People v. Warner*, 74 N.W. 705, 116 Mich. 228 (1898). That precedent was briefly upset by *Kavanaugh v. Rabior*, 192 N.W. 623, 222 Mich. 68 (1923) and *Kavanaugh v. Baird*, 217 N.W. 2, 241 Mich. 240 (1928), which for the first time placed the boundary at the "meander line." The *Hilt* court expressly overruled the "*Kavanaugh* cases" and re-established the boundary at the water's edge, consistent with earlier cases such as *People v. Warner, supra*. Until *Glass, supra*, *Hilt* was the unquestioned and well-followed Michigan authority on the extent of riparian and public rights to the shore, as more thoroughly explained below.¹

2. The Michigan Supreme Court Long Ago Limited the Public Trust to the Water's Edge.

The extent of the public trust is a matter of state law. *Phillips Petroleum Co v. Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988). A lifetime before the errant *Glass* decision, Michigan rejected the proposition that the "public trust" extends beyond the water's edge of Michigan's Great Lakes shores. In *Hilt v. Weber*, the Michigan Supreme Court in 1930 duly recognized that the state held title to the lakebed *in trust* "for the preservation of the public rights of navigation, fishing, and hunting," and that the State "cannot sell the land, and cannot lease it for any purpose which would injure the trust or affect riparian rights." *Hilt* at 224-225. But the *Hilt* court went on to conclude that the trust ended with the state's title at the

¹ For an excellent discussion of the *Hilt* decision and its historical context, see Steinberg, "God's Terminus: Boundaries, Nature, and Property on the Michigan Shore, *The American Journal of American Legal History*, Vol. XXXVIII, P. 72 (1993).

water's edge. To support this holding, the court cited the "rule of reliction" that "the title of the riparian owner follows the shoreline under what has been graphically called 'a movable freehold.'" It cited *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L.Ed. 331 (1894) for the proposition that the rule of reliction "*is independent of the law governing the title in the soil covered by the water* (emphasis in original)." *Hilt* at 219. Finally, *Hilt* pointed out that even if the state's title extended shoreward of the water's edge, as the *Kavanaugh* cases suggested, it would be "a naked legal title in the state, without practical right of use." *Id.* at 225. This is because the riparian's rights are subordinate only to the public's "free and unobstructed use of navigable water for navigation"; and because "the riparian owner has the exclusive use of the bank and shore." *Id.* at 225-226. The dissent made the majority's decision crystal clear: "My Brother's opinion is far reaching, for it constitutes the Michigan shore line of 1624 miles private property, and thus *destroys* for all time *the trust vested in the State* for the use and benefit of its citizens (emphasis added)." *Id.* at 231.

In rejecting public rights to the shore, the *Hilt* court acknowledged the pressures on the court to appropriate the beaches to public use:

With much vigor and some temperature, the loss to the State of financial and recreational benefit has been urged as a reason for sustaining the *Kavanaugh* doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens vacation time, to work out the definite program to attract tourists begun by the State and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The State should provide proper parks and playgrounds and camping sites and other instrumentalities for its citizens to enjoy the benefits of nature. But to do this, the State has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the State, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The State must be honest.

Hilt at 224. The *Hilt* court therefore sided with the private shore owner, a policy choice which aided “development of the lake shores,” and allowed the state “to levy and collect taxes on the relicted land.” The *Hilt* court therefore affirmed in 1930 that the private owner “has full and exclusive use of the relicted land” representing the shore above the water’s edge. *Id.* at 226.

3. Michigan’s Courts Have Consistently Followed *Hilt*’s Holding of Riparian Ownership and Exclusive Use to the Water’s Edge, and Denied the State’s Claims of Public Trust Rights Beyond the Water’s Edge.

For 75 years since *Hilt v. Weber*, Michigan’s courts have consistently followed that decision. See, e.g., *Kavanaugh v. Baird* (On Rehearing), 235 N.W. 871, 253 Mich. 631 (1931) (quieting title of shore down to water in favor of riparian, and against state’s claim of trust title); *Staub v. Tripp*, 226 N.W. 667, 248 Mich. 45 (1931) (title extends to water’s edge); *Schofield v. Dingman*, 247 N.W. 67, 261 Mich. 611 (1933) (riparian owners on Lake Michigan generally enjoy exclusive rights to beach); *Meridian Twp v. Palmer*, 273 N.W. 277, 279 Mich. 586 (1937) (citing *Hilt*’s exclusive use rule and applying it to inland lake); *Thies v. Howland*, 380 N.W. 463, 424 Mich. 282 (1985) (citing *Hilt*’s exclusive use rule and applying it to inland lake); *Peterman v. Dep’t. of Natural Resources*, 521 N.W.2d 499, 446 Mich. 177 (1994) (finding that riparian rights include “exclusive use of the bank and shore”; that the right of exclusion is “one of the essential elements of property in land,” and affirming damage award against state for its destruction of Plaintiffs’ beach, including beach below “ordinary high water mark,” in constructing boat ramp).

These precedents were not just *dictum*, but involved the determination of substantial rights, including the state’s claim of public rights to the dry beach. For example, the *Hilt* court dealt with an assertion that because of the *Kavanaugh* holdings, a seller of beachfront property could not deliver marketable title to the beach. By finding that the seller could indeed deliver

both *title and exclusive use* to the water's edge, the Michigan Supreme Court found that the seller could perform his obligation to deliver title to the beach.

In *Kavanaugh v. Baird* (On Rehearing), *supra*, the riparian sued the state of Michigan (through Baird, Director of its Department of Conservation) to quiet title to Saginaw Bay shoreland between the meander line and the water's edge. The state defended by claiming title under what was then called its "trust" title, while the riparian claimed ownership to the low water mark or water's edge based upon his riparian rights. Based upon its holding in *Hilt*, the Michigan Supreme Court reopened the case and quieted title in the riparian.

Similarly, in *Peterman v. Dep't. of Natural Resources*, *supra*, a riparian owner on Grand Traverse Bay sued the state, through its Department of Natural Resources, which had built a boat launch next door. The faulty design of the boat launch prevented sand from accumulating on the riparian's beach. Finding that the riparian's title and rights of exclusive use were paramount to the state's navigation rights where a better design would not have interfered, the court affirmed an award of damages against the state for the riparian's loss of beach both above and below the so-called ordinary high water mark.²

4. Michigan's Attorneys General Have Consistently Issued Written Opinions that Riparians Have Exclusive Use to the Water's Edge.

Michigan's attorneys general have for decades consistently published opinions that Great Lakes riparians have exclusive use to the water's edge. See O.A.G. 1932-34, p. 287 (1933) ("the riparian title (on the Great lakes) goes to the water at whatever stage, the shore being subject to the *public use when it becomes covered with water* (emphasis added)"); O.A.G. 0-2249 (1944)

(state could not unilaterally grant a lease to extract oil from submerged Great Lakes lands because “lands formerly submerged... would become by reliction lands owned *and controlled* by the riparian owner (emphasis added)); O.A.G. 1977-1978, No.5327 (July 6, 1978) (“The riparian owner therefore has *trespass control to the water’s edge* (emphasis added)).” Indeed, there is no published opinion concluding that the public has a right to walk on dry Great Lakes beaches.

5. Michigan’s Land Title Standards Found the Law Undisputed That Riparians Own to the Water’s Edge.

The state’s mandatory organization of lawyers, the Michigan Bar Association, published Land Title Standards concluding that “[t]he waterfront boundary line of property abutting the Great Lakes is the naturally occurring water’s edge.” Michigan Land Title Standards, 5th Edition, Standard 24.6.³ Like the state’s prior court decisions and attorney general opinions, the Land Title Standard makes no suggestion that the inherent right of exclusive use is somehow impaired.

The foregoing authorities demonstrate that Michigan’s rule of riparian ownership and exclusive use to the water’s edge was well established. The *Glass* court erred in failing to acknowledge this substantial precedent against its decision.

² The *Glass* decision pounces upon *Peterman’s* recognition of a navigational servitude to launch its extension of all “public trust” rights beyond the shore, noting that the servitude is “rooted in the public trust doctrine.” *Glass* at 687, note 15. This is of no moment. *Hilt* recognized the same point, *Hilt* at 226, but nevertheless limited all other public rights to the water’s edge, and found title and exclusive use in the riparian. *Id.* at 226-227. See also Michigan Land Title Standards (6th Edition), Standard 24.3 (State Bar of Michigan 2007).

³ In a caveat, the Land Title Standard considers, but rejects, the proposition that the “ordinary high water mark” represents the boundary. The Land Title Standards Committee includes “only those principles of land title law which are clearly supported by the law of the state . . . as to which there are relevant statutes or cases which are reasonably definitive in their effect or holding. Points of law that are subject to some dispute, or as to which there are conflicting opinions, are not included . . . *Id.*, preface.

B. THE GLASS COURT MISSTATES AND MISCHARACTERIZES THE AUTHORITIES IT RELIES UPON TO DENY RIPARIANS THEIR EXCLUSIVE USE RIGHTS AND TRANSFER TO THE PUBLIC BEACH WALKING RIGHTS.

In its passage at page 224 cited above, the *Hilt* decision acknowledged the benefits of state ownership of the shores, but also warned that “[t]he state must be honest” in its endeavor to acquire them. But in *Glass v. Goeckel*, five of seven justices of the Michigan Supreme Court ignored and denied the exclusive use rights that Michigan Great Lakes shoreline owners long enjoyed. Instead, the majority presented a faulty presentation of existing precedent to reach a flawed and unjust result.

In *Glass*, the Michigan Court of Appeals reviewed Michigan law and concluded that because riparians “have the right to the exclusive use and enjoyment of their land to the water’s edge,” they may exclude trespassers. *Glass v. Goeckel, supra*. But in reversing, the Michigan Supreme Court simply ignored the clear holdings of *Warner, Hilt*, and subsequent decisions, the consistent published opinions of the state’s attorney general, and the guidance of the state’s bar association. Instead, it created out of whole cloth “the [public’s] right to walk along the shore of Lake Huron on land lakeward of the ordinary high water mark.” *Id.* at 675. In his vigorous and poignant dissent, Justice Markman recognized that this holding altered “the longstanding status quo in our state concerning the competing rights of the public and lakefront property owners” that existed “over 160 years and probably even earlier.” *Id.* at 709, 713. The Goeckels appealed to the US Supreme Court, complaining of a judicial taking⁴, but that Court denied *certiorari*. *Goeckel v. Glass, supra*.

⁴ On the issue of judicial takings by state courts, the U.S. Supreme Court has issued its loudest warning yet in *Stop the Beach Renourishment, Inc. v. Florida*, ___ U.S. ___, 130 S. Ct. 2592, 177 L. Ed.2d 184 (2010).

The *Glass* court’s analysis purports to be based on Michigan common law, but starts with a presentation of U.S. Supreme Court decisions addressing the extent of the public trust doctrine to the ordinary high water mark (OHWM) on oceans. *Glass* at 685-686. The *Glass* court then holds that “Michigan’s courts have adopted the ordinary high water mark as the landward boundary of the public trust,” and embarks upon a presentation attempting to prove the point. That presentation fails on each point, and simply lacks merit.

1. Mischaracterizing the *Peterman* Holding.

To support its position, the *Glass* court first cites *Peterman v. Dep’t. of Natural Resources*, 521 N.W.2d 499, 446 Mich. 177, 198-199 (1994):

For example, in an eminent domain case concerning property on a bay of Lake Michigan, we held that public rights end at the ordinary high water mark. *Peterman v. Dep’t of Natural Resources* [citation omitted]. Thus, we awarded damages for destruction of the plaintiff’s property above the ordinary high water mark that resulted from construction by the state (which occurred undisputedly in the water and within the public trust).

Glass at 687. These statements from the *Glass* court are misleading and unfair.

Contrary to the assertions of the *Glass* court, *Peterman* did not *hold* that “public rights end at the ordinary high water mark.” Instead, at pages 198-199, the *Peterman* court focused only on one public right—the right of navigation—and *observed* that the *public right of navigation* on *rivers and streams* was limited to the OHWM. It did this to demonstrate that fast land (i.e. land above the OHWM) was “not burdened with a public right.” *Id.* at 198. The *Peterman* court had already noted that the riparian held ownership, including exclusive use rights, to the water’s edge. *Peterman* at 192. The *Glass* court’s implicit suggestion that *Peterman* recognized—or even allowed for—a “public trust” right of beach walking above the water’s edge is simply opposite to its explicit holding. See note 2, *supra*.

But this is not the worst omission in the *Glass* presentation of *Peterman*. The *Glass* court held that *Peterman* “awarded damages for destruction of the plaintiff’s property above the ordinary high water mark.” *Glass* at 687. That statement is certainly true. But *Peterman* also affirmed an award of damages *below* the high watermark. *Peterman* at 192, 200-202. By recognizing only the award of damages for damage above the OHWM, and omitting recognition of the award of damages below the OHWM, the *Glass* court misrepresents the holding of *Peterman*, and stands the case on its head.

In fact, the 1994 *Peterman* result well-follows the 1930 *Hilt v. Weber* decision. It recognizes the riparian’s exclusive use rights to the water’s edge, and affirms an award compensating the riparian for the loss of his entire beach above the water’s edge.

2. Mischaracterizing the *Venice of America Land Company* Holding.

The *Glass* court next relies on *State v. Venice of America Land Company*, 125 N.W. 770, 160 Mich. 680 (1910) :

Similarly, in an earlier case where the state asserted its control under the public trust doctrine over a portion of littoral property, the Court also employed the high water mark as the boundary of the public trust.

Id at 687. This conclusion is untrue. *Venice* did not involve “littoral” property at all⁵; it involved land that was submerged at the time of statehood, but was part of an island in Lake St. Clair at low water. With no title based on a U.S. land patent, the defendant claimed he owned the land based on “a grant of the island from the British government,” which the court denied. *Id.* at 683, 691. There is no suggestion that he based his claim on riparian rights. *Hilt* at 223. And there is no reference to any “high water mark” or any “boundary” to the property. Having rejected

⁵ “Littoral land” is defined as “Land bordering [sic] ocean, sea, or lake.” Black’s Law Dictionary (5th Ed.), West Publishing Co. (1979). An unpatented island is owned by the state, and is not “littoral land.”

Defendants' claim, the court awarded the land to the state based upon its status as submerged land at the time of statehood.

3. Overstating the *Broedel Dictum*.

The *Glass* court next states: "Our Court has previously suggested that Michigan law leaves some ambiguity regarding whether the high or low water mark serves as the boundary of the public trust," citing *People v. Broedell*, 112 N.W.2d 517, 365 Mich. 201, 205-206 (1961). Again, the *Glass* court mischaracterizes. *Broedell* does not use the word "ambiguity" when describing Michigan law. What *Broedell* did—in one paragraph—is recognize arguments made in the case about the extent of riparian ownership, before deciding the case *on other grounds*:

The record is replete with maps, charts, plats, pictures and other exhibits...bearing on water levels and the submerged condition of the lots from time to time through the years and decades. These have given rise to questions as to whether the trust ownership of the State should be held to extend to the all time high water mark on record, the mean high water mark, the mean level, the mean low level or the lowest water mark. In holding to the theory that the State holds certain submerged lands in trust for public navigation, fishing, hunting etc., this court has referred to the low water mark as the boundary thereof. See *Lincoln v. Davis*, 53 Mich 375, 19 N.W. 103. See, also, *Laporte v. Menacon*, 220 Mich 684, 190 N.W. 655, for the low water mark theory. For language seemingly favorable to the high water mark theory, however, see *State v. Venice of America Land Co.*, 160 Mich 680, 125 N.W. 770; *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115. Plaintiff says that in administering the submerged lands act, above mentioned, it follows the 'philosophy' which it says is found in *Hilt v. Weber*, 252 Mich 198, 233 N.W. 159, 71 ALR 1238, of 'a moveable freehold', that is to say, that the dividing line between the State's and the riparian owners' land follows the water's edge or shoreline at whatever level it may happen to be from time to time. We think, however, that decision in this case may be controlled by another factor....

Broedell, at 205-206. So the *Broedell* statement relied upon in *Glass* was *dictum*, a fact not disclosed in *Glass*. Moreover, it is a stretch to say *Broedell* suggested an "ambiguity" in Michigan law. *Broedell* recognized that cases holding to the "trust" theory referred to the low water mark as the boundary between state and riparian. That other cases have "language

seemingly favorable” to an opposite theory hardly makes the law uncertain.⁶ Simply put, the *Glass* court cannot fairly rely upon inapposite *dictum* in *Broedell* to take away the clear rights established in the clear and unambiguous decisions both before and after *Broedell*.

4. Mischaracterizing the *Hilt* Decision.

After citing *Broedell*, the *Glass* analysis departs from Michigan precedent, embarks on conclusory pronouncements about the overlapping of private title and public rights, and cites cases from other jurisdictions in support. *Glass* at 687-689. Then, in attacking the Court of Appeals’ decision, the *Glass* decision embarks on a failed attempt to distinguish *Hilt*.

Glass asserts that the issue in *Hilt* was “the boundary of a littoral landowner’s *private* title, rather than the public trust,” citing *Hilt* at 206. This is untenable. The defendant in *Hilt* alleged that a seller could not deliver marketable title because the state held “trust” title. *Hilt* at 201, 224-225 (alleging “failure of title to the strip between the meander line and the stake, under the authority of *Kavanaugh v. Rabior* and *Kavanaugh v. Baird* [citations omitted], which hold that the fee in all land between the meander line and the water is in the State in trust, subject to the riparian rights of the upland owner.”) *Hilt* concluded that the state’s trust title ended at the water’s edge. It reasoned that even if the state held “trust” title above the water’s edge, the existence of riparian rights (including the right of exclusive use) would render “a naked legal title in the state, without practical right of use.” *Hilt* at 225. While riparian rights are subordinate to “trust purposes,” *Hilt* noted that “[t]he only substantial paramount public right is the right to the free and unobstructed use of navigable waters for navigation.” *Id.* at 226. Since a dry beach has no water on it, there is no navigation, and therefore no paramount public right on it

⁶ The State of Michigan’s concession, revealed in the 1961 *Broedell* decision, that it followed *Hilt v. Weber, supra*, in carrying out its duties is an important point totally ignored by the *Glass* Court. It demonstrates that *Hilt* was so clearly the law in 1962 that even the state followed its holding.

exists. The *Hilt* court therefore reasoned it only made sense to find the riparian has title to the water's edge. *Id.* at 227. There can be no legitimate dispute that the Michigan Supreme Court in 1930 was placing the line between public rights and private rights at the water's edge.⁷

Once again, the dissent clarifies the meaning of *Hilt*. In dissenting Justice Weist's view, *Hilt* "takes from the sovereign State a vested public trust." *Id.* at 229. More specifically, *Hilt* "destroys for all time *the trust* vested in the State for the *use* and benefit of its citizens (emphasis added)." *Id.* at 231. Obviously, Justice Weist did not predict the power and willingness of his court—75 years later—to violate the "rules of property" and simply disregard the holding of his day. *See Bott, supra*, at 78.

The *Glass* characterization of *Hilt* is even more troublesome in light of the rehearing of *Kavanaugh v. Baird* (On rehearing), *supra*. As a direct result of its ruling that the riparian had exclusive use of his land free of competing public trust rights, the Michigan Supreme Court awarded to Mr. Kavanaugh a victory in his quiet title action against the state's claim of "trust title." Certainly, under principles of *res judicata*, the state cannot today properly deny his successors their right of exclusive use!

5. The Resulting Need to Define the New Boundary.

Having ignored, mischaracterized, and misstated over one hundred years of well-developed Michigan law, the *Glass* court had to confront a new problem: there was no clear definition, under Michigan law, for the boundary of its newly-created public trust rights upon the shore. *Glass* at 692. As a result, the *Glass* court adopted a definition from Wisconsin. *Id.* Prior to *Glass*, the riparian's title and concomitant right of exclusive use made a definition of the term

⁷ Without citation, *Glass* also asserts, in footnote 18 on page 690, that while *Hilt* involved relicted land, *Glass* did not. This is simply untrue. Any land below meandered riparian property is treated under the law as relicted land. *See Hilt* at 203, 218-220; *Klais v. Danowski*, 129 N.W.2d 414; 373 Mich. 262, 279 (1964) (riparians gain by reliction but do not lose patented land).

“ordinary high water mark” irrelevant as a boundary on the Great Lakes. That the *Glass* court had to create such a definition 167 years after the state’s admission to the union makes the nature of its actions—taking from the riparian and giving to the public—abundantly clear.

C. THE *GLASS* COURT VIOLATED “RULES OF PROPERTY.”

As set forth above, prior Michigan law on the extent of riparian and public rights to the shore was clear. Nevertheless, the Michigan Supreme Court in *Glass* chose to make new law for Michigan under the guise of following precedent. By doing so, it violated rules of property contrary to Michigan law.

Boiled to its essentials, the public trust movement is grounded upon an underlying premise that government needs increased control of shoreline property for varying reasons. Whether those reasons justify the means is not addressed in judicial decisions like *Glass*, which conjure up strained interpretations of prior law to find new outcomes. This type of approach was previously rejected by the Michigan Supreme Court in *Bott, supra*, where litigants urged the court to reject the log flotation test to determine navigability.

In *Bott*, the Michigan Supreme Court declined to reject the log flotation test and join an alleged “growing number of states” which adopted a “recreational boating test.” *Id.* at 74. To the contrary, it ruled that a change would violate “rules of property”:

This court has previously declared that *stare decisis* is to be strictly observed where past decisions establish ‘rules of property’ that induce extensive reliance. The justification for this rule is not to be found in rigid fidelity to precedent, but to conscience. The judiciary must accept responsibility for its actions. Judicial ‘rules of property’ create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital.

Id. at 77-78. *Bott* rested its decision on the loss of the right of exclusive use:

The recreational-boating test would deny riparian and littoral owners the right to exclude others, a right inherent in the concept of private property.

Bott at 81.

In response to the argument of public need, the *Bott* court pointed to the same argument made and rejected in *Hilt*, and concluded:

The Court's experience following the *Kavanaugh Cases* suggests that we should not casually enlarge the rights of the public at the expense of property owners who have relied on prior decisions of this Court. The *Kavanaugh Cases* were overruled because, among other things, they worked severe injustice and constituted a judicial 'taking' without compensation.

Bott at 84.

Without accepting that public need justifies a change in the law, *Bott* noted that the record was insufficient for it to determine a public "need" for such a change:

It has yet to be shown that the lakes, rivers, and streams heretofore opened to the public are not adequate to meet public needs.

Id. at 72. Indeed, *Bott* recognized that increased public rights could destroy the scenic beauty of Michigan's wilderness areas. *Id.* at 86. *Bott* rejected the invitation to change Michigan law because of "an uncertain societal consensus" and an "inability to compensate riparian owners for the loss of a valuable right." *Id.*

Instead of following the precedent of *Bott*, the Michigan Supreme Court in *Glass* embarked on a strained and inaccurate analysis of Michigan law to reach an unfair result. And it did so without any analysis of whether public need for increased shoreline rights justified its result. With its decision in *Glass*, the Michigan Supreme Court violated its own rules of property.

CONCLUSION

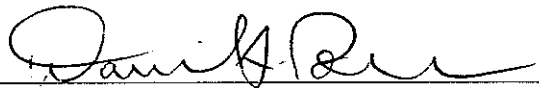
The foregoing analysis clearly sets forth that Judge Lucci was correct. The Michigan Supreme Court's decision of *Glass v. Goeckel* was indeed poorly reasoned. It ignored and mischaracterized clear and well developed law in the state of Michigan for well over one hundred years. It confiscated the riparian's exclusive use rights, and gives new rights—the scope of which are not, and may never be, fully defined—to the public.

Moreover, *Glass* likely created more problems than it purports to solve. To date, the Michigan Department of Natural Resources and Environment has been perplexed in its effort to apply the new boundary definition in practice. Further, by extending to the dry beach all “activities inherent in the exercise of so-called “traditional public rights,” the court suggests the beaches are open not just to beach walking, but also hunting, fishing, and swimming. *Glass* at 695-696. *Glass* therefore leaves littoral owners in a constant state of uncertainty regarding their rights, and law enforcement is left to guess not only as to the boundary location between riparian and the public, but what rights might be fairly exercised.

This Court should reject *Glass v. Goeckel* as poorly reasoned, and as a poor and unworthy example for Ohio to follow.

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Respectfully submitted,



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