IN THE INDIANA COURT OF APPEALS

CAUSE NO. 46A05-1404-PL-146

<table>
<tr><td>LBLHA, LLC, MARGARET L. WEST,
and DON H. GUNDERSON,

Appellants,

v.

TOWN OF LONG BEACH, INDIANA,
ALLIANCE FOR THE GREAT LAKES
and SAVE THE DUNES,
LONG BEACH COMMUNITY
ALLIANCE, PATRICK CANNON,
ROGER GANSAUER, DAVID OEI,
BERNARD RABINOWITZ,
and JOAN SMITH,

Appellees.</td><td>)
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)</td><td>Appeal from the
LaPorte Circuit Court
Trial Court Case No.:
46C01-1212-PL-1941

Hon. Thomas J. Alevizos
Judge</td></tr>
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BRIEF OF AMICUS CURIAE SAVE OUR SHORELINE
IN SUPPORT OF APPELLANTS

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Dated September 25, 2014

TABLE OF CONTENTS

TABLE OF CONTENTS i

INDEX OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. INDIANA AND ITS GREAT LAKES NEIGHBORING STATES PLACE AT THE WATER'S EDGE THE BOUNDARY BETWEEN RIPARIAN OWNERS AND THE PUBLIC 3

II. STATE ENVIRONMENTAL DEPARTMENTS SEEK TO CHANGE THE COMMON LAW OF GREAT LAKES RIPARIAN OWNERSHIP 7

CONCLUSION 11

VERIFICATION 12

CERTIFICATE OF SERVICE 13

INDEX OF AUTHORITIES

Cases

Bainbridge v. Sherlock, 29 Ind. 364 (1868) 6

Borden Ranch Partnership v. U.S. Army Corps of Engineers, 536 U.S. 903, 122 S.Ct. 2355 (mem), 153 L.Ed.2d 178, 153 L.Ed.2d 178 (2002) . . . 1

Brundage v. Knox, 279 Ill. 450, 117 N.E. 123 (1917) 5

Glass v. Goeckel, 262 Mich. App. 29, 683 N.W.2d 719 (2004). 2

Glass v. Goeckel, 473 Mich. 667, 703 N.W.2d 58 (2005) . . . 2, 7, 9

Glass v. Goeckel, 546 U.S. 1174, 126 S.Ct. 1340, 164 L.Ed.2d 54 (2006) 2

Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930) . . . 6

Kaiser Aetna v. United States, 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979) 11

Kavanaugh v. Rabior, 222 Mich. 68, 192 N.W. 623 (1923) 6, 7

Kavanaugh v. Baird, 241 Mich. 240, 217 N.W. 2 (1928), rev'd, 253 Mich. 631, 235 N.W. 871 (1930) . . . 6

LaPlaisance Bay Harbor Co. v. Monroe City Council, Walker Chancery Rep. 155 (1843) 5

Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) 8

Parkinson v. McCue,
831 N.E.2d 118 (Ind. App. 2005) 6

Seaman v. Smith,
24 Ill. 521 (1860) 4, 5

Sizor v. Logansport,
151 Ind. 626, 50 N.E. 377 (1898) 6

Sloan v. Billmeier,
34 Ohio St. 492 (1878) 5

State ex. rel. Merrill v. Ohio Department of Natural Resources,
130 Ohio St.3d 30, 955 N.E.2d 935 (2011) 2, 5, 10, 11

Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection et al,
560 U.S. 702, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010) 1

U.S. v. Marian L. Kincaid Trust,
463 F. Supp. 680 (E.D. Mich. 2006) . . . 1

Other Authorities

CJS, Constitutional Law, § 744 8

Huffman, Speaking of Inconvenient Truths – A History of the Public Trust Doctrine,
18 Duke Envt'l. & Pol'y. F. (2007) 7

Paganelli, "*Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan*," 58 Hastings Law Journal 1095 (2007). 9

Putting the Public Trust to Work
(Coastal States Organization 1990) 7

Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,
68 Michigan Law Review 471 (1970). 7

TABLE OF CONTENTS

TABLE OF CONTENTS i

INDEX OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

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Brundage v. Knox, 279 Ill. 450, 117 N.E. 123 (1917) 5

Glass v. Goeckel, 262 Mich. App. 29, 683 N.W.2d 719 (2004). 2

Glass v. Goeckel, 473 Mich. 667, 703 N.W.2d 58 (2005) . . . 2, 7, 9

Glass v. Goeckel, 546 U.S. 1174, 126 S.Ct. 1340, 164 L.Ed.2d 54 (2006) 2

Hilt v. Weber, 252 Mich. 198, 233 N.W. 159 (1930) . . . 6

Kaiser Aetna v. United States, 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979) 11

Kavanaugh v. Rabior, 222 Mich. 68, 192 N.W. 623 (1923) 6, 7

Kavanaugh v. Baird, 241 Mich. 240, 217 N.W. 2 (1928), rev'd, 253 Mich. 631, 235 N.W. 871 (1930) . . . 6

LaPlaisance Bay Harbor Co. v. Monroe City Council, Walker Chancery Rep. 155 (1843) 5

Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) 8

Parkinson v. McCue,
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Seaman v. Smith,
24 Ill. 521 (1860) 4, 5

Sizor v. Logansport,
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Sloan v. Billmeier,
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130 Ohio St.3d 30, 955 N.E.2d 935 (2011) 2, 5, 10, 11

Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection et al,
560 U.S. 702, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010) 1

U.S. v. Marian L. Kincaid Trust,
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18 Duke Envt'l. & Pol'y. F. (2007) 7

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Putting the Public Trust to Work
(Coastal States Organization 1990) 7

Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,
68 Michigan Law Review 471 (1970). 7

Interest of Amicus Curiae

Formed in 2001, amicus curiae Save Our Shoreline ("SOS") is a Michigan non-profit membership corporation which at one time was comprised of approximately 3,200 families who own a home or cottage, or live, along Michigan's 3,288 miles of Great Lakes shoreline. The organization's mission is to "preserve and maintain riparian rights, including the right to maintain safe recreational beaches and waterfront areas, both public and private; and to preserve and maintain a proper balance for the coexistence of man and nature upon and near waterfront property." See <www.saveourshoreline.org> viewed September 22, 2014. The group has responded to a new and sudden assertion of state and federal governments to acquire control over beaches. SOS has participated as amicus curiae in the U.S. Supreme Court case of *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), where the issues raised in its brief were specifically discussed in oral argument; and *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection et. al.*, 560 U.S. 702, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010). The organization also provided support to the landowner in *U.S. v. Marian L. Kincaid Trust*, 463 F. Supp. 680 (E.D. Mich. 2006), where the Court determined that the U.S. Army Corps of Engineers' claim of jurisdiction based upon an

administratively set ordinary high water mark was unsupported by law, and thereby invalid.

Save Our Shoreline also provided financial and amicus support in the Michigan cases of *Glass v. Goeckel*, 262 Mich. App. 29, 683 N.W.2d 719 (2004), and *Glass v. Goeckel*, 463 Mich. 667, 703 N.W.2d 58 (2005), which cases involve the issues of ownership to the water's edge and the public trust. Save Our Shoreline also provided financial support for the landowners' petition for a writ of certiorari to the U.S. Supreme Court. See *Glass v. Goeckel*, 546 U.S. 1174, 126 S.Ct. 1340, 164 L.Ed.2d 54 (2006).

Finally, Save Our Shoreline provided financial and amicus support to the Ohio Lakefront Group in its successful declaratory action in the State of Ohio determining Lake Erie riparian ownership to the water's edge, free of any claimed public trust. See *State ex. rel. Merrill v. Ohio Department of Natural Resources*, 130 Ohio St.3d 30, 955 N.E.2d 935 (2011).

Summary of Argument

In Indiana, riparian owners on lakefront property own to the water's edge. This is consistent with the law of Indiana's Great Lakes neighbors: Illinois, Ohio, and Michigan. But over the last thirty years, the environmental and natural resource departments of these states have engaged in a coordinated campaign to change over 150 years of law and take part of the dry shore for their

respective state governments. Their acknowledged common goal is to obtain regulatory control over shore lands free of any need to use the police power, and its concomitant requirement that their regulations be reasonable. The change sought was partially accepted in Michigan in a poorly reasoned and much criticized decision, but was later soundly rejected in Ohio. The change should be rejected in Indiana as well.

Argument

I. INDIANA AND ITS GREAT LAKES NEIGHBORING STATES PLACE AT THE WATER'S EDGE THE BOUNDARY BETWEEN RIPARIAN OWNERS AND THE PUBLIC.

With its inheritance of English common law, and the lack of anything like the Great Lakes in England, courts of many Great Lakes states struggled early on to determine an appropriate body of water law upon which to decide Great Lakes shoreline disputes. The lakes are much unlike the oceans, whose tides change the location of the water on the shore between high and low watermarks approximately twice daily. Nor are the Great Lakes entirely similar to England's rivers, which change between high and low water marks annually based upon the seasons. Instead, the Great Lakes have their own water level regime, with water level changes classified into three types: (1) long-term changes (changes over a period of years), which are based on weather variations. On Lake Michigan, the U.S. Corps of Engineers has compiled water level

measurements dating back to at least 1865, and noted variations of over six feet, with changes between highs and lows typically spanning decades. See <http://www.great-lakes.net/teach/envt/levels/lev_2.html> (viewed 9-21-2014); (2) seasonal changes, typically 12 to 18 inches, from winter lows to summer highs; and (3) short term changes, due to changes in winds or barometric pressure, lasting hours or days. *Id.* As a result, attempts to apply England's law of oceans or rivers to the Great Lakes, and to delineate boundaries based on high and low water marks, was necessarily addressed early on.

One the earliest and clearest cases came from the neighboring state of Illinois: *Seaman v. Smith*, 24 Ill. 521 (1860). In that case, the Illinois Supreme Court used the logic and reasoning behind the law of oceans to announce a nevertheless different rule for the lakes:

> We are therefore clearly of the opinion, that the line at which the water usually stands, when free from disturbing causes, is the boundary of land in a conveyance calling for the lake as a line.

Id. In coming to its conclusion, the court reasoned that since ocean tides regularly covered the shore between high and low points, and the shore in between could not be used for "cultivation or other private use," the ocean's shores belonged to the public. *Id.* But on the Great Lakes, because "[t]he portion of the soil which is seldom covered with water may be valuable for cultivation

or other private purposes," the Court reasoned that the line where the water usually stands should be the boundary. *Id.*

Despite the early date of the *Seaman* rule, the Illinois Courts have been steadfast in upholding the rule. See *Brundage v. Knox*, 279 Ill. 450, 117 N.E. 123 (1917) (trial court "rightly fixed appellees' easterly boundary as the edge of Lake Michigan when free from disturbing causes."). These decisions continue to represent the law in Illinois commonly accepted to this day.

Indiana's neighbor to the east, Ohio, came early in its history to the same conclusion. In *Sloan v. Billmeier*, 34 Ohio St. 492 (1878), the Ohio Supreme Court concluded that the private boundary was "[t]he line at which the water usually stands when free from disturbing causes," citing *Seaman v. Smith, supra*. That holding was recently and forcefully confirmed in *State ex. rel. Merrill v. Ohio Department of Natural Resources, supra*.

Indiana's neighbor to the north, Michigan, similarly found the public/private boundary at the water's edge shortly after Michigan became a state. See *LaPlaisance Bay Harbor Co. v. Monroe City Council,* Walker Chancery Rep. 155 (1843) ("[t]he proprietor of the adjacent shore has no property in the land covered by the water of the lake."). After a unique and temporarily successful effort to change that boundary to the state surveyor's "meander

line" in 1923[1], the Michigan Supreme Court, in an extensive and well-followed opinion, restored the boundary at the water's edge. *Hilt v. Weber*, 252 Mich. 198, 233 N.W. 159 (1930). The *Hilt* decision was notable for its depth of analysis and the breadth of its reasoning, and has been well-followed and extensively cited since its issuance in 1930. For example, *Hilt* surveyed the decisions of other states on the question and relied on their example, including *Sizor v. Logansport*, 151 Ind. 626, 50 N.E. 377 (1898). It spelled out the riparian rights and their significance to the question, which includes the "rule of reliction," as well as "the right to accretions." *Id.* at 219, 225.

The Indiana Supreme Court has not yet specifically taken up the issue of ownership on Lake Michigan. But in other decisions involving other lakes and rivers, the state's courts have recognized that the boundary between public and private rights in Indiana is, like the above-cited decisions in Ohio and Michigan, at the water's edge. See, *e.g.*, *Bainbridge v. Sherlock*, 29 Ind. 364 (1868) (Ohio River), *Sizor v. Logansport*, *supra* (lake), and *Parkinson v. McCue*, 831 N.E.2d 118 (Ind. App. 2005) (recognizing rule of reliction cited in *Hilt* and other cases).

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[1] See *Kavanaugh v. Rabior*, 222 Mich. 68, 192 N.W. 623 (1923) and *Kavanaugh v. Baird*, 241 Mich. 240, 217 N.W. 2 (1928), rev'd, 253 Mich. 631, 235 N.W. 871 (1930).

II. STATE ENVIRONMENTAL DEPARTMENTS SEEK TO CHANGE THE COMMON LAW OF GREAT LAKES RIPARIAN OWNERSHIP.

As the Michigan cases of *Kavanaugh v. Rabior, supra* and *Kavanaugh v. Baird, supra* clearly demonstrate, there has long been an effort to modify the rules of ownership to the water's edge along the Great Lakes shores. As early as 1962, Michigan's Department of Conservation unsuccessfully pursued legislation changing the boundary to an elevation it confusingly called "the ordinary high water mark." See Brief of Amicus Curiae Save Our Shoreline and Great Lakes Coalition, Inc., pp. 37-46, filed in *Glass v. Goeckel*, Michigan Supreme Court Docket No. 126409, viewable at <http://www.saveourshoreline.org/LegalMatters/GlassvGoeckel/MISupremeCourt/SOSAmicus.pdf>. Other influential efforts include an article by University of Michigan's Professor Joseph Sax, who published his article, "*The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*," 68 Michigan Law Review 471 (1970)[2], and a subsequent treatise developed by state governments to effect a change in the law: "*Putting the Public Trust to Work*" (Coastal States Organization 1990). This book, put together by coastal managers of state governments, unabashedly details a game plan for how advocates might convince the courts to

[2] For an excellent response, see Huffman, "Speaking of Inconvenient Truths--A History of the Public Trust Doctrine," 18 Duke Envt'l. & Pol'y. F. (2007).

change existing law to the liking of these bureaucrats. The work also explained the benefits of their approach:

> When acting under the authority of the Public Trust Doctrine, however, the state and state agencies are in a strong position to defend against "takings" claims.

Id. at 9. They are also clear about other benefits of the doctrine:

> This allows the state to manage these resources as a property owner without having to exercise either its regulatory powers or its powers of eminent domain.

Id. at 8. The importance of this latter point cannot be overstated. It is unquestioned that the states may regulate the use of private property through the police power, but that regulation must be reasonable. CJS, Constitutional Law, § 744. The regulation must "substantially advance" the state's "legitimate state interests." *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). Thus, the states seek the power to control the shores in front of expensive shoreline homes and businesses without being shackled with the restraint of reasonableness.

It was not long after that this playbook was put into use. In 1999, the Michigan Department of Environmental Quality (MDEQ) asserted that the dry land below a stated elevation and the water's edge was "state owned." See "Briefing Report," located at <http://www.saveourshoreline.org/Miscellaneous/NARRATIVE_SUMMARY_FINAL.pdf>. It thereafter wrote hundreds of shoreline owners demanding that they cease mowing the land, which it asserted was

"owned by the State of Michigan." *Id.* Shoreline owners on Lake Huron and its bays banded together and formed "Save Our Shoreline," at one time exceeding 3,200 member households. *Id.* As part of its efforts, the group helped fund litigation that led to the decision in *Glass v. Goeckel*, 473 Mich. 667, 703 N.W.2d 58 (2005). In its ruling, the Michigan Supreme Court declined an invitation to rule that the state's beaches were publicly owned as asserted by the MDEQ. But the court did ignore and misstate 150 years of precedent, opinions of the state bar, and the state's attorney general, ripping away the riparian's right of exclusive use, and for the first time announcing that the public had rights to the use of the dry shore. The decision has thereafter come under substantial, well-deserved criticism. See, *e.g.*, Paganelli, "*Creative Judicial Misunderstanding: Misapplication of the Public Trust Doctrine in Michigan*," 58 Hastings Law Journal 1095 (2007). Starting in the mid to late 1990's, the Ohio Department of Natural Resources (ODNR) began requiring that shoreline owners—whose seawalls or other structures existed on the dry land but below a stated elevation it called the "ordinary high water mark"—sign a lease with the state for that land, or face removal of the structure. In response, shoreline owners banded together, forming the Ohio Lakefront Group. After efforts for legislation and other remedies failed, the group in 2004 filed its complaint for declaratory relief against the state. In ruling for

the property owners, the trial court criticized and rejected the *Glass* decision as "poorly decided." See <http://www.saveourshoreline.org/LegalMatters/Merrill_v._ODNR.pdf> (viewed 9-24-2014). When the case reached the Ohio Supreme Court, Save Our Shoreline demonstrated the same in its amicus curiae brief filed with that court. See <http://www.saveourshoreline.org/LegalMatters/AmicusBrief.pdf> (viewed 9-22-2014). The Ohio Supreme Court thereafter rendered its decision in favor of the shoreline owners, finding that they owned to the water's edge when free from disturbing causes, and free of any claimed "public trust" rights. *State ex. rel. Merrill, supra.*

Further evidence of the cooperative effort of the states is the amicus brief of the states of Michigan and Pennsylvania, filed in Ohio's *State ex. Rel. Merrill* case, urging a finding of state ownership of the shores. See <http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=669181.pdf (viewed 9-23-14).

In lockstep with the ODNR in Ohio, and the MDEQ in Michigan, the Indiana Department of Natural Resources (IDNR) has presented its version of the law on its website, where it writes:

> The ordinary high watermark is the line on Lake Michigan and other navigable waterways used to designate where regulatory jurisdiction lies and in certain instances to determine where public *use* and *ownership* begins and/or ends (emphasis added).

Order and Partial Summary Judgment, ¶ 3, p. 2. See Appellant's Brief, p. 36. As was the case in Ohio and Michigan, addressed

above, there is, to amicus' knowledge, no Indiana caselaw to support this proposition as to "public use and ownership." The statement by an agency of Indiana's state government nevertheless has substantial weight with the public. Indeed, as this case demonstrates, the assertion has led at least one city to defeat the riparian's right of exclusive use, one of the most essential sticks in the bundle of rights that are commonly characterized as property. *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979).

Like the Ohio Supreme Court did in *State ex. rel. Merrill*, *supra*, this court should follow the decisions of this state, consistent with the long-standing precedent of neighboring states set forth above, and determine that the boundary between public and private rights is the water's edge when free from disturbing causes.

Conclusion

The Indiana cases, as well as the decisions from its neighboring states, have been clear: the riparian owner owns to the water's edge when free from disturbing causes. A desire by state government using strategies such as its website to effect a change in the law--especially without having made the case as to the need or fairness for the change, or without addressing the challenges which the change might present--is no reason to change the law of this state.

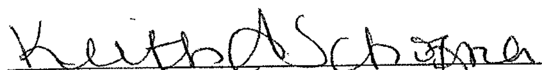
Verification

I verify that this brief contains no more than 14,000 words.

Respectfully submitted,

LAMBERT LESER

Dated: September 25, 2014



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was filed with the Clerk this 25th day of September, 2014, via UPS. I further certify that a true and correct copy of the foregoing brief has been served this day via first-class mail, postage prepaid, upon each of the following:

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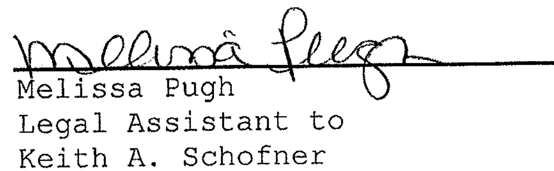

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