IN THE

SUPREME COURT OF INDIANA

Cause No. _____

DON H. GUNDERSON, et al.,	)	Appeal from the
	)	LaPorte Superior Court 2
Appellants,	)	Trial Court Cause No.
	)	46D02-1404-PL-606
v.	)	
	)	The Honorable Richard R.
STATE OF INDIANA, et al.,	)	Stalbrink, Jr., Judge
	)	
Appellees.	)	Court of Appeals
	)	Cause No. 46A03-1508-PL-1116
and,	)	Consolidated herein with
	)	Cause No. 46A04-1601-PL-84
ALLIANCE FOR THE GREAT LAKES, ET AL.	)	
	)	
	)	
Appellees-Cross Appellants.	)	
	)	

BRIEF *AMICI CURIAE* OF RAY CAHNMAN AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION TO TRANSFER

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INTEREST OF THE *AMICI CURIAE*

Pursuant to Rule 41 of the Indiana Rules of Appellate Procedure, *Amici* Ray Cahnman and Pacific Legal Foundation (PLF) respectfully submit this brief in support of Appellants Don H. Gunderson and Bobbie J. Gunderson, Co-Trustees of the Don H. Gunderson Living Trust. *Amici* were previously granted leave to appear by the Court of Appeals.

Ray Cahnman owns property in Porter, Indiana, along the shore of Lake Michigan. Resolution of the issue in this case—whether the scope of the Public Trust Doctrine allows the State of Indiana to establish a de facto uncompensated easement on his property under the guise of the Public Trust Doctrine—has the potential to encumber and diminish the value of his property.

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of public interest. PLF has numerous supporters and contributors nationwide, including in the State of Indiana. Since 1973, Pacific Legal Foundation has litigated in support of property rights and has participated, either through direct representation or as *amicus curiae*, in nearly every major property rights case heard by the United States Supreme Court in the past three decades, including *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

PLF has also been involved with many cases raising similar questions to those presented in this case, including a related case below. *See*, *e.g.*, *LBLHA, LLC v. Town of Long Beach*, 28 N.E.3d 1077 (Ind. Ct. App. 2015) (holding that the state is a necessary party in dispute over ownership of lakefront land); *State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 955 N.E.2d 935, 950 (Ohio 2011) (holding that "the public trust in Lake Erie extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes[.]"); *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009) (addressing legislative expansion of public-beach access effecting a taking of private property).

Finally, PLF attorneys have contributed scholarly literature on the public trust doctrine and the background principles of property law. *See*, *e.g.*, David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339 (2002); James S. Burling, *Private Property Rights and the Environment After* Palazzolo, 30 B.C. Envtl. Aff. L. Rev. 1 (2002).

Amici are familiar with the legal issues raised by this case. *Amici* supplement the arguments of the parties by offering guidance to this Court on background principles of property law and on the proper application of the public trust doctrine.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents the Court with a matter of first impression in Indiana affecting fundamental questions of property rights along Lake Michigan's shoreline. At issue is whether the courts of Indiana can ignore centuries of law and—by mere declaration and without providing just compensation—convert private property into public spaces.

Petitioners Don Gunderson and Bobbie Gunderson, as trustees of the Don H. Gunderson Living Trust, sought a declaratory judgment that their property abutting Lake Michigan extends to the moveable water's edge and that their property is not subject to a "public trust" encumbrance. According to the traditional, common-law Public Trust Doctrine, derived from English common law, the State holds navigable waters and their beds "in trust" for public navigation, commerce, and fishing. In the opinions below, both the trial court and the appellate court expanded the scope of the Public Trust Doctrine far beyond its original constraints.

The trial court held that the Gundersons' property extended, not to the water's edge, but only to the ordinary high-water mark (OHWM), as defined by Indiana regulation. Further, the trial court ruled that the property below the OHWM, subject to the Public Trust Doctrine, could be used by the public for virtually any purpose: "commerce, navigation, fishing, recreation, and other activities related thereto, including but not limited to boating, swimming, sunbathing, and other beach sport activities." July 24, 2015 Order ¶66.

In reaching the latter conclusion, the trial court—without explanation—placed the burden on the Gundersons, who supposedly "provided no evidence and no persuasive argument for finding that the recreational activities, such as swimming and walking on the beach, should not also be permissible public uses protected by the Public Trust Doctrine." *Id.* ¶65. The court seemingly recognized the traditional limits of the Public Trust Doctrine (". . . should not *also* be permissible"), but it did not explain why those limits should be abandoned. It simply declared that recreation (broadly defined) is an appropriate public use. *Id.*

The appellate court affirmed in part and reversed in part. *Gunderson v. Indiana*, 67 N.E.3d 1050 (Ind. Ct. App. 2016). It reversed the trial court's ruling that the OHWM could be defined by regulation and instead held that the common law controls the location of the OHWM. *Id.* at 1059. The appellate court affirmed the trial court's order that property below the OHWM is land held "in trust" for the public. *Id.* at 1053-56.

With respect to the scope of the Public Trust Doctrine, the appellate court apparently applied a narrower rule, ruling that land below the OHWM is "open to limited public use, such as gaining access to the public waterway or walking along the beach." *Id.* at 1058-59. But despite this narrow holding, the appellate court in its final paragraph "affirm[ed] the trial court's findings regarding the nature *and scope* of the public trust as it relates to Lake Michigan." *Id.* at 1060 (emphasis added). This last paragraph leaves open the

possibility that the trial court's far more expansive reading will set the baseline for future expansion of the scope of the public trust, untethered to long-standing common-law principles.

But even if the appellate court's narrower ruling controls, its failure to grapple with the traditional bases of the Public Trust Doctrine all but guarantees its expansion. Instead, both courts below seem to have simply divined suitable "public uses" without tying their analyses to Indiana's common law or the historical justifications for subjecting certain property to state control and, further, without appropriately considering the paramount role that private property plays in American law. If allowed to stand, the decisions below would give courts the authority to encroach on private property upon their mere say-so.

Finally, neither court even considered whether the expansion of the Public Trust Doctrine—which effectively creates a permanent easement across the Gundersons' property—requires the State to provide the Gundersons with just compensation. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013) (The rulings below "would transfer an interest in property from the landowner to the government[,]" *i.e.*, a *per se* taking.).

Therefore, this Court should grant the Petition and settle this matter of first impression: Should Indiana apply the traditional, common-law Public Trust Doctrine, such that the uses guaranteed to the public are limited to navigation, commerce, and fishing; or should Indiana courts be permitted to

expand the scope of the Public Trust Doctrine to any use that could conceivably be conducive to public enjoyment, and thereby effect noncompensable takings?

ARGUMENT

I

EXPANDING PUBLIC TRUST BEYOND ITS EXTENT AT THE TIME THE U.S. CONSTITUTION WAS RATIFIED WOULD ABROGATE CONSTITUTIONAL PROTECTIONS OF PRIVATE PROPERTY RIGHTS

The scope of Indiana's public trust is a question of the state's property law; however, the Indiana courts are not free to define the scope of the public trust in any manner they so choose. The Fifth Amendment places a constraint upon all branches of state government through the Fourteenth Amendment. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 (1992) ("We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.").

Under English common law, the land beneath the seabed was held by the sovereign in trust for public navigation and fishing. Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 Alb. L. Rev. 623, 628 (1998). The public trust was limited to the land beneath the waters since the doctrine was first set forth in Roman law out of recognition that the land beneath the sea was unsuitable for private use.

David C. Slade*, Putting the Public Trust Doctrine to Work* xvii (National Public Trust Study, 1990); *see also* George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. Envtl. Aff. L. Rev. 307, 310 (2006) (noting that in 530 A.D., the Institutes of Justinian pronounced that watercourses should be protected from private acquisition). This common law tradition passed to the original thirteen states at the time they attained sovereignty over the beds of the sea following the revolution. *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842).

As had long been the rule at common law, the public trust acquired by the original thirteen states encompassed only the bed of tidal lands, and the boundary of the public trust was demarcated at the mean high-tide mark, as measured over an 18.6 year period in order to account for the full lunar cycle effecting the ebb and flow of the tides. *See* Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L. Rev. 1, 23 (2010). Likewise, the Supreme Court has recognized that the public trust doctrine applies in the Great Lakes by the same terms as it applied historically at common law when the thirteen original states ratified the Constitution, because newly admitted states entered the Union upon equal footing with the others. *Ill. Cent. R.R. v. Ill.*, 146 U.S. 387, 434 (1892) (holding that there was no rationale for differentiating between traditional tidal water bodies and the Great Lakes given the fact that they served the same historical public purposes of fishing and commerce-driven navigation). This is known as the

Equal Footing Doctrine. For navigable waters not impacted by tides, like the Great Lakes, early American common law generally defined the ordinary mean high watermark as the point on the shore "where the presence and action of the water are so common and usual as to leave a distinct mark." Kilbert, 58 Clev. St. L. Rev. at 23.

Accordingly, Indiana attained a public trust in the land beneath Lake Michigan upon its admission into the Union, and the scope of that trust was *no greater than the scope of the public trust recognized at common law at the time the Constitution was ratified in 1787. Ill. Cent. R.R.*, 146 U.S. at 436-37 (public trust in the Great Lakes is subject to the same limitations as the public trust had always been at common law). As such, this Court should review this case and reject the trial court's expansion the public trust beyond its historical common law scope—ostensibly accepted by the appellate court—because Indiana's sovereign powers can be no greater than those of the original states. Any expansion of the public trust beyond the scope of the powers originally acquired on equal footing would redefine the public trust and annihilate private property rights along the Lake's shore in violation of the Fifth Amendment. It would effect a taking of the Gundersons' private property, and in fact that is exactly what the lower court rulings both did.

II

THE SCOPE OF THE PUBLIC TRUST IS CONSTANT, REGARDLESS OF MODERN USES OF THE SHORELINE

Neither the State nor the lower courts have the authority to expand the public trust to accommodate *modern* uses of the Lake, such as recreational uses or environmental protection—yet that is what the State has argued for and the lower courts have approved. As set forth above, Indiana's public trust in the waters of Lake Michigan is based upon the Equal Footing Doctrine, which allowed Indiana to enter the Union in 1816 with the same sovereign powers that the original thirteen states held at common law when the Constitution was ratified. *Ill. Cent. R.R.*, 146 U.S. at 436-37. Therefore, the rules for demarcation of the public trust stand as they did historically.

Under English common law, the public trust existed only for two limited public purposes: (a) fishing and (b) navigation. Smith & Sweeney, *supra*, at 312 ("[T]he public trust doctrine officially emerged as an instrument of federal common law to preserve the public's interest in free navigation and fishing."). As the public trust doctrine was applied in the original thirteen states, a third use was understood as bound up with the doctrine as well: commerce. Janice Lawrence, Lyon *and* Fogerty*: Unprecedented Extensions of the Public Trust*, 70 Cal. L. Rev. 1138, 1140 (1982) ("Traditionally, the doctrine allowed the public to use trust lands, even if privately owned, for navigation, commerce, and fisheries."). Commerce was vital to the development of our young nation, and was conducted largely through navigation over the waters of the United

States, which served as natural public highways connecting the states and foreign nations. As such, commerce was naturally associated with the already recognized public use of navigation in public trust waters.

Those were the three recognized uses of the public trust at the time the Constitution was ratified, and thus the only three public uses upon which the Lake Michigan public trust may be based. Kilbert, *supra*, at 6. To go beyond those uses effects a constitutional taking. But the trial court and appellate court went further on nothing other than their own *ipse dixit*, without constitutional or legal support. Moreover, the lack of justification for the lower courts' rulings invites further expansion of the public trust *ad infinitum*. The trial court called it "a ridiculous stretch of reason to say that a public right would extend into the owner's home," Order ¶42 n.3, but failed to provide a limiting principle to stop courts from unreasonable, unconstitutional expansion of the public trust.

Instead of demarking clear lines between the fundamental right of private property and *truly* public interests, the decisions below improperly attempt a "balance" between the public's "right" to use beach-front land for supposedly beneficial public purposes against property owners' (purportedly) mere interests. In this way, the rulings below "stray[] from [the Public Trust's] original function, that of *limiting* government power over *public* assets, and addresses a new function, that of *expanding* government power over *private*

property." Richard A. Epstein, *The Public Trust Doctrine*, 7 Cato J. 411, 412 n.1 (Fall 1987) (emphasis added).

III

EXPANDING THE PUBLIC TRUST DOCTRINE WOULD ABROGATE CONSTITUTIONAL PROTECTIONS OF PRIVATE PROPERTY RIGHTS

If a proposed "public" use is truly a public need, then the public may "purchase" the property—through eminent domain, if necessary. Otherwise, the State will "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The courts below ignored this issue; this Court must not. The question of where the public trust ends and where unencumbered private property begins must be resolved and must be resolved in a manner consistent with the Fifth and Fourteenth Amendments to the United States Constitution, which prohibit government from taking private property—even for public use—without just compensation. U.S. CONST. amend. V, IV. *See also* IND. CONST. art. I, § 21 ("No person's property shall be taken by law, without just compensation[.]").

The right to exclude others from entering upon one's land is universally held to be one of the most fundamental rights included with the ownership of private property. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (A physical

invasion of private property will always effect a taking because it eviscerates the owner's right to exclude others from entering upon and using the property, "perhaps the most fundamental of all property interests."); *Donovan v. Grand Victoria Casino & Resort, L.P.*, 934 N.E.2d 1111, 1113 (Ind. 2010) ("One of the time-honored principles of property law is the absolute and unconditional right of private property owners to exclude from their domain those entering without permission."). The right to exclude is so essential to private property that the United States Supreme Court has held that, to the extent that the government authorizes the public to cross an individual's land, the government destroys all essential rights thereto and effects a categorical taking. *Loretto*, 458 U.S. at 435.

It is unsurprising, therefore, that several courts faced with the same arguments as those advanced by the State and intervenors below have concluded that creating an easement over private, upland property from a public-trust water—essentially what the lower courts have done here—would effect a taking. In *Bell v. Town of Wells*, for example, the Maine Supreme Judicial Court held that an attempt to expand the state's Public Trust Doctrine to allow the public to traverse private lands to reach public land for recreational purposes resulted in a taking of private property. 557 A.2d 168 (Me. 1989).

Similarly, the Massachusetts Supreme Judicial Court refused to expand statutory declarations of public trust to grant access across private land to

reach intertidal lands. *Opinion of the Justices*, 313 N.E.2d 561, 568 (Mass. 1974). The court explained that a permanent physical intrusion into the property of private persons "is a taking of property within even the most narrow construction of that phrase possible under the Constitution of the Commonwealth and of the United States. . . ." *Id*. "If a possessory interest in real property has any meaning at all it must include the general right to exclude others." *Id.* Because the proposed statute involved "a wholesale denial of an owner's right to exclude the public," the court declared it unconstitutional. *Id*.

Several opinions of the New Hampshire Supreme Court also skeptically viewed expansions of the public trust that intrude on private property. Responding to a statute that provided for access to a public-trust shoreline across abutting private land, New Hampshire's high court held:

> When the government unilaterally authorized a permanent, public easement across private lands, this constitutes a taking requiring just compensation. . . . Because the bill provides no compensation for the landowners whose property may be burdened by the general recreational easement established for public use, it violates the prohibition contained in our State and Federal Constitutions against the taking of private property for public use without just compensation.

Opinion of the Justices (Public Use of Coastal Beaches), 649 A.2d 604, 611 (N.H. 1994) (citations omitted).

The court drove home these points in *Purdie v. Attorney General*, 732 A.2d 442 (N.H. 1999). There, forty beachfront-property owners alleged that the state appropriated their property when it established a statutory boundary

line defining public-trust lands further inland from the mean-high watermark. The Court succinctly explained that the state could not do so without compensating the affected landowners. *Id.* at 447 (citations omitted).

In sum, a state court's power does not include the ability "to eliminate or change established property rights." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 736 (2010)* (Kennedy, J., concurring). Yet that is what the lower courts approved in this case. This Court should grant review and correct that error.

IV

THIS COURT SHOULD REAFFIRM THE COURTS' TRADITIONAL ROLE IN PROTECTING INDIVIDUAL RIGHTS

Ultimately, the lower courts used an amorphous and expansive interpretation of the Public Trust Doctrine and ignored the strictures of takings law. *See* James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. Land Use & Envtl. L. 171 (Fall 1987).[1] Using the Public Trust

[1] An expansive interpretation of the Public Trust Doctrine assumes that a conflict exists between private-property rights and the "public good." If that were true, then the solution is to compensate private property owners when their land is taken. But the premise is false. Private property itself is part of the public good. *Cf.* Eric R. Claeys, *Public Use Limitations and Natural Property Rights*, 2004 Mich. St. L. Rev. 877, 909-10 (2004) (positing that the deferential view of "public use" in takings matters is erroneously based on the "assum[ption] that the main justification for government action was to promote social utility, *without regard to the social utility created by the institution of property[]" itself*) (emphasis added).

—continued—

Doctrine to side-step the Takings Clause undermines the preeminent place that private property enjoys in America, and it would improperly deprive the courts of their traditional role in determing litigants' legal rights in condemnation proceedings—a role this Court has repeatedly confirmed. *See Derloshon v. City of Fort Wayne on behalf of Dep't of Redevelopment,* 250 Ind. 163, 171, 234 N.E.2d 269, 274 (1968) (quoting *Cemetery Company v. Warren Sch. Twp. of Marion Cnty.*, 236 Ind. 171, 178, 139 N.E.2d 538, 539, 541 (1957)); *see Derloshon*, 250 Ind. at 167 ("[N]o private citizen can be compelled to submit to the actions of public officials or a board which he claims to be arbitrary and capricious without a right to be heard on that question; otherwise, democratic government ceases and becomes dictatorial.").

Indeed, the lower courts' cavalier disregard for these rights disregards a bedrock principle of our constitutional order: "[A] government can scarcely be deemed to be free when the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the right of personal liberty and private property should be held sacred." *McKinster v. Sager*, 163 Ind. 671, 72 N.E. 854, 856 (1904) (quoting *Wilkinson v. Leland*, 27 U.S. 627, 637 (1829)).

Further, private ownership ensures the highest and best use of property, including its preservation for future use. *See* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 Cal. W. L. Rev. 239, 255 (1992) ("In a well functioning market economy, property will usually be put to its most valuable use because that is what is most profitable to the property owner.").

To prevent this side-step, this Court should determine the proper scope of the Public Trust Doctrine, so that it cannot be used to trample private property rights, and provide a clear definition and instructions on the appropriate analysis to guide lower courts on how to resolve similar disputes consistently and fairly. *See* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 619 (2004) ("By offering clear declarations of the extent of property owners' constitutional rights and limiting the discretion of judges and administrative decision makers, clear rules ensure fair and value-neutral coherence, regularity, and predictability across disparate, individual cases.").

In defining the limits of the Public Trust Doctrine, this Court should look to the traditional, common-law scope of the Public Trust Doctrine, *i.e.*, the use of trust lands for navigation, commerce, and fishing. Janice Lawrence, *Lyon and Fogerty: Unprecedented Extensions of the Public Trust*, 70 Cal. L. Rev. 1138, 1140 (1982). Doing so will prevent improper expansion of the Public Trust Doctrine and ensure that private property rights are settled and not arbitrarily diminished by courts.

CONCLUSION

As the last word on the scope of the Public Trust Doctrine in Indiana, this Court is the bulwark against those who would redefine centuries of property rights upon mere declaration of some "public good." This Court should

grant the Petition in order to properly define the scope of the Public Trust Doctrine and ensure the protection of private property rights in the State.

Dated: April 10, 2017

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 4,200 words.

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CERTIFICATE OF SERVICE

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