No. 18-462

# In The
# Supreme Court of the United States

BOBBIE GUNDERSON, *et vir*,
*Petitioners*,

v.

STATE OF lNDIANA, *et al.*,
*Respondents*.

On Petition for Writ of Certiorari
to the Indiana Supreme Court

## BRIEF IN OPPOSITION OF ALLIANCE FOR THE GREAT LAKES AND SAVE THE DUNES

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January 3, 2019

## COUNTERSTATEMENT OF QUESTION PRESENTED

The Indiana Supreme Court held that under the federal equal footing doctrine, at statehood Indiana received its portion of the bed of Lake Michigan below the ordinary high water mark ("OHWM"), including the temporarily-exposed shores. The court adopted the federal definition of the common-law ordinary high water mark, stated as the point "where the presence and action of water are so common and usual ... as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself."

The question presented is: Whether the common-law ordinary high water mark adopted by the Indiana Supreme Court as the initial boundary of the state's equal footing title on the Lake Michigan shore is consistent with federal standards under the equal footing doctrine.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent-Intervenors Alliance for the Great Lakes and Save the Dunes are nonprofit organizations that have no parent corporations, and no publicly-held company has any ownership interest in them.

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## INTRODUCTION

In the litigation below, petitioners argued that their property[1] abutting the shore of Lake Michigan extends down to the instant edge of the water where it laps at the shore at any given moment. Petitioners claimed, in other words, that they own any given point on the beach not at the moment covered by water, though that point would be covered by water again due to the recurrent rise in lake water levels.

The Indiana Supreme Court rejected petitioners' claim as inconsistent with the federal equal footing doctrine.[2] The court ruled that, under this doctrine, at statehood Indiana acquired title to its portion of the bed of Lake Michigan including the shore below the common-law ordinary high water mark ("OHWM") regardless of whether the shore was covered by water or temporarily exposed. Pet. App. 3, 11–21 (*Gunderson v. State*, 90 N.E.3d 1171, 1173, 1177–81

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[1] The Gundersons sold their property in the spring of 2015, before the case left the state trial court. The Indiana Supreme Court declined to decide the question of mootness raised by respondent state because the case involved "questions of great public interest." Pet. App. 8 n.3.

[2] The equal footing doctrine applies only to waterbodies that were navigable-in-fact or tidally influenced at the time of statehood. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1219, 1227–28, 1233 (2012). Lake Michigan was and is navigable-in-fact.

(Ind. 2018)). And unless the state were to relinquish its shoreland title, the temporarily-exposed shores below the current OHWM remain in state ownership. Pet. App. 20–23.

The *Gunderson* court followed federal law defining the OHWM boundary according to the traditional common-law concept: "the point 'where the presence and action of water are so common and usual ... as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself.'" Pet. App. 20–21 (quoting from *Howard v. Ingersoll*, 54 U.S. (13 How.) 381, 427 (1851), and other authorities). Following the Indiana Supreme Court, we refer to this boundary as the common-law OHWM. *See* Pet. App. 3, 30, 33.

Petitioners now argue that the common-law OHWM recognized by the *Gunderson* court as the boundary of equal footing land acquired at statehood, although valid for rivers, is invalid and unfair when applied to Great Lakes sandy shores, primarily because it results in too much beach being available to the public. Petitioners make an argument they did not present to the Indiana courts: they argue for a new and special definition of OHWM to serve as the federal equal footing boundary for the Great Lakes.

Petitioners' proposal would establish the very boundary of private property that they unsuccessfully sought from the Indiana court—the "waterline,"

another term for the instant water's edge (possibly plus a wave or splash zone) where the water hits the shore at any moment. This proposal would convey essentially all temporarily-exposed shore into private ownership, forcing members of the public who want to walk the shoreline to keep their feet wet.

Constructing a special definition of OHWM to serve as the equal footing boundary for Great Lakes sandy shores is not only unnecessary and unhelpful, it would also conflict with the Court's precedent, decades of federal court decisions, federal agency policy and practice, and settled expectations in numerous states including Indiana, all rooted in the common-law definition of OHWM. The common-law OHWM is widely used to demarcate federal interests on the shores of both lakes and rivers. It properly captures the ordinary high reach and influence of water on these shores over the long term. In contrast, petitioners and their amici, notwithstanding their repeated assertions, do not present any authority that recognizes petitioners' "waterline" as the federal equal footing boundary for either rivers or lakes.

In an attempt to justify certiorari, petitioners and their amici invent "conflict" and "confusion" among states. But this claim of conflict does not refer to any disagreement over the initial boundary of equal footing land acquired by new states, the only possible issue of federal law raised here. Rather, petitioners and amici refer to differences among states in the degree to which they have relinquished equal footing

shoreland. But a state's decision to cede its public land to private interests is *a matter of state law and policy*, informed by the state's views of its obligations and law regarding disposition of such land. Any perceived "confusion" does not relate to federal law, but rather to the varying paths that state laws have taken.

The definition of OHWM recognized by the Indiana Supreme Court is faithful to the equal footing doctrine and faithful to the OHWM applied across the nation by federal courts, statutes, and agencies to both lakes and rivers. The Court should deny certiorari.

## STATEMENT OF THE CASE

### I. The Gunderson Deed and Plat Are Based on a Federal Land Survey and Patent.

The Gunderson deed and plat in the record are rooted in an 1837 federal land patent, which was based on an 1829 federal public land survey. The survey notes contain the term "to Lake Michigan and set post." *See* Pet. 19. The Gunderson plat, referenced in the deed, contains the label "Lake Michigan."

The Public Land Survey System was used by the federal government to survey new territory that came into its possession after the Revolutionary War, including the territory that became Indiana. *See* United States Dep't of Interior, Bureau of Land Mgmt., *Manual of Surveying Instructions for the Survey of Public Lands of the United States* §§ 1-1 to

1-11, 1-28 (2009) ("U.S. Survey Manual").[3] The federal government sold off or granted much of the surveyed land to settlers as private property.

The federal government did not survey navigable waterbodies below the "high-water mark." *Shively v. Bowlby*, 152 U.S. 1, 49–50, 58 (1894) (holding that "[g]rants by congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark"); *Barney v. Keokuk*, 94 U.S. 324, 338 (1876) (stating "the beds and shores of [navigable] waters . . . properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water").

Federal surveyors are instructed to establish a "meander line" along the OHWM of inland navigable waterbodies, such as Lake Michigan, for the purpose of "segregating" the equal footing bed of the waterbody from the adjoining "uplands" available for public sale and settlement. U.S. Survey Manual § 3-185 ("All navigable lakes are meandered."); *id.* at § 3-162 ("All lands beneath navigable waters and other important rivers and lakes are to be segregated from the upland. Meanders are run along the OHWM for inland waters,

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[3] *Available at* https://www.blm.gov/sites/blm.gov/files/Manual_Of_Surveying_Instructions_2009.pdf.

and along the line of MHT [mean high tide] for tidewater."); *id.* at §§ 3-167, -168 (describing "upland" as high and dry ground containing terrestrial vegetation and soils); *see also Utah Div. of State Lands v. United States*, 482 U.S. 193, 205 (1987) (discussing meandering of Utah Lake); George M. Cole, *Water Boundaries* 110 (1997) (explaining that meander lines segregating beds of navigable waterbodies from surrounding uplands "were to be established at what we today consider to be the ordinary high water mark. . . . This probably had been the practice since the inception of the public land surveys").

## II. The *Gunderson* Court's Rulings.

As a preliminary matter, the state argued in *Gunderson* that because the petitioners sold their property in the spring of 2015, the case was rendered moot. The court responded that "[b]ecause this case involves 'questions of great public interest' . . . we need not decide the question of mootness on these procedural grounds." Pet. App. 8 n.3 (citation omitted).

The *Gunderson* court proceeded to identify "[t]he basic controversy" in the case as "whether the State holds exclusive title to the exposed shore of Lake Michigan up to the OHWM, or whether the Gundersons, as riparian property owners, hold title to the water's edge, thus excluding public use of the beach." Pet. App. 8.

To answer this question, the court adopted a two-step approach. At step one, the court sought to determine the boundary of the bed of Lake Michigan that automatically passed to Indiana at statehood in 1816 under the federal equal footing doctrine. At step two, the court sought to determine whether after statehood the state relinquished title to the disputed shoreland such that petitioners would have come to own it. Step two is a matter of state law. Pet. 6–7.

The court ruled at step one that at statehood Indiana acquired exclusive title to its bed of Lake Michigan below the common-law OHWM to hold in trust for its citizens. Pet. App. 11–21, 30–36. The court explained that the state's equal footing land includes temporarily-exposed shores up to the OHWM. Pet. App. 18–20.

The court determined that the OHWM is defined by reference to soil, vegetation, and other physical factors on Indiana's Lake Michigan shore:

> Rather than positioning the OHWM at the water's edge, early American common law defined that boundary as the point "where the presence and action of water are so common and usual ... as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself."

Pet. App. 20–21 (quoting from *Howard*, 54 U.S. at 427 (Curtis, J., concurring), and other authorities).

The court rejected petitioners' argument that the shore had to be covered by water at any given moment to be equal footing land. Pet. App. 18–20. The court also rejected the state's argument that it could replace the common-law, physical-factors definition of the OHWM boundary with an "administrative" OHWM defined exclusively by a fixed elevation irrespective of physical factors. Pet. App. 30–32.

## REASONS FOR DENYING THE WRIT

### I. The Indiana Supreme Court Faithfully Followed Settled Federal Law and Policy by Adopting the Common-Law OHWM as the Boundary of Equal Footing Title.

Petitioners contend that the common-law OHWM as it has developed in federal law is inconsistent with the equal footing doctrine when applied to the Great Lakes. Petitioners ask this Court to single out the Great Lakes and, for their shores, replace the common-law OHWM with the waterline—that is, the instant water's edge[4]—as the boundary of lakebed

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[4] Although the term "water's edge" (along with "lake edge" and other such terms) can be and has been used to refer to the common-law OHWM—i.e., the edge of the ordinary high reach of the water on the shore based on observations over a long time—petitioners and their amici use the term to mean the instant waterline, i.e., the line where the water meets the shore at any given moment or day.

title acquired by the state under the equal footing doctrine.

But the *Gunderson* court's recognition of the common-law OHWM as the boundary of equal footing title for Lake Michigan is squarely in step with a long line of federal court decisions, with the policy and practice of federal agencies, and with equal footing principles. Accepting petitioners' invitation to adopt a new equal footing rule for the Great Lakes would upend this settled and workable federal law and practice as well as the existing law and practice of many states.

Petitioners have no reasonable expectation that any shore below the common-law OHWM belongs to them. Because Lake Michigan is navigable-in-fact, all terms in petitioners' deed and plat must be construed to be consistent with equal footing law as well as with federal practice that reflects this law. *See State v. Jefferson Island Salt Mining Co.*, 163 So. 145, 153 (La. 1935) ("[T]he fundamental rights of the State as the sovereign to the ownership of the beds of its navigable waters, must be literally read into the titles of all lands bordering on such waters."). Petitioners' deed and plat are rooted in an 1837 federal land patent based on an earlier federal public land survey. The federal survey does not include equal footing land, and such land cannot be conveyed in a federal land patent. *See Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 376, 378 (1977). And because the common-law OHWM is the boundary

between equal footing shoreland and privately-owned upland, the root deed to petitioners' property could not have conveyed any shore below that boundary. The federal government simply did not own that shore.

### A. The *Gunderson* court adopted the federal definition of OHWM but did not decide the physical location of the OHWM.

Petitioners contend that the *Gunderson* court ruled that the state owns the "entire beach." Pet. 15; *see also* Pet. i (stating Question Presented as whether state took title to "entire beach"); Pet. 1 (contending that the government claims "every inch of sand on the beach"); Pet. 15 (stating Indiana "asserted a novel public right to access the entire beach"). But the *Gunderson* court did not consider or decide how much of any particular beach is owned by the state, because the court did not consider the physical location of the OHWM. The actual ruling by the court is simply that "the State retains exclusive title" up to the "common-law ordinary high water mark." Pet. App. 3.

Petitioners' replacement of "common-law OHWM" with "entire beach" is not a minor mistake of wording. Petitioners' focus on the amount of beach in state ownership reframes the question from what the *Gunderson* court actually decided—that the boundary of state title acquired under the equal footing doctrine is the common-law OHWM—to a question that the court did not decide or even consider: whether the equal footing doctrine passed the "entire beach" to the

state and whether the beach should be apportioned between the state and private landowners.

Petitioners' statement of the question and description of the *Gunderson* court's rulings obscure the distinction between the legal definition of OHWM, which was considered by the court, and where the OHWM is physically located on the ground, which was not. The legal definition of OHWM is a matter of law, whereas the delineation of the OHWM's location is a matter of fact. *See, e.g.*, *United States v. 21.54 Acres of Land*, 491 F.2d 301, 303, 306 (4th Cir. 1973). No party in this case entered into the record any reliable evidence of the location of the OHWM. Lay speculation of where the OHWM *might* be located does not constitute reliable evidence. *See* Pet. 22 (newspaper story); Pet. 20 n.16 (affidavits of lay individuals). The record in this case does not allow the question of whether Indiana "took title to the entire beach" to be answered.

The *Gunderson* court set out a legal framework for deciding what land was acquired by the state under equal footing. This is only an initial step in a fact-laden process of determining the location of such land, vis-à-vis private property, along the lakeshore.

### B. The common-law OHWM is the equal footing boundary on Lake Michigan.

Petitioners concede that the common-law OHWM is valid for shores of navigable rivers, but they claim it is invalid for the sandy shores of the Great Lakes. This novel differentiation of rivers versus lakes (and of rocky versus sandy shores, and of the Great Lakes versus other navigable lakes) is not supported by authority. In fact, the relevant authorities show the contrary—that the common-law OHWM applies to both navigable rivers and navigable lakes.

#### 1. *The common-law OHWM boundary is widely used for federal purposes on both rivers and lakes.*

*Federal courts*. Federal courts use the common-law definition of OHWM as the boundary of federal interests on lakes. *E.g.*, *101 Ranch v. United States*, 905 F.2d 180, 183 n.4, 184 (8th Cir. 1990) (in quiet title action for Devils Lake, explaining "the ordinary high water mark constitutes the boundary between the land owned by private interests and the lakebed owned by the sovereign," using state's statutory definition of lakebed as "the bed which the water occupies sufficiently long and continuously to wrest it from vegetation"); *United States v. Carstens*, 982 F. Supp. 2d 874, 878 (N.D. Ind. 2013) (in enforcement action in Indiana Dunes National Lakeshore, stating "[t]he land between the edge of the water of Lake

Michigan and the ordinary high water mark" is held by the State of Indiana); *Miller v. United States*, 480 F. Supp. 612, 619 (E.D. Mich. 1979) (explaining for Lake Michigan and Lake Huron "[t]he ordinary high-water mark on non-tidal waters is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear natural line impressed on the bank, shelving, changes in the character of the soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas") (citing *United States v. Cameron*, 466 F. Supp. 1099 (M.D. Fla. 1978)).

Different federal courts articulate the common-law OHWM using different language, but these articulations contain the same key elements: (1) soil, vegetation, and other relevant physical features change at the OHWM from those typical of a water-influenced environment to those typical of terrestrial uplands; and (2) the OHWM reflects the highest landward point that water "ordinarily" reaches (for example, absent storm surge) when observed over a considerable period of time. *See Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579, 583 (Ct. Cl. 1975) (citing substantially equivalent versions of the common-law definition of OHWM).

Importantly, none of these federal courts identify petitioners' waterline or visibly wet wave/splash zone as a viable legal definition of the OHWM boundary.

*Federal Submerged Lands Act of 1953*. The federal SLA, which codified equal footing boundaries, defines the term "lands beneath navigable waters" for inland lakes and rivers as,

> all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union . . . *up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction* . . . .

43 U.S.C. § 1301(a)(1) (emphasis added). The ordinary high water mark referenced here is the long-term mark on the shore influenced by long-term changes to the shoreline. The Act does not mention the waterline, nor does it mention changes in water level, the primary factor modifying the location of the waterline.

*Federal agencies*. Federal agencies apply the common-law OHWM as the boundary of federal jurisdiction. For example, the Army Corps of Engineers relies on the common-law OHWM as a regulatory boundary: "districts should give priority to evaluating the physical characteristics of the area that are determined to be reliable indicators of the OHWM," including "[c]hanges in the character of soil" and "[d]estruction of terrestrial vegetation." United

States Army Corps of Eng'rs, Regulatory Guidance Letter No. 05-05, at 2–3 (Dec. 7, 2005).[5]

Similarly, the U.S. Survey Manual instructs federal public land surveyors to apply the common-law OHWM as the boundary between uplands, which are included in the survey and subject to sale, and the full beds of navigable rivers and lakes, which are not. U.S. Survey Manual § 3-164 ("For inland waters, the OHWM normally used is the line below which the water impresses on the soil by covering it for sufficient periods to deprive it of terrestrial vegetation, and the soil loses its value for agriculture, including grazing of livestock.")

*State courts*. Some states have addressed the issue of the initial boundary of equal footing title. These states agree that for navigable lakes this federal boundary is the common-law OHWM.

For example, Indiana has long recognized the common-law OHWM as the boundary of equal footing title. Pet. App. 19–20 n.6 (citing attorney general opinions from 1978 and 1990).

Florida, in *Ex parte Powell*, 70 So. 392, 395 (Fla. 1915), identified the OHWM as the equal footing boundary acquired at statehood and recognized in *Tilden v. Smith*, 113 So. 708, 712 (Fla. 1927), that the

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[5] *Available at* http://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl05-05.pdf.

mark of shoreline vegetation was valid evidence for ascertaining that boundary on Lake Johns.

Idaho, in *West v. Smith*, 511 P.2d 1326, 1330 n.1 (Idaho 1973), identified the OHWM as the equal footing boundary on lakes and rivers and then in *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Imp. Dist.*, 17 P.3d 260, 264 (Idaho 2000), relied on the common-law definition of OHWM as the boundary of state title on Hayden Lake.

And North Dakota, in *Reep v. State*, 841 N.W.2d 664, 671 (N.D. 2013), identified the OHWM as the equal footing boundary on lakes and rivers and in *State ex rel. Sprynczynatyk v. Mills*, 592 N.W.2d 591, 594 (N.D. 1999), discussed the common-law OHWM as the boundary of state title on inland waterbodies.

In contrast to the above state cases, the state cases on which petitioners rely (*see, e.g.*, Pet. 14–18, 23–26, 28–29) do not address the issue of the initial boundary of equal footing title. As we will show in section II, this is one of the key failings of the petition.

### 2. *The common-law OHWM works for both rivers and lakes.*

The common-law OHWM works for both lake and river boundaries because the primary causes of water-level fluctuation and shoreline submergence are the same for lakes and rivers: seasonal and yearly variation in precipitation, runoff, evaporation, and groundwater flow. *See* Richard K. Norton et al.

*Drawing Lines in Law Books and on Sandy Beaches: Marking Ordinary High Water on Michigan's Great Lakes Shorelines Under the Public Trust Doctrine*, 39 Coastal Mgmt. 133, 144 (2011). In turn, inland lakes and rivers are both different from oceans, where the main cause of fluctuation in water levels and the resulting reach of the water on the shore is the tide.

Petitioners' concern that Great Lakes shores are "pounded by storm waves" and "[s]oil and vegetation characteristics therefore do not demonstrate where their high-water levels can be found" (Pet. 27–28) is addressed by commonly-used OHWM delineation methods. First, delineation of the common-law OHWM excludes the effects of extraordinary storms and floods on soil and vegetation. Army Corps of Eng'rs, Guidance Letter No. 05-05, at 3.

Second, irrespective of petitioners' sole focus on soil and vegetation, delineation of the common-law OHWM rarely involves looking only at soil and vegetation, particularly in places where those factors are not decisive or could lead to inaccurate results. *See United States v. Cameron*, 466 F. Supp. 1099, 1111–14 (M.D. Fla. 1978) (discussing that the physical location of the common-law OHWM "may be capable of proof by a variety of methods depending upon the facts and circumstances of the particular case"); Army Corps of Eng'rs, Guidance Letter No. 05-05, at 2–3 (discussing a range of physical indicators and other evidence besides soil and vegetation, including historic photographs, used for delineating the

common-law OHWM); *Idaho Forest Indus.*, 17 P.3d at 265 ("While the presence of vegetation, the 'vegetation test,' is important in determining the OHWM, it is merely 'an aid' in that determination; not the sole and exclusive means of proving the location of that line.") (citation omitted).

### C. The common-law OHWM on non-tidal shores is legally analogous to the mean high water line on ocean shores, but petitioners' waterline is not.

The mean high water (or high tide) line ("MHWL") on ocean shores and the common-law OHWM on non-tidal waterbody shores are treated by the federal government as legally analogous boundaries of federal interests. *See, e.g.*, U.S. Survey Manual § 3-162 ("Meanders are run along the OHWM for inland waters, and along the line of MHT for tidewater."); *id.* at § 3-159 ("The ordinary high water mark (OHWM), or line of mean high tide (line of MHT) of the stream, or other body of water . . . is the actual boundary."); *see also id.* at § 3-164 (defining OHWM using the common-law concepts).

This analogy is logical because both boundaries reflect the concept of ordinary high water. *See Borax Consol., Ltd. v. City of Los Angeles*, 296 U.S. 10, 22 (1935); *Shively*, 152 U.S. at 57. The MHWL and common-law OHWM are tailored, however, to the distinctive causes, time scales, and consequences of water-level fluctuations on tidal and non-tidal

waterbodies, respectively. Both boundaries reflect the core principles underlying the equal footing boundary: both indicate the ordinary high reach and influence of the water; both give effect to the *Shively* Court's recognition that states should have the opportunity to hold their intermittently-submerged shores for public use; and both are relatively stable over time, an important attribute of property boundaries.

Petitioners' waterline, in contrast, reflects neither the concept of ordinary high water nor any of these principles. Not surprisingly, therefore, petitioners do not cite any authority saying that the waterline is the boundary of equal footing title acquired by states.

### 1. *The MHWL and common-law OHWM reflect the same equal footing principles.*

*Principle 1: High reach and influence of water*. The Court has rejected attempts to expand private property into shoreland influenced by the ordinary reach of high water. In *Borax*, the Court rejected the claim that the boundary separating equal footing shoreland from private property should be defined by "neap high tides" rather than by "all the high tides," the latter of which was used in existing federal agency practice. *Borax*, 296 U.S. at 14–15, 22–24, 26–27. Because neap tides do not reach as high as other high tides, the line of neap tides would have given the private landowners title to more shore than would the line using all high tides.

The *Borax* Court approved the definition of ordinary high water used by the U.S. Coast and Geodetic Survey—the "average height of all the high waters at that place over a considerable period of time"—and approved the 18.6-year astronomical cycle (the full periodic range of the relative positions of the sun, moon, and earth) as the relevant time period. *Id.* at 26–27. Significantly, the resulting MHWL does not reflect the daily reach of the water. Rather, it reflects the ordinary high reach of tidal water on the shore when observed over the long term.

The Gundersons point to the statement in *Borax* that the neap tide line would have "exclud[ed] from the shore the land which is actually covered by the tides most of the time." *See id.* at 26. The importance of this statement is not that the equal footing boundary must be covered by water "most of the time," as petitioners claim, but rather that the MHWL is the boundary that reflects the ordinary high reach and influence of the water on tidal shores.

Similarly, the common-law OHWM reflects the ordinary high reach and influence of seasonally and annually variable water levels on non-tidal shores when observed "over a considerable period of time" (*see Borax*, 296 U.S. at 26–27). But unlike the MHWL, which is based on tidal elevations, the high-water line on non-tidal rivers and lakes is still primarily indicated by observable physical features on the shore such as vegetation. Cole, *Water Boundaries* 60.

Petitioners' waterline, in contrast, even including a splash/wave zone, does not reflect the long-term, ordinary high reach and influence of the water. Rather, it reflects only the water's hourly or, at most, daily reach.

*Principle 2: Opportunity for states to hold shores for public uses*. The second principle underlying the analogy between the MHWL and common-law OHWM as the boundaries of equal footing title is that both separate land suitable for private uses from lands covered by water frequently enough to indicate that such private uses are best considered subordinate to public uses. As the Court stated in *Shively*, a foundational equal footing case, "Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high-water mark. . . . Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right." 152 U.S. at 57; *see also* U.S. Survey Manual § 3-164 ("For inland waters, the OHWM normally used is the line below which the water impresses on the soil by covering it for sufficient periods to deprive it of terrestrial vegetation, and the soil loses its value for agriculture, including grazing of livestock."); Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L. Rev. 1, 22 (2010) ("English common law recognized title in the crown up to the high water mark and that lands below the high water mark are incapable of cultivation or improvement in the same manner as uplands.").

Although the dominance of agricultural land use has diminished since *Shively*, the principle articulated in *Shively* to underpin the OHWM boundary remains a cogent rationale for the federal public policy applied to equal footing waterbodies. Intermittently-inundated shores are still an integral part of such waterbodies. Shoreland below the common-law OHWM provides valuable public resources and enhances access to traditional public uses of the water. The fact that several states have relinquished shoreland acquired under equal footing does not undermine the continued relevance of the *Shively* principle—the equal footing doctrine simply gives new states the *opportunity* as sovereigns to hold the intermittently-submerged shores of their navigable waterbodies for valuable public uses.

The common-law OHWM recognized by the *Gunderson* court reflects this fundamental principle articulated in *Shively*. Petitioners' waterline, in contrast, does not.

*Principle 3: Stable property boundary*. The third principle linking the MHWL and common-law OHWM is that both are relatively stable over time. The common-law OHWM integrates the relatively large fluctuations and instabilities in Great Lakes water levels and beach profiles. *See* Norton et al., 39 Coastal Mgmt. at 146, 149–50.

Petitioners' waterline, in contrast, is an unstable and highly changeable property boundary. *See id.* at

144–45; Pet. 12–14. Petitioners are asking for a property boundary that might significantly change on a daily time scale and that indisputably does significantly change across seasons.

### 2. *Petitioners' focus on the amount of beach above the OHWM is misguided.*

Petitioners argue that because some sandy beach exists above the MHWL on some ocean shores, this Court should redefine OHWM on Great Lakes shores to be the waterline, thus conveying essentially all temporarily-exposed beach to private ownership. Pet. 1, 8–10, 26. Petitioners also argue that the Court's statements that the Great Lakes are like "inland seas" (Pet. 12, 27; *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 453 (1851)) means that the amount of beach above the MHWL and OHWM should be similar.

First, the dynamics of Great Lakes beaches are different from those of ocean beaches. According to Norton et al., "in contrast to the ocean environment, changes in the beach morphology of a Great Lakes shoreline—which occur over the period of years—often result in the appearance of broad beaches . . . that appear to be stable . . . but that in fact are ephemeral, quickly lost when water levels rise again." 39 Coastal Mgmt. at 146. Contrary to petitioners' unsupported assertions (Pet. 27–28), this influence of the water on Great Lakes shores described by Norton et al. represents "ordinary" high-water events that

occur with sufficient regularity to be included within the bounds of the ordinary high water mark.

Second, how much beach remains above the MHWL or common-law OHWM is immaterial to the legal definitions and legal effect of these boundaries under equal footing law. These boundaries are used to demarcate equal footing land because they have historically protected state sovereignty and important public uses on coastal shores, not because they produce a preconceived allocation of public and private property.

Third, the *Genesee Chief* Court drew the analogy between oceans and the Great Lakes to rule that admiralty jurisdiction applies to inland navigable waterbodies as well as to tidal waterbodies, not to compare the high water mark boundary on oceans and lakes. *Genesee Chief*, 53 U.S. at 453, 456–57; *see also* Kilbert, 58 Clev. St. L. Rev. at 4 n.12. In any case, one must ask why the boundary of equal footing title should be petitioners' instant waterline for "inland seas" but the long-term, ordinary high reach of the water for tidal seas.

Petitioners' ultimate argument seems to be that application of the common-law OHWM will inevitably result in all exposed beach being open to the public, and that this result is unfair. If the state believed that delineation of the common-law OHWM would produce an unfair outcome, such unfairness could be remedied by the Indiana legislature. More importantly, any

attempt to define the legal boundary of equal footing title based on how much current (or historic) shore should be allocated to private ownership would send this Court down a legally dangerous and technically demanding path that would receive no support from existing legal authority or the record in this case.

### D. The Court should reject petitioners' request to impose a special legal definition or delineation test for the boundary of equal footing title on the Great Lakes.

As discussed above, the common-law OHWM is widely accepted and used as the boundary of federal interests and jurisdiction for both lakes and rivers. To be sure, it can be technically difficult to accurately determine the water's ordinary high reach and influence on some shores. This is a well-recognized challenge, and federal agencies have been busy developing methods for delineating the common-law OHWM in various places. For example, delineation of the common-law OHWM in the arid West is particularly challenging, but federal agencies are addressing the issue. *See* Robert W. Lichvar & Shawn M. McColley, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual* (U.S. Army Corps of Eng'rs ERDC/CRREL TR-08-12, Aug. 2008). Delineating the common-law OHWM is also challenging in Florida. *See* Richard

Hamann & Jeff Wade, *Ordinary High Water Line Determination: Legal Issues*, 42 Fla. L. Rev. 323, 345 (1990).

These examples highlight the troubling implications of petitioners' request that the Court craft for the Great Lakes either a special legal definition of OHWM or a special test for delineating the OHWM's physical location.

If the Court were to adopt a special legal definition of OHWM for the equal footing title acquired by Great Lakes states, why not a special definition for states in the arid West or the South as well?

Furthermore, the record in this case does not contain an OHWM delineation or any other information that would be necessary for this Court to specify technical tests for delineating the OHWM on Great Lakes shores. Federal agencies are already working to develop delineation methods that account for our nation's wide variety of lake and river types, climatic conditions, and shoreline dynamics. There is no reason for this Court to wade into that undertaking and substitute its judgment for that of the delineation experts.

## II. Petitioners Do Not Identify Conflicts Over the Interpretation of Federal Equal Footing Law But Rather Identify Differences in the Development of State Property Law.

In an attempt to interest this Court in adopting a special definition or test of OHWM for the Great Lakes, petitioners invent a conflict by citing to differences among states in the boundary of private ownership on lakeshores. *See* Pet. 14–18, 23–26. Petitioners assert that the reason Great Lakes states recognize different boundaries of private title on their lakeshores is that these states "have conflicting views of the equal footing doctrine" and that these differences are "not simply a matter of diverging state laws." Pet. 23. But equal footing law and the very cases cited by petitioners and their amici contradict these assertions. The arguments of petitioners and their amici rely on a mischaracterization of state cases as having decided the federal issue of the equal footing boundary when in fact these cases were decided based on each state's distinctive property law and policy.

As petitioners recognize, the initial boundary of lakebed title passed to new states under the equal footing doctrine is a matter of federal law. *Corvallis Sand & Gravel*, 429 U.S. at 374–76. After equal footing title vests in the new state, however, state law governs subsequent issues such as disposal of equal footing land and redefinition of property boundaries. *Id.* (explaining that after statehood "the role of the

equal-footing doctrine is ended, and the land is subject to the laws of the State"); *see also PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227–28 (2012) ("Upon statehood, the State gains title within its borders to the beds of waters then navigable . . . It may allocate and govern those lands according to state law . . . ."); *Barney*, 94 U.S. at 338 ("If [states] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."); *cf. Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (considering limitations on disposal of equal footing land).

The equal footing doctrine's "uniform approach" is that all states receive the same rights to their navigable waterbodies at statehood, not that each state must then maintain its equal footing land to be the same as every other state, as amicus Minnesota Association of Realtors suggests (*see* Realtors Br. 8).

Indeed, several Great Lakes states including Ohio, Michigan, and Minnesota, as well as states outside the region, have set the boundary separating state and private title on shorelands at the low water mark or some other line below the common-law OHWM. Those choices had the legal effect of relinquishing those states' equal footing shoreland between the OHWM and the new boundary line. As petitioners recognize, "some states have 'limited their title' in submerged lands to a point below the high-water line, which 'effectively convey[s] land above the [new boundary] to the upland owner.'" Pet. 7 (brackets in

original) (citation omitted). And these post-statehood choices, made as a matter of state property law, are why different states today recognize different boundaries of private title on the shores of their navigable waterbodies.

For example, the Ohio high court recently stated in *State ex rel. Merrill v. Ohio Dep't of Nat. Res.* that Ohio decided in 1878, following decisions made even earlier under Illinois state law, that private ownership on Lake Erie's shoreline could extend to "the line at which the water usually stands when free from disturbing causes." 955 N.E.2d 935, 947, 950 (Ohio 2011). The *Merrill* court expressly stated that this boundary is "not the high-water mark." *Id.* at 947. But, according to the court, this boundary is not the waterline (instant water's edge) either. *Id.* at 949 (stating that "[t]he boundary of the public trust does not . . . change from moment to moment as the water rises and falls").

The *Merrill* court viewed this choice of boundary as a matter of Ohio law. The court stated that the designation of the boundary of private ownership is "[b]ased on opinions of this court from as early as 1878 and the Ohio General Assembly's statement of public policy enunciated in the Fleming Act in 1917." 955 N.E.2d at 939. There is no discussion in the case of the equal footing doctrine or any other federal law or question. The Ohio court based its decision squarely on Ohio law and precedent.

Similarly, the Michigan high court in *Glass v. Goeckel*, in deciding that the boundary of public rights on Michigan's Great Lakes shores remains at the common-law OHWM, noted that at least 100 years ago the Michigan courts had relinquished the state's title in its shores down to the low water mark as a matter of state law. 703 N.W.2d 58, 69–70, 70 n.16 (Mich. 2005), *cert. denied*, 546 U.S. 1174 (2006).

Petitioners and their amici extensively rely on the dissent in *Glass*. The dissenting justices had wanted the boundary of public rights on the shore to be the waterline rather than the OHWM. Notably, the dissent referred to the boundary choice as a development of "the common law as it has developed in Michigan," a result of the "local laws" of the state, and a reflection of "Michigan's views of justice and policy." *Id.* at 86–87, 90, 93–94 (Markman, J., dissenting in part). That is, the dissenters were arguing state legal precedent and policy, not federal equal footing law. Petitioners' reliance on the losing argument of the *Glass* dissent is misplaced.[6]

The state-law basis of the boundary decisions cited by petitioners and their amici is further highlighted by considering states that have consciously and expressly relinquished equal footing shoreland by statute. For example, the California high court explained in *State v. Superior Court (Lyon)* that at

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[6] The Court properly denied certiorari in *Glass*.

statehood in 1850 "California succeeded to the ownership of the beds of [navigable] waters upon its admission to the Union, to the high water mark," but that in 1872 the legislature "grant[ed] to private persons . . . title to the beds of navigable, nontidal bodies to low water mark." 625 P.2d 239, 246, 248 (Cal. 1981).

Similarly, the North Dakota high court in *In the Matter of Ownership of the Bed of Devils Lake* affirmed that "[u]pon being admitted to statehood the State of North Dakota acquired the bed of Devils Lake, the boundary of which was the ordinary high water mark," but that "[b]y legislative act now codified . . . the State of North Dakota granted to riparian and littoral landowners ownership rights below the ordinary high water mark, down to the low water mark." 423 N.W.2d 141, 142 (N.D. 1988).

Indiana's *Gunderson* decision stands in contrast to these examples of states that have relinquished their title to equal footing shoreland. *Gunderson* is notable because the court ruled in step two of its analysis that Indiana, unlike most other Great Lakes states, never changed the boundary of its equal footing title on the lakeshore from the common-law OHWM. *See* Pet. App. 22–23.

Amicus Realtors misunderstands this point. Contrary to Realtors' suggestion, the *Gunderson* court did not interpret the equal footing boundary any differently than other states. *See* Realtors Br. 8.

These different choices of property boundaries (and of the scope of public rights) are what Kilbert and Scanlan (*see* Pet. 14, 23) were talking about when they noted the "inconsistent" approaches of Great Lakes states. *See* Melissa K. Scanlan, *Shifting Sands: A Meta-theory for Public Access and Private Property Along the Coast*, 65 S.C. L. Rev. 295, 306, 312–13, 318–19 (2013) (noting variation among states in conveyance of equal footing title and recognition of public rights on shores as matters of state law). As Kilbert observed, "While certain states recognized private title below the OHWM, it does not change the fact that the lands underlying those navigable waters up to the OHWM passed to the states pursuant to the equal footing doctrine." 58 Clev. St. L. Rev. at 24. The differences among states in their choices of the boundary of private ownership on shores reflect state prerogatives and do not create a conflict of concern to this Court. Petitioners make no argument that could justify a decision by this Court to preempt Indiana's prerogative to keep its full equal footing shoreland whether or not other states have relinquished theirs.

## III. The Amici Aligned With Petitioners Are Adrift in Immaterial Issues of Upland Property and State Law and Policy.

The arguments of amici Cato Institute et al. are based on a profound misunderstanding of the *Gunderson* facts and decision. Also, their brief is focused on decisions made pursuant to state law and

prerogative, which are immaterial to the federal issue raised here—i.e., the boundary of shores acquired by Indiana under the federal equal footing doctrine.

For example, Cato et al. repeatedly assert without any support that "[t]he water's edge has been the traditional demarcation" between public and private land. Cato Br. 3, 5, 10. They conflate petitioners' "water's edge" with the common-law definition of OHWM and then erroneously attribute the conflation to Kilbert. *See* Cato Br. 9.

First, Kilbert never said or implied that the "water's edge" (as petitioners and their amici use the term) is the boundary of equal footing land. Kilbert actually said that the OHWM boundary of equal footing title is "a visible mark, such as the line where terrestrial vegetation ends or the soil changes character"—that is, the common-law OHWM. Kilbert, 58 Clev. St. L. Rev. at 23–24. In fact, Kilbert uses the term "water's edge" throughout his article as a *contrast* to the OHWM. *See, e.g.*, *id.* at 9–12.

Second, Cato et al. (like petitioners and Realtors) present no law to support their assumption that the instant water's edge is or ever has been the boundary of equal footing title acquired by the states. Their assertion is based exclusively on decisions by other states to set property boundaries below the common-law OHWM—for example, at the line at which the water stands when free from disturbing causes (Illinois and Ohio) and at the low water mark

(Minnesota and Michigan). But as shown above, these decisions were made as a matter of state law and policy, often reflecting 19th-century state law precedents, and so are immaterial to the federal issue of the equal footing boundary.

Cato et al. also falsely claim that "[i]n 2017 the Indiana Department of Natural Resources adopted . . . [a] new 'administrative boundary' [that] shifted the boundary between privately-owned land and land subject to the public trust doctrine shoreward . . . [and] allowed the public to use the Gundersons' (and other Indiana landowners') upland property," and that the *Gunderson* court "affirmed this new 'administrative boundary.'" Cato Br. 4–5.

Amici misunderstand the facts. The *Gunderson* court in fact *rejected* the agency's "administrative boundary" (actually adopted in agency regulations in 1995), partly at the request of petitioners. Pet. App. 30–35. And the agency's "administrative" line threatened to shift the boundary of private property lakeward, not shoreward as amici claim. Pet. App. 33. Moreover, in federal law, "upland" is land "above the high-water mark" containing terrestrial soils and vegetation. *United States v. 30.54 Acres of Land*, 90 F.3d 790, 794 n.1 (3d Cir. 1996); U.S. Survey Manual §§ 3-164, -167, -168. Upland property was not at issue in *Gunderson*.

Cato et al. lastly argue that the public trust doctrine should not be interpreted to approve public

uses on the shores other than navigation, commerce, and fishing. Cato Br. i, 14–15 (presenting a litany of recreational uses *not* approved by the *Gunderson* court). But the scope of public trust uses is a state law matter. *PPL Montana*, 132 S. Ct. at 1235 (stating that "[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders").

The brief of Minnesota Association of Realtors similarly exhibits a deep misunderstanding of the *Gunderson* case. For example, Realtors claims that the Court's takings analysis in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), applies here. Realtors Br. 2–7. *Nollan*, however, concerned land entirely *above* the ordinary high water mark—i.e., upland that was part of the public land survey and available for transfer into private ownership via federal patent. *See Nollan*, 483 U.S. at 827–28 (explaining that "[t]he historic mean high tide line determines the [Nollans] lot's oceanside boundary"). And California has retained the original high-water mark boundary between public and private property on its ocean shores (unlike its inland waterbody shores). *See State v. Superior Court (Lyon)*, 625 P.2d at 246 ("California succeeded to the ownership of the beds of [navigable] waters upon its admission to the Union, to the high water mark."); West's Ann. Cal. Civ. Code § 670 ("The State is the owner of all land . . . below ordinary high-water mark, bordering upon tide water within the State . . . ."); *id.* at § 830 ("[T]he

owner of the upland, when it borders on tide water, takes to ordinary high-water mark . . . ."). Because the Nollans' property indisputably was not equal footing land, a regulatory taking was possible and a takings analysis was appropriate.

*Gunderson*, in contrast, is about ownership of land entirely *below* the ordinary high water mark—i.e., equal footing land acquired at statehood and thus not available for transfer via federal patent.[7] Equal footing land not relinquished by the state (like the disputed shore in *Gunderson*) cannot be the subject of a taking because it is not privately owned.

Realtors also contends that the Indiana Supreme Court in *Gunderson* incorrectly analyzed the equal footing doctrine (Realtors Br. 2, 8–10), but like petitioners Realtors relies on state court decisions that relinquished equal footing title pursuant to state property law, not federal equal footing law. Realtors cites to *State v. Korrer*, 148 N.W. 617, 623 (Minn. 1914), but this case further negates its arguments. The Minnesota court indeed stated in *Korrer* that "[i]n this state it has been settled for nearly 50 years that the title of the riparian owner extends to low-water mark." Realtors Br. 9. But Realtors omits the prior three sentences: "Many courts and text-writers lay

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[7] The *Gunderson* court did not consider public rights to land *above* the common-law OHWM, and no party argued that such land was public or available for public access.

down the rule that the title of the riparian owner stops at high-water mark. Others hold that his title extends to low-water mark. *This is a matter for each state to determine for itself*." 148 N.W. at 623 (emphasis added).

According to *Korrer*, Minnesota set the boundary of private title at the low-water mark around 1864. This was before the seminal cases of *Barney* (1876) and *Shively* (1894) that fleshed out the key features of the equal footing doctrine. The argument put forth by amici and petitioners that early state courts were interpreting equal footing law to set property boundaries even before the Court articulated the basic equal footing doctrine is illogical and unsupportable.

Ultimately, the amici (like the petitioners) fail to present any authority saying that the boundary of equal footing title acquired at statehood is anything other than the common-law OHWM. That failure stands in stark contrast to the authorities presented above supporting the *Gunderson* court's conclusion that the common-law OHWM is the equal footing boundary on the shore of Lake Michigan.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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January 3, 2019