UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

RANDALL PAVLOCK, KIMBERLEY PAVLOCK, and RAYMOND CAHNMAN, Plaintiffs, v. ERIC J. HOLCOMB, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF INDIANA; CURTIS T. HILL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF INDIANA; CAMERON F. CLARK, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE STATE OF INDIANA DEPARTMENT OF NATURAL RESOURCES; AND TOM LAYCOCK, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR FOR THE STATE OF INDIANA LAND OFFICE, Defendants.	)	No. 2:19-CV-466 **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

Plaintiffs Randall Pavlock, Kimberley Pavlock, and Raymond Cahnman (Plaintiffs) submit this response to Defendants' motion to dismiss (Doc. 23).

STATEMENT OF THE CASE

This civil rights lawsuit[1] seeks to enjoin Indiana officials from continuing to enforce the result of a recent Indiana Supreme Court decision that declared—contrary to prior precedent, historical practice, and the common law of similarly situated states—that private lakefront owners such as Plaintiffs cannot own property

[1] Defendants suggest that Plaintiffs did not plead this case under Section 1983. Not only is that wrong, Complaint ¶¶ 7, 69, but it is clear that state officials sued in their official capacity for injunctive relief are persons under Section 1983, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989).

below the "ordinary high water mark" (OHWM) of Lake Michigan. *Gunderson v. State*, 90 N.E. 3d 1171 (Ind. 2018), *cert. denied sub nom. Gunderson v. Indiana*, 139 S. Ct. 1167 (2019). As a result of *Gunderson*, the State now owns what once was Plaintiffs' beach property below the OHWM. Plaintiffs can no longer use and enjoy this property. They are now limited to the same rights the general public possesses. Complaint ¶¶ 12, 14. While Plaintiffs have no issue with the public walking across the beach pursuant to walking easements they have conveyed, *id.* ¶¶ 32-33, *Gunderson*'s decree extinguished their ownership of the beach and the many rights that come with it.

Plaintiffs possess platted deeds describing property below the OHWM. Complaint ¶¶ 11, 13 & Exs. A-D. They allege that Indiana law before 2018 permitted private ownership to the "low-water mark" of non-tidal navigable waterways. *See Stinson v. Butler*, 4 Blackf. 285, 285 (1837); Complaint ¶¶ 22, 72. They further allege that the history of ownership along the beach demonstrates that all relevant stakeholders—the federal government, the State, local governments, the public, and private owners—understood that this rule applied equally to Lake Michigan. Complaint ¶¶ 26, 29-58. Therefore, by holding that Indiana maintains exclusive title to property below the OHWM, *Gunderson* moved the property line and transferred Plaintiffs' property below that line to the State. *Id.* ¶ 66. Because "a State, by *ipse dixit*, may not transform private property into public property without compensation," *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980),

Plaintiffs charge that the *Gunderson* decreed just such a transformation, and as such that the State took their property without compensation. Complaint ¶¶ 66, 70-71.

Defendants—the Governor, Attorney General, Director of the Department of Natural Resources (DNR), and the Acting Director of the State Land Office, in their official capacities—moved to dismiss the complaint. Defendants raise two main arguments: (1) that judicial takings are not cognizable; and (2) that even Plaintiffs' claim for injunctive relief is barred by sovereign immunity under a sui generis exception to the *Ex parte Young*, 209 U.S. 123 (1908), doctrine.[2] Both arguments fail.

At this stage, Defendants do not challenge Plaintiffs' underlying argument that *Gunderson* changed Indiana law by rejecting the clear import of *Stinson* and its progeny and ignoring historical practice and the development of the law in neighboring states. Instead, they broadly assert that there is no such thing as a judicial taking. Defendants are wrong. "Judicial takings are ultimately no different from takings carried out by other government actors. The text and original meaning of the Constitution provide no basis for distinguishing between the two." Ilya Somin,

[2] Defendants also argue that (1) Defendants other than the Director of DNR are not proper parties to sue regarding Plaintiffs' main claim for injunctive relief; and (2) none of the Defendants are responsible for enforcing state trespass laws. First, Defendants concede that the Director of DNR is the proper party for a *Young* suit regarding coastal property. *Gunderson* discussed DNR's general authority over "state lands abutting a lake or stream," confirming that Indiana law gives DNR—under the State's theory—authority over the contested property. *See Gunderson*, 90 N.E.3d at 1185 (citing Ind. Code § 14–18–5–2 (2017)). Plaintiffs named the other State officials because they have authority to enforce State law and delineate State land. Whether they remain as parties is immaterial to Plaintiffs' claim seeking an injunction prohibiting the State from exercising ownership over the disputed property. However, the Southern District of Indiana has indicated that where a governor directs enforcement of state law to relevant agencies through memoranda, he may be a proper party in a *Young* suit. *Bowling v. Pence*, 39 F. Supp. 3d 1025, 1028 (S.D. Ind. 2014). Without discovery in this case, there's no way to know whether Governor Holcomb has directed DNR on the enforcement of *Gunderson*.

Second, Plaintiffs concede that Defendants do not enforce state trespass law. Plaintiffs simply seek relief that would compel the State to treat their property the same as all other private property. Plaintiffs recognize that local officials not parties here are responsible for enforcing trespass law.

Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pub. Pol'y 91, 93 (2011). Plaintiffs' case, therefore, should go forward.

The Court should similarly reject the State's reliance on *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), to establish sovereign immunity from Plaintiffs' claim for injunctive relief. *Idaho* is a truly unique case that stands for the proposition that a State cannot be haled into federal court by an Indian tribe claiming *sovereignty* over State lands *if the state courts remain open* to hear the tribe's claim. It does not extend beyond its facts to shield the State from a claim to stop its taking Plaintiffs' property without compensation.

For the reasons stated, the Court should deny the State's motion to dismiss.

STANDARD OF REVIEW

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), this Court must accept "as true all well-pleaded factual allegations" and draw all reasonable inferences in Plaintiffs' favor. *See Rueth v. U.S. E.P.A.*, 13 F.3d 227, 229 (7th Cir. 1993). A complaint should not be dismissed if it alleges facts which, if true, would "plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

ARGUMENT

I

JUDICIAL TAKINGS ARE COGNIZABLE

A. Applicable Supreme Court Precedent Identifies and Validates the Judicial Takings Theory

The Fifth Amendment states that "private property" may not be "taken without just compensation." U.S. Const. amend. V. "Nowhere does [the Fifth

Amendment] distinguish between takings conducted by the judiciary and those carried out by any other branch of government." Somin, *supra*, at 94. This Court should not do so either. Indeed, judicial takings theory is well-grounded in Supreme Court precedent.

In *Hughes v. Washington*, 389 U.S. 290 (1967), the Supreme Court held that a private property owner along the Pacific Ocean who traces his title to before Washington became a state owns future accretions as a matter of federal law. Justice Stewart wrote separately to explain how a judicial decision in such a factual scenario might operate as a taking. He warned that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Id*. at 296-97 (Stewart, J., concurring). Under his theory, "to the extent that [a state high court decision] constitutes a sudden change in state law, unpredictable in terms of the relevant precedents," federal courts would owe it no deference. *Id*. at 296. Whether the state decision "worked an unpredictable change in state law" was precisely the federal question. *Id*. at 297.

Thirteen years later, the Supreme Court in *Webb's Fabulous Pharmacies* unanimously endorsed the proposition that any branch of government can commit a taking—even the Judicial Branch. The Court there held that a statute declaring the interest from an interpleader account to be public money effected a taking. In no uncertain terms, the Court declared that "[n]either the Florida Legislature by statute, *nor the Florida courts by judicial decree*, may accomplish the result the

county seeks simply by re-characterizing the principal as 'public money' because it is held temporarily by the court." *Webb's Fabulous Pharmacies*, 449 U.S. at 164 (emphasis added). Regardless of the actor, "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Id.*

Webb's Fabulous Pharmacies established the principle from Justice Stewart's concurrence—namely, that a State cannot avoid the import of the Takings Clause through a judicial decree declaring the property taken never existed in the first place. But it would be another 30 years until the petitioner in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* argued that a Florida Supreme Court decision interpreting the state's Beach and Shore Preservation Act effected a taking of beachfront owners' littoral rights. 560 U.S. 702, 712 (2010). Led by Justice Scalia, a four-justice plurality concluded that "if a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Id.* at 715 (plurality opinion). For good reason, the plurality effectively found the unanimous decision in *Webb's Fabulous Pharmacies* controlling. *Id.*

The State points out that the portion of Justice Scalia's opinion in *Stop the Beach* concerning judicial takings (Parts II and III) received only four votes. Plaintiffs concede that it is not binding on this Court. But neither does it bind the Court to hold that a judicial takings claim is *not* viable.[3] Indeed, the unanimous portion of Justice

[3] Defendants appear to argue that *Gibson v. American Cyanamid Co,*, 760 F.3d 600 (7th Cir. 2014), holds that a lack of binding precedent from the Supreme Court renders courts within the circuit unable

Scalia's opinion (Parts IV and V) concluded only that no taking had occurred because the Florida Supreme Court decision had not actually extinguished any established property rights. *Id.* at 733 (majority opinion). In effect, in Parts IV and V assumed, without deciding, a judicial taking would occur when a state court decision effectively divests a property owner of established property rights under state law. This is precisely what Plaintiffs allege here. Complaint ¶ 71. Justice Scalia went on to explain that a taking would not occur where a state high court "merely clarif[ies] and elaborate[s] property entitlements that were previously unclear." *Id.* at 727 (plurality opinion). But that is not what Plaintiffs allege occurred in *Gunderson*. The only holding of *Stop the Beach* was that under the facts presented, no taking occurred.[4]

As the Federal Circuit put it, "the theory of judicial takings existed prior to 2010." *Smith v. United States*, 709 F.3d 1114, 1117 (Fed. Cir. 2013). The soundness of Plaintiffs' judicial takings theory flows directly from the unanimous holding of *Webb's Fabulous Pharmacies* that "[n]either the Florida legislature by statute, *nor the Florida courts by judicial decree*" can accomplish what would otherwise be a taking "simply by re-characterizing" private money as public money. 449 U.S. at 164 (emphasis added). That is because a state, whether by legislation or judicial decree, "may not transform private property into public property without compensation." *Id.*

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to recognize a takings claim. That is wrong. *Gibson* simply held that the plurality opinions in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), and *Stop the Beach* change existing law, which was that state action which "imposes a liability on a party rather than take or burden a specific property interest" is not a taking. *Gibson*, 760 F.3d at 626. Here, no Supreme Court or Seventh Circuit case *rejects* judicial takings as a theory, while *Webb's Fabulous Pharmacies* supports the theory.

[4] The remaining four justices participating in *Stop the Beach* thought the Court should wait for another case to decide the question. *See id.* at 741-42 (Kennedy, J., concurring in part and concurring in the judgment) & *id.* at 745 (Breyer, J., concurring in part and concurring in the judgment). Justice Stevens did not participate.

If that was true in *Webb's Fabulous Pharmacies*, which concerned interest from money temporarily deposited with a court in an interpleader account, it is certainly true in this case where real property is involved. Indeed, government appropriation of private property without compensation is "the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.*

B. If Courts Can Violate Other Constitutional Provisions, They Can Violate the Takings Clause

It has been suggested that judicial takings are somehow different from those committed by the political branches of a state or local government, whether because courts generally lack the power of eminent domain, *see Stop the Beach*, 560 U.S. at 736 (Kennedy, J., concurring in part and concurring in the judgment), or because judges cannot be sued for their judicial actions, *see* Memo in Support (Doc. 24) at 5-6. But there is no question that courts can violate other constitutional provisions—indeed, the Supreme Court has twice before held that judicial decisions violated the First Amendment. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court explicitly "rejected the libel plaintiff's argument that the First Amendment did not apply to state judicial decisions in private civil actions," Somin, *supra*, at 95, explaining instead that it mattered not "the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised," *Sullivan*, 376 U.S. at 265. And in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), "the Court concluded that a state property law ruling violated the First Amendment rights of protestors." Somin, *supra*, at 96; *see also Stop the Beach*, 560 U.S. at 714-15 (plurality opinion) (arguing that *PruneYard*'s consideration of the

property owner's takings argument "certainly does not suggest that a taking by judicial action cannot occur, and arguably suggests that the same analysis applicable to taking by constitutional provision would apply"). Just as courts may violate the First Amendment, they may violate constitutionally protected property rights. That they lack eminent domain power under state law hardly renders them unable to commit a taking.

That judges are absolutely immune from suit based on their decisions does not matter either. First, monetary relief is likely not available in judicial takings cases for several reasons, but perhaps the best is that it would make little sense to require a state to pay for a taking not effected by its political branches. Further, judicial takings claims can arise in two distinct postures: either, like in *Stop the Beach*, a petition for certiorari to the Supreme Court of the United States arguing that the decision of a state court of last resort took its property *in the instant case for which the petitioners seek review*; or like in this case, where a state court declares that what had been established property no longer exists, and nonparties to that state court case sue in federal district court. *See Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1335-36 (1994) (mem.) (Scalia, J., joined by O'Connor, J., dissenting from denial of certiorari) (explaining why a collateral attack by nonparties to the original case would present courts, and eventually the Supreme Court, with a better record to determine whether the state court had indeed divested established property rights); *Stop the Beach*, 560 U.S. at 728 (plurality opinion) ("[W]here the claimant was not a party to the original suit, he would be able to challenge in federal court the taking effected by

the state supreme-court opinion to the same extent that he would be able to challenge in federal court a legislative or executive taking previously approved by a state supreme-court opinion."). Either way, injunctive relief is the best remedy, as that would permit the legislature to either condemn the disputed property or simply abide by the injunction to avoid financial liability. *See Stop the Beach*, 560 U.S. at 723-24.

As in all cases for injunctive relief against state officials arising out of *Ex parte Young*, plaintiffs do not sue the individuals who *enacted* the challenged law (the state legislators), who are themselves "entitled to absolute immunity from liability under § 1983 for their legislative activities." *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). Instead, they must sue the officials tasked with carrying out those laws—or, here, the effects of the judicial ruling. *See Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300 (7th Cir. 2018), *rev'd in part on other grounds by Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780 (2019) (suing Commissioner of state health department to challenge abortion regulation statute); *Sotomura v. Hawaii County*, 460 F. Supp. 473 (D. Haw. 1978) (granting injunction against various state officials in claim that state supreme court decision divested owners of property). That's why Plaintiffs here have sued the Director of DNR and other state officials with potential authority, not the justices of the Indiana Supreme Court. If judicial immunity is a problem for judicial takings doctrine, official immunity similarly infects all *Young* cases. But that simply cannot be the case under prevailing *Young* doctrine.[5]

[5] For the same reason, Defendants' passing reference to the redressability requirement of Article III standing is misplaced. In all *Young* cases, the plaintiff sues the state official responsible for enforcing

"No one doubts that judges are forbidden to violate other constitutional rights. Property rights protected by the Takings Clause are no different." Somin, *supra*, at 106. And just as with other constitutional violations by state actors, there is no need to sue anyone who is absolutely immune from suit to obtain prospective injunctive relief. Judicial takings should be treated like any other takings claim.

C. Other Objections to the Application of Judicial Takings Theory Do Not Justify Failure To Apply the Doctrine

Defendants do not delve into the mechanics of judicial takings, choosing instead to simply assert that the lack of a majority in *Stop the Beach* is enough for them to prevail. However, Plaintiffs will address the major objections to the adoption of judicial takings theory: (1) judicial takings are better addressed under the rubric of the Due Process Clause; (2) federal courts lack the expertise on state law to determine whether a state court decision effects a taking; and (3) further recognition of judicial takings will open the lawsuit floodgates. None of these stand up to scrutiny.

With respect to the first objection, Justice Kennedy argued that "[t]he Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the Due Process Clause." *Stop the Beach*, 560 U.S. at 737 (Kennedy, J., concurring in part and concurring in the judgment).[6] But of course, as Justice Scalia observed, "[t]he first problem with using

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the challenged law. Here, DNR is responsible for enforcing *Gunderson*'s boundaries. There is no need to sue the justices of the Indiana Supreme Court. *See Weigel v. Maryland*, 950 F. Supp. 2d 811, 828-29 (D. Md. 2013); *Sotomura*, 460 F. Supp. 473 (injunction issued against state and county officials).

[6] The Seventh Circuit in *Gibson* recognized that judicial decisions applied retroactively might violate substantive due process. But that case demonstrates how due process is an insufficient remedy for a

substantive due process to do the work of the Takings Clause is that [the Supreme Court] held it cannot be done." *Id.* at 721 (plurality opinion). His point was that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Id.* (citations omitted). The Court further noted in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-41 (2005), that takings and due process cases are distinct and that due process precedents should not be imported into takings jurisprudence. And even if relief were available under the Due Process Clause in some cases, it would often fall short of the protection afforded by the Takings Clause. Prevailing rational basis review under substantive due process gives inadequate protection to property rights intended to be protected by the Takings Clause *See Stop the Beach*, 560 U.S. at 721. Attempting to force takings cases like this into the due process box would make little sense when the Takings Clause applies to this very situation.

Procedural due process might be a better fit, but that only guarantees pre-deprivation notice and a hearing. *See Parratt v. Taylor*, 451 U.S. 527, 540-41 (1981) (pre-deprivation notice and hearing required unless the deprivation of property was the "result of a random and unauthorized act by a state employee"). *Sotomura*—a case strikingly similar to this one—shows why the Takings Clause is the superior vehicle. There, the plaintiffs demonstrated that a Hawaii Supreme Court decision

violation of the Takings Clause. Simply put, an uncompensated taking need not be "irrational" or "indefensible" to violate the Fifth Amendment. *Cf. Gibson*, 760 F.3d at 623.

moved the established boundary between public and private land, divesting them of property to which they held title. Like *Gunderson*, the decision there "was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline." 460 F. Supp. at 481. The district court issued an injunction on procedural due process grounds, *id.* at 478, but went on to hold that the decision was "so radical a departure from prior state law as to constitute a taking of the Owners' property by the State of Hawaii without just compensation," *Id.* at 483. In short, the court used the language of takings—citing favorably to Justice Stewart's concurrence in *Hughes*—but nevertheless found a *substantive due process* violation. *See id.* at 478. In a post-*Lingle* world, the Takings Clause must do the heavy lifting here.

As for the second objection, Justice Breyer worried judicial takings would "open the federal-court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges." *Stop the Beach*, 560 U.S. at 744 (Breyer, J., concurring in part and concurring in the judgment). But as Professor Somin explained, "if taken seriously, the expertise argument applies to many other areas of constitutional law as well." Somin, *supra*, at 101. Yet in untold numbers of cases, federal courts interpret state laws and determine whether they comply with the Federal Constitution. Indeed, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from

unconstitutional action under color of state law, 'whether that action be executive, legislative, *or judicial*.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)) (emphasis added). Property rights are entitled to the same "full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights." *Knick v. Township of Scott*, 139 S. Ct. 2162, 2170 (2019).

Finally, there is the "floodgates" argument. The reality is that judicial takings will be relatively rare. A state court that rejects a plaintiff's regulatory takings claim, for example, will essentially never commit a judicial taking because the decision will rarely, if ever, mark change in state law. A plaintiff who loses a takings case in the court of last resort may petition for certiorari to the Supreme Court, but his argument will be that the state supreme court *misapplied takings law*, not that it *redefined property interests*. Recognition of judicial takings would have no effect on the vast majority of takings cases brought in state courts each year. What it would do, however, is hold state courts accountable by placing an important limit on their power to simply declare that what was once private property is now the State's.

D. The Facts Presented Here Illustrate the Prototypical Judicial Taking

Defendants do not at this stage contest the underlying question whether the facts as pleaded here would constitute a judicial taking under the test adopted by the plurality and applied by the majority in *Stop the Beach*. However, Plaintiffs will briefly address this to demonstrate how judicial takings work in practice.

The facts here are relatively simple. Plaintiffs hold deeds describing land below any potential definition of the OHWM, which at usual times constitutes significant dry beach along Lake Michigan. In 1837, the Indiana Supreme Court heard a trespass action involving land along the Ohio River—another navigable waterway in the State to which the Equal Footing doctrine applies—and had to determine the boundary of private land along the river. *Stinson*, 4 Blackf. at 285. The defendants sought to show that title extended only to the OHWM, but the Indiana Supreme Court rejected their argument. The court held that title extended to the "ordinary low-water mark" and that English common law cases the defendants relied on had "no application" because they dealt with "waters which ebb and flow with the tide," which the Ohio River does not. *Id.* at 285. The court reaffirmed this rule several times in nineteenth century Ohio River cases. *See Martin v. City of Evansville*, 32 Ind. 85, 86 (1869) (property owners own to the low water mark of the Ohio River "subject only to the easement in the public of the right of navigation"); *Sherlock v. Bainbridge*, 41 Ind. 35, 41 (1872) (describing this rule as "settled . . . as far back as 1837").

Lake Michigan, of course, is also a navigable non-tidal body of water to which the Equal Footing doctrine applies.[7] Often relying on the lake's non-tidal nature, several other Great Lakes states subsequently found that title to the shore of Lake Michigan extended either to the water's edge at any particular time, or to the low-

[7] To be sure, none of the nineteenth century cases involved Lake Michigan. But *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 435-36 (1892), confirmed that the traditional rule that the states hold sovereignty to tidal waters also applies to navigable lakes and rivers. It would be strange if lakes and rivers were subject to different rules, and the Indiana appellate court has never so held. *See, e.g.*, *Spurrier v. Vater*, 113 N.E. 732, 733 (Ind. Ct. App. 1916) (holding that a city—which held title to the land—was not impermissibly removing sand and gravel from the lakeshore, noting that the removal had "extended" the "low-water mark" of the lake, thus "reducing the number of acres of the park").

water mark.[8] Historical practice in Indiana confirms that the *Stinson* rule applied to Lake Michigan: counties taxed land below the OHWM, the federal government purchased privately held beach to create the National Lakeshore and later obtained walking easements for the public across those other property, and localities excluded non-residents from town beaches. This is all consistent with the established *Stinson* rule. In short, the *Gunderson* decision was "contrary to established practice, history and precedent." *Sotomura*, 460 F. Supp. at 481.

Plaintiffs' argument is a simple one: their deeds are not imaginary nor fraudulent. They exist because under state law until 2018, property owners could own the shore of Lake Michigan to the low-water mark. Like the Hawaii Supreme Court decision at issue in *Sotomura*, *Gunderson* decreed, contrary to established law and practice, that Plaintiffs' property belonged to the State. Since a state may not, whether by legislative action or "judicial decree," "transform private property into public property without compensation," Plaintiffs contend that a judicial taking has occurred. *Webb's Fabulous Pharmacies*, 449 U.S. at 164.

II

SOVEREIGN IMMUNITY DOES NOT BAR PLAINTIFFS' CLAIM

In our dual sovereignty system, it is generally true that a state may not be haled before the federal courts without its consent. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Sovereign immunity also applies in some circumstances where the

[8] *See Seaman v. Smith*, 24 Ill. 521, 524 (1860); *Doemel v. Jantz*, 193 N.W. 393, 398 (Wis. 1923); *Glass v. Goeckel*, 703 N.W.2d 58, 68-71 (Mich. 2005); *State ex rel. Merrill v. Ohio Dep't of Natural Resources*, 955 N.E.2d 935, 949 (Ohio 2011). The Indiana Supreme Court itself once cited *Seaman* as an authority "upon the general subject of grants of lands bordering upon natural lakes." *State v. Portsmouth Sav. Bank*, 7 N.E. 379, 390 (Ind. 1886).

state itself is not the named defendant—those seeking relief that would "impose a liability which must be paid from public funds in the state treasury." *Id.* at 663. In such cases, the state is "the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.* (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945)). At bottom, sovereign immunity bars actions against state officials seeking retrospective relief in the form of damages that would drain a state's treasury.

Conversely, where an action seeks prospective injunctive relief—that is, to prevent the continuing enforcement of an allegedly unconstitutional or illegal state action—sovereign immunity is no bar. *Idaho*, 521 U.S. at 294 (O'Connor, J., concurring in part and concurring in the judgment). The Supreme Court first recognized this principle in *Ex parte Young*, reasoning that a state official engaged in such conduct "'comes into conflict with the superior authority of [the] Constitution,' and therefore is 'stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.'" *Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011) (quoting *Young*, 209 U.S. at 159-60). Because "an officer acts independently when enforcing an unconstitutional law," *Kolton v. Frerichs*, 869 F.3d 532, 536 (7th Cir. 2017), the State lacks the "power to impart to him any immunity from responsibility to the supreme authority of the United States," *Young*, 209 U.S. at 160.

Without the *Young* "exception" to sovereign immunity, citizens would often have no federal forum to enforce the rights guaranteed by the Constitution and

enforced through 42 U.S.C. § 1983. As such, the Supreme Court has repeatedly found that *Young* is "necessary to 'permit the federal courts to vindicate federal rights,'" *Stewart*, 563 U.S. at 255 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)), and remarked that the doctrine "gives life to the Supremacy Clause," *Green v. Mansour*, 474 U.S. 64, 68 (1985)). While state courts can and do enforce federal rights, Congress has granted individuals a supplemental federal remedy through Section 1983. Indeed, as Plaintiffs note in the previous section, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum*, 407 U.S. at 242.

A. Plaintiffs Seek Prospective Injunctive Relief of the Type Usually Permitted Under *Young*

The facts of this case at the pleading stage are simple. As explained in the previous section, Plaintiffs contend that the Indiana Supreme Court in *Gunderson* upended established law and transferred their property below the OHWM to the State. Therefore, Plaintiffs seek an injunction prohibiting the State of Indiana from exercising ownership of the property below the OHWM described in their deeds. Complaint ¶ 72 & Prayer for Relief ¶ B. They seek no damages or other retrospective relief that would bring the case outside the ambit of *Young*. Complaint ¶ 72 (acknowledging Indiana's immunity). Instead, they simply want the Court to stop the allegedly unconstitutional taking and restore the status quo ante *Gunderson*. An injunction would not entitle Plaintiffs to any monetary relief in state court, but simply prevent the State and its officials from enforcing the *Gunderson* boundaries and permit Plaintiffs to resume the use and enjoyment of their property. Because

Plaintiffs seek relief to prohibit State officials from continuing to enforce an allegedly unconstitutional taking of property without compensation, this case falls squarely within the confines of the *Young* doctrine.

B. Injunctive Relief Is Appropriate Because There Is No Other Remedy Available

Ironically, Defendants cite *Knick*—a landmark Supreme Court decision affirming takings plaintiffs' immediate access to federal court—for the proposition that injunctive relief is unavailable in most takings cases (and thus that Plaintiffs have *no forum* to challenge the alleged taking in this case). To be sure, monetary relief is available (and equitable relief thus foreclosed) in most takings cases. But no monetary relief is available against a state because it is not a "person" under Section 1983. *See Kolton*, 869 F.3d at 535-36. Plaintiffs therefore cannot seek monetary relief in federal court.[9] And because the state supreme court decreed the unconstitutional taking, Plaintiffs have no remedy in state court. *See Kolton*, 869 F.3d at 535 (noting that "someone else has asked [for compensation], and the highest state court has answered. Illinois will not pay. This leaves [the plaintiff] with a federal forum . . . ."). Therefore, prospective injunctive relief is appropriate in this case. *See id.* at 535-36; *see also Knick*, 139 S. Ct. at 2180 (Thomas, J., concurring).

The facts of *Kolton* are instructive. There, the plaintiff filed a putative class action alleging that an Illinois statute permitting the state to collect interest on unclaimed property in its possession effected an unconstitutional taking. *Id.* at 533.

[9] Two other circuits agree on sovereign immunity grounds. *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527-28 (6th Cir. 2004).

He sought damages as well as declaratory and injunctive relief. *Id.* The district court dismissed the claims under the then-existing state-litigation requirement (overruled in *Knick*), but the Seventh Circuit reversed, concluding that the plaintiff had a federal forum since the Illinois Supreme Court had already denied compensation. *Id.* at 535. The court permitted only the claims for prospective relief to proceed because no monetary damages were available either against the state or its named officials. *Id.* at 535-36. As Judge Easterbrook explained, "[p]laintiffs are entitled to prospective relief under *Ex parte Young* . . . . But they cannot parlay success under *Ex parte Young* into a money judgment in federal court…." *Id.* at 536; *cf. Seven Up*, 523 F.3d at 956 (*Young* was inapplicable because the plaintiff failed to seek any prospective relief).

Knick actually *confirmed* the availability of injunctive relief. It held that a takings claim accrues immediately when the government takes property and fails to pay compensation. *Knick*, 139 S. Ct. at 2170. It also emphasized the importance of guaranteeing a federal forum for takings claims, just as for other constitutional claims. *See id.* at 2167-68. Because any taking is complete and actionable when the property is taken without compensation, Plaintiffs allege an ongoing violation of their constitutional rights that may be cured through prospective injunctive relief. That is precisely the type of case in which *Young* typically applies. *See Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (characterizing the question of whether *Young* applies as a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." (quoting *Idaho*, 521 U.S. at 296)).

In short, while injunctive relief is unavailable in many takings cases, it is available here precisely because Indiana is immune to inverse condemnation suits in federal court (and cannot be sued through Section 1983 in any case). As it usually does, the availability of relief through suit against state officials under *Young* permits plaintiffs to hold states and their officials accountable to the supremacy of the United States Constitution. That is no different in the takings context.

C. *Idaho v. Coeur d'Alene Tribe of Idaho* Does Not Displace *Young*

Defendants' only argument against the straightforward applicability of *Young* here is that *Idaho* substantially limits the *Young* doctrine. A review of that case demonstrates that it is inapposite. There, the Coeur d'Alene Tribe alleged that the submerged lands of Lake Coeur d'Alene and various rivers and streams within the boundaries of its reservation, as established in an 1873 executive order later ratified by Congress, were within its sovereign territory. *See* 521 U.S. at 265. To enforce its claim, the Tribe sued Idaho in federal court seeking "a declaratory judgment to establish its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands as well as a declaration of the invalidity of all Idaho statutes, ordinances, regulations, customs, or usages which purport to regulate, authorize, use, or affect in any way the submerged lands." *Id.* Idaho argued that the Tribe's claims were barred by sovereign immunity; the Tribe maintained it could seek prospective relief from an ongoing violation of federal law under *Young*.

Faced with these unusual facts, the Supreme Court crafted a good-for-one-case-only rule. The only part of the Court's opinion that commanded a majority held *Young* inapplicable because the Tribe's suit was "the functional equivalent of a quiet

title action which implicates special sovereignty interests." *Id.* at 281. Yet these "special sovereignty interests" arose not merely because the case involved a property dispute between the Tribe and the State, but because—by virtue of the separate sovereignty of Indian tribes—the suit sought "a determination that the lands in question are not even within the regulatory jurisdiction of the State." *Id.* at 282. The threatened offense to Idaho's sovereignty was that a federal court might divest it not only of ownership, but *sovereignty or jurisdiction* over the disputed area. *See id.* at 283 ("Not only would the relief block all attempts by these officials to *exercise jurisdiction* over a substantial portion of land but also would divest the State of its *sovereign control* over submerged lands . . . ." (emphases added)). These were the "particular and special circumstances" under which the Court permitted Idaho to assert a sovereign immunity defense. *Id.* at 287.

The Supreme Court subsequently backed away from any broad reading of *Idaho*. "The Court treated *Coeur d'Alene Tribe* as an unusual case that was an exception to the *Young* doctrine because it would decide the state's ownership and legal and regulatory authority over 'a vast reach of lands and waters long deemed by the State to be an integral part of its territory.'" *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 372 (7th Cir. 2010) (emphasis added) (quoting *Idaho*, 521 U.S. at 282). And in *Verizon*, the Court ultimately "returned to the 'straightforward' inquiry into 'whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Ind. Prot. & Advocacy Servs.*, 603 F.3d at 372 (quoting *Verizon*, 535 U.S. at 645). Justice

Kennedy, who wrote the lead opinion in *Idaho*, said in *Verizon* that *Idaho* had been distinct because the Tribe "tried to use *Ex parte Young* to divest a State of *sovereignty over territory* within its boundaries." *Verizon*, 535 U.S. at 648 (Kennedy, J., concurring) (emphasis added). *Idaho* has been limited to its facts. It stands for the proposition that a federal court will not order a State to relinquish sovereignty over what it claims to be its territory.

Obviously, Plaintiffs do not seek to divest Indiana of its sovereignty or jurisdiction over the disputed property. Indeed, Plaintiffs do not even contend that the property below the OHWM is unencumbered by the public trust. After all, as Indiana courts have recognized, private ownership below the OHWM is entirely compatible with the public trust. *Martin*, 32 Ind. at 86 (holding that riparian title on the Ohio River "extends to low-water mark, subject only to the easement in the public of the right of navigation"). And the scope of property at issue here, which consists of portions of a handful of lots, much of which is indisputably subject to the public trust while submerged, does not even come close to the vast swath of shoreline and submerged land at issue in *Idaho*. Accordingly, an injunction in this case would not offend Indiana's dignity any more than would losing a typical constitutional case.

What is more, even in a case as unique as *Idaho*, the Court relied on the fact that Idaho's state courts were open to hear the case. *See Idaho*, 521 U.S. at 287-88. As Justice Kennedy explained in the lead opinion, "a most important application of the *Ex parte Young* doctrine" is "where there is no state forum available to vindicate federal interests, thereby placing upon Article III courts the special obligation to

ensure the supremacy of federal statutory and constitutional law." *Id.* at 270-71 (opinion of Kennedy, J.). The rule in this case takes on "special significance" because "providing a federal forum for a justiciable controversy is a specific application of the principle that the plan of the Convention contemplates a regime in which federal guarantees are enforceable so long as there is a justiciable controversy." *Id.* at 271 (citing The Federalist No. 80, p. 475 (C. Rossiter ed. 1961) (A. Hamilton)). Since Idaho was amenable to being sued in its own courts, there was "neither warrant nor necessity to adopt the *Young* device to provide an adequate judicial forum for resolving the dispute between the Tribe and the State." *Id.* at 274.

Plaintiffs allege that Indiana has taken their property without compensation. The Indiana Supreme Court decreed the taking, so by definition Indiana's courts are *not* open to hear this case. And by declaring that the State always retained exclusive title below the OHWM, the *Gunderson* court indicated that the State would not compensate Plaintiffs. Plaintiffs are therefore entitled to a federal forum to seek prospective relief via *Young*. *Idaho* is no bar.

D. Declaratory Relief Is Also Available

Defendants finally argue that declaratory relief is unavailable. Because injunctive relief would cure Plaintiffs' ongoing injury, this point is academic. But in any event, Defendants' authorities hold only that declaratory relief is unavailable with injunctive relief is *also unavailable*. *See MSA Realty Corp. v. Illinois*, 990 F.2d 288, 295 (7th Cir. 1993) ("The point of *Green [v. Mansour]* is that declaratory relief should not be awarded where the eleventh amendment bars an award of monetary

and injunctive relief; otherwise, the relief would operate as a means of avoiding the amendment's bar."); *Council 31 of the Am. Fed. of State, County, & Municipal Employees, AFL-CIO v. Quinn*, 680 F.3d 875, 884 (7th Cir. 2012) (same). Where injunctive relief is available, sovereign immunity is no bar to declaratory relief.

CONCLUSION

This is a constitutional case that can only be brought in this posture. Plaintiffs allege that until 2018, they owned significant property below Lake Michigan's OHWM. Porter County taxed these lots as platted below the OHWM. History indicates that private individuals could own the beach below the OHWM. And all of this was consistent with the only Indiana precedent on the books: *Stinson* and its progeny. Plaintiffs allege that the Indiana Supreme Court abruptly changed state law, decreeing a transfer of their property to the State without compensation. With no remedy in state court, Plaintiffs are entitled to seek relief in federal court for the alleged taking. After all, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 163 (1803) (quoting 3 Blackstone, Commentaries 23).

For the reasons stated in this memorandum, and any other reasons the Court deems fit, Plaintiffs respectfully ask this Court to deny Defendants' motion to dismiss.

DATED: March 4, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2020, I filed the foregoing Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss with the Court via CM/ECF. I further certify that all participants in the case (listed below) are registered CM/ECF users and that service will be accomplished by the CM/ECF system:

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