

2. On January 28, 2020, the State Defendants filed a motion to dismiss Plaintiffs' complaint. The State Defendants presented two main arguments: (a) that judicial takings are not cognizable under any circumstance; and (b) that Plaintiffs' claims here are barred by sovereign immunity. The State Defendants also argued that only Director Clark, Director of the Indiana Department of Natural Resources, enforces the State's purported ownership of the shoreline of Lake Michigan. The State Defendants noted that none of them are responsible for enforcing trespass laws.

3. On March 4, 2020, Plaintiffs filed their response to the motion to dismiss. Plaintiffs opposed the State Defendants' arguments regarding judicial takings and sovereign immunity and argued that Plaintiffs' claim for injunctive and declaratory relief with respect to the State's claim of ownership should proceed. Plaintiffs, however, conceded that the State Defendants are not responsible for enforcing Indiana's trespass laws.

4. On March 20, 2020, the State Defendants filed their reply brief in support of their motion to dismiss.

5. On March 21, 2020, Governor Holcomb signed House Enrolled Act 1385 (the Act).¹ Among many other things, the Act codifies *Gunderson*'s declaration of ownership. It provides that—absent an authorized legislative conveyance before *Gunderson* was decided—Indiana owns the shoreline of Lake Michigan below the common law ordinary high water mark. HEA 1385, § 57 (codified at Ind. Code § 4-26-2.1-3(a) (in effect July 1, 2020)). The Act also potentially expands the protected public

¹ The text of the law can be found here: <http://iga.in.gov/legislative/2020/bills/house/1385#document-1b7a2d6e>.

uses of the shoreline below the ordinary high water mark, particularly with a catch-all provision permitting the public to use the shore for “[a]ny other recreational purpose for which Lake Michigan is ordinarily used”. HEA 1385, § 57 (codified at Ind. Code § 14-26-2.1-4(b) (in effect July 1, 2020)).

6. On March 23, 2020, Plaintiffs’ counsel contacted counsel for the State Defendants regarding this motion. Plaintiffs’ counsel explained that Governor Holcomb had signed a bill directly relevant to the claim at issue in this case. Although the initial briefing on the State Defendants’ motion to dismiss had already been completed, Plaintiffs believed the best course of action would be to amend the complaint to address the effect of the new statute and seek additional relief.² Plaintiffs’ position is that neither the Indiana Courts nor the General Assembly may, without compensating Plaintiffs, declare that Plaintiffs’ property is now public. Therefore, if Plaintiffs are correct that *Gunderson* decreed a taking, the General Assembly cannot simply codify that result without compensating Plaintiffs.

7. On March 30, 2020, Plaintiffs’ counsel sent the State Defendants’ counsel a draft of the proposed amended complaint.

8. The amended complaint, attached here, makes two key additions to the original complaint based on the enactment of HEA 1385. First, it seeks additional injunctive and declaratory relief from HEA 1385’s codification of the *Gunderson* ownership decree. While Plaintiffs maintain that *Gunderson*’s decree effected the

² While Plaintiffs seek to amend their complaint under Federal Rule of Civil Procedure 15(a)(2), if the Court deems a supplemental pleading under Rule 15(d) more appropriate, Plaintiffs would not oppose that solution. Plaintiffs would simply request the Court grant them a reasonable time to draft a supplemental pleading.

taking, relief *only* from enforcement of that judicial decision would permit the statute to accomplish the same thing when it goes into effect this July. In the absence of *Gunderson*, the statute's declaration of ownership would effect a taking. And second, the amended complaint adds a cause of action challenging HEA 1385's potential expansion of public activities on the shore of Lake Michigan. If Plaintiffs secure relief on the ownership claim, they maintain that such an expansion of public rights would be a taking of a broad easement without compensation.

9. The amended complaint also removes Plaintiffs' original prayer for relief seeking an injunction requiring the State Defendants to enforce trespass laws with respect to Plaintiffs' properties. This is in line with Plaintiffs' concession on this point in the March 4, 2020, response brief.

10. On April 6, 2020, the State Defendants indicated that they had no objection to the motion to amend complaint. The State Defendants agreed that briefing on the amended complaint would be limited to the new claims. The parties agreed on a briefing schedule for the State Defendants' anticipated renewed motion to dismiss the amended complaint: the State Defendants agreed to file their motion and supporting brief 28 days after the Court grants this motion. Under the schedule Plaintiffs would then have 28 days to file a response, and the State Defendants would have 14 days to file a reply brief.

Therefore, to benefit judicial economy by keeping all of Plaintiffs' claims against the State Defendants regarding the taking of their lakefront property within one case, Plaintiffs respectfully request that the Court grant their motion to amend

the complaint. Plaintiffs also respectfully request that the Court adopt the briefing schedule indicated in Paragraph 10 above, and, in accordance with the parties' agreement, limit the briefing to Plaintiffs' new claims regarding HEA 1385.

DATED: April 9, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2020, I filed the foregoing Plaintiffs' Motion to Amend Complaint for Declaratory and Injunctive Relief 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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DATED: April 9, 2020.

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