

No. 05-764

In The
Supreme Court of the United States

RICHARD A. GODICKEL and
KATHLEEN D. GODICKEL

Petitioners,

VS.
JOAN M. GLASS

Respondent.

On Petition For A Writ Of Certiorari
To The Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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**COUNTERSTATEMENT OF
QUESTION PRESENTED**

Should this Court consider Petitioners' federal constitutional challenge to the Opinion of the Michigan Supreme Court, where the Opinion is based entirely on Michigan common law dating back to the 19th century, where no federal constitutional claim was decided by the Michigan Supreme Court, and where the record below is silent as to any federal constitutional claim until Petitioners' passing reference to a federal taking claim in their brief on appeal to the Michigan Supreme Court?

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INTRODUCTION

Plaintiff/Respondent Joan Glass asks this Court to deny the Petition for a Writ of Certiorari filed by Defendants/Petitioners Richard and Kathleen Goeckel, seeking review of the Opinion of the Supreme Court of Michigan in this case (“Opinion”). Petitioners’ claims are legally flawed, and rely on a misstatement of the record.

◆

COUNTERSTATEMENT OF THE CASE

Respondent purchased her property near Lake Huron in northeast Michigan in 1967. Her deed granted her an easement “for ingress and egress to Lake Huron” across the north fifteen feet of a lakefront parcel located across the highway from her property. Throughout the years, Respondent and her family used the express easement to gain access to Lake Huron and to walk along its shore. Brief on Appeal – Appellant, p. 4.¹

The lakefront parcel was purchased by Petitioners in 1997. Soon after, a dispute arose which led Respondent to file suit seeking to enjoin Petitioners from interfering with her use of the easement. Although the parties resolved the dispute in the trial court, another dispute arose over Respondent’s right to walk along the shore of Lake Huron in front of Petitioners’ property. Respondent then amended her complaint to add a count seeking to enjoin Petitioners from interfering with her right, as a member of the public, to walk the shore of Lake Huron below the ordinary high

¹ The briefs filed in the Michigan Supreme Court proceedings are online at <http://courts.michigan.gov/supremecourt/Clerk/03-05/126409/126409-index.htm>.

water mark. Respondent based her claim on Michigan common law and statutory law.

In the trial court, Petitioners argued that Respondent could not walk the shore between the ordinary high water mark and the lake without their permission. Yet Petitioner Mr. Goeckel admitted in his deposition that, like Respondent and her family, he regularly walks along the Lake Huron shore, as do members of the public. In Mr. Goeckel's words, beach walkers are "not traveling over my property. They're traveling next to the water's edge, which is the State of Michigan's property." Brief on Appeal—Appellant, pp. 3-4 and Appendix on Appeal, pp. 61a-63a, 65a. Petitioners did not raise any federal taking or due process claim in the trial court proceedings.

The trial court granted Respondent summary disposition, concluding that she had the right to walk "the shore of Lake Huron lying below and lakewards of the natural ordinary high water mark as specifically defined in M.C.L. § 324.32502" (Appendix p. 118).² Petitioners appealed this ruling to the Michigan Court of Appeals, arguing that they owned the Lake Huron shore to the edge of the water, with the right of exclusive use. Petitioners failed to raise any federal taking or due process claim in the Court of Appeals. Petition, p. 3.

The Michigan Court of Appeals reversed the trial court, stating that "the state of Michigan holds in trust the *submerged lands* beneath the Great Lakes within its borders for the free and uninterrupted navigation of the

² M.C.L. § 324.32502, set out in full in the Opinion, p. 15 (App. 12-13), is part of Michigan's Great Lakes Submerged Lands Act, M.C.L. §§ 324.32501 *et seq.* ("GLSLA").

public” *Id.* at 42, App. 111 (italics in original). The court held that the state holds title to land previously submerged, subject to the exclusive use of the riparian owner up to the edge of the moving waters, except as to navigational issues which remain paramount. *Id.* at 43, Appendix, p. 112-113. The decision thus confined Respondent and other members of the public to walking in the cold waters of Lake Huron itself.

When the case reached the Supreme Court of Michigan, the issue presented was “whether the public has a right to walk along the shores of the Great Lakes where a private landowner ostensibly holds title to the water’s edge.” Opinion, p. 1 (App. 1).

In its Opinion, the Michigan Supreme Court traced the common law evolution of the public trust doctrine in Michigan, relying exclusively on early Michigan common law. Opinion, pp. 9-14 (App. 8-11). At the outset, the Court held that the common law of the sea under which “the sovereign must sedulously guard the public’s interest in the seas for navigation and fishing – passed from English courts to the American colonies, to the Northwest Territory, and, ultimately, to Michigan.” Opinion, p. 9 (App. 8). The Court went on to rule that “the public trust doctrine from the common law of the sea applies to the Great Lakes,” under which the state, as sovereign, is obligated to protect and preserve the waters of the Great Lakes and the lands underlying them for the public. Opinion, pp. 9-10 (App. 8). Protected public rights include “fishing, hunting, and boating for commerce or pleasure.” Opinion, p. 10 (App. 9).

In examining the boundary of public trust lands, the Court concluded that “Michigan’s courts have adopted the

ordinary high water mark as the landward boundary of the public trust.” Opinion, p. 21 (App. 18). Then, after discussing the hydrological differences between tidal waters and the waters of the Great Lakes, the Court noted that its earlier cases had not clearly defined the ordinary high water mark. Opinion, pp. 26-28 (App. 22-24). For greater clarity, the Court adopted the common law definition of the ordinary high water mark used in Michigan’s sister Great Lakes State of Wisconsin for some hundred years, noting that such definition is consistent with meanings previously recognized in Michigan including Michigan’s statutory definition of the ordinary high water mark for inland waters. *Id.*

With respect to the statutory high water mark elevations for the Great Lakes set out in the GLSLA, the Court held that the statute “reiterates the state’s authority as trustee of the inalienable *jus publicum*,” and “establishes the scope of the regulatory authority that the Legislature exercises, pursuant to the public trust doctrine”, but it does not establish the boundaries of the public trust and thus does not supplant the Court’s case law. Opinion, pp. 16-17 (App. 14). In so ruling, the Court noted that the Michigan Legislature has recognized and protected the public trust lands and waters of the Great Lakes in statutes dating back to 1913. Opinion, p. 19, n. 14 (App. 16).

The Court then held that walking along the shore falls within the scope of the public trust because Michigan’s courts have traditionally protected rights of “fishing, hunting, and navigation for commerce or pleasure” under the public trust doctrine, and to engage in these activities, “the public must have a right of passage over land below the ordinary high water mark.” Opinion, pp. 32-34 (App. 27). The Court noted that other state courts have likewise

recognized a right of passage as embraced within their public trust. Opinion, p. 33 (App. 28).

The five-justice majority responded to concerns raised in the minority opinion of Justice Markman (joined by Justice Young). Opinion, pp. 36-44 (App. 30-37). The majority dismissed any alleged "taking" concern as follows:

As trustee, the state has an obligation to protect the public trust. The state cannot take what it already owns. Because private littoral title remains subject to the public trust, no taking occurs when the state protects and retains that which it could not alienate: public rights held pursuant to the public trust doctrine. Certainly, the loss of littoral property or riparian rights could result from an unconstitutional taking. See, e.g., *Peterman*, *supra* at 198, 208 . . . ; see also *Bott v. Natural Resources Comm.*, 415 Mich. 45, 80, 327 N.W.2d 838 (1982); *Hilt*, *supra* at 225, 233 N.W. 159. Yet, here, defendants have not lost any property rights. Rather, they retain their property subject to the public trust, just as all property that abuts the Great Lakes in Michigan remains subject to the public trust, pursuant to our common law.

Opinion, p. 43 (App. 36).

The Court emphasized that, although Justices Markman and Young dissented from the majority as to the particulars of how far public rights extend, the Court unanimously agreed that the public trust doctrine as descended from common law applies to the Great Lakes, and requires the state as trustee to preserve public rights in the lakes and their submerged lands. The Court also unanimously agreed that "plaintiff retains the same right to walk along the Great Lakes she has always held," and

“does not interfere with defendants’ property rights when she walks within the public trust.” Opinion, p. 37 (App. 31).

The Court preserved littoral title as landowners have always held it in Michigan – according to the terms of their deeds. Opinion, pp. 26, 40 (App. 22, 33). The Court reasoned that the established distinction under the public trust doctrine between public rights (*jus publicum*) and private title (*jus privatum*) “preserves public rights separate from a landowner’s fee title,” so that “the boundary of the public trust need not equate with the boundary of a landowner’s littoral title.” Opinion, p. 23 (App. 19-20). Observing that its case law has established that “the *jus privatum* and the *jus publicum* may overlap” (Opinion, p. 24, App. 20), the Court refused to enshrine “a solitary boundary” between public rights and private title, something it had never done in its history (Opinion, p. 39, App. 33).

The lakefront boundary of Petitioners’ property is described in their deed as “the meander line of Lake Huron.” Opinion, p. 5 (App. 5). The parties did not contest the terms of Petitioners’ deed, nor did the record reflect any argument over the meaning of “meander line.” Opinion, pp. 5-6 (App. 5). The Court took it as given that Petitioners “hold title to their property according to the terms of their deed.” *Id.* The issue before the Court was “not how far defendants’ private littoral title extends, but how the public trust affects that title.” Opinion, p. 6, n. 5 (App. 5). The Court concluded its Opinion by holding that “plaintiff, as a member of the public, may walk the shores of the Great Lakes below the ordinary high water mark,” and that “[u]nder longstanding common-law principles, defendants hold private title to their littoral property

according to the terms of their deed and subject to the public trust." Opinion, p. 44 (App. 37).

In their brief on appeal to the Michigan Supreme Court, Petitioners for the first time raised a federal taking claim. Petition, p. 3. Petitioners' entire statement of the claim in their brief was relegated to the following footnote:

Regardless of whether action from this Court, or the Legislature, any retreat from the water's edge proclamation in *Hilt* that would deprive beachfront property owners of land to which they had either title or exclusive right to use, and would therefore constitute an unconstitutional taking without just compensation under both State and Federal law. See *Peterman, supra*, brief of Amici curiae Michigan Chamber of Commerce, et al, Section III C, and brief of Defendants of Property Rights, Section II.

Brief on Appeal – Appellees, p. 21, n. 9.

Petitioners' first substantive presentation of a federal taking claim in the state court proceedings, along with their first mention of a federal due process claim, appears in their Motion for Rehearing filed after the Michigan Supreme Court issued its Opinion. Petition, p. 4; Brief in Support of Defendants'/Appellees' Motion for Rehearing, pp. 20-23.



REASONS FOR DENYING THE WRIT

I. THE MICHIGAN SUPREME COURT DID NOT CONSIDER OR DETERMINE ANY FEDERAL CONSTITUTIONAL QUESTION IN ITS OPINION.

The most obvious reason why certiorari should be denied in this case is that the Michigan Supreme Court did not consider or determine any federal constitutional question in its Opinion. Instead, the Court defined the scope of the public trust doctrine in accordance with Michigan common law dating back more than a century.

This Court is not vested with jurisdiction over a state court decision unless a federal question was raised and decided in the state court. *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969); *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 89 L.Ed. 789 (1945). If a state court decision rests on a state law ground which is independent of any federal question and adequate to support the judgment, this Court lacks jurisdiction to review the decision. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Lambrix v. Singletary*, 520 U.S. 518, 522-523, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997). Resolution of an independent federal ground for such a decision could not affect the judgment and would thus amount to an impermissible advisory opinion. *Coleman, supra*.

Petitioners concede that “[t]he extent of the boundary of the public trust and the extent of riparian ownership are questions of state law.” Petition, p. 21. Yet, under a century and a half of this Court’s decisions enunciating the public trust doctrine applying to the shores of navigable waters as being the sovereign domain of state law, Petitioners’ concession is an understatement. In few areas of

the law has this Court held interpretations of state law by a state's highest court to be more inviolate.

In *Shively v. Bowlby*, 152 U.S. 1, 40, 14 S.Ct. 548, 38 L.Ed. 331 (1894), the Court held that "the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several States, subject, of course, to the rights granted to the United States by the Constitution." The English common law of the sea, adopted as the law in this country governing rights in the shores of navigable waters, applied to each new state upon its admission into the Union, *with title and control of the shore below high water mark being vested in the state as sovereign in trust for the public, to be freely used by all for navigation and fishing.* *Shively* at 10-18, 57-58. These sovereign lands "are incapable of cultivation or improvement in the manner of lands above high-water mark", yet "are of great value to the public for the purposes of commerce, navigation, and fishery." *Shively*, at 57.

Nearly a century after *Shively*, the Court in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476-477, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988), held that "it has been long established that *the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.*" *Id.* at 475 (citing *Shively, supra*, 152 U.S. at 26) (emphasis added). Further, this Court's decisions have long recognized that trust lands may be used not only for navigation, but also for other uses, such as fishing for both shellfish and floating fish. *Phillips Petroleum*, at 476.

Recently, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), the

Court reaffirmed in sweeping terms the weighty interests involved in a state's ownership and control of sovereign trust lands. Holding that the Tribe's claim to ownership of the submerged lands of Lake Coeur d'Alene amounted to a quiet title action against the state's special sovereign interests, the Court ruled the claim barred by the state's Eleventh Amendment immunity. *Id.* at 287-288. The Court emphasized that ownership of submerged lands below the high water mark of navigable waters is "an essential attribute of sovereignty," and that these sovereign lands have "a unique status in the law and [are] infused with a public trust the State itself is bound to respect." *Id.* at 283. Each state's ownership of these sovereign lands arises from the equal footing doctrine, so that it is conferred "by the Constitution itself." *Id.*

This Court applied the public trust doctrine to the Great Lakes more than a century ago in its seminal decision in *Illinois Central RR Co. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892), ruling that the English common law of the sea applies to the waters and submerged lands of the Great Lakes:

We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters in the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

146 U.S. at 436-437. The state can no more abdicate its trustee obligations, leaving trust lands "entirely under the use and control of private parties, . . . than it can abdicate

its police powers in the administration of government and the preservation of the peace." *Id.* at 453.

While *Illinois Central* was "necessarily a statement of Illinois law", *Coeur d'Alene Tribe of Idaho, supra*, 521 U.S. at 285 (quoting *Appleby v. City of New York*, 271 U.S. 364, 395, 46 S.Ct. 569, 578, 70 L.Ed. 992 (1926)), its ruling that the public trust doctrine under the common law of the sea applies to the Great Lakes was soon adopted as the law of Michigan.

In *People v. Silberwood*, 110 Mich. 103, 108, 67 N.W. 1087 (1896), the Michigan Supreme Court upheld the validity of a state statute designating submerged lands of Lake Erie as public shooting grounds. Initially, the Court explained that the question of title to the beds of the Great Lakes was not directly at issue in any of its prior decisions. *Silberwood*, at 106. The *Silberwood* Court then adopted the ruling of *Illinois Central* that the public trust doctrine under the common law of the sea applies to the Great Lakes, reasoning that: "the law enunciated [in *Illinois Central*] ought to stand as the law of this state. It commends itself to one's reason and judgment, and avoids many difficulties incident to a different construction of the law." *Silberwood*, at 108. Three decades later, in *Hilt v. Weber*, 252 Mich. 198, 213, 217, 233 N.W. 159 (1930), the Court reaffirmed that it "had not established a rule of property as to land upon the Great Lakes, contrary to the law of the sea."

In its Opinion, the Michigan Supreme Court properly relied on *Silberwood*, *Hilt*, *Nedtweg v. Wallace*, 237 Mich. 14, 17, 208 N.W. 51 (1926), and other early Michigan cases as establishing the bedrock principle of Michigan common law that the public trust doctrine inalienably preserves

the waters and lands of the Great Lakes for use by the public for "fishing, hunting, and boating for commerce or pleasure." Opinion, pp. 10-11 (App. 8-9). In then ruling that the public trust extends to the ordinary high water mark, the Court relied on its early case of *Venice of America Land Co.*, 160 Mich. 680, 701-702, 125 N.W. 770 (1910), in which the Court adopted the view of Justice Hooker's minority opinion in *State v. Lake St. Clair Fishing & Shooting Club*, 127 Mich. 580, 87 N.W. 117 (1901). In turn, Justice Hooker's opinion in *Lake St. Clair Fishing & Shooting Club* declared in no uncertain terms that the ordinary high water mark is the upper boundary of Great Lakes trust lands:

We must take judicial notice that the Great Lakes are navigable waters, and while, as in all cases of water, there must be a line where the water meets the shore, and consequently shallows, the legal characteristics of navigable water attach to all of it. It is an old and well-settled rule that the privileges of the public are not limited to the channel, or to those parts which are most frequently used, but extend to high-water mark in all tide waters.

Id. at 585-586. Thus, the boundary of Michigan's Great Lakes public trust lands has been set at the ordinary high water mark since at least the 1910 decision in *Venice of America Land Co.*

The prevailing rule in the other Great Lakes States of Wisconsin, Minnesota, Illinois, Indiana, Ohio, Pennsylvania and New York is the same as held by the Michigan Supreme Court in its Opinion, and is in accord with the common law of the sea as enunciated in *Illinois Central*, *supra* and *Shively*, *supra*. The boundary of the public trust

doctrine under the common law of the majority of Great Lakes States is the ordinary high water mark. See Brief on Appeal – Appellant, pp. 39-46. Like Michigan, both Wisconsin and Minnesota have judicially defined the ordinary high water mark in terms of key physical characteristics of the shore, while Ohio and Indiana have by regulation adopted the ordinary high water mark according to International Great Lakes Datum elevations. *Id.*

The Michigan Supreme Court adopted Wisconsin's definition of the ordinary high water mark, i.e., "the point on the . . . shore up to which the presence and action of the water is so continuous as to leave a distinct mark. . . ." Opinion, p. 27 (App. 23). This definition captures the essence of the ordinary high water mark under the common law of the sea, i.e., the point below which the land "is for the most part not dry or maniorable." *Borax v. City of Los Angeles*, 296 U.S. 10, 23, 56 S.Ct. 23, 80 L.Ed. 9 (1935). It also mirrors the definition under the Minnesota common law, i.e., the line below which "the presence and action of the water are so common and usual . . . as to mark upon the soil of the bed a character distinct from that of the banks. . . ." *Carpenter v. Board of Comm'rs of Hennepin County*, 56 Minn. 513, 522; 58 N.W. 295 (1894). It likewise mirrors Michigan's own definition of the ordinary high water mark for inland waters in MCL 324.30101(i), i.e., "the line between upland and bottomland that persists through successive changes in water levels, below which the presence and action of the water is so common or recurrent that the character of the land is marked distinctly from the upland. . . ." Opinion, pp. 26-28 (App. 22-24).

Throughout its Opinion, the Michigan Supreme Court relied exclusively on Michigan common law dating back to

the 19th century in reaching its overall conclusion that “plaintiff, as a member of the public, may walk the shores of the Great Lakes below the ordinary high water mark,” and that “defendants hold private title to their property according to the terms of their deed and subject to the public trust.” Opinion, p. 44 (App. 37). Because the Court’s decision is deeply rooted in the Michigan common law, independent of any federal question, this Court lacks jurisdiction to review the decision. *Coleman, supra; Lambrix, supra.*

II. PETITIONERS’ ATTEMPT TO AVOID THE JURISDICTIONAL BAR TO THIS COURT’S REVIEW IS BASED ON A GLARING MISINTERPRETATION OF MICHIGAN LAW WHICH WAS SOUNDLY REJECTED BY THE HIGHEST COURT OF MICHIGAN

In an effort to evade the jurisdictional bar to this Court’s review established by the adequate and independent state law ground which so soundly supports the Opinion, Petitioners resort to the argument that “the Michigan Supreme Court’s Opinion represents a sudden and unexpected change in property law.” Petition, p. 4. As Petitioners’ argument goes, the Opinion thus effects an unconstitutional taking under *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979). Petition, pp. 5-21, 22-24.

Petitioners’ attempt to cast the Opinion as somehow announcing a sudden change in Michigan property law is unavailing. In the state court proceedings, Petitioners sought a ruling which would have amounted to one of the

biggest giveaways of public property in American history – the grant to private upland owners along Michigan’s 3,288 miles of Great Lakes shores of title down to the actual edge of the waters, to the exclusion of the public. The argument Petitioners advance to this Court, the same one they unsuccessfully advanced below, is founded on a tortured misinterpretation of the Michigan Supreme Court’s 1930 decision in *Hilt, supra*. Petitioners ignore the essential ruling of *Hilt* in favor of selectively extracting isolated quotes, to buttress a flawed legal argument that defies more than a century of well-settled Michigan common law.

The most obvious flaw in Petitioners’ argument arises from their refusal to even acknowledge, much less discuss, the common law of the sea which *Hilt* itself ruled has governed Michigan’s Great Lakes shores since at least as early as the Michigan Supreme Court’s 1896 decision in *Silberwood, supra*. Instead, Petitioners argue that the nomenclature “water’s edge” as used in *Hilt* is intended to mean the literal edge of the moving waters at any given time. Petition, p. 7. Likewise, they argue that this Court in *Illinois Central* allegedly confined the reach of the public trust doctrine to “lands *under* the navigable waters of Lake Michigan.” Petition, pp. 21-22.

Any doubt that the language Petitioners quote from *Illinois Central* means Great Lakes lands *extending to high-water mark and thus including the shore*, is resolved by this Court’s decision in *Illinois Central RR Co. v. City of Chicago*, 176 U.S. 646, 20 S.Ct. 509, 44 L.Ed. 622 (1900) (“*Illinois Central II*”). The Court in *Illinois Central II* confirmed that, under the common law of the sea, “a grant of lands by the state *does not pass title to submerged lands below high-water mark, and that this principle also applies*

to the Great Lakes.” *Id.* at 660 (emphasis added).³ The nomenclature “lands under the navigable waters” and “submerged lands” is used interchangeably in *Illinois Central* as a pithy means of referring to all lands lying below the ordinary high water mark, embracing the obvious fact that these shore lands are “ordinarily” covered with water, although from time to time they might be exposed.

The nomenclature “water’s edge” which Petitioners extract from *Hilt, supra* is precisely to the same effect. State and federal decisions have consistently used “water’s edge” to mean the edge of the water at high water mark. See Brief on Appeal – Appellant, pp. 24-26. As the court in *State v. Great Falls Mfg. Co.*, 76 N.H. 373, 83 A. 126, 127 (1912), held: “There was a general understanding that . . . when it was said that the title of the littoral owners extended to the ‘water’s edge’, the idea intended was that it was limited by the high-water mark.”

The issue in *Hilt* was the boundary of a lakefront owner’s private title, *not* the boundary of the public trust. Particularly, the issue was the title to high and dry *relicted or accreted* land (Opinion, p. 25, n. 18, App. 22) – land which by common law definition lies above the ordinary high water mark and is thus outside the scope of the public trust doctrine (see Brief on Appeal – Appellant,

³ Although Petitioners allege that the decision below is also contrary to *Massachusetts v. New York*, 271 U.S. 65, 93, 46 S.Ct. 357, 70 L.Ed. 838 (1926) and *Vermont v. New Hampshire*, 289 U.S. 593, 605, 53 S.Ct. 708, 77 L.Ed. 1392 (1933), both cases involved this Court’s determination of an interstate boundary along navigable waters and *not* the scope of the public trust.

pp. 21-22).⁴ The *Hilt* Court declares at the outset that the decision is limited to relicted and accreted lands only: "Lest we be misled, we must keep it clear that the issue . . . covers only dry land, extending meandered upland by gradual and imperceptible accession or recession of the water, on the lake side of the meander line." *Hilt* at 203.

Ignoring the actual issue decided in *Hilt*, Petitioners elevate the following isolated quotation from *Hilt* to a binding rule of law: "The riparian owner has the *exclusive use* of the bank and shore, and may erect bathing houses and structures thereon for his business and pleasure." Petition, p. 7 (quoting *Hilt* at 226). Petitioners rely on this quotation as the foundation for their "exclusive possession" argument, yet they fail to quote the full sentence in *Hilt* which states:

The riparian owner has the exclusive use of the bank and shore and may erect bathing houses and structures thereon for his business or pleasure, 45 C.J. p. 505; *Ferry Pass, I. & S. Ass'n v. White River I. & S. Ass'n*, 57 Fla. 399, 48 So. 643, 22 L.R.A. (N.S.) 345; *Town of Orange v. Resnick* [94 Conn. 573, 578, 109 A. 864 (1920)]; although it also has been held that he cannot extend structures into the space between low and high-water mark, without consent of the State (*Thiesen v.*

⁴ Under the common law of the sea, upland owners on navigable waters have title and exclusive possession of dry land formed by the gradual and imperceptibly slow processes of reliction and accretion, which thus becomes unfit for purposes of navigation, hunting, and fishing but is suitable for human occupation, i.e., land above the ordinary high water mark. *Nedtweg v. Wallace*, 237 Mich. 14, 211 N.W. 647 (1927). See also *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 181, 191-193, 10 S.Ct. 518, 33 L.Ed. 872 (1890).

Railway Co., 75 Fla. 28 [78 So. 491, L.R.A. 1918E, 718;]).

Hilt, at 226. The fallacy of Petitioners' argument becomes almost painfully evident from the full passage, which begins by citing cases ruling that the riparian owner may erect structures on the shore, and ends by citing a case ruling that the riparian owner may *not* do so.

All the Justices of the Michigan Supreme Court soundly rejected Petitioners' argument, unanimously agreeing that none of the various state laws included in the discussion in which the quoted passage appears were adopted as a rule of law in *Hilt*. Instead, the passage is part of the *Hilt* Court's discussion supporting its correction of its departure from the common law in *Kavanaugh v. Rabior*, 222 Mich. 68, 192 N.W. 623 (1923) and *Kavanaugh v. Baird*, 241 Mich. 240, 217 N.W. 2 (1928) (the "*Kavanaugh* cases"). Opinion, pp. 34-36 (App. 29-30). When the *Hilt* Court discussed the rights of upland owners under the laws of other states, it did not adopt any of these rules and "it did not alter the public trust or preclude the public from walking within it." Opinion, p. 36 (App. 30); Justice Markman's minority opinion, pp. 52-53 (App. 83-84).

All of the land at issue in *Hilt* was permanently dry *relicted* land lying lakeward of the meander line, and by definition, above the ordinary high water mark. The *Hilt* decision left intact the inalienable rights of the public to use the sovereign trust lands of the Great Lakes lying below ordinary high water mark, as confirmed by its ruling that: "Until the *Kavanaugh* cases . . . this court was in accord with other American courts in applying the common law of waters and had not established a rule of property as to land upon the Great Lakes contrary to the law of the sea." *Hilt*, at 213.

Because Petitioners' "exclusive possession" argument is founded on a gross misinterpretation of *Hilt*, it is fatally flawed. It is also glaringly contradicted by Petitioner Mr. Goeckel's admission that he and other members of the public regularly walk along the beach in front of his property, and that the public has the right to do so because: "They're not traveling over my property. They're traveling next to the water's edge, which is the State of Michigan's property." Appellant's Appendix on Appeal, pp. 61a-62a.

Equally unavailing is Petitioners' misinterpretation of *Peterman v. DNR*, 446 Mich. 177, 521 N.W.2d 499 (1994). Petition, pp. 13-15. The issue in *Peterman* was the extent of damages to be awarded for the destruction of the plaintiff's property on Lake Michigan caused by the state's negligent construction of jetties which could have been constructed to improve navigation without entirely destroying the plaintiff's beach and substantial portions of their fast land. *Peterman*, at 181, 201-202. The Court held that by virtue of the state's "navigational servitude" (*Id.* at 194), "the general rule is that only the loss of fast lands [above high-water mark] must be compensated", but an exception exists, allowing recovery of damages below high-water mark, where the taking serves no public interest. *Peterman*, at 200, 202. The Court rooted the state's "navigational servitude" in Michigan's public trust doctrine, as follows:

[W]hen Michigan entered the union of States she became vested with the same qualified title that the United States had; that these waters and the soil under them passed to the State in its sovereign capacity impressed with a perpetual trust to secure to the people their rights of navigation, fishing and fowling. *Collins v. Gerhardt*, 237 Mich. 38, 45-46 (1926). See also *State v. Venice of*

America Land Co., 160 Mich. 680 (1910);
Nedtweg v. Wallace, 237 Mich. 14, 16-17, 211
N.W. 647 (1927).

Peterman, at 194, n. 22. Opinion, p. 22, n. 15 (App. 19).

In another ill-informed attempt to buttress their vacuous “exclusive possession” argument, Petitioners quote language from *Lorman v. Benson*, 8 Mich. 18, 30 (1860), to the effect that members of the public who walk the shores for passage do so “not as rightful, but merely by sufferance.” Petition, p. 17. However, *Lorman* is not a Great Lakes case, but rather involved the rights of a riparian owner on the Detroit River, where the title of private upland owners extends from the ordinary high water mark to the center of the stream, as opposed to the Great Lakes where title to the submerged lands is vested in the state in trust for the public. *Silberwood, supra*, at 106.

Petitioners’ “sudden change in Michigan law” argument, founded on their tortured misinterpretation of *Hilt* as having granted them title and exclusive possession down to the very edge of the moving waters of Lake Huron, is spurious. Neither title to nor exclusive possession of the shore of Lake Huron was ever a stick in Petitioners’ bundle of property rights. Instead, under Michigan common law dating back more than a century, the property now owned by Petitioners is that defined in their deed, and “was originally conveyed *subject to specific public trust rights in Lake Huron and its shores up to the ordinary high water mark.*” Opinion, p. 4, App. 4 (emphasis in original).

III. PETITIONERS' FEDERAL TAKING AND DUE PROCESS CLAIMS FALL WITH THEIR VACUOUS "EXCLUSIVE POSSESSION" ARGUMENT

Petitioners' federal taking and due process claims fall along with their spurious exclusive possession argument. As the Michigan Supreme Court stated so succinctly, the state could not possibly "take what it already owns." Opinion, p. 43 (App. 35).

As this Court held in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988), where a state's common law has consistently held that the public trust includes title to submerged lands under navigable waters and has described public uses of the trust lands such as swimming, fishing, and recreation, "any contrary expectations cannot be considered reasonable." Nor did Petitioner Mr. Goeckel, who admitted that members of the public have the right to walk the Lake Huron shore because it belongs to the State of Michigan, have any such contrary expectations.

Petitioners argue that the Court in its Opinion effected a taking and violated due process by "opening Petitioners' private property to public use", citing *Nollan v. California Coastal Commission*, 483 U.S. 825, 831, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); and *Kaiser Aetna v. United States*, 444 U.S. 164, 178, 100 S.Ct. 383, 392, 62 L.Ed.2d 332 (1979). However, the property at issue in *Nollan* was a stretch of privately-owned dry sand located above the mean high tide line marking the upper limit of the public beach. *Nollan*, at 827, 840. In *Kaiser Aetna*, the shallow pond at issue had likewise always been privately owned and used under state law. *Id.* at 384. In neither case were rights to public trust lands, below the ordinary high water mark, at issue.

As held in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), this Court's takings jurisprudence "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." With this in mind, the Court "assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title." *Lucas*, at 1028 (emphasis in original). Where existing rules or understandings have always restricted a private landowner's bundle of rights, by implication of background principles of state law, it is open to the State at any point to make the implication explicit. *Lucas*, at 1030.

Moreover, where a state court determines that an upland owner's claimed property right is non-existent, as occurred here with respect to Petitioners' claimed rights of title to and exclusive possession of the shore of Lake Huron, there is no taking. *Fox River Paper Co. v. Railroad Commission of Wisconsin*, 274 U.S. 651, 47 S.Ct. 669, 71 L.Ed. 1279 (1927). As the Court explained:

It is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be nonexistent. We accept as conclusive the state court's view of the nature of the rights of riparian owners.

Id. at 657.

IV. PETITIONERS FAILED TO PROPERLY RAISE THEIR FEDERAL CONSTITUTIONAL CHALLENGE IN THE STATE COURT PROCEEDINGS

While the jurisdiction of this Court to grant certiorari is barred by the adequate and independent state law ground that soundly supports the Michigan Supreme Court's Opinion, another ground upon which this Court should refuse consideration of Petitioners' federal constitutional challenge to the Opinion is their failure to properly present any federal taking or due process claim in the state court proceedings.

Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 U.S.C. § 1257. In relevant part, that statute provides that this Court may review “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right is specially set up or claimed under the Constitution . . . of . . . the United States.” 28 U.S.C. § 1257(a). Since the early 19th century, under § 1257(a) and its predecessors, this Court has consistently refused to consider a federal constitutional challenge to a state court decision unless the federal claim was decided by, or properly presented to, the state court. *Howell v. Mississippi*, 534 U.S. 440, 125 S.Ct. 856, 858, 160 L.Ed.2d 873 (2005). Regardless of the significance of the underlying issue, this Court scrupulously adheres to this limitation on its discretion to promote respect for the Court's adjudicatory process. *Adams v. Robertson*, 520 U.S. 83, 92, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997).

In its Opinion, the Michigan Supreme Court did not consider or decide any federal due process claim. The Court did briefly address the issue of an unconstitutional

taking, holding that no taking occurs when the state protects and retains inalienable public rights under the public trust doctrine. Opinion, p. 43 (App. 35-36). However, in so ruling the Court cited its own prior cases of *Peterman, supra*, and *Bott v. Natural Resources Comm.*, 415 Mich. 45, 327 N.W.2d 838 (1982), both of which decided takings issues under the Michigan Constitution, and not the Federal Constitution. *Peterman, supra*, at 184; *Bott, supra*, at 80-82. There is thus flatly no indication in the Opinion that the Michigan Supreme Court believed any federal taking issue was presented, or that it decided anything other than the issue of whether there was a taking in violation of the Michigan Constitution.

Where a state's highest court is silent on a federal question presented to this Court, the Court assumes that the issue was not properly presented, and the petitioner bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question presented for review. *Adams, supra*, at 86-87. In determining whether an issue was properly presented in the state court, this Court has required petitioners to establish that the claim was raised "at the time and in the manner required by the state law," and to demonstrate that they presented the claim with "fair precision and in due time." *Adams, supra*, at 87.

In compliance with this Court's Rule 14(1)(g)(i) requiring them to specify when and how the federal questions sought to be reviewed were raised in the state court proceedings, Petitioners point to only two places in the record below where they allegedly raised their federal taking and due process claims. The first was in their brief on appeal to the Michigan Supreme Court, and the second in their motion for reconsideration to that court. Petition,

pp. 3-4. In their brief on appeal to the Michigan Supreme Court, Petitioners made only a single passing reference to a federal taking claim in the following footnote:

Regardless of whether action from this Court, or the Legislature, any retreat from the water's edge proclamation in *Hilt* that would deprive beachfront property owners of land to which they had either title or exclusive right to use, and would therefore constitute an unconstitutional taking without just compensation under both State and Federal law. See *Peterman, supra*, brief of Amici curiae Michigan Chamber of Commerce, et al, Section III C, and brief of Defendants of Property Rights, Section II.

Brief on Appeal – Appellees, p. 21, n. 9. Petitioners failed to even cite to the Federal Constitution, much less to any cases addressing federal takings claims. Instead, they cited only *Peterman, supra*, which addressed a state constitutional taking claim rather than a federal one. *Peterman*, at 184. Nor did Petitioners make any claim in their motion for rehearing before the Michigan Supreme Court that the Court's failure to reach the federal claim in its Opinion was error.

Under Michigan law, constitutional claims are not properly before the appellate courts unless they were presented to the trial court. *Dagenhardt v. Special Machine & Engineering, Inc.*, 418 Mich. 520, 345 N.W.2d 164 (1984); *Booth Newspapers, Inc. v. Univ. of Michigan Bd. of Regents*, 444 Mich. 211, 234, 507 N.W.2d 422 (1993). If a constitutional claim is not pleaded in the complaint, or addressed by the trial court, or raised in the statement of questions presented to the appellate court, it is not properly preserved for appellate review. *Id. Advocacy Organization*

for Patients & Providers v. Auto Club Insurance Assoc., 257 Mich.App. 365, 670 N.W.2d 569 (2003). Here, Petitioners did not plead any federal taking or due process claim in their complaint, nor did the trial court address any taking or due process issues. Nor did Petitioners raise their federal claims in their statement of questions presented in either the Michigan Court of Appeals or the Michigan Supreme Court (nor did they address the issue at all in the Court of Appeals). Petitioners thus failed to raise any taking and due process claim “at the time and in the manner required by state law,” so that the claims were not properly presented to the state court. *Adams, supra*.

Petitioners also failed to present their federal claims with fair precision and in due time. It cannot be reasonably alleged that Petitioners’ first substantive presentation of their federal constitutional claims in their motion for reconsideration *after* the Michigan Supreme Court rendered its Opinion, was in due time.

This Court recently found a lack of fair precision where the petitioner failed to cite to the state court the Federal Constitution or any of this Court’s cases construing it. *Howell, supra*; see also *Adams, supra*, at 89, n. 3. In their passing invocation of a federal taking claim footnoted in their brief on appeal in the Michigan Supreme Court, Petitioners likewise failed to cite the Federal Constitution or any cases construing federal takings claims. Brief on Appeal – Appellees, p. 21, n. 9. Petitioners also failed to even mention their federal due process claim until their motion for reconsideration to the Michigan Supreme Court. Petitioners thus failed to present their federal claims with “fair precision and in due time.” *Adams, supra*.

CONCLUSION

For all of these reasons, Respondent requests that the Petition be denied.

Respectfully submitted,

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