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STATE OF RHODE ISLAND
SUPREME COURT

DAVID M. ROTH, LINDA H. ROTH, and ES710 LLC, *Plaintiffs-Respondents,*	:	
v.	:	**SU-2024-0244-MP**
STATE OF RHODE ISLAND and THE RHODE ISLAND COASTAL RESOURCES MANAGEMENT COUNCIL, *Defendants-Petitioners.*	:	
STILTS, LLC, a Rhode Island Limited Liability Company, *Plaintiff-Respondent,*	:	
v.	:	**SU-2024-0245-MP**
STATE OF RHODE ISLAND, and RHODE ISLAND COASTAL RESOURCES MANAGEMENT COUNCIL, *Defendants-Petitioners.*	:	

AMICUS BRIEF OF THE SURFRIDER FOUNDATION AND BACKCOUNTRY HUNTERS & ANGLERS IN SUPPORT OF DEFENDANTS-PETITIONERS

Sean Lyness, R.I. Bar #9481
333 Faunce Corner Road
Dartmouth, Massachusetts
508 985 1120
slyness@umassd.edu

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I. STATEMENT OF IDENTITY AND INTEREST

Amicus Curiae Surfrider Foundation is a 501(c)(3) environmental non-profit organization dedicated to the protection and enjoyment of the world's oceans, waves, and beaches. Surfrider has approximately 350,000 members and supporters organized into approximately 80 volunteer-driven Chapters and 134 school clubs located across the U.S. Surfrider has a Rhode Island Chapter and a University of Rhode Island Surfrider school club. Surfrider has approximately 2,000 members living in Rhode Island.

Under its Beach Access initiative, which is one of the organization's five primary initiatives, Surfrider works to protect low-impact beach access for all. Surfrider members use Rhode Island beaches not only for low-impact recreation, but for coastal stewardship. Surfrider's Rhode Island Chapter volunteers host approximately six beach cleanups a year at rotating locations throughout Rhode Island; has an Adopt-a-Spot at Pilgrim Avenue in Point Judith, where Chapter volunteers do monthly maintenance; and has a partnership with Middletown Coastal Access Alliance and supports a public right-of-way point at Tuckerman Avenue. Since 2018, 381 volunteers participated in 23 cleanups, collectively removing more than 3,000 pounds of trash from the beach. This includes from beaches in front of private residences, such as at or near Sand Hill Cove, Camp Cronin, and the beach at Pilgrim Avenue at Point Judith. In addition to beach cleanups, the Chapter

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operates the "Blue Water Task Force" water quality monitoring program, where volunteers sample and test water quality at 25 popular recreational sites along Rhode Island's coast, including many popular surf spots, in order to protect the health and safety of everyone who recreates in the State's ocean.[1]

Meanwhile, Surfrider's Club at the University of Rhode Island, founded in January 2024, hosts many stewardship, social, and educational activities on Rhode Island's beaches. Club volunteers host beach cleanups every other Sunday throughout the entire school year (fall through spring) at various beaches, and at least two socials per semester at a beach, where Club members get to know one another, swim and recreate in the water, and play games and picnic on the beach. At beach cleanups, Club members generally clean the entire width of the sandy beach, even occasionally on the sand in front of private beachfront residences if they feel there is enough trash to warrant cleaning there. The Club plans to start holding educational events at the beach as well, such as a learn to surf day, within the next two semesters. It currently hosts meetings twice a month, with activities like screening environmental educational films, doing art projects with recycled materials to raise awareness about plastic waste, and working to make the University's dining hall more "ocean friendly," which entails encouraging the campus to eliminate use of

[1] See "Blue Water Task Force," *Surfrider Foundation Rhode Island,* https://ri.surfrider.org/programs/blue-water-task-force.

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single-use plastics, and adopt other sustainable practices.[2] More than 400 students have signed up for the Club's mailing list, and approximately 20 to 30 students consistently attend the Club's events.

Backcountry Hunters & Anglers (BHA) is a 501(c)(3) non-profit organization focused on the protection and enhancement of North America's public lands, waters and wildlife, including our coasts, through policy advocacy, on-the-ground stewardship work, and community building. BHA has approximately 40 volunteer-driven Chapters throughout North America. BHA members in Rhode Island are part of the New England Chapter. Approximately 100 BHA members live within Rhode Island, and hundreds more regularly visit to spend time outdoors.

Access to public resources—including water resources protected by the public trust doctrine—is a core aspect of BHA's mission. BHA seeks to ensure that all hunters and anglers are able to pursue fish and game on North America's shared public lands and waters. That effort includes prioritizing conservation of key lands and waters, protecting valuable habitat, implementing responsible, science-based resource management policies, and resisting against the privatization of public lands, waters and wildlife. BHA has advocated for increased public access to Rhode

[2] See Surfrider's Ocean Friendly Restaurants Program website here https://www.surfrider.org/programs/ocean-friendly-restaurants

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Island's shoreline for years, including supporting the challenged Act when it was being considered by the General Assembly.

These consolidated cases involve the landward extent of where members of the public, including Surfrider and BHA members, have the right to be on Rhode Island's beaches. They are of particular concern to Surfrider and BHA because they have members and staff who live, work, visit, recreate, and provide stewardship on and near Rhode Island's beaches, and who are impacted by having to rely on a vague public rights boundary that is impossible to discern by eye, and by beach access limitations. Surfrider and BHA therefore have an interest in this case and in the application of public access rights to Rhode Island's beaches.[3]

Undersigned counsel Sean Lyness appears in his individual capacity; institutional affiliation is provided for identification and contact purposes only.

II. SUMMARY OF ARGUMENT

Forty years ago, the people of the State of Rhode Island passed a constitutional amendment to protect strong public shoreline access. Of the fourteen ballot questions

[3] While Surfrider supports the Act's recognition and protection of the public's longstanding access rights on Rhode Island's beaches, Surfrider does not agree with the Act's restriction providing that "the public's rights and privileges of the shore shall not be afforded where [… there are] sea walls or other legally constructed shoreline infrastructure", where that infrastructure encroaches on public trust property or on property that has supported customary passage along the water.

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submitted to the people that year, the shoreline access amendment received the highest support.[4] This constitutional guarantee of the public's right to the shoreline is part of an unbroken line of Rhode Island state law dating back to the colony's 1663 Charter. This includes protection in the State's original 1843 Constitution and in caselaw dating back 85 years which recognizes that the public's right of passage along the shore includes passage above the waterline on dry sand. *See, e.g.*, *Jackvony v. Powel*, 21 A.2d 554, 556 (R.I. 1941). We are lucky—and unique—in our state's protection of beach access.

But questions remained after passage of the 1986 amendment. Despite the state Constitution's express guarantee of the right of "passage along the shore" in that 1986 Constitutional amendment, coastal property owners and members of the public alike faced uncertainty as to where, exactly, this "passage" applied. Some pointed to this Court's 1982 *Ibbison* decision to limit the extent of public access to the mean high tide line. *See State v. Ibbison*, 448 A.2d 728 (R.I. 1982). But the mean high tide line is a scientific measure, ascertainable only with surveying equipment, leaving the dividing line impossible for the public to discern. Further, the mean high tide line is frequently underwater, leaving "passage along the shore" only possible for several hours a day. *See* 2023 H 5174, § 1, Legislative Findings ("[D]ry sand is

[4] *See* Elliot Andrews, Thomas Evans & Kenneth Carlson, *Rhode Island Constitutional Convention History*, R.I. FUTURE, http://www.rifuture.org/wp-content/uploads/RI-Constitutional-Conventions-History.pdf.

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exposed below MHW [the mean high water line] for, at most, only a few hours over a tidal cycle."). After the amendment's passage, headlines followed of citizens, relying in good faith on our Constitution's guarantees, arrested for walking along the shore.[5] Surfrider and BHA members attest that this indeterminate state of affairs led to conflict and confusion. And this Court has never weighed in on the 1986 Constitutional clarification.

In 2023, the General Assembly stepped in. In so doing, the General Assembly created certainty by passing an Act clarifying those public rights that already existed and have for centuries. The text of the 1986 amendment, the intent of its framers, and its Constitutional history all point in the same direction: the 1986 amendment of "passage along the shore" codified the shoreline right to pass *above* the water's edge that has been recognized in the State's caselaw and enjoyed by Rhode Islanders for generations. The Act simply makes that clear.

Clarifying those background principles of Rhode Island property law does not effect a taking. After all, it is "open to the State at any point to make the implication of those background principles of nuisance and property law explicit." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992). Indeed, "many government-

[5] *See, e.g.*, Brian Amaral, *R.I. Beach Access Case Settled for $25,000, But Underlying Issue is Still in the Weeds*, THE PROVIDENCE JOURNAL, December 13, 2019, https://www.providencejournal.com/news/20191213/ri-beach-access-case-settled-for-25000-but-underlying-issue-is-still-in-weeds.

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authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 160 (2021). Such is the case here. Other states have likewise clarified their background principles of property law without constitutional affront. *See, e.g.*, *Pavlock v. Holcomb*, 532 F.Supp.3d 685 (N.D. Ind. 2021) (upholding legislature's codification of public shoreline passage rights). Rhode Island's background principles of public shoreline access—and specifically lateral shoreline "passage" above the water's edge—are strong, longstanding, and have been continuously reaffirmed. The Act's clarification of the extent of the public's rights on beaches merely makes explicit limits long embedded in coastal titles. This is particularly so for Plaintiffs-Respondents who all purchased their property *after* 1986.

The Act has been in place since the summer of 2023. Surfrider and BHA members report increased certainty in where they can exercise their constitutionally protected shoreline access rights. Members of the public and private coastal property owners alike now have more certainty about where public rights end. The Act allows the public to know where they can walk, fish, surf, and host beach cleanups along the shoreline. And it provides private property owners certainty about where they can properly exclude the public. In short, the Act has worked. This Court should not upend this functioning scheme.

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III. ARGUMENT

A. Longstanding Reasonable Uses of Lateral Passage Above Rhode Island's Shoreline are at Stake in this Case

No matter where you are in Rhode Island, you are never more than 25 miles from the coast. Our unique geography has contributed to the State's longstanding culture of beach access. Rhode Island's beaches see roughly 20 million visits annually.[6] During the summer, individual beaches can see up to 10,000 visitors in a single day.[7] For generations, the beach has been a traditional place for the community to gather, with individuals and families seeking out the sand for quiet rest and relaxation, recreation, and/or traditional pursuits like fishing and fowling. These time-honored uses have long been recognized and protected under Rhode Island law. Yet important public rights of access are now at stake in this case.

Surfrider and BHA have a particular interest in this case as we have staff and members who live, work, visit, recreate, and provide stewardship on and near Rhode Island's beaches. Our members, who include parents and families, surfers, marine biologists, educators, students, watermen and women, fishers, and other general beach lovers, enjoy strolling on the beach for meditation, recreation, or to simply

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[6] *See, e.g.*, "Narragansett Bay Watershed Economy," (https://www.nbweconomy.org/wp/wp-content/uploads/2019/08/beach_use_1018.pdf).

[7] *See, e.g.*, "Beaches," Rhode Island Department of Health, (https://health.ri.gov/beaches).

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soak in the sunrise or sunset and sound of the waves. *See* Exhibit A, Declaration of Mary Brantley, ¶ 2; *see also* Exhibit B, Declaration of Boynton Allen, ¶ 2. In addition to recreation, Surfrider members laterally pass along the beach while providing coastal stewardship, whether in testing water quality at 25 Rhode Island beaches, or cleaning trash from the sandy and rocky shores at bi-monthly beach cleanups.

All of these activities stand to be impacted by this Court's decision in this case. Upholding the Act would allow these reasonable, traditional, and culturally ingrained public uses to continue, and support just and equitable access. Families, including those with babies and small children, and individuals with mobility issues, who cannot safely walk in or roll wheelchairs in the ocean, could continue to more safely walk or wheel above the waterline. On cold wintry days, individuals could continue to pass along the beach above the water, without submerging their feet in chilling water. Surfrider members testing water quality will be confident walking along the sandy or rocky beach until they get to the specific testing location to go into the water; and members cleaning beaches would feel more confident and empowered to pick up trash they see that is not in the water or on wet sand. In this way, both beachgoers and Rhode Island's beaches will benefit.[8]

[8] While upland private property owners may raise concerns about having members of the public on their property, these customary uses can still be subject to local regulation under municipalities' police power to protect health, safety, and welfare.

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Conversely, a decision striking down the Act would constrain public access rights below the "mean high water line" boundary, a line that (1) can only be determined through specialized surveying equipment,[9] (2) varies based on the local beach conditions, and (3) is underwater for several hours each day.

Beachgoers, including Surfrider and BHA members, are unable to determine where the mean high water line is on the beach. *See* Exhibit A, Declaration of Mary Brantley, ¶¶ 5, 6; *see also* Exhibit B, Declaration of Boynton Allen, ¶ 8. Uncertainty surrounding where the boundary line is creates apprehension for beachgoers who do not want to face allegations of trespass or threats of punishment.

Given this impossibility for beachgoers to know where the mean high water line is, a court decision striking down the current framework would unfairly place the burden of uncertainty on the public. Beachgoers, with no way of knowing where the mean high water line is, could foreseeably overcorrect and limit themselves too

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For example, local beach ordinances can regulate where pets may and may not go, restrict loud music, and ban littering.

[9] See, e.g., Rhode Island's Coastal Resources Management Council's ("CRMC") more than 8 page *Methodology for Determining the Mean High Water [line]*, available at: https://www.crmc.ri.gov/climatechange/methods_meanhighwater.pdf (CRMC's methodology document illustrates the inherent difficulties involved: "Due to time and resource constraints, primary determinations of tidal datums (i.e. using 19 years of data) are not practical at every location along the entire coast where tidal datums are required. At intermediate locations, a secondary determination of tidal datums can usually be made by means of observations covering much shorter periods than 19 years if the results are corrected to an equivalent mean value by comparison with a suitable control tide station.").

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far seaward, out of fear they may be subject to trespass allegations (thereby, not utilizing portions of the public trust). This would curtail a portion of the public's rightful public trust uses—critical access allowing for dry, safe lateral access above the waterline. In effect, this would improperly grant public trust property to private parties. In other words, *not* having the clarifying Act risks taking, or giving away, the public's rightful ability to access and exercise trust uses on sandy or rocky coast above the waterline.

Striking down the Act and constraining the public's rightful beach access could also impact the State's recreation and tourism economy. Beach recreation and use in Rhode Island is a crucial driver of the state's economy. The State estimates that State parks and beaches generate roughly $315 million annually to the economy, and support nearly 4,000 jobs a year.[10] Without dry sand available to recreate, and out of fear of confrontations with upland owners, people may be less inclined to visit certain beaches.

The Act fixes these problems. Under the Act, beachgoers can easily determine their upland boundary of access under the Act. *See* Exhibit A, Declaration of Mary

[10] *See, e.g.*, "Governor McKee Signs Executive Order Establishing July 30 as Governor's Bay Day," July 24, 2023, (https://riparks.ri.gov/press-releases/governor-mckee-signs-executive-order-establishing-july-30-governors-bay-day#:~:text=Rhode%20Island's%20natural%20and%20public,hashtag%20%23GovBayDay%20on%20social%20media).

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Brantley, ¶ 5; *see also* Exhibit B, Declaration of Boynton Allen, ¶ 8. Visualizing the narrow area protected for public lateral passage demonstrates how customary and reasonable this right of access is.

Neither Surfrider nor BHA advocate for disruptive, loud beach uses, or other uses that would constitute a nuisance. And public usage can still be regulated by local jurisdictions. Rather, Surfrider and BHA supports low-impact ("leave no trace") reasonable usage, including strolls above the waterline, as Rhode Islanders and visitors have customarily engaged in for centuries. The Act recognizes and protects those uses.

B. The 1986 Constitutional Amendment Codified Longstanding Public Shoreline Passage Rights

A central dispute in these consolidated cases is the effect of the 1986 Constitutional amendments. The amendment's plain language, the intent behind its enactment, and its specific Constitutional history all support the same conclusion: the 1986 Constitutional Amendment codified longstanding public shoreline passage rights. In 2023, the Act merely clarified and confirmed that codification.

1. The 1986 Amendment's Text

Begin with the plain language. Before the 1986 amendment, the Rhode Island Constitution protected the public's "privileges of the shore," without detailing what

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those entail. *See* R.I. Const., Art I, § 17 (1843). The 1986 Amendment added four nonexclusive examples of those "privileges": (1) "fishing from the shore," (2) "the gathering of seaweed," (3) "leaving the shore to swim in the sea," and (4) "passage along the shore[.]" R.I. Const., Art I, § 17. Of these, "passage along the shore" is the most relevant here.

"Passage" on Rhode Island beaches has a long legal history. Whether termed "the public trust doctrine" or "customary rights" or "rights of usage" Rhode Islanders have had their shoreline access rights enshrined for centuries. The 1663 Rhode Island Royal Charter granted the public "full and free power and liberty to continue and use the trade of fishing upon the said coast[.]" Rhode Island Royal Charter, 1663. The state's first constitution in 1843 further safeguarded the public's "privileges of the shore" which they "shall continue to enjoy and freely exercise[.]" R.I. Const. art I, § 17 (1843).

In 1895 this Court recognized a right of "passage" as part of "the public rights secured" by the state in the shoreline. *Allen v. Allen*, 19 R.I. 114, 32 A. 166 (1895); *see also Providence Steam-Engine Co. v. Providence & S.S.S. Co.*, 12 R.I. 348, 357–58 (1879) (J. Potter, concurring) ("[T]he State has the governmental control of the shores and tide-waters for the benefit of the public, in order to protect the public rights of passage[.]"). This public right of shoreline passage was reiterated in 1903.

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See R.I. Motor Co. v. City of Providence, 55 A. 696, 697 (R.I. 1903) (quoting *Allen*'s "passage" language).

But by far the greatest exploration of and support for shoreline passage is 1941's *Jackvony v. Powel*, 21 A.2d 554 (R.I. 1941). Faced with a beach club's barrier along the shore, the Court held that blocking public access infringed on the public's right to "go along the shore." *Id.* at 557. The Court noted that the public's rights to use of the shoreline to fish, swim, and gather seaweed was dependent on "a separate and independent right, that of *passage along the shore*" which was "necessary for the enjoyment of any of these rights." *Id.* at 556 (emphasis added). Indeed, "at the time of the adoption of our constitution there was, among the 'privileges of the shore', to which the people of this state had been theretofore entitled under the 'usages of this state', a public right of passage along the shore." *Id.* at 558 (emphasis added). That right of "passage along the shore" was beyond the General Assembly's power to curtail. *Id.*

Jackvony made clear that this "passage" was not just to the water itself. *See id.* at 556 (observing that the beach club barrier would "prevent any of the people of the state from passing *along the shore into* that *part of it* which is to the south of Easton's Beach.") (emphasis added). By using this language "passage along the shore *into* that part of it" which was seaward of the mean high tide line, it is clear the court is (1) describing walking along the shore *outside* of the portion of beach

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below the mean high tide line, and (2) recognizing the areas above and below the mean high tide line to be *parts* of the shore. Even if "shore" were limited to the area between the mean low tide and mean high tide line, the right recognized by *Jackvony* was not "passage *on* the shore" nor "passage *in* the shore." Employing the word "along," *Jackvony* clearly meant to include passage *above* of the water's edge. *See* BLACK'S LAW DICTIONARY (4th rev. ed. 1968) ("Along") ("implying motion or at *or near*[.]") (emphasis added). As Black's Law Dictionary makes plain, "[t]he term does not necessarily mean touching at all points; *** nor does it necessarily imply contact." BLACK'S LAW DICTIONARY (4th rev. ed. 1968) ("Along"). In this coastal context, "passage *along* the shore" means walking *above* the shore.

This reading of *Jackvony* makes sense for a constantly changing boundary. The shoreline is ever shifting with the tides; the only way to guarantee public passage is to draw the access line in a manner consistent with the water's edge. Indeed, *Jackvony*'s "passage along the shore" contemplates that at high tides (happening roughly twice a day) passage inherently requires walking upland, out of the water on privately owned land.[11] Otherwise, people are walking "in" or "on" the shore.

That rich historical context informs the 1986 Constitutional amendment's text: by choosing the phrase "passage along the shore,"—*Jackvony*'s central

[11] *See, e.g.*, "How much public access is protected under current law?" *University of Rhode Island* (https://ci.uri.edu/wp-content/uploads/sites/1126/shoreline_access_factsheet.pdf).

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holding—the 1986 amendment codified the longstanding public right of upland shoreline passage.

But the 1986 addition of "passage along the shore" should also be considered in light of more contemporaneous legal history: 1982's *Ibbison* decision. *See State v. Ibbison*, 448 A.2d 728 (R.I. 1982). Expressly noting that it was "handicapped by the absence of a record[,]" *Ibbison* picked the mean high tide line as the purported extent of the public's rights in the shoreline. *See id.*, 448 A.2d at 730.

However, in so doing, it made three missteps. First, it relied almost exclusively on federal law to pick the mean high tide line. *See id.* at 731 (relying on *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935)). But the extent of public rights in the shoreline is *state* law, and Rhode Island's version is unique. *See Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1042 (R.I. 1995) ("The laws of our sister states are not always helpful to a determination of the law of the State of Rhode Island regarding the public-trust doctrine[.]").

Second, the Court did not address *Jackvony*'s "passage along the shore" or reconcile its holding with the larger historical context. Indeed, Rhode Island's longstanding public right of "passage" is entirely absent from the opinion. Instead, the Court improperly limited its inquiry to the issue of *title ownership*—state ownership versus private ownership. *See Ibbison*, 448 A.2d at 729 ("The question raised is this: To what point does the shore extend on its landward boundary? The

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setting of this boundary will fix the point at which the land held in trust by the state for the enjoyment of all its people ends and private property belonging to littoral owners begins."). But the Court failed to consider and account for the public's limited usage rights above that ownership boundary, which are clearly recognized in *Jackvony*.

Third, and most importantly, the *Ibbison* Court picked a dividing line inconsistent with *Jackvony*'s "passage"; at the time of *Ibbison*'s events, "the mean high tide line was *underwater*." *Id.* at 730 (emphasis added). As noted above, *Jackvony*'s "passage" does not contain any exceptions for high tides, which happen roughly twice a day, nor for the several other hours per day that the mean high tide line is submerged underwater; nor does "along" contemplate walking *in* or *on* the water. *Jackvony* clearly recognizes a public right of lateral passage above the water's edge, "as necessary for the enjoyment of" the public's privileges. *Jackvony*, 21 A.2d at 558. *Ibbison* selected a line that made exercising those public rights practically impossible.

The 1986 constitutional codification of "passage along the shore" is thus a response to *Ibbison*. You cannot have "passage along the shore" if the line demarcating public rights is often underwater. That was true in 1982. *See Ibbison*, 448 A.2d at 730. It is still true today. *See* 2023 H 5174, § 1, Legislative Findings ("[D]ry sand is exposed below MHW [the mean high water line] for, at most, only a

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few hours over a tidal cycle.").[12] "Passage along the shore" is a practical impossibility under *Ibbison*. As a textual matter, then, the 1986 amendment clarified the public's right to "passage" above the water's edge.

2. *The 1986 Amendment's Purpose*

That conclusion is reinforced by the purpose behind the constitutional change. The state constitution was amended to better protect existing rights of public shoreline access. The ballot question presented to the people (and overwhelmingly approved) was entitled "Shore Use and Environmental Protection[.]"[13] Rhode Islanders did not vote to curtail their use of the shoreline. Importantly, the 1986 amendment was a mere four years after *Ibbison*, timing that can only be characterized as a reaction.

Further, the amendment explicitly added in *Jackvony*'s "passage along the shore," after that holding was undermined in *Ibbison*—again, because as a practical matter you cannot have dry passage along the shore for many hours of the day if strictly confined below the mean high tide line. Doing so clarified that *Jackvony* was

[12] Available at https://webserver.rilegislature.gov/BillText/BillText23/HouseText23/H5174.pdf.
[13] A copy of the "Voters' Guide to Fourteen Ballot Questions for Constitutional Revision" from 1986 is available at https://ballotpedia.s3.amazonaws.com/images/5/59/1986_Rhode_Island_Constitutional_Convention_Questions.pdf.

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the proper understanding of the public's rights in the shoreline. And *Jackvony* itself was based on rights stemming from "the time of the adoption of our [1843] constitution" and the "usages of this state." *Jackvony*, 21 A.2d at 558. The intent of the 1986 amendment, then, was to return to a proper pre-*Ibbison* baseline, one that had existed for centuries.

3. *The 1986 Amendment's Commentary*

The official Commentary of the 1986 amendment's passage tells the same story. *See* CONSTITUTION OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS: ANNOTATED EDITION, 8–10 (1988), helindigitalcommons.org/cgi/viewcontent.cgi?article=1026&context=lawarchive. Completed on December 4, 1986, just after the Constitutional Convention concluded, the Commentary is a series of annotations by the convention committees explaining their reasoning for each proposed constitutional change. *See id.* Released nearly contemporaneously with the public's ratification of the amendments (and having been written by the drafters themselves) the Commentary is the definitive statement on the 1986 Constitutional amendment.

The Commentary starts with the problem: *Ibbison*. *See id.* After citing *Ibbison*, the convention committee noted that it "was concerned with the absence of [a] constitutional definition of the 'privileges of the shore' to which Rhode Islanders

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are entitled." *Id.* at 9. This was the problem that *Ibbison* created. In response, the committee turned to *Jackvony*. *See id.* ("The case of *Jackvony v Powel* was central to the deliberations of the committee."). In adding "passage along the shore," the committee "strongly affirmed that the *Jackvony* case accurately reflected those shore privileges which have been in place in Rhode Island historically. The resolution reflected that sentiment." *Id.*

Thus, the Commentary says the same thing the text and purpose do: *Ibbison* created a problem and *Jackvony*'s "passage" was the solution. Codifying *Jackvony* clarified the shoreline access Rhode Islanders had for generations: the right of passage above the water's edge.

***

In sum, the text, the purpose, and the Commentary of the 1986 amendment speak with one voice: the public right of "passage along the shore"—part of Rhode Island's rich history of protected shoreline rights and recognized for nearly a century by this Court—was constitutionally codified. All the Act does is clarify that right.

C. Clarifying Public Passage Along the Shore Is Not a Taking Under Rhode Island Law

Clarifying that the public's right to "passage along the shore" includes walking above the water's edge is not a taking. It is well-established that state actions

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that make longstanding background principles of property law explicit are not takings. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) ("[I]t was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."). After all, "property rights protected by the Takings Clause are creatures of *state law*." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 155 (2021) (emphasis added); *see also Borax Consolidated Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935) ("Rights and interests in the tideland, which is subject to the sovereignty of the state, are matters of local law."). This is why "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." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988).

For that reason, "[a] decision that *clarifies* property entitlements (or the lack thereof) that were previously unclear *** does not eliminate established property rights." *Stop the Beach Renourishment, Inc. v. Fl. Dept. of Envt'l Prot.*, 560 U.S. 702, 728 (2010) (J. Scalia, plurality) (emphasis added). So long as they do so consistent with their respective state's background principles, it is *not* a constitutional violation. *See Cedar Point*, 594 U.S. at 160 ("[M]any government-authorized physical invasions will not amount to takings because they are consistent

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with longstanding background restrictions on property rights, including traditional common law privileges to access private property.").

This is especially so in the shoreline context, where the public trust doctrine and other rights of usage such as those based on the doctrine of custom and public easements are such background principles. *See, e.g.*, Nestor M. Davidson & Timothy M. Mulvaney, *Per Se Non-Takings*, 104 TEX. L. REV. 103, 136 (2025) ("[C]ourts have routinely recognized the public trust doctrine as a form of reserved public rights that categorically immunizes the state from takings liability."); *see also Cedar Point*, 594 U.S. at 160 ("These background limitations also encompass traditional common law privileges to access private property."). This is why "regulations that codify public trust principles cannot constitute a regulatory taking." Sean B. Hecht, *Taking Background Principles Seriously in the Context of Sea-Level Rise*, 39 VT. L. REV. 781, 784 (2015).

Here, where the public trust doctrine and other rights of usage exist on privately owned property through the public's right to "passage along the shore," the right to exclude is not part of the "bundle of sticks" on those portions of property. Accordingly, the Act's recognition and protection of such background principles takes nothing from the upland owner.

Examples of states recognizing and protecting public beach access rights, consistently with existing background principles of state property law, abound from

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coast to coast. Consider North Carolina, where town ordinances permitting public access on portions of the dry sand beach were held constitutionally permissible. *See Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. App. 2015). Such legislative action was not a "taking" because "[t]he right to prevent the public from enjoying the dry sand portion of the Property was never part of the 'bundle of rights' purchased by Plaintiff." *Id.* at 197. "[I]t is not the Ordinances that authorize public access to the dry sand portion of the Property; public access is permitted, and in fact guaranteed, pursuant to the associated public trust rights." *Id.* at 201. Indeed, the town ordinances "do not *create* a right of the public relative to the Property; they *regulate* a right that the public already enjoyed." *Id.* at 198 (emphasis added).[14] This is exactly what the Act does here—it does not *create* any new rights but merely recognizes and protects the public's right of lateral passage along the shore,

[14] In recognizing this right, the *Nies* court noted it was unclear whether public rights to the dry sand (above the public ownership line) were based on an independent common law doctrine of custom, or whether long-standing custom had been used to help determine where and how the public trust doctrine applies, and the court recognized that in any event, what was important is that the "public right of access to dry sand beaches in North Carolina is so firmly rooted in the custom and history of North Carolina that it has become a part of the public consciousness. Native-born North Carolinians do not generally question whether the public has the right to move freely between the wet sand and dry sand portions of our ocean beaches." *Nies*, 780 S.E.2d at 196. The court thus upheld that the boundary of public trust use rights extends on to privately-owned dry sand beaches.

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including above the waterline as necessary for such passage, as engrained in Rhode Island law.

Similarly, look to Oregon, where courts have recognized public rights on the State's beaches, even portions of the dry sand that may be in private ownership, under the doctrine of custom. *See, e.g.*, *Thornton v. Hay*, 462 P.2d 671 (Or. 1969). Coastal property owners challenged the doctrine and its implementing statutes as a taking and likewise failed. *See Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993). The caselaw supporting public shoreline rights did *not* "create a new rule of law as applied to plaintiffs' land here." *Id.* To the contrary, the precedent "merely enunciated one of Oregon's 'background principles of *** the law of property.'" *Id.* (quoting *Lucas*, 505 U.S. at 1029). When the Oregon coastal property owners "took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the 'bundle of rights' that they acquired[.]" *Id.* Just as Oregon's customary use doctrine is a background principle of property law that defeated an alleged takings claim, Rhode Island's constitutional guarantee of "passage along the shore," rooted in the State's extensive history of shoreline passage, including above the waterline as needed for lateral passage, is an important background principle of State coastal property law, and legislative recognition of this right takes nothing from private upland owners.

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The closest analogue to this case is found in Indiana. That state too sought to spell-out the extent of the public's right in the shoreline (there, along Lake Michigan), first by judicial opinion and then by statute. *See Gunderson v. State*, 90 N.E.3d 1171 (Ind. 2018) (holding that the State held exclusive title to the shore of Lake Michigan up to the high-water mark); *see also* Ind. Code Ann. § 14-26-2.1-3 (2020) (codifying *Gunderson*). There, the Indiana Supreme Court held that there was a "public right of passage" along the shores of Lake Michigan. *Gunderson*, 90 N.E.3d at 1188. The Indiana General Assembly codified that holding. *See* Ind. Code Ann. § 14-26-2.1-3 (2020). Like here, property owners sued the state alleging a takings claim.

The federal district court made short work of the claim. *Pavlock v. Holcomb*, 532 F.Supp.3d 685, 697–702 (N.D. Ind. 2021).[15] Although "there was significant ambiguity in that field of property law[,]" Indiana had not effected "a sudden change in state law regarding a well-established property right." *Id.* at 699, 701. Instead, Indiana merely "clarified where the boundary of the public trust had always existed along the shores of Lake Michigan." *Id.* at 701. Doing so "did not transform private property to public property" nor was it "a radical departure from previously well-established property law in Indiana." *Id.* At most, "the area of property law was

[15] The Seventh Circuit affirmed dismissal of the case on standing grounds only and did not reaching the takings issue. *Affirmed by Pavlock v. Holcomb*, 35 F.4th 581 (7th Cir. 2022), *cert. denied* 143 S.Ct. 374 (Oct. 31, 2022)

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murky in the State of Indiana, and, likely, even murkier on the shores of Lake of Michigan." *Id.* As such, "[w]ithout a clearly established property interest in the land, the subsequent state clarification—either by the judiciary or the legislature of where the boundary between state and private property and where the public trust had always existed ***—cannot be considered a taking." *Id.* at 701–02.

These cases from sister states make plain that clarifying pre-existing public rights in the shoreline—even on what may be private property—is not a taking. The Act does the same thing in Rhode Island, but on an even stronger Constitutional footing. Rhode Island has a unique and longstanding history of public access to the shore. From the 1663 Charter to the 1843 State Constitution to the 1986 Constitutional amendments, the public's shoreline rights have been constitutionalized in every iteration of our governing document. This pedigree is rare; we are one of only a select few states that has constitutionally codified shoreline access rights, and the *only* to have an unbroken line of such codification from its founding more than 350 years ago.

And this Court has recognized public shoreline passage for more than a century. *Jackvony* recognized in 1941 that the public had a right to pass along the shore above the water's edge. *See Jackvony*, 21 A.2d at 558. It did so based on the "usages of this state[,]" many dating back to "the time of the adoption of our [1843] constitution[.]" *Id.*

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Rhode Island's background principles of public shoreline access—and specifically shoreline passage above the water's edge—are thus stronger, more longstanding, and more continuously reaffirmed than the background principles in North Carolina, Oregon, and Indiana, all of which were sufficient to defeat a takings claim. The Act merely clarifies the extent of those longstanding public shoreline passage rights, and it does so based on Rhode Island's background principles. The Act thus makes explicit limits long embedded in coastal titles. *See Lucas*, 505 U.S. at 1030 ("[I]t was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.").

Indeed, all the Plaintiffs-Respondents in this case purchased their coastal properties *after* 1986. Simply put, when they purchased their property, the state constitution already protected the public the right to "passage along the shore" on their land, as recognized in state caselaw. The Act did not change that, it merely clarified it. This clarification was a legitimate exercise of the state's authority to protect public rights on its shores. That should end this case.

IV. CONCLUSION

The Act has been in place for nearly three years. It works. Members of the public can immediately understand where they can exercise their shoreline access rights. So can coastal private property owners. With that clarity, the Act does what

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it was intended to do: realize a forty-year-old constitutional guarantee, hundreds of years in the making. We respectfully request that the decision below from the Superior Court be reversed and the Act upheld.

Respectfully submitted,

The Surfrider Foundation and

Backcountry Hunters and Anglers,

By their Pro Bono counsel for this matter:

/s/ Sean Lyness
Sean Lyness, R.I. Bar #9481
Assistant Professor of Law
University of Massachusetts School of Law
333 Faunce Corner Road
Dartmouth, Massachusetts
508 985 1120
slyness@umassd.edu

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 18(b)

I certify that:
1. This Brief of Amicus Curiae contains 6,434 words, excluding the parts exempted from the word count by Rule 18(b).
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/s/ Sean Lyness
Sean Lyness

CERTIFICATE OF SERVICE

I hereby certify that, on the 4th day of March, 2026:

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Gerald J. Petros, gpetros@hinckleyallen.com
Mackenzie C. McBurney, mmcburney@hinckleyallen.com
Daniel J. Procaccini, dprocaccini@apslaw.com
Colten Hilton Erickson, cerickson@apslaw.com
Joan H DePari jdepari@apslaw.com
Lauren LeBlanc lleblanc@apslaw.com
J. David Breemer, jbreemer@pacificlegal.org
Jeff Kidd, jkidd@riag.ri.gov
Sarah W. Rice, Esq., srice@riag.ri.gov
Paul Moesky, pmoesky@riag.ri.gov

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/s/ Sean Lyness

Sean Lyness, R.I. Bar #9481
Assistant Professor of Law
University of Massachusetts School of Law
333 Faunce Corner Road
Dartmouth, Massachusetts
508 985 1120
slyness@umassd.edu