UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RHODE ISLAND ASSOCIATION OF COASTAL TAXPAYERS,
Plaintiff,

v.

PETER NERONHA, in his official Capacity as Attorney General of Rhode Island; JEFFREY WILLIS, in his official capacity as Executive Director of the Rhode Island Coastal Resources Management Council; and TERRENCE GRAY, in his official capacity as Director of the Rhode Island Department of Environmental Management,
Defendants.

C.A. No. 23-cv-00278-WES-PAS

STATE DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendants Peter Neronha, in his official capacity as Attorney General of Rhode Island; Jeffrey Willis, in his official capacity as Executive Director of the Rhode Island Coastal Resources Management Council; and Terrence Gray, in his official capacity as Director of the Rhode Island Department of Environmental Management (collectively, the "State Defendants"), hereby move to dismiss the Second Amended Complaint filed by Plaintiff Rhode Island Association of Coastal Taxpayers (the "Association") for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. In support, State Defendants rely on the Memorandum of Law previously submitted in support of their Motion to Dismiss the Association's Amended Complaint, *see* ECF No. 20-1, as well as the contemporaneously submitted Supplemental Memorandum.

Respectfully Submitted,

Defendants,
PETER NERONHA, in his official capacity as Attorney General of Rhode Island; JEFFREY WILLIS, in his official capacity as Executive Director of the Rhode Island Coastal Resources Management Council; and TERRENCE GRAY, in his official capacity as Director of the Rhode Island Department of Environmental Management

By:

PETER F. NERONHA
ATTORNEY GENERAL

/s/ Jeff Kidd

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CERTIFICATE OF SERVICE

I hereby certify that I filed the within document via the ECF filing system on August 15, 2023, and that a copy is available for viewing and downloading.

/s/ Jeff Kidd

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RHODE ISLAND ASSOCIATION OF COASTAL TAXPAYERS,
Plaintiff,

v.

PETER NERONHA, in his official Capacity as Attorney General of Rhode Island; JEFFREY WILLIS, in his official capacity as Executive Director of the Rhode Island Coastal Resources Management Council; and TERRENCE GRAY, in his official capacity as Director of the Rhode Island Department of Environmental Management,
Defendants.

C.A. No. 23-cv-00278-WES-PAS

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendants Peter Neronha, in his official capacity as Attorney General of Rhode Island ("Attorney General Neronha"); Jeffrey Willis, in his official capacity as Executive Director of the Rhode Island Coastal Resources Management Council ("Executive Director Willis"); and Terrence Gray, in his official capacity as Director of the Rhode Island Department of Environmental Management ("Director Gray"; collectively, the "State Defendants"), hereby move to dismiss the Second Amended Complaint filed by Plaintiff Rhode Island Association of Coastal Taxpayers (the "Association") for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

The Association's Second Amended Complaint suffers from the same basic deficiencies as its Amended Complaint: namely, the Association lacks standing because it cannot establish traceability or redressability with respect to the State Defendants, and Eleventh Amendment

immunity bars this suit in federal court. The State Defendants expressly incorporate by reference those arguments as presented in the Memorandum of Law in Support of their Motion to Dismiss the Association's Amended Complaint, *see* ECF No. 20-1, and submit this Supplemental Memorandum to address the material changes in the Second Amended Complaint.

I. INTRODUCTION

In the Second Amended Complaint, the Association continues to challenge H.B. 5174A (the "Act"), a Rhode Island state law that clarifies the public's rights and privileges of the shore under Article I, Sections 16 and 17 of the Rhode Island Constitution. *See* ECF No. 21 at ¶ 3; Ex. A. The Association asserts that it is acting on behalf of its members who own beachfront property. *See* ECF No. 21 at ¶¶ 12-13. Where the Amended Complaint identified only Association President David Welch ("President Welch") as the owner of "a small home on beachfront property in the Charlestown area" that was affected by the Act, the Second Amended Complaint now alleges that the home where President Welch resides is owned by Stilts, LLC, a limited-liability company that is itself a member of the Association. ECF No. 11 at ¶ 13; *cf.* ECF No. 21 at ¶¶ 14, 40. The Second Amended Complaint also identifies an additional Association member, Joseph Simonelli ("Simonelli"), as the owner of a beachfront home in Westerly, Rhode Island that has allegedly been affected by the Act. *See* ECF No. 21 at ¶ 42. In contrast to the property owned by Stilts, LLC, the Second Amended Complaint does not specifically allege that members of the public have entered onto property owned by Simonelli. *See id.* at ¶ 47.

Also new to the Second Amended Complaint are two legal allegations specific to Executive Director Willis and Attorney General Neronha. *See id.* at ¶¶ 17-18. The Association asserts that Executive Director Willis has the "authority to address and remedy an alleged violation of the Act" under Rhode Island General Laws § 46-23-7(a)(2), which empowers the "staff" of the Coastal Resources Management Council (the "CRMC") to "issue written cease and desist orders in any

instance where activity is being conducted which constitutes a violation of any provision of this chapter." *Id.* at ¶ 17 (quoting R.I. Gen. Laws § 46-23-7(a)(2)). As the Association points out, the Act amends Chapter 46-23 of the Rhode Island General Laws. The Association also asserts that Attorney General Neronha has the authority to enforce Rhode Island General Laws § 11-44-24, which makes it a misdemeanor offense to "obstruct or block or cause any obstruction of any public rights-of-way to water areas of the state[.]" *Id.* at ¶ 18 (quoting R.I. Gen. Laws § 11-44-24).

II. STANDARD OF REVIEW

Federal courts are courts of limited jurisdiction and "the party invoking the jurisdiction of a federal court carries the burden of proving its existence." *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995). "There are two species of 12(b)(1) attacks on subject-matter jurisdiction: facial and factual challenges." *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 265 (1st Cir. 2022), cert. granted, 143 S. Ct. 1053 (2023) (citing *Torres-Negrón v. J & N Recs., LLC*, 504 F.3d 151, 162 (1st Cir. 2007)). "If the attack is factual, then the court 'need not accept the plaintiff's allegations as true but can 'weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Id.* (quoting *Toddle Inn Franchising, LLC v. KPJ Assocs., LLC*, 8 F.4th 56, 61 n.5 (1st Cir. 2021)).

"When the attack is facial, the relevant facts are the well-pleaded allegations in the complaint, which the court must take as true." *Id.* (citing *Toddle Inn Franchising, LLC*, 8 F.4th at 61 n.5). Nonetheless, even against a facial challenge, "the plaintiff bears the burden of establishing sufficient factual matter to plausibly demonstrate his standing to bring the action." *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 731 (1st Cir. 2016). "Neither conclusory assertions nor

unfounded speculation can supply the necessary heft." *Id.* (citing, inter alia, *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)).

III. ARGUMENT

A. The Association Lacks Standing to Pursue its Claim against the State Defendants

The Court should dismiss the Second Amended Complaint for lack of subject matter jurisdiction because the Association lacks standing. "A plaintiff has standing only if [it] can 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)). Moreover, "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek[.]" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

In their prior Memorandum of Law, the State Defendants pointed out that the Amended Complaint failed to identify an Association member with a legally cognizable ownership interest. *See* ECF No. 20-1 at 5-6. Although the Second Amended Complaint now identifies Stilts, LLC, and Simonelli as Association members and owners of affected properties, the presence of new Association members does not affect the traceability and redressability prongs of the standing analysis. The other provisions of state law newly cited by the Association in the Second Amended Complaint also do nothing to move the needle.

i. The Association's Alleged Injury Is Not Fairly Traceable to any Allegedly Unlawful Conduct of the State Defendants

The Association lacks standing because the alleged injury of an unconstitutional taking is not "fairly traceable to" any "allegedly unlawful conduct" of the State Defendants. *California v. Texas*, 141 S. Ct. at 2113. As with the Amended Complaint, nowhere in the Second Amended Complaint does the Association claim either that the State Defendants have yet done anything to

implement the provisions of Act, or that the alleged violation of Association members' property rights is contingent upon any future action by the State Defendants. Instead, the Second Amended Complaint squarely and repeatedly alleges that it is the Act itself that "takes an interest in RIACT members' real property, without just compensation." ECF No. 21 at ¶ 63; *see id.* at ¶¶ 61-69.

As for the alleged trespasses by members of the public onto the property owned by Stilts, LLC, according to the Association, those events are alleged to have occurred promptly after the passage of the Act and without the State Defendants having taken any steps whatsoever to implement the Act. *See id.* at ¶ 47. Moreover, and as discussed in the State Defendants' prior memorandum, the Association cannot claim standing based on a desire that State Defendants prosecute members of the public. Under these circumstances, the Association cannot plausibly claim that there is any meaningful connection between the alleged trespass incidents, or any future incidents, and any conduct of the State Defendants—who had taken no action prior to those incidents. *See* ECF No. 20-1 at 7-8.

These conclusions are not affected by the new allegations regarding the specific enforcement authority of Attorney General Neronha and Executive Director Willis referenced in the Second Amended complaint. For the potential of future enforcement actions to support standing against the government official charged with enforcement, plaintiffs must not only show "that they intend to violate or are violating an existing law; they must also show that the threat of prosecution is sufficiently real to provide standing." *Int'l Game Tech. PLC v. Garland*, 628 F. Supp. 3d 393, 400 (D.R.I. 2022); *see Blum v. Holder*, 744 F.3d 790, 798 (1st Cir. 2014) ("Particular weight must be given to the Government disavowal of any intention to prosecute on the basis of the Government's own interpretation of the statute and its rejection of plaintiffs' interpretation as unreasonable.").

Beginning with Attorney General Neronha's authority to enforce the criminal penalties of § 11-44-24, Rhode Island case law makes clear that in the context of coastal waters, "rights-of-way to water areas" are parcels of land used to travel *to* the shore *from* inland areas. *See, e.g.*, *Sartor v. CRMC*, 542 A.2d 1077, 1078-79 (R.I. 1988) (recognizing CRMC's duties to discover and designate "public rights-of-way to the tidal areas of the state"); *Riesman v. CRMC*, PC-93-5078, 2005 WL 3074143, at *1 (R.I. Super. Nov. 16, 2005) ("Between Lots 104 and 105 runs a 30–foot wide, and approximately 400–foot long, parcel of land from Tuckerman Avenue to the Atlantic shoreline. It is this right-of-way that was at issue before the CRMC."); *Sartor v. Town of Barrington*, PC-03-3985, 2004 WL 1769943, at *1 (R.I. Super. Aug. 4, 2004) ("According to a recent survey of the Parcel, it runs (from Nayatt Road) approximately 240 feet along Mushechuck Creek to the shore of Narragansett Bay."); *see also* Ex. B (Affidavit of Jeffrey M. Willis). The perpendicular shoreline access protected by § 11-44-24 is thus distinct from the lateral shoreline access at issue in the Act and the Association's Second Amended Complaint. *See* ECF No. 21-3 at 11 (*Final Report*, Special Legislative Commission To Study And Provide Recommendations On The Issues Relating To Lateral Access Along The Rhode Island Shoreline) (hereinafter Commission Report) (recommending "[i]ncreasing CRMC's capacity to designate perpendicular access to the shore in accordance with its enabling statute at RIGL 46-23-6").

As for Executive Director Willis's authority to "issue written cease and desist orders in any instance where activity is being conducted which constitutes a violation of any provision" of Chapter 46-23 of the General Laws, the Association has not alleged that the CRMC has issued, or threatened to issue, any such orders against its members. R.I. Gen. Laws § 46-23-7(a)(2)). Nor has the Association alleged that its members are conducting, or planning to conduct, any "activity" that would implicate § 46-23-7(a)(2)—which is unsurprising, given that the claimed injury is the

alleged taking itself. Moreover, even before the passage of the Act, Association members' activities were *already limited* by pre-existing CRMC regulatory schemes disallowing fences or other construction in the shoreline areas in question. *See* Ex. B at ¶¶ 5-9. The Association's bare citation to § 46-23-7(a)(2) is therefore insufficient to create standing with respect to Executive Director Willis. *See Savage v. U.S. Small Bus. Admin.*, 552 F. Supp. 3d 241, 249 (D.R.I. 2021) (quoting *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017)) (alterations and quotation marks omitted) ("A plaintiff's conjectural fear that a government actor might in the future take some other and additional action detrimental to her does not suffice to create standing.").

In short, the Association has not plausibly alleged a substantial risk of the imminent enforcement of either § 11-44-24 or § 46-23-7(a)(2)) against one of its members by any of the State Defendants. More fundamentally, neither statute—and none of the State Defendants—has any causal connection to the injury actually asserted in the Second Amended Complaint: the taking allegedly worked by the passage of the Act. Accordingly, the Association lacks standing because the injury allegedly suffered by its members is not fairly traceable to any conduct of the State Defendants.

ii. The Requested Relief Would Not Redress the Association's Alleged Injury

Similarly, neither § 11-44-24 nor § 46-23-7(a)(2) change the redressability analysis. The Association does not seek to enjoin the enforcement of either statute and does not allege that the alleged injury of an unconstitutional taking could be redressed by such relief. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). And as the State Defendants previously argued in their Memorandum of Law, any injunctions or declarations that the Association could obtain against the State Defendants would

not be legally binding with respect to nonparties, including the public at large.[1] ECF No. 20-1 at 11-12; *see United States v. Texas*, 143 S. Ct. 1964, 1979 (2023) ("Nor do we measure redressability by asking whether a court's legal reasoning may inspire or shame others into acting differently. We measure redressability by asking whether a court's judgment will remedy the plaintiff's harms.").

Any "incidental legal determination[s]" produced by injunctive relief against the State Defendants with respect to the Act, § 11-44-24, or § 46-23-7(a)(2) would thus be entirely advisory, and members of the public would be entitled to rely on their rights as set forth in the Act—raising the specter of competing legal judgments from federal and Rhode Island courts regarding the validity of a Rhode Island statute. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1639 (2023); *cf. id.* (rejecting plaintiff's argument "that state courts are likely to defer to a federal court's interpretation of federal law, thus giving rise to a substantial likelihood that a favorable judgment will redress their injury"). The Association cannot avoid this problem by phrasing its request for declaratory relief against the State Defendants as a global pronouncement that the Act works an unconstitutional taking; declaratory relief, no less than injunctive relief, is subject to the principle that "it is the judgment, not the opinion, that demonstrates redressability."[2] *Id.* at 1640. The

[1] As for § 46-23-7(a)(2), that statute explicitly allows for cease and desist orders to be issued by not only CRMC staff and "conservation officers within the department of environmental management," but also officers of the "state and municipal police[.]" R.I. Gen. Laws § 46-23-7(a)(2). Even assuming that the Association's alleged injury could be viewed as traceable to the enforcement of § 46-23-7(a)(2), "a plaintiff's injury isn't redressable by prospective relief where other state actors, who aren't parties to the litigation, would remain free and clear of any judgment and thus free to engage in the conduct that the plaintiffs say injures them[.]" *Support Working Animals, Inc. v. Governor of Fla.*, 8 F.4th 1198, 1205 (11th Cir. 2021) (citing *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1255 (11th Cir. 2020)).

[2] In fact, even the decision to hear a jurisdictionally proper request for declaratory relief is ultimately discretionary. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) ("In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.").

Association thus cannot establish standing against the State Defendants, and the Second Amended Complaint should be dismissed for lack of subject matter jurisdiction.

B. The Association's Suit is Barred by Rhode Island's Eleventh Amendment Immunity

As the foregoing demonstrates, and as the State Defendants previously argued in their Memorandum of Law, the only way that the Association can avoid the causation and redressability issues and establish standing for its takings claim would be to seek binding relief against the State of Rhode Island as a whole. *See* ECF No. 20-1 at 13. But such relief directly implicates Rhode Island's Eleventh Amendment immunity, and the Association cannot dodge that issue by invoking *Ex parte Young*. None of the alterations in the Second Amended Complaint change that reality; to the contrary, they further demonstrate that the State of Rhode Island is the "the real, substantial party in interest" here. *Virginia Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011).

i. The Association's Claim Does Not Meet the Prerequisites Needed to Properly Invoke the *Ex parte Young* Doctrine

Although the *Ex parte Young* doctrine carves out an exception to Eleventh Amendment immunity, that doctrine applies only in "cases in which the relief against the state official directly ends the violation of federal law[,] as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law[.]" *Papasan v. Allain*, 478 U.S. 265, 278 (1986); *see Green v. Mansour*, 474 U.S. 64, 68 (1985) ("[C]ompensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."). Much like the State Defendants' duties under the Act itself—which are limited to promulgating information and developing signage—the Association cannot plausibly claim that ordering Attorney General Neronha or Executive Director Willis to refrain from acting pursuant to either § 11-44-24 or § 46-23-7(a)(2) would "serve[ ] directly to bring an end to [the] present violation of federal law"

allegedly worked by the passage of the Act. *Town of Barnstable v. O'Connor*, 786 F.3d 130, 138 (1st Cir. 2015); *see Stewart*, 563 U.S. at 255 (describing the *Ex parte Young* doctrine as "limited to [the] precise situation" in which "a federal court commands a state official to do nothing more than refrain from violating federal law").

ii. *Ex parte Young* is Inapplicable because the Association's Suit is the Functional Equivalent of a Quiet Title Action

Even if the *Ex parte Young* doctrine might otherwise apply, it is unavailable in this case because the Association has framed a claim that is "close to the functional equivalent of quiet title." *Pavlock v. Holcomb*, 35 F.4th 581, 591 (7th Cir.), cert. denied, 143 S. Ct. 374 (2022) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997)). The Association's additions to the Second Amended Complaint do not substantially affect the State Defendants' previous arguments on that issue. *See* ECF No. 20-1 at 18-20.

iii. *Ex parte Young* is Inapplicable because the Association's Suit Directly Implicates Rhode Island's Sovereign Interests in Enforcing its Constitution

Finally, the Association's incorporation of the Commission Report as an exhibit to the Second Amended Complaint only confirms that the State of Rhode Island is the "real, substantial party in interest" in this case. *Stewart*, 563 U.S. at 255; *see* ECF No. 21-3. The Association directly attacks the legality of the Act, a state law enacted by the General Assembly pursuant to multiple provisions of the Rhode Island Constitution that recognize and protect the "rights of fishery" and "privileges of the shore" enjoyed by the people of Rhode Island. R.I. Const. art I, § 17; *see* Ex. A at 1-4. In turn, and as the Commission Report indicates, the Act directly references those pre-existing public rights and privileges and seeks to clarify and codify those rights so as to ensure their continued viability. *See* Ex. A at 1-4; Commission Report at 5-11. Asserting its own preferred interpretation of Rhode Island law, the Association disagrees as to where those rights and

privileges may be exercised. *Compare* ECF No. 21 at ¶ 26 ("Under the common law of Rhode Island, the state owns or controls the wet beach area that extends from the open ocean waters to the [Mean High Water] line.") *with* Commission Report at 11 ("The [Mean High Water] boundary employed by the Rhode Island Supreme Court in the 1982 *Ibbison* case has been rendered obsolete by the 1986 Rhode Island Constitutional Amendments[.]").

The relief the Association seeks—an enforceable declaration by a federal court that the General Assembly misinterpreted Rhode Island constitutional law and was in fact powerless to vindicate the public's long-standing rights and privileges of the shore under Article I, Sections 16 and 17 of the Rhode Island Constitution—would thus affect the "dignity and status" of Rhode Island's sovereign interests "in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Coeur d'Alene*, 521 U.S. at 287. The Court should look past the "empty formalism" of the Association's attempt to plead around Eleventh Amendment immunity and dismiss the Second Amended Complaint. *Stewart*, 563 U.S. at 256 (quoting *Coeur d'Alene*, 521 U.S. at 270); *see Papasan*, 478 U.S. at 279 (stating that the inquiry into whether *Ex parte Young* applies "look[s] to the substance rather than to the form of the relief sought").

IV. CONCLUSION

For the reasons stated above, the State Defendants respectfully request that the Court dismiss the Association's Second Amended Complaint for lack of subject matter jurisdiction.

Respectfully Submitted,

Defendants,
PETER NERONHA, in his official capacity as Attorney General of Rhode Island; JEFFREY WILLIS, in his official capacity as Executive Director of the Rhode Island Coastal Resources Management Council; and TERRENCE GRAY, in his official capacity as Director of the Rhode Island Department of Environmental Management,

By:
PETER F. NERONHA
ATTORNEY GENERAL

/s/ Jeff Kidd

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CERTIFICATE OF SERVICE

I hereby certify that I filed the within document via the ECF filing system on August 15, 2023 and that a copy is available for viewing and downloading.

/s/ Jeff Kidd

EXHIBIT A

H.B. 5174A

2023 -- H 5174 SUBSTITUTE A

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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2023

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A N A C T

RELATING TO WATERS AND NAVIGATION -- COASTAL RESOURCES MANAGEMENT COUNCIL

Introduced By: Representatives Cortvriend, Carson, McNamara, Craven, Spears, Fogarty, Knight, Edwards, Kennedy, and Kazarian
Date Introduced: January 19, 2023

Referred To: House Judiciary

It is enacted by the General Assembly as follows:

SECTION 1. Legislative findings.

(1) The general assembly finds that the lack of a workable, readily identifiable right of access to the shore by the public has led to confusion, conflict and disputes between those attempting to exercise their rights and privileges to the shoreline and the rights of landowners whose property abuts the shore.

(2) The general assembly recognizes and declares the public's rights and privileges of the shore of this, the ocean state, are not only guaranteed in the State Constitution but have enjoyed a long use throughout history to our founding documents, including the 1663 Rhode Island Charter from King Charles II. The general assembly further acknowledges the use and enjoyment of the shore by Native Americans for thousands of years prior to that.

From the Rhode Island Charter (1663-1843)

"Our express will and pleasure is, and we do, by these presents, for us, our heirs and successors, ordain and appoint that these presents, shall not in any manner, hinder any of our loving subjects, whatsoever, from using and exercising the trade of fishing upon the coast of New England, in America, but that they, and every or any of them, shall have full and free power and liberty to continue and use the trade of fishing upon the said coast, in any of the seas thereunto adjoining, or any arms of the seas, or salt water, rivers and creeks, where they have been accustomed to fish, and to build and set upon the waste land belonging to the said Colony and Plantations, such wharves,

stages and workhouses as shall be necessary for the salting, drying and keeping of their fish, to be taken or gotten upon that coast."

(3) Rhode Island's historical commitment to the public rights and privileges of the shore is so strong that is was written into our Constitution in 1843 making us unique to other states:

From the Rhode Island Constitution (1843)

"The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state. But no new right is intended to be granted, nor any existing right impaired, by this declaration".

(4) The general assembly also recognizes that its public trust duty to preserve the public's rights and privileges of the shore is a progressive and evolving doctrine that is expected to adjust to changing circumstances. In this spirit, voters of Rhode Island overwhelmingly supported the reinforcement of these rights and privileges in 1986 following the constitutional convention of that same year.

Added to the constitution in 1986

"Section 16. Compensation for taking of private property for public use -- Regulation of fishery rights and shore privileges not public taking.

Private property shall not be taken for public uses, without just compensation. The powers of the state and of its municipalities to regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in Article I, Section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property.

"Section 17. The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it is the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration, and restoration of the natural

environment of the state."

(5) In 1982, our state supreme court, acknowledging that it was acting in the absence of guidance from the general assembly, defined the public's rights to the shore by the mean high water (MHW) line, derived from an arithmetic average of high-water heights measured over an 18.6-year metonic cycle. The 1986 Constitutional Convention considered and rejected defining the mean high tide line for purposes of public access by this means and, accordingly, amended the constitution. Moreover, since 1982, there has also been a greater awareness by the public, judiciary and lawmakers of the scientific findings that establish the difficulties in using the MHW line as the indicator of public rights to the shore.

The general assembly accepts the conclusions of the coastal scientists from the University of Rhode Island who have documented that:

(i) The MHW line is not a visible feature that can be seen on the beach like a watermark or debris line. MHW is an elevation, calculated from the average of all the high tides, two (2) per day in Rhode Island, over a nineteen (19) year period and the MHW line is where this elevation intersects the beach profile. It cannot be determined by the naked eye and requires special surveying expertise and equipment, thereby making it impossible for the general public to know where the line is.

(ii) The MHW line may change on a daily basis. Because the profile or shape of the beach changes constantly, as waves move sand onshore, offshore and alongshore, the location where MHW intersects the beach likewise changes. Even when the MHW line is found through precise surveying, it does not remain in the same location for very long on a wave-dominated shoreline. For instance, two (2) years of near weekly surveyed beach transects in the town of Charlestown revealed that the position of the MHW line migrated back and forth across a one hundred twenty-five foot (125') swath of the beach profile.

(iii) The MHW line is based on measurements collected inside a tide gauge, an instrument that filters out dynamic factors like breaking waves, which causes water to run up the beach. In other words, the measure of MHW is insulated from the dynamic action of the surf, which projects the water to a higher elevation. This results in a pervasive and predominant situation in which the actual water line is significantly landward of the MHW line. Data has shown that, on most days, due to the dynamic action of the surf and other factors, dry sand is exposed below the MHW line for, at most, only a few hours over a tidal cycle. This exposure occurs only at or near the time of low tide.

In sum, while the MHW may be helpful for other purposes, such as findings or definitions pertaining to waters and navigation, use of the MHW for determining shoreline access has restricted

the public's rights. Retaining the MHW line rule employed by the court in 1982 results in the public only having meaningful shoreline access at or near the time of low tide, if at all, at some locations. Thus, the constitutional right and privileges of the shore delineated in the 1986 Constitutional Convention amendments have become illusory under such a rule.

(6) Insofar as the existing standard for determining the extent of the public's access to the shore is unclear and not easily discernable, due to the lack of a boundary that can be readily seen by the casual observer on the beach, resulting in confusion, uncertainty and even confrontation, the General Assembly is obligated to provide clarity. This enactment constitutes the necessary clarification in accordance with Article I Section 17 of the R.I. Constitution.

SECTION 2. Chapter 46-23 of the General Laws entitled "Coastal Resources Management Council" is hereby amended by adding thereto the following section:

46-23-26. The public's rights and privileges of the shore.

(a) The public's rights and privileges of the shore are established by Article I, Sections 16 and 17 of the Rhode Island Constitution.

(b) For purposes of this chapter, the "recognizable high tide line" means a line or mark left upon tidal flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface level at the maximum height reached by a rising tide. The recognizable high tide line may be determined by a line of seaweed, oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, or other suitable means that delineate the general height reached by the water's surface level at a rising tide. If there is more than one line of seaweed, oil, scum, fine shell, or debris, then the recognizable high tide line means the most seaward line. In the absence of residue seaweed or other evidence, the recognizable high tide line means the wet line on a sandy or rocky beach. The line encompasses the water's surface level at spring high tides and other high tides that occur with periodic frequency, but does not include the water's surface level at storm surges in which there is a departure from the normal or predicted reach of the water's surface level due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storms.

(c) Notwithstanding any provision of the general laws to the contrary, the public's rights and privileges of the shore may be exercised, where shore exists, on wet sand or dry sand or rocky beach, up to ten feet (10') landward of the recognizable high tide line; provided, however, that the public's rights and privileges of the shore shall not be afforded where no passable shore exists, nor on land above the vegetation line, or on lawns, rocky cliffs, sea walls, or other legally constructed shoreline infrastructure. Further, no entitlement is hereby created for the public to use amenities

privately owned by other persons or entities, including, but not limited to: cabanas, decks, and beach chairs.

(d) Any landowner whose property abuts the shore shall, with respect to the public's exercise of rights and privileges of the shore as defined in this chapter, be afforded the liability limitations pursuant to chapter 6 of title 32.

(e) The coastal resources management council (CRMC) in collaboration with the department of environmental management (DEM), shall develop and disseminate information to educate the public and property owners about the rights set out in this section.

(f) The CRMC in collaboration with the DEM, and the attorney general, shall determine appropriate language and signage details for use at shoreline locations.

SECTION 3. This act shall take effect upon passage.

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LC000193/SUB A
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EXPLANATION

BY THE LEGISLATIVE COUNCIL

OF

A N A C T

RELATING TO WATERS AND NAVIGATION -- COASTAL RESOURCES MANAGEMENT COUNCIL

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This act would provide that the public's rights and privileges of the shore established by Article I, Sections 16 and 17 of the State Constitution may be exercised where shore exists, on wet or dry sand or rocky beach up to ten feet (10') landward of the high tide line but not where no passable shore exists with abutting landowners afforded limited liability.

This act would take effect upon passage.

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LC000193/SUB A
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EXHIBIT B

Affidavit of Jeffrey M. Willis

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

RHODE ISLAND ASSOCIATION OF COASTAL TAXPAYERS,
Plaintiff,

v.

PETER NERONHA, in his official Capacity as Attorney General of Rhode Island; JEFFREY WILLIS, in his official capacity as Executive Director of the Rhode Island Coastal Resources Management Council; and TERRENCE GRAY, in his official capacity as Director of the Rhode Island Department of Environmental Management,
Defendants.

C.A. No. 23-cv-00278-WES-PAS

AFFIDAVIT OF JEFFREY M. WILLIS

I, Jeffrey M. Willis, being duly sworn according to the law, do upon my oath depose and state the following:

1. I am over the age of eighteen (18) years, am competent to testify as to the matters herein, and make this declaration based on my personal knowledge.

2. I am the Executive Director of the Rhode Island Coastal Resources Management Council ("CRMC"), a position I have served in since becoming acting Executive Director in June 2020 and then full Executive Director in September 2020. Prior to becoming the CRMC Executive Director, I was the CRMC Deputy Director since 2002; before that, I have held supervisory coastal planner positions since the late 1980s.

3. The CRMC's primary responsibility is the preservation, protection, development and where possible the restoration of the coastal areas of the state of Rhode Island via the implementation of its integrated and comprehensive coastal management plans and the issuance of permits for work with the coastal zone of the state. The geographic scope of the CRMC's regulatory authority is generally defined by the area extending from the territorial sea limit, 3 miles offshore, to two hundred feet inland from any coastal feature.

4. To properly manage coastal resources, the General Assembly has given the CRMC explicit powers and duties, including the authority to formulate policies and plans and to adopt regulations necessary to implement its various management programs. The CRMC has promulgated regulations codified at 650-RICR-20-00-01.

5. The CRMC is also responsible for the designation of all public rights-of-way to the tidal water areas of the state, and for carrying on a continued discovery of appropriate public rights-of-way. The CRMC's powers and duties with respect to public rights-of-way are set out at Rhode Island General Laws Section 46-23-6(5). As defined by 650-RICR-20-00-1.1.2.A.118, a public right-of-way is "a parcel of land over which the public has a right to access tidal waters." In other words, a public right-of-way allows the public to reach tidal areas from inland or upland areas.

6. As part of its permitting process, CRMC considers whether the proposed activity or alteration has a potential for significant adverse impacts on the coastal environment, including on circulation and/or flushing patterns; sediment deposition and erosion; biological communities, including vegetation, shellfish and finfish resources, and wildlife habitat; areas of historic and archaeological significance; scenic and/or recreation values; water quality; public access to and along the shore; and shoreline erosion and flood hazards.

7. With respect to the construction of fences in coastal beach areas, under 650-RICR-20-00-1.2.2.A.2.c, alterations to coastal beaches that are "adjacent to Type 1 and Type 2 waters are prohibited except where the primary purpose of the project is to preserve or enhance the area as a natural habitat for native plants and wildlife." Fences (or more appropriately, "snow fences") in a beach and dune environment are designed and permitted to enhance the collection of sands that further build and nurture a dune system, ensuring dunes are preserved to serve their primary function as a natural storm buffer. See 650-RICR-20-00-1.2.2(G). These fences should be directly adjacent to the dunes they are meant to protect and enhance. CRMC regulations do not allow for the construction of fences, or other permanent structures, in beach and dune environments for the sole purpose of serving as property boundary markers.

8. Under 650-RICR-20-00-1.2.2(G)(1)(c), regarding dunes, the CRMC's "goals are to: (1) Protect the foredune zone from activities that have a potential to increase wind or wave erosion; (2) To prevent construction in high hazard areas and protect the public from dangerous storm forces; (3) To enhance the ability of dunes to serve as a natural storm buffer; and, (4) To protect the scenic and ecologic value of the foredune zone and dunes."

9. The CRMC regulations and policies described in this Affidavit predate the enactment of H.B. 5174A.

Signed under the pains and penalties of perjury on this 15th day of August 2023.

JEFFREY M. WILLIS

Subscribed and sworn to/before me on this 15th day of August 2023.

Notary Public

OFFICIAL SEAL
LISA A. TURNER
NOTARY PUBLIC - RHODE ISLAND
My Commission Expires 3-31-27

Print Name: Lisa A. Turner

My Commission Expires On:

03-31-2027