In the

Supreme Court of Ohio

STATE OF OHIO ex rel. ROBERT MERRILL, TRUSTEE, et al.,	:	Case No. 2009-1806
Plaintiffs-Appellees,	:	On Appeal from the Lake County Court of Appeals, Eleventh Appellate District
and	:	
HOMER S. TAFT, et al.,	:	
Intervening Plaintiffs-Appellees-Cross-Appellants	:	Court of Appeals Case Nos. 2008-L-007, 2008-L-008 Consolidated
v.	:	
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	:	
Defendants-Appellants-Cross-Appellees,	:	
and	:	
STATE OF OHIO,	:	
Defendant-Appellant-Cross-Appellee,	:	
and	:	
NATIONAL WILDLIFE FEDERATION, et al.,	:	
Intervening Defendants-Appellants-Cross-Appellees.	:	

SUPPLEMENTAL JURISDICTIONAL MEMORANDUM OF DEFENDANT-APPELLANT-CROSS-APPELLEE STATE OF OHIO

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INTRODUCTION

The Court has ordered the parties to brief two issues before it decides whether to accept the discretionary appeals and cross-appeals in this case: (1) "Does the Attorney General have standing to appeal a judgment against the state of Ohio if that appeal is contrary to the directive of the Governor, and the Attorney General is not representing an administrative agency?" and (2) if so, "is the record in this matter sufficient for this court to resolve the appeals and cross appeal, if they are accepted, even though the state of Ohio's assignments of error and briefs were stricken by the court of appeals?" *12/23/09 Case Announcements*, 2009-Ohio-6787.

The answer to both questions is "yes." The Attorney General, as the State's counsel and a constitutionally independent executive officer, is vested with the power and duty to represent the State's interests. Further, the facts of this case show that the Attorney General's authority to appeal here is straightforward, because the Governor and the Ohio Department of Natural Resources ("ODNR") support the Attorney General's right to appeal. Finally, no barrier exists to prevent the Court from reaching the merits of this case now.

First, although the Attorney General's power to litigate for "the State" is independent of the Governor's executive oversight, the Court can and should avoid addressing any hypothetical question about *conflicts* between the two executives, because the Governor fully supports, and always has supported, the State's appeals in this case. In pleadings filed in the trial court, ODNR stated that the Governor had directed it to honor *temporarily* the deeds of the plaintiff-relator lakefront owners, as a regulatory matter, *until* a court decided the issues, recognizing that litigation would continue. *State ex rel. Merrill v. State* (11th Dist.), 2009-Ohio-4256 ("App. Op."), ¶ 42. ODNR and the State jointly told the court that the State would continue on a separate track in the litigation. Also, the Governor issued a public statement restating both the regulatory change and that the Attorney General would continue to press the State's interests

separately. And in this Court, ODNR has again endorsed the Attorney General's authority to appeal for the State, and it has even encouraged the Court to address the merits of the case.

The only "directive" from the Governor was his directive *to ODNR,* a department subordinate to him—the Governor never directed the Attorney General to stop litigating for the State of Ohio, a separately named defendant with separate interests. The Governor has always endorsed the State's appeal, and he decided ODNR's path only on the assumption that the litigation could, and would, continue. Thus, no conflict exists, and the Court should resolve the issue on that basis, as well as on the basis of the points raised in the State's jurisdictional memorandum.

Nevertheless, if the Court wishes to address the Attorney General's independent authority to represent the State, it should affirm that general authority and the specific power to file this appeal. The question here is not one of "standing" to appeal, as the Attorney General does not claim party status for himself, and the State, as a named defendant, indisputably has standing to appeal a judgment entered against it. See *State ex rel. Gabriel v. City of Youngstown* (1996), 75 Ohio St. 3d 618, 619. The issue is the Attorney General's power to direct the State's litigation independently, or whether he must seek the Governor's permission for all litigation on the State's behalf.

The Attorney General is independent, both because of the nature of his office and because of the nature of the State. The Attorney General is an independent constitutional officer with direct obligations to the citizens of Ohio. His clients are all Ohioans, not the particular officeholders or agency managers at the moment. Thus, he has always exercised broad constitutional, statutory, and common-law powers, see, e.g., *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986, ¶¶ 14–18, including the right to direct the State's

litigation without seeking approval from the Governor or any other officer, see *State v. United Transp., Inc.* (S.D. Ohio 1981), 506 F. Supp. 1278, 1281–83. Further, the State as an entity is broader in scope than the Governor's jurisdiction. Ohio has three branches of government, with a divided executive branch that includes separate elected officers and independent agencies. Thus, the Governor is the highest executive, but he is not the exclusive executive. Just as he cannot direct this Court, the Auditor, or the retirement systems in their respective regulatory activities, he cannot direct litigation when those actors are sued, nor can he do so when the named party is "the State," which encompasses all State entities as a whole. That is the Attorney General's job, and he is doing it here.

Second, neither further record development nor any other proceedings on remand are needed before the Court reviews the case. The formal "record" in the case was fully established in the trial court, before the appeals court mistakenly ejected the State from the case. Although the appeals court failed to consider the State's view, the matter is now appropriate for this Court's review, with the State's full participation. That is so because the appeals court reached and resolved the relevant issues, rendering them ripe for this Court's review. A remand to the appeals court would add nothing but delay, and all parties are best served by a final resolution of the important Lake Erie issues now rather than later.

For these and other reasons below, the answer to both of the Court's questions is "yes," and the Court should summarily reverse on the procedural issue and address the merits of the case.

ARGUMENT

A. The Attorney General is authorized to appeal here, both because the Governor and ODNR agree that he may do so and because he has independent power to direct litigation for the State of Ohio as a named party.

The Court's first question asks, "Does the Attorney General have standing to appeal a judgment against the state of Ohio if that appeal is contrary to the directive of the Governor, and the Attorney General is not representing an administrative agency?" As detailed below, the answer is "yes," because the Attorney General has independent constitutional authority—and the duty—to represent the entire State of Ohio. But equally important, the Court need not answer that question in terms of a "contrary . . . directive" of the Governor, because this case does not involve any such directive: The Governor fully supports the State of Ohio's appeal, so the Court may resolve the status of this appeal without addressing an unnecessary hypothetical question about a clash between constitutionally independent executive officers.

Before even reaching the issue in its narrower form, the Court should clarify that the issue here is not the Attorney General's "standing"; it is the Attorney General's power to represent the State, coupled with the *State's* standing here. As the State's jurisdictional memorandum explained, the State had standing to appeal because a judgment was entered against it, rendering it "a party aggrieved by the final order," *Gabriel*, 75 Ohio St. 3d at 619, and the State also required representation because it was an appellee as to the Plaintiffs' cross-appeals. See State Jur. Mem. at 6-7. Thus, the question here is more precisely whether the Attorney General, as the State's chief legal officer, has independent power to decide litigation strategy, including whether to appeal, in the course of representing the State. The separate issue of "Attorney General standing," in those terms, exists only when the Attorney General is a party, that is, when he sues (or is sued) in his own name, and that is undoubtedly not the case here. Here, he represents the State of Ohio in a case brought against it, and that is his job.

1. The Governor and ODNR fully support the Attorney General's power to appeal for the State, and even his decision to appeal.

The facts of this case are clear, as shown by plain language in the pleadings and in public statements: The Governor and ODNR have consistently supported the Attorney General's right to appeal independently for the State. Though the Governor and ODNR pursued a separate path for ODNR, they did so on the understanding that the State, as a separate party, would continue to press the State's broader, separate interests. Plaintiff Homer Taft's opposing characterization of the State's appeal—namely, that it is "contrary to the wishes of the executive authority of the State of Ohio," Taft Jur. Mem. at 1—is firmly contradicted by repeated statements of all involved. Because those statements show that the Governor and ODNR never sought to "direct" the Attorney General not to appeal for the State, the Court need not address what would happen if the Governor and the Attorney General clashed over issues of representing the State.

As an initial matter, the issue of the State's representation arises here because the State is a party separate from ODNR. As the State's jurisdictional memorandum detailed further, State Jur. Mem. at 2-3, this case began with two separate suits filed in 2004 by individuals owning property bordering Lake Erie. The complaints in both cases (which were ultimately consolidated) named three separate defendants: (1) ODNR, (2) ODNR's director (together, "ODNR"), and (3) the State of Ohio. See *State ex rel. Merrill v. State*, Lake County Court of Common Pleas No. 04CV001080; *State ex rel. Taft v. State*, Lake County Court of Common Pleas No. 04CV001081. The relief sought necessarily had to run against the State, as the landowners sought not only to control ODNR's regulatory activities, but also to resolve the extent of *the State's* ownership of Lake Erie and the State's public trust authority. Plaintiffs sought to bind not only current ODNR practice, but also the State's power, and the public's rights, forevermore.

The Attorney General has represented all State parties at all times in this case, but the form of his representation has changed along the way. The Attorney General is, of course, required to represent the State and its entities in legal proceedings, under both the Constitution and R.C. 109.02. When the case began, the Attorney General assigned assistant attorneys general to represent all named defendants jointly, and that representation continued for three years. In July 2007, after various summary judgment motions were filed by all sides, the State parties decided to pursue different paths. At that time, the Attorney General exercised his power under R.C. 109.07 to appoint special counsel (here, Kathleen M. Trafford of Porter, Wright, Morris & Arthur, LLP) to represent ODNR.

When representation diverged, the State and ODNR filed two documents, both of which reflect their shared understanding that ODNR's change in direction would not diminish the State's continued, separate litigation track. First, the State and ODNR filed a joint notice about the change in representation, noting that "Defendant-Respondent State of Ohio will continue to be represented" by the Attorney General through the same assistants who had previously represented all defendants. See Notice of Substitution of Counsel for Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources (attached as Exhibit 1). If the parties' understanding had been that the State's position must be yoked to ODNR's, the dual teams would have been unnecessary.

Second, on the same day that Trafford entered her notice of appearance of counsel, ODNR filed a response to the pending motions for summary judgment. This document is what the Eleventh District cited in concluding mistakenly that the Governor issued a "directive" against a State appeal. App. Op. at ¶¶ 42, 44. ODNR's document explains its position:

> The Court has been provided with able and exhaustive briefs by the Plaintiffs-Relators on behalf of the lakefront owners and the Attorney General on behalf of the

> State of Ohio. These briefs fully explain and document the opposing positions on each of the three issues the Court certified for declaratory judgment in its Order certifying the class action. Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources, (collectively "ODNR"), welcome the Court's resolution of these issues and will carry out their statutory duties consistent with the Court's ultimate declarations.
>
> ODNR believes that they must and should honor the apparently valid real property deeds of the plaintiff-relator lakefront owners unless a court determines that the deeds are limited by or subject to the public's interests in those lands or are otherwise defective or unenforceable. Accordingly, ODNR, acting with the consent and direction of Governor Ted Strickland, will discharge its statutory duties and will adopt or enforce administrative rules and regulatory policies with the assumption that the lakefront owners' deeds are presumptively valid.

Response of Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources, to the Pending Motions for Summary Judgment at 1–2 (attached as Exhibit 2).

This separate ODNR filing unequivocally reflects ODNR's and the Governor's understanding that the State would litigate independently, and that they even contemplated the likelihood of appeal. The language says that ODNR will honor the owners' deeds "unless a court determines" that the deeds are otherwise limited. That reference to a future determination shows that further litigation was assumed. *Id.* at 2. If ODNR had wished to preclude further litigation (though it did not), and if it could have done so (though it could not have), it could have tried to enter a consent order or settlement to end the matter—but it did not. And the reference to "a court," especially in contrast to the specific reference to the trial court in the preceding paragraph, reflects an understanding that appeals to higher courts were likely. Finally, ODNR's filing refers repeatedly to its "regulatory" policies, both in the last-cited sentence above, and in the final sentence of the filing, which refers to ODNR's "new regulatory policy." *Id.* That shows ODNR's understanding that it was changing its regulatory approach while

awaiting the end of litigation, not purporting to achieve an end to litigation or to predetermine its result.

The Governor's press release, issued the same day as ODNR's pleadings, further confirms not only the Governor's expectation that the State would continue to litigate independently, but also that his position *depended upon further litigation by the State.* See July 13, 2007 Press Release, "Governor Strickland Announces New Regulatory Policy for Coastal Land Management," available at http://ohio.gov/news/2007/jul.stm (last visited January 7, 2010) (attached as Exhibit 3). The release, even in its title, refers to ODNR's "new regulatory policy" and to a change in "coastal land management," not to any new litigating position agreeing with Plaintiffs. The release notes that "[t]he Attorney General, in his role as counsel to the State of Ohio, has informed the Governor that his office will continue to pursue its current position in support of the public trust lands doctrine." *Id.* Everything about ODNR's position therefore logically relied upon the State's continued litigation.

ODNR's reliance on the State's continued efforts is shown by the fact that the Governor's statement does not adopt Plaintiffs' views on the disputed issues, but it instead acknowledges points on both sides, showing the need for further litigation and resolution. The statement expressly notes that the State's position might defeat Plaintiffs' claims: "The Governor and ODNR recognize that there are arguable legal claims that some of the deeds have specific defects and that deeds purporting to cover lands below the [ordinary high water mark] may ultimately be found by the Ohio courts to be subordinate to the public's interest in those lands." *Id.* In other words, the Governor was waiting to see whether the State or the Plaintiffs would win, and he simply instructed ODNR to err on the side of honoring the deeds unless and until a court said

otherwise: "Still, without such a determination by the Ohio courts, ODNR believes that it must honor those deeds." *Id.*

Thus, the Governor never *opposed* the State's litigating position; rather, he simply instructed ODNR, as a matter of regulatory policy, to treat the deeds as valid and unqualified until the litigation ended. His regulatory position was akin to a court's preliminary injunction, granting temporary relief to parties who might eventually win or lose, until the merits were resolved. It would make no sense for the Governor to await further court rulings, and to acknowledge that courts could find that "the public's interest in those lands" could trump the owners' claims, if he sought to end the litigation and thus to preclude such further rulings.

Finally, ODNR confirmed its support of the State's appeal when it joined the State's Notice of Appeal to this Court and filed its own jurisdictional memorandum urging the Court to review the case. See ODNR Jur. Mem. ODNR did not merely acknowledge that the Attorney General *could* appeal for the State; instead, it urged the Court to hear the State's appeal to ensure that the issues are "clearly presented to the Court by the respective advocates for both sides, including the Ohio Attorney General on behalf of the State of Ohio." *Id.* at 1.

While the statements above show that the Governor and ODNR support the State's appeal, Taft offers no support for his contrary claim that the State's appeal violates the Governor's and ODNR's wishes. Taft repeatedly states, in a conclusory fashion, that the State's appeal, filed by the Attorney General, is "contrary to the wishes of the executive authority of the State," Taft Jur. Mem. at 1 and that the appeal is an "open rebellion" against the Governor, *id.* at 6. But he does not even address, let alone explain away, the language from the Governor's and ODNR's statements discussed above.

The appeals court's view, although unclear, is also mistaken. As the State's jurisdictional memorandum explained, the court erred in discussing "standing to sue," or the lack of "authority for the attorney general to prosecute this matter on his own behalf," because the Attorney General did not sue and is acting in the State's name, not in his own. See State Jur. Mem. at 6-9, citing App. Op. at ¶¶ 42, 44. The appeals court seemed to act on the premise that ODNR was the sole party, ignoring both that Plaintiffs chose to sue the State as a separate defendant and that the trial court's judgment ran against the State. The appeals court said that "the attorney general represented the state due to the activities of the ODNR . . . . The governor has ordered ODNR to cease those activities that made it a party to the action. We find no authority for the attorney general to prosecute this matter on his own behalf." *Id.* at ¶ 44. But the State was not a party merely because of "the activities of the ODNR." Plaintiffs sought relief against the State and its ownership and public trust interests, not just against ODNR's regulatory activities, so they properly sued the State of Ohio as a separate entity.

In sum, the Attorney General's power to appeal here is a simple issue. It is based on his representation of the State, not of himself, and the State's status and standing as a separate party is indisputable. The Attorney General has the right and the obligation to direct litigation for the State, and the Governor fully supports the Attorney General's power to appeal for the State in this case.

2. The Ohio Attorney General has the independent power and duty to direct the State's legal positions, including whether to appeal from an adverse judgment.

As explained above, the Court need not, and thus should not, address the issue of a hypothetical conflict between the Governor and the Attorney General, because no such conflict exists. The reasons not to reach the issue are compelling. The Court has repeatedly described "hypothetical question[s]" as "inappropriate for review," and it has refused to address legal

issues that do "not present an actual, justiciable controversy," because "doing so would result in an improper advisory opinion." *State v. Kalish*, 120 Ohio St. 3d 23, 2008-Ohio-4912, ¶ 25 (citing *Cascioli v. Cent. Mut. Ins. Co.* (1983), 4 Ohio St. 3d 179, 183). The Court should be especially wary on an issue like this. Beyond the issue's importance, its nature is such that any potential clash between the Governor and the Attorney General would deserve a full, adversarial airing, including the possibility that an appointed counsel for the Governor would argue in favor of the Governor's authority as against the Attorney General's, as has happened in other States. See, e.g., *Feeney v. Commonwealth* (Mass. 1977), 366 N.E.2d 1262. But here, ODNR's filings show that the Governor supports the appeal.

If the Court reaches the question, however, it should conclude that the Attorney General is empowered to appeal cases for the State, even if the Governor or any officer objects. The Ohio Attorney General, like attorneys general in most States, is a constitutionally created executive officer, cloaked with broad powers independent of the rest of the executive branch and not subject to the Governor's control. These powers include the right to represent the State on appeal, regardless of whether the Governor has assented to the representation.

Unlike the federal government, most state governments, including Ohio, have divided executive branches. While the Ohio Constitution vests "supreme executive power . . . in the governor," see Section 5, Article III, Ohio Constitution, this power is not equivalent to that of the President. The Governor's authority "is supreme in the sense that no other executive authority is higher or authorized to control his discretion," but "it is not supreme in the sense that he may dominate the course and dictate the action and control the discretion of other executive officers of inferior rank acting within the scope of the powers, duties, and authorities conferred upon them respectively." *State ex rel. S. Monroe & Son Co. v. Baker* (1925), 112 Ohio St. 356, 366.

Indeed, "the secretary of state, auditor of state, treasurer of state, and attorney general, all of whom are executive officers, have duties and functions wholly separate and distinct from the duties of the Governor, and wholly independent of his authority." *Id.* at 364; see also Section I, Article III, Ohio Constitution ("The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general. . . ."). Further, "every executive officer is invested with certain powers and discretion, and within the scope of the powers granted and discretion conferred his dictum is supreme and his judgment is not subject to the dictation of any other officer." *S. Monroe & Son Co.*, 112 Ohio St. at 366–67.

As the top legal officer in the executive branch, the Attorney General's general duties arise from his power to direct and control the State's legal activities. These powers and duties predate the United States, and in fact, the historical role of the office in England has largely shaped the modern view of the Attorney General in Ohio and throughout the rest of the country. The Fifth Circuit, in summarizing that history, noted that "[a]s chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion." *State of Florida ex rel. Shevin v. Exxon Corp.* (5th Cir. 1976), 526 F.2d 266, 268 (footnote omitted). The court further explained "[t]ransposition of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch, could only broaden this area of the attorney general's discretion," and consequently, "the attorneys general of our states have enjoyed a significant degree of autonomy." *Id.* In particular, the court noted that the attorneys general's "duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law," that "he typically may exercise all such authority as the public interest requires," and that he "has wide

discretion in making the determination as to the public interest." *Id.* at 268-69 (footnotes omitted).

The modern state attorney general, like his English ancestors, stands as an independent representative of the common good, or of the people, in the state legal system. Indeed, as former Ohio Attorney General William A. Saxbe noted, the Attorney General stands as "a kind of fourth check or balance in addition to the purely legislative, executive and judicial branches of State government. This gives the Office a highly responsible place on our State-wide community, and this direct responsibility to the people is not to be taken lightly." Saxbe, Functions of the Office of Attorney General of Ohio (1957), 6 Cleveland-Marshall L. Rev. 331, 334.

The Ohio Constitution does not specifically enumerate any of the Attorney General's specific powers; rather, they are defined statutorily and incorporated through the common law. See *Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986, at ¶¶ 14–18. Pursuant to R.C. 109.02, "[t]he attorney general is the chief law officer for the state and all its departments," and in this role has the exclusive right, subject to certain exceptions not relevant here, to represent various State entities and officers. The Attorney General shall also appear for the State in this Court whenever the State's interests are implicated, appear for the State in any court when asked to do so by the Governor or General Assembly, and may prosecute individuals at the Governor's request. *Id.*; see *State v. Finley* (2d Dist.), 1998 Ohio App. Lexis 2693, *43–44 (noting that the Governor's power to ask the Attorney General to act in certain instances does not preclude the Attorney General from acting on his own accord, without such a direct request). And Ohio's declaratory judgment statute instructs those challenging state laws to serve the Attorney General. R.C. 2721.12(A).

The framers of the Ohio Constitution also incorporated all of the common law powers held by attorneys general, and these powers remain unless clearly abrogated by statute. See *Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986, at ¶¶ 16–18 (citing, among other cases, *State v. Wing*, 66 Ohio St. 407, 420 (1902)); see also *United Transp., Inc.*, 506 F. Supp. at 1281. Though they have never been exhaustively defined in Ohio jurisprudence, these common law powers are broad, and in line with the traditional powers of attorneys general. See *State ex rel. Doerfler v. Price* (1920), 101 Ohio St. 50, 57 (stating that the Attorney General is "chargeable with such duties as usually pertain to an attorney general"); *United Transp., Inc.*, 506 F. Supp. at 1281–82 (noting that the Attorney General has broad powers to "champion[] the proprietary and pecuniary interests of the government itself, and contest[] infringements of the rights of the general public via the doctrine of parens patriae").

Chief among these powers, though, is the Attorney General's power to represent the public interest, through the name of the State of Ohio, on his own accord. See, e.g., *State ex rel. Little v. Dayton & S.E. R.R. Co.* (1881), 36 Ohio St. 434, 440 (noting that it "is abundantly shown by the authorities" that the Attorney General has the power to institute suits on behalf of the public); Saxbe, 6 Cleveland-Marshall L. Rev. at 334 ("It is essential that we bear in mind that we do not, in a legal sense, represent the administration, nor, in a strict sense, the State as an entity, but in a broad sense, the people from whom we derive our powers."). This practice has continued through the present day in literally thousands of cases in every type of legal proceeding. The power is not limited to the right to institute suits; it extends to the exclusive right to make judgment calls about litigation strategy, such as whether to appeal, throughout the life of a case.

Cases in other States show a broad consensus about an attorney general's power to direct the State's litigation. This Court has looked to other States' practices to clarify the Ohio

Attorney General's powers, see *Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986, at ¶ 23, and other States agree that the common-law power of the State's legal counsel necessarily includes full authority to control litigation advanced by, or filed against, the State. "The authority of the Attorney General, as chief law officer, to assume primary control over the conduct of litigation which involves the interests of the Commonwealth . . . [creates] a relationship with the State officers he represents that is not constrained by the parameters of the traditional attorney-client relationship." *Feeney v. Commonwealth* (Mass. 1977), 366 N.E.2d 1262, 1266. "Where, in his judgment, an appeal would further the interests of the Commonwealth and the public he represents, the Attorney General may prosecute an appeal . . . over the expressed objections of the State officers he represents." *Id.* at 1267. "The overwhelming authority supports the decision . . . that the attorney general has the power to manage and control all litigation on behalf of the State . . . ." *Ex parte Weaver* (Ala. 1990), 570 So.2d 675, 684; see also *id.* at 676–684 (surveying the law of various States on this issue). "'[A]s a rule, the attorney-general has power, both under the common law and by statute, to make any disposition of the state's litigation that he deems for its best interest; for instance, he may abandon, discontinue, dismiss, or compromise it.'" *State v. Finch* (Kan. 1929), 280 P. 910, 912 (quoting 2 Thornton on Attorneys at Law 1131). "We conclude therefore that the duties of the Attorney General . . . include the duty to appear for and to defend the State or its agencies in all actions in which the State may be a party or interested." *Martin v. Thornburg* (N.C. 1987), 359 S.E.2d 472, 479–80 (also noting that this power is not inconsistent with the Governor's authority).

Many other courts agree that an attorney general's power to direct litigation in the State's name is broad, and beyond the control of other state officials. See, e.g., *Shevin*, 526 F.2d at 270–71 (Florida law); *Manchester v. Rzewnicki* (D. Del. 1991), 777 F. Supp. 319, 326–27; *People v.*

Massarella (Ill. 1978), 382 N.E.2d 262, 264; *Humphrey ex rel. State v. McLaren* (Minn. 1987), 402 N.W.2d 535, 539; see also Marshall, Break Up the Presidency?: Governors, State Attorneys General, and Lessons from the Divided Executive (2006), 115 Yale L.J. 2442, 2451–52, available at http://www.law.columbia.edu/center_program/ag/Library/AG_Publications (last visited January 7, 2010) ("Must the Attorney represent the position of the Governor on a disputed legal issue, or is she free to substitute her own independent legal judgment as to the best interests of the state? The majority rule favors attorney general independence."); Myers and Ross, State Attorneys General, Powers and Responsibilities (2 Ed. 2007) 42–48. The United States Supreme Court also recognizes the special powers that state attorneys general have in directing the litigation activities of their states. See U.S.S. Ct. Prac. R. 37(4) ("No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented . . . on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General."). Even in States whose courts have taken limited views of the attorney general's common law powers and his ability to direct the course of litigation when representing a specific state officer, his power to direct litigation brought against the State is not in doubt. See *Manchin v. Browning* (W.Va. 1982), 296 S.E.2d 909, 918–19. That ability is threatened only in the rare State where, unlike in Ohio, the attorney general has no common law powers at all. See *Blumenthal v. Barnes* (Conn. 2002), 804 A.2d 152, 165.

The Attorney General's power to represent the State, and to direct the State's litigation strategy on appeal and elsewhere, is not some archaic ability that has been dusted off for this case in particular. Since the inception of the office, the Attorney General and his staff of assistant attorneys general have consistently, and continually, represented the State's interests at every level of legal proceeding, including in suits pertaining to Lake Erie over the years. See

State ex rel. Duffy v. Lakefront E. Fifty-Fifth St. Corp. (1940), 137 Ohio St. 8; *State ex rel. Crabbe v. Sandusky, Mansfield & Newark R.R. Co.* (1924), 111 Ohio St. 512; *State v. Cleveland & Pittsburgh R.R. Co.* (1916), 94 Ohio St. 61. Commonly referred to as "the largest law firm in the State," the Attorney General's Office now employs hundreds of attorneys in various specialty sections that must make innumerable judgment calls about the State's litigation strategy on a daily basis. Other than in the decision below, the Attorney General's power to direct the State's litigation has never been in doubt in Ohio, even from the time of the first Attorney General, Henry Stanbery. See *Powell v. State* (1846), 15 Ohio 579; *Jackson v. State* (1846), 15 Ohio 652.

Moreover, requiring the Attorney General to seek the Governor's approval on all litigation decisions would be problematic as a matter of both practice and principle. For example, as the State's jurisdictional memorandum noted, both the volume and urgency of modern litigation make it impractical to obtain case-specific permission slips from the Governor, or to work out disagreements, in every case. See State Jur. Mem. at 8. Further, giving the Governor veto power over litigation would, in effect, expand his limited veto power over legislation, by giving him a second, unlimited veto. The Governor's veto power is limited by the General Assembly's power to override a veto, pursuant to Section 16, Article II, of the Ohio Constitution. But a Governor could overcome that limit if he could shut down the Attorney General's defense of a state law. As long as some plaintiff challenges a law in court—a common occurrence, especially on laws controversial enough to trigger a veto and an override—a Governor could simply instruct the Attorney General not to defend the law, or at least not to appeal a loss. The General Assembly could not override that "second veto," and further, a Governor could use that litigation-based veto on *any* statute, not just new enactments, as long as some plaintiff steps forward. Thus, forcing the Attorney General to answer to the Governor would not only eviscerate the Attorney

General's independence, but it would also diminish the power of the General Assembly, and indeed, even the judiciary, by allowing a Governor to shut down litigation before the courts can weigh in. That result, by unbalancing the powers across the three branches, as well as distorting the divided executive power within the executive branch, runs contrary to Ohio's fundamental constitutional design.

Further, having the Governor speak for "the State" in its entirety not only distorts the powers of the Governor and the Attorney General, but it also misapprehends the nature of the State of Ohio as an entity. The State is a broad entity, encompassing hundreds of different discrete bodies. See R.C. 2743.01(A) (defining the State for the purposes of suits in the Court of Claims as including, but not being limited to, "the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state"). When an individual sues the State generally, he could be referring to actions taken by the Governor, the General Assembly, this Court, the Secretary of State, or any number of other entities that fall under the broader definition of the State. Here, for example, the landowners sought, and the trial court granted, relief limiting the State's public trust authority, which would limits all Ohioans' rights and would limit the General Assembly's power to enact new laws regarding Lake Erie. Thus, it makes little sense to give the Governor control over all actions prosecuted or defended in the State's name, regardless of whether the underlying affected entity is independent of the Governor's control. The power to control such litigation is properly in the hands of the Attorney General, who is charged by Constitution, statute, and common law to represent the public interest. Saxbe, 6 Cleveland-Marshall L. Rev. at 334.

In short, it has never been the law in Ohio that the Attorney General's powers to control litigation are beholden to any other state officer, and the law in other States is in accord. This Court should likewise recognize, if it reaches the issue, that the Attorney General's inherent powers include the right to control litigation undertaken in the name of the State, free from the control of any other executive officer.

B. The case is ripe for the Court's review on the merits, because the record is complete and the appeals court's review resolved the legal issues.

The Court's second question asks whether, if the first question is resolved in the State's favor, "the record in this matter [is] sufficient for this court to resolve the appeals and cross appeal, if they are accepted, even though the state of Ohio's assignments of error and briefs were stricken by the court of appeals?" The answer is "yes." The record and all aspects of the case's procedural posture are complete and entirely sufficient for the Court to reach the merits now, and any remand would merely waste time and harm the parties' and the public's interest.

First, the trial court record was complete before the issue of the State's status first arose in the appeals court. Thus, to the extent the term "record" might refer, as a formal matter, to the record developed in the trial court, that is not an issue here. No one disputes that the record was fully developed in the trial court. In any event, the issues here are primarily, if not exclusively, legal ones, not factual ones, as shown by the fact that the case was resolved on cross-motions for summary judgment and by the parties' reliance on case law, not on depositions or on record evidence. This Court's review, like the appeals court's below, will be de novo.

Second, although the Eleventh District erred by refusing to consider the State's views, this Court can and should review the merits of the case now, without being hindered by the appeals court's mistakes below. In particular, it would not be sufficient to adopt the class Plaintiffs' suggestion that the Court could summarily reverse on the procedural issue but deny review on

the merits. See Response Mem. of Merrill, et al. at 1. That approach is untenable because it would allow the last word on the State's and the public's interest in Lake Erie to have resulted from a hearing in which the State's voice was silenced.

But if this Court grants jurisdiction over this case on the merits (as it should), its review would not be diminished in any way by the exclusion of the State below. The intervention by the National Wildlife Federation and the Ohio Environmental Council ensured that the merits issues were still reached and resolved, and thus are ripe for review. All appropriate parties are participating before this Court and the legal issues are fully presented, on a complete factual record, for this Court's determination. That is not to say that the Eleventh District's error was immaterial, but only to say that its error provides no substantial and distinct basis for this Court to decline to reach the merits now.

A remand, by contrast, would add nothing to the process at this point. As a practical matter, the result is unlikely to change, for the Eleventh District's views on the merits are clear and established. And regardless of the outcome on remand, the weighty issues at stake here would likely still warrant this Court's review, so the question is *when,* not *whether,* to review the case. Consequently, even though the appeals court erred in excluding the State from participating on the merits of the appeal, this Court will undertake its own independent review of the important legal issues raised here and will determine them with finality as a matter of Ohio law. A remand, therefore, would not add value.

Third, the delay engendered by remand would harm all parties and the public interest. If the Court is to review the case, as the State strongly urges, then even Plaintiffs should agree that such review is better now, to settle the questions that they themselves have raised, than in

another year. And these issues are vitally important to all Ohioans, not just the landowners. Thus, the Court should resolve these issues, and it should do so now.

CONCLUSION

For the above reasons, the Court should answer both questions in the affirmative. Then, for the reasons in the State's jurisdictional memorandum, it should summarily reverse the appeals court's rejection of the State's participation, and it should accept the case for full briefing on the merits of the State's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Supplemental Jurisdictional Memorandum of Defendant-Appellant-Cross-Appellee State of Ohio was served by U.S. mail this 7th day of January, 2010, upon the following counsel:

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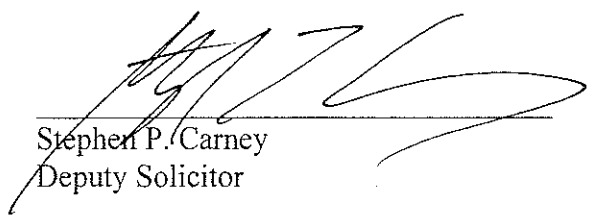

Stephen P. Carney
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EXHIBIT 1

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO, ex rel., ROBERT MERRILL, TRUSTEE, et al.,	:	
Plaintiffs-Relators,	:	**Case No. 04-CV-001080**
v.	:	**Judge Eugene A. Lucci**
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	:	
Defendants-Respondents	:	

NOTICE OF SUBSTITUTION OF COUNSEL FOR DEFENDANTS-RESPONDENTS OHIO DEPARTMENT OF NATURAL RESOURCES AND SEAN LOGAN, DIRECTOR OF NATURAL RESOURCES

Please take notice that Kathleen M. Trafford of Porter, Wright, Morris & Arthur LLP is hereby entering her Notice of Appearance on behalf of Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources, pursuant to an appointment by Ohio Attorney Marc Dann as Outside Counsel for these Defendants-Respondents. Defendant-Respondent State of Ohio will continue to be represented by Ohio Attorney General Marc Dann and Assistant Attorneys General Cynthia K. Frazzini and John P. Bartley. Please serve all notices, pleadings, motions and other documents filed with the Court upon Ms. Trafford at the address indicated below.

Respectfully submitted,

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ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that on July 16th , a copy of the foregoing will be served via electronic delivery and regular U.S. mail, postage prepaid, to the following parties:

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EXHIBIT 2

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

STATE OF OHIO, ex rel., ROBERT MERRILL, TRUSTEE, et al.,	:	
Plaintiffs-Relators,	:	**Case No. 04-CV-001080**
v.	:	**Judge Eugene A. Lucci**
STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al.,	:	
Defendants-Respondents	:	

RESPONSE OF DEFENDANTS-RESPONDENTS OHIO DEPARTMENT OF NATURAL RESOURCES AND SEAN LOGAN, DIRECTOR OF NATURAL RESOURCES, TO THE PENDING MOTIONS FOR SUMMARY JUDGMENT

The Court has been provided with able and exhaustive briefs by the Plaintiffs-Relators on behalf of the lakefront owners and the Attorney General on behalf of the State of Ohio. These briefs fully explain and document the opposing positions on each of the three issues the Court certified for declaratory judgment in its Order certifying the class action. Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources, (collectively "ODNR"), welcome the Court's resolution of these issues and will carry out their statutory duties consistent with the Court's ultimate declarations.

ODNR believes that they must and should honor the apparently valid real property deeds of the plaintiff-relator lakefront owners unless a court determines that the deeds are limited by or subject to the public's interests in those lands or are otherwise defective or unenforceable. Accordingly, ODNR, acting with the consent and direction of Governor Ted Strickland, will discharge its statutory duties and will adopt

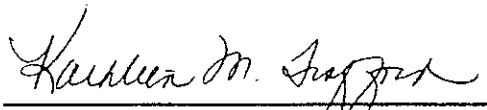
or enforce administrative rules and regulatory policies with the assumption that the lakefront owners' deeds are presumptively valid.

Recognizing the presumptive validity of the lakefront owners' deeds will not undermine ODNR's ability to manage coastal lands so as to protect Lake Erie as an important public resource. Utilizing existing coastal management authority under Ohio law and the Ohio Administrative Code, ODNR will require property owners who wish to build structures along the shores of Lake Erie that could impact coastal lands to obtain appropriate permits before commencing any such construction. Furthermore, ODNR will no longer require property owners to lease land contained within their presumptively valid deeds.

ODNR believes that its new regulatory policy can effectively balance the public's interest and the property owners' interest pending the Court's resolution of the issues before it.

Respectfully submitted,

MARC DANN
ATTORNEY GENERAL OF OHIO



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Ohio Department of Natural Resources and
Sean Logan, Director of Natural Resources

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Response of Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources, To the Pending Motions for summary Judgment* will be served electronically and by regular U.S. mail, postage prepaid, on July 16, 2007 to the following:

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EXHIBIT 3

July 13, 2007 – Governor Strickland Announces New Regulatory Policy for Coastal Land Management

Columbus, Ohio – Governor Ted Strickland announced today plans to implement a new regulatory policy regarding the ownership and management of property along Lake Erie coastal lands.

"Under this new policy, the state will honor the valid deeds of local property owners along the coast of Lake Erie," Strickland said. "I believe this policy ensures protection of our important natural resources without compromising the rights of landowners."

The New Regulatory Policy Follows:

New Regulatory Policy Regarding Coastal Land Management

The State of Ohio, the Ohio Department of Natural Resources ("ODNR"), and its Director, Sean Logan, are defendants in a lawsuit filed in May of 2004 in the Lake County Court of Common Pleas regarding the ownership and management of property along the shores of Lake Erie. Since the inception of the case, the State and ODNR have argued that the lands along the shores of Lake Erie up to the "Ordinary High Water Mark" (OHWM) are lands held in trust by the State of Ohio on behalf of its people. Property owners along the lake, on the other hand, have insisted that their deeds demonstrating property ownership below the OHWM are valid and must be honored and that the State's "public trust lands" position interferes with their private use of land that they own. As he has consistently stated for more than a year, Governor Strickland believes that apparently valid real property deeds must be honored unless a court of law determines that the deeds are limited by or subject to the public's interest in those lands or are otherwise defective and/or unenforceable.

The Governor and ODNR recognize that there are arguable legal claims that some of the deeds have specific defects and that deeds purporting to cover lands below the OHWM may ultimately be found by the Ohio courts to be subordinate to the public's interest in those lands. Still, without such a determination by the Ohio courts, ODNR believes that it must honor those deeds.

The Governor and ODNR also recognize that they have a solemn duty to manage coastal lands in a manner that protects the important resource that Lake Erie represents. In that regard, ODNR has begun the planning necessary to implement the following new regulatory policies:

1. Property owners who wish to build structures along the shores of Lake Erie that could or would impact coastal lands will no longer be required to obtain leases for the lands within their deeds which are beneath such structures, but will be obligated to obtain appropriate permits from ODNR's Office of Coastal Management before commencing any such construction.

   Much like local zoning laws which require homeowners to obtain permits from local officials before building a fence or garage on their own property, this requirement, utilizing the State's existing coastal management authority under Ohio law and the Ohio Administrative Code, will assure that coastal land management interests are not compromised by the construction of unauthorized break walls, docks or other structures.

2. Consistent with the Governor's view that deeds should be honored unless they are found to be limited and/or unenforceable by a court of law, ODNR has determined that it is inappropriate to require deed holders to lease land that they maintain that they own.

   Still, because some land owners would prefer to voluntarily obtain a lease for the property on which they intend to build permitted structures, ODNR will continue to make leases voluntarily available. This will accommodate those landowners wishing to hold an unchallenged, leasehold property interest in the lands beneath their permitted structures.

The Attorney General's office has appointed outside counsel to represent ODNR and Director Logan in the ongoing litigation, and that outside counsel will immediately make the above positions known to the Court in the

pending Lake County case. The Attorney General, in his role as counsel to the State of Ohio, has informed the Governor that his office will continue to pursue its current position in support of the public trust lands doctrine.

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