In the

# Supreme Court of Ohio 09-1806

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



## MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT STATE OF OHIO

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*Any defendant against whom judgment is entered has standing to appeal, including the State of Ohio when it is named independent of a specific agency, and including when the State's broader interests exceed an agency's administrative interests. In all such cases, the Attorney General represents the State, and his authority to proceed does not require case-by-case instructions from the Governor or the General Assembly.* ..... 11

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*Lake Erie, within the State's boundaries, belongs to the State of Ohio as proprietor in trust for the people of Ohio, and the State's public trust duties extend to the usual*

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## INTRODUCTION

The appeals court below committed two fundamental errors of profound significance. Plaintiffs sued the State of Ohio over the boundaries of property rights along Lake Erie, yet the court held, inexplicably, that the State lacks standing ***to defend itself.*** Then, on the merits, the court needlessly moved the property lines of every single landowner along the Lake while declaring that the State can no longer protect the rights of all Ohioans to enjoy the Lake and its shore. *State ex rel. Merrill v. State of Ohio* (11th Dist.), 2009-Ohio-4256 ("App. Op.," Ex. 2). The Court should hear this case to correct both errors.

First, the Court should correct the appeals court's rejection of the State's "standing to participate in this appeal," *id.* ¶ 41, which would have devastating effects for other cases and parties. Even though the State is a named defendant in this case, the appeals court applied the test used for a ***plaintiff's*** standing to *sue*. *Id.* ¶ 43. The court compounded its error by saying the Attorney General may not perform his duty of representing the State—a view at odds with this Court's recent decision in *State ex rel. Cordray v. Marshall*, slip op. No. 2009-Ohio-4986, ¶¶ 16-17. Because this result is so obviously wrong, the Court should invoke its rule authorizing summary reversals and correct this error at the threshold as part of an order granting jurisdiction.

Second, the Court should address the appeals court's decision moving the boundary of Lake Erie and extinguishing public trust rights, because the effects of that ruling are immense and contrary to established law. The decision defines the rights of every landowner along the Lake, the rights of every Ohioan to enjoy (or no longer enjoy) the lakeshore, and the right and duty of the State to protect the public's rights. Even if the decision were correct (and it is not), issues of such import should be decided by the State's highest Court rather than by just one of the four appellate districts along the lakefront. This is especially true since the court below decided these issues ***without even considering*** the State's arguments on behalf of the public.

At the same time, the lakefront owners' own property rights warrant due recognition. Ohio has long recognized that such owners have unique littoral rights that are not shared with the public, such as rights to access the water, build wharfs out into the water, and more. Those rights cannot be unduly burdened or restricted, but they must also be balanced with the public's overlapping rights in the territory of Lake Erie. Here, the appeals court upset that balance. Indeed, the decision below harms as well as helps lakefront owners, so it is in everyone's interest—that of the State, the owners, and the public—to have this Court review this case.

## STATEMENT OF THE CASE AND FACTS

### A. After landowners sued the State over the scope of the State's public-trust ownership of Lake Erie, the trial court entered judgment against the State in key respects.

This case began when two sets of Plaintiffs, all owners of property bordering Lake Erie, filed parallel suits in Lake County in May, 2004. Both complaints named three defendants: (1) the Ohio Department of Natural Resources ("ODNR"), (2) ODNR's Director, 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 cases were consolidated, and the National Wildlife Federation ("NWF") and the Ohio Environmental Council ("OEC") intervened. Plaintiffs sought declaratory relief regarding the boundaries of their titles, the rights of the State and the public, and the boundaries applicable to those rights. They also sought a declaration that their land had been unconstitutionally taken, along with injunctive relief, damages for the claimed takings, and relief in the form of mandamus.

The trial court certified the case as a class action on limited issues. It defined the class as "all persons . . . excepting the State of Ohio and any state agency . . . who are owners of littoral property bordering Lake Erie . . . within the territorial boundaries of the State." Class Cert. Order, Docket (Tr. Dkt.) 123, at 2 (footnote omitted). The trial court explained that "'upland

property' is defined as real property bordering a body of water and that, in Ohio, 'littoral property' is defined as upland property that borders an ocean, sea, lake, or a bay of any of these water bodies, as opposed to 'riparian property' which is defined as upland property that borders a river, stream, or other such watercourse." *Id.* The court then certified three questions of law:

> (1) What constitutes the furthest landward boundary of the "territory" as that term appears in R.C. 1506.10 and 1506.11, including, but not limited to, interpretation of the terms "southerly shore" in R.C. 1506.10, "waters of Lake Erie" in R.C. 1506.10, "lands presently underlying the waters of Lake Erie" in R.C. 1506.11, "lands formerly underlying the waters of Lake Erie and now artificially filled" in R.C. 1506.11, and "natural shoreline" in RC. 1506.10 and 1506.11.
>
> (2) If the furthest landward boundary of the "territory" is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985), and does the State of Ohio hold title to all such "territory" as proprietor in trust for the people of the State.
>
> (3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the "territory."

*Id.* at 2-3.

While summary judgment motions were underway, the State parties determined that their interests, while common in many respects, diverged in others. ODNR and its Director (collectively, "ODNR") notified the court that ODNR would litigate separately from the State of Ohio, that the Attorney General would represent ODNR through Special Counsel, and that the Attorney General would represent the State directly. Tr. Dkt. 169. ODNR responded to the summary judgment motions by stating that, as the administrator of various regulations, it would "carry out [its] statutory duties consistent with the Court's ultimate declarations." Tr. Dkt. 170. The State separately maintained that its public title and the public's rights run to the "ordinary high-water mark"—that is, the usual reach of high water established over time, not the momentary water's edge. Plaintiffs, on the other hand, claimed that the boundary was the "low-water mark," even when that mark was below the water, with no public rights above that point.

The trial court rejected both views. See Summary Judgment Order, Tr. Dkt. 183 ("Com. Pl. Op.") (attached as Ex. 3). It ruled that the most landward boundary of Lake Erie held in trust by the State of Ohio is "the water's edge, which means the most landward place where the lake water actually touches the land at any given time," though it noted that artificial fill could not be used to move the line. *Id.* at 71-72. In other words, it held that the private owners hold title in fee simple—with no subservience to "public trust" or any public rights—down to the "water's edge . . . at any given moment." *Id.* at 74-75. Indeed, the trial court went further and reformed the legal descriptions in all class members' deeds to reflect ownership "to the water's edge as it existed when the deed was filed," apparently without realizing that this date-specific approach would lead to inconsistent property lines even among neighboring owners. *Id.* at 74. The trial court ordered that the owners can "exclude others from using the shore down to the water's edge," *id.* at 60, and barred the State from exercising any "public trust" rights inconsistent with this regime, *id.* at 74, and reserved any takings issues for future proceedings, *id.*

**B. The appeals court ejected the State from the case on standing grounds and fixed the boundary at the momentary water's edge.**

All parties appealed except for ODNR. At the outset, the appeals court *sua sponte* questioned "whether the state of Ohio has standing to participate in this appeal," and "conclude[d] it does not." App. Op. ¶ 41. The court noted ODNR's willingness to honor the presumptive validity of deeds and administer its authority accordingly. *Id.* ¶ 42. It cited case law governing a ***plaintiff's*** "standing to sue," *id.* ¶ 43, and stated that the "Attorney General may only act at the behest of the Governor or General Assembly," *id.* The court concluded that, because "[t]he governor has ordered ODNR to cease those activities that made it a party to the action," the Attorney General has "no authority . . . to prosecute this matter on his own behalf." Holding that "the state of Ohio no longer has standing in this matter," the court struck the State's

briefs. *Id.* ¶ 44. Judge Cannon, dissenting on this point, noted that this issue "was not raised by any party," *id.* ¶ 135, and that "[t]he state of Ohio is a named defendant," *id.* ¶ 136.

On the merits, the appeals court adopted most of the trial court's holdings, including a unitary boundary of the "actual water's edge" at a given moment. App. Op. ¶ 127. It held that this boundary limited the State's "public trust," so that only the water itself and "lands under the waters of Lake Erie, *when submerged under such waters,* are subject to the public trust." *Id.* (emphasis added). But it departed from the trial court's ruling in significant respects: (1) it did not define "water's edge" as fixed at the time the deeds were filed, *id.*; (2) it did not define "water's edge" as a definitive boundary at all times, but only when it stands between the "high and low water mark," *id.*; (3) it vacated the trial court's order reforming the legal descriptions in the owners' deeds, which it held should be resolved individually, *id.* ¶ 103; and (4) it disagreed with the trial court about artificial fill, suggesting that "filled in lands" were now the owners' property in fee simple, no longer subject to the State's public trust authority, *id.* ¶ 127.

## THIS CASE IS OF GREAT PUBLIC OR GENERAL INTEREST AND RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION

### A. The Court should review the appeals court's rejection of the State's standing to appeal and its denial of the Attorney General's power and duty to defend the State.

The appeals court adopted a radical approach to the State's standing and the Attorney General's representation, which urgently calls for review. The lower court's holding impedes the State's ability to defend the public trust in Lake Erie, and it affects every case in which the State has an interest. In fact, the lower court's approach could affect every defendant, whether public or private, who wishes to appeal from an adverse judgment.

These broad implications—and thus the pressing need for review—flow from several fundamental mistakes that the appeals court made in reaching its dramatic conclusion. The court (1) confused a plaintiff's standing to sue with a defendant's standing to appeal or to defend itself

as an appellee; (2) disregarded the distinction between the State's broader interests and an agency's administrative interests; and (3) transformed the Attorney General's ***additional*** authority to appear in cases at the Governor's or General Assembly's request into a ***barrier*** against defending the State without such a request in hand. Each mistake, taken alone, hampers important State interests and is worthy of review. Taken together, however, they yield a troubling outcome that warrants the rare step of summary reversal before briefing and argument.

**1. The appeals court mangled the doctrine of appellate standing.**

The appeals court started off on the right foot in framing the issue as whether the State as a party had appellate standing. App. Op. ¶ 41. But the court then failed to cite any of the law that applies to appellate standing and instead cited a body of law that deals solely with a plaintiff's standing to sue. *Id.* ¶ 42. The court next detoured into issues of the Attorney General's representation. *Id.* ¶ 43. This is not a case, however, in which the State or Attorney General initiated suit. Rather, ***plaintiffs sued the State,*** and the trial court entered judgment against it. The proper question, then, is whether the State, ***as a losing defendant,*** had appellate standing as a "party aggrieved by the final order appealed from." *State ex rel. Gabriel v. City of Youngstown* (1996), 75 Ohio St. 3d 618, 619.

By wrongly excluding a losing party from its own appeal, the appeals court set an untenable precedent for defendants in all cases, not just the State here. Almost every defendant meets the "party aggrieved" test if judgment is entered against it, regardless of whether it would have standing to sue as a plaintiff. Indeed, a typical defendant is alleged to have caused an injury, not suffered one. A party lacks appellate standing only when the party "is not prejudiced by the" order. *Denovchek v. Board of Trumbull County Comm'rs*, (1988) 36 Ohio St. 3d 14, 17. But here the orders, including injunctive relief and a threat of future damages, Com. Pl. Op. at 75, were entered against "the State of Ohio." The State's appellate standing is thus evident.

The appeals court made a second significant oversight: The State in this case was also an ***appellee*** on the plaintiffs' cross-appeals. Yet the court held that the State could not "participate" in the appeal, App. Op. ¶ 41, and struck the State's ***briefs*** in whole, *id.* ¶ 43, without addressing any of the State's merits arguments, including those defending against the cross-appeal. Thus the State was not allowed to defend even those portions of the judgment that it had won below!

**2. The appeals court impaired the State's ability to protect the public interest.**

Even if the appeals court meant to say (what it did not say) that ODNR, rather than the State, is the real party in interest in this case, that reasoning, too, is mistaken, and it affects a broad category of cases that involve the State and its agencies.

The State's interests go far beyond the narrow question of how ODNR should administer various duties. The State's interest is shown first and foremost by the language of the trial court's order, which enjoins the "State of Ohio" from asserting public rights, including rights affecting the use and disposition of the State's natural resources. Com. Pl. Op. at 74. The State's interest is also shown by the order's effects, as the order seems to preclude the General Assembly from legislating in any way inconsistent with the order's terms. If the court proceeds to order compensation for a taking, or any damages for other encroachments flowing from "using the wrong border," then the State and its taxpayers will be the ultimate source of funds, even if those judgments are formally entered against ODNR. For example, by analogy, the Court of Claims Act says that the State is the "only defendant," R.C. 2743.02(E), but directs plaintiffs to "name as defendant each state department" involved, R.C. 2743.13(A).

The appeals court's focus on the narrowest agency at hand, to the exclusion of the State's broader interests, threatens to interfere with all cases that involve multiple State parties—a common occurrence. Plaintiffs often sue the State, even alongside a specific agency or agent, and where interests diverge, the Attorney General supplies separate teams of lawyers. See, e.g.,

*UAW v. Brunner*, 182 Ohio App. 3d 1; 2009-Ohio-1750 (State of Ohio and Secretary of State); *OHA v. ODHS*, 96 Ohio St. 3d 301; 2002-Ohio-4209 (two agencies). Indeed, the Court allows additional State actors to intervene when they have different interests. E.g., *State ex rel. LetOhioVote.org v. Brunner*, slip op. No. 2009-Ohio-4900. The appeals court's logic would wreak havoc in all such cases.

**3. The appeals court hobbled the Attorney General's ability to protect state interests.**

The appeals court's last significant misstep with respect to standing was holding that the Attorney General could not appeal on the State's behalf because he had not been instructed to do so by the Governor or ODNR. This holding conflates the party (here, the State) with the lawyer who represents that party (the Attorney General), thereby crippling the authority of the Attorney General and undermining the interests of the State.

First, the appeals court's statutory reading is both wrong and untenable. It is wrong because it misreads R.C. 109.02 and the Constitution's allocation of duties to the independently elected Attorney General, as this Court just held. See *State ex rel. Cordray v. Marshall*, slip op. No. 2009-Ohio-4986, ¶¶ 16-17. And it is untenable because the Attorney General has the right, and the duty, to defend the State and her entities when they are sued. He often must rush to court to defend against TROs or to file extensive pleadings within hours on urgent matters such as capital cases, election crises, and the like. Obtaining case-specific "permission slips" on every such case, and on the thousands of slower-paced state cases open at any time, is not only unnecessary, it is impossible. It also is unprecedented over centuries of tradition and practice.

Second, the appeals court compounded its mistake and implicated another body of law when it conflated the Attorney General's role as counsel for the State with his occasional role as the named party-plaintiff protecting state interests. After properly noting that "[i]n this case, the

attorney general represented the [S]tate," the court inexplicably said that "[w]e find no authority for the attorney general to prosecute this matter on his own behalf." App. Op. ¶ 44. The court then cited the constitutional designation of the Governor as the supreme executive. Again, however, the Attorney General did not "prosecute" this case, he defended the State. And he did so as the State's lawyer, not "on his own behalf."

The appeals court's confusion of roles and reference to the Governor's authority warrant review because they undermine those cases in which the Attorney General ***does*** need to act, and ***can*** act, in his own name to protect the public. The Constitution designates the Attorney General as the State's legal officer and vests him with common-law powers to protect the public's interests beyond R.C. 109.02's language and without reference to a "request." *Marshall*, slip op. No. 2009-Ohio-4986, ¶¶ 16-20. Indeed, if the Attorney General may represent the State's interest separate from county prosecutors, based on the broad interest in criminal justice and in the proper allocation of judicial authority, *id.* ¶¶ 20-23, then surely he may also represent the State's interests where the State holds an express "public trust" duty.

**4. The Court should summarily reverse the appeals court's standing decision.**

The appeals court's standing ruling is so plainly wrong that the State urges the Court to take the rare step of summarily reversing that part of the decision. Rule III, Section 6 of the Court's Rules expressly provides that, upon consideration at the jurisdictional stage, the Court can "either order the case or limited issues in the case to be briefed and heard on the merits ***or enter judgment summarily.***" (Emphasis added.) If the Court takes that step here, it can then grant plenary review over, and allow the parties to brief fully, the second issue—the boundary of Lake Erie property rights—without expending resources unnecessarily on a clear-cut issue that no party even raised below. Summary reversal on the standing issue would also remove damaging precedent from the books as expeditiously as possible. Parties are already mistakenly

citing this portion of the appeals court's decision as precedent. See, e.g., Additional Authority of Appellant Rawlins, *State ex rel. Cordray v. Marshall*, No. 2009-25 (Sept. 23, 2009). The State accordingly urges the Court to reverse summarily on this question in light of the recent *Marshall* decision holding foursquare to the contrary, thereby clearing the way for the parties and the Court to give their full attention to the important Lake Erie issues described below.

**B. The appeals court's departure from centuries of established law has immense practical and financial effects for the State and for all Ohioans.**

Whether or not the decision below concerning the boundary of Lake Erie is correct in any respect, the sheer scope and impact of the decision calls for review by the State's highest Court. As a class action, the decision binds the rights of every property owner along Lake Erie. And as to public rights, it forever binds the State and every member of the public. Once a property right is declared and vested, no future case can reverse it; the State would have to use eminent domain to buy what it lost by judicial fiat. By declaring that Ohio has been using the wrong line for generations, the decision threatens untold liability for takings claims and other damages claims.

All Ohioans will share the burdens of any financial costs to the State, and all citizens face the loss of their public rights to walk along, fish from, or otherwise temporarily enjoy the shore in limited ways. The "water's edge" rule sows uncertainty, as the inconsistencies between the two lower court rulings here amply demonstrate. An exclusive focus on the *momentary* edge, which fluctuates more widely in the face of short-term and seasonal events, could jeopardize ownership rights. The traditional line of the ordinary high-water mark, by contrast, provides a more stable line over seasons and years. The decisions below did not effectively address the problem of time, and did not tell owners what will happen if they build permanent structures on what becomes "their" land when the water recedes below the ordinary high-water mark, only to see those structures later under water when lake levels rise under different conditions.

The appeals court's "fill" holding—that areas filled in artificially had been converted from public water to private land outside the public trust—also warrants review. The trial court, although mistaken about the momentary edge, rightly held that owners' use of fill does not push back the public trust and expand private dominion, as this Court held long ago. See *State v. C. & P. R.R. Co.* (1916), 94 Ohio St. 61, 79. The appeals court's contrary holding defied both common sense and the plain terms of the pertinent statutes. See R.C. 1506.10-.11.

Finally, the decision below warrants review because it breaks faith with centuries of law identifying the ordinary high-water mark as the boundary of the public trust. The appeals court claimed to follow precedent that described that boundary as where the water meets the land when undisturbed. See App. Op. ¶ 142 (citing *Sloan v. Biemiller* (1878), 34 Ohio St. 492). But *Sloan* expressly identified the "ordinary high-water mark" as the relevant "boundary," and *Sloan*'s discussion of the "the line at which the water usually stands when free from disturbing causes" equated that line with the ordinary high-water mark, ***rejecting*** the unstable momentary edge that the appeals court adopted here. See *Sloan*, 34 Ohio St. at 513. Cases since have confirmed this boundary and also have noted that the State cannot abdicate its sovereign authority as trustee of Lake Erie. See *C. & P. R.R. Co.*, 94 Ohio St. at 80.

## ARGUMENT

**Defendant-Appellant State of Ohio's Proposition of Law 1:**

> *Any defendant against whom judgment is entered has standing to appeal, including the State of Ohio when it is named independent of a specific agency, and including when the State's broader interests exceed an agency's administrative interests. In all such cases, the Attorney General represents the State, and his authority to proceed does not require case-by-case instructions from the Governor or the General Assembly.*

As explained above, the issue here is not a plaintiff's standing to sue, or the Attorney General's right to sue on his own behalf. The issue is the State's appellate standing, as a "party aggrieved by the final order," *Gabriel*, 75 Ohio St. 3d at 619, both to appeal and to participate as

an Appellee. The State has standing as a "party aggrieved" because it was a defendant with a judgment entered against it—an order enjoining its actions and potentially subjecting it to future damages proceedings. Com. Pl. Op. at 74-75. The State does not lose its ability to participate in an appeal merely because an order also affects a co-party, such as ODNR. The key question is whether the State was affected in its role as a named defendant, which it clearly was in this case.

Moreover, because the State is a party-defendant here, the Attorney General has both the power and the duty to defend the State. Both the Constitution and R.C. 109.02 assign the Attorney General the job of defending the State, and the language ***additionally*** providing for the Governor or General Assembly to seek his involvement does not impose any ***requirement*** that such a request must be made. *Marshall*, *supra*, at ¶¶ 15-17. That is confirmed by the statutory language, which provides for the Governor or Assembly to invoke the clause for any case "in which the state is a party, or in which the state is directly interested." This latter phrase contemplates intervention or other involvement when the State is not already a party as it is here, and even in those cases separate intervention is warranted for the State or other agencies to represent the State's broader interest when the State's current party status is only through an agent or actor with a narrower interest. See, e.g., *LetOhioVote.org*, slip op. No. 2009-Ohio-4900.

Because the appeals court so clearly erred on the question of the State's appellate standing, this Court should summarily reverse to resolve this point without any further delay.

**Defendant-Appellant State of Ohio's Proposition of Law 2:**

> *Lake Erie, within the State's boundaries, belongs to the State of Ohio as proprietor in trust for the people of Ohio, and the State's public trust duties extend to the usual or ordinary high-water mark, and not the highest or lowest point to which the water rises or recedes or where the water stands at the moment. Further, although gradual, natural changes such as accretion may move that mark or natural shoreline, private landowners may not use fills or other artificial encroachments to move the boundary of public rights. Adjacent landowners do, however, possess special property rights, known as "littoral rights," below the ordinary high-water mark that are not possessed by other members of the public and that are entitled to respect and certain protections even against the State.*

Both courts below erred in redefining the boundary of the "territory" of Lake Erie in a way that abolished long-held public-trust rights that exist up to the ordinary high-water mark, and they upset the careful balance among the legitimate rights of the lakefront owners, the State of Ohio, and the people of Ohio in the Lake and its shore. These issues are of great public interest not only in the vicinity of Lake Erie itself, but also to many, if not all, Ohioans.

**A. The landward boundary of Lake Erie is, as a matter of law, its ordinary high-water mark, and the State as the public's trustee cannot abdicate—nor may courts abolish—the State's duty to protect Lake Erie and its shore in harmony with rights of the public and landowners alike.**

All States received sovereign authority and title in trust to all lands below the ordinary high-water mark of navigable bodies of water within their territorial boundaries upon admission to the Union. The United States Supreme Court recognized this principle under the Equal Footing Doctrine, see, e.g., *Pollard's Lessee v. Hagan* (1845), 44 U.S. 212, and Congress reaffirmed it in the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315. Accordingly, upon its accession to statehood in 1803, the State of Ohio received the lands, waters, and contents of Lake Erie up to its ordinary high-water mark to hold as proprietor in trust for its people.

After statehood, each State may choose to recognize different public and private rights in its public trust lands beneath the ordinary high-water mark, but it may not entirely abdicate its sovereign trust authority. *Illinois Cent. R.R. Co. v. Illinois* (1892), 146 U.S. 387. Longstanding Ohio law confirms that the State of Ohio has not generally chosen to grant title to all private owners below the ordinary high-water mark. See *C. & P. R.R. Co.*, 94 Ohio St. at 80; *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303; see also 2000 Op. Att'y Gen. No. 2000-047, at 22-23. Even if the State did, in individual instances, grant private title below the ordinary high-water mark—something that it never did globally for all owners and thus should be resolved individually and not as a class-wide declaration—it did not and could not abandon its

public-trust duties and rights below that same boundary of Lake Erie. The Fleming Act, adopted in 1917, confirms that the "territory" of Lake Erie and its lands, waters, and contents "do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state." R.C. 1506.10. That statute also says that the State's public trust boundaries cannot be pushed back by certain artificial encroachments such as fill, to the detriment of public rights. *Id.* The public has rights to use the territory of Lake Erie for purposes of the public trust, including navigation, commerce, fishery, or recreation, and thereby has access to its shores on a temporary basis for reasonable uses incident thereto, with the State as trustee to protect the public trust. See, e.g., *Squire*, 150 Ohio St. at 322-27; OAG 2000-047, at 4-8.

**B. Ohio has long recognized that lakefront owners possess special property rights, known as "littoral rights," below the ordinary high-water mark of Lake Erie. These rights are not titles, do not include the right to exclude, and are subject to the State's public trust over the same area, but they are rights not possessed by other members of the public and are entitled to respect and certain protections even from the State.**

As the Court explained in a landmark public trust decision in 1916, "upland" owners of lakefront property are entitled to certain littoral rights (but not title) extending below the ordinary high-water mark. *C. & P. R.R. Co.*, 94 Ohio St. at 68, 75-76. These special rights, which are ancient rights at the common law, are rights that extend beyond those enjoyed by other members of the public. The Court has found that Ohio, like most other States, recognized an unfettered "right of access" to the lake waters; the right of wharfage to construct piers and wharfs reaching out to navigable waters so as to effectuate the right of access; and the right of reasonable use of the waters so accessed, all below the ordinary high-water mark and subject only to such general rules as Congress or the state legislature may prescribe. See *id.* at 72-84; *Squire*, 150 Ohio St. at 335-47; see also R.C. 1506.11. As a matter of Ohio law, these special rights in the lands lying below the Lake's ordinary high-water mark belong to the adjacent landowner to be exercised

reasonably, and they are a species of "property rights" that cannot be curtailed or even unduly burdened by restrictive processes, unreasonable fees, or other limitations not germane to the State's superior authority to protect the public trust below the ordinary high-water mark. See *Squire*, 150 Ohio St. at 342.

In sum, the State of Ohio not only has sovereign authority over the shore, but also a perpetual and inalienable duty to act as the trustee for public trust rights in the "territory" of Lake Erie. That territory is traditionally defined as the lands, waters, and contents of the Lake up to its ordinary high-water mark. The State's authority in this territory is subject to the supreme navigational servitude of the United States, reserved over those same lands and waters up to the ordinary high-water mark, to protect the nation's navigable waterways. Subordinate to the State's authority are the public's individual rights in the territory, including use of the lakebed itself for purposes of navigation, commerce, fishery, or recreation, and more limited access to its shorelands on a temporary basis for reasonable uses incident thereto. Finally, in coordination with the public's rights, the upland owners of lakefront property enjoy special "littoral" property rights below the ordinary high-water mark, including rights of access, wharfage, and reasonable use, which the State cannot infringe except pursuant to its valid role as trustee.

## CONCLUSION

For the above reasons, this Court should accept jurisdiction over this appeal and reverse the decision below.

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## CERTIFICATE OF SERVICE

I certify that a copy of this *Memorandum in Support of Jurisdiction of Defendant-Appellant State of Ohio* was served by U.S. mail this 7th day of October, 2009, upon the following counsel:

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