

IN THE SUPREME COURT OF OHIO

ORIGINAL

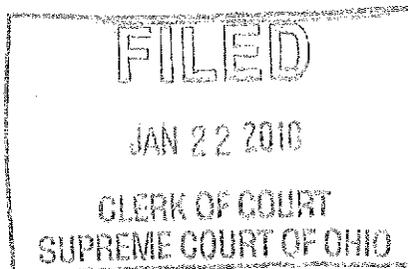
---

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

---

**BRIEF OF AMICI CURIAE OHIO BASS FEDERATION, IZAAK WALTON LEAGUE OF OHIO, RIVERS UNLIMITED, OHIO LEAGUE OF CONSERVATION VOTERS, GREEN OHIO COALITION, AND BUCKEYE FOREST COUNCIL IN SUPPORT OF SUPPLEMENTAL JURISDICTION OF DEFENDANT-APPELLANT-CROSS-APPELLEE STATE OF OHIO**

---



RICHARD CORDRAY (0038034)  
Attorney General of Ohio

KATHLEEN M. TRAFFORD (0021753)  
Porter, Wright, Morris & Arthur, LLP  
41 S. High Street  
Columbus, Ohio 43215  
(614) 227-1915  
(614) 227-2100 (fax)  
ktrafford@porterwright.com

Special Counsel for Defendants-  
Appellants-Cross-Appellees,  
Ohio Department of Natural Resources and  
Sean Logan, Director

JAMES F. LANG (0059668)  
FRITZ E. BERKMUELLER (0081530)  
Calfee, Halter & Griswold, LLP  
1400 McDonald Investment Center  
800 Superior Avenue  
Cleveland, Ohio 44114-2688  
(216) 662-8200  
(216) 241-0816 (fax)

Class Counsel and Counsel for Plaintiffs-  
Appellees,  
Robert Merrill, Trustee, et al.

HOMER S. TAFT (0025112)  
202200 Center Ridge Road, Suite 300  
P.O. Box 16216  
Rocky River, Ohio 44116  
(440) 333-1333  
(440) 409-0286 (fax)

Intervening Plaintiff-Appellee-  
Cross-Appellant, Pro Se

L. SCOT DUNCAN (0075158)  
1530 Willow Drive  
Sandusky, Ohio 44870  
(419) 627-2945  
(419) 625-2904 (fax)

BENJAMIN C. MIZER (0083089)  
Solicitor General, Counsel of Record  
STEPHEN P. CARNEY (0063460)  
Deputy Solicitor  
CYNTHIA K. FRAZZINI (0066398)  
Assistant Attorney General  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-8980  
(614) 466 5087 (fax)  
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Defendant-Appellant-Cross-  
Appellee,  
State of Ohio

NEIL S. KAGAN (*pro hac vice* pending)  
Senior Counsel, Counsel of Record  
National Wildlife Federation  
Great Lakes Regional Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104  
(734) 887-7106  
(734) 887-7199 (fax)

PETER A. PRECARIO (0027080)  
326 South High Street  
Annex, Suite 100  
Columbus, Ohio 43215  
(614) 224-7883  
(614) 224-4510 (fax)

Counsel for Intervening Defendants-  
Appellants-Cross-Appellees,  
National Wildlife Federation  
Ohio Environmental Council

Intervening Plaintiff-Appellee, Pro Se and  
Counsel for Intervening Plaintiff-Appellee,  
Darla J. Duncan

## TABLE OF CONTENTS

TABLE OF CONTENTS	4
TABLE OF AUTHORITIES	5
THE INTEREST OF AMICUS CURIAE	7
ARGUMENT	7
I. <u>The Court of Appeals Misinterpreted R.C. 109.02 in Finding that the Attorney General Had No Standing to Represent Ohioans</u>	
II. <u>The Ohio Attorney General Has Long Had Common Law Powers to Represent the Interests of Citizens With or Without the Direction of the Governor or the General Assembly</u>	
III. <u>The Court's <i>Sua Sponte</i> Ruling on an Unbriefed Issue Was Improper</u>	
CONCLUSION	13
PROOF OF SERVICE	14

## TABLE OF AUTHORITIES

### Cases

<i>Carducci v. Regan</i> (D.C. Cir. 1983) 714 F.2d 171	13
<i>Ex rel. Fogle v. Steiner</i> (1995) 74 Ohio St. 3d 158	12
<i>Feeney v. Commonwealth</i> (Mass. 1977), 366 N.E. 2d. 1262	12
<i>Fergus v. Russel</i> (Ill. 1915) 270 Ill. 304	11
<i>Ohio v. American International Group</i> (2007) Cuyahoga Court of Common Pleas No. CV-07-633857)	9
<i>Ohio v. United Transp., Inc.</i> (S.D. Ohio 1981) 506 F. Supp. 1278	9
<i>State v. Blackburn</i> (2003) 11 <sup>th</sup> Dist. No. 2001-T-0052, 2003-Ohio-605	12
<i>State ex rel. Brown v. Newport Concrete Co.</i> (1975) 44 Ohio App. 2d 121	10
<i>State ex. rel. Cordray v. Marshall</i> (2007) 123 Ohio St. 3d. 229, slip op. No. 2009-Ohio-4986	9
<i>State ex rel. Doerfler v. Price</i> (1920) 101 Ohio St. 50	9
<i>State v. Johnson</i> (Ohio Ct. App., Lucas County, 1981) 1981 Ohio App. LEXIS 13540	10
<i>State ex. rel. Little v. Dayton &amp; S.E. Railroad Co.</i> (1881) 36 Ohio St. 434	10
<i>State ex. rel. Merrill v. State</i> (11 <sup>th</sup> District) 2009-Ohio-4256	8, 12
<i>State ex rel. S. Monroe &amp; Son Co. v. Baker</i> (1925) 112 Ohio St. 356	11
<i>State of Michigan ex. rel. Frank J. Kelley v. C. R. Equipment</i> (W.D. Mich., 1995)	11

898 F. Supp 509	
<i>State v. Peagler</i> (1996) 76 Ohio St.3d 49	12
<i>State v. Wing</i> (1902) 66 Ohio St. 407	9
<b>Constitutional Provisions, Statutes, Rules</b>	
Ohio App. Rule 12(A)(2)	12
R.C. 109.02	8, 9, 11
R.C. 109.24	10
Section 1, Article III, Ohio Constitution	9, 11
Sup. Ct. Rule of Practice 3.5	7

## THE INTEREST OF AMICI CURIAE

The Supreme Court of Ohio has requested all parties to brief two preliminary legal issues before it considers the substantive issues in this case. The preliminary issues to be briefed are: (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”?; (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. Amici Curiae answer both questions asked by the court in the affirmative, although the majority of this brief will address the crux of question (1): whether the Attorney General has standing to appeal a case when not directed to do so by the Governor or the General Assembly.<sup>1</sup>

In response to the court’s call for briefs, Amici Curiae hereby submit this brief pursuant to Sup. Ct. Rule of Practice 3.5. Amici Curiae Ohio Bass Federation, Izaak Walton League of Ohio, Rivers Unlimited, Green Ohio Coalition, Ohio League of Conservation Voters, and Buckeye Forest Council, are Ohio sportsmen’s and conservation organizations, each with a special interest in the resolution of the question before the court. Environmental enforcement and natural resource protection is a fundamental part of the duties of the Attorney General. As sportsmen’s and conservation organizations, Amici Curiae and their members depend on the environmental protection and enforcement provided by an independent Ohio Attorney General.

---

<sup>1</sup> However, Amici Curiae endorse the full extent of the Supplemental Jurisdictional Memorandum of Defendant-Appellant/Cross-Appellee State of Ohio filed in this case, including its argument that, in the present case, there is no conflict between the Governor and the Attorney General.

While the State of Ohio in its Supplemental Jurisdictional Memorandum clearly and accurately explained how the actions of the Attorney General were in no way “contrary to the directive of the Governor,” Amici Curie believe it is important that they address the standing question and the underlying issue of the Eleventh District’s *sua sponte* dismissal of the State of Ohio. Amici Curiae maintain that the Attorney General of the State of Ohio, an independently elected official, has the constitutional and common law powers to represent the state and its citizens with or without the endorsement of the governor or the General Assembly. The decision by the Eleventh District Court of Appeals to remove the state of Ohio and the Ohio Attorney General from this case was an error that could have a negative effect on the Amici Curiae, their members, and on all citizens of the state of Ohio. That decision, if unchanged by this court, could set a precedent severely limiting the power of the Attorney General to act as an independent advocate for the Amici Curiae and for all Ohioans.

## ARGUMENT

### **I. The Court of Appeals Misinterpreted R.C. 109.02 in Finding that the Attorney General Had No Standing to Represent Ohioans**

The Eleventh District’s finding that “The Ohio Attorney General may **only** act at the behest of the governor, or the General Assembly,” *State ex. rel. Merrill*, 2009-Ohio-4256, at ¶44 (citing R.C. 109.02) (emphasis added), is a gross misinterpretation of R.C. 109.02. The court justifies its removal of the Attorney General from the case at hand by citing this code section alone, providing no other authority for its finding. R.C. 109.02 states that the Attorney General shall represent the state “[w]hen required by the governor or the general assembly...in a cause in which the state is a party, or in which the state is directly interested.” However, the code does not indicate that the Attorney General may only act at the behest of the Governor or the General

Assembly, nor does the code state that the Attorney General may not represent the citizens of the state of Ohio. In fact, the Supreme Court of Ohio reached this same conclusion in a recent 2009 decision. *See State ex. rel Cordray v. Marshall*, slip op. No. 2009-Ohio-4986, ¶¶ 16-17 (assertion that Attorney General has no standing in a prohibition case unless requested to participate in the proceeding by the Governor or General Assembly is “incorrect”).

As dissenting Judge Cannon notes, R.C. 109.02 represents “language of inclusion, not of exclusion.” *Merrill* at ¶136. That is, the statute’s mandate that the Attorney General act on behalf of the governor or General Assembly when directed to do so does not preclude the Attorney General from acting independently in other cases. The court’s interpretation of R.C. 109.02 suggests that the meaning of the statute—and the scope of the Attorney General’s power—is somehow different from its text. The Eleventh District’s negative inference on this point, if left unchanged by the Supreme Court of Ohio, could have the effect of rewriting R.C. 109.02 and restricting the powers of the Attorney General.

## **II. The Ohio Attorney General Has Long Had Common Law Powers to Represent the Interests of Citizens With or Without the Direction of the Governor or the General Assembly**

This court has held that the Ohio Attorney General has broad common law powers to act for the public’s benefit in many situations, with or without the direction of the Governor or the General Assembly. *See, e.g., State ex. rel Cordray* ¶ 18. The office of the Attorney General was created by Article III, Section 1 of the Ohio Constitution, a section that was “adopted with a recognition of established contemporaneous common law principles, and ...did not repudiate but cherished the established common law.” *Ohio v. United Transp., Inc.*, 506 F. Supp. 1278, 1281 (S.D. Ohio 1981) (citing *State v. Wing*, 66 Ohio St. 407, 420 (1902)). This court has also held that the Attorney General is charged with “such duties as usually pertain to an attorney general,

and especially with those delegated to him by the general assembly of Ohio.” *State ex rel. Doerfler v. Price*, 101 Ohio St. 50, 57 (1920). Thus the decisions of this court make clear that the Attorney General possesses common law powers to act for the public’s benefit in addition to those duties delegated by the governor or prescribed by the General Assembly.

These common law powers of the Attorney General include the power “to bring, on his own initiative, civil actions on behalf of the state.” *Ohio v. United Transp., Inc.*, 506 F. Supp. 1278, 1281 (S.D. Ohio 1981). For example, the Attorney General may bring suit on his or her own initiative to enforce state and federal anti-trust laws, *see e.g. Ohio v. American International Group CV-07-633857* (Cuyahoga Court of Common Pleas 2007), or to recover public funds, *see e.g. State v. Johnson*, 1981 Ohio App. LEXIS 13540 (Ohio Ct. App., Lucas County Oct. 30, 1981), and the Ohio General Assembly has explicitly referenced the Attorney General’s common law powers to enforce charitable trusts, stating that “The powers of the attorney general under sections 109.23 to 109.33 of the Revised Code shall be **in addition to and not in limitation of** his powers held at common law.” R.C. 109.24 (emphasis added). The Supreme Court of Ohio has also held that it “is abundantly shown by the authorities” that the Attorney General is authorized to “institute [nuisance suits on] behalf of the public.” *State ex. rel. Little v. Dayton & S.E. Railroad Co.*, 36 Ohio St. 434 (Ohio 1881).

Moreover, as in the present case, the Attorney General has always been the legal representative of the citizens of the state of Ohio in matters related to public property rights and the protection of the environment. Ohio’s First District Court of Appeals has held that the Attorney General is precisely the officer who should represent citizens in public trust matters such as this one:

“It is quite natural, pursuant to the general constitutional and statutory powers of the Attorney General of the state, that **his**

**office is the one which should exercise the rights of the state of Ohio as they relate to the natural resources of the state, and the rights of the citizens of this state to the continued free use of such resources as are held in trust by our state.”** *State ex rel. Brown v. Newport Concrete Co.*, 44 Ohio App. 2d 121, 129 (Ohio Ct. App., Hamilton County 1975) (emphasis added).

It should also be noted that, unlike the Attorney General of the United States, the Ohio Attorney General is an independently elected constitutional officer. Unlike the federal Attorney General, the Ohio Attorney General is not appointed by the executive nor confirmed by the legislature. The Governor of Ohio is the state’s chief executive, but his executive power is not akin to that of the President of the United States. The governor may not “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. To the contrary, the Attorney General must be able to take affirmative actions, even when contrary to the policies of a sitting Governor. Allowing the Eleventh District’s interpretation of 109.02 to stand would diminish the significance of the election of the Attorney General and would denigrate the autonomy of the office as established by Article III, Section 1 of the Ohio Constitution.

Other states with independently elected attorneys general have acceded to this view of the Attorney General as having the common law powers to bring suit on behalf of the citizens. For example, the Michigan Attorney General has the common law powers to bring civil suits on behalf of taxpayers, *see e.g. State of Michigan ex. rel. Frank J. Kelley v. C. R. Equipment*, 898 F. Supp. 509, 513-514 (WD Mich, 1995), while the Illinois Attorney General is the “law officer of the people” with “all the common law powers” descending from the English crown. *Fergus v. Russel* (1915), 270 Ill. 304. In Massachusetts, the Attorney General has the power to, “as chief law officer, assume primary control over the conduct of litigation which involves the interests of

the Commonwealth” and likewise “may prosecute an appeal...over the expressed objections of the State officers he represents.” *Feeney v. Commonwealth* (Mass. 1977), 366 N.E. 2d 1262, 1266-67). The state of Ohio, were the Eleventh District’s ruling allowed to stand, would have the ignominious distinction of being perhaps the only state in which the Attorney General is tethered to the executive branch. Such a finding could leave Ohioans without an advocate independent of the current governor and free from the ruling majority of the present General Assembly.

### III. The Court’s *Sua Sponte* Ruling on an Unbriefed Issue Was Improper

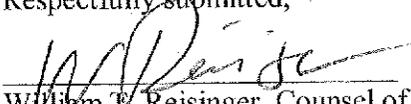
Finally, the court’s decision to consider the issue of the Attorney General’s standing was improper. The question of whether the Attorney General had standing to participate in the appeal was not raised by any party, nor was any party or *amicus* given the opportunity to submit briefs on the issue. The Supreme Court of Ohio has held that *sua sponte* decisions by courts are inappropriate in most circumstances, unless the “parties are given notice of the courts [sic] intention...and an opportunity to respond.” *Ex rel. Fogle v. Steiner*, 74 Ohio St. 3d 158 (1995). As dissenting Judge Cannon notes, although Ohio App. Rule 12(A)(2) gives an appellate court the power to review an unbriefed issue, the better rule is that ““the court should notify the parties and give them an opportunity to brief the issue.”” *State ex rel. Merrill*, 2009-Ohio-4256, at ¶135 (citing *State v. Blackburn*, 11th Dist. No. 2001-T-0052, 2003-Ohio-605, at ¶45, citing *State v. Peagler* (1996), 76 Ohio St.3d 496, 499, fn.2.) No one has expressed this argument better than Justice Antonin Scalia of the United States Supreme Court. Justice Scalia has argued that *sua sponte* decision making contravenes a fundamental tenet of our legal system: “The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry

and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

### CONCLUSION

The finding of the Eleventh District Court of Appeals that the Ohio Attorney General does not have standing to represent Ohioans without the express direction of the governor or the General Assembly was improper. The finding represents a misreading the Ohio Revised Code, conflicts with over 100 years of Ohio case law, and the court's decision to review the issue represents the sort of judicial decision making that is inconsistent with our system of justice. If not reversed by this court, the Eleventh District's decision could prevent the Attorney General, an independently elected official, from carrying out his duties to advocate on behalf of the interests of the citizens of the state of Ohio. Amici Curiae, as sportsmen's and conservation advocates, respectfully request this court to overrule the portion of the Eleventh District's decision which restricts the power of the Ohio Attorney General to act as an independent advocate for the citizens of the state of Ohio and their natural resources.

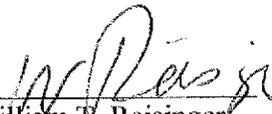
Respectfully submitted,

  
William T. Reisinger, Counsel of Record (0084327)  
Trent A. Dougherty (0079817)  
1207 Grandview Avenue, Suite 201  
Columbus, Ohio 43206  
(614) 487-7506  
(614) 487-7410 (fax)

**Counsel for Amici Curiae Ohio Bass Federation,  
Izaak Walton League of Ohio, Rivers Unlimited,  
Green Ohio Coalition, Ohio League of  
Conservation Voters, and Buckeye Forest  
Council**

## CERTIFICATE OF SERVICE

I certify that a copy of this Brief of Amici Curiae was sent by Regular U.S. Mail on this 22<sup>nd</sup> day of January, 2010, on the following counsel.

  
William T. Reisinger

RICHARD CORDRAY (0038034)  
Attorney General of Ohio

KATHLEEN M. TRAFFORD (0021753)  
Porter, Wright, Morris & Arthur, LLP  
41 S. High Street  
Columbus, Ohio 43215  
(614) 227-1915  
(614) 227-2100 (fax)  
ktrafford@porterwright.com

Special Counsel for Defendants-  
Appellants-Cross-Appellees,  
Ohio Department of Natural Resources and  
Sean Logan, Director

JAMES F. LANG (0059668)  
FRITZ E. BERKMUELLER (0081530)  
Calfee, Halter & Griswold, LLP  
1400 McDonald Investment Center  
800 Superior Avenue  
Cleveland, Ohio 44114-2688  
(216) 662-8200  
(216) 241-0816 (fax)

Class Counsel and Counsel for Plaintiffs-  
Appellees,  
Robert Merrill, Trustee, et al.

HOMER S. TAFT (0025112)  
202200 Center Ridge Road, Suite 300  
P.O. Box 16216  
Rocky River, Ohio 44116  
(440) 333-1333  
(440) 409-0286 (fax)

BENJAMIN C. MIZER (0083089)  
Solicitor General, Counsel of Record  
STEPHEN P. CARNEY (0063460)  
Deputy Solicitor  
CYNTHIA K. FRAZZINI (0066398)  
Assistant Attorney General  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-8980  
(614) 466 5087 (fax)  
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Defendant-Appellant-Cross-  
Appellee,  
State of Ohio

NEIL S. KAGAN (*pro hac vice* pending)  
Senior Counsel, Counsel of Record  
National Wildlife Federation  
Great Lakes Regional Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104  
(734) 887-7106  
(734) 887-7199 (fax)

PETER A. PRECARIO (0027080)  
326 South High Street  
Annex, Suite 100  
Columbus, Ohio 43215  
(614) 224-7883  
(614) 224-4510 (fax)

Counsel for Intervening Defendants-  
Appellants-Cross-Appellees,  
National Wildlife Federation

Intervening Plaintiff-Appellee-  
Cross-Appellant, Pro Se

L. SCOT DUNCAN (0075158)  
1530 Willow Drive  
Sandusky, Ohio 44870  
(419) 627-2945  
(419) 625-2904 (fax)

Intervening Plaintiff-Appellee, Pro Se and  
Counsel for Intervening Plaintiff-Appellee,  
Darla J. Duncan