ORIGINAL

In the

Supreme Court of Ohio

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

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REPLY BRIEF AT SUPPLEMENTAL JURISDICTIONAL STAGE OF DEFENDANT-APPELLANT-CROSS-APPELLEE STATE OF OHIO

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INTRODUCTION

After six rounds of jurisdictional briefing and at least fourteen briefs, at least one thing is clear: All parties, despite their disagreements on the merits and on the Attorney General's power to file the State's appeal, agree that if the Court finds the State's appeal valid, nothing stands in the way of the Court's ability to address the merits of the case now. Specifically, all parties agree that the case's record and posture render it ripe for review now, and that remand would serve no purpose.

Further, even as to the validity of the State's appeal, the parties' dispute includes key points of consensus. First, although the dispute is premised upon a purported "conflict" between the Attorney General and two of the three Defendants—the Ohio Department of Natural Resources and its Director (together, "ODNR")—ODNR's own filing confirms that it and the Governor, ODNR's superior executive, fully support, and always have supported, the Attorney General's right to appeal on behalf of the third Defendant, the State of Ohio. See ODNR Supplemental Jurisdictional Brief ("Supp. Jur.") at 1-2. Second, Plaintiff Homer Taft states conditionally that "if the Governor . . . approved . . . the appeal," Taft "concede[s] the appeal" is proper. Taft Supp. Jur. at 1. Although he disputes the facts of that approval, he concludes that he "would not interpose strenuous objection to vacating the decision as to the Attorney General's" appeal, *id.* at 15, and explains why remand is not needed to proceed to the merits, *id.* at 15-17.

The State's appeal is valid for several reasons. First, although the Governor's approval is unneeded, the record shows that such approval has always been present. Second, even if the Governor's approval were lacking, the Attorney General's power to proceed is clear. Third, all Plaintiffs miss the mark in challenging—contrary to their positions throughout the litigation—the State's status as a party here, as opposed to the Attorney General's power to speak for the State *when* the State is a party. Rather than admitting that the State and ODNR are separate

defendants and disputing whether the Attorney General speaks for the State, Plaintiffs now suggest that the State is not an actual party to this litigation at all. But this assertion contradicts Plaintiffs' earlier decisions to sue the State as a separate defendant, to pursue relief directly against the State after ODNR changed its regulatory approach in July 2007, and to cross-appeal against the State to pursue further relief. Even now, Plaintiffs' position is contradictory, for they need *some* entity as an adversary, to bind the State now and in future proceedings.

The Court should therefore state summarily that the State of Ohio is a proper party here, appropriately represented by the Attorney General, and the Court should proceed to the merits.

ARGUMENT

A. The State's appeal is not invalid for lack of the Governor's or ODNR's approval, as both have always supported the Attorney General's representation of the State.

As the State explained in response to the Court's questions, the Governor and ODNR have consistently supported the Attorney General's right to litigate independently for the State. See State Supp. Jur. at 5-10. Plaintiff Taft concedes that if that is true, his opposition to the appeal evaporates. Taft Supp. Jur. at 1. But he, joined now by the other Plaintiffs, contests whether such approval existed. The record evidence and common sense show that the approval was there all along: ODNR's approach was premised on the State's continued litigation.

ODNR and the Governor never imagined that the Attorney General needed a permission slip to do his job, because none is required. Yet Taft insists on such a requirement. Although he says the Attorney General need not "in every case and circumstance have or file a written document before proceeding" to represent the State, Taft Supp. Jur. at 14, he elsewhere maintains that any approval in this case did not suffice because "there was no affirmative directive," *id.* at 10. For the reasons explained in the State's first supplemental brief, the

Attorney General does not need the Governor's express permission to represent the State. State Supp. Jur. at 10-19.

Even if a formal approval were needed (and it is not), ODNR's filed statements meet that test. ODNR and the State filed a joint statement asserting that the Attorney General's Office would continue to represent the State. See Notice of Substitution of Counsel for Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources (attached as Ex. 1 to State Supp. Jur.). If ODNR wished to veto that continued representation, it surely would not have issued the joint statement, and likely would have registered its disapproval. It did not do so, for good reason: because the State's continued litigation was the very premise of ODNR's policy change.

ODNR's own separate filing in the trial court explained, in plain terms, that it not only expected the case to continue, but that it *wanted* that continuation, and that *the State's* role made such continuation possible. It explained that its regulatory change would honor the owners' deeds "unless a court determines that the deeds are limited." 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 ("ODNR 2007 Response") (attached as Ex. 2 to State Supp. Jur.). ODNR said it "welcome[d] the Court's resolution of these issues," and it specifically noted that the trial court could resolve the issues based on the "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*." *Id.* (emphasis added).

Plaintiffs offer no competing explanation for this language; instead, they simply ignore it. The State cited these documents heavily in its response to the Court's questions, State Supp. Jur. at 6-7, and it attached them to demonstrate what ODNR said in 2007: that it "welcomed"

continued litigation based on the State's briefing. In retelling their versions of events, Plaintiffs ignore the record evidence of ODNR's 2007 filings.

OLG discusses one relevant statement from July 2007—the Governor's press release explaining his and ODNR's policy—but OLG misrepresents that statement when it claims that the Governor and ODNR affirmatively *supported* the landowners. OLG Supp. Br. at 5. The record instead shows that ODNR adopted a neutral position, leaving it to the adversarial process between the State and the landowners to resolve the dispute. OLG claims that "ODNR had thus changed positions and stood on the side of the private landowners," *id.*, and OLG quotes the Governor's press release, which acknowledged the "apparently valid real property deeds," *id.*

But OLG's quote omits the Governor's very next sentence, in which the Governor also noted that the State's view, not Plaintiffs', might be the better legal position: "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." See July 13, 2007 Press Release (attached as Ex. 3 to State Supp. Jur.). The elided sentence shows that OLG is wrong to claim that ODNR *supported* Plaintiffs.[1]

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[1] OLG further seeks to rely on two irrelevant statements. OLG tries to bolster its misreading of the Governor's 2007 statement by tying it to a 2006 campaign statement, OLG Supp. Jur. at 5, but that political statement carries no legal relevance. OLG also cites the State's summary judgment brief as purported support for the proposition that ODNR, not the Attorney General, controls the State's litigation. *Id.* at 7-8. But those out-of-context statements did not involve the Attorney General's power to direct the State's litigation or any related procedural issue. Instead, the State was responding, on the merits of the Lake Erie boundary issues, to Plaintiffs' attempt to rely on their interpretation of an opinion of the Attorney General. The State responded, properly, not only by offering a different reading of that opinion, but also by explaining that even if an Attorney General opinion supported Plaintiffs' view, such an opinion could not override the General Assembly's definition of the boundary or the State's authority over Lake Erie. See State Opp. to OLG's SJ Mot. at 26.

Not only did the July 2007 statements from ODNR and the Governor leave no doubt that they "welcomed" the State's independent path, but Plaintiffs, too, at the time accepted the consensus view that litigation would continue. They did not ask for the case to be dismissed as moot based on ODNR's stance; they did not ask for a default judgment for lack of a proper defendant; they did not ask for a consent decree or any other order premised upon ODNR's position. Had OLG believed then, as it claims now, both (1) that the State was never a party, and ODNR is "the only proper party here," OLG Supp. Jur. at 5 n.1, and (2) that ODNR "withdrew from the case on July 16, 2007," OLG Jur. Resp. at 1 n.1, then the case should have ended when the "only" State defendant "withdrew." Instead, OLG and the other Plaintiffs proceeded on the same premise as everyone else: that the State was a proper defendant, represented, appropriately, by the Attorney General.

The inescapable logic—and thus the fatal flaw—of all Plaintiffs' theories is this: If the State's appeal here is invalid, then this case should have been shut down the moment ODNR changed course. After all, ODNR's changed position in July 2007 is the linchpin of Plaintiffs' claim that the State now lacks standing, and no theory justifies allowing the case to proceed to judgment in the common pleas court but cutting off any appeals. In other words, regardless of which theory Plaintiffs now urge—that the State did not have the Governor's approval to continue or that the State was never a true party, such that the controversy ended upon ODNR's regulatory change—the case should have ended then. But because Plaintiffs accepted in the trial court that ODNR and the Governor never purported to veto the State's continued litigation, their opportunistic change of heart should not be entertained at this late stage.

Finally, while the critical statements and events are those of July 2007, it is telling that OLG compounds its resistance to plain English by arguing that even today, the wording of

ODNR's filings is insufficient to show ODNR's support of this appeal. OLG asserts that ODNR latest filing is not strong enough because it says merely that ODNR "expected" the State to appeal, and OLG finds it "telling[]" that ODNR never uses the word "support." OLG Supp. Jur. at 10 n.5. But ODNR filed a Memorandum *in Support of* Jurisdiction as to the State's appeal, and ODNR even joined the State in filing a Joint Notice of Appeal. It is hard to see how ODNR could be more supportive than joining the appeal as a party and filing its own jurisdictional memorandum to stress the point. ODNR could not ask this Court to hear an appeal now if the State's power to proceed had been lost years ago.

B. The Attorney General is empowered to direct the State's litigation, even if the Governor objects to the Attorney General's litigation choices.

As the State's first supplemental brief explained, the Court need not address the broader legal issue of whether the Attorney General could appeal for the State *if* the appeal were "contrary to the directive of the Governor," because here the Governor approved of the Attorney General's continued litigation. Nevertheless, as that brief also explained, the Attorney General has both the power and the duty to direct the State's litigation, even if the Governor or any other state actor disagrees. See State Supp. Jur. at 10-18.

As an initial matter, Plaintiffs are wrong in claiming that the State avoided answering the Court's question about the Attorney General's power to act contrary to the Governor's wishes. See OLG Supp. Jur. at 3; Taft Supp. Jur. at 2. To be sure, the State did urge, and still urges, the Court to avoid addressing the issue, but such urging reflects the Court's own practice of declining to address hypothetical disputes. State Supp. Jur. at 10-11. In any event, the State fully addressed the legal issue, see *id.* at 10-19, specifically explaining that "the Attorney General is empowered to appeal cases for the State, even if the Governor or any officer objects," *id.* at 11.

Plaintiffs' objections to the Attorney General's independent power to direct the State's litigation are meritless. Taft argues that the "history of the office of Attorney General is contrary to creation of 'common law' powers," see Taft Supp. Jur. at 3, but that conflicts with the Court's recognition that "the attorney general has common-law—as well as statutory—authority to institute suits on behalf of the public." *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986, ¶ 19; *State ex rel. Doerfler v. Price* (1920), 101 Ohio St. 50, 57 ("the attorney general of Ohio is a constitutional officer of the state . . . with such duties as usually pertain to an attorney general, and especially with those delegated to him by the general assembly of Ohio"). While the Attorney General need not turn to common-law power here, Taft evidences his misunderstanding of the Attorney General's role by stating a principle directly at odds with the Court's precedent.

Taft also challenges the breadth of the Attorney General's statutory power under R.C. 109.02, but that statute broadly empowers the Attorney General to represent the State when it is a party. The statute does so by declaring that the "attorney general is the chief law officer for the state and all its departments," and that "no state officer . . . institution of the state shall employ, or be represented by, other counsel." This language confirms that "the state" is separate from "its departments." It also means that the Attorney General represents the State and her entities, for they cannot hire other counsel directly (because special counsel hired under R.C. 109.07 are simply the Attorney General's assistants), and they of course cannot go unrepresented when sued. R.C. 109.02 additionally provides that "*[w]hen* required by the governor or the general assembly, the attorney general shall appear for the state" (emphasis added), and as the State explained before, this provides an *additional* way for him to appear. It does not set a requirement that a gubernatorial or legislative request is needed in all cases before the Attorney

General can defend the State or its agents or agencies; reading this line to create such a requirement is both atextual and impractical. See State Jur. Mem. at 8-9.

In particular, reading R.C. 109.02 to require the Attorney General to obtain the Governor's or General Assembly's approval to defend the State or her agencies is inappropriate in cases that do not involve entities under the Governor's or the General Assembly's control. For example, if someone sues the Auditor or this Court, the Attorney General need not seek the Governor's approval before defending the Auditor or Court. The same is true when someone sues the State as a whole, which encompasses more than the Governor's or the General Assembly's sphere of control. See State Supp. Jur. at 18.

Further, nothing in R.C. 1506.10, which directs ODNR to manage the State's interests in Lake Erie, grants ODNR veto power to direct the State's litigation when the State is validly a separate party. Plaintiffs' arguments regarding R.C. 1506.10 are primarily a version of their argument that the State is not a valid party, on the idea that R.C. 1506.10's commitment of Lake Erie to ODNR's care means that only ODNR, not the State, can be a party regarding the State's Lake Erie interests. See, e.g., OLG Supp. Jur. at 8 n.4 (arguing that the State has no "separate standing or authority" because R.C. 1506.10 vests all State interests in Lake Erie in ODNR). In that regard, the argument is discussed below in Part A-3, which explains the State's independent party status.

But to the extent that Plaintiffs separately suggest that R.C. 1506.10 authorizes ODNR to direct the State's litigation *even if* the State is validly a separate party, Plaintiffs are wrong. R.C. 109.02 commits issues of *legal* representation to the Attorney General, and that is true whenever another statute commits regulatory powers to another agency to enforce some area of law. Taft cites cases that, in his view, support the proposition that statutes vesting regulatory power in

other agencies preclude the Attorney General's representational powers. Taft Supp. Jur. at 9 (citing *State ex rel. Brown v. Rockside Reclamation, Inc.* (1976), 47 Ohio St. 2d 76, and *State ex rel. Rogers v. New Choices Community School* (2d Dist.), 2009-Ohio-4608). Those cases are inapposite because they involve the scope of the Attorney General's power to serve as the *party-plaintiff,* and thus as the regulator-by-enforcement-litigation, which is distinct from his legal duty to serve as the State's (or any agency's) defense lawyer when the State is sued. Further, in *Rockside Reclamation,* the Court explained that the relevant statute expressly required the director of environmental protection to declare a nuisance before the Attorney General could sue. Thus, the focus in that case was on statutory procedural requirements, not any broader principles about an agency's control over litigation in its field generally. 47 Ohio St. 2d at 81-82.

Finally, while ODNR is of course a party in many cases challenging its specific regulatory actions, the Attorney General has, since R.C. 1506.10's enactment, represented the State's interests in Lake Erie in the State's name. For example, in *State ex rel. Duffy, Attorney General v. Lakefront East 55th St. Corp.* (1940), 137 Ohio St. 8, the Attorney General sued, as relator for the State, to oust a private landowner from an area that the State alleged was artificially filled in, and thus was still part of the territory of Lake Erie as defined in R.C. 1506.10. The State lost on the merits, because the Court found that the disputed area had grown by natural accretion (rather than artificial fill). *Id.* at 11-13. But no one insisted that the case required the presence of the Department of Public Works, which preceded ODNR as the named agency in R.C. 1506.10. And in *State ex rel. Squire v. Cleveland* (1948), 94 Ohio St. 61, the Attorney General defended the State's interests as an amicus, not a party, for the simple reason that the underlying dispute was between the City of Cleveland and a landowner, and the legal issues overlapped with the

State's authority over Lake Erie. But no other state agency was a party, either, so OLG's reliance on *Squire* is misplaced.

For all these reasons, the Attorney General has both the power and duty to represent the State when it is sued, and that includes the right to appeal judgments against the State, regardless of any possible objection by the Governor.

C. Plaintiffs cannot disclaim the State's party status after relying on it both to secure the rulings below and to seek further relief on remand.

Plaintiffs, especially OLG, focus heavily on the alternative argument that the State is not, and never was, a proper party to this litigation. That curious assertion is wrong on the law and contrary to Plaintiffs' entire approach to this case. Plaintiffs themselves *sued the State*. The Complaint named "State of Ohio" separately from ODNR, and if they had second thoughts about that after the July 2007 events, they could have tried to dismiss the State then. Instead, they relied on (and still rely on) the State's presence to justify keeping the case alive to obtain relief binding the State. The Court should reject their attempt now to have it both ways by terminating the State's party status (and thereby the State's appeal).

First, Plaintiffs' argument that the State is not a proper party is distinct from their argument that the Attorney General lacks the right to direct the State's litigation. OLG asserts that "ODNR is the only proper party here." OLG Supp. Jur. at 5 n.1. OLG acknowledges that it sued the State as a separate defendant, but it says it did so only "out of an abundance of caution," and that its choice to do so is irrelevant because "OLG . . . has no . . . authority to change the identity of the proper parties by naming certain entities as defendants." *Id.* OLG thus disclaims its earlier decision to sue the State, and it bases its new view upon its claim that R.C. 1506.10, by entrusting the protection of Lake Erie to ODNR, precludes the State from having separate party status or "standing." *Id.* at 8 n.4. Taft and the Duncans also rely on the same R.C. 1506.10

argument, and regardless of whether they use the term "proper party," the logic of the argument shows that it is based on the idea that only ODNR is a proper party, as opposed to the idea that ODNR can direct the State's litigation *even if* the State is a separate proper party. Taft Supp. Jur. at 9; Duncan Supp. Jur. at 5-6; but see Taft Jur. Mem. and Jur. Response at 6 (conceding that "Cross-Appellant agrees . . . that the 'State of Ohio' was a party burdened or 'aggrieved' by the trial court's order, and would have the right to appeal," and disputing only whether Attorney General or Governor directs the State's litigation).

Second, R.C. 1506.10 does not support Plaintiffs' view. The full text of that provision demonstrates that ODNR's duty to protect natural resources like Lake Erie and to enforce the State's rights refers only to regulatory or administrative management, not to control over litigation. It states:

> The department of natural resources is hereby designated as the state agency in all matters *pertaining to the care, protection, and enforcement of the state's rights* designated in this section.
>
> Any order of the director of Natural Resources in any matter *pertaining to the care, protection, and enforcement of the state's rights* in that territory is a rule or adjudication within the meaning of sections 119.01 to 119.13 of the Revised Code.

R.C. 1506.10 (emphasis added). The parallel use of the same clause shows that the phrase "enforcement of the state's rights" has the same meaning in both sentences. The second sentence, meanwhile, declares that all of the ODNR Director's actions under that power are rules or adjudications subject to Ohio's Administrative Procedure Act, R.C. Chapter 119. That commitment to APA review shows that the contemplated "enforcement" actions are regulatory ones, not litigation ones, as only such decisions can sensibly be subject to further review under Chapter 119.

Third and most important, Plaintiffs' desire to eliminate the State as a party on appeal does not square with their entire approach to the case thus far. Until now, Plaintiffs have relied on the

State's presence as a party to achieve relief against the State. There is a reason that Plaintiffs sued the State in their Complaints, sought relief against the State, and named the State as an Appellee in their cross-appeals: because the State's presence was, and still is, essential to Plaintiffs' litigation.

If the State was never a real party, then the litigation should have ended in July 2007 when ODNR changed its regulatory approach. As noted above (at 5), that end could have taken any of several approaches. The case could have been declared moot as to the regulatory disputes. Plaintiffs could have asked ODNR to sign a consent decree on some or all issues, or Plaintiffs could have asked the trial court to enter default judgment based on a failure to defend. But Plaintiffs did no such thing. They instead continued to fight for summary judgment, achieving a partial victory that declared relief running against "the State" in several respects. State Jur. Mem. at 7, 12 (citing Com. Pl. Op. at 74-75). What is more, both OLG and Taft filed cross-appeals against the State as cross-appellee, hoping to reverse the trial court in part and move the disputed boundary further lakeward to the "low-water mark."

Notably, while OLG now insists that ODNR is "the only proper party here," OLG Supp. Jur. at 5 n.1, and disclaims the State's party status, OLG told the Court just last month that ODNR completely "withdrew" from the case in July 2007, at the point of ODNR's regulatory change, and OLG insisted that ODNR's filings in this Court should be considered those of a mere amicus, not a party, OLG Jur. Resp. at 1 n.1. OLG is wrong in claiming that ODNR "withdrew," for it remains a party, and a *defendant's* ability to unilaterally "withdraw" from a case is a novel notion. But if OLG nevertheless stands by its claim that ODNR has not been a party since July 2007, and if it now insists that the State has *never* been a true party independent of ODNR, OLG leaves unanswered the identity, in its view, of its adversarial Defendant in the

trial court and its Appellee in the Eleventh District. In both courts, OLG won rulings that purport to bind the State, but without, in its latest revisionist view, *any* State defendant.

Further, Plaintiffs rely on the State's presence for *future* purposes. Taft, for example, has cross-appealed to this Court, still pushing for the low-water mark, and he needs the State as an adversarial Appellee. And although OLG has not cross-appealed, the litigation is not over from its perspective, either. Once the boundary issue is resolved with finality, OLG wants to reach further issues, such as a takings claim. State Jur. Mem. at 4, Com. Pl. Op. at 74. And it presumably wants the State to pay any compensation or damages claims to which it might be deemed entitled. All this cannot be squared with eliminating the State as a defendant, and especially with OLG's (incorrect) insistence that ODNR has ceased to be a party as well.

Nor can the presence of the National Wildlife Federation and the Ohio Environmental Council (together, "NWF"), the intervenors defending their members' rights, fill that gap. Even if the NWF's presence preserves a live case or controversy, a decision between Plaintiffs and NWF could not bind the State as to its property rights, its sovereign or trust rights, or its alleged duty to pay damages. Only a present *state* entity could do that. Meanwhile, Plaintiff Taft still seeks to eject NWF from this suit, in which case—on his theory—no defendant would be left for him to litigate against.

Plaintiffs' positions before this Court so contradict their earlier statements that they should be estopped from changing tacks. "Courts apply judicial estoppel in order to preserve[] the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment." *Greer-Burger v. Temesi* (2007), 116 Ohio St. 3d 324, 2007-Ohio-6442, ¶ 25 (internal quotations and citations omitted). Here, Plaintiffs took the position that the State was a

party, and the trial court accepted that position when it entered judgment against the State. The appeals court, too—despite its purported ejection of the State on appeal—affirmed the trial court's judgment against the State, which it could not do if the State were never even a defendant.

In sum, not only is the State a party, but Plaintiffs have always relied on that status and continue to do so. In the alternative, if the State is not and never has been a party, the Court should vacate the judgments below (to the extent they run against the State) based on that flaw.

D. The Court should reverse the State's exclusion and proceed to the merits with the State as a party.

In light of the above, the Court should summarily reverse the appeals court's ejection of the State and proceed to the merits of the case. On the Court's second question—whether the merits of this case are ripe for review if the Court finds for the State on the first issue—all parties agree that the answer is "yes" and that remand would serve no purpose here.

Further, in proceeding to the merits, the Court should reverse the appeals court's ejection of the State and fully restore the State's full party status. Taft suggests, as alternatives to reversal, that the Attorney General could proceed in this Court as a mere amicus, rather than as a party, Taft Supp. Jur. at 14, or that the Court could simply "vacate" the appeals court's decision rejecting the appeal below, as having been improperly reached, so that this Court could "avoid[] the determination of the issue entirely in this appeal." *Id.* at 15. But neither alternative works, because, as explained above, only the State's full party status ensures that the Court's jurisdiction is complete (especially in light of Taft's continued effort to eject NWF from the case). Indeed, even Plaintiffs need a binding ruling against the State as a *party*, not as an amicus, and they need the State's party status to continue their quest for further relief on remand.

In addition, the appeals court's opinion was so plainly wrong that it needs to be reversed, not just set aside. And as the State said in its earlier brief, the public deserves to have its representative voice, the State, protect the rights of the public and the State. Consequently, the Court should reverse the appeals court's mistaken ejection of the State, and it should do so summarily, so that the Court and the parties may move on to the important issues in this case.

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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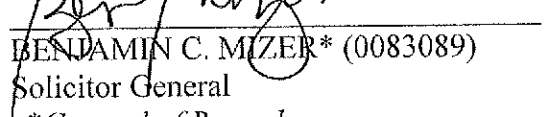

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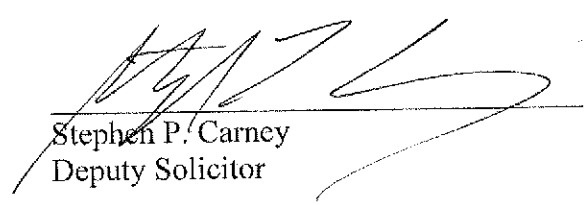

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