

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**MEMORANDUM CONTRA PLAINTIFFS-APPELLEES' AND INTERVENING
PLAINTIFFS-APPELLEES/CROSS-APPELLANTS' JOINT MOTION TO STRIKE THE
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF JURISDICTION OF *AMICI
CURIAE* OHIO BASS FEDERATION, *ET AL.***

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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, 17th 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

Introduction

On January 22, six sportsmen's and conservation organizations filed a timely *amici curiae* brief, pursuant to Sup. Ct. Rule of Practice 3.5, in Support of Jurisdiction of Defendant-Appellant-Cross-Appellee State of Ohio. On January 28, Plaintiffs-Appellees' and Intervening Plaintiffs-Appellees/Cross-Appellants ("Plaintiffs-Appellees") filed a Joint Motion to Strike ("Joint Motion") the brief of *amici curiae*, citing several objections. Each objection to the filing of the *amici curiae* lacks merit.

For the following reasons, this court should disregard the Joint Motion to Strike and should consider the important issues raised by the *amici curiae*.

I. The Joint Motion Lacks a Legal Rationale to Strike Brief of *Amici Curiae*

The Joint Motion first alleges that the brief of *amici curiae* was not timely filed. This is incorrect. The brief, filed on January 22, 2010, was timely pursuant to this court's call for briefs on December 23, 2009. That call provided that "Appellant/cross-appellee state of Ohio's brief shall be filed within 15 days from the date of this order" and that "all other parties may file briefs within 15 days after the state of Ohio's brief has been filed." *See 12/23/09 Case Announcements, 2009-Ohio-6787*. Because the state's brief was filed on January 7, 2010, the brief of *amici curiae* was timely, as it was filed within 15 days for the state's filing. The Joint Motion provides no other reason why the *amici curiae* brief was untimely and should not be considered in this case pursuant to Sup. Ct. Rule of Practice 3.5.

The Joint Motion also contends that the brief's discussion of the Eleventh District's *sua sponte* ruling was improper. In support of this assertion, the Joint Motion contends that the issue was properly considered by the lower court because it was raised "during oral argument before

the Eleventh District of Appeals [sic].” *Joint Motion at 4*. However, the lower court’s decision to remove the AG from the case was not briefed by either party, but instead was raised by the Eleventh District panel itself. Judge Timothy J. Cannon filed a dissenting opinion on this very point, writing that as a rule of practice, a court should always “notify the parties and give them an opportunity to brief the issue” before ruling on that 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.)

However, the main objection to the *amici brief* raised in the Joint Motion is that the brief was filed by two attorneys who are currently employed by the Ohio Environmental Council (“OEC”), which is a party to the case. Plaintiffs-Appellees successfully navigated the court’s attorney registry, and correctly point out that “The Amici Brief was prepared and filed by a staff attorney (Mr. Reisinger) and the director of legal affairs (Mr. Dougherty) for the Ohio Environmental Council, which is a party to this proceeding.” *Joint Motion at 4*. Plaintiffs-Appellees argue that “The OEC should not be permitted two bites at the apple.” *Joint Motion at 4*. With this statement, the Joint Motion implies that when counsel for *amici curiae* filed a brief on behalf of six public interest organizations, they were really filing a brief on behalf of the OEC. This is incorrect. The OEC is represented by independent counsel in this case, not by counsel for *amici curiae*. The OEC and the National Wildlife Federation filed a one page brief, which endorsed the state’s brief but did not include a substantive discussion of the issues. Counsel for *amici curiae* filed the brief—*pro bono*—on behalf of six public interest, charitable organizations, each with a special interest in the issues raised by the court’s call for briefs. The Ohio Rules of Professional Conduct suggest that “All lawyers have a responsibility to assist in providing *pro bono publico* service.” *Ohio R. Prof. Conduct 6.2, Comment*. Further, the

Supreme Court of Ohio has long recognized the importance of *pro bono* activity, recently stating that “This Court strongly encourages each Ohio lawyer to ensure access to justice for all Ohioans by participating in pro bono activities.” *Statement Regarding Pro Bono Legal Services, Sept. 20, 2007.*

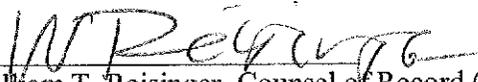
II. *Amici Curiae* Should Be Heard on This Matter of Great Public Concern

The question of whether the Ohio Attorney General has the ability to represent Ohio citizens in litigation, even when not directed to do so by the governor, is one that is profoundly important to the *amici curiae*. If the decision of the Eleventh Amendment Court of Appeals is affirmed by this court, it could set an important precedent defining the constitutional role of the Attorney General. While not parties to the shoreline case at hand, these charitable groups at least have the right to have their voices heard on the important question regarding the independence of the Ohio Attorney General. The six named organizations are sportsmen’s and/or conservation organizations. Conservation organizations and their members depend on an independent Attorney General with the constitutional authority to take on polluters or appeal a judgment, even when such actions are contrary to the policies of a sitting governor. These groups should be heard on this important constitutional question.

Conclusion

The Joint Motion to Strike the brief of *amici curiae* does not contain a legal rationale to strike the brief. The brief was timely filed and contains valid arguments from six charitable, public interest organizations, each of which deserve to be heard on the important constitutional questions raised in this case. This court should disregard the Joint Motion to Strike and consider the arguments raised by *amici curiae*.

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 2nd day of February, 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, 17th 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-
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