



CHARLES R. SAXBE\* (0021952)

*\*Counsel of Record*

GERHARDT A. GOSNELL II (0064919)

Chester, Willcox & Saxbe LLP

65 East State Street, Suite 1000

Columbus, OH 43215-3413

614-221-4000

614-221-4012 fax

rsaxbe@cwslaw.com

ggosnell@cwslaw.com

Counsel for *Amici Curiae* former Ohio Attorneys

General Betty Montgomery, Jim Petro, and

Nancy Rogers

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. BERCKMUELLER (0081530)

Calfee, Halter & Griswold LLP

1400 McDonald Investment Center

800 Superior Avenue

Cleveland, Ohio 44114-2688

216-622-8200

216-241-0816 fax

jlang@calfee.com

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

RICHARD CORDRAY (0038034)

Attorney General of Ohio

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)

*\*Counsel of Record*

Senior Counsel

National Wildlife Federation

Great Lakes Regional Center

213 West Liberty Street, Suite 200

Ann Arbor, Michigan 48104

734-887-7106

734-887-7199 fax

kagan@nwf.org

PETER A. PRECARIO (0027080)

326 South High Street

Annex, Suite 100

Columbus, Ohio 43215

614-224-7883

614-224-4510 fax

precariolaw@aol.com

Counsel for Intervening Defendants-

Appellants-Cross-Appellees,

National Wildlife Federation and

Ohio Environmental Council

HOMER S. TAFT (0025112)  
20220 Center Ridge Road, Suite 300  
P.O. Box 16216  
Rocky River, Ohio 44116  
440-333-1333  
440-409-0286 fax  
hstaft@yahoo.com  
Intervening Plaintiff-Appellee-  
Cross-Appellant, Pro Se

L. SCOT DUNCAN (0075158)  
1530 Willow Drive  
Sandusky, Ohio 44870  
419-627-2945  
419-625-2904 fax  
scotduncan@alum.mit.edu  
Intervening Plaintiff-Appellee, Pro Se and  
Counsel for Intervening Plaintiff-Appellee,  
Darla J. Duncan

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF INTEREST OF AMICI CURIAE..... 1

INTRODUCTION ..... 1

STATEMENT OF FACTS ..... 2

ARGUMENT..... 2

    Defendant-Appellant State of Ohio’s Proposition of Law No. 1 ..... 2

*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 [or her] authority to proceed does not require case-by-case instructions from the Governor or the General Assembly.* .....2

        A. The Ohio Attorney General is a constitutionally created executive officer with the broad independent authority and obligation to represent the State of Ohio’s legal interests in court, and conditioning that authority on the assent of the Governor or General Assembly undermines Ohio’s constitutional design. ....2

        B. Any requirement that the Attorney General seek assent from the Governor or any other executive officer would seriously hamper the ability of the Attorney General to effectively represent the State’s interest as a whole and the public generally.....6

CONCLUSION..... 7

CERTIFICATE OF SERVICE ..... 8

## TABLE OF AUTHORITIES

### CASES

<i>Ex parte Weaver</i> (Ala. 1990), 570, So.2d 675 .....	4
<i>Feeney v. Commonwealth</i> (Mass. 1977), 366 N.E.2d 1262.....	4
<i>Humphrey ex rel. State v. McLaren</i> (Minn. 1987), 402 N.W.2d 535 .....	4
<i>Manchester v. Rzewnicki</i> (D. Del. 1991), 777 F. Supp. 319.....	4
<i>People v. Massarella</i> (Ill. 1978), 382 N.E. 2d 262 .....	4
<i>State ex rel. Cordray v. Marshall</i> , 123 Ohio St. 3d 229, 2009-Ohio-4986.....	3, 5
<i>State ex rel. Doerfler v. Price</i> (1920), 101 Ohio St. 50 .....	3
<i>State ex rel. Little v. Dayton &amp; Southern-Eastern RR Co.</i> (1881), 36 Ohio St. 434.....	4
<i>State ex rel. Merrill v. State</i> (11 <sup>th</sup> Dist.), 2009-Ohio-4256 .....	1
<i>State ex rel. S. Monroe &amp; Son Co. v. Baker</i> (1925), 112 Ohio St. 356.....	3
<i>State of Florida ex rel. Shevin v. Exxon Corp.</i> (5 <sup>th</sup> Cir. 1976), 526 F.2d 266 .....	4
<i>State v. Finch</i> (Kan. 1929), 280 P. 910.....	4

### STATUTES

R.C. 109.02 .....	1, 5
-------------------	------

### CONSTITUTIONAL PROVISIONS

Section 1, Article III, Ohio Constitution.....	2
Section 5, Article III, Ohio Constitution.....	3

## **STATEMENT OF INTEREST OF AMICI CURIAE**

*Amici Curiae* Betty Montgomery, Jim Petro, and Nancy Rogers are former Ohio Attorneys General. With a combined tenure of over twelve and half years as Ohio's chief legal officer, these *Amici* have a unique perspective on the day-to-day privilege and duty of serving as Ohio's Attorney General. More importantly, *Amici* share a common interest in ensuring that the independent authority of the Attorney General to control the State's legal positions is not undermined, as it is only through such independence that Ohio's constitutional design can be maintained and the interests of the State as a whole and the people generally can be effectively served. Consequently, these *Amici* file this brief in support of Defendant-Appellant-Cross-Appellee State of Ohio's Proposition of Law No. 1 and for the limited purposes of addressing an error in the decision of the Court of Appeals that if left uncorrected threatens to undercut the constitutional independence of the Attorney General in Ohio.

These *Amici* take no position on the underlying merits of the decision below and take no position on the State of Ohio's Proposition of Law No. 2.

### **INTRODUCTION**

The Attorney General, as the State's legal counsel and a constitutionally independent executive officer, is vested with the power and duty to represent the State's legal interests. Citing only R.C. 109.02, the Court of Appeals below undercut the independent constitutional authority of Ohio's Attorney General when it made the remarkable statement that "[t]he Ohio Attorney General may only act at the behest of the governor, or the General Assembly." *State ex rel. Merrill v. State* (11<sup>th</sup> Dist.), 2009-Ohio-4256, ¶44. The Court of Appeals decision is fundamentally flawed. First, it is contrary to Ohio's constitutional design. It threatens the balance between the divided executive power established under Ohio's Constitution and

threatens the very separation of powers between the three branches of government. Second, it undermines the ability of all future Attorneys General to effectively represent the legal interests of the state and the people generally. Therefore, this Court should adopt the State of Ohio's Proposition of Law No. 1.

### **STATEMENT OF FACTS**

*Amici Curiae* adopt by reference the statement of the case and facts set forth in the Merit Brief of Defendant-Appellant-Cross-Appellee State of Ohio relevant to Defendant-Appellant State of Ohio's Proposition of Law No. 1.

### **ARGUMENT**

#### **Defendant-Appellant State of Ohio's Proposition of Law No. 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 [or her] authority to proceed does not require case-by-case instructions from the Governor or the General Assembly.*

- A. The Ohio Attorney General is a constitutionally created executive officer with the broad independent authority and obligation to represent the State of Ohio's legal interests in court, and conditioning that authority on the assent of the Governor or General Assembly undermines Ohio's constitutional design.**

In sharp contrast to the federal constitutional scheme providing for a unitary executive, the Ohio Constitution divides executive authority into separate constitutional executive officers. Since 1851, the Ohio Constitution has provided that "[t]he executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general. . . ." Section 1, Article III, Ohio Constitution. Each of these executive officers is elected directly by the voters, and each is separately responsible for a distinct domain of executive authority. As this Court recognized nearly 90 years ago, "every executive officer is

invested with certain powers and discretion, and within the scope of the powers granted and discretion conferred his dictum is supreme and his judgment is not subject to the dictation of any other officer.” *State ex rel. S. Monroe & Son Co. v. Baker* (1925), 112 Ohio St. 356, 366-67.

Thus, while “supreme executive power” is vested in the governor, Section 5, Article III, Ohio Constitution, the governor’s authority is not superior to the other executive officers when acting within the scope of their separately delegated authority. Rather, “the secretary of state, auditor of state, treasurer of state, and attorney general, all of whom are executive officers, have duties and functions wholly separate and distinct from the duties of the Governor, and wholly independent of his authority.” *State ex rel. S. Monroe & Son Co.*, 112 Ohio St. at 364. The Governor’s authority may be “supreme in the sense that no other executive is higher or authorized to control his discretion, where discretion is lodged in him, and yet it is not supreme in the sense that he may dominate the course and dictate the action and control the discretion of other executive officers of inferior rank acting within the scope of the powers, duties, and authorities conferred upon them respectively.” *Id.* at 366.

The constitutional authority of the Attorney General to act as the state’s legal representative, separate and apart from any statutory basis and independent from the interference of any other executive officer, cannot seriously be questioned. This Court has repeatedly recognized that the Ohio Constitution incorporates all of the common law powers traditionally held by an attorney general. See e.g., *State ex rel. Doerfler v. Price* (1920), 101 Ohio St. 50, 57 (“[T]he 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.”); *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986, ¶18 (framers of the Ohio Constitution incorporated all of the common law powers held by

attorneys general unless clearly abrogated by statute); *State ex rel. Little v. Dayton & Southern-Eastern RR Co.* (1881), 36 Ohio St. 434 (Attorney General held common-law authority to institute suits on behalf of the public).

Cases throughout the nation confirm what, until the Court of Appeals decision below, had never been doubted in Ohio -- that the Attorney General is empowered to direct litigation on behalf of the state, and that this power can be exercised even over the objections of other state officials. See e.g., *Feeney v. Commonwealth* (Mass. 1977), 366 N.E.2d 1262, 1267 (“Where, in his judgment, an appeal would further the interest of the Commonwealth and the public he represents, the Attorney General may prosecute an appeal . . . over the expressed objections of the State officers he represents.”); *Ex parte Weaver* (Ala. 1990), 570, So.2d 675, 684 (“The overwhelming authority supports the decision . . . that the attorney general has the power to manage and control all litigation on behalf of the State . . . .”); *State v. Finch* (Kan. 1929), 280 P. 910, 912 (“[A]s a rule, the attorney-general has power, both under the common law and by statute, to make any disposition of the state’s litigation that he deems for its best interest; for instance, he may abandon, discontinue, dismiss, or compromise it.” (quoting 2 Thornton on Attorneys at Law 1131)). Many other courts agree that an attorney general’s power to direct litigation in the State’s name is broad, and beyond the control of other state officials. See e.g., *State of Florida ex rel. Shevin v. Exxon Corp.* (5<sup>th</sup> Cir. 1976), 526 F.2d 266, 270-71 (Florida law); *Manchester v. Rzewnicki* (D. Del. 1991), 777 F. Supp. 319, 326-27; *People v. Massarella* (Ill. 1978), 382 N.E. 2d 262, 264; *Humphrey ex rel. State v. McLaren* (Minn. 1987), 402 N.W.2d 535, 539.

The broad and unqualified language of the first sentence of R.C. 109.02 fully supports the traditional, common-law understanding of the Attorney General’s power to represent the

interests of the state without condition: “The attorney general is the chief law officer *for the state and all* its departments....” And nothing in balance of R.C. 109.02 can be read as a limitation on the powers of the Attorney General, let alone authority for the Court of Appeals’ remarkable conclusion that the Attorney General did not have the authority to represent the State on appeal below. In fact, this Court has recently rejected the argument that R.C. 109.02 places a limitation on the powers of the Attorney General to institute lawsuits unless specifically requested by the Governor or the General Assembly. See *Marshall*, 123 Ohio St. 3d at ¶¶ 12-23 (Attorney General had common-law standing to commence prohibition action against common pleas court judge even though neither the governor nor the General Assembly requested that the attorney general bring the action). Moreover, even if such assent from the Governor were required, there can be no dispute that the Governor has in fact given such assent in this case. See *Supplemental Jurisdictional Brief of the Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources* (filed with this Court on January 7, 2010).

Additionally, the ruling of the Court of Appeals fails to recognize that the State as an entity is not limited to those agencies and offices under the direct control of the Governor. As already noted, the executive department of the State also includes the Treasurer, the Auditor, and the Secretary of State. And of course, state government includes the legislative and judicial branches, as well as a myriad of other boards, commissions, and other instrumentalities. It simply makes no sense that the Governor alone should have authority over litigation strategy in all cases brought against the state, especially where such litigation frequently might involve state entities independent of the Governor’s control.

Further, the Court of Appeal’s decision threatens the very notion of separation of powers. If the governor has the authority to instruct the Attorney General to not defend state law when

those laws are challenged in the courts, the Governor would be granted what amounts to an after-the-fact, extra-constitutional “veto” over any legislative enactment. Thus, the Court of Appeals decision not only undercuts the independent constitutional authority of the Attorney General, but it threatens the very power of the citizens of Ohio to enact Ohio’s laws through the legislative branch. In short, the decision of the Court of Appeals cannot be squared with Ohio’s Constitutional scheme.

**B. Any requirement that the Attorney General seek assent from the Governor or any other executive officer would seriously hamper the ability of the Attorney General to effectively represent the State’s interest as a whole and the public generally.**

The Court of Appeals’ limitation on the power of the Attorney General to represent the interests of the state is not only an affront to Ohio’s constitutional design, but it suffers from significant practical infirmities. These *Amici* know that the day-to-day effectiveness of the Office of Attorney General, as well as the fundamental interest of the State, would be seriously jeopardized if the Attorney General were required to seek the Governor’s approval on all litigation decisions.

The Office of the Attorney General employs hundreds of attorneys in a wide variety of specialty sections. These rank and file lawyers frequently must file pleadings and appear on behalf of the State on short notice, including but not limited to capital cases, election disputes, and other civil litigation where temporary restraining orders or preliminary injunctions are sought. Requiring the Governor’s assent on such matters, or any of the other myriad of cases in which the State is a party at any given time, is simply unworkable as a practical matter.

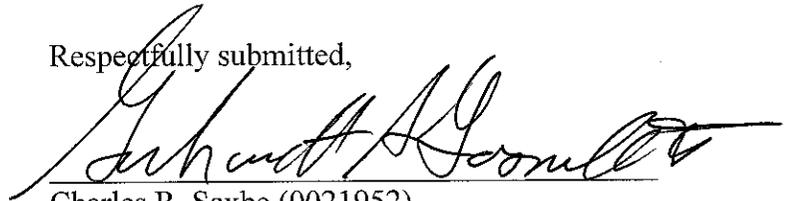
Finally, the Attorney General must always consider what the ramifications of any particular position or course of action sought to be advanced by any particular agency or state official would be on the interest of the State as a whole and on the public generally. To permit

other state officers who represent the interests of only one segment of state government to dictate a course of conduct to the Attorney General undercuts the ability of the Attorney General to establish, where possible, a uniform and consistent legal policy for the State as a whole and complicates the management of conflicts where unavoidable. In sum, effective representation of the State's interests as a whole and the public generally requires that the Attorney General control litigation undertaken in the name of the State, free from the interference of other executive officers, including the Governor.

### CONCLUSION

For the foregoing reasons, *Amici Curiae* Betty Montgomery, Jim Petro, and Nancy Rogers strongly support the adoption of Defendant-Appellant-Cross-Appellee State of Ohio's Proposition of Law No. 1.

Respectfully submitted,



Charles R. Saxbe (0021952)  
Gerhardt A. Gosnell II (0064919)  
CHESTER, WILLCOX & SAXBE LLP  
65 East State Street, Suite 1000  
Columbus, OH 43215-3413  
614-221-4000  
614-221-4012 fax  
rsaxbe@cwslaw.com  
ggosnell@cwslaw.com  
Counsel for *Amici Curiae* former Ohio Attorneys  
General Betty Montgomery, Jim Petro, and Nancy  
Rogers

**CERTIFICATE OF SERVICE**

I certify that a copy of this **Brief of *Amici Curiae* Former Ohio Attorneys General Betty Montgomery, Jim Petro, and Nancy Rogers in Support of Defendant-Appellant-Cross-Appellee State of Ohio's Proposition of Law No. 1** was served by U.S. mail this 12th day of July, 2010, upon the following counsel:

Richard Cordray  
Attorney General of Ohio  
Benjamin C. Mizer  
Solicitor General  
Stephen P. Carney  
Deputy Solicitor  
Cynthia K. Frazzini  
Assistant Attorney General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215  
Counsel for Defendant-Appellant-  
Cross-Appellee, State of Ohio

James F. Lang  
Fritz E. Berckmueller  
Calfee, Halter & Griswold LLP  
1400 McDonald Investment Center  
800 Superior Avenue  
Cleveland, Ohio 44114-2688  
Class Counsel and Counsel for Plaintiffs-  
Appellees, Robert Merrill, Trustee, et al.

Homer S. Taft  
20220 Center Ridge Road, Suite 300  
P.O. Box 16216  
Rocky River, Ohio 44116  
Intervening Plaintiff-Appellee-Cross-  
Appellant, Pro Se

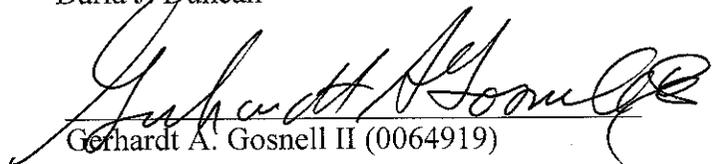
Kathleen M. Trafford  
Porter, Wright, Morris & Arthur, LLP  
41 S. High Street  
Columbus, Ohio 43215  
Special Counsel for Defendants-Appellants-  
Cross-Appellees,  
Ohio Department of Natural Resources and  
Sean Logan, Director

Neil S. Kagan  
Senior Counsel  
National Wildlife Federation  
Great Lakes Regional Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104

Peter A. Precario  
326 South High Street  
Annex, Suite 100  
Columbus, Ohio 43215

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

L. Scot Duncan  
1530 Willow Drive  
Sandusky, Ohio 44870  
Intervening Plaintiff-Appellee, Pro Se and  
Counsel for Intervening Plaintiff-Appellee,  
Darla J. Duncan

  
Gerhardt A. Gosnell II (0064919)