

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO, *ex rel*,
ROBERT MERRILL, TRUSTEE, *et al.*,

Case No. 09-1806

Plaintiffs-Appellees,

On Appeal from the
Lake County
Court of Appeals,
Eleventh Appellate District

and

HOMER S. TAFT, *et al.*,

Court of Appeals Case Nos.
2008-L-007, 2008-L-008
Consolidated

Intervening Plaintiffs-Appellees

v.

STATE OF OHIO, DEPARTMENT OF

Defendants-Appellants,

and

STATE OF OHIO,

Defendant-Appellant,

and

NATIONAL WILDLIFE FEDERATION, *et al.*,

Intervening Defendants-Appellants

**BRIEF OF AMICI CURIAE STATES OF MICHIGAN AND PENNSYLVANIA
IN SUPPORT OF DEFENDANT-APPELLANT-CROSS-APPELLEE STATE OF OHIO**

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TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	ii
Introduction.....	1
Statement of Amicus Interest.....	1
Statement of the Case and Facts	1
Argument	2
I. The Public Trust Doctrine is an ancient principle of law recognizing the importance of preserving every citizen's right to use navigable waters. To protect these rights, the public's interest in the bottomlands of navigable waters was recognized for hundreds of years under the English common law that was almost universally adopted in the United States. The boundary between bottomland and upland in navigable waters under the common law was defined by the ordinary high water mark, and every State was vested with title to bottomlands below that mark upon achieving statehood. The Public Trust Doctrine obligates the State to preserve the public's rights in Great Lakes bottomlands below the ordinary high water mark , even if those bottomlands are temporarily exposed.	2
A. The Public Trust Doctrine is a longstanding and universally recognized principle requiring that states protect and preserve their citizen's rights to use navigable waters for certain purposes.	2
B. All other Great Lake states have set the boundary for where the public's rights under Public Trust Doctrine must be recognized and preserved as below the ordinary high-water mark.	4
II. Ohio law has been consistent with the other Great Lakes States in recognizing the public's rights below the ordinary high water mark, starting with the decision in <i>Sloan v. Biemiller</i> . The Court of Appeals ignored this Court's precedent in its ruling that the public has no interest in the area of shoreline above the current waterline but below the ordinary high water mark.	8
CONCLUSION.....	10
CERTIFICATE OF SERVICE	12

INDEX OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Burnham v. Jones</i> , 20 N.E. 577 (N.Y. 1889).....	7
<i>Cobb v. Lincoln Park Comm'rs</i> , 67 N.E. 5 (Ill. 1903).....	5
<i>Freeland v. Pa. R.R. Co.</i> , 47 A. 745 (Pa. 1901).....	7
<i>Glass v. Goeckel</i> , 703 N.W.2d 58 (2005).....	5, 9, 10
<i>Illinois Central R.R. Co. v. Illinois</i> , 146 U.S. 387; 13 S. Ct. 110; 36 L. Ed. 1018 (1892).....	3, 4, 6, 7
<i>Matter of Lupo v. Board of Assessors of Town of Huron</i> , 2005 NY Slip Op 25295 (N.Y. Sup. Ct. 2005).....	7
<i>R.W. Docks & Slips v. Wisconsin</i> , 628 N.W.2d 781 (Wis. 2001).....	7
<i>Seaman v. Smith</i> 24 Ill. 521 (1860).....	5, 8, 9
<i>Sherlock v. Bainbridge</i> , 41 Ind. 35 (1872).....	5
<i>Shively v. Bowlby</i> , 152 U.S. 1; 14 S. Ct. 548; 38 L. Ed. 331 (1894).....	3, 5
<i>Sprague v. Nelson</i> , 6 Pa. D. & C. 493 (1924).....	7
<i>State v. Slotness</i> , 185 N.W.2d 532 (Minn. 1971).....	6
<i>Wisconsin v. Trudeau</i> , 408 N.W.2d 337 (Wis. 1987).....	7

Statutes

312 Ind. Admin. Code 1-1-26(2) (2009)..... 6

Other Authorities

<http://www.lre.usace.army.mil/greatlakes/hh/datalinks/PrinterFriendly/quickGraph.pdf>
(graph summarizing Great Lakes water level data between 1918 and 2009)..... 9

Robert Haskell Abrams, *Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in Glass v. Goeckel*, 40 Mich. L.J. Reform 861, 898 (2007)..... 6

The Institutes of Justinian
bk. 2, tit. 1, pts. 1-6, at 65 (J Thomas trans. 1975) 2

INTRODUCTION

The common law Public Trust Doctrine—the principle that all citizens have the right to use navigable waters for commerce, navigation, and fishing—is uniformly recognized and applied throughout the Great Lakes region. While the Great Lakes States may differ in how they describe the respective rights of the public and lakefront property owners on the shoreline as a matter of State property law (and in the precise scope of the rights protected by the Public Trust Doctrine) all Great Lakes States, including Ohio, have uniformly recognized that these rights exist. And that the area where they apply is defined by the ordinary high water mark of the Great Lakes. The Court of Appeals' decision, which extinguishes all public rights in the shore unless it happens to be covered by water at that moment, is a radical and unjustified departure from this universally recognized principle. Unless reversed, that decision will not only place Ohio law at odds with the laws of the other Great Lakes States, but may infringe upon the rights of the public to lawfully use Lake Erie.

STATEMENT OF AMICUS INTEREST

The States of Michigan and Pennsylvania contain parts of one or more of the Great Lakes. Within their respective borders, each of these States, like Ohio, holds a sovereign interest in the waters and bottomlands of the Lakes. Under the Public Trust Doctrine, each of the amici States, like Ohio, holds these waters and lands as a trustee for the benefit of the public and has the responsibility to protect these resources and the public's rights to use them. The Great Lakes States have a strong and shared interest in ensuring the ability of their citizens to lawfully exercise public trust rights throughout the Great Lakes region, including Lake Erie.

STATEMENT OF THE CASE AND FACTS

Amici Curiae, States of Michigan and Pennsylvania, accept Defendant-Appellant-Cross-Appellee State of Ohio's Statement of the Case and Facts.

ARGUMENT

- I. The Public Trust Doctrine is an ancient principle of law recognizing the importance of preserving every citizen's right to use navigable waters. To protect these rights, the public's interest in the bottomlands of navigable waters was recognized for hundreds of years under the English common law that was almost universally adopted in the United States. The boundary between bottomland and upland in navigable waters under the common law was defined by the ordinary high water mark, and every State was vested with title to bottomlands below that mark upon achieving statehood. The Public Trust Doctrine obligates the State to preserve the public's rights in Great Lakes bottomlands below the ordinary high water mark, even if those bottomlands are temporarily exposed.**

Defendant-Appellant-Cross-Appellee State of Ohio has provided a comprehensive discussion of the Public Trust Doctrine. The state Amici Curiae will not duplicate those efforts, but will emphasize certain key points, particularly that the Great Lakes States have consistently recognized the rights protected under the Public Trust Doctrine, and that the area where those rights can be exercised has consistently been held to be defined by the ordinary high water mark.

- A. The Public Trust Doctrine is a longstanding and universally recognized principle requiring that states protect and preserve their citizen's rights to use navigable waters for certain purposes.**

The principle of public rights in natural resources that underlies the Public Trust Doctrine can be traced back to Roman civil law. The sixth-century Institutes of Justinian declared that natural resources, including the sea and seashore, were owned by the public: "By the law of nature these things are common to all mankind – the air, running water, the sea, and consequently the shore of the sea." The Institutes of Justinian bk. 2, tit. 1, pts. 1-6, at 65 (J Thomas trans. 1975). Because the sea and the seashore were commonly owned, the public could access the shore as long as other property interests were not harmed. "No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations." The Institutes of Justinian bk. 2, tit. 1, pts. 1-6, at 65 (J Thomas trans. 1975).

English common law also preserved the public's rights in the sea and seashore. Unlike Roman law, however, English law safeguarded the public's rights by vesting title of all tidal waters and lands

below the high water mark in the King. *Shively v. Bowlby*, 152 U.S. 1, 11; 14 S. Ct. 548; 38 L. Ed. 331 (1894).

The shore is that ground that is between the ordinary high water and low water mark. This doth prima facie and of common right belong to the King, both in the shore of the sea and the shore of the arms of the sea. [*Shively v. Bowlby*, 152 U.S. at 12 (quoting Hargrave's Law Tracts).]

The King held two types of title in the lands below the high water mark: the *jus privatum* title in the King as sovereign, and the *jus publicum* title in the King as representative of the public and for the public benefit. While the *jus privatum* title could be conveyed, the private interest was always subject to the King's *jus publicum* title to protect the rights of the public to engage in commerce, fish, and navigate in the waters.

American common law expanded the doctrine to all navigable waters. In the seminal case of *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387; 13 S. Ct. 110; 36 L. Ed. 1018 (1892), the United States Supreme Court plainly held that the Public Trust Doctrine applied to the Great Lakes. The Court recognized that the doctrine "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. at 436. Thus, upon statehood, the several Great Lakes States were given title to lands under the Great Lakes, "subject to the same trusts and limitations" as are impressed on tidal waters. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. at 437.

When the State of Ohio entered the Union on equal footing with the original States, it received title in trust to lands below the high water mark of all navigable waters. *Shively v. Bowlby*, 152 U.S. at 26-27. As trustee, Ohio has an affirmative obligation to guard against private encroachment of these interests. The State holds the lands "in trust for the people of the State that they may enjoy the

navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. at 452.

Regardless of how the property right Ohio retains in the lands below the high water mark is characterized under State law, the Public Trust Doctrine is foremost a restraint on the State's ability to use or convey these lands. As a trustee, the State must act in the best interests of the public. Just as the King was limited in his ability to convey trust lands to private parties, so is the State. "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Illinois Central R.R. Co. v. Illinois*, 146 U.S. at 453. The only exception to this limitation is when a conveyance is used to promote the public interest or there is no substantial impairment of the public interest in the remaining lands and waters.

B. All other Great Lake states have set the boundary for where the public's rights under Public Trust Doctrine must be recognized and preserved as below the ordinary high-water mark.

While each of the Great Lakes States has a different way of describing the respective property interests of lakefront property owners and the public in the shoreline of the Great Lakes, each of the States recognizes the principle that the public has rights in the bottomlands of the Great Lakes below the ordinary high water mark. A brief survey of each State's law is provided below.

Michigan

The recent Michigan case of *Glass v. Goeckel*, 703 N.W.2d 58 (2005), clearly established the boundary for where the public's rights under Public Trust Doctrine exist in Michigan – below the "ordinary high water mark." *Glass v. Goeckel*, 703 N.W.2d at 71. The *Glass* court held that on the Great Lakes shoreline where there is an overlap of private title and public trust doctrine rights, "the private title of littoral landowners remains subject to the public trust beneath the ordinary high water mark." *Glass v. Goeckel*, 703 N.W.2d at 73.

Illinois

The State of Illinois similarly recognizes the ordinary high water mark as the line defining the area where the public retains an interest. The early Illinois case of *Seaman v. Smith*, 24 Ill. 521 (1860) (cited but misinterpreted by the Court of Appeals below), first noted that the rule was that the upland owner held title only to the ordinary high-water mark on oceans and bays. The case then described the analogous point of separation with regards to a property bounded by a non-tidal body, Lake Michigan, as being "that place where its outer edge is *usually* found." *Seaman v. Smith*, 24 Ill. at 525. (Emphasis added.) A later Illinois case traced the Illinois rule for Lake Michigan back to the *Shively* case, stating that, "below ordinary high-water mark ... this title (*jus privatum*), whether in the sovereign or in the subject, is held subject to the public right (*jus publicum*) of navigation and fishing." *Cobb v. Lincoln Park Comm'rs*, 67 N.E. 5, 6 (Ill. 1903).

Indiana

The State of Indiana has no case on point concerning the Great Lakes but has recognized the public's right of access below the ordinary high water mark in a case involving the Ohio River. *Sherlock v. Bainbridge*, 41 Ind. 35, 45 (1872). Moreover, Indiana, through the exercise of its regulatory authority, has administratively defined the ordinary high water mark as the demarcation for a navigable waterway. 312 Ind. Admin. Code 1-1-26(2) (2009).

Minnesota

Minnesota recognizes the rights of the public below the ordinary high water mark in a different way. Its courts have held that the boundary between privately held uplands and the state-owned bottomlands of Lake Superior is the ordinary low water mark. *State v. Slotness*, 185 N.W.2d 532, 533 (Minn. 1971). But while littoral owners own to the low water mark, this private ownership is exclusive only to the ordinary high-water mark. The area between the high and low water marks is clearly subject to public rights. *State v. Slotness*, 185 N.W.2d at 533.

As noted by Professor Robert Haskell Abrams,

[T]he Minnesota example is quite helpful in relation to judicial opinions that find, in one phrasing or another, that each state is free to formulate its own public trust law. Minnesota, by granting private title to the foreshore subject to a paramount public usufruct, established a unique property law/public trust law for its foreshore without abandoning the core principles of the public trust doctrine. Plainly, from a public trust perspective, it is not a denial of the trust for the upland owner to own down to low water as long as the trust remains intact to high water. Formulating localized public trust law is not the same as being able to disregard the trust altogether. [Robert Haskell Abrams, *Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in Glass v. Goeckel*, 40 Mich. L.J. Reform 861, 898 (2007).]

New York

The State of New York presents a somewhat unique situation. Unlike the other Great Lakes States, New York also has an extensive boundary on the Atlantic Ocean that is subject to the rise and fall of the tides. But *Illinois Central* held that for purposes of the Public Trust Doctrine, the Great Lakes were "fresh water seas" and subject to the same rules as the ocean. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. at 437. New York recognizes its obligations under the Public Trust Doctrine, the "State of New York holds lands under navigable waters and the foreshore in its sovereign capacity as trustee for the beneficial use and enjoyment of the public. The doctrine grows out of the *jus publicum*, the public right of navigation and fishery." *Matter of Lupo v. Board of Assessors of Town of Huron*, 2005 NY Slip Op 25295 (N.Y. Sup. Ct. 2005). The New York Court of Appeals recognized state trust

ownership of great lakes bottomlands to the ordinary high-water mark in *Burnham v. Jones*, 20 N.E. 577 (N.Y. 1889).

Pennsylvania

The Commonwealth of Pennsylvania recognizes the rights of the public under the Public Trust Doctrine up to the high-water mark on navigable rivers even when the riparian title ran to low water. *Freeland v. Pa. R.R. Co.*, 47 A. 745 (Pa. 1901). "Though the title of a riparian owner to the soil extends to low watermark, it is absolute only to high, and qualified as to what intervenes. Between high and low water he can use the land for his own private purposes, provided that, in such use of it, he does not interfere with the public rights of navigation, fishery and improvement of the stream." *Freeland v. Pa. R.R. Co.*, 47 A at 746. That decision was applied to the Lake Erie shore. *Sprague v. Nelson*, 6 Pa. D. & C. 493, 496 (1924).

Wisconsin

The State of Wisconsin's application of the Public Trust Doctrine in Wisconsin along the Great Lakes shore is clear: the state owns the shore below the ordinary high-water mark along Lakes Superior and Michigan in trust for the people. The Wisconsin Supreme Court has held that the public trust right up to the high-water mark "is established by judicial authority so long acquiesced in as to become a rule of property." *R.W. Docks & Slips v. Wisconsin*, 628 N.W.2d 781, 788 (Wis. 2001). The Court has defined the ordinary high water mark as where "the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristics." *Wisconsin v. Trudeau*, 408 N.W.2d 337, 343 (Wis. 1987).

Summary

In sum, all of the other Great Lake states have consistently adhered to the legal principle that the waters and bottomlands of the Great Lakes up to the ordinary high water mark are subject to the Public Trust. Accordingly, each State retains the legal duty to regulate activities on those bottomlands below the ordinary high water mark, including those that may be temporarily exposed by fluctuations in water levels, in order to preserve and protect the rights of the public.

II. **Ohio law has been consistent with the other Great Lakes States in recognizing the public's rights below the ordinary high water mark, starting with the decision in *Sloan v. Biemiller*. The Court of Appeals ignored this Court's precedent in its ruling that the public has no interest in the area of shoreline above the current waterline but below the ordinary high water mark.**

This Court first addressed the Lake Erie boundary in *Sloan v. Biemiller*, 34 Ohio St. 492, 495 (1878), and it located that boundary as the "ordinary high-water mark." As the Court of Appeals recognized, *Sloan* had borrowed this language from an Illinois Supreme Court opinion of *Seaman v. Smith*, 24 Ill. 521 (1860), which rejected the high water mark as the boundary in favor of the ordinary high water mark. *Seaman v. Smith*, 24 Ill. at 524-25. The Illinois Court in *Seaman* acknowledged that the Great Lakes, unlike the oceans and seas have "no appreciable tides." Yet, as that Court further acknowledged, "the rules that govern boundaries on the ocean, govern this case." *Seaman v. Smith*, 24 Ill. at 524. The *Seaman* Court went on to hold that,

the highest point to which storms or other extraordinary disturbing causes may drive the water on the shore, should not be regarded as the point where the owner's rights terminate, nor yet should it not be extended to the lowest point to which it may recede from like disturbing causes, But it should be at that line where the water usually stands when unaffected by any disturbing cause. The portion of the soil which is only seldom covered with water may be valuable for cultivation or other private purposes. And the line at which it usually stands unaffected by storms and other causes, represents the **ordinary high water mark** on the ocean, and the point between the highest and lowest water marks produced by the tides. [Emphasis added.]

The *Sloan* Court, by adopting the holding in *Seaman*, identified the boundary of Lake Erie as the ordinary high water mark, and not the highest, nor the lowest mark, and clearly not where the

water meets the land at any given point in time. Thus, Court of Appeals holding that only lands "when submerged" (App. Op. ¶ 129.) are subject to the public trust unjustifiably departs from the principle—applied by this Court in *Sloan*, and each of the other Great States as outlined above—that the bottomlands of the Great Lakes, up to the ordinary high water mark, are impressed with the public trust.

By radically departing from the well-established law of Ohio and the other Great Lakes States, the decision of the Court of Appeals undermines the Public Trust Doctrine and threatens the public rights that the Doctrine is intended to protect. While the Great Lakes, unlike the oceans, are not subject to the rise and fall of tides, the levels of the Great Lakes do fluctuate, over time, between the low and high water marks.¹ As the Michigan Supreme Court explained in *Glass v Goeckel*, in the context of the Great Lakes, the Public Trust doctrine protects bottomlands below the ordinary high water mark, including lands temporarily exposed because of natural, nontidal, changes in water levels:

In the Great Lakes, water levels change because of precipitation, barometric pressure, and other forces that lack the regularity of lunar tides, which themselves exert a less noticeable influence on the Great Lakes than on the oceans. Applying a term from the common law of the sea, despite the obvious difference between the oceans and the Great Lakes, has led to some apparent discontinuity in the terminology employed in our case law. Notwithstanding some prior imprecision in its use, a term such as 'ordinary high water mark' attempts to encapsulate the fact that water levels in the Great Lakes fluctuate. This fluctuation results in temporary exposure of land that may then remain exposed above where water currently lies. This land, although not immediately and presently submerged, falls within the ambit of the public trust because the lake has not permanently receded from that point and may yet again exert its influence up to that point. . . . Thus, the ordinary high water mark still has meaning as applied to the Great Lakes and marks the boundary of land, even if not instantaneously submerged, included within the public trust. [*Glass v. Goeckel*, 703 N.W.2d at 71-72 (internal citations omitted).]

¹ The dynamic nature of water levels in the Great Lakes, including Lake Erie, is reflected in the water level monitoring data regularly compiled by the United State Army Corps of Engineers from a network of monitoring gauges around the Lakes. See, for example: <http://www.lre.usace.army.mil/greatlakes/hh/datalinks/PrinterFriendly/quickGraph.pdf> (graph summarizing Great Lakes water level data between 1918 and 2009).

Because temporarily exposed lands below the ordinary high water mark are, by definition, lands which will again be submerged by the waters of the particular Great Lake when they return to their "ordinary" or "usual" level, the Public Trust Doctrine establishes that the State, as trustee, retains, and may not abdicate its responsibility to regulate such bottomlands in order to protect the reasonable exercise of public rights, such as navigation and fishing in the Lake. But under the Court of Appeals' decision, the State of Ohio would be stripped of that authority. For example, so long as the "actual water's edge" was below the ordinary high water mark at the time of construction, the littoral property owner would have an absolute right to erect a building or other structure on the temporarily exposed bottomlands that could unreasonably interfere with the public's rights to fish and navigate in Lake Erie when the waters returned to the ordinary high water mark. Thus, even apart from its obvious impracticality and instability, the rule adopted by the Court of Appeals, which relies upon momentary presence of water at a particular location to absolutely divide public and private rights is plainly at odds with the Public Trust Doctrine in Ohio and the Great Lakes region as whole.

CONCLUSION

Amici States recognize that each State is free to define its own property law, and to specify the particular activities protected by the Public Trust Doctrine, and to provide for regulation to ensure that those rights are exercised in a reasonable manner with due regard to the rights of littoral property owners and the public generally. Amici States also recognize, as does Ohio, that littoral property owners have certain unique rights that are established and protected by State law. Thus, the details of precisely where and how Ohio law defines property boundaries, or how it specifies and regulates the exercise of public trust rights are beyond the scope of this brief. Indeed, as Ohio notes in its brief, this Court need not decide those issues in the present case.

But Amici States respectfully submit that the Court can and should correct the erroneous decision of the Court of Appeals that the Public Trust Doctrine applies only to lands that are, at any given moment, under water. The Court should instead reaffirm—as held in *Sloan*, and as recognized in every other Great Lakes State—that the public trust doctrine protects public rights in lake bottom lands up to the ordinary high water mark. Only such a holding will preserve the integrity of a core principle of the Public Trust Doctrine throughout the Great Lakes and protect the public trust rights of all citizens, including those of the Amici States, boat and fish in Lake Erie.

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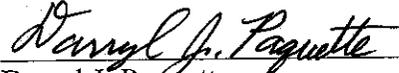
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