

**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, )  
 )  
 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. )

No. 2009-1806  
 On Appeal from the Lake County  
 Court of Appeals, Eleventh  
 Appellate District  
 Court of Appeals Case  
 Nos. 2008-L-007, 2008-1-008  
 Consolidated

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**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION  
 IN SUPPORT OF STATE OF OHIO EX REL. ROBERT MERRILL, TRUSTEE, ET AL.**

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## INTRODUCTION AND INTEREST OF AMICUS CURIAE

Pursuant to Rule VI, section 6, of the Rules of Practice of the Supreme Court of Ohio, Pacific Legal Foundation (PLF) respectfully files this brief amicus curiae in support of Plaintiff Appellees, State of Ohio *ex rel.* Robert Merrill Trustee, et al. A motion for admission pro hac vice of R. S. Radford and Luke A. Wake is pending before this Court.

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of public interest. PLF has numerous supporters and contributors nationwide, including in the State of Ohio.

For over 36 years, Pacific Legal Foundation has litigated in support of property rights. PLF has participated, either through direct representation or as amicus curiae, in every major property rights case heard by the United States Supreme Court in the past three decades, including *Kelo v. City of New London*, 545 U.S. 469 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF has also been involved with many cases raising similar questions to those presented in this case. *See, e.g., Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009) (addressing a legislative expansion of public beach access effecting a taking of private property); *Env't'l Prot. Info. Ctr. v. California Dep't of Forestry & Fire Prot.*, 187 P.3d 888, 897 (Cal. 2008) (addressing a proposed expansion of the public trust doctrine over all wildlife); *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1110 (Fla. 2008) (addressing the scope of Florida's public trust). Moreover, PLF attorneys have contributed to the body of scholarly literature on the public trust doctrine and the background principles of property law. *See, e.g.,* David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings*

*Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339 (2002); James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. Env'tl. Aff. L. Rev. 1 (2002).

PLF's attorneys are familiar with the legal issues raised by this case and the briefs on file in this Court. PLF appears in this action to offer guidance to this Court on background principles of property law and on the proper application of the public trust doctrine. In furtherance of PLF's continuing mission to defend private property rights, PLF urges this Court to avoid expanding the scope of Ohio's public trust doctrine.

### **QUESTIONS PRESENTED**

Amicus Curiae Pacific Legal Foundation addresses the following questions:

1. Would "recognition" of a public trust up to the annual ordinary high water mark, along the shores of Lake Erie, represent an expansion of the public trust beyond its original scope as recognized by the original thirteen states at the time of the ratification of the U.S. Constitution in 1787?
2. Would expansion of the public trust doctrine up to the annual ordinary high water mark, along the shores of Lake Erie, unconstitutionally take private property in violation of the Fifth Amendment?

### **INTRODUCTION**

The present case involves a territorial dispute over the strip of land between Lake Erie's high and low water marks. The State of Ohio asserts that, under the public trust doctrine, it owns the bed of the Lake, and the land beyond the water's edge, all the way up to the "ordinary high water mark" as fixed by the Army Corps of Engineers when the Lake was at its highest recorded level. Yet Ohio

law has never held the public trust to extend beyond the shores of the Lake. Both statutory and common law hold that the public trust entails only the bed of the Lake, and extends no farther than the point at which the water meets the shore.

Over the years, the State has changed its position three times as to where the public trust ends and unencumbered private property begins.<sup>1</sup> Each time, the State encroached further, claiming more land as part of the public trust. In the late 1960s and 1970s, the State recognized that the public trust extended no farther than the Lake's mean low-water mark. Class Supp., Exh. B at 25 (10/12/1970 letter from R. Weisent for DWP to E. Feick). Then, in the late 1970s the State extended the public trust beyond the low-water mark to that point at which the water meets the shore. Class Supp., Exh. B at 35 (Public Review Draft, Coastal Zone Management Program, 1979 at 99). The State again affirmed that the public trust boundary is the natural shoreline in 1993. *See* Ohio Attorney General, Opinion No. 93-025, 1993 Ohio A6 LEXIS 27 (1993). Yet the State has recently begun to assert that the public trust extends even farther, all the way up to the "ordinary high-water mark," as defined by the Army Corps of Engineers at the Lake's all-time historic high-water level.<sup>2</sup> Class Supp., Exh. B, Herdendorf Exh. B, pp. 2, 3. After extending the public trust to the Lake's historic high-water level, the Ohio Department of Natural Resources (ODNR) began issuing bills to littoral landowners,

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<sup>1</sup> We refer to "unencumbered private property" as being property unencumbered by the public trust. Such property may in fact be encumbered by liens or other instruments of property law, but for the purpose of the present dispute are merely to be understood as privately held properties outside the public trust. Such lands may include properties owned by public entities outside the public trust as well.

<sup>2</sup> The Army Corps of Engineers established the "ordinary high water mark" in 1992 following a six-year review of Lake Erie during the 1980s when the Lake was at a historic high. *See* "IGLD 1985—Brochure on the International Great Lakes Datum," Coordinating Committee on Great Lakes Basic Hydraulic Data, January 1992, at 2, *available at* <http://huron.lre.usace.army.mil/IGLD.1985/igldhmpg.html> (last visited Aug. 8, 2010).

charging them rent for the use of the land beneath that mark, despite the fact that the State had previously recognized exclusive private property rights to the waters edge and below.

The littoral landowners then challenged the State's assertion of ownership over the land below the expansive "ordinary high-water mark" measure. The court of appeals held that the Lake Erie public trust extends no farther than the point at which the water meets the shore, and that the State had wrongfully asserted dominion over the land above. Thus the court ruled that littoral landowners retain unencumbered title to the land down to the water's edge. *State ex. rel. Merrill v. State*, 2009 Ohio 4256, 42 (Ohio. Ct. App., Lake County Aug. 21, 2009).

This Court is now called upon to define the scope of the Lake Erie public trust, and to demarcate where that trust ends and where unencumbered private property begins. Though courts have previously discussed the public trust's application in the bed of Lake Erie, and indicated that the public trust extends no farther than the water's edge, no decision has ever seriously examined the question of where the boundary lies between public trust and unencumbered private property. Yet the historical public trust doctrine at common law provides ample guidance to this Court in determining the demarcation line.

## ARGUMENT

### I

#### **EXPANDING OHIO'S PUBLIC TRUST BEYOND ITS EXTENT AT THE TIME THE U.S. CONSTITUTION WAS RATIFIED WOULD ABROGATE CONSTITUTIONAL PROTECTIONS OF PRIVATE PROPERTY RIGHTS**

The scope of Ohio's public trust is a question of the state's property law; however, this Court is not free to define the scope of the public trust in any manner it should choose. The Fifth

Amendment places a constraint upon all branches of state government through the Fourteenth Amendment. Ohio's public trust should be defined no more expansively than the public trust was understood to be historically at common law when Ohio attained its sovereign powers, because any expansion would effect a compensable taking.

**A. The Fifth Amendment Prohibits the Uncompensated Taking of Private Property Rights Through Expansion of the Public Trust**

The question of where the Lake Erie public trust ends and where unencumbered private property begins must be resolved in a manner consistent with the Fifth Amendment of the United States Constitution, which provides that government may not take private property without just compensation. Although as a general matter property rights are determined by state law, the background principles of property law cannot be changed in such a way as to negate previously recognized rights without the state incurring liability for a constitutional taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1032 (1992) (“We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.”). The U.S. Supreme Court recently underscored that point in *Stop the Beach Renourishment*, as a majority of the Justices agreed that judicial redefinition of the background principles of a state's property law would raise federal constitutional problems. *See Stop the Beach Renourishment v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2601 (2010) (Justice Scalia, writing on behalf of Chief Justice Roberts, Justice Thomas, and Justice Alito, stated that the Fifth Amendment prohibits state courts from redefining property rights out of existence unless compensation is paid); *see also id.* at 2614 (Justice Kennedy and Justice Sotomayor stating that “a

judicial decision . . . [eliminating] an established property right, [may be] set aside as a deprivation of property without due process of law.” (internal quotations and citations omitted)).

Here the State argues that the public trust extends all the way to the Army Corps’ administratively established “ordinary high-water mark;” however, that demarcation line encroaches upon property previously recognized as private and unencumbered, and thereby takes property without compensation, in violation of the Fifth Amendment. Though the State contends that the public trust has extended to the Army Corps’ “ordinary high water mark” since Ohio joined the Union in 1803, that contention cannot be squared with the historical roots of the public trust doctrine.

**B. Ohio’s Public Trust Is Constrained by the Historical Common Law Origins of the Doctrine**

Under English common law, the land beneath the seabed was held by the sovereign in trust for public navigation and fishing. Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 Alb. L. Rev. 623, 628 (1998). The public trust was limited to the land beneath tidal waters since the doctrine was first set forth in Roman law out of recognition that the land beneath the sea was unsuitable for private use. David C. Slade, *Putting the Public Trust Doctrine to Work* xvii (National Public Trust Study, 1990); see also George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within Penumbra*, 33 B.C. Envtl. Aff. L. Rev. 307, 310 (2006) (In 530 A.D. the Institutes of Justinian pronounced that watercourses should be protected from private acquisition). This common law tradition passed to the original thirteen states at the time they attained sovereignty over the beds of the sea following the revolution. *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367 (1842) (United

States Supreme Court held that the crown's interest in tidelands passed to New Jersey upon the American Revolution).

As had long been the rule at common law, the public trust acquired by the original thirteen states encompassed only the bed of tidal lands, and the boundary of the public trust was demarcated at the mean high-tide mark, as measured over an 18.6 year period in order to account for the full lunar cycle effecting the ebb and flow of the tides. See Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 Clev. St. L. Rev. 1, 23 (2010). Likewise, the Supreme Court has recognized that the public trust doctrine applies in the Great Lakes by the same terms as it applied historically at common law when the thirteen original states ratified the Constitution, because newly admitted states entered the Union upon equal footing the others. *Ill. Cent. R.R. v. Ill.*, 146 U.S. 387, 434 (1892) (holding that there was no rationale for differentiating between traditional tidal water bodies and the Great Lakes given the fact that they served the same historical public purposes of fishing and commerce-driven navigation).

Accordingly, Ohio attained a public trust in the land beneath Lake Erie upon its admission into the Union, but the scope of that trust was no greater than the scope of the public trust recognized at common law at the time the Constitution was ratified in 1787. *Id.* at 437 (public trust in the Great Lakes is subject to the same limitations as the public trust had always been at common law). The State of Ohio concedes this much, stating that its sovereign powers as trustee over the Lake Erie public trust were attained from the common law of the original states as it had been handed down from England. See Merit Br. of Def.-Appellant-Cross-Appellee State of Ohio, at 23, Lake County Court of Common Pleas, Case No. 04CV001080 (July 12, 2010).

As such, this Court should reject any demarcation line which may expand the public trust beyond its historical common law scope, because Ohio's sovereign powers can be no greater than those of the original states. Any expansion of the public trust, beyond the scope of the powers originally acquired on equal footing, would redefine the public trust and annihilate private property rights along the Lake's shore in violation of the Fifth Amendment.

## II

### **THE DEMARCATION LINE BETWEEN PUBLIC TRUST LANDS AND UNENCUMBERED PRIVATE PROPERTY CANNOT BE BASED UPON THE ARMY CORPS' "ORDINARY HIGH WATER MARK" ASSESSED AT THE LAKE'S HIGHEST HISTORICAL LEVEL**

Since Ohio attained its public trust on equal footing with the original thirteen states, the demarcation line between public trust and unencumbered private property can rest no farther upland than the mean daily high-water mark measured over an 18.6 year period. *See* Kilbert, *supra*, at 23. This calculus is consistent with the historical common law rule for demarcation, which held that the public trust extended upland only to the mean daily high-tide mark measured over that same time frame. Though it may be proper to recognize a demarcation line below that mean high-water mark, in light of the special nature of freshwater lakes, any calculus which would set the demarcation line farther upland would represent an expansion of the public trust and must therefore be rejected.

#### **A. The Army Corps' Administratively Determined "Ordinary High Water Mark" Rests Upland of the Historical Common Law Demarcation Line**

The State contends that the demarcation line should be based upon the Army Corps' "ordinary high water mark," even though that mark was drawn for the purpose of identifying the scope of the Army Corps' jurisdiction under the Clean Water Act, without regard or reference to the

public trust doctrine. See *United States v. Appel*, 91 Fed. Appx. 20, 22 (9th Cir. 2004). Rather than establishing the “ordinary high water mark” in consideration of measurements attained over the past 18.6 years, beginning in 1991 as the historical common law rule would dictate, the Army Corps instead based its assessment upon a six-year period during the mid-1980s when the water levels were at an all-time historical high. Class Supp., Exh. B, Herdendorf Exh. B, pp. 2, 3. This “high-water mark” demarcation line is based upon an out-dated and arbitrarily segmented assessment of the Lake’s waters that would effect an expansion of the public trust.

Since the Lake’s waters fluctuate with the seasons and the years, depending upon shifting climate patterns, different temporal assessments of the Lake’s water levels will result in varied mean high-water measures. It is therefore significant that the Army Corps’ “ordinary high-water mark” is based upon only a six-year study that is now over two decades old. This shortened period for assessment took into account only a few years when the Lake was at its highest recorded level, and excluded measures of water levels over the past 18.6 years. See *Borax Consol. Ltd. v. Los Angeles*, 296 U.S. 10, 22 (1935) (rejecting petitioner’s contention that the demarcation line should be based upon an assessment of only the highest water levels); Richard F. Brown, *Oil, Gas and Mineral Law*, 55 S.M.U. L. Rev. 1219, 1220 (2002) (averaging daily water levels over a full lunar cycle evens out the natural fluctuations that occur over shorter time periods). Therefore, since the Lake has receded from its all-time high in the 1980s, the Army Corps’ “ordinary high water mark” is necessarily upland of the historical common law mean high-water mark, and any demarcation line based upon the Army Corps’ assessment would expand the public trust. Simply put, the State wishes to extend the public trust to the Army Corp’s “ordinary high-water mark,” by basing it upon cherry-picked data resulting in the most land being transferred to the government.

The State's reliance upon *Illinois Central* is misplaced and cannot justify its purported demarcation line. *Illinois Central* merely held that Illinois holds title to the lands under the navigable waters of Lake Michigan in public trust to the point of "practical navigability." *Ill. Cent. R.R.*, 146 U.S., at 452 ("[T]he bed or soil of navigable waters is held by the people of the State in their character as sovereign in trust for public."). Nothing in *Illinois Central* indicates that the public trust doctrine applies in an expanded form in the Great Lakes, so as to justify the State's proposed demarcation. On the contrary, the opinion provides that the public trust doctrine applies in the Great Lakes with the very same limitations as it applies in traditional tidal waters. *Id.* at 437.

Neither *Illinois Central*, nor any previous decision in Ohio case law, endorses the Army Corps' arbitrarily segmented six-year assessment as the standard for demarcation. *Sloan v. Biemiller*, 34 Ohio St. 492 (1878), and *State v. Cleveland & Pittsburgh R.R. Co.*, 94 Ohio St. 61 (1916), like *Illinois Central* itself, dealt with questions pertaining to the right of private parties to use actual submerged lands in the navigable waters of the Great Lakes. Neither one of these cases closely examined the question of how the traditional demarcation rule should apply in the context of the Great Lakes. The only guidance they offer is that the Lake Erie trust is to be demarcated on the basis of the Lake's actual navigability, which *Sloan* indicates extends only "[to] the line at which the water usually stands, when free from disturbing causes." *Sloan*, 34 Ohio St. at 492; *see also Cleveland & Pittsburgh R.R. Co.*, 94 Ohio St. at 79 (stating that the littoral property owner has a right to build out to the line of navigability).

**B. The Demarcation Line Between Public Trust and Private Property Cannot Be Established in Consideration of Modern Uses**

The State cannot justify an expansion of the public trust in consideration of modern uses of the Lake, such as recreational uses or environmental protection. As set forth above, Ohio's public trust in the waters of Lake Erie is based upon the Equal Footing Doctrine, which allowed Ohio to enter the Union in 1803 with the same sovereign powers that the original thirteen states held at common law when the Constitution was ratified. *Id.* The State admits that its public trust was established by the common law at that time, and thus that Ohio's public trust doctrine must be understood within that historical context. *See* Merit Br. of Def.-Appellant-Cross-Appellee State of Ohio at 23, Lake County Court of Common Pleas, Case No. 04CV001080 (July 12, 2010). Therefore the rules for demarcation of the public trust stand as they did historically. The State cannot justify its proffered demarcation line in consideration of modern uses of the Lake, because those activities were not recognized as public trust uses historically at common law. *Id.* at 22.

Under English common law, the public trust existed only for two limited public purposes: (a) fishing and (b) navigation. Smith & Sweeney, *supra*, at 312 (“[T]he public trust doctrine officially emerged as an instrument of federal common law to preserve the public’s interest in free navigation and fishing.”). As the public trust doctrine was applied in the original thirteen states, a third use was understood as bound up with the doctrine as well. Janice Lawrence, *Lyon and Fogerty: Unprecedented Extensions of the Public Trust*, 70 Cal. L. Rev. 1138 (1982) (“Traditionally, the doctrine allowed the public to use trust lands, even if privately owned, for navigation, commerce, and fisheries.”). Commerce was vital to the development of our young nation, and was conducted largely through navigation over the waters of the United States, which served as natural public

highways connecting the states and foreign nations. As such, commerce was naturally associated with the already recognized public use of navigation in public trust waters. Those were the three recognized uses of the public trust at the time the Constitution was ratified, and thus the only three public uses upon which the Lake Erie public trust may be based. Kilbert, *supra*, at 6. Though the public may now use the Lake for recreational purposes today, or may wish to invoke the public trust doctrine to protect the environment, these modern uses simply have no bearing upon the rules for demarcation, which were established long ago.

### III

#### **SPECIAL CONSIDERATION OF LAKE ERIE'S UNIQUE CHARACTER MAY JUSTIFY DEMARCATIION AT THE WATER'S EDGE BELOW—BUT NEVER ABOVE—THE HISTORICAL COMMON LAW LINE**

While the State may confine its public trust to the land presently submerged by water, or to any point below the 18.6 year mean high-water mark, it may not expand the public trust upland of that mark without effecting a taking in violation of the Fifth Amendment. *Barney v. Keokuk*, 94 U.S. 324, 338 (1877) (The states determine the rights and title in the soil below the high water mark of navigable waters.). As discussed above, the State attained its sovereign powers under the Equal Footing Doctrine, and thus can assert dominion over submerged lands only to the extent that the original states could historically at common law. Henceforth, the 18.6 year mean high-water mark represents the ceiling to which the State may raise its public trust over submerged lands. Yet, in consideration of the unique character of Lake Erie and the historic purposes of the public trust doctrine, the State may recognize the demarcation line at the water's edge up to the mean high-water mark. *Barney*, 94 U.S. at 338 (“If [the states] choose to resign to the riparian proprietor rights which

properly belong to them in their sovereign capacity, it is not for others to raise objections.”); *but see Ill. Cent. R.R.*, 146 U.S. at 456 (holding that the public trust cannot be abandoned once recognized).

Lake Erie is distinct from traditional public trust waters because it is only marginally affected by lunar tides. Therefore, unlike traditional tidal waters, Lake Erie does not fluctuate drastically throughout the day, absent extreme events. Class Supp., Exh. B, Herdendorf Exh. B, pp. 2, 3. As a result of these differences in character, the shores of the Lake, unlike the shores of traditional tidal waters, can be put to productive private uses, which do not interfere with the historically recognized public uses of the trust. *See Lawrence, supra*, at 1148. This may justify a less expansive public trust in freshwater bodies.

Historically, the rationale supporting demarcation at the mean high-tide mark was based upon the fact that the land below that mark was submerged multiple times throughout the day by saltwater. *Id.* (“[B]ecause of their high salt content, tidelands cannot be used for many purposes other than those incident to navigation . . . .”). As such, the land below the mean high-tide mark was viewed as unsuitable for private use, but the land below Lake Erie’s mean high-water mark is perfectly suitable for private use to the point where the water meets the land because the water does not rise and fall drastically, absent extreme events. *Id.* As such, the shores of the Lake have historically been used for such productive private purposes down to the waters edge, in a way that the beaches of traditional tidal waters could not have been used. *See, e.g., Hogg v. Beerman*, 41 Ohio St. 81, 98-99 (1884) (discussing historical private uses along the waters edge including the construction of structures and agricultural uses). Thus the historical rationale for the establishment of the demarcation line as a constant at the mean high-tide mark in traditional tidal waters cuts in favor of confining the public trust to the water’s edge in freshwater bodies like Lake Erie.

Moreover, public policy has historically encouraged the productive use of land in the State, as demonstrated by the Northwest Ordinance, which authorized and encouraged the settlement of Ohio. See James H. Madison, *Land and Liberty: The Ordinances of the 1780s* 8 (1987), available at <http://www.jstor.org/pss/25162560> (last visited Sept. 15, 2010) (“The commitments made in the Northwest Ordinance encouraged westward movement and ensured that pioneering would take place within the political and psychological boundaries of the American nation.”). As such, the demarcation line should be interpreted consistent with that historic land use policy, so as to allow individuals to put the land to its most productive use.

#### IV

#### **THE PUBLIC TRUST DOCTRINE DOES NOT APPLY TO PROPERTIES PRIVATELY OWNED BEFORE OHIO’S ADMISSION TO THE UNION**

There is a carve-out exception to the public trust doctrine for property privately owned before the State joined the Union. Slade, *supra*, at 119 (conveyance prior to statehood is exempted from the public trust). Thus, wherever the demarcation line stands as a general matter of state law, the public trust doctrine cannot be applied to divest lakeshore landowners of property privately held before Ohio entered the Union in 1803. Indeed Ohio’s public trust doctrine could not have divested private landowners of their property, because Ohio only acquired its sovereign powers over the public trust through a federal act—its entrance into the Union by virtue of the Equal Footing Doctrine—which, necessarily, had to comport to the Fifth Amendment’s prohibition against government actions effecting the uncompensated taking of private property. See *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987) (an established federal conveyance prior to statehood will defeat state’s claim of title to submerged land); see also *Hogg*, 41 Ohio St. at 98-99

(recognizing certain portions of Lake Erie exempt from the public trust as a result of a conveyance from the federal government predating Ohio's statehood). Moreover, the Northwest Ordinance, which governed Ohio at the time it attained statehood, provided for the protection of private property against such governmental takings as well. Northwest Ordinance of 1787, art. 2, *available at* [http://avalon.law.yale.edu/18th\\_century/nworder.asp](http://avalon.law.yale.edu/18th_century/nworder.asp) (last visited Sept. 15, 2010) (“[S]hould the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.”). Accordingly, the public trust cannot encumber or divest any property in the State if the landowner can demonstrate a chain of title dating back before the State's admission into the Union, unless the owner is fully compensated.

### CONCLUSION

For these reasons, Pacific Legal Foundation respectfully urges this Court to determine the scope of the Lake Erie public trust in a manner consistent with the historical common law doctrine,

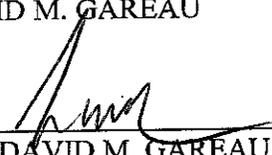
as recognized by the original thirteen states at the time they entered the union, so as to avoid negating previously recognized property rights in contravention of the Fifth Amendment.

DATED: September \_\_\_\_, 2010.

Respectfully submitted,

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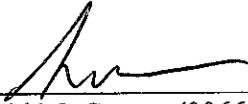
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