

**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/ )  
Cross-Appellants, )  
 )  
vs. )  
 )  
STATE OF OHIO, DEPARTMENT OF )  
NATURAL RESOURCES, *et al.*, )  
 )  
Defendants-Appellants, )  
 )  
And )  
 )  
STATE OF OHIO, )  
 )  
Defendant-Appellant/ )  
Cross-Appellee, )  
 )  
And )  
 )  
NATIONAL WILDLIFE FEDERATION, *et al.*, )  
 )  
Intervening Defendants/ )  
Appellants and 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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**BRIEF OF AMICI CURIAE CLEVELAND FRATERNAL ORDER OF  
POLICE LODGE 8 AND CLEVELAND POLICE PATROLMEN'S  
ASSOCIATION**

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## INTRODUCTION

Appellants and Appellants' amici in this action are asking this Honorable Court to condone the permanent, uncompensated taking of deeded private property (dry land) by the regulatory fiat of the Ohio Department of Natural Resources ("ODNR"), without payment of any monetary compensation to the thousands of homeowners living along the shores of Lake Erie. The relief sought by Appellants is contrary to: (1) the United States and Ohio Constitutions, U. S. Const. Amend. V; Art. I, Sec. 19, Ohio Const.; and (2) this Court's prescient recognition that "[t]he right of private property is an original and fundamental right, existing anterior to the formation of the government itself." *City of Norwood v. Horne*, 110 Ohio St. 3d 353, 362 (para. 36) 2006 Ohio 3799, 853 N.E. 2d 1115, 1128 (hereinafter referred to as "*Norwood*"). As Justice O'Connor noted in *Norwood*:

The fundamental principles set forth in the *bill of rights* in our [state] constitution, declaring the inviolability of private property, were designed to protect the right of private property as one of the primary and original objects of civil society ... (emphasis sic.) *Bank of Toledo*, 1 Ohio St. at 632.

\* \* \*

. . . it is not surprising that the founders of our state expressly incorporated individual property rights into the Ohio Constitution in terms that reinforced the sacrosanct nature of the individual's "inalienable" property rights, Section 1, Article I, which are to be held forever "inviolable." Section 19, Article I.

*Id.* at 362-63, 853 N.E. 2d 1128-29.

Indeed, this Court has long and often recognized that the right of private property ownership is a fundamental right. *Reece v. Kyle* (1892), 49 Ohio St. 475, 484, 31 N.E. 747, overruled in part on other grounds, *Mahoning City, Bar Assn. v. Ruffalo* (1964), 176 Ohio St.

263, 199 N.E. 2d 396; *Kata v. Second National Bank of Warren* (1971), 26 Ohio St. 2d 210, 271 N.E. 2d 292; *Norwood, supra*.

As this Court correctly concluded in *Norwood*:

There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.

*Norwood*, 110 Ohio St. 3d at 363, 853 N.E. 2d at 1129.

### **STATEMENT OF AMICUS INTEREST**

The law enforcement members of Amicus Curiae Cleveland Fraternal Order of Police Lodge 8 (“FOP”), Amicus Curiae Cleveland Police Patrolmen’s Association (“CPPA”), and the Cleveland Firefighters Association (FOP and CPPA are collectively referred herein as “Amici FOP/CPPA”) have taken an oath to support and defend the Constitution of the United States and the Constitution of the State of Ohio, as well as to promote and foster the enforcement of law and order and protect the public.

In support of the Constitutional rights under siege by Appellants in this action and to promote and foster the enforcement of law and order and public safety in the communities located along Lake Erie, Amici FOP/CPPA respectfully urges this Court to affirm the decision of the Eleventh District Court of Appeals that:

The shoreline, that is, the actual water’s edge, is the line of demarcation between the waters of Lake Erie and the land when submerged thereunder held in trust by the state of Ohio and those natural or filled in lands privately held by littoral owners.

2009 Ohio 4256, para. 127.

Amici FOP/CPPA respectfully urge affirmation of the Eleventh Appellate District Court’s well-reasoned decision for the reasons stated below.

## STATEMENT OF THE CASE AND FACTS

Amici FOP/CPA accept the Statement of the Case and Facts as submitted by Appellee Robert Merrill, Trustee, and Appellee Homer Taft.

### ARGUMENT

A. **The Right to Exclude Others from Their Private Property Is Both a Fundamental and Constitutional Right and Necessary to Promote Law and Order and Public Safety in the Communities along Lake Erie.**

This Court long ago recognized the right of littoral property owners to exclude the public from their private property. *Sloan v. Biemiller* (1878), 34 Ohio St. 492. Ample legal authority has recognized the demarcation between privately owned and controlled dry land and the public trust waters of Lake Erie as the “shore line.” *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 82 N.E. 709; 1993 Ohio Atty. Gen. Ops. No. 93-025, 1993 Ohio AG LEXIS 27. As the Ohio Attorney General correctly noted: “The ‘shoreline’ is ‘(t)he line marking the edge of a body of water.’” 1993 Ohio Atty. Gen. Ops. No. 93-025, 1993 Ohio AG Lexis 27. This definition is both accurate and functional, especially in the context of law enforcement and public safety.

At the heart of this dispute is the issue as to where the public is entitled to go with respect to the waters of Lake Erie and where does the right of private property owners living along Lake Erie to control access on their private dry land begin. From a law enforcement function, the Eleventh Appellate District Court’s determination that the public’s rights start at the water’s edge and go northward in the lake is practical and enforceable. The public and law enforcement officers can readily and visually determine where the water is located along the Lake Erie shore line. It is highly doubtful and far more difficult for the public and law enforcement to ascertain where the so-called “high water” mark is located. This mark is subject to challenge and debate. The location of the water is always visible. Indeed, prosecution for trespass would be far more

difficult under the ‘high water’ mark approach and would invariably lead to a dispute as to where the “high water” mark was located on the date and place of arrest. This confusion is eliminated by the clear demarcation recognized by the appellate court in this action. If it is wet, it is open to the public; if it is dry and not part of a state or local park or beach, it is private property.

More than 180 years ago, in deciding that the beds of all rivers in Ohio including the Sandusky River must be placed in private ownership, this Supreme Court recognized this same danger, noting: “if it be assumed, the United States retain the fee simple in the beds of our rivers, who is to preserve them from individual trespasses or determine matters of wrong between the trespassers themselves? [I]f all the beds of our rivers ... are to be regarded as unappropriated territory, a door is opened for incalculable mischiefs. Intruders upon the common waste would fall into endless broils among themselves, and involve the owners of adjacent lands in controversies innumerable. Stones, soil, gravel, the right to fish, would all be subjects for individual scramble, necessarily leading to violence and outrage.” *Administrators of Gavit v. Chambers*, (1828) 3 Ohio 495, 497-98.

As law enforcement and first responders, Amici FOP/CPA has a sworn duty to protect the constitutional private property rights of homeowners living along Lake Erie – property rights that this Court has deemed “fundamental” and “existing anterior to the formation of government.” *Norwood*, 110 Ohio St. 3d at 362, 853 N.E. 2d at 1128. The Eleventh District Court’s demarcation of the public’s right starting with the water lakeward of the shore line provides a fair and readily determinable delineation between public access and private property. Maintaining this reasonable and ascertainable demarcation will protect the constitutional private property rights of lakefront homeowners, allow the public the unfettered use of the waters

of Lake Erie as held in public trust accessible by state and local parks and beaches, and provide law enforcement and first responder officials with a functional means to prevent trespass and to protect public access and public safety.

Additionally, Amici FOP/CPPA is concerned that a ruling in favor of Appellants' effort to convert the now privately-owned dry land portion of the Lake Erie shore into public land will invite trespass over adjacent lakefront residential property by members of the public seeking to access the shore from the public roads along which the lakefront homes front. Inevitably, some of the enthusiastic public will be tempted to walk over lakefront homeowners' lots to get to or from Appellants' newly created public trust "beachfronts". This will result in potential confrontations between those public intruders and the lakefront homeowners, which, in turn, could lead to physical violence or, at a minimum, increased criminal trespass complaints. This will lead to more demand on local law enforcement officers and increased enforcement and prosecution costs to the taxpayers in communities along Lake Erie. That is precisely why the State of Ohio maintains Mentor Headlands, Maumee, and Cleveland Lakefront State Parks and local municipalities maintain dozens of parks and beaches along Lake Erie so that those members of the public who want to swim, fish, hunt, or walk along Lake Erie can have plenty of public access to Lake Erie.

For these reasons, Amici FOP/CPPA urges affirmance of the constitutionally sound and functionally enforceable decision by the Eleventh District Court of Appeals in this case.

**B. Reversal of the Appellate Court's Well-Reasoned Decision and Imposition of a High Water Mark Boundary Would Cause Jurisdictional and Enforcement Problems for Law Enforcement.**

In addition to the trespass enforcement confusion that a "high water" mark boundary would cause for homeowners, law enforcement, and the public, rejection of the readily

determinable water versus dry land boundary delineated by the appellate court below in this case would cause jurisdictional and enforcement problems for law enforcement officials and local prosecutors in the numerous municipalities located in the eight counties along Lake Erie.

Generally, primary responsibility for law enforcement on state-owned property along Lake Erie rests in the Ohio Department of Natural Resources. R.C. 1506.10. To the extent that Appellants urge this Court to essentially take the now-deeded private property (dry land) of lake front private property owners and convey it to the State of Ohio “in trust” for the public, primary jurisdiction by ODNR would be warranted. However, ODNR, at most, has only one wildlife enforcement officer in each county along Lake Erie. The potential for confusion, delay and jurisdictional challenges by clever defense counsel is obvious. Potential trespass defendants will simply assert the “high water mark” defense.

Currently, ODNR and the Coast Guard primarily maintain order on the waters of Lake Erie and local law enforcement officers maintain order on the non-state owned private shores along the lake. This law enforcement approach is consistent with the readily determinable public (water)-private (dry land) boundary delineated by the court of appeals in this case. Keeping the appellate court’s function and readily determinable boundary is in the best interest of (1) protecting the public, (2) respecting private property rights, and (3) maintaining good law and order and public safety.

For those reasons, Amici FOP/CPA urges that the decision of the Eleventh District Court of Appeals in this case be affirmed.

C. **Affirmance of the Appellate Court’s Decision Is Necessary to Protect the Fundamental and Constitutional Rights of the Lakefront Homeowners and to Maintain Public Safety and the Rule of the Law in Ohio.**

The members of Amici FOP/CPA have sworn to support and uphold the Constitutions of the United State and Ohio. Therefore, Appellants' quest to allow ODNR, by regulatory interpretation, to take the deeded private property rights of lakefront homeowners without providing any compensation to those homeowners is a matter of great concern to Amici FOP/CPA and its members. *See* Ohio Const., Art. I, Sec. 1 and Art. I, Sec. 19.

The dry land area at issue has been included in private conveyance deeds for almost two hundred years. Those deeds have been accepted for record by Ohio county recorders and taxes have been assessed on those private properties by the government. Appellants and their amici now ask this Court to ignore the government's prior recognition of those private property interests and to rewrite history by retroactively eliminating the deeded and recorded ownership rights of lakefront homeowners, without any compensation.

Appellants' arguments directly contravene the "fundamental" property rights of lakefront property owners. *Norwood, supra* ("the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution").

Moreover, Appellants' justification that the uncompensated alienation of lakefront homeowners' deeded private property interests is needed to provide public access to the waters of Lake Erie is simply not true. Amici FOP/CPA certainly recognizes and supports the right of Ohioans to use and enjoy the waters of Lake Erie. In fact, providing the public access to Lake Erie obviously was the reason why the State of Ohio purchased and maintains Mentor Headlands, Maumee, and Cleveland Lakefront State Parks for use by the public to access the waters of the lake, and is the reason why there are dozens of local municipal public parks and beaches along Lake Erie. If, as Appellants argue, the public always had the right to use private beachfront property along Lake Erie, why would public tax dollars have had to be spent to

provide public and local governmental state parks and beaches? The answer is obvious -- private shore area (dry land) described in the recorded deeds of lakefront homeowners is private property. In fact, that is the reason that land is taxed, the State of Ohio does not pay real property taxes on “public” land.

Amici FOP/CPA supports the maintenance of the rule of law. That rule mandates that private property deeds be respected and any taking of private property interests must comply with Article I, Section 19 of the Ohio Constitution and state law, including compensation to homeowners for any governmental taking. The rule of law also prohibits the government’s retroactive regulatory divestiture of fundamental real property rights, especially without just compensation.

In this case, maintaining the rule of law and recognizing the “fundamental” and constitutional private property rights of lakefront homeowners necessitates affirmance of the decision of the Eleventh District Court of Appeals in this case. If the State of Ohio and ODNR want to acquire more beach area along Lake Erie, they should pursue such acquisition by eminent domain and not attempt to take that private property by regulatory fiat or clever revisionist legal argument.

For these reasons, Amici FOP/CPA urges affirmance of the constitutionally sound and historically correct decision by the Eleventh District Court of Appeals in this case.

### CONCLUSION

Amici FOP/CPA urges affirmance of the well-reasoned, constitutionally correct decision of the Eleventh District Court of Appeals in this case for the following reasons:

1. The right of lakefront homeowners to exclude others from their private property (dry land) is both a Constitutional right and necessary to promote law and order and maintain public safety.

2. The water-land boundary delineated by the Eleventh District Court of Appeals is reasonable, functional, and readily determinable. As such, that boundary will prevent unwarranted trespass by unknowledgeable members of the public and allow local enforcement officials to protect the fundamental private property rights of lakefront homeowners, while still preserving the public's right to use and enjoy the waters of Lake Erie.
3. The "high water" mark boundary urged by Appellants and Appellants' amici would create confusion, encourage unwarranted trespass on adjacent private land, and make it difficult for local law enforcement officers and prosecutors to maintain law and order.
4. Appellants' transformation of privately owned shore areas (dry land) into "public trust" beaches will encourage public trespass over the lakefront homeowners' adjacent land by those seeking to access these new "public beaches".
5. Affirmance of the Appellate Court's decision is necessary to protect the fundamental and constitutional rights of Lakefront homeowners and to maintain the rule of law in Ohio.
6. Appellants' scheme effort to take the deeded property interests of lakefront homeowners without compensation violates the U.S. and Ohio Constitutions, as well as the homeowners' "fundamental" private property rights as recognized by this Court in *City of Norwood v. Horne*.

For each and every one of these reasons, Amici FOP/CPPA respectfully urges that this Honorable Court affirm the constitutionally correct decision of the Eleventh District Court of Appeals.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Brief of Amici Curiae Ohio Fraternal Order of Police and Cleveland Police Patrolmen's Association has been sent by regular U.S. Mail upon the following persons this 17<sup>th</sup> day of September, 2010:

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