ORIGINAL

In the

Supreme Court of Ohio

STATE OF OHIO ex rel. ROBERT MERRILL, TRUSTEE, et al.,	:	Case No. 2009-1806
Plaintiffs-Appellees,	:	On Appeal from the Lake County Court of Appeals, Eleventh Appellate District
and	:	
HOMER S. TAFT, et al.,	:	
Intervening Plaintiffs- Appellees-Cross-Appellants	:	Court of Appeals Case Nos. 2008-L-007, 2008-L-008 Consolidated
v.	:	
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.	:	

THIRD BRIEF OF
DEFENDANT-APPELLANT-CROSS-APPELLEE STATE OF OHIO

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INTRODUCTION

As the opening brief explained, the State's approach to Lake Erie's boundary is not only supported by precedent and principle, but it is also balanced: It honors both the public's rights and the lakefront owners' important littoral rights. Under the traditional view, protecting the public's rights up to the "ordinary high-water mark" allows private owners and the public to have overlapping rights in the same physical space, and using that mark as the *physical* line still allows for substantive legal lines to be drawn that protect the private owners' rights, along with the State's right and duty to protect the public trust.

By contrast to this traditional, balanced approach, the lakefront owners' new rule would fully eject the State from any inch of the Lake's bed that is temporarily dry, even for a day. All Plaintiffs insist that *any* area above the momentary water's edge is not only within their private title, but also that the public trust stops at the water's edge or at an even lower lakeward point. That is, some Plaintiffs insist that they own deep into the water, to the "low-water mark," and even to the lowest-ever historical mark, such that areas that have ever been dry for a day are theirs alone. That extreme position has never been adopted by this Court or by any State along the Great Lakes, and the Court should not adopt it today.

Plaintiffs are not content to rewrite just the law of Lake Erie; they also seek to rewrite Ohio law to block the State from even litigating this case to protect the State's and the public's interests. All Plaintiffs argue—albeit by different and even conflicting theories—that the State should not be allowed to press this appeal, and that the appeal should be decided only between the lakefront owners and the intervening public-interest groups. And Plaintiff Taft goes further, seeking also to eject those groups—the National Wildlife Federation and the Ohio Environmental Council (together, "NWF")—from the case. The Court should reject Plaintiffs' attempt to eliminate all opposition and win by default.

The Court need only follow settled law to conclude that the State's appeal is valid and that the public trust over Lake Erie reaches the ordinary high-water mark. The State's appeal is proper because (1) Plaintiffs chose to sue the State here as an independent party, separate from the Ohio Department of Natural Resources and its Director (together, "ODNR"), and (2) the Attorney General represents and defends the State, including its public trust and sovereign interests, whenever it is named as a defendant in a lawsuit. Settled law also supports the traditional use of the ordinary high-water mark as the boundary of the State's title and public trust authority over Lake Erie. The State received the Lake, at statehood, up to the ordinary high-water mark. Since then, this Court's cases have confirmed that Ohio has not changed the law from that historic starting point, though it is free to do so.

The Court should reject Plaintiffs' unprecedented views and reverse the court below on both issues.

ARGUMENT

A. The State's appeal is valid, and none of Plaintiffs' conflicting theories undercuts the State's party status or the Attorney General's power to represent the State.

The validity of the State's appeal turns on two distinct issues: (1) the State's status as an independent party, because Plaintiffs chose to sue it, and (2) the Attorney General's power to represent the State when it is sued. The appeals court erred in conflating these issues, and the various Plaintiffs here attack the propriety of the State's appeal on different theories. None of those theories is sound.

As a threshold matter, the Court cannot, as OLG and Duncan suggest, simply ignore the issue of the State's appellate rights and move on. OLG Br. at 45-46; Duncans Br. at 3. OLG's sole basis for bypassing the issue is its claim that "the question of the boundary still remains in front of the Court based on the appeals filed by Appellants NWF and OEC." OLG Br. at 45. But NWF's appeal does not eliminate the need to affirm the State's presence. A case decided between private parties, without the State's full presence as a *party,* cannot bind the State, yet the trial court ordered relief against "the State." State Br. at 9, 15-16. Moreover, OLG's attempt to rely on NWF requires the Court to reject Taft's separate attempt to eject NWF from the case. See Taft Br. at 47-50 (seeking to reverse NWF's intervention). If the Court ejects both NWF and the State—though it should do neither—it could not then reach the merits. Further, if neither ODNR nor the State had been a valid party all along, the decisions below would need to be vacated for lack of a live controversy. See State Br. at 19-21. And if ODNR, but not the State, was a party, at least the relief against the State would need to be vacated. In sum, the Court must resolve the issue of the State's presence, and along with it, the Attorney General's representation.

On these two sub-issues—the State's party status and the Attorney General's representation—the Plaintiffs chart differing courses. Taft focuses solely on the representation

issue, saying that the Governor decides the State's litigation approach in all cases *when* the State is sued, but he admits that the "State of Ohio was a party at all times." See Taft Br. at 2. Indeed, he even insists that "[n]o party asserts that the State of Ohio was not a party." *Id.* Duncan adopts Taft's views. Duncans Br. at 3. OLG, in sharp contrast, takes the reverse approach, attacking the State's party status rather than the Attorney General's representation power. OLG admits that the Attorney General has "general authority to prosecute actions on behalf of the State." OLG Br. at 46. But OLG says that the Attorney General's authority "must yield to ODNR's specific authority in this limited instance," *id.,* because ODNR is the "real party" here, *id.* at 47. ODNR, according to OLG, has exclusive power to control litigation concerning Lake Erie because it is the State's agent for the public trust under R.C. 1506.10, and here, says OLG, ODNR waived its right to appeal.

Both theories are wrong, as the State is a party here, and the Attorney General represents the State.

1. The State is a party independent of ODNR, as Taft admits, and OLG may not ignore a defendant that it chose to sue.

As noted above, Taft insists that the State is a real party and that no one even suggests otherwise. But OLG does attack the State's presence, saying that "ODNR is the real party in interest" with sole authority to speak for the State on "all matters regarding the State's public trust rights in Lake Erie." OLG Br. at 47. The appeals court, too, said that the State was not a proper party, *State ex rel. Merrill v. Ohio Dep't of Natural Res.* (11th Dist.), 2009-Ohio-4256 ("App. Op."), Apx. Ex. 3, A-7, at ¶ 41-43, though it blurred the issue with Attorney General representational issues, *id.* at ¶ 44. Thus, Taft is wrong in saying "[n]o party asserts that the State is not a party," Taft Br. at 2, but Taft is right that the State *is* a party. OLG's attacks on the State's status fail for several reasons.

First, OLG fails to address the State's points that OLG *chose* to sue the State, and OLG specified that it sought relief against "the State," not just ODNR. State Br. at 4, 13. OLG's complaint specified ODNR in the factual allegations, but it carefully targeted "the state" in seeking declaratory relief regarding the limits of the State's public trust authority. See First Amended Complaint ("FAC") at 7 ¶ 32, Supp. S-13 (seeking declaration as to the "interest of the state as trustee over the public trust"); *id.* at 9, Prayer for Relief, ¶ 2 (same), Supp. S-15. If OLG had second thoughts later, after the State and ODNR diverged in the trial court, it could have voluntarily dismissed the State. Instead, it kept the State on the hook, trying to have it both ways—ensuring relief against the State while not letting the State defend itself. The State noted this inconsistency problem extensively in both its opening brief and its supplemental jurisdictional briefs, and OLG has yet to respond.

Second, OLG is wrong to insist that R.C 1506.10, the Fleming Act, vests ODNR with control over all *litigation* choices for the State where Lake Erie is involved. That statute merely grants ODNR authority over *regulatory* action. As the State explained, the regulatory nature of ODNR's power is shown by the provision stating that ODNR's "enforcement" actions under that section are subject to administrative appeals under R.C. 119.12. State Br. at 19.

Similarly, OLG confuses regulatory power with litigation authority when it points to out-of-context statements by the Attorney General in the trial-court pleadings about "disclaim[ing] any authority superior to ODNR." OLG Br. at 48 (citing statements in various trial court pleadings). OLG argued in the trial court that certain Attorney General opinions—advisory interpretations, not litigation statements—represented state law and trumped both ODNR's regulatory position and the State/ODNR's then-joint litigation position. In response, the Attorney General properly noted that any of his advisory opinions, *if* they stated anything

contrary to ODNR's views, could not trump ODNR and bind the State on those regulatory positions. That simple point says nothing about the Attorney General's power to litigate cases for his clients and to defend the State's legal interests in the courts.

Further, although OLG insists its view is a "limited" exception, its attempt to blur the line between an agency's regulatory power and the Attorney General's litigation authority would eviscerate the Attorney General's power as radically as Taft's proposed transfer of power to the Governor. OLG says that ODNR calls the shots, "including the authority to direct litigation on the State's behalf," because the General Assembly delegated regulatory power to ODNR in R.C. 1506.10. But virtually all agencies' statutes contain similar language delegating regulatory power over a certain field to that agency. OLG's view accordingly would require the Attorney General to defer to that agency to "direct litigation," including decisions to appeal, whenever a lawsuit involves its regulatory field.

OLG's attempt to apply its view here demonstrates both the breadth and flaws of its approach. First, OLG does not limit its view to those cases in which an agency *initiates* enforcement as a plaintiff; it includes all cases in which an agency is sued. Some enforcement actions may require agency action first, see, e.g., *State ex rel. Brown v. Rockside Reclamation, Inc.* (1976), 47 Ohio St. 2d 76, but that does not extend to defense, which is governed by the Attorney General's representational duty under R.C. 109.02. Second, OLG does not limit its view to cases that name ODNR (or any given agency) as a sole defendant, as OLG applies that view here to a case filed *against the State by naming the State.* That would mean that even when a plaintiff sues *solely* the State, not the State plus an agency, the Attorney General would need to determine what agency best represents the subject area, then have that agency tell him what to do, based on that agency's regulatory power.

That approach would not only eviscerate the Attorney General's independent constitutional power, but it would also prevent the State from having one consistent voice before the courts. The State must frequently litigate broad issues that affect many or all agencies, such as issues of State immunity or public records. Thus, if the State must in some cases "speak with one voice," as OLG says, OLG Br. at 49, the voice of "the State" must be the Attorney General's.

The State sees no difficulty with allowing different agencies, or the State and an agency, to take different positions in a case; in fact, it happens all the time. See, e.g., *State ex rel. LetOhioVote.org v. Brunner*, 125 Ohio St. 3d 420, 2010-Ohio-1895. But if a problem of separate voices exists here at all, it is the product of OLG's decision to sue separate entities as defendants. To avoid any such problem, OLG could have framed its complaint differently at the outset, or it could have tried to drop the State after ODNR changed its position in the trial court. Of course, if OLG had done so, it would have then faced the problem of being unable to bind the broader State with a judgment preventing, for example, the General Assembly from legislating. See Summary Judgment Order, Tr. Dkt. 183, Dec. 11, 2007 ("Com. Pl. Op."), Apx. Ex. 4, A-40, at 69, 74. Instead, OLG apparently wants to have it both ways—keeping the State separate from ODNR for purposes of obtaining the trial court judgment, while keeping it yoked as one entity with ODNR for purposes of stopping the appeal and retaining that judgment.

Finally, even if the Court accepts OLG's core premise for argument's sake—namely, that ODNR was effectively the sole party all along or speaks for both the State and ODNR—that position does not support the conclusion that ODNR waived the State's appeal rights. The record shows that ODNR's position was *based on* the State's continued litigation, including on appeal. A waiver occurs only when a party intentionally relinquishes a known right. *State v. Underwood*, 124 Ohio St. 3d 365, 2010-Ohio-1, ¶ 32. Here, ODNR said that it no longer would

litigate the boundary issue, but it "welcome[d] the Court's resolution" of the issue based on the State's continued dispute with OLG. State Br. at 7; see Response of Defendants-Respondents Ohio Department of Natural Resources and Sean Logan, Director of Natural Resources, to the Pending Motions for Summary Judgment at 1–2 ("ODNR MSJ Resp."), Tr. Dkt. 170, July 16, 2007, Supp. S-4 (noting that trial court could rely on "able and exhaustive briefs by the Plaintiffs-Relators on behalf of the lakefront owners and the Attorney General on behalf of the State of Ohio").

Notably, ODNR's statement shows that it assumed an appeal would be likely, as it said it would honor the lakefront owners' "apparently valid real property deeds . . . unless ***a court*** determines" that the law is otherwise. *Id.* (emphasis added). ODNR's reference to the ultimate determination by "a court," as opposed to referring to the trial court as "the Court" in the immediately preceding sentence, leaves no doubt that it expected the State's litigation to reach some other "court."

Consequently, ODNR's purported "waiver" cannot be held against ODNR and the State, as ODNR and the State would have responded differently had anyone immediately questioned, in the trial court, the State's ability to proceed. That is, if OLG or Taft sought to dismiss the State, or sought some sort of default judgment or consent order against ODNR as the "sole" party, then ODNR and the State could have responded. For example, if any Plaintiffs dismissed the State, the State could have intervened to re-enter the case. Or if ODNR were found to be the sole party, and the State were denied intervention, perhaps ODNR would have appealed on its own, as again, ODNR's approach was premised upon the State's continuation of the dispute. Or the Attorney General might have exercised his prerogative to appeal on ODNR's behalf, if somehow

he could do so only through that entity. The bottom line is that the State's voice must be heard through some mechanism.

Indeed, the need for the State to be heard, by one route or another, is demonstrated by the strikingly similar case of *Northeast Ohio Coalition for the Homeless v. Blackwell* (6th Cir. 2006), 467 F.3d 999 ("*NEOCH*"). In *NEOCH,* plaintiffs sued solely the Secretary of State on election-related issues. The Secretary did not wish to appeal a restraining order that suspended certain Ohio election laws, but the Attorney General determined that an appeal was needed to protect the public interest in maintaining Ohio's elections system as it was intended by the General Assembly. The Attorney General took a belt-and-suspenders approach: (1) he filed an appeal in the Secretary's name, against the Secretary's wishes, and (2) he moved to intervene in the State's name, urging that *if* the appeal did not proceed for the Secretary, the State had a right to intervene. *Id.* at 1004-05. The Sixth Circuit held that the State was entitled to intervene, for the Secretary's unwillingness to appeal demonstrated that the Secretary did not adequately represent the State's interest in defending its laws. *Id.* at 1007-08. The court found it therefore unnecessary to resolve whether the Attorney General could also appeal for the Secretary. *Id.* at 1009. The State's appeal in its own name was enough.

This case is identical to *NEOCH* in its essential points: The State is entitled to protect the public interest apart from an agency, and when those interests are challenged in litigation, the Attorney General decides when and how to speak for the State. Indeed, the facts here make this an easier case. The State did not need to intervene, because plaintiffs named it separately at the outset. And ODNR supports the State's right to appeal, as opposed to the Secretary's attempt to block the appeal in *NEOCH*. *NEOCH* also illustrates the two tracks that would have been available if the State's power to proceed had been fully aired then.

For all these reasons, the State is a proper party, separate from ODNR. That separate party status carries with it the State's right to appeal, as it would be an empty formalism to acknowledge the State as a separate party but to yoke the State and ODNR together as joint parties under ODNR's control. Because ODNR does not speak for the State, OLG's effort fails, leaving Taft's alternative view of having the Governor speak for the State. As explained below, that, too, is wrong.

2. The Attorney General, not the Governor, represents the State and decides its litigation strategy.

As the State explained in both its opening brief and its supplemental jurisdictional briefs, the Attorney General has the power and duty to represent the State when it is sued, as it was here. State Br. at 16-18; State Supp. Jur. at 10-19. The Attorney General's role is established and confirmed by the Constitution, the statute (R.C. 109.02), the Court's cases, common law, and common sense. Against all this, Taft insists that R.C. 109.02 vests the *Governor* with control over *all* cases involving the State, so that the Attorney General needs the Governor's express approval to proceed. Taft Br. at 12-16. And Taft says that the Constitution and common law provide the Attorney General no powers outside the statute, *id.* at 6-11, which, Taft says, puts the Governor in charge. *Id.* at 12-16. Taft further says that no evidence exists here of the Governor's approval to appeal, so the case must be thrown out. Taft is wrong on all counts.

First, R.C. 109.02, on its own terms, confirms the Attorney General's power to represent the State; it does not support Taft's theory of the Governor as chief legal officer. That statute says the "attorney general is the chief law officer for the state and all its departments," R.C. 109.02, not the Governor. Reading the Governor's "supreme executive power" to include litigation decisions would make him, not the Attorney General, the chief law officer. The provision calling for the Attorney General to appear "*[w]hen* required by the governor or the

general assembly" merely supplies an *additional* way for the Attorney General to appear, as an amicus or an intervenor. This method is additional because the sentence appears *after* the clauses providing for the Attorney General to represent the State and forbidding agencies from using other counsel. Were it meant to achieve Taft's view of the law, the provisions could have been merged to say "the attorney general shall represent the state and all its departments when required by the governor or the general assembly." Further, Taft's theory does not account for the General Assembly, or what to do if the Governor and the Assembly disagree on how to proceed. If both may control the Attorney General, any conflict between them is irreconcilable. But if the clause means only that either the Governor or General Assembly may invoke the Attorney General's action, then no conflict exists. Thus, the statute alone affirms the Attorney General's role.

Second, the Constitution and common law also support the Attorney General's power of representation. The Court long ago held that the "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. Doerfler v. Price* (1920), 101 Ohio St. 50, 57. That decision suffices to refute Taft's claim that Ohio is a "code-only" State. Further, just last year the Court reiterated that the constitutional grant of power includes common-law powers of an attorney general as well. *State ex rel. Cordray v. Marshall,* 123 Ohio St. 3d 229, 2009-Ohio-4986, ¶ 19.

Third, Taft's governor-centric view is unworkable in practice, and Taft offers no sound way to reject *this* appeal without throwing out thousands of pending cases in which no express "permission slip" exists. Taft says that it is not enough, on these facts, for the Attorney General to point to the Governor's acknowledgement of the State's separate efforts and to the Governor's

and ODNR's later (and current) ratification of its approval, if somehow needed. Taft Br. at 12-13. Taft insists on express approval, dated at the time of the appeal. But no such records exist for other cases, because everyone involved has rightly seen no need for such permission slips.

Taft tries gamely to limit ODNR's and the Governor's "approval" of the State's separate track to the trial court only, but not any appeal. Taft Br. at 13. His attempt seems to recognize implicitly the need to preserve the trial court's judgment, in contrast to OLG's failure to address the issue at all. So he says the Governor approved *only* the continuation of the trial court litigation, to reach judgment, but not any appeal.

But Taft's "limited approval" theory fails for several reasons. First, allowing only a limited continuation would not address the State's need to continue as an Appellee, at a minimum, as against cross-appeals. Second, it does not address the continued trial-court litigation on other issues not yet reached. Finally, it flies in the face of the common-sense recognition that continued litigation, as a general matter, almost always includes appeals.

On top of all that, Taft's governor-centric view does not account for all the cases that do not involve entities under the Governor's or the General Assembly's control, such as when someone sues the Auditor of State or this Court. Even if he limits his view to cases filed against "the State," such cases routinely involve powers and issues that are closely tied to such independent officers.

For all these reasons, Taft's view is wrong, as is OLG's, and the Attorney General properly appealed this case on behalf of his client, the State of Ohio.

B. The Lake Erie issues before the Court include both the boundary of the State's public trust and the classwide boundary of private title, not any individual title disputes or the method used to demarcate the ordinary high-water mark.

Before addressing the component parts of the Lake Erie issues, the State here clarifies what is, and is not, before the Court, as Plaintiffs' arguments blur the issues in several respects.

First, the Court must resolve the boundary of the State's public trust authority, which is conceptually distinct from the boundary of the State's private title. All authorities agree that public trust and private title are separate concepts, even when the sovereign holds both forms of "title" to the same boundary line. *Shively v Bowlby* (1894), 152 U.S. 1, 11, 57; Kenneth T. Kilbert, The Public Trust Doctrine and the Great Lakes Shores, 58 Clev. St. L. Rev. 1, 17, 39-58 (noting that the "boundary for public trust purposes, though, need not be the same as the boundary for title purposes" and summarizing all Great Lakes States' laws). And here, the State's primary argument is that Ohio has kept the two lines coterminous, so that Ohio holds both trust and title up to the ordinary high-water mark. Nevertheless, the distinction is critical because the appeals court held that *both* trust and title end at the water's edge, as assessed moment-to-moment, leaving the State with no public trust authority over any inch of lakebed that is dry for even a day (at least on that dry day).

Plaintiffs repeatedly blur these two distinct interests, and they mistakenly invoke authorities that discuss *private title boundaries* as support for pushing back *both* boundaries below the ordinary high-water mark, even when those authorities note that the *public trust remains* in place over the physical space up to that mark. For example, Taft cites several other States as "low-water States" without acknowledging that those States use low-water *only* as to private title, while preserving the public trust up to ordinary high-water. Minnesota is explicit about this, as the State showed in its opening brief. State Br. at 37-38; *State v. Korrer* (1914), 127 Minn. 60, 75-76 ("While the title of a riparian owner in navigable or public waters extends

to ordinary low-water mark, his title is not absolute except to ordinary high-water mark. As to the intervening space his title is limited or qualified by the right of the public to use the same for purpose of navigation or other public purpose."). Yet Taft cites Minnesota without that caveat. Taft Br. at 36. The same is true of Pennsylvania. State Br. at 38; *Freeland v. Pa. R.R. Co.* (1901), 197 Pa. 529, 539. No State has ever surrendered its public trust authority over any Great Lake below the ordinary high-water mark, yet that is what Plaintiffs here ask the Court to do in Ohio—and they seek to do so not based on *any* support from those other States for moving the public trust boundary, but by blurring the distinction that those States all stress.

Similarly, OLG invokes comparisons to riparian law, citing Ohio cases allowing private ownership of soil underneath rivers. OLG Br. at 21 (citing *Gavit v. Chambers* (1828), 3 Ohio 495). OLG admits that, under riparian law, "the public trust requires . . . an easement of passage across navigable waters," OLG Br. at 21, but it does not admit the implication of that principle with respect to Lake Erie. The concept means that rivers *are subject to public trust* in Ohio below high-water mark. The public trust component is consistent.

The distinction between public trust and private title is also important because the Court could ultimately decide—though it should not—that lakefront owners hold private title to some point below the ordinary high-water mark, while preserving the public trust to the higher point. Again, the State does not support such a divided approach, as the Court should adhere to its precedents maintaining the traditional mark for both private title *and* public trust. But if the Court rejects the State's view as to the State's private title, the State urges maintenance of at least the public trust up to the ordinary high-water mark. That approach would keep Ohio from being the sole Great Lakes State to surrender the public trust, and it would allow owners to assert title

according to deed while still allowing the flexibility of public trust to protect both the public interest and owners' interests alike.

Second, even as to private title, the sole issue before the Court is whether Ohio has granted private title to *all lakefront owners,* on a classwide basis, to some point below the ordinary high-water mark. This is a class action, and the court below ruled on a classwide basis as to all owners. Consequently, any arguments that are limited to *certain* owners, whether as to individuals or as to large sub-classes, provide no basis for moving the boundary as to the entire class. At most, such arguments are a basis to preserve certain issues for individual owners or sub-classes to pursue on remand or in separate cases.

For example, all Plaintiffs invoke certain purported federal grants of land issued before Ohio's statehood, such as the "Firelands" given to Revolutionary War veterans, and they invoke surveys and platting done pre-statehood. OLG Br. at 7-8; Taft Br. at 23-26; Duncans Br. at 14-21. They argue that Ohio, at statehood, was encumbered by those purported grants below the ordinary high-water mark.

While that view is mistaken, as explained below (at 36-38), the more important point here is that such issues do not affect the classwide property-line issue. If Ohio *generally* received up to the ordinary high-water mark at statehood, subject to various grants below that mark, the appeals court's overbroad classwide ruling still must be reversed. The appeals court read this Court's cases as adopting a global "water's edge" line, and if that is wrong—and it is—it cannot be defended on the idea that some owners may have greater rights derived from pre-statehood events, based on grants not in the record in this case. The Court should simply reverse the appeals court on the ground that the ordinary high-water mark is the classwide *default line* for private title. This Court could, if it finds it appropriate, remand for individual or sub-class

variations, but it cannot reach and resolve all such issues, because the record is not sufficiently developed on that score—not every deed of every owner has been examined.

Third, the issue before the Court is whether the ordinary high-water mark is a relevant boundary at all, whether for public trust or private title, but the methodology used to locate that mark is not before the Court in this appeal. To be sure, the issue of methodology *was* before the trial court, as it was the second of the three certified class-action questions. State Br. at 5-6. But once the trial court determined—albeit incorrectly—that the ordinary high-water mark had no legal relevance at all, it was correct in declining to reach the methodology issue, because there was no need to pinpoint a line the court had deemed meaningless. Com. Pl. Op. at 72-73. The appeals court also found the issue irrelevant. App. Op. at ¶¶ 86-87. Thus, this Court cannot be the first to review the issue, because there is no trial court finding, including factfinding, as to the validity or reliability of any given method. Indeed, no plaintiff expressly asks the Court to reach the methodology issue, even as a backup issue if the Court agrees with the State that the ordinary high-water mark is a relevant boundary.

Nevertheless, Plaintiffs seek to make much of the methodology dispute as part of their attack on recognizing the ordinary high-water mark at all, and they are wrong—and indeed, precisely backwards—to do so. OLG, for example, argues that the ordinary high-water mark cannot be the right line because, OLG says, Lake Erie does not rise frequently enough to the specific mark that is designated as the ordinary high-water elevation by the U.S. Army Corps of Engineers. That elevation is set at 573.4 feet as measured by the International Great Lakes Datum, or IGLD. OLG argues strenuously that this measurement is too high. But OLG's complaint, even if valid, is no reason to abolish all use of the ordinary high-water mark, because the case law adopts and supports the *concept* of the ordinary high-water mark. OLG's fact-based

complaint would, at most, be a reason to reject the Army Corps' methodology and to locate the ordinary high-water mark by some other specific measurement, not to throw out the ordinary high-water concept entirely.

Put another way, OLG could argue on remand that the ordinary high-water mark should be set at some other point or by some other methodology. OLG could argue that the elevation of 573.4 feet IGLD does not fairly represent a line to which the water "usually" or "frequently" returns, if the water does not reach that level "often enough" by some measure. But that debate would still allow for a stable line that protects areas that are often or usually submerged, as opposed to a purely "momentary water's edge" approach, which deprives the State of authority over *any* inch of lakebed when temporarily dry, even for a day.

C. Federal law shows that Ohio received, upon statehood, Lake Erie within Ohio's territorial boundaries up to the ordinary high-water mark, and that federal grant remains the *starting point*—not the end point—of the analysis.

The State's opening brief left no doubt that it invoked federal law as the *starting point*, but not the end point, in balancing the interests in Lake Erie. Ohio and all States are free to change state law after receiving title at statehood. In particular, Ohio may choose to recognize private and public rights *below* the ordinary high-water mark of navigable waters after being entrusted with title at statehood. Of course, any such State-based recognition must follow State law regarding the process for transferring title and be consistent with the State's duties as trustee, but within those bounds, the State can decide for itself, and is not tied to a federal one-size-fits-all rule for all time. But again, federal law gives the starting point.

The original grant to each Great Lakes State extends to the ordinary high-water mark, "and not upon the ebb and flow of the tide." *Phillips Petroleum Co. v. Mississippi* (1988), 484 U.S. 469, 478-79 (citing *Ill. Cent. R.R. v. Chicago* (1900), 176 U.S. 646, 660). Congress confirmed that earlier grant in enacting the Submerged Lands Act ("SLA"), which confirms that non-tidal

States such as Ohio and the other Great Lakes States control "up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction." 43 U.S.C. §§ 1301(a)(1) and (3).

The State has always recognized, in this appeal, that, "the States are generally free to re-define and recognize private rights in public trust lands as a matter of state law." State Br. at 28; see *id.* ("Ohio is free, as a sovereign State, to define the scope of that authority in several respects."). The State never said that federal law imposed a permanent boundary for all purposes; it said only that federal law defined "the default position," requiring Plaintiffs to demonstrate any later change in position. Indeed, the State explained that "Ohio may, as a sovereign, grant title . . . to adjacent landowners, either on an individual or broad basis." *Id.* at 29.

In light of the State's clear commitment to the State's right to re-grant the title that it received under federal law, OLG is mistaken if it is suggesting that the State seeks to impose a permanent federal mandate in favor of State title up to the ordinary high-water mark. The State recognizes that it may re-grant *private title* below the ordinary high-water mark; the State argues that Ohio has never done so along Lake Erie, not that Ohio may not. To be sure, even transfers of private title, if they validly occur, are accompanied by the State's retention of public trust authority over the transferred area, but this Court has long held that Ohio law requires that the "state as trustee for the public cannot by acquiescence abandon the trust property." *State v. Cleveland & Pittsburgh R.R. Co.* (1916), 94 Ohio St. 61, 80 ("*C&P R.R. Co.*"). Thus, to the extent that public trust duties impose limits, *C & P. R.R. Co.* shows that those limits are a matter of State law, not a matter of being "handcuffed by federal law." See OLG Br. at 2. Moreover, a recent constitutional amendment regarding riparian rights specified that "[n]othing in this section

affects the application of the public trust doctrine as it applies to Lake Erie or the navigable waters of the state"—showing that the doctrine is embedded in *Ohio* law. See Ohio Const., Art. I, Sec. 19b.

Moreover, although the State cannot entirely abandon its public trust duties over an area, it can define the substantive scope of the public and private rights and duties within that space, and federal law does not handcuff the State's power to do so. (Taft, by contrast, argues in the alternative that *if* the ordinary high-water mark has any legal relevance, it must be located as a matter of federal law based upon the time of admission. Taft Br. at 26. But that is irrelevant now, because the methodology or location of the mark is not before the Court. See above at 15-17.)

OLG also cites examples of variations in different States' laws, and those examples, properly understood, support the State's view, not OLG's. For example, OLG explains how, on the Mississippi River and the Gulf of Mexico, some States use the ordinary high-water mark as the boundary of riparian title, and some grant private title to different points, and so on. OLG Br. at 19. That is perfectly consistent with the State's view, because those States were free to keep (as Iowa or Arkansas did) or re-grant the private aspect of the title that they received under federal law. But if pre-statehood common law already limited States' private title and even their public trust authority, to reach only to some point below the ordinary high-water mark over inland navigable waters, as OLG seems to suggest, then Iowa and Arkansas, for example, could never have later extended their private title or their public trust authority to the ordinary high-water mark.

Because OLG erroneously focuses on whether federal law prevents state-law changes post-statehood, it is hard to discern OLG's precise position on the relevant federal-law question

regarding the scope of the *initial* federal grant to Ohio upon statehood. OLG does seem to challenge whether the initial federal grant, as to Lake Erie, extended to ordinary high-water mark, as it asks questioningly "***if*** the State . . . were correct that all states obtained title over navigable waters" under the equal footing doctrine. OLG Br. at 20 (emphasis added). But OLG does not expressly assert that the initial federal grant amounted to something less, nor does it tie its analysis to Lake Erie, as opposed to its analogies to rivers. And to the extent that OLG does deny that the initial federal grant extends to the ordinary high-water mark, it runs headlong into federal law specifically identifying the ordinary high-water mark as the boundary of non-tidal navigable waters received by the States to hold in trust. See *Phillips Petroleum Co.*, 484 U.S. at 473; *Shively v Bowlby* (1894), 152 U.S. 1, 11, 57; 43 U.S.C. §§ 1301(a)(1) and (3).

OLG's discussion of 19th century federal cases, especially *Shively,* does not overcome the State's showing regarding the extent of the initial federal grant, and indeed, it shows why the State, not OLG, is correct on that score. See OLG Br. at 18-19. OLG cites *Shively* for the principle that littoral "title and rights" in the "soil below high water mark" are left to the States to define or modify. That is true, but the reason the *Shively* court cited the "high water mark" as the relevant point is that the State *begins* with both interests (private title and public trust) at that point at statehood. If the "water's edge," or the lower "low-water mark," were the starting point, the States would not have been free to claim title to a higher point post-statehood without effecting a taking. Similarly, OLG cites *Barney v. Keokuk* (1877), 94 U.S. 324, 338, in recognizing that if 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." Again, the States could not "resign" rights that they never had.

OLG's argument regarding the Submerged Lands Act ("SLA") does not help its cause, either. Strictly speaking, the SLA, enacted in 1953, did not effect a "grant" at all, as each State received its grant upon statehood. It merely codified and confirmed the established common law and constitutional law. OLG adds that the SLA merely confirmed the federal government's concession of State control as against the federal government's own claims. OLG Br. at 35-36 (citing *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.* (1977), 429 U.S. 363, 372-74). OLG says that private owners' claims against the State were unaffected. That is partly true, but incomplete. It is true that the SLA itself granted nothing as between States and private owners, as the States received their title upon statehood. And it is also true that States were then free to re-grant title as a matter of state law. But that means that the SLA granted nothing either to the States or to any private owners; instead, private owners must show that they received something *under state law.* And "federal law determines the scope of the grant in the first instance." *Cal. ex rel. State Lands Comm'n v. United States* (1982), 457 U.S. 273, 288. Thus, the SLA does not support OLG's claim, because only Ohio law can, nor does the SLA *directly* support the State's current claim about current state law. But it does expressly confirm that the State's view of the *initial federal grant* is correct: Ohio received title and trust over Lake Erie up to the ordinary high-water mark.

D. This Court's cases confirm that Ohio has retained the "ordinary high-water mark" as the landward boundary of Lake Erie, both as to the public trust and the State's title.

Ohio has always maintained its ownership of Lake Erie to the ordinary high-water mark, as shown by this Court's key cases, such as *Sloan, C&P. R.R. Co.*, and *Squire*. *Sloan v. Biemiller* (1878), 34 Ohio St. 492; *C&P. R.R. Co.*, 94 Ohio St. 61; *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303. Plaintiffs' attempts to re-write those cases are unavailing, as are their attempts to rely on Ohio's non-Lake Erie cases or on non-Ohio cases. In particular, plaintiffs are

mistaken in expressly insisting that this Court has never even used the term "ordinary high-water mark," or in ignoring the details of the Court's usage of the term. As shown below and in the State's opening brief, the Court has repeatedly referred to the "ordinary high-water mark" as the boundary of Lake Erie.

1. This Court adopted the "ordinary high-water mark" by name in *Sloan*, and it equated that term with the "line where the water usually stands."

The parties agree on at least one basic point: The Court in *Sloan* defined the boundary of Lake Erie, for purposes of a dispute among private individuals, as "that line where the water usually stands when unaffected by any disturbing cause." 34 Ohio St. at 525. See OLG Br. at 6 n.10, 24; Taft Br. at 19; Duncans Br. at 2, 23. The parties disagree, however, on whether the line "where the water usually stands" was *equated* with the term of art "ordinary high-water mark," which the Court indisputably used in some fashion in the same passage. *Id.* at 513. The State says yes, and the Plaintiffs all say no, for varying reasons. The State is right, and Plaintiffs' varying arguments alternate between avoiding the issue and arguing the untenable. But in all events, the line "where the water usually stands" has never, as a matter of precedent, been equated with the "momentary water's edge" or with the lowest-ever historical low-water mark. Nor can the "usual" mark be equated with the "lowest ever" mark as a practical matter.

The key passage in *Sloan,* as the State showed in its opening brief, is this one, in which this Court adopted the Illinois Supreme Court's standard from *Seaman v. Smith* (1860), 24 Ill. 521, a case involving a different Great Lake, Lake Michigan:

> In the [*Seaman*] opinion it is said: "A grant giving the ocean or a bay as the boundary, by the common law, carries it down to ***ordinary high-water mark*** . . . The principle, however, which requires that the ***usual high-water mark is the boundary*** on the sea, and ***not the highest or lowest point to which it rises or recedes, applies in this case, although this body of water has no appreciable tides***. . . . The portion of the soil which is only seldom covered with water may be valuable for cultivation or other private purposes."

Sloan, 34 Ohio St. at 512-13 (quoting *Seaman*, 24 Ill. at 524) (internal citations omitted) (emphases added). As an initial matter, this passage, whatever its ultimate meaning, undercuts Taft's occasional claims that Ohio courts have never used the term "ordinary high-water mark" at all. See Taft Br. at 23 ("In summary, neither Ohio's courts nor legislature has used either the term 'OHWM' or language compatible with that term"); *id.* at 19 ("Further, the [*Sloan*] Court never employed the term OHWM"); but see *id.* (acknowledging that *Sloan* quoted *Seaman*'s use of term as to "oceans").

Sloan's use of the term "ordinary high-water mark" in this passage also undercuts OLG's claim that the State argues merely that "the Court implicitly adopted the OHWM in *Sloan* ***based solely*** on the wording 'the line at which the water usually stands.'" OLG Br. at 26 (emphasis added). It is one thing to argue that *Sloan*'s express use of the term "ordinary high-water mark" does not amount to an actual adoption of that mark as Ohio law, but it is inaccurate to say that the State's argument is "implicit" or relies "solely" on the use of a phrase different from "ordinary high-water mark" itself.

Moreover, the context shows that the Court *did* adopt the term "ordinary high-water mark," and it equated that point with the "line at which the water usually stands." To be sure, *Sloan*'s language is not as precise as it might have been, but the Court's statements point to no other conclusion. First, the *Sloan* Court cited *Seaman* as referring to the ordinary high-water mark as the boundary on the ocean or sea. Then the *Sloan* Court cited the "usual high-water mark" as the sea's boundary, showing that it used "ordinary" and "usual" as interchangeable synonyms. In the sentence using "usual high-water mark," it also said that "the principle" applying that mark on the seas also "applies to this case" involving a Great Lake, despite the lack of appreciable tides. That equating of the Lake's boundary with the sea's boundary is even more solid in the

context of the preceding paragraphs, in which the Court expressly rejected the use of Ohio's river law on the Lake. *Id.* at 512 (describing riparian rule and holding that it "clearly does not" apply to the Lake). And *Sloan* also contrasted its description of the ordinary high-water boundary with the lines it rejected, saying that the boundary is "not the highest or lowest point to which it [the water] rises or recedes." *Id.* at 513.

OLG offers several counter-arguments to discount *Sloan*'s use of the disputed term, and in doing so, it ignores several parts of this passage, such as the use of the term "usual high-water mark" as a synonym and the Court's contrast with the rejected "highest or lowest" points. OLG argues first that the factual "record is clear that the OHWM is not the line where the water usually stands," that is, that the two terms cannot have been equated because, in OLG's view, they are factually incompatible. OLG Br. at 4, 14-15. Second, it argues that the *Sloan/Seaman* alignment of the same "principle" for the sea and the Lake refers not to the principle applying the ordinary high-water mark itself, but to the principle that the law should preserve for private owners all land that is "seldom covered with water" and may therefore be "valuable for cultivation." *Id.* at 25. On the sea, OLG says, the ordinary high-water mark implements that principle. But on the Lake, OLG says, that principle clashes with the ordinary high-water mark, because—incorporating its factual argument about the record and the alleged unfairness of using 573.4 feet IGLD as the ordinary high-water mark—OLG claims the water seldom reaches that elevation. *Id.* These arguments fail for several reasons.

First, to the extent that OLG claims that the term "ordinary high-water mark" is *inherently* incompatible with the line where "the water usually stands"—no matter what decade or no matter how the ordinary high-water mark is assessed—such a claim cannot overcome the fact that *Sloan* did equate them. OLG apparently assumes that "usually," as an adverb, means

"almost all of the time," or at least "most of the time." But the *Sloan* Court's use of the adverb "usually," in defining the Lake's boundary, must be read in light of its adjacent use of "usual" as an adjective in describing the "usual high-water mark" on the sea. The *Seaman* quote used "usual" and "ordinary" to describe the same line on the sea, and the dictionary definitions from that period defined "usual" and "usually" in terms of what was common or ordinary. Webster's defined "usual" as "[c]ustomary; common; frequent; such as occurs in *ordinary* practice or in the *ordinary* course of events," and it defined "usually" as "[c]ommonly; customarily; *ordinarily*." Noah Webster, An American Dictionary of the English Language (1854 ed.), 1222 (emphases added). See also The Oxford English Dictionary (1933 ed.), 477 (defining "usual" as "[t]hat is in ordinary use or observance . . . commonly observed . . ." and "usually" as ". . . commonly, customarily, ordinarily . . ."). Consequently, *Seaman*'s and *Sloan*'s usage of "usual" meant that the water "commonly" returns to that point as a high-water mark, under "normal" variations in rain, etc., but excluding "unusual" or "extraordinary" disturbing causes. Reasonable minds may differ on what constitutes "usual," in terms of days per year or decade, but it need not mean most or all of the time.

Second, to the extent that OLG's argument about the incompatibility of "ordinary high-water mark" and "usually" is premised on its fact-based arguments about how infrequently the Lake reaches the elevation of 573.4 feet IGLD, that is an argument against using that IGLD elevation as the locator of the ordinary high-water mark, not an argument against using any form of ordinary high-water mark at all as a matter of law. That is, suppose that the ordinary high-water mark were set at some lower elevation IGLD, or located by using other common-law methods, such as looking to "visual inspection" to determine where "terrestrial vegetation" could

take root. Such an approach would entirely eliminate the source of OLG's complaint about incompatibility, but that issue is not before the Court, as explained above.

Moreover, although the question of how to locate the boundary is not before the Court, the State notes that OLG's own factual claims are not inconsistent with describing the current IGLD ordinary high-water elevation for Lake Erie as where the water "usually" stands, as *Sloan* used the term. OLG bemoans that such an elevation, in recent decades, was reached "only briefly" in the 1970s, 1980s, and 1990s. OLG Br. at 4. That regular return, even if only for periods, is perfectly "common," and is not "unusual." OLG also complains about the 1950s and earlier, but the State has always acknowledged that the physical location of the ordinary high-water mark moves in the long run, over decades, so comparing today's line to 60 years ago is unavailing. And again, in any event, such complaints go to the location of the ordinary high-water mark as a factual matter, not to the concept of the ordinary high-water mark as the boundary of Lake Erie as a legal matter.

Indeed, the Pacific Legal Foundation ("PLF"), as amicus, seeks to support OLG by objecting to the use of the Army Corps' IGLD methodology for locating the ordinary high-water mark, but PLF's argument actually supports the State at this stage, because PLF admits that the State's historical public trust boundary extends to some form of "high-water mark." PLF Amicus Br. at 8-9. PLF says that the Army Corps' mark was "assessed at the Lake's highest historical level," and is thus too high to be a fair location of the high-water mark. *Id.* at 8. Instead, PLF urges that the mark should be the "mean" high-water mark, as opposed to the "ordinary" one, and PLF says that it should be set "no further upland than the mean daily high-water mark measured over an 18.6 year period." *Id.* (citing Kilbert, The Public Trust Doctrine and the Great Lakes Shores, 58 Clev. St. L. Rev. at 23).

While the methodology debate is premature, as explained above, PLF's argument is notable for two reasons. First, PLF cites Professor Kilbert's article for support, but Kilbert properly explained that the "mean" high-water mark is for *tidal* bodies, and he specifically cited the "18.6 year" average as applying to "uplands along tidal waters." Kilbert, The Public Trust Doctrine and the Great Lakes Shores, 58 Clev. St.L. Rev. at 23. Kilbert explained that the *ordinary* high-water mark was the established boundary for non-tidal bodies such as Lake Erie. *Id.* at 23 ("For navigable waters not impacted by tides, early American common law generally defined OHWM" as the boundary); *id.* at 24 ("the lands underlying those navigable waters up to the OHWM passed to the states pursuant to the equal footing doctrine"). Second, PLF urges the Court to consider *moving* the public trust boundary to somewhere even lower than its version of the high-water mark, suggesting that the "special consideration of Lake Erie's" character justifies a line lower than the one that PLF admits was the historic one. *Id.* at 12-13. That argument shows that history and precedent support the State, and Plaintiffs' side seeks to move the line for policy reasons.

Equally important, for all of OLG's attacks on the ordinary high-water mark as incompatible with the "line at which the water usually stands," neither OLG nor the other Plaintiffs explain how they justify equating *Sloan*'s description of the line where the water "usually stands" with *their* candidates for the appropriate boundary, whether the appeals court's momentary "water's edge," which OLG now defends as appellee, or the "low-water mark" that Taft urges as cross-appellee and that OLG once advanced.

The appeals court left no doubt that it drew the line where the water stands *now,* in each moment, subject only to an upper limit at the "high water mark" and a lower limit at the "low water mark," but with neither term defined. See App. Op. at ¶ 97 (referring to line as between

high and low water marks); *id.* at ¶ 127 (referring to the "actual water's edge," and explaining that the State held only the water itself and "lands under the waters of Lake Erie, *when submerged under such waters.*" (emphasis added)); cf. Com. Pl. Op. at 71 (defining boundary as "the water's edge, which means the most landward place where the lake water actually touches the land *at any given time*" (emphasis added)). Thus, under the appeals court's "water's edge" rule, a strip of the lakebed that is not only "usually" underwater, but has been documented as underwater for 95% of the days in the last decade, falls entirely outside the public trust on those few days that the strip dries up during a drought. That result cannot reasonably be squared with any definition rooted in *Sloan*'s "line at which the water usually stands." Nor does the phrase "free from disturbing causes" salvage the reasonableness of the appeals court's line, as a drought is not necessarily a "disturbing cause": Winds and storms disturb the water that is there, moving it up or down, but a *lack* of water does not "disturb" anything; it simply is not there. The Duncans' appeal to the simplicity of a "wet feet" rule, Duncans Br. at 43, however attractive it might seem for ease-of-use, demonstrates how the appeals court and Plaintiffs stray from their professed fealty to *Sloan*'s "usually stands" line, as a bright-line "wet feet" rule undoubtedly excludes from the public trust a rarely-dry strip, *when it dries up.*

Beyond the "water's edge" line, Taft's suggested boundary of the historic "low water mark"—which he defines as the lowest level ever recorded, even if only for a few days a century ago, Taft Br. at 41-42—cannot possibly be compatible with *Sloan*'s concept of the "line where the water usually stands."

At most, Plaintiffs' purported reliance on *Sloan*'s "usually stands" formula, along with a claim that it must refer to "areas submerged most of the time," would support some version of an average or mean high-water mark, cf. PLF Amicus Br. at 8, or even a pure mean water line. But

it cannot translate to the "water's edge" at each moment or to any version of a low-water mark that is often or always far out into the Lake. The better view is that *Sloan* supports the use of the "ordinary high-water mark" as the Lake's boundary and as a synonym for where the water usually stands. Any other issues about the practical application of that mark must be resolved in the context of the deferred issue regarding the specific methodology used to locate the ordinary high-water mark.

2. The Court's later cases and the Fleming Act also confirm Ohio's retention of the ordinary high-water mark as Lake Erie's boundary.

In light of the above points regarding the initial federal grant and *Sloan*'s maintenance of the ordinary high-water mark, the main point derived from the Fleming Act and from its declaratory section (now in the current R.C. 1506.10), and from the Court's decisions in *C&P R.R. Co.*, 94 Ohio St. 61, and *Squire*, 150 Ohio St. 303, is a simple affirmation that nothing changed. As the State's opening brief explained, the statute confirmed the continuity of the line from statehood (the federal grant), to the common law (*Sloan* and *C&P R.R. Co.)*, to the statutory definition, by using the phrase "do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state." R.C. 1506.10. And the Court in *Squire* explained that the Fleming Act codified the earlier law. *Squire*, 150 Ohio St. at 336-37; see also *Thomas v. Sanders* (6th Dist. 1979), 65 Ohio App. 2d 5, 9-10 ("The Fleming Act did not purport to change the common law with regard to other navigable waters in this state," but rather codified and re-affirmed the existing common-law boundary of the "territory.").

In addition, the contexts of those cases' express use of the term ordinary high-water mark, even if more as background than as holdings, show that the Court understood the ordinary high-water mark to be the relevant boundary of Lake Erie. In *C&P R.R. Co.*, the disputed issue was

whether the littoral owner had a right to wharf out beyond his titled property and into the water to the point of navigability. The right to wharf out is, by definition, a littoral right to reach into the public space, not an exclusive right based on any "ownership" of the water, or any ownership of the soil beneath navigable waters. OLG, in fact, properly describes littoral rights as "exercised *beyond the border* of a littoral property owner's property." OLG Br. at 39-40 (emphasis added).

In this context, the Court in *C&P. R.R. Co.* described the background principles leading to the wharfing issue there presented, and it noted that the parties' briefs "disclose a wide diversity of view as to public and private rights in subaqueous land below the high-water mark of navigable waters." *Id.* at 67. While OLG derides this passage as dicta, OLG Br. at 34, the language shows that it was understood that the public area, or navigable waters, *physically* start at high-water mark, and the debate was over the substantive scope of the competing public and private rights below that mark, because the littoral right of wharfing occurs below it, in the public-trust space. In other words, the question was framed as to how, or on what terms, an upland owner could build beyond his zone of exclusive ownership and control and into the public space of Lake Erie—that is, what he could do beyond the boundary of the ordinary high-water mark. If it were instead understood that private owners held to the moving "water's edge" at all times, with not even a public trust overlaying their private title, the debate over wharfing rights would logically be described in terms of an owner's right to reach beyond the "water's edge" and into the public space. And it if were instead understood that owners held to a "low-water mark," it would have been described in terms of an owner's right to extend past that "low-water mark." But the Court did not describe the issue in terms of wharfing rights beyond the "water's edge" or a "low-water mark." It described the issue in terms of rights beyond the

"ordinary high-water mark" because it was well-understood that *that* mark was where Lake Erie began, as a matter of both public trust and the State's private title.

OLG counters that this sentence in *C&P R.R. Co.* also includes the phrase "subaqueous lands," showing that only lands beyond the current water's edge were at issue. But if that were so, why not stop at saying "subaqueous land," and why add the phrase "high-water mark" at all? Indeed, that is a problem running throughout all Plaintiffs' arguments: If the ordinary high-water mark had no legal meaning whatsoever, why did it keep showing up at all? And why are Plaintiffs' favored terms, whether "water's edge" or "low-water mark," noticeably absent? Beyond the quoted usage above, the term "ordinary high-water mark" recurs in *C&P R.R. Co.* several other times, as quoted from other cases that this Court cited. In each case, the usage may be called dicta, but each usage shows that the underlying courts using the phrase must have seen the mark as meaning something. See *id.* at 75-76 (citing *Brookhaven v. Smith* (1907), 188 N.Y. 74; *id.* at 71-72 (citing *Shively*, 152 U.S. 1).

The pattern continued in *Squire*, which also framed the issue there, regarding artificially filled areas, in terms of the rights that obtain "beyond high-water mark." *Squire*, 150 Ohio St. at 322. In particular, *Squire* uses the phrase in a paragraph that starts with reference to "the title of the state of Ohio to subaqueous and filled lands beyond the natural shore line of Lake Erie" and end with a phrase that is a near-verbatim reiteration, changing the first line's use of "natural shore line" to "high-water mark": "the title to subaqueous and filled-in lands beyond high water mark is in the state." *Id.* The two phrases are set up as parallels, showing that the Court treated natural shoreline and high-water mark as synonymous. Notably, the State does not urge that the omission of the term "ordinary" transforms the law to extend to the ultimate or unusual high-

water mark; rather, the minor variance simply shows that the Court varies terms slightly, while always meaning the same thing.

In addition, *Squire*'s use of the term "natural shoreline," coupled with that term's usage in the Fleming Act and the context of the artificial-fill issue in *C&P R.R. Co.*, shows that the term "natural shoreline" was used as a counter to "artificial shoreline," and not as any endorsement of a water's edge approach. See State Br. at 35-36. After the artificial-fill issue in *C&P R.R. Co.* triggered the Fleming Act, it was natural for the General Assembly to use the terms "natural shoreline" and "artificial encroachments" to confirm that littoral owners could not move the boundary by virtue of artificial fill (except in the case of restoring avulsive loss, see below at 37).

Beyond misreading the Court's use of the ordinary high-water mark in these landmark cases, Plaintiffs seek to rely on a 1993 Attorney General opinion to support their view, but that opinion does not support their cause, either. See OLG Br. at 37 (citing 1993 Ohio Op. Atty. Gen. 128, No. 93-025) ("1993 OAG"); Duncans Br. at 12-13 (same). The opinion confirms that the federal grant at statehood, as later re-affirmed by the SLA, runs to the ordinary high-water mark. 1993 OAG at 7-8 (citing 43 U.S.C. § 1301(a)(3)). It also found that the "low water mark" is not the boundary of an upland owner's title on Lake Erie, but that the "natural shoreline" (which it contrasts with the "artificial shoreline") is. *Id.* at 5. That opinion also says that the actual location of the "natural shoreline" of Lake Erie is a factual question: "The determination of the natural shoreline of Lake Erie is a question of fact." *Id.* at 1, syllabus. That is consistent with the need to resolve the actual location of the ordinary high-water mark in future proceedings.

The opinion does say that "a littoral owner along Lake Erie is the beneficiary of a grant pursuant to" the SLA "of land above the natural shoreline of Lake Erie." *Id.* at 13. That language is admittedly imprecise, for, as all agree, the SLA itself did not effect any grants, as its

1953 enactment could not re-effect grants made to each State upon admission to the Union. But to the extent that this language allows for a grant below the ordinary high-water mark, the better reading is that it acknowledges that federal law *allows* for States to grant title to such beneficiaries as a matter of state law, not that federal law *effects* such a grant, so the question turns on State law, not upon any reading of the SLA itself, which, again, starts with the ordinary high-water mark. And as a state law matter, the opinion must be read in light of the actual cases, as explained above. Finally, even if the opinion were read, as Plaintiffs suggest, to support their view, then it is not consistent with, and cannot override, this Court's opinions. *State ex rel. Van Dyke v. Public Emples. Ret. Bd.* (2003), 99 Ohio St. 3d 430, 437 ("Attorney General opinions are not binding on courts; at best, they are persuasive authority.")

In sum, the Court's later key cases, although dealing with other issues, repeat the terms so routinely that it shows that Ohio has consistently maintained the line described in *Sloan* and going back to the federal grant as described in *Shively*: Lake Erie includes waters and soil, whether wet at the moment or not, up to the ordinary high-water mark.

3. None of the other cases cited by Plaintiffs overcomes the Court's usage, in *Sloan, C&P R.R. Co.,* and *Squire,* of the ordinary high-water mark.

Plaintiffs cite many other cases, both from Ohio and other States, to support their view, but none of those cases overcomes the showing of the landmark cases above, which all refer to the ordinary high-water mark in connection with Lake Erie and Ohio law. All of Plaintiffs' cases fall into one of several categories that render them inapposite at best, or show instead why the State's position is correct.

First, all Plaintiffs cite many cases concerning Ohio's law regarding rivers, as opposed to Lake Erie. For example, OLG precedes its discussion of *Sloan* with an extended discussion of *Gavit v. Chambers* (1828), 3 Ohio 495, which concerned riparian rights in the beds of Ohio's

rivers and streams. OLG says that *Gavit* is important because the "Court weighed the public trust interest in navigation the sacred private property rights of landowners, and determined that the public trust requires no more than an easement of passage across navigable waters." OLG Br. at 21. But *Sloan* summarized *Gavit* and said, in no uncertain terms, that the riparian approach "clearly does not" apply to Lake Erie. *Sloan,* 34 Ohio St. at 512. For that reason, none of the riparian concerns raised by the parties, or by amici, matters here at all. See, e.g., Ohio Farm Bureau Amicus Br. at 4-10, 13-14. In addition, even if *Gavit* had any analogous import—though it does not, as *Sloan* said—OLG's own summary demonstrates that *Gavit* and its progeny held that a public trust *did* apply in riparian law, even where the upland owners held private title to the riverbeds.

Second, Plaintiffs cite various other non-Lake Erie cases that might seem at first blush to connect to the Lake, but are closer to the riparian cases in involving other types of bodies of water. See, e.g., OLG Br. at 29-30 (citing *Hogg v. Beerman* (1884), 41 Ohio St. 81, and *Bodi v. Winous Point Hunting Club* (1897), 57 Ohio St. 629. *Hogg* involved the swamp lands and waters forming East Harbor in Ottawa County, which was landlocked and hydraulically connected to, but not actually *part of*, Lake Erie. See *Hogg*, 41 Ohio St. at 97 (noting that in the sense at issue, "the name 'Lake Erie' embraces only the main water, excluding land-locked bays and harbors."). In fact, the *Hogg* Court described East Harbor as "bounded" on the "north by 'the shore of Lake Erie.'" *Id.* Thus, *Hogg* simply did not involve Lake Erie.

Nor can OLG rely on *Bodi v. Winous Point Hunting Club* (1897), 57 Ohio St. 629, which was merely a three-sentence opinion vacating part of a lower-court injunction regarding fishing in swampy marshes and other lands west of Sandusky Bay. This Court's minimal decision in *Bodi* did not address any boundary issues. In addition, it did not include the short phrase

regarding "lands, shores, marshes, and islands"—a phrase that OLG implies was this Court's language, as OLG follows it with a citation to this Court's opinion. See OLG Br. at 30. This Court's three-sentence *Bodi* opinion does not support bootstrapping in the entire lower-court opinion or overcoming this Court's landmark cases above.

And even the lower-court opinion in *Bodi* does not support Plaintiffs, as it, like *Hogg,* above, makes clear that the case involves swamp lands, and those lands are *not* part of Lake Erie. *Winous Point Shooting Club v. Bodi* (Ottawa App. 1895), 10 Ohio Cr. Dec. 544; see also *Niles v. Cedar Point Club* (1899), 175 U.S. 300, 309 (recognizing that "swamp and boggy land is to be treated as land" as opposed to "Lake Erie, a navigable lake, and in that case belonging to the state of Ohio"). Indeed, Ohio received swamp lands bordering Lake Erie from the federal government under the Swamp Lands Act of 1850, well after Ohio had received Lake Erie itself upon statehood in 1803. In sum, the "swamplands" are not Lake Erie, so none of the swampland cases support Plaintiffs. Cf. Com. Pl. Op. at 69 ("the court's decision does not attempt to cover swamp lands covered by the federal Swamp Land Act of 1850.").

The sole cited case from the Court that actually involves Lake Erie, and that mentions the boundary in a way that even superficially seems to support Plaintiffs, is *Mitchell v. Cleveland Electric Illuminating Co* (1987), 30 Ohio St. 3d 92, a tort case that notes the boundary in pure dicta. *Mitchell* involved plaintiffs that sought to hold the city of Avon Lake liable for injuries they sustained far into the water, and far beyond the municipal boundaries, on the theory that plaintiffs began from the city's shore, and the city failed to warn adequately of dangers in the water. In passing, the Court did refer to the "low-water mark" as the city's boundary, but that specific term was not relevant to the dispute, as all parties agreed that the accident was far

beyond any city limit. Even the appeals court in this case, while otherwise agreeing with OLG on most points, rejected this as dicta. App. Op. at ¶ 100.

Third, Plaintiffs cite other States' cases as purported support for the result they seek here. To the extent that those cases simply involve other States' laws, and the parties agree that States may go their separate ways, they are irrelevant. But those cases do show that even the States that adopt a "low-water mark" as to private title are uniform in protecting a public trust over Great Lakes to the ordinary high-water mark. To the extent the cases help Plaintiffs' efforts to obtain title, then, they deeply undercut their attempt to push back the public-trust boundary. See, e.g., *Korrer*, 127 Minn. at 76, *Sprague v. Nelson* (1924), 6 Pa. D. & C. 493.

Beyond reliance on inapposite case law, Plaintiffs claim that their views are supported by pre-statehood conveyances of title to the uplands bordering Lake Erie, especially the transfers of the "Firelands" areas once held by Connecticut as its Western Reserve, as well as other federal grants. OLG Br. at 7-8, Taft Br. at 23-26; Duncans Br. at 14-21. Plaintiffs also point to the "the Quieting Act" enacted by Congress before Ohio's statehood, along with execution of a patent by President John Adams, regarding Connecticut's Western Reserve lands. Plaintiffs claim that these land grants extended beyond the ordinary high-water mark and into Lake Erie, so that as a consequence, Ohio took title at statehood subject to being encumbered by those pre-statehood grants below ordinary high-water mark.

But this pre-Statehood history does not support Plaintiffs' cause. First, as explained above (at 15), this entire argument would *at most* support *some* plaintiffs; it would not support a classwide boundary shift. Second, the Court can and should reject this argument now, rather than have it relitigated on remand by some Plaintiffs, for several reasons. This Court long ago explained that the Western Reserve, including its Firelands, was bounded on the north by Lake

Erie and did not include Lake Erie. See, e.g., *Hogg*, 41 Ohio St. at 97; see also *Holmes v. Cleveland, C. & C. R. Co.* (1861), 93 F. 100, 101, 109 (N.D. Ohio) (describing Western Reserve lands as originally surveyed as "bounded north by the lake" and finding that such land at that time "embraces 20 acres of soil *above high water*, exclusive of streets and the lake shore"). Thus, the definition of "Lake Erie," from other cases, controls the line, and as shown above, Lake Erie has been defined as reaching its ordinary high-water mark.

In addition, federal law governs issues regarding the boundaries of such pre-statehood grants by the federal government, and "[g]rants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark." *Shively*, 152 U.S. at 58. Such grants "do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State." *Id.*; see also *Borax Consol., Ltd. v. Los Angeles* (1935), 296 U.S. 10, 22; see also *Corvallis Sand*, 429 U.S. 363; *Phillips Petroleum Co.*, 484 U.S. 469. Indeed, a federal court has specifically recognized this principle's application to lands bordering Lake Erie in the State of Ohio, finding that federal grants "extend only to *high-water mark*" and that the "title to *the shore*, and to the lands under such water, is in the state within which such waters are situated, as an incident of the sovereignty of the state, and is held by the state in trust for the public purposes of navigation." *Niles v. Cedar Point Club* (1898), 85 F. 45, 50 (emphases added).

And even if these grants fell under Connecticut law, as opposed to the federal law definition of Ohio's ownership at statehood, Plaintiffs lose. Connecticut is a high-water mark state: Connecticut's upland owners have no title below the ordinary high water mark of navigable bodies of water. See *Water St. Assocs. Ltd. Partnership v. Innopak Plastics Corp.*

(1994), 230 Conn. 764; *Lovejoy v. van Emmenes* (1979), 177 Conn. 287 (holding that the State holds the shore between the high and low water marks of navigable bodies of water, while upland owners possess certain littoral rights to use the shore adjacent to their upland). Tellingly, Connecticut, the only State that granted title to the now-Ohio land bordering Lake Erie before Ohio's statehood, is also the only state with pre-statehood claims in Ohio's territory whose law Taft does not cite.

Consequently, none of Ohio's pre-statehood history supports Plaintiffs' goal of redefining the boundaries of Lake Erie. Nor do any of the cases that Plaintiffs cite overcome the State's demonstration that Ohio has always maintained the ordinary high-water mark as the boundary of Lake Erie.

E. As the parties now agree, the State retains title over the artificially filled lands of Lake Erie, and only gradual, natural accretion transfers title to littoral owners.

All plaintiffs agree with the State that private landowners may not expand their holdings unilaterally by artificially filling in Lake Erie, and all parties agree that private owners may use fill to restore natural upland lost to sudden avulsion, in accordance with common law. See State Br. at 42-45; ODNR Br. at 8-13; OLG Br. at 41-45; Taft Br. at 39-40; Duncans Br. at 45-46; *United States v. 461.42 Acres of Land* (N.D. Ohio 1963), 222 F. Supp. 55, 56; *Baumhart v. McClure* (6th Dist. 1926), 21 Ohio App. 491, 493-494.

Thus, the Court need only affirm the parties' shared view. The sole disagreement between the parties is whether the appeals court even challenged this settled rule, and while the State stands by its description in its opening brief, the Court need not resolve any dispute about the appeals court's holding. It need only state the correct law going forward, by re-affirming its own precedent regarding artificial fill, as codified by the Legislature. *C&P R.R. Co.,* 94 Ohio St. 61; *Squire,* 150 Ohio St. 303; R.C. 1506.10-.11; R.C. 721.04.

CONCLUSION

For the reasons above and in the State's opening brief, the Court should reverse the appeals court's rejection of the Attorney General's representation of his client, the State of Ohio, as a named defendant in this case. It should then reverse the appeals court's definition of the Lake Erie boundary at the momentary water's edge, and it should hold instead that Lake Erie, and the State's public trust authority over Lake Erie, extends to the traditional common-law boundary, which is the ordinary high-water mark of the Lake, even if the Lake recedes below that line from moment-to-moment on a given day.

Respectfully submitted,

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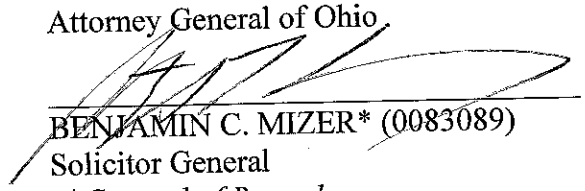

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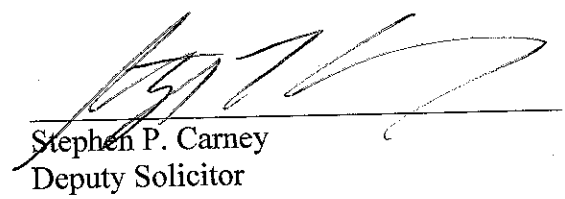

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