ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. ROBERT MERRILL, TRUSTEE, *et al.*, Plaintiff-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

BRIEF OF *AMICUS CURIAE* 1851 CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF APPELLEES ROBERT MERRILL, *et al.*

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INTEREST OF *AMICUS CURIAE*

Formed to support public policies that advance liberty, individual rights, and a strong economy in Ohio, the 1851 Center for Constitutional Law is dedicated to protecting Ohioans' control over their lives, their families, their property, and thus, ultimately, their destinies. In doing so, the 1851 Center has developed particular expertise in Ohio constitutional law, has authored numerous publications on this topic, and has achieved favorable results for Ohioans in numerous state constitutional law cases.

More pointedly, the 1851 Center has an interest in protecting Ohioans' rights to acquire, possess, use, and dispose of their private property in a way that does not harm others, and in ensuring that government act responsibly in all cases, and adhere to strict procedural safeguard prior to taking or destroying private property. This is particularly so when those rights are imperiled by amorphous public "rights" or prerogatives such as the public trust doctrine. As constitutional scholar Richard Epstein explains:

> The public trust doctrine strays from its original function, that of limiting government power over public assets, and addresses a new function, that of expanding government power over private property. The newer approach to the public trust doctrine is simply another unfortunate effort to create instability in private rights, in harmony with the modern efforts to eviscerate the eminent domain clause.[1]

If Ohio were to adopt this "newer approach to the public trust doctrine," property rights of all Ohioans will be placed at risk. "Well-organized political groups may well be able to obtain net

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[1] Richard A. Epstein, *The Public Trust Doctrine,* Cato Journal, Vol. 7, No. 2 (Fall 1987), at 411.

transfers from legislation." Indeed, that is the case here, as two interest groups seek to acquire, free of charge, benefits for their members at the expense of the lakefront property owners. These interest groups and the state basically ask "some people alone to bear the burdens which, in all fairness and justice, should be borne by the public as a whole."[2] "As such the connection between the defects of the political process and the public trust doctrine is as explicit as the connection between the defects of the political process and the eminent domain clause."[3] Thus, when left unchecked by property rights "public trust doctrine is a blunt instrument in the hands of interest groups, voters, legislatures, and courts."[4]

The 1851 Center for Constitutional Law thus has a strong interest in this Court's ruling, as it will (1) confirm or deny the proposition that the Ohio Constitution is more protective of Ohioans' property rights than its federal counterpart; and (2) preserve or eviscerate Ohioans' right to be free from an application of the public trust doctrine that renders their private property in perpetual jeopardy.

FACTS AND STATEMENT OF THE CASE

Amicus defers to the Facts and Statement of the Case articulated by Appellees, with only this caveat: Lakefront property owners' ("the property owners") property rights in land up to the waters of Lake Erie is a function of reasonably-settled expectations that must be honored. These expectations arise not just from the Lockean notions of property rights acknowledged by this Honorable Court in *Norwood v. Horney* and earlier, whereby one develops a property interest in

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2 *Armstrong v. United States*, 364 U.S. 49, 49 (1960).

3 Epstein: Cato Journal, Vol. 7, No. 2 (Fall 1987), at 429.

4 Randy T. Simmons, *Property and the Public Trust Doctrine*, at 3.

land through making gainful use thereof. These expectations further arise from the fact that many of the property owners have, for decades if not centuries, paid property taxes on land up to point where it meets the waters of Lake Erie. And these expectations further arise from the fact that many of the property owners' deeds preserve for them an interest in land up to the point where it meets the waters of Lake Erie.

It is equally compelling that these settled expectations arise from the State of Ohio itself. Prior to deciding that it would attempt to take all of the property owners' land below the high-water mark, the state maintained that this land belonged to the property owners:

- In October of 1970, the State of Ohio Department of Public Works cited the low-water mark as the extent of public trust property in Lake Erie.[5]

- In the Spring of 1979, the Ohio Department of Natural Resources' public draft of the Ohio Coastal Zone Management Program notes that "currently, Ohio's shoreline of Lake Erie, the line where the land and water meet, is normally used to determine where the state's rights over the bed of Lake Erie begin." The report then recommends changing this to (1) the lower water mark; (2) the ordinary high water mark; or (3) the average water level.[6]

- In 1993, the Ohio Department of Natural Resources requested that Attorney General Lee Fisher clarify the extent of lakefront landowners' property rights. Attorney General Fisher responded with OAG 93-025, which concluded that "a littoral owner along Lake Erie holds title to the extent of the natural shoreline," and defined the "natural shoreline" as "the edge of a body of water." The opinion further notes that land lying between the shoreline and ordinary high water mark belongs to the littoral owner, and not to the state of Ohio.[7]

- In March of 1997, the Coastal Management Program and Environmental Impact Statement underwritten by ODNR and the U.S. Department of Commerce observed that private lakefront property owners' rights extent to "the water's edge," "where land and water meet," and include "the beach."[8]

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5 Trial Court's Judgment Entry, pp. 46-48.

6 Id.

7 Id.

8 Id.

It is only recently that ODNR has adopted a different public trust boundary: The Army Corps of Engineers estimate of Lake Erie's high-water mark (574.4 feet IGLD), a mark set by the Corps for entirely unrelated regulatory purposes. In setting this mark, the State of Ohio now contends that private lakefront property owners must obtain submerged land leases from it to use property between the lake shore (where the land and water meet) and this high water mark.

Meanwhile R.C. 1506 continues to define the public trust property boundary as the "natural shoreline." The plain meaning of this term is thoroughly and accurately briefed by Appellees, and certainly, particularly when taken in conjunction with the aforementioned acknowledgments of the State of Ohio, creates a settled expectation amongst any reasonable person that Ohio's lakefront private property owners' rights extent to where land and water meet.

ARGUMENT

Property must be secured, or liberty cannot exist.

-John Adams, Discourses on Davila, 1790.

The facts above demonstrate settled expectations amongst lakefront property owners that they own to the point where their land meets the waters of Lake Erie. Both the Trial Court and the Court of Appeals for the Eleventh District of Ohio confirmed this ownership interest. Accordingly, Ohio's constitutional protections of property rights apply to this matter. It is against these protections of fundamental and sacrosanct rights that the public trust doctrine, codified as a mere legislative enactment in Ohio, must be judged. Between the two, as demonstrated below, there is no contest. Moreover, even holding the property owners'

constitutional guarantees aside, the public trust doctrine is not intended to apply to land, and Ohio's codified version thereof, on its own terms, fails to apply to land.

A. Lakefront property owners' property rights are sacrosanct, and must be tread upon lightly.

i. Rights accrue from the property owners' reasonable settled expectations.

The Supreme Court of the United States frequently emphasizes the need to protect settled property interests and attendant expectations.[9] Here, the State of Ohio and its political subdivisions have *acquiesced* to these expectations through acknowledgment of the property owners' deeds, which extend below the Army Corps' high-water mark, and receipt of the property owners' property taxes, which are paid upon land below the Army Corps' high-water mark. But perhaps more importantly, the State of Ohio, and its tentacles and political subdivisions have *built* these expectations through numerous acknowledgments that the property owners' land extends below the Army Corps' high-water mark, and to the point where it meets the waters of Lake Erie.

Finally, the plain language of Ohio's codified public trust doctrine itself refers only to waters and submerged lands. R.C. 1506.10 governs the state's rights to the waters of Lake Erie and provides, in relevant part:

> It is hereby declared that *the waters of Lake Erie* consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with *the soil beneath* and their contents, do now belong and have always, since the

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[9] *See Leo Sheep Co. v. U.S.*, 440 U.S. 668, 687-88(1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.").

> organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, for the public uses to which they may be adapted, subject to the powers of the United States government, to the public rights of *navigation*, *water commerce*, and *fishery*, and to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands.

The term "territory," as it appears above, is defined as "the waters and the lands presently underlying the waters of Lake Erie and the lands formerly underlying the waters of Lake Erie and now artificially filled, between the natural shoreline and the international boundary line with Canada."[10] R.C. 1506.10 designates ODNR as the state agency responsible for the enforcement of the state's rights as set forth in that section and the Ohio Administrative Code establishes many of the guidelines as pertains to the lease of submerged lands.[11] Although the latter contains many definitions of the terms necessary for the statute's enforcement, conspicuously absent is any definition of "underlying waters" or "submerged lands."

Though Appellees' amply elaborate on this point, and *Amicus* elaborates *infra,* it is sufficient to note for now that there is nothing in these descriptions, or in the plain meanings of these terms, which would indicate to a current or potential lakefront property owner that the state has an entitlement to land not covered by the waters of Lake Erie. Thus the property owners have quite reasonably developed and retained settled expectations that their interest in lakefront land extends to the points where it meets the waters of Lake Erie.

ii. The Ohio Constitution is more protective of property rights.

Ohio's lakefront property owners are entitled to the additional protections offered by Sections 1 and 19 of Article I of the Ohio Constitution, and this Court is free to construe those

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10 R.C. 1506.11(A).

11 See Ohio Adm.Code 1501-6-01 et seq.

provisions so as to protect these property owners from the public trust doctrine. The United States Supreme Court has repeatedly reminded state courts that they are free to construe their state constitutions so as to provide different, and broader, protections of individual liberties than those offered by the federal Constitution.[12] It has further declared that "state courts' interpretations of state constitutions are to be accepted as final, as long as the state court plainly states that its decision is based on independent and adequate state grounds."[13]

Accordingly, Ohio courts are free to interpret the Ohio Constitution without adherence or deference to federal court decisions-- the United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by state citizens."[14] Put another way, "states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution. *However, there is no prohibition against granting individuals or groups greater or broader protections.*"[15]

Ohio courts have not hesitated to recognize this capacity:

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12 *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing, *e.g., City of Mesquite v. Aladdin's Castle, Inc.* (1982), 455 U.S. 283, 293, 102 S.Ct. 1070, 1077, 71 L.Ed.2d 152, 162 (" * * * [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); and *California v. Greenwood* (1988), 486 U.S. 35, 43, 108 S.Ct. 1625, 1630, 100 L.Ed.2d 30, 39 ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."). See, also, *Pruneyard Shopping Ctr. v. Robins* (1980), 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741, 752.

13 *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing *Michigan v. Long* (1983), 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201, 1214-1215.

14 *PruneYard Shopping Ctr. v. Robbins* (1980), 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741; *State v. Brown* (1992), 63 Ohio St.3d 349, 588 N.E.2d 113.

15 *Arnold*, supra.

> [W]e believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, *state courts are unrestricted in according greater civil liberties and protections to individuals and groups.*[16]

The above statement leaves no doubt that Ohio courts have the capacity to find that the Ohio Constitution provides protections for individual liberty that stretch beyond those of the U.S. Constitution.[17] In 2008, the Ohio Supreme Court reaffirmed this axiom, acknowledging in *State v. Gardner,* that "[w]e are, of course, free to determine that the Ohio Constitution confers greater rights on its citizens than those provided by the federal Constitution, and we have not hesitated to

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16 *Arnold,* supra. After making this paradigmatic statement, the Ohio Supreme Court, recognized an obligation "not to disturb the clear protections provided by the drafters of [the Ohio] Constitution." As such, in *Arnold*, it interpreted the Ohio Constitution's protection of the Right to Bear Arms, articulated in Section 4, Article I of the Ohio Constitution, as more protective of that right than the Second Amendment. Emphasis added.

17 *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570, citing *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 21 O.O. 422, 38 N.E.2d 70. To the same effect, see, for example, *State v. Smith* (1931), 123 Ohio St. 237, 174 N.E. 768; *State v. Mapp* (1960), 170 Ohio St. 427, 11 O.O.2d 169, 166 N.E.2d 387; *State ex rel. The Repository v. Unger* (1986), 28 Ohio St.3d 418, 28 OBR 472, 504 N.E.2d 37; and *Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813, all cases where the Ohio Supreme Court found the Ohio Constitution as conferring rights greater than those of the U.S. Constitution. See also *Gardner*, infra, *Arnold*, supra, and *Norwood v. Horney* 110 Ohio St.3d 353, 853 N.E.2d 1115, 36 Envtl. L. Rep. 20,161, 2006 -Ohio- 3799

do so in *cases warranting an expansion,*"[18] and recognized that "state constitutions are a vital and independent source of law."[19]

Ohio recognizes the need to use its own constitution to protect individual rights, and especially the right of property. The Ohio Supreme Court's 1941 ruling in *Direct Plumbing Supply v. City of Dayton* stresses the importance using the Ohio Bill of Rights as an independent basis for protecting individual rights:

> 'The guaranties of sections 1, 2, and 19 of the Bill of Rights in the Constitution of Ohio are similar to those contained in the amendment to the federal Constitution referred to [the 14th Amendment].' *If in the midst of current trends toward regimentation of persons and property, this long history of parallelism seems threatened by a narrowing federal interpretation of federal guaranties, it is well to remember that Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality. Decision here may be and is bottomed on those guaranties.*[20] (Emphasis added).

In *Direct Plumbing Supply*, with no mention of the federal Constitution, and citing only Ohio's Bill of Rights, the Court decisively struck down the regulation at issue, concluding that "[t]he burdens of the ordinance are unduly oppressive upon individuals and interfere with the rights of private property and the freedom of contract beyond the necessities of the situation. The ordinance is therefore held to be invalid as in contravention of Section 19, Article I, of the

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18 *State v. Gardner* (2008) 118 Ohio St.3d 420, 889 N.E.2d 995, citing *Norwood v. Horney,* 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (holding that the Ohio Constitution's Takings Clause affords greater protection than the corresponding federal provision).

19 *Gardner*, supra, citing generally William J. Brennan Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights (1986), 61 N.Y.U.L.Rev. 535. asdf

20 *Direct Plumbing Supply v. City of Dayton* (1941), 138 Ohio St. 540, 38 N.E.2d 70, 137 A.L.R. 1058, 21 O.O. 422, citing *Wilson v. City of Zanesville*, supra; *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 110 N.E. 648, at p. 651.

Constitution of Ohio."[21] Thus, this Court must apply the more scrutinizing and protective standards of the Ohio Constitution, and is free to go beyond the baseline federal guarantees, when weighting the settled expectations of lakefront property owners against other interests, such as the public trust doctrine.

iii. Lakefront owners' property rights are entitled to commanding deference.

Historically, the laws of Ohio were designed to ensure the right to own and protect property. Ohio's Constitution was significantly influenced by the Northwest Ordinance of 1787.[22] In effect, the Northwest Ordinance was "much more stringent than what is found in the Takings Clause of the Fifth Amendment to the United States Constitution."[23] Accordingly, when attaining statehood in 1803, the framers of the Ohio Constitution were sure to include a rigid takings clause, which embodied the letter and spirit of the Northwest Ordinance that had served the territory well for its previous 16 years.[24]

As a result, Ohio's first constitution contained two provisions relating to the protection of private property.[25] "All men * * * have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property."[26] The constitution also contained an eminent domain clause, providing "[p]rivate

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21 *Direct Plumbing Supply* , supra.

22 Note, Not by the Hair of My Chinny Chin Chin: Ohio's Attempt to Combat the Big Bad Wolf of Blight, 2 Liberty U.L.Rev. 243, 263.

23 *Id.*

24 *Id.*

25 *Id.*

26 Then Section 1, Article VIII, Ohio Constitution (1802).

property ought and shall ever be held inviolate, but always subservient to the public welfare; provided a compensation in money be made to the owner."[27]

In 1850, a constitutional convention was held and a new constitution was proposed dues to a one of the faults of the 1802 constitution, as identified by the drafters: the earlier clauses were deemed insufficient to properly protect the private property rights of landowners.[28] As a result, in the revision, the drafters changed the placement and rewrote the property clauses, and strengthened the eminent domain clause. These protections were placed at the forefront of the constitution. Section 1, Article I of the 1851 Constitution provides, "all men * * * have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property * * *." Section 19, Article I of the 1851 Constitution guarantees that private property be held "inviolate."

This concept of inviolability is stronger than the generalized takings clause found in the United States Constitution. Like the principle that property in Ohio is inviolate, the Ohio Constitution contains additional protection not included United States Constitution, which has been and should again be recognized by the Ohio Supreme Court.

Indeed, in its seminal decision of *Norwood v. Horney,* this Court acknowledged that "the rights related to property, i.e., to acquire, use, enjoy, and dispose of property,[29] are among the

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27 Then Section 4, Article VIII, Ohio Constitution (1802).

28 Fischel, The Offer/Ask Disparity and Just Compensation for Takings: A Constitutional Choice Perspective, 15 International Rev.L. & Econ. 187, 197.

29 Norwood v. Horney, supra, citing *Buchanan v. Warley* (1917), 245 U.S. 60, 74, 38 S.Ct. 16, 62 L.Ed. 149

most revered in our law and traditions, and that "property rights are integral aspects of our theory of democracy and notions of liberty."[30]

Believed to be derived fundamentally from a higher authority and natural law, property rights were so sacred that they could not be entrusted lightly to "the uncertain virtue of those who govern."[31] As such, property rights were believed to supersede even constitutional principles. Thus, "[t]o be * * * protected and * * * secure in the possession of [one's] property is a right inalienable, a right which a written constitution may recognize or declare, but which existed independently of and before such recognition, and which no government can destroy."[32] As this Court noted in *Norwood,* quoting Chief Justice Bartley:

> The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself; the civil rights, privileges and immunities authorized by law, are *derivative*-mere *incidents* to the political institutions of the country, conferred with a view to the public welfare, and therefore *trusts* of civil power, to be exercised for the public benefit. * * * Government is the necessary burden imposed on man as the only means of securing the protection of his rights. And this protection-the primary and only legitimate purpose of civil government, is accomplished by protecting man in his rights of personal security, personal liberty, and private property. The right of private property being, therefore, an *original right,* which it was one of the primary and most sacred objects of government to secure and protect, *is widely and essentially distinguished in its nature, from those exclusive political rights and special privileges * * * which are created by law* and conferred upon a few *

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30 See, e.g., Robert Meltz, Dwight H. Merriam, and Richard M. Frank, The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation (1999) 10; Bernard H. Siegan, Property and Freedom: The Constitution, the Courts, and Land-Use Regulation (1997) 14-18; The Private Use of Public Power: The Private University and the Power of Eminent Domain (1974), 27 Vand.L.Rev. 681, 683, and fn. 1.

31 *Parham v. Justices of Decatur Cty. Inferior Court* (Ga.1851), 9 Ga. 341, 348. See, also, *Bank of Toledo v. Toledo* (1853), 1 Ohio St. 622, 664; *Proprietors of Spring Grove,* 1 Ohio Dec. Reprint 316; Joseph J. Lazzarotti, Public Use or Public Abuse (1999), 68 U.M.K.C.L.Rev. 49, 54; J.A.C. Grant, The "Higher Law" Background of the Law of Eminent Domain (1932), 6 Wisc.L.Rev. 67.

32 *Henry v. Dubuque Pacific RR. Co.* (1860), 10 Iowa 540, 543.

> * *. The fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, * * * were evidently designed to protect the right of private property as one of the primary and original objects of civil society * * *.[33]

For these reasons, "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."[34] Consequently, Ohio has always considered the right of property to be a fundamental right.[35] There can thus 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."[36] These viewpoints case a heavy shadow when this Court is called upon to weigh the property rights of Ohioans against less fundamental interests, such as the public trust doctrine.

iv. Amongst lakefront owners' rights is the right to exclude.

Importantly, the aforesaid principles carry weight in protecting more than mere ownership of private property in Ohio: of what value is the right to own, if one does not carry with it the right to use, and the right to exclude others? One essential stick in lakefront property owners' bundle of private constitutional rights is the right to exclude. It is a tenet of property law in Ohio that

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33 *Bank of Toledo,* 1 Ohio St. at 632. (Emphasis added).

34 Norwood, supra.

35 See, e.g., *Reece v. Kyle* (1892), 49 Ohio St. 475, 484, 31 N.E. 747, overruled in part on other grounds, *Mahoning Cty. Bar Assn. v. Ruffalo* (1964), 176 Ohio St. 263, 27 O.O.2d 161, 199 N.E.2d 396; *Hatch v. Buckeye State Bldg. & Loan Co.* (P.C.1934), 32 Ohio N.P. (N.S.) 297, 16 Ohio Law Abs. 661; *In re Vine St. Congregational Church* (C.P.1910), 20 Ohio Dec. 573; *Caldwell v. Baltimore & Ohio Ry. Co.* (C.P.1904), 14 Ohio Dec. 375; *Kata v. Second Natl. Bank of Warren* (1971), 26 Ohio St.2d 210, 55 O.O.2d 458, 271 N.E.2d 292.

36 *Norwood*, supra.

the right to exclude others is inherent to the right of property ownership.[37] Beyond Ohio's borders, the late Justice Thurgood Marshall observed that the common-law right to exclude has long been a fundamental tenet of real property law: "the power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[38]

A compensable taking is established if a landowner simply demonstrates a substantial or unreasonable interference with a property right. These rights include the owner's absolute right of dominion, use, and disposition of his property for every lawful purpose. It includes the right to exclude others from exercising any dominion, use, or disposition over it. As a result, "'any physical interference by another, with the owner's use and enjoyment of his property, is a taking to that extent.'"[39] Thus, the state transgresses the transcendent constitutional guarantees articulated above when it provides for "public access," thereby eliminating a property owner's right to exclude others from his property. As such, this Court cannot act as King Solomon, leaving title with lakefront owners, but handing out unfettered rights of access to the public.

Meanwhile, from a policy standpoint, there is no dearth of public access now. "There is no reason to adopt a system that speaks of some inherent right of public access to navigable waters over private riparian [or littoral] lands. While there may be a single navigable river [or lake], there can be many places where access to that river [or lake] can be gained. Competition between landowners will keep the price of entry down, and if public access points are desired,

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37 *Bresnick v. Beulah Park Ltd. Partnership, Inc.* (1993), 67 Ohio St.3d 302, 303, 617 N.E.2d 1096, 1097.

38 See *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 419, 435, 102 S.Ct. 3164, 3176, 73 L.Ed.2d 868, 882.

39 *State ex rel. OTR,* 76 Ohio St.3d at 207, 667 N.E.2d 8, quoting *Mansfield v. Balliett* (1902), 65 Ohio St. 451, 63 N.E. 86.

then individual landowners can be compensated for the loss of their exclusive possession."[40] Indeed, this Court can take judicial notice of the fact that state and political subdivisions currently own numerous public access points to Lake Erie. Consequently, there is no deprivation of public access to be cured.

B. <u>The public trust doctrine's narrow application</u>

The Public Trust is not based upon any constitutional provision, and "it is therefore an open question whether the public trust doctrine has a constitutional home."[41] The public trust doctrine instead has its roots in English common law. Traditionally, all navigable waterways in England were by law common highways for the public.[42] Furthermore, the King held title to the soil beneath the sea and the arms of the sea, "where the sea flows and reflows."[43] When the first American States became sovereign after our Revolution, their governments succeeded to the King's powers with respect to waters within their borders.[44] New States like Ohio, upon entering the Union, acquired equivalent rights under the equal-footing doctrine.[45]

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40 Epstein, supra, at 417.

41 Epstein, supra, at 427.

42 M. Hale, De Jure Maris et Brachiorum ejusdem, cap. iii (1667), reprinted in R. Hall, Essay on the Rights of the Crown and the Privileges of the Subject in the Sea Shores of the Realm, App. v (2d ed. 1875).

43 Hale, cap. iv, reprinted in Hall, *supra,* at App. vii, ix.

44 *Martin v. Waddell,* 16 Pet. 367, 410, 10 L.Ed. 997 (1842).

45 *Pollard's Lessee v. Hagan, supra,* 3 How., at 228-229.

The United States Supreme Court, the Ohio Legislature, and the courts within the state of Ohio have adopted the "public trust doctrine" regarding the question of who owns the submerged lands of Lake Erie. According to the public trust doctrine:

> [O]wnership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.[46]

Even though, according to English common law, the public trust doctrine applied only to lands covered by "tide waters," because of the similar nature of the Great Lakes to the ocean, the "same doctrine is * * * held to be applicable to lands covered by fresh water in the Great Lakes, over which is conducted an extended commerce with different states and foreign nations."[47] The public trust doctrine has existed in the state of Ohio since it was admitted to the Union in 1803. As stated in R.C. 1506.10:

> It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with *the soil beneath* and their contents, 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, for the public uses to which they may be adapted, subject to the powers of the United States government * * *.

According to the public trust doctrine, the state of Ohio simply holds title to the *submerged lands* of Lake Erie "as trustee for the people."[48]

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46 *Illinois Central RR. Co. v. Illinois* (1892), 146 U.S. 387, 435, 13 S.Ct. 110, 111.

47 *Illinois Central,* at 435.

48 *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, paragraph two of the syllabus.

i. The public trust doctrine is subordinate to the Ohio Constitution.

Importantly, while some states have elevated the public trust doctrine to constitutional rights by placing the doctrine in their state constitutions,[49] Ohio has deliberately abstained from doing so. Instead, the public trust doctrine is a legislative enactment, codified in R.C. 1506. It is thus subordinate to protections enshrined in the Ohio Constitution, and must be treated as such when weighed against those rights. Moreover, because courts have a duty to construe legislative enactments as constitutional, so as to preserve them, it must be construed as in harmony with Ohio's fundamental guarantee of private property rights.[50] Thus, as one Ohio Court recently put it "[w]hile the doctrine charges the state with the responsibility and authority to maintain offshore submerged lands for the benefit of the public, the doctrine does not give the state the unbridled power to do anything it pleases.[51]

ii. Only that property which is necessary to preserve navigability is public trust property.

All rationales for the public trust doctrine demonstrate that its purpose is to prevent private ownership of navigable waterways, so as to preserve free commercial navigation thereon.

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49 While many states, such as Montana, have explicit public trust doctrines in their state constitutions. See Art. 9, Section 3, Ohio does not. This suggests that Ohio's constitutional enshrinement of property rights should take precedence when disputes arise.

50 See *inter alia, Bishops v. Hybud Equip. Corp.* (when a statute is susceptible to two meanings - - one of which would make the statute unconstitutional and the other of which would make it constitutional - - courts are bound to give the statute that construction which would uphold its validity).

51 *Sandusky Marina Ltd. Partnership v. Ohio Dept. of Natural Resources*, 126 Ohio App.3d 256, 710 N.E.2d 302, citing to *Lemley,* 104 Ohio App.3d 126, 661 N.E.2d 237, and holding that constitutional safeguards, in that case obligations of contract clause in the Ohio Constitution, take precedence over the public trust doctrine.

As numerous Justices of the Supreme Court have explained, "the public trust properly extends only to land underlying navigable bodies of water and their borders, bays, and inlets. This Court has defined the public trust repeatedly in terms of *navigability*."[52] "[T]here is no reason to think that different tests of the scope of the public trust apply to saltwater and to freshwater. Navigability, not tidal influence, ought to be acknowledged as the universal hallmark of the public trust."[53] Precedents explain that the public trust extends to navigable waterways because its fundamental purpose is *to preserve them for common use for transportation*: "It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon [navigable waterways], and consequently to the exclusion of private ownership, either of the waters or the soils *under them*."[54] Even cases heavily relied upon by the State of Ohio emphasize that the public trust doctrine "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment."[55]

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52 *E.g., Utah Div. of State Lands v. United States,* 482 U.S. 193, 107 S.Ct. 2318, 96 L.Ed.2d 162 (1987); *Montana v. United States,* 450 U.S. 544, 551, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493 (1981); *Utah v. United States,* 403 U.S. 9, 10, 91 S.Ct. 1775, 1776, 29 L.Ed.2d 279 (1971); *United States v. Oregon,* 295 U.S. 1, 14, 55 S.Ct. 610, 615, 79 L.Ed. 1267 (1935); *United States v. Utah,* 283 U.S. 64, 75, 51 S.Ct. 438, 440, 75 L.Ed. 844 (1931); *United States v. Holt State Bank,* 270 U.S. 49, 54-55, 46 S.Ct. 197, 198-199, 70 L.Ed. 465 (1926); *Brewer-Elliott Oil & Gas Co. v. United States,* 260 U.S. 77, 84-85, 43 S.Ct. 60, 63, 67 L.Ed. 140 (1922); *Oklahoma v. Texas,* 258 U.S. 574, 583, 42 S.Ct. 406, 410, 66 L.Ed. 771 (1922); *Pollard's Lessee v. Hagan,* 3 How. 212, 230, 11 L.Ed. 565 (1845).

53 Id.

54 *Packer v. Bird,* 137 U.S. 661, 667, 11 S.Ct. 210, 211, 34 L.Ed. 819 (1891).

55 *Illinois Central R. Co. v. Illinois,* 146 U.S. 387, 436, 13 S.Ct. 110, 112, 36 L.Ed. 1018 (1892).

Although the States may commit public trust waterways to uses other than transportation, such as fishing or land reclamation, this exercise of sovereign discretion does not enlarge the scope of the public trust to embrace land that is not indispensable to the preservation of commercial navigation. Neither the State of Ohio nor the two political interest groups make any showing that dry land abutting Lake Erie is indispensible to the very purpose for which the public trust doctrine exists.

iii. The purpose of the public trust doctrine does not embrace state land ownership.

Based on Justinian Code, which is widely believed to mark the advent on the public trust doctrine, "these things are by natural law common to all: air, flowing water, the sea. . . What a person builds on the seashore becomes his, because beaches are not public. . . as soon as they are taken, they become without doubt the property of those into whose hands they have fallen."[56] Thus ownerships of land for public trust purposes is neither necessary nor desirable. As one legal scholar explains:

> The desirability of [a complete system of private property] changes radically when we consider, for example the use of navigable rivers and lakes for transportation. Now, any system of divided private ownership, based on first possession, tends to create the very bargaining and holdout problems that the institution of private property is designed to overcome. Hence, the public trust is essentially a 'navigation servitude.'[57]

While the state may own land on other grounds, dedicating perpetually dry land to the public trust would also invite absurd results. Applying the public trust doctrine to dry lands would give R.C. 1506 wings that it simply does not have. That section references two types of land that the state may own: "submerged lands" and "the soil beneath [the water of Lake Erie]." Neither type

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56 Simmons, supra., at p. 6.

57 Epstein, supra., at 415.

of land is at issue in this case. The State of Ohio is plainly trying to possess dry, unsubmerged land.

The position of the State of Ohio and its two coordinating political interest groups appears to be that "because water was once on the land, and the state owns the water, the state now and forever owns the land. To illustrate the absurdity of this position, one only need to take account of the state's other public trust interest: ownership of wild animals. R.C. 1531.02 states "ownership of and the title to all wild animals in this state, * * * is in the state," which holds such title in trust for the benefit of all the people."

Concluding that the state owns any land where the waters of Lake Erie have once been would, by similar logic, force the conclusion that the State of Ohio owns all private land where the wild animals that it owns have once stood, or are currently standing. In other words, just as lakefront property owners lose land when Lake Erie roams, private property across which white-tailed deer roam would suffer a similar fate. Such an understanding would naturally follow from Appellant's rationale, but would obviously violate those Ohioans' constitutionally-protected property rights. For the same reason, the Appellants' theory here violates the lakefront property owners' rights.

C. Prioritizing the public trust doctrine over the lakefront property owners' constitutionally-preserved property rights would effectuate a judicial taking.

This Court must not use the subordinate and inapplicable public trust doctrine to abrogate lakefront property owners' constitutionally-guaranteed settled interests in land up to the waters of Lake Erie - - doing so would impermissibly effectuate a judicial taking. "[T]hough the classic taking is a transfer of property to the State or to another private party by eminent domain, the

Takings Clause [and its Ohio analog] applies to other state actions that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property."[58] Most applicable here, "states effect a taking if they recharacterize as public property what was previously private property."[59]

Since state and federal takings clauses are "not addressed to the action of a specific branch or branches," but instead are "concerned simply with the act, and not with the governmental actor ("nor shall private property *be taken*" (emphasis added)). As the Supreme Court of the United States recently explained:

> There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.[60]

As one example, *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), involved a decision of the California Supreme Court overruling one of its prior decisions which had held that the California Constitution's guarantees of freedom of speech and of the press, and of the right to petition the government, did not require the owner of private property to accord those rights on his premises. The appellants, owners of a shopping center, contended that their private property rights could not "be denied by invocation of a state

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58 *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental* (2010), 130 S.Ct. 2592, citing, generally, *United States v. Causby,* 328 U.S. 256, 261-262, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); *Pumpelly v. Green Bay Co.,* 13 Wall. 166, 177-178, 20 L.Ed. 557 (1872).

59 Id., citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163-165, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980).

60 *Stop the Beach, supra, citing Stevens v. Cannon Beach,* 510 U.S. 1207, 1211-1212, 114 S.Ct. 1332, 127 L.Ed.2d 679 (1994) (SCALIA, J., dissenting from denial of certiorari).

constitutional provision *or by judicial reconstruction of a State's laws of private property,*"[61] Though the Supreme Court did not find a taking, it "treated the California Supreme Court's application of the constitutional provisions as a regulation of the use of private property, and evaluated whether that regulation violated the property owners' "right to exclude others,"[62]

More pointedly, in *Webb's Fabulous Pharmacies, supra,* the purchaser of an insolvent corporation had interpleaded the corporation's creditors, placing the purchase price in an interest-bearing account in the registry of the Circuit Court of Seminole County, to be distributed in satisfaction of claims approved by a receiver. *The Florida Supreme Court* construed an applicable statute to mean that the interest on the account belonged to the county, because the account was "considered 'public money,'"[63]

The Supreme Court held this to be a taking, noting that "[t]he usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal,"[64] and "neither the Florida Legislature by statute, nor the Florida courts by judicial decree * * * may accomplish the result the county seeks simply by recharacterizing the principal as 'public money.'"[65] Consequently, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking: "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that

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61 *Id.*, at 79, 100 S.Ct. 2035 (emphasis added).

62 *Id.,* at 80, 100 S.Ct. 2035 (internal quotation marks omitted).

63 *Beckwith v. Webb's Fabulous Pharmacies,* 374 So.2d 951, 952-953 (1979) *(per curiam).*

64 449 U.S., at 162, 101 S.Ct. 446.

65 *Id.,* at 164, 101 S.Ct. 446.

property, no less than if the State had physically appropriated it or destroyed its value by regulation."[66]

This Court should not invite U.S. Supreme Court scrutiny. Quite contrarily, it has an independent duty to apply the Ohio Constitution, and a prerogative to construe the protections therein as more protective of the lakefront property owners' rights in this case. In Ohio, a compensable taking is established if a landowner simply demonstrates a substantial or unreasonable interference with a property right. These rights include the owner's absolute right of dominion, use, and disposition of his property for every lawful purpose. And it also includes the right to exclude others from exercising any dominion, use, or disposition over it. As a result, "'any physical interference by another, with the owner's use and enjoyment of his property, is a taking to that extent.'"[67]

Thus, either (1) redefining lakefront owners' interest in land abutting Lake Erie; or (2) opening the floodgates for all Ohioans to physically occupy lakefront owners' property for recreational lakefront effectuates an actionable judicial taking. This is impermissible if compensation is not paid. Consequently, the lakefront property owners' settled expectations must be permitted to stand.

D. Conclusion

Ohio's lakefront property owners have rationally-developed settled expectations that they own to the point where their land touches the waters of Lake Erie. The heightened protections of property rights articulated by the Ohio Constitution preclude the redefinition of rights that this

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66 Stop the Beach, supra., adding "[A] State, by *ipse dixit,* may not transform private property into public property without compensation."

67 *State ex rel. OTR,* 76 Ohio St.3d at 207, 667 N.E.2d 8, quoting *Mansfield v. Balliett* (1902), 65 Ohio St. 451, 63 N.E. 86.

Court is called upon to execute through the codicil of the public trust doctrine. Lakefront property owners' claim to all land to the water's edge must be upheld.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon the parties specified below this 20th day of September, 2010.

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