

**IN THE COURT OF COMMON PLEAS  
LUCAS COUNTY, OHIO**

MIKE FERNER, *et. al.*,

Plaintiffs, : Case No. G-4801-CI-0201902904-000

v.

STATE OF OHIO, : Judge Michael R. Goulding

Defendant. :

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**PLAINTIFFS' RESPONSE TO STATE OF OHIO'S MOTION TO DISMISS**

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Defendant State of Ohio ("the State") moved to dismiss the Complaint for Declaratory Judgment filed by plaintiffs Michael Ferner, Bryan Twitchell, and John Michael Durback. The State argues that this Court should dismiss the Complaint for failure to state a claim upon which relief can be granted. Specifically, the State claims that Plaintiffs lack standing to bring this lawsuit because they "do not allege any concrete harm caused by the State's participation in the preexisting litigation, and any potential harm caused by the invalidation of the Charter Amendment is speculative." State's Motion to Dismiss ("MTD"), pg. 2. The State also claims that "Plaintiffs lack a legal basis to preclude the State, through its Attorney General, from defending state interests in Lake Erie and state environmental, natural resources, and agriculture laws." *Id.*

In response, Plaintiffs counter that they have suffered many injuries that are directly traceable to the State's unlawful conduct. Plaintiffs assert that these injuries would be redressed by an order from this court declaring that the State has failed to protect Lake Erie and all those who depend on her; a determination that the Lake Erie Bill of Rights is enforceable in its entirety under the authority of Ohio Const. Art. I, §§ 1 and 2, and Art. XVIII §§ 3 and 7 and is not

preempted by state law; and by the issuance of a permanent injunction against the State of Ohio, any citizen, any person, and any legal or fictitious entity, enjoining them from abridging the rights of Plaintiffs under the Lake Erie Bill of Rights or denying them the right to enforce any provisions of the Lake Erie Bill of Rights against any person, corporation, federal, state, or local governmental entity, and any other legal entity.

Plaintiffs also maintain that whether or not they possess a legal basis rooted in prevailing legal ideology is largely irrelevant. Plaintiffs assert that ecological reality is more important than legal ideology. All life depends on clean water, breathable air, healthy soil, a habitable climate, and complex relationships formed by living creatures in natural communities. Water is life and in northwest Ohio, no natural community is more responsible for the facilitation of life than Lake Erie. Because so much life depends on Lake Erie, the needs of Lake Erie are primary. Social morality must emerge from a humble understanding of this reality. Law is integral to social morality, so law must emerge from this understanding, too. In this case, this Court is presented with an opportunity to help Ohio law change so that it may adequately respond to both the Lake Erie crisis and the global environmental crisis.

## **I. Argument**

It is true that, in order to establish standing, Plaintiffs must show that they have “suffered (1) an injury that is (2) fairly traceable to the defendant’s allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.” *State ex. rel. Food & Water Watch v. State*, 2018-Ohio-555, 100 N.E.3d 391, ¶ 19. The State correctly points out that “a potential, speculative injury is incompatible with standing in Ohio courts” and that standing requires “a concrete injury in fact, rather than an abstract or suspected injury.” MTD, pg. 5.

**A. Plaintiffs and Lake Erie have suffered many concrete injuries.**

There is no need more fundamental to all life than the need for clean water. In Northern Ohio, the Lake Erie Ecosystem and Watershed fulfill this need. Injuries to the Lake Erie Ecosystem and Watershed are injuries to all who depend on the lake. Therefore, Plaintiffs have suffered more than *an* injury; they have suffered many. Their drinking water has been poisoned and continues to be poisoned. They experience harmful algae blooms every summer. They are routinely denied the ability to recreate in Lake Erie as conditions regularly become so harmful to human health that advisories must be issued warning Toledo-residents not to touch the Lake's water. They, along with 400,000 of their neighbors, had their tap water shut off for three days in August, 2014. And, they constantly live with the fear that this will happen again. No one who has visited the shores of Lake Erie in the vicinity of an algae bloom can claim that these injuries are speculative or abstract. To support this claim, Plaintiffs offer the attached photos of Lake Erie, taken at Maumee Bay State Park five years to the day after the disastrous algae bloom of 2014. *See Attached Photos.*

Furthermore, if the Lake Erie Bill of Rights is invalidated, Lake Erie will continue to be subject to an array of polluting events causing multiple water quality issues which degrade and destroy the viability of water, the source of life, in the region. The City water utility has no other good source of water and plaintiffs will suffer real and substantial harm if the Lake Erie Bill of Rights is invalidated and residents of the City of Toledo are deprived of a vital means of protecting Lake Erie. The invalidation of LEBOR and the continued pollution of Lake Erie, then, is not just a substantial injury, it could very well prove to be a *mortal* one.

**B. Plaintiffs' and Lake Erie's concrete injuries are directly traceable to the State's conduct.**

Next, the State argues that the harms visited upon Lake Erie and the resultant injuries Plaintiffs and all those who rely on the lake have suffered are not fairly traceable to the State's conduct. The State is wrong. First, the State refuses to enforce many regulatory laws. U.S. District Judge James G. Carr recently found that the State of Ohio's Environmental Protection Agency "failed in 2014 and again in 2016, to determine as the [Clean Water Act] requires whether Lake Erie's open waters met the state's own water quality standards." *Envtl. Law & Policy Ctr. v. United States Env'tl. Prot. Agency*, 349 F.Supp.3d 703, 705 (N.D. Ohio 2018). Because of this, Carr stated that the State of Ohio has demonstrated a "long-standing, persistent reluctance and, on occasion, refusal, to comply with [Clean Water Act]." *Id.*

This has injured the Plaintiffs, Lake Erie, and Northwest Ohio residents because as Carr wrote,

"As a result of the State's inattention to the need, too long manifest, to take effective steps to ensure that Lake Erie (the Lake) will dependably provide clean, healthful water, the risk remains that sometime in the future, upwards of 500,000 Northwest Ohio residents will again, as they did in August 2014, be deprived of clean, safe water for drinking, bathing, and other normal and necessary uses." *Id.*

Second, the laws the State does enforce are in reality reckless government policies that include permitting and licensing the very activities known to pollute Lake Erie and to cause harmful algae blooms. A permit, after all, grants *permission* to pollute. A permit legalizes harm and protects the permit holder from legal liability for engaging in permitted activities. Third, the State has failed to adequately intervene in the polluting processes and actions that produce dangerous cumulative effects and ultimately poison Lake Erie. Fourth, the State has dangerously deregulated radioactive road de-icers and dust suppressants.

Fifth, by filing suit in June 2019 against the City of Toledo in an express attempt to invalidate the democratically enacted Lake Erie Bill of Rights and by prolonging a suit where a temporary injunction against enforcing the Lake Erie Bill of Rights has been issued, the State

ensures that Lake Erie continues to endure more than a century of assault and ruin. While the Lake Erie Bill of Rights is enjoined, the direct dumping of industrial wastes and the runoff of noxious substances from large scale agricultural practices, including factory hog and chicken farms, that cause harmful algae blooms in Lake Erie continue.

**C. Plaintiffs’ and Lake Erie’s injuries would be redressed by Plaintiffs’ requested relief.**

The final prong of the State’s standing argument is that the poisoning of Lake Erie – that the State permits and protects – is unlikely to be redressed by the Plaintiffs’ requested relief. The State is wrong here, too. As any good doctor knows, the cure requires proper diagnosis. The proper diagnosis of what ails Lake Erie must include the realization that the State of Ohio has maintained policies that have failed to abate widespread pollution of Lake Erie and have caused additional harm; has allowed the use of poisonous radioactive road de-icers and dust suppressants in the Lake Erie watershed; and, despite failing its obligations to protect Lake Erie, the State has actively undermined the Lake Erie Bill of Rights, which would impose meaningful protections for Lake Erie, was the result of a democratic election, and represents the political will of the people of Toledo. Many Americans still respect American courts as places where justice is served. In this spirit, the proper diagnosis of Lake Erie’s ills made in the form of a declaration from this Court would help all of us understand what needs to be done to cure Lake Erie.

The Plaintiffs also request a determination from this Court that the Lake Erie Bill of Rights is enforceable in its entirety. The Lake Erie Bill of Rights “establishes irrevocable rights for the Lake Erie Ecosystem to exist, flourish, and naturally evolve, a right to a healthy environmental for the residents of Toledo.” At the heart of both the ecological disaster Lake Erie

is experiencing and the ecological disaster the planet is experiencing is the notion that nature is only property, an object which may be consumed, exploited, and destroyed.

One of the darkest times in American history was when African Americans were defined as property to be bought and sold by white slaveowners. It wasn't until African Americans were recognized as rights-bearing citizens that we began to correct this atrocity. The situation is similar for Lake Erie. Currently, under American and Ohio law, Lake Erie is defined purely as the property of the State. Perhaps it is because the State only sees Lake Erie as property, as an object to be consumed and destroyed, that the State fails to adequately protect Lake Erie and all those who depend on her.

The Lake Erie Bill of Rights would transform Lake Erie from property, from an object to be exploited, into a rights-bearing subject. And, just like negotiations over how much money an African American should be bought or sold for have become disgusting, if not unthinkable, negotiations over how much of this or that pollutant anyone has a right to inject into Lake Erie will one day become disgusting, if not unthinkable, if the Lake Erie Bill of Rights is found to be enforceable.

The powers granted by American and Ohio law to corporations are another major reason both Lake Erie and the planet are being destroyed. The structure of federal and state law – both statutory and constitutional – empowers corporations to override local democratic decision making. Since the early 1800s, corporations have gained rights and protections under the US Constitution despite the word “corporation” being found nowhere in the Constitution. Corporations now are able to invoke constitutional “rights” and protections under the Commerce Clause and Contracts Clause, as well as under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. Corporations use these “rights” to challenge state and local laws, and to chill efforts

at the local level to fight meaningful environmental protections. Of course, corporate rights were judicially created, so they can be judicially destroyed.

The ongoing pollution of Lake Erie is a textbook example of how corporate power is at the heart of ecological collapse. The Environmental Working Group and Environmental Law and Policy Center report that between 2005 and 2018, the number of factory farms in the Maumee river watershed, which boasts the largest drainage area of any Great Lakes river

“exploded from 545 to 775, a 42 percent increase. The number of animals in the watershed more than doubled, from 9 million to 20.4 million. The amount of manure produced and applied to farmland in the watershed swelled from 3.9 million tons each year to 5.5 million tons.”

The groups also state that “[t]he amount of phosphorus added to the watershed from manure increased by a staggering 67 percent between 2005 and 2018.” And, “69 percent of all the phosphorus added to the watershed each year comes from factory farms in Ohio.”

The Plaintiffs were involved in drafting the Lake Erie Bill of Rights. Because they understand the statistics cited above and the central role corporate power has in the destruction of Lake Erie and the planet, the Lake Erie Bill of Rights “elevates the rights of the community and its natural environment over powers claimed by certain corporations.” If citizens could use the Lake Erie Bill of Rights to alleviate the problems corporate power enables, if they could eliminate the phosphorus added to the Lake Erie watershed by corporate, factory farms in Ohio, they could eliminate the single biggest source of pollution in the Lake Erie watershed. It is clear, then, that the poisoning of Lake Erie that the State ensures and protects could be redressed by the relief Plaintiffs request.

**D. Plaintiffs’ claims are rooted in the plain meaning of Article 1, Sections 1 and 2 of the Ohio State Constitution.**

The second major argument offered by the State is that “[p]laintiffs assert no legally supported basis allowing the requested relief against the State of Ohio and its counsel, the Ohio Attorney General.” This is disingenuous.

Article 1, Section 1, of the Ohio State Constitution states: “All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.” Article 1, Section 2, of the Ohio State Constitution states: “All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.”

Regardless of the fact that Ohio courts have held that Article 1, Sections 1 and 2 are not self-executing and thus cannot be the foundation for a cause of action, the words of Article 1, Sections 1 and 2 are clear. By ruling that these sections of the Ohio constitution are not self-executing, Ohio courts have rendered Article 1, Sections 1 and 2 meaningless. By rendering those sections meaningless, Ohio courts have turned Article 1, Sections 1 and 2 into empty promises that only exist to pacify the people.

Indeed, the text of the Lake Erie Bill of Rights proudly declares that “We the people of the City of Toledo affirm” Article 1, Sections 1 and 2 of the Ohio constitution. When the people of the City of Toledo voted to enact the Lake Erie Bill of Rights, they publicly and clearly affirmed their belief that all people have inalienable rights to defend life and liberty and to seeking and obtaining happiness and safety. They also publicly and clearly affirmed their belief that all political power is inherent in the people and that the people have the right to alter, reform,



or abolish government *whenever* they deem it necessary. When a government enables the poisoning of a community's water supply and protects those doing the poisoning against those being poisoned, the people have a moral and an ecological imperative to reform their government. The Lake Erie Bill of Rights is a peaceful, democratic attempt to do so.

**E. Despite the State holding Lake Erie in trust for the benefit of all Ohio citizens, it consistently fails its duties as trustee.**

Central to the State's argument that Plaintiffs assert no legally supported basis allowing the relief they request are the State's claims that Lake Erie is "held by the State as a public trust resource for the benefit of all Ohio citizens." MTD, pg. 8. Also, "the State objects to the Charter Amendment's purported conferral of standing to represent Lake Erie, which is separate and distinct from the State's authority over the Lake under state and federal law, and to its express attempt to supersede state and federal laws and permits or approvals issued by the State to facilities in the Lake Erie watershed." MTD, pg. 3.

The Plaintiffs cannot respond better than the City of Toledo ("City") recently did in its Opposition to Intervening Plaintiff State of Ohio's Motion for Judgment on the Pleadings and Cross Motion Under Civil Rule 12(c) recently in *Drewes Farms Partnership, et. al. v. Toledo*, N.D. Ohio No. 19-cv-00434, Dkt. # 48 ("*Drewes*"). The City explains:

"Although the State concedes it holds Lake Erie in trust for the benefit of the public it ignores its inaction regarding those duties entrusted to it. While the State repeatedly shouts that it is the trustee for the [sic] Lake Erie and the public, it does not allege or argue that it has fulfilled its duties to address the [Harmful Algae Blooms] and environmental deterioration of Lake Erie and its watershed. The State has substantially failed to comply with its duties under the Clean Water Act." (*internal citations omitted*), Dkt. # 48, pg. 5.

Plaintiffs only add that the reason the State does not allege or argue that it has fulfilled its duties to address harmful algae blooms and environmental deterioration of Lake Erie and its watershed is because the State, in good conscience, cannot claim to have fulfilled its duties. If

the State was truly interested in fulfilling its duties to hold Lake Erie in trust for the benefit of all Ohio citizens, the State would work to support the Lake Erie Bill of Rights.

**F. This Court has an opportunity to stand on the right side of history.**

We must not assume that the courts always serve justice. Of course, this isn't news to the courts. US Supreme Court Justice Roger B. Taney, on his way to unforgivably ruling that African Americans could not be American citizens in the notorious *Dred Scott v. Sandford* decision, explained, "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws." 60 US 393, 405 (1856). We must not assume that just because the courts have enshrined a particular ideology that we must forever be chained to that ideology no matter the injustice that ideology wreaks on the real world.

American legal history overflows with examples of the courts making the wrong decision and bending the plain meaning of this country's foundational documents to support these wrong decisions. *Dred Scott v. Sandford* has been mentioned. *Plessy v. Ferguson*, which enshrined apartheid in the United States for decades, and *Lochner v. New York*, which undermined government attempts to limit daily and weekly working hours, come to mind.

Consider the rhetorical gymnastics Justice Taney had to perform in *Dred Scott v. Sandford* decision, for example. Consider, too, how eerily similar Taney's twisting of the words of the Declaration of Independence is to the State's twisting of the words of the Ohio constitution. Taney quoted the famous words from the Declaration of Independence:

"We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed."

Then, Taney entered his gymnastics routine. He wrote:

“The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted, and instead of the sympathy of mankind to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.”

60 US 393, 410 (1856)

Before and after *Dred Scott v. Sandford*, much like the Plaintiffs in the case at hand, anyone arguing that members of “the enslaved African race” should be entitled to American citizenship had no legal basis for making that argument. It could be said that slavery had to be ended by the bloodiest war in American history precisely because those standing on the side of justice had no legal basis for their arguments. Similarly, until the Nineteenth Amendment passed, those who argued women should have the right to vote had no legal basis for making their argument. A clear-eyed view of American legal history, in fact, yields the realization that because only land-owning white men were originally afforded the full rights of citizenship, every marginalized group that has gained full American citizenship since then has relied on arguments that, technically, they had no legal basis for making.

Despite courts routinely standing on the wrong side of American history, there have been some brave judges willing to push American law towards justice. American school children are still taught to celebrate the American Supreme Court’s willingness to overturn Jim Crow racial segregation laws and decades of precedent in *Brown v. Board of Education*. Similarly, many of the fundamental rights Americans enjoy today, rights like First Amendment guarantees of free speech and religion, rights like those now guaranteed to criminal defendants such as the right to an attorney, and rights against race and sex-based discrimination, are the result of a forward

thinking American Supreme Court that was determined to incorporate the Bill of Rights against reactionary state governments.

This Court has an opportunity in this case to stand on the right side of history. American law is failing to respond to the seriousness of the ecological collapse we are currently living through. Lake Erie is a great example. The State has demonstrated its impotence to adequately address the destruction of Lake Erie time and time again. Instead of supporting a democratically-enacted law that would give citizens the tools to enforce meaningful protections for Lake Erie, the State protects the corporations primarily responsible for the pollution causing Lake Erie's harmful algae blooms and is working to undermine the will of the people of Toledo as represented by the Lake Erie Bill of Rights. When the State refuses to protect the people's drinking water, and the courts refuse to support the people's efforts to protect themselves, where else can the people turn?

### **Conclusion**

For these reasons, the Plaintiffs respectfully request that the Court deny the State's motion to dismiss and alternative motion to stay.

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Michael Ferner

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Bryan Twitchell

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John Michael Durback



























