Opponent Testimony of Ohio Environmental Council Action Fund
Regarding House Bill 285
Presented to the Ohio House State and Local Government Committee
June 9, 2021

Good afternoon Chair Wiggam, Vice Chair John, Ranking Member Kelly; thank you for the opportunity to testify before this committee today on House Bill 285 (HB 285). My name is Trent Dougherty, General Counsel for the Ohio Environmental Council Action Fund (OECAF).

Our organization, celebrating its 52nd anniversary this year, works to secure healthy air, land and water for all who call Ohio home. Much of that work involves policy education and advocacy, working with members of the General Assembly, the executive branch agencies, members of the regulated community and impacted members of the public. However, when necessary, we go to court to secure protections for Ohio's environment, Ohio's natural resources, and Ohio's impacted communities. In my 16 years as a legal advocate for Ohio's environment, I have won some and lost some. In a few instances, on behalf of my client, I have settled these cases outside of protracted litigation, and done so in a way that is beneficial to people of Ohio and Ohio's environment. With that backdrop, the OEC Action Fund opposes HB 285.

The OEC Action Fund sees HB 285 as a solution looking for a problem. As the bill's sponsor suggests in his Sponsor Testimony, there is no current or past problem in Ohio with state Attorneys General shirking on their duty to the people of Ohio. Unfortunately, it is looking to solve a non-existent problem by creating further problems for the executive branch, the judicial system, and Ohioans looking to seek amends.

There are two main authorizations HB 285 gives to the legislature:

1) Allows the House of Representatives, the Senate, and the General Assembly as a whole to intervene at any time in an action in state OR federal court that: (1) Challenges the constitutionality of a statute, facially or as applied, (2) challenges a statute as violating or preempted by federal law, or (3) otherwise challenges the construction or validity of a statute.

a) In an action where the General Assembly **has intervened**, the Speaker of the House or the President of the Senate or the Speaker and President acting jointly on behalf of the General Assembly can obtain legal counsel **other than** the Attorney General to represent them.

2) Requires the Attorney General to obtain legislative approval before compromising or settling an action brought against the state for injunctive relief or for which there is a proposed consent decree.

With both of these authorizations, there are substantial separation of powers considerations pitting the executive branch's power to enforce the laws that the legislature passes, against new powers of the legislature to take the place of the Attorney General. As the Sponsor notes, this same template legislation was passed in Wisconsin and challenged in Wisconsin state court. In Wisconsin, the law was upheld by the Wisconsin Supreme Court, however the court stressed that this decision was narrow. *SEIU, Loc. 1 v. Vos,* 393 Wis. 2d 38, 81 ("We stress that this decision is limited. We express no opinion on whether individual applications or categories of applications may violate the separation of powers …"). However, this is Ohio, and I will leave the Ohio Attorney General to defend his office against the separation of powers issue.

The OEC Action Fund, however, opposes HB 285 due the impact it will have on future litigation and the judicial system. The mere threat of a court allowing the General Assembly to intervene in cases where an individual Ohioan or a small Ohio business is already up against a state executive agency **and** the office of the Ohio Attorney General, is enough to stop otherwise important cases from seeing the courtroom. If those cases do come, the ability for the General Assembly to veto a proposed settlement will mean that neither of the original parties will wish to seek settlement resulting in longer and more costly litigation. Furthermore, allowing intervention as of right would most likely unduly delay any and all proceedings where the General Assembly seeks to become a party. All of this, too, done with funding from the state coffers that dwarf many plaintiffs' legal budget. **Utilizing the judicial system in a way to force plaintiffs to expend unnecessary resources or be forced to dismiss otherwise colorable claims, should not be the business of the Ohio General Assembly.**

If this Committee intends to report this legislation favorably, we recommend significant amendments to the bill to both ensure litigants' due process rights and to ensure sorely needed efficiencies in an already bogged-down judicial system. First, if the General Assembly wishes to be a party to a proceeding between a private plaintiff and an executive branch agency defendant, the General Assembly must have a distinct timeline for entering the case. Allowing the General Assembly to come and go as it pleases, in what to others is a costly and resource intensive process of seeking justice, only will exacerbate those costs. Secondly, the intervention should not be as of right, as the bill states, but the General Assembly must make

a motion to the court and prove their case that it should be part of the proceeding. Just with any other intervenor, the General Assembly must be able to demonstrate that its involvement in the proceedings will not unduly delay the proceedings or prejudice the adjudication of the original parties' rights.

Finally, and most importantly, if the General Assembly is permitted to intervene as a party, then it must be treated as a full party. By that I mean that full discovery by any other party should be permitted on the General Assembly; General Assembly members and staff must be made available for depositions; members and staff must be available to appear in court and face cross examination; and if necessary, respond to subpoenas. If the General Assembly's role in the proceeding is to defend the laws it passes in a way that the Attorney General may not, therefore the General Assembly should. In environmental litigation, in particular, the statute frequently provides a substantive standard against which to measure the defendant's conduct, and often administrative regulations that the court must interpret and apply in determining whether the underlying conduct violates any legal or constitutional norm. Having the General Assembly fully present in a proceeding would be beneficial to the ultimate determination of the constitutionality of Ohio's laws and the executive branch's proper enforcement of Ohio's environmental laws.

Thank you again for the opportunity to submit testimony, and for your consideration of our perspective. Allowing the General Assembly to intervene as a matter of right in lawsuits and veto authority over executive branch settlements as proposed in HB 285 we feel will do little to achieve judicial economy or the search for a just result. Nevertheless, our team would be more than happy to provide any assistance to make this bill one where litigants' rights and laws that follow Ohio's constitution are preserved.