

ORIGINAL

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IN THE SUPREME COURT OF OHIO

Cincinnati City School District	:	
Board of Education,	:	Case No. 08-1480
	:	
Appellee,	:	
	:	
v.	:	Appeal from the Hamilton County
	:	Court of Appeals, First Appellate District
State Board of Education of Ohio, et al.,	:	
	:	Court of Appeals Case No. C-070494
Appellants.	:	

MERIT BRIEF OF APPELLEE, THE CINCINNATI CITY SCHOOL DISTRICT BOARD OF EDUCATION

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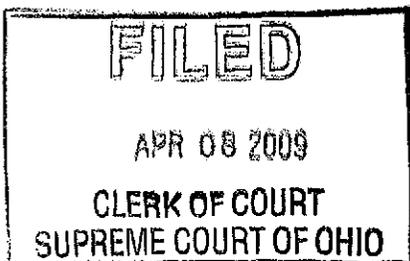


TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF FACTS	3
ARGUMENT	5
I. A prevailing political subdivision is eligible for an award of attorney fees against the State under R.C. 2335.39, regardless of its “net worth” or the number of persons it employs, because it is not an “organization” subject to the exclusions set forth in R.C. 2335.39(A)(2)(c) or (d).	5
A. R.C. 1.47 and common rules of statutory construction dictate that R.C. 2335.39(A) must be construed as a whole.	5
B. The only way to give meaning to every term used in subsections (A)(2)(c) and (d) is to construe “organization” in the context of the other listed entities, all of which are non-governmental in nature.	8
1. Applying ejusdem generis, the term “organization,” as used in R.C. 2335.39(A)(2)(d), encompasses only non-governmental entities.....	9
a. Governmental and non-governmental entities are comprehensively and consequentially distinct.	14
2. Having used express terms in (A)(2)(d), none of which include the term “political subdivision,” the legislature intended that political subdivisions not be included in that subsection.	16
C. The federal Equal Access Justice Act provides further support that the Ohio General Assembly has made the policy choice to include all political subdivisions as eligible parties under R.C. 2335.39.....	16
D. As a remedial statute, R.C. 2335.39 must be liberally construed.....	19
1. Having brought massive resources of the State to bear in a manner that precipitated, and to this day has necessitated, the continuation of this litigation, it is disingenuous for the State to argue that the Cincinnati City School District does	

not need to be made whole for its costs in prosecuting this suit.	20
2. An award of attorneys fees in this case is just, reasonable, and eminently consistent with the remedial purpose and the deterrent purpose of R.C. 2335.39.....	22
CONCLUSION	23
CERTIFICATE OF SERVICE.....	25

TABLE OF AUTHORITIES

	<u>Page No.</u>
Cases	
<i>Brooks v. Ohio State Univ.</i> (1996), 111 Ohio App.3d 342.....	13
<i>Central Midwest Interstate Low-Level Radioactive Waste Commn. v. O’Leary</i> (C.D. Ill. 1995), 873 F.Supp. 159	17
<i>Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn.</i> , 176 Ohio App.3d 157, 2008-Ohio-1434.....	3, 4, 10
<i>Collyer v. Broadview Dev. Ctr.</i> (1992), 81 Ohio App.3d 445.....	19
<i>Commrs. of Highways of the Towns of Annawan v. United States</i> (C.A.7, 1982), 684 F.2d 443	17
<i>D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health</i> , 96 Ohio St.3d 250, 2002-Ohio-4172	5, 8, 9
<i>E. Ohio Gas Co. v. Pub. Util. Commn.</i> (1988), 39 Ohio St.3d 295.....	9
<i>Haghighi v. Moody</i> , 152 Ohio App.3d 600, 2003-Ohio-2203.....	19
<i>Hess v. Toledo</i> (1999), 133 Ohio App.3d 729	19
<i>In re Estate of Morgan</i> (1981), 65 Ohio St.2d 101.....	18
<i>MacDonald v. Bernard</i> (1982), 1 Ohio St.3d 85	6
<i>Schneider v. Laffoon</i> (1965), 4 Ohio St.2d 89.....	18
<i>State ex rel. Beacon Journal Pub. Co. v. Ohio Dept. of Health</i> (1990), 51 Ohio St.3d 1	19
<i>State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.</i> (1917), 95 Ohio St. 367	8
<i>State ex rel. R.T.G., Inc. v. State</i> , 98 Ohio St.3d 1, 2002-Ohio-6716.....	19
<i>State v. Aspell</i> (1967), 10 Ohio St.2d 1	9, 13
<i>State v. Buehler</i> , 113 Ohio St.3d 114, 2007-Ohio-1246.....	9
<i>State v. Wilson</i> (1997), 77 Ohio St.3d 334.....	6
<i>Weaver v. Edwin Shaw Hosp.</i> , 104 Ohio St.3d 390, 2004-Ohio-6549.....	16

Statutes

1985 U.S.C.C.A.N. 13218

28 U.S.C. §241216, 19

28 U.S.C. §2412(b).....16

28 U.S.C. §2412(d)(2)(B).....17

28 U.S.C. 2412(d)(2)(B)(ii).....17

28 U.S.C. 2412(d)(2)(B)(iii).....17

R.C. 1.11.....19

R.C. 1.47.....5, 22

R.C. 1.47(B).....5, 14

R.C. 109.36(C).....11

R.C. 121.22.....15

R.C. 1301.01(BB).....11, 12

R.C. 149.43.....15

R.C. 1711.13.....11

R.C. 2151.011(B)(32).....12

R.C. 2335.39.....passim

R.C. 2335.39(A).....passim

R.C. 2335.39(A)(2).....4

R.C. 2335.39(A)(2)(a).....2, 7, 8, 14

R.C. 2335.39(A)(2)(d).....passim

R.C. 2335.39(A)(6).....7, 16

R.C. 2743.01.....2, 7, 11, 16

R.C. 2743.01(A).....4, 7

R.C. 2743.01(B).....4, 7, 15

R.C. 2744.01(F).....	15
R.C. 2907.12.....	13
R.C. 3313.08.....	15
R.C. 3313.17.....	11
R.C. 3375.33.....	11
R.C. 4503.44(A)(2).....	12
R.C. 4582.02.....	11
R.C. 503.01.....	11
R.C. 9.314(A)(2).....	11
R.C. Chapter 2744.....	15
R.C. Chapter 3317.....	1
R.C. Chapter 5705.....	15
Other Authorities	
2A Singer & Singer, Sutherland Statutory Construction (7 Ed. 2007), 251, Section 46:6.....	8
2A Singer & Singer, Sutherland Statutory Construction (7 Ed. 2007), 375, Section 47:17.....	13
H.R. Rep. No. 99-120 (1985).....	18
The American Heritage [®] Dictionary of the English Language (4 Ed. 2000).....	8

INTRODUCTION

Appellants, the State Board of Education of Ohio and the Ohio Department of Education (hereinafter the “State”), unlawfully withheld nearly \$7 million in school foundation funds from Appellee, the Cincinnati City School District (“Cincinnati”). The funds were allocated by the general assembly for the support of the educational programs of Cincinnati pupils, among others, pursuant to R.C. Chapter 3317. The State’s proffered justification for this unlawful action was its unilateral decision to substitute an internal directive for the statutory law that governed the calculation of school funding. Cincinnati was forced to resort to litigation and incur significant legal fees to recover the funds that lawfully belonged to it. After prevailing against the State, Cincinnati applied for its attorney fees under R.C. 2335.39, which entitles a prevailing “eligible party” to recover attorney fees if the state was not substantially justified in initiating the matter in controversy.

The sole issue before this Court is whether Cincinnati is an “eligible party,” as that term is expressly defined in R.C. 2335.39(A). The State’s interpretation is driven by reference to a single subsection in the statute—indeed, a single word—read in isolation from the rest of the statute. The State’s claim that political subdivisions fall under the term “organization” ignores the substance, context, and purpose of R.C. 2335.39. The State’s reading relies on a definition of “organization” drawn solely from extraneous sources and is so broad as to encompass *any* linkage of two or more people. But such an unrestrained view of this one word causes the other, more specific terms utilized in the statute to be rendered meaningless—a result that common rules of statutory construction do not permit.

Such a tortured interpretation would also require a suspension of reason with respect to the fundamental distinctions between governmental and non-governmental entities that are well established in law and practical experience. More importantly, these fundamental differences

were recognized by the legislature, thus resulting in a clear demarcation between non-governmental entities and political subdivisions in R.C. 2335.39(A).

Contrary to what the State asks here, statutes and the words contained therein are not construed in a vacuum. When R.C. 2335.39(A) is construed as a whole, giving meaning to every word, it is clear that the legislature has determined that *every* political subdivision, regardless of the size of its work force or its year-end balance, is eligible to seek recovery of attorney fees in suits against the State, if they prevail and otherwise meet the requirements of the statute.

The subsection that singularly drives the State's position, (A)(2)(d), does not address political subdivisions. Specifically, (A)(2)(d) excludes as eligible parties the following: unincorporated businesses, partnerships, corporations, associations and organizations that employ over 500 persons. These terms describe *non-governmental* entities. Not a single governmental entity is among those enumerated. Rather, governmental entities are addressed in R.C. 2335.39(A)(2)(a) and defined by reference to R.C. 2743.01, which defines both the "state" and its "political subdivisions." That reference demonstrates that the general assembly choose to exclude state governmental entities from recovering fees but specifically did *not* exclude local governmental entities, i.e., political subdivisions.

Political subdivisions are simply not addressed in subsections (A)(2)(c) and (d). The general assembly has made the policy determination that when the victim of the state's unjustified conduct is an Ohio political subdivision, the local government's operating budget and taxpayer base should not bear the burden of funding the litigation that arises from the state's wrongful conduct. It is within the general assembly's province to shift the burden from the local level to the statewide level. And that is precisely what the legislature has done in R.C. 2335.39.

The First District Court of Appeals correctly determined that Cincinnati is not an "organization" as such term is used in R.C. 2335.39(A)(2)(d) and that as a political subdivision, Cincinnati is eligible to seek recovery of attorney fees against the State. This decision should be affirmed.

STATEMENT OF FACTS

Cincinnati filed this case in April 2006 in the Hamilton County Court of Common Pleas. Cincinnati sought relief from the State's failure to adhere to the statutory methodology for calculating "average daily membership," a major determinant of public school foundation funding. The State's unlawful actions resulted in a loss to Cincinnati's pupils of approximately \$7 million. Prior to filing suit, Cincinnati attempted to persuade the State to utilize the calculation mandated by statute. The parties even reached an agreement on the settlement of the dispute, but at the eleventh hour the State refused to finalize it. Cincinnati was then forced to bring suit.

Each party moved for summary judgment. The trial court granted summary judgment to Cincinnati, finding the State was without legal authority to deviate from the statutory provisions that dictate how average daily membership is calculated. (See Trial Court's Nov. 22, 2006 Entry, at pp. 26-27.) The State was ordered to pay Cincinnati \$2,729,699 for fiscal year 2006 and \$1,968,508.17 for fiscal year 2007, and the State was barred from attempting to recover an additional \$2,260,172 from Cincinnati for fiscal year 2005. (See Trial Court's Jan. 5, 2007 Judgment Entry.) This judgment was affirmed on appeal. See *Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 176 Ohio App.3d 157, 2008-Ohio-1434. The parties settled the merits of the case while it was pending before this Court, and the State dismissed its appeal.

In salvaging the funds that rightfully belonged to it and its students, Cincinnati incurred significant attorney fees. As a prevailing, eligible party against the State in an action made

necessary by the State's misconduct, Cincinnati moved the trial court for attorney fees pursuant to R.C. 2335.39. The State asserted that Cincinnati was not an “eligible party” because it was an “organization” that employed over 500 persons. The trial court denied Cincinnati’s request for attorney fees on the sole grounds that it was an organization employing over 500 persons, as set forth in R.C. 2335.39(A)(2)(d). (See Trial Court’s June 8, 2007 Entry, attached to the State’s Merit Brief at Ex. 4, Appx. A-13.)

Cincinnati appealed to the First District Court of Appeals, which reversed the trial court’s denial of Cincinnati’s request for attorney fees. The court of appeals unanimously determined that the entities excluded from recovery of attorney fees pursuant to R.C. 2335.39(A)(2)(d) were limited to private, non-governmental entities. See *Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn.*, 176 Ohio App.3d 678, 2008-Ohio-2845 at ¶22-23 (emphasis added; decision attached to State’s Merit Brief at Ex. 3, Appx. A-5.) The court’s decision was based on a recognition of the fundamental differences between a political subdivision, which is a unit of government, and an “unincorporated business,” “partnership,” “corporation” and “association.” *Id.* at ¶20-22. This distinction is embedded in the language and structure of the statute itself.

As the court of appeals recognized, R.C. 2335.39(A)(2) excludes the “state” from those entities eligible to recover attorney fees and specifically defines the state by reference to R.C. 2743.01(A). *Id.* at ¶13. R.C. 2743.01(A) defines the “State” to include the general assembly and the offices of all elected state officers, and specifically states that the “State” does *not* include “political subdivisions.” *Id.* R.C. 2743.01(B), in turn, defines “political subdivisions” to include municipal corporations, townships, counties and school districts. *Id.* at ¶14. Ultimately, the court of appeals concluded that Cincinnati, a political subdivision, is not a private “organization”

as that term is used in R.C. 2335.39(A)(2)(d) and, thus, Cincinnati is an eligible party under R.C. 2335.39(A). *Id.* at ¶23, 25.

The State has appealed to this Court and submits the following Proposition of Law:

“A school district with more than 500 employees is an ‘organization’ barred from recovering attorney fees by R.C. 2335.39(A)(2)(d).”

The following analysis demonstrates why the State’s proposition is not and should not become the law of Ohio.

ARGUMENT

I. A prevailing political subdivision is eligible for an award of attorney fees against the State under R.C. 2335.39, regardless of its “net worth” or the number of persons it employs, because it is not an “organization” subject to the exclusions set forth in R.C. 2335.39(A)(2)(c) or (d).

The State’s entire proposition rests on its claim that a political subdivision is an “organization” as such term is used in R.C. 2335.39(A)(2)(d). There are two basic reasons why the State’s argument fails. First, principles of statutory construction do not permit the result urged by the State. Second, R.C. 2335.39 is a remedial statute that must be liberally construed. A liberal construction, coupled with the intent of the legislature as evidenced by the words used in the statute, leads to the conclusion that Cincinnati is not barred from seeking its attorney fees.

A. R.C. 1.47 and common rules of statutory construction dictate that R.C. 2335.39(A) must be construed as a whole.

The legislature has mandated that its statutes be read in such a manner as to give effect to the entire statute. R.C. 1.47(B). Statutes cannot be examined in a vacuum, and their words and phrases must be read in context. See *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, at ¶19. Thus, in reviewing a statute, one cannot pick out one sentence or word and disassociate it from the context; instead, the four corners of the statute must

be examined in order to determine legislative intent. See *State v. Wilson* (1997), 77 Ohio St.3d 334, 336, citing *MacDonald v. Bernard* (1982), 1 Ohio St.3d 85, 89.

When R.C. 2335.39(A) is read as a whole, giving consideration to *all* of its subsections and *all* of the words used therein, the State's argument collapses. A political subdivision such as Cincinnati is not an "organization," as that term is used in R.C. 2335.39(A)(2)(d); therefore, a prevailing political subdivision—regardless of the number of its employees or its year-end balance—is eligible to seek attorney fees.

R.C. 2335.39(A) defines the persons and entities that are excluded from recovering attorney fees in actions against the state:

(A) As used in this section:

* * *

(2) "Eligible party" means a party to an action or appeal involving the state, *other than the following*:

(a) *The state*;

(b) An individual whose net worth exceeded one million dollars at the time the action or appeal was filed;

(c) A sole owner of an unincorporated business that had, or a partnership, corporation, association, or *organization* that had, a net worth exceeding five million dollars at the time the action or appeal was filed, except that an organization that is described in subsection 501(c)(3) and is tax exempt under subsection 501(a) of the Internal Revenue Code shall not be excluded as an eligible party under this division because of its net worth;

(d) A sole owner of an unincorporated business that employed, or a partnership, corporation, association, or *organization* that employed, more than five hundred persons at the time the action or appeal was filed.

* * *

(6) "State" has the same meaning as in section 2743.01 of the Revised Code.

(Emphasis added.)

The State's analysis of whether a political subdivision is an eligible party under the above provisions begins and ends with its claim that the meaning of the term "organization" must be determined in the abstract. But the State's analysis completely ignores subsections (A)(2)(a) and (A)(6) and the words used alongside "organization" in subsection (A)(2)(d). Instead of focusing solely on one word, "organization," contained in the fourth subsection, the proper analysis of R.C. 2335.39(A) requires a review of every subsection and an examination of *all* of the terms used in subsection (A)(2)(d).

Subsection (A)(2)(a) defines the first class of entities excluded from the definition of "eligible party." Subsection (A)(2)(a) excludes the "state," as defined by reference to R.C. 2743.01. See R.C. 2335.39(A)(6). R.C. 2743.01(A) expressly states that the "State" does not include "political subdivisions." A school district is a political subdivision. See R.C. 2743.01(B).

R.C. 2335.39(A)(2)(a), read in conjunction with R.C. 2335.39(A)(6) and R.C. 2743.01, defines which *governmental* entities are excluded from the definition of eligible party. Only *state* governmental entities, such as the general assembly and state agencies, are excluded from being eligible parties. *Local* governmental entities, such as school districts, are specifically *not* included within the definition of the "state" and, therefore, are not excluded as eligible parties.

The State does not dispute that political subdivisions are not excluded from the definition of eligible party by way of subsections (A)(2)(a) and (A)(6). Instead, the State disregards these subsections and looks to subsection (A)(2)(d), claiming this subsection excludes "large" political subdivisions by use of the term "organization." The State's argument defies basic principles of statutory construction. As a leading treatise on statutory construction states, "where the legislature has employed a term in one place and excluded it in another, [that term] should not be

implied where excluded.” 2A Singer & Singer, Sutherland Statutory Construction (7 Ed. 2007), 251-252, Section 46:6. Here, the legislature employed the term “political subdivision,” by reference, in subsection (A)(2)(a). It did *not* use that term in subsections (A)(2)(c) or (d). Therefore, the term “political subdivision” cannot be implied as existing in subsections (A)(2)(c) and (d).

The State asks this Court to ignore the existence of subsections (A)(2)(a) and (A)(6) and R.C. 2743.01, and rely solely on a dictionary definition of the term “organization.” The State’s argument fails because the term “organization,” as used in subsection (A)(2)(c) and (d), simply does not encompass government entities.

B. The only way to give meaning to every term used in subsections (A)(2)(c) and (d) is to construe “organization” in the context of the other listed entities, all of which are non-governmental in nature.

On its own, the word “organization” is a broad term, encompassing any group of persons organized for a particular purpose. See The American Heritage® Dictionary of the English Language (4 Ed. 2000). But reading subsection (A)(2)(d) in context reveals that the legislature did not intend such an all-encompassing meaning of the term. Thus, while the legislature did not define the term “organization” in R.C. 2335.39(A)(2)(d), it also did not use the term in a vacuum. Instead, “organization” is used along with other, more specific terms: “[a] sole owner of an unincorporated business that employed, or a partnership, corporation, association, or organization that employed, more than five hundred persons * * *.” R.C. 2335.39(A)(2)(d). The term “organization” must be construed in light of these other terms.

Indeed, the natural meaning of words is not always conclusive as to the construction of statutes. *D.A.B.E., Inc.*, 2002-Ohio-4172, at ¶22, citing *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.* (1917), 95 Ohio St. 367, 373. And, while words and phrases will ordinarily be given their usual, ordinary meaning, this is not so when a contrary intention clearly

appears. See *D.A.B.E., Inc.* at ¶22. For example, a word will not be given its ordinary meaning if, by doing so, it would render the general assembly's use of it or other words redundant. See *E. Ohio Gas Co. v. Pub. Util. Commn.* (1988), 39 Ohio St.3d 295, 299 (words in statutes should not be construed to be redundant, nor should any words be ignored). Furthermore, in determining legislative intent, a court reviews words and phrases in context. See *State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, at ¶29.

These principles instruct that the term “organization” is not used in its ordinary sense in R.C. 2335.39(A)(2)(d). Its meaning is not derived simply by reference to a dictionary, but from the context of the statute itself. When meaning is given to *all* of the words used in R.C. 2335.39(A)(2)(d), and the term “organization” is construed giving recognition to these other words, it becomes clear that the term “organization” refers to non-governmental entities.

1. Applying ejusdem generis, the term “organization,” as used in R.C. 2335.39(A)(2)(d), encompasses only non-governmental entities.

As the court of appeals recognized, application of the canon “ejusdem generis” yields the conclusion that political subdivisions, such as school districts, are not “organizations” within the contemplation of R.C. 2335.39(A)(2)(d). This canon holds that where terms first used in a statute are confined to a particular class of objects having well-known and definite features and characteristics, and when these terms are followed by a term having a broader signification, the latter term embraces only things of a similar character as those comprehended by the preceding limited and confined terms. *State v. Aspell* (1967), 10 Ohio St.2d 1, paragraph two of the syllabus.

Under this well established canon, the more expansive terms (“organization” and “association”) that follow the more specifically-named entities (“unincorporated business,” “partnership,” and “corporation”) must be given a similar meaning. The terms “unincorporated

business,” “partnership” and “corporation” all describe non- governmental entities. In these circumstances, the term “organization” cannot reasonably be interpreted to encompass governmental entities.

The State asserts that *ejusdem generis* is not applicable because the terms that precede the word “organization” are not themselves specific. This assertion ignores the distinct features between the types of entities listed. “Unincorporated businesses,” “partnerships” and “corporations” are, in fact, specific types of entities or organizations. As the court of appeals noted:

Black's Law Dictionary defines “partnership” as a “voluntary association of two or more persons who own and carry on a business for profit.” “Corporation” is defined as an “entity having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely.” And an “association” is both an “unincorporated organization that is not a legal entity separate from the persons who compose it” and a “gathering of people for a common purpose.” Last, while Black's Law Dictionary does not specifically define “unincorporated business,” it does define the term business as a “commercial enterprise carried on for profit.”

See Cincinnati City School Dist. Bd. of Edn., 2008-Ohio-2845 at ¶21, pinpoint citations omitted.

The fact that the law recognizes various subsets of partnerships, associations and corporations does not alter the fact that these terms describe entities that are different from each other. An unincorporated business is neither a partnership nor a corporation. A partnership is not a corporation. These terms, unlike the umbrella term “organization,” cannot be used interchangeably or as a substitute for each other. Thus, these terms describe specific types of organizations, none of which possess the distinctive characteristics of government. *Ejusdem generis* applies to limit the meaning of the general term “organization” to embrace only entities of a similar character to unincorporated businesses, partnerships and corporations—namely, non-governmental entities.

The fact that political subdivisions are described elsewhere in the Revised Code as “bodies corporate” or in case law as “quasi-corporations” does not alter the conclusion that the entities listed in (A)(2)(d) are non-governmental in nature. Political subdivisions are not simply “corporations.” They are, instead, consistently referred to in the Revised Code as “bodies corporate *and politic*.” See, for example, R.C. 109.36(C) and 9.314(A)(2) (“political subdivisions” mean municipal corporations, townships, counties, school districts and other bodies corporate *and politic* responsible for governmental activities in geographical areas smaller than that of the state); see also, R.C. 503.01; R.C. 1711.13; 3313.17; 3375.33; and 4582.02 (defining townships; county agricultural societies; boards of education; boards of library trustees; and port authorities, respectively, as bodies corporate *and politic*).

This establishes that the legislature does not use the terms “political subdivision” and “corporation” interchangeably. Thus, if it wanted to include political subdivisions in the list of entities described in subsection (A)(2)(d), then it would have had to have used more than just the term “corporation.” This is particularly true in the context of R.C. 2335.39(A), as the operative term “political subdivision” *was* identified, and thus distinguished, by the reference to the definition set forth in R.C. 2743.01.

The State further misses the mark by asserting that political subdivisions are subsumed under the general terms “association” and “organization,” as used in R.C. 2335.39(A)(2)(d), because governmental agencies are included in *other* provisions of the Revised Code that define the term “organization.” For example, the State points to R.C. 1301.01(BB) (erroneously cited by the State as R.C. “1343.01(BB)”), part of the Ohio Uniform Commercial Code, which defines “organization” to include a “corporation,” “government,” “governmental subdivision or agency,” “partnership,” “association,” or “any other legal or commercial entity.” The State’s example

actually illustrates Cincinnati's position. The term organization is an all encompassing term, yet, in R.C. 1301.01(BB) the legislature had to make it clear that the term includes not only private business entities—but also governments and governmental agencies. It did so by expressly using the terms “government” and “governmental subdivision.” In stark contrast, the legislature did *not* include these terms in R.C. 2335.39(A)(2)(d).

R.C. 1301.01(BB) is not the only place in the Revised Code where the legislature felt it necessary to define broad terms such as “organization” and “person” by expressly including therein governmental units. R.C. 4503.44(A)(2) defines “organization” to include: “any private organization or corporation, or any governmental board, agency, department, division, or office * * *.” In R.C. 2151.011(B)(32), the term “person” is defined as “an individual, association, corporation, or partnership *and* the state or any of its political subdivisions, departments or agencies.” (Emphasis added.) This statutory provision also indicates that the legislature does not consider the terms “corporation” and “political subdivision” as synonymous; otherwise, there would have been no need to include the term “political subdivision” alongside “corporation.”

These statutory examples belie any conclusion that “organization” always includes political subdivisions. Had the legislature desired to include political subdivisions or other governmental entities along with unincorporated businesses, partnerships, corporations and associations, it would have used the express terms. The stark absence of any reference to any type of governmental entity in R.C. 2335.39(A)(2)(d) evidences the intent that the class of entities described in (A)(2)(d) are non-governmental entities. It follows that the meaning of the umbrella term “organization” is limited to the same types of entities—non-governmental organizations.

The State also asserts that ejusdem generis may not be applied because the term “organization” is not preceded by the word “other.” But the use of ejusdem generis is not confined to only those situations where the list of objects is connected by the term “other.” Indeed, the seminal case that adopted the doctrine as syllabus law in Ohio involved a statute that, like R.C. 2335.39(A)(2)(d), did not use the word “other.” See *State v. Aspell*, 10 Ohio St.2d at 1 (interpreting former R.C. 2907.12: “[n]o person * * * shall * * * force or attempt to force, an entrance into a safe, vault, or depository box * * *”).

Contrary to the State’s assertion, the statutory provision before this Court presents a classic example of the proper use of ejusdem generis. R.C. 2335.39(A)(2)(d) contains a list of objects—in this case non-governmental entities—that starts with more specific terms: “unincorporated business,” “partnership” and “corporation”; then follows with increasingly broader terms, ending with the all encompassing term “organization.” The State would read out the earlier terms, as if the subsection contains only the word “organization.” The State’s interpretation would require this Court to determine that the legislature’s use of the terms “partnership,” “corporation,” and “association” was unnecessary. Ejusdem generis does not permit such a result:

The doctrine of ejusdem generis is an attempt to reconcile an incompatibility between specific and general words so that all words in a statute * * * can be given effect, all parts of a statute can be construed together *and no words will be superfluous*. If the general words are given their full and natural meaning, they would include the objects designated by the specific words, making the latter superfluous. * * * The resolution of this conflict by allowing the specific words to identify the class and by restricting the meaning of general words to things within the class is justified on the ground that *had the legislature intended the general words to be used in their unrestricted sense, it would have made no mention of the particular words*.

2A Singer & Singer, *Sutherland Statutory Construction* (7 Ed. 2007), 375-379, Section 47:17; emphasis added. See, also, *Brooks v. Ohio State Univ.* (1996), 111 Ohio App.3d 342, 347 (the

reason behind ejusdem generis is that, if the legislature meant the general words to be applied without restriction, it would have only used the general term, rather than specifically enumerating certain subjects, objects or persons).

If “organization” is given its broadest meaning, as suggested by the State, then the other words used by the legislature were superfluous. Such a result is inconsistent with R.C. 1.47(B), as well as long established canons of statutory construction. The only way to give effect to all of the terms used in subsection (A)(2)(d) is to recognize—as the court of appeals did—that the term “organization” must be restricted to encompass only those entities of a similar class—namely, private, non-governmental entities. And, because a political subdivision is not a private entity, it cannot be an “organization” as that term is used in R.C. 2335.39(A)(2)(d).

a. Governmental and non-governmental entities are comprehensively and consequentially distinct.

The distinctions between non-governmental entities such as unincorporated businesses, partnerships and corporations, on the one hand, and political subdivisions such as Cincinnati, on the other, are fundamental to the issue before the Court. The distinctions are so many and varied, so intrinsic to the respective natures of the entities, and of such elemental significance that it cannot be that in R.C. 2335.39, these two types of entities were classed together under the label “organization.” The illogic of presuming otherwise is underscored by the fact that the only specific entities listed are of the non-governmental variety, with not a single governmental entity referenced. And if that were not enough, there is an entirely distinct statutory section—(A)(2)(a)—that actually *does* deal with the governmental entities, *excluding* them to the extent that they are *state* level entities but *not* extending the exclusion to political subdivisions.

The legislature recognized the fundamental differences between political subdivisions, which are units of government, and non-governmental entities. Political subdivisions are created

by either state statute or the Ohio Constitution. They have defined territory which is less than the territory of the State. See R.C. 2743.01(B) and 2744.01(F). They enjoy a measure of sovereign immunity. See R.C. Chapter 2744. They are subject to state law regarding the appropriation and expenditure of funds, and may raise revenue by taxation. See, for example, R.C. Chapter 5705. They are subject to state open meetings laws and public records laws. R.C. 121.22; R.C. 149.43. They are generally governed by an elected board, directly responsible to the electorate. See, for example, R.C. 3313.08. Political subdivisions have no ability to independently define their purpose; they exist to fulfill the purposes assigned them by the legislature or Ohio Constitution, and nothing more.

By comparison, non-governmental entities can decide their own structure and purpose. They can raise and spend funds, operate for profit or not, exist or dissolve, and function in any venue they choose. They are not subject to the same laws as political subdivisions with respect to matters of employment, ethics, taxation, investment, or debt. Harm to a non-governmental entity is unlike harm to a political subdivision. With a political subdivision, harm flows through to the public entitled to governmental services. In this case, the harm caused by the State flowed directly to the pupils of Cincinnati who were deprived of educational opportunities by the loss of funds.

The foregoing is by way of example only. The distinctions between governmental and non-governmental bodies are legion. Had the general assembly intended subsections (A)(2)(c) and (d) to apply to political subdivisions, it would have expressly stated so, just as it has in so many other statutes. The general assembly chose not to do so here.

2. Having used express terms in (A)(2)(d), none of which include the term “political subdivision,” the legislature intended that political subdivisions not be included in that subsection.

Finally, the maxim “*expressio unius est exclusio alterius*,” the expression of one thing implies the exclusion of another, establishes that the legislature did not intend to include political subdivisions under the umbrella term “organization.” This maxim prevents the addition of a statutory exclusion that is not expressly incorporated therein. See *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St.3d 390, 2004-Ohio-6549, at ¶20. R.C. 2335.39 expressly excluded the “State” from those entities eligible to recover fees. At the same time, the legislature defined *but did not exclude* “political subdivisions.” See R.C. 2335.39(A)(6), referencing R.C. 2743.01. To insert “political subdivision,” an entity of an entirely different type, into the list of excluded entities contained in subsection (A)(2)(d) would be to amend the statute to exclude a category of entities not specifically enumerated. Such judicial interference is not permitted.

In summary, reading R.C. 2335.39(A) as a whole and giving meaning to every word used therein—which this Court must do—a prevailing political subdivision is eligible for an award of attorney fees against the State, regardless of its “net worth” or the number of persons it employs, because it is not an “organization” as that term is used in R.C. 2335.39(A)(2)(c) or (d).

C. The federal Equal Access Justice Act provides further support that the Ohio General Assembly has made the policy choice to include all political subdivisions as eligible parties under R.C. 2335.39.

The federal counterpart to R.C. 2335.39 is found in Section 2412, Title 28, U.S. Code (hereinafter “federal EAJA” or “28 U.S.C. §2412”). The federal EAJA permits an award of attorney fees to the prevailing party in any civil action brought by or against the United States. *Id.* at 2412(b). “Party” is defined as:

- (i) an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed, or
- (ii) any owner of an unincorporated business, or any partnership, corporation, association, *unit of local government*, or organization,

the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed * * * [.]

(Emphasis added.)

Contrary to Ohio's statute, the federal EAJA expressly includes a term that references political subdivisions, i.e., "unit of local government." Federal case law addressing this issue establishes that Congress included the term "unit of local government" because the term "organization," without more, does *not* encompass governmental entities.

Prior to August 1985, the federal EAJA did not include the term "unit of local government" and simply stated that a "party" was a "sole owner of an unincorporated business, or a partnership, corporation, association, or organization" having not more than 500 employees and with a net worth of less than \$5,000,000. See former 28 U.S.C. 2412(d)(2)(B)(ii) and (iii). Federal courts interpreted the former version of the federal EAJA as *not* including local units of government within the definition of "party" because a governmental entity did not fall under the term "organization."

For example, in *Commrs. of Highways of the Towns of Annawan v. United States* (C.A.7, 1982), 684 F.2d 443, the 7th Circuit Court of Appeals addressed whether a state political subdivision came within the definition of "party" under former 28 U.S.C. §2412(d)(2)(B). The court of appeals concluded that "governmental bodies such as the Commissioners" were not intended to come within the scope of the Act. *Id.* at 445. In *Central Midwest Interstate Low-Level Radioactive Waste Commn. v. O'Leary* (C.D. Ill. 1995), 873 F.Supp. 159, the federal district court addressed whether a two-state compact was a "party" under the amended version of the federal EAJA. The court determined that the compact—which was essentially a *state*

governmental entity—was neither an “organization” nor a “local unit of government” under the statute. *Id.* at 161.

In so holding, the district court recognized that governmental entities, state or local, do not fall under the umbrella term “organization.” The court went on to quote the relevant legislative history to the amendment that added the term “unit of local government”:

The term [unit of local government] includes any general or special purpose district organized under State law (such as a school district, sewer district, irrigation district or planning district). Of course, only smaller governmental units and special-purpose districts would meet the \$ 7,000,000 net worth and 500 employee maximum threshold requirements under the Equal Access to Justice Act. . . . *The terms “corporation” and “organization” in the existing law, have, for the most part, been interpreted by Federal departments and agencies to be limited to small, private businesses and not to include governmental bodies. . . .*

Id., citing H.R. Rep. No. 99-120 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 143 (emphasis added).

This establishes that the umbrella term “organization” in the federal EAJA does not include governmental bodies and that such term only encompasses *private* entities. Thus, in order to include governmental entities within the definition of “party,” Congress had to amend the federal EAJA to specifically include the term “unit of local government.” This Court has indicated that federal judicial constructions of the same or similar terminology in a federal statute may supply the technical or particularized meaning of the words in Ohio’s statutory counterpart. See *In re Estate of Morgan* (1981), 65 Ohio St.2d 101, 103-104; *Schneider v. Laffoon* (1965), 4 Ohio St.2d 89, 96.

R.C. 2335.39 was first effective in April 1985. The federal EAJA, in effect at that time, had been interpreted by the federal courts to not include governmental entities because governmental bodies did not fall within the term “organization.” Had the general assembly desired to exclude political subdivisions as eligible parties under R.C. 2335.39(A)(2)(c) or (d),

based on their size or net worth, then it should have included the term “political subdivision” or “unit of local government” within the list of entities contained in those subsections. It did not.

Further, the general assembly has amended R.C. 2335.39 twice since 1985—after Congress had amended 28 U.S.C. §2412 to include the term “unit of local government.” The general assembly could have followed Congress and added the term “unit of local government” or “political subdivision” so that political subdivisions with over 500 employees would be excluded as eligible parties. It did not. This provides further support that the Ohio General Assembly made the policy choice to permit *all* Ohio political subdivisions—regardless of their size or net worth—to be eligible for attorney fees in actions against the state.

D. As a remedial statute, R.C. 2335.39 must be liberally construed.

Statutes providing for attorney fees are remedial laws. See *State ex rel. Beacon Journal Pub. Co. v. Ohio Dept. of Health* (1990), 51 Ohio St.3d 1, 3. Remedial laws and all proceedings under them must be liberally construed in order to promote their object and assist the parties in obtaining justice. R.C. 1.11. R.C. 2335.39 was passed to protect citizens from unjustified state action. *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, at ¶68. Its purpose is to censure frivolous government action that coerces a party to resort to the courts to protect its rights. See *Haghighi v. Moody*, 152 Ohio App.3d 600, 2003-Ohio-2203, at ¶10. As a remedial statute, R.C. 2335.39 must be given a broad construction to prevent oppressive government action. See *Collyer v. Broadview Dev. Ctr.* (1992), 81 Ohio App.3d 445, 450; *Haghighi* at ¶15; and *Hess v. Toledo* (1999), 133 Ohio App.3d 729, 735 (statutes authorizing attorney fees must be liberally construed and given the broadest interpretation possible).

The State asks the Court to construe R.C. 2335.39(A)(2)(d) narrowly so as to exclude from its protection an entire class of important entities—“large” political subdivisions (i.e., those with numerous employees or high “net worth”)—by claiming that these entities fall under the

umbrella term “organization.” Not only is this interpretation inconsistent with the language and structure of the statute, as discussed above, but it also violates the principle that R.C. 2335.39 must be liberally construed and given its broadest possible meaning.

The purpose of political subdivisions is to serve local citizens. When a political subdivision is the victim of oppressive and unjustified state action, its citizens are the victims. This notion has been brought to life in the present case. Millions of dollars that the legislature appropriated for the education of Cincinnati’s pupils were arbitrarily and unjustifiably withheld by the State. The Cincinnati Public School District had a fiduciary duty to secure all of the funding that its pupils were entitled to receive and had no choice but to resort to litigation to preserve those rights. Neither the pupils of Cincinnati—nor any other citizens served by a local government—should be dissuaded from opposing frivolous state action for fear of having to expend precious, local public dollars to do so.

A liberal construction of R.C. 2335.39, especially in light of the words used in the statute and the purpose of the statute, leads to the *inclusion*—not the exclusion—of *all* political subdivisions.

- 1. Having brought massive resources of the State to bear in a manner that precipitated, and to this day has necessitated, the continuation of this litigation, it is disingenuous for the State to argue that the Cincinnati City School District does not need to be made whole for its costs in prosecuting this suit.**

The State essentially argues that because Cincinnati is a large school district, it does not need to be made whole for its considerable costs in prosecuting this litigation. This argument is fundamentally irrelevant since, as discussed above, the legislature has already made the policy decision that exclusion of large entities applies only to those that are not governmental in nature. But, just as was true in relation to the construction of the words of the statute, it is appropriate to put this policy argument of the State's into context.

This litigation was precipitated by the State. It was *the State* that chose to disregard a statutorily mandated system of school funding in favor of one of its own making. It was then *the State*—not Cincinnati—that that repudiated a settlement agreement both parties had worked hard to achieve. When Cincinnati brought suit and prevailed on summary judgment, *the State* persisted in its untenable desire to supersede clear statutory mandates, choosing to pursue an appeal, which it also lost. Now, even after having settled, finally, the merits of this case, it is *the State* that continues to perpetuate this litigation. Yet the State argues that Cincinnati should be deprived of its right to pursue recovery of its fees because, presumably, it has “resources” to sustain litigation. Such an assumption is wholly unwarranted, false and inappropriate.

In a very real sense, it is *the State's* size and resources that have enabled *it* to prolong this controversy. Cincinnati chose neither the battle nor the battleground, preferring to settle this early on. The State's refusal required Cincinnati to expend resources diverted from the real victims: the school children of Cincinnati. For the State to argue that because the district is so large its needs are less belies the facts. The district is large because it serves many. The students served are diverse, and a majority of them are impoverished. Their needs are great, and the district's resources are limited. The funds recovered by Cincinnati through this suit were always due to it, by the State, for the school children. It is their education that will be diminished if Cincinnati is denied recovery of its attorney fees. The argument that they may be required to suffer this consequence presumes that because the district is large, it has a surplus of resources. Unfortunately, it does not—nor would it matter if it did. Cincinnati should, by law, recover, and that recovery will redound to the benefit of the students no less than would be the case if the district were of a different size.

2. An award of attorneys fees in this case is just, reasonable, and eminently consistent with the remedial purpose and the deterrent purpose of R.C. 2335.39.

In enacting a statute, it is presumed that a just and reasonable result is intended. R.C. 1.47(C). The purpose of R.C. 2335.39 is served and a just and reasonable result ensues in interpreting R.C. 2335.39 to permit all political subdivisions to be eligible to seek attorney fees against the State.

The fact that the school children injured by the State's action attend a large, urban district instead of a small one makes them no less deserving or legally entitled to be made whole than those in a smaller district. And, the message to the State should be that it cannot abuse its power under any circumstances. Such an outcome would insulate (at least from an award of attorney fees) those actions of the State that harm the greatest number of individuals. This is not what the legislature intended. When the State chooses, as it did here, to pursue an unauthorized and unreasonable course of action against a political subdivision, small *or* great, the State must be prepared to incur the costs—including an award of attorney fees. It is to the greater public good that the State should, and it is a legal fact that the State must, include this in its calculus of whether to persist in such a course of action.

It is entirely reasonable to permit a public school district—even a so-called “large” school district like Cincinnati—to recover attorney fees when it has had to expend local dollars to compel the state to comply with the law. Indeed, ongoing state regulation makes *all* political subdivisions particularly vulnerable to unjustified state conduct. The State concedes that it could be called upon to pay for its wrongdoing, but only if the political subdivision is small or relatively poor. The State’s position ignores the fact that the harm to the ultimate victims has nothing to do with the size of the political subdivision serving them and it ignores the local burden that ensues.

The prospect of paying for its unsubstantiated position should, and no doubt does, deter the state from arbitrary and unlawful conduct against those over which it wields power. In this case, the State wielded considerable power over Cincinnati's funds. When the State withheld a substantial portion of those funds, the resulting litigation was funded with tax dollars on both sides of the case. The ultimate question is who should bear the burden of the costs of this litigation. The legislature made a policy decision to shift the burden from the local government's budget and local taxpayer base to the state treasury and statewide taxpayer base. The legislature recognized all of the circumstances that are unique to political subdivisions and made the policy decision to *not* equate political subdivisions with private entities and to not place a restriction on political subdivisions based on their relative "net worth" and size.

Not only do the words of the statute itself dictate that the legislature intended political subdivisions, large and small, to be eligible for attorney fees under R.C. 2335.39, but this result is just and reasonable and serves the purposes of the statute.

CONCLUSION

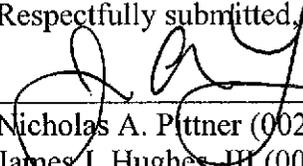
Cincinnati had both a legal responsibility and a fiduciary duty to secure the funding that was due its pupils. It is the State, not Cincinnati, that caused and continued this litigation. The State's wrongdoing is now established beyond question. At the end of the day, the question is who should bear the burden of correcting the State's wrongdoing, the local taxpayers of Cincinnati or the state taxpayers.

Under the State's tortured construction, Ohio's fee shifting statute would license arbitrary state conduct toward its political subdivisions, so long as their tax base is relatively large. Political subdivisions such as Cincinnati would be forced to either accept the wrongdoing or shoulder the entire cost of correcting it. If we sweep Ohio political subdivisions under the nearly all-encompassing "organizations" banner, we both misread the legislature's intent and create an

unjust result by ignoring the importance of deterring arbitrary state conduct against any of its political subdivisions. But the legislature did not intend such a result, and this is why R.C. 2335.39 is drafted the way it is.

The court of appeals unanimously and correctly determined that a political subdivision such as Cincinnati is not an “organization” as that term is used in R.C. 2335.39(A)(2)(d). Because Cincinnati is not an “organization,” the fact that it employs more than 500 persons does not preclude it from being an eligible party under the statute. Such a result is fair, just, and in keeping with well established rules of statutory construction and sound public policy. Indeed, it is the only result that brings a rational conclusion to this case. The court of appeals’ judgment should be affirmed.

Respectfully submitted,

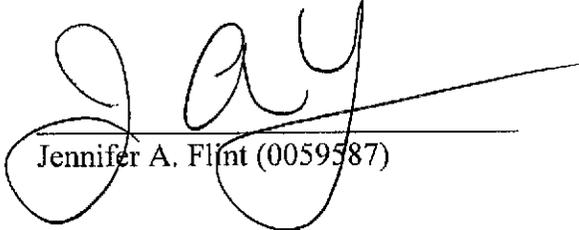


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following, by regular United States mail, postage prepaid, this 8th day of April, 2009.

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