

In the
Supreme Court of Ohio

CINCINNATI CITY SCHOOL DISTRICT	:	Case No. 2008-1480
BOARD OF EDUCATION,	:	
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Hamilton County
v.	:	Court of Appeals,
	:	First Appellate District
STATE BOARD OF EDUCATION OF	:	
OHIO, <i>et al.</i> ,	:	Court of Appeals Case
	:	No. C-070494
Defendants-Appellants.	:	

**REPLY BRIEF OF DEFENDANTS-APPELLANTS
STATE BOARD OF EDUCATION OF OHIO AND
OHIO DEPARTMENT OF EDUCATION**

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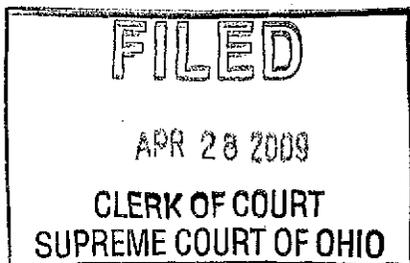


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INTRODUCTION

This case involves the plain meaning of the word “organization.” Under the word’s plain meaning, which is the paramount consideration in statutory construction, the Cincinnati City School District (“School District”) is an “organization”—and because it is an organization with over 500 employees, it is ineligible for attorneys fees under Ohio’s fee compensation statute, R.C. 2335.39. That statute allows parties of lesser means, in certain situations, to recover attorneys fees after litigating against the State. But the statute excludes from fee eligibility any “partnership, corporation, association, or organization” that has more than 500 employees or a net worth of over \$5 million. R.C. 2335.39(A)(2)(c) and (d) (hereafter “subsections (A)(2)(c) and (d)”). Because “organization” includes government organizations, large government organizations such as the School District here are ineligible for fees, while smaller ones remain eligible.

Nothing in the School District’s opposition brief overcomes that showing. While the School District’s arguments are couched as text-based, they boil down to policy arguments for why local government entities should have the uniquely privileged status of *always* being eligible for fees, regardless of their size and means. But that is an astonishingly radical reading of the fee compensation statute—first, because the statute does not confer blanket fee eligibility on *any* type of entity, let alone local government entities, but rather subjects all entities to the employee size and net worth tests enumerated in subsections (A)(2)(c) and (d); and second, because the School District cannot point to any statutory language that excludes local government entities from the term “organization” in those subsections. In fact, the School District’s arguments are based on statutory *silence*. The School District contends that the lack of the term “political subdivision” in the string of entities listed in subsections (A)(2)(c) and (d)—“partnership, corporation, association, or organization”—proves that political subdivisions are

not subject to the employee size and net worth tests enumerated in those provisions. But that is precisely backwards, since the common understanding of government entities as “organizations” (and many of them as corporations, partnerships, and associations) shows that the General Assembly had no need to add the term “political subdivision” when government entities were already covered by the other terms.

The School District’s reliance on the statutory canon *ejusdem generis* fares no better. First, that canon is used only to resolve ambiguity, and the School District cannot overcome the plain meaning of “organization” to reach ambiguity in the first place. But the canon also fails on its own terms. That is, the School District says that the canon limits “organization” to non-government entities because the other terms in the clause, such as “corporation,” are strictly non-governmental. But those other terms, in their common usage and their usage by the General Assembly, *do* include government entities. For instance, it is well-settled that municipalities are corporations. The examples go on, see below at 10-12, proving that the other terms in subsections (A)(2)(c) and (d) contemplate government entities. Indeed, just as the School District must resort to statutory acrobatics to escape the plain meaning of “organization,” it must do the same to sidestep the plain meaning and ordinary usage of the other terms. Thus, the School District says that the other terms, like “corporation,” cannot include government bodies because the statute nowhere mentions “political subdivisions” by name. But any basis for seeing that silence as meaningful circles back to the School District’s failed argument that the terms “organization,” “corporation,” “partnership,” and “association” do not already include government entities—which they unquestionably do. In short, the School District cannot show that Ohio’s fee compensation statute distinguishes between government and non-government entities.

Finally, the School District’s policy arguments are mistaken. While the School District portrays this Court’s decision as a choice between protecting local government entities or leaving them out to dry, that is a false dichotomy. In the view of Appellants, the State Board of Education and the Department of Education (collectively, “the State”), political subdivisions are neither categorically eligible nor categorically ineligible for attorneys fees, but rather subject to the same employee size and net worth tests as all other entities. Thus, in the State’s view, many local government entities *are* eligible for attorneys fees under R.C. 2335.39—but not ones that exceed the size or net worth limitations set forth in subsections (A)(2)(c) and (d). By contrast, the School District contends that local government entities are blanketly eligible for fees. Yet it cannot point to any language or policy in the statute that authorizes such automatic fee eligibility and a free pass on the employee size and net worth tests that all other potentially eligible parties are subject to. The more logical policy view, to the extent policy is even relevant in the face of an unambiguous statute, is that the General Assembly wished to compensate only smaller entities, whether private or public, and not larger ones like the Cincinnati City School District.

For these and the other reasons below and in the State’s opening brief, this Court should reverse the decision of the First Appellate District and hold that the School District is an “organization,” and that because it has over 500 employees, it is ineligible for attorneys fees under R.C. 2335.39.

ARGUMENT

The School District’s view of a uniquely privileged status for local government entities is not supported by the text of R.C. 2335.39, the canon of *ejusdem generis*, or the policy behind the statute. In fact, all of those approaches support the State’s view that the School District is an “organization” under the statute and therefore subject to the same fee eligibility standards as all other entities.

A. The plain meaning of the term “organization” includes government organizations such as the School District.

Both R.C. 1.42 and this Court’s precedent require that words used in the Revised Code “shall be . . . construed according to . . . common usage.” R.C. 1.42; *Maschari v. Tone*, 103 Ohio St. 3d 411, 2004-Ohio-5342, at ¶ 12 (same). As the State demonstrated in its opening brief, both lay and legal dictionaries show that “organization” includes government organizations, since the term refers broadly to a group of persons organized for a particular purpose. (State’s Br. at 7-8.) But the Court of Appeals never probed the plain meaning of the word “organization.” In fact, the court rejected a plain meaning approach outright and jumped straight to the *ejusdem generis* canon. *Cincinnati City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.* (1st Dist.), 176 Ohio App.3d 678, 2008-Ohio-2845, at ¶ 17 (“Because the statute itself does not define ‘organization,’ the trial court relied on the dictionary definition of the term to conclude that the District was an organization. We cannot agree with the trial court’s conclusion.”). Having failed to account for the paramount consideration of statutory construction—the text’s plain meaning—the Court of Appeals opinion should not be credited by this Court.

In its opening brief, the State also pointed to a raft of case law where courts have construed the term “organization” to include government entities. (State’s Br. at 8.) See also *United States v. Madrzyk* (N.D. Ill. 1997), 970 F. Supp. 642, 644 (holding that the City of Chicago is an “organization,” a “government agency,” and a “local government” for purposes of a statute that protects all three types of entities). Conspicuously, the School District fails to dispute those citations and fails to put forward a single dictionary definition or case that interprets the plain meaning of “organization” to exclude government entities.

Further examples of the plain meaning of “organization” abound. For example, the use of “organization” in the Ohio Revised Code reflects the common understanding that the term

includes government entities. Several statutes, for instance, specifically exclude government entities from the meaning of “organization,” confirming that government entities ordinarily are embraced by the word. See, e.g., R.C. 2901.23(D) (statute describing “organizational criminal liability” notes that the term “organization” “does not include an entity organized as or by a governmental agency for the execution of a governmental program”); R.C. 4712.01(C)(2)(i) (Ohio Credit Services Organization Act notes that “credit services organization” does not include “[a]ny political subdivision, or any governmental or public entity, corporation, or agency, in or of the United States or any state of the United States.”).

Even where the General Assembly is not directly defining “organization” in a statute, its ordinary use of the word in other statutes compellingly demonstrates its common usage to describe government entities. For example, R.C. 3727.01(A) makes clear that the term “health maintenance organization” includes a “public or private organization”; and R.C. 4766.12, which deals with the Ohio Medical Transportation Board and its licensing powers, refers to county and township emergency medical services entities as “emergency medical service organizations.”

The same conclusion—that the common usage of the term “organization” includes government entities—can be drawn from the ordinary use of the term by courts. For example:

- “[T]he National Guard is an **organization** controlled and utilized by both the state and federal governments and constitutes a vital part of the nation’s defense system.” *Nelson v. Geringer* (10th Cir. 2002), 295 F.3d 1082, 1088 (emphasis added).
- “The Forest Service is an **organization** within the United States Department of Agriculture.” *Dubois v. United States Dep’t of Agric.* (1st Cir. 2001), 270 F.3d 77, 79 n.2 (emphasis added).
- “The Missouri Department of Transportation (“MoDot”) is an **organization** operating under the control of [the Missouri Highway and Transportation Commission]....” *Wheeler v. Missouri Highway & Transp. Comm’n* (8th Cir. 2003), 348 F.3d 744, 747-48 (emphasis added).

- “When the opposing party is an *organization* such as Fulton County....” *Kenny A. v. Perdue* (N.D. Ga. 2003), 218 F.R.D. 277, 304 (emphasis added).
- “The drainage district is a municipal *organization* created by law, and has been recognized as a municipal entity, with power and discretion in the matter of constructing sewers and drains and the enforcement of assessments to pay for the same.” *Alber v. Kansas City* (Kan. 1933), 138 Kan. 184, 189 (emphasis added).
- “[T]he [county] board of supervisors is a county *organization*....” *In re Noble* (N.Y. App. Div. 1898), 34 A.D. 55 (emphasis added).

In light of the overwhelming evidence of the word’s plain meaning and common usage—which the School District does not and cannot refute—this Court need not resort to canons of construction, or any other rationale, to construe “organization.” “The rule is that when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply the rules of statutory interpretation.” *State ex rel. Wise v. Ryan*, 118 Ohio St.3d 68, 72, 2008-Ohio-1740, at ¶ 26 (quotation and citation omitted). In short, the plain meaning of the term “organization” resolves this case and demonstrates that the School District, because it has over 500 employees, is not eligible for attorneys fees under R.C. 2335.39.

B. The absence of the term “political subdivision” in R.C. 2335.39(A)(2)(c) and (d) does not overcome the plain meaning of “organization” or mean that local government entities are excluded from the employment size and net worth tests for fee eligibility set forth in those sections.

The School District complains that the State’s case depends on “a single word”—“organization.” (School District’s Br. at 1.) But in the end, the School District relies not even on one word, but on the *absence* of words. In a confusingly serpentine argument, the School District contends that the exclusion of the term “political subdivisions” from the statute’s definition of “state” and the lack of the term “political subdivision” in the string of entities listed in subsections (A)(2)(c) and (d)—“partnership, corporation, association, or organization”—prove

that political subdivisions are not subject to the employee size and net worth tests enumerated in those provisions. Neither of those arguments withstands scrutiny.

1. The exclusion of political subdivisions from the definition of “state” in subsections (A)(2)(a) and (A)(6) does not support the School District.

First, the School District is mistaken in its heavy reliance on subsections (A)(2)(a) and (A)(6), which exclude the State from eligibility for fees. Those subsections incorporate the definition of “state” set forth in the Court of Claims Act, R.C. 2743.01(A), which in turn excludes political subdivisions from the definition of “state.” The School District contends that because the State is not eligible for fees, and because political subdivisions are not included in the definition of “state,” then political subdivisions are not excluded as fee-eligible parties. (School District Br. at 7.) The State has no qualms with that conclusion. But the School District goes much further, hurdling from the conclusion that political subdivisions are not categorically *excluded* from fee eligibility (as the State is) to the conclusion that they therefore are *always eligible*, regardless of size or net worth.

That reasoning is flawed on many levels. First, just because political subdivisions are not categorically excluded from fee eligibility (as the State is) does not mean that they are categorically *eligible* for fees irrespective of the size and means lines drawn in subsections (A)(2)(c) and (d). Second, the School District fails to show how excluding political subdivisions from the definition of “state” in other subsections of the statute overcomes their inclusion as “organizations” under subsections (A)(2)(c) and (d). Finally, the exclusion of political subdivisions from the statute’s definition of “state” has a much more obvious basis than the School District’s unlikely theory. That is, if the definition of “state” included political subdivisions, then the fee compensation statute would operate against local governments—meaning, local governments would have to *pay attorneys fees* to their litigation opponents. That

would be the case because the statute applies “in a civil action, or appeal of a judgment in a civil action in which the *state* is a party,” R.C. 2335.39(B)(1) (emphasis added); and a party is eligible to recover attorneys fees under certain circumstances if it is “a party to an action or appeal involving the *state*.” R.C. 2335.39(A)(2) (emphasis added). In other words, if the italicized terms in the previous sentence included political subdivisions, then local government entities would have to pay attorneys fees to their opponents in their own cases. Because the General Assembly only intended to make the State liable for fees, political subdivisions are excluded from the definition of “state.” Thus, there is no basis for crediting the School District’s alternative and far more attenuated theory for that exclusion.

In short, the exclusion of political subdivisions from the definition of “state” in subsections (A)(2)(a) and (A)(6) does not support the School District’s position and certainly does not demonstrate why local government entities—in contrast to all other entities—merit the uniquely privileged status of always being eligible for fees, regardless of their employee size or net worth.

2. The absence of the term “political subdivisions” in subsections (A)(2)(c) and (d) does not indicate that local government entities are blanketly eligible for fees.

The School District’s text-based argument depends primarily upon its “state” definition argument, as explained above. But the School District also contends that the lack of the term “political subdivision” in the string of entities listed in subsections (A)(2)(c) and (d)—“partnership, corporation, association, or organization”—proves that political subdivisions are not subject to the employee size and net worth tests enumerated in those subsections.

But that absence is not remarkable in light of the well-established view of courts that government entities are included in terms such as “organization” and even “corporation,” “partnership,” and “association.” See above at 4-6; below at 10-12; State’s Br., at 7-8, 12.

More to the point, if the General Assembly wanted to exempt political subdivisions from the employee-size and/or net worth tests in subsections (A)(2)(c) and (d), it knew how to do so, and could have done so. That is clear from the fact that subsection (A)(2)(c), which sets forth the net worth limit, exempts non-profits from that test: “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.”

In other words, while non-profits are subject to the employee size test set forth in subsection (A)(2)(d), they are exempt from the net worth test in (A)(2)(c). Thus, if the General Assembly wished to exempt local government entities from the employee size and net worth tests, it could and would have done so in subsections (A)(2)(c) and (d), as it did for non-profits regarding the net worth limit. Conversely, if the General Assembly wanted to *subject* local government entities to the tests—and it did—then it easily did so by *not* excluding them by name, but rather relying on the settled understanding that government entities are included in the terms “organization,” “partnership,” “corporation,” and “association.” See above at 4-6, below at 10-12; State’s Br., at 8, 12, citing, e.g., *Adams v. United States* (S.D. Ill. 1965), 241 F. Supp. 383, 385 (given statute’s “definition[] certainly include[s] governments within the class of organizations”) and other cases.

In sum, the General Assembly knew how to exempt certain entities from the size and/or net worth tests for fee eligibility. Because local government entities are not excluded from those tests, and because local government entities are contemplated by the term “organization” (and even by the terms “corporation,” “partnership,” and “association”) this Court should find, as the trial court did, that the School District is an “organization” and therefore subject to the employee size and net worth tests set forth in subsections (A)(2)(c) and (d).

C. The *ejusdem generis* canon does not overcome the inclusion of government entities in the term “organization.”

As explained above, the Court need not, and should not, reach the canon of *ejusdem generis*, which is reserved only for use in resolving ambiguities. (State’s Br., at 9.) There is no ambiguity here—the trial court found no ambiguity in the word “organization,” the court of appeals found no ambiguity (and dispensed with a plain meaning analysis entirely), and the School District has never argued that the word “organization” is ambiguous. But even if this Court looks to the *ejusdem generis* canon, it does not support the School District’s effort to exclude government entities from the scope of the term “organization.”

The School District says that the *ejusdem generis* canon limits the word “organization” to non-government entities because the other terms in the relevant clause of subsections (A)(2)(c) and (d)—terms such as “corporation,” “partnership,” and “association”—are strictly non-governmental. But the School District’s argument is meritless, because those terms, in their common usage, *do* include government entities. For instance, it is well-settled that municipalities are “corporations,” see, e.g., Ohio Const., Art. XVIII, and this Court has recognized that other types of local government entities are also “corporations.” See, e.g., *Hamilton Cty. Bd. of Mental Retardation v. Professional Guild of Ohio* (1989), 46 Ohio St.3d 147, 149-50 (holding that a “political subdivision” is a “governmental body or public corporation having powers and duties of government.”). Many other government entities are also corporations—for instance, the Federal Deposit Insurance Corporation (FDIC), the National Railroad Passenger Corporation (commonly known as “Amtrak”), and the Tennessee Valley Authority.

So too, the terms “partnership” and “association” contemplate government entities in addition to private entities. See, e.g., R.C. 3301.41 (establishing the Ohio Partnership for

Continued Learning, which seeks to integrate Ohio's educational, economic, and workforce development efforts in order to maintain a high-quality workforce in the state); R.C. 3929.43 (establishing the Ohio Fair Plan Underwriting Association); R.C. 3929.51 (establishing the Ohio Mine Subsidence Insurance Underwriting Association); R.C. 3930.03 (establishing the Ohio Commercial Insurance Joint Underwriting Association).

The examples go on, proving that the plain meaning and ordinary use of the other terms in subsections (A)(2)(c) and (d) include government entities.

The School District offers no argument as to why the terms "partnership" and "association" do not include government entities. However, the School District strains to exclude public entities from the term "corporation," on the theory that the General Assembly only used the broad term "corporation" in the fee compensation statute, without any extra adjectives. According to the School District, the General Assembly "would have had to have used more than just the term 'corporation'" to embrace public entities. (School District's Br. at 11.) But the illogical premise of that argument is obvious: If the unadorned term "corporation" cannot include public entities without the adjective "public" in front of it, then it cannot possibly denote *any* of the many types of corporations without putting descriptive adjectives in front of the word "corporation." The reason the General Assembly did *not* need to rattle off every variant of "corporation"—for instance, "for-profit corporation," "not-for-profit corporation," "municipal corporation," other public but non-municipal corporations, partly-public-and-partly-private corporations, and so on—is because the unadorned term "corporation" already includes *all* corporations.

More importantly, the School District's arbitrary exclusion of public corporations from the plain term "corporation" has already been rejected by this Court. The School District says that

“[p]ublic bodies are not simply ‘corporations,’” because they are “bodies corporate *and politic*.” (School District Br. at 11.) The School District’s implication, it seems, is that an entity that is *both* cannot fall under the term “corporation” alone. But this Court rejected that theory in *Hamilton County Bd. of Mental Retardation*, 46 Ohio St. 3d at 149-150, where the Court held that a county board of mental retardation was a “person” under a certain statute, because the statute in turn defined a “person” as a “corporation, association, or partnership.” The county entity’s personhood in that case was linked to the unadorned term “corporation.” Significantly, the Court noted the formula the School District invokes here—that a public corporation is a “body corporate and politic”—but that did not prevent the Court from easily concluding that the county board was a “person” by virtue of its status as a “corporation.”

In addition, the School District’s claim that there is a “clear demarcation” between public and private entities fails as a matter of law and practical reality. (School District’s Br. at 2, 14-15.) Many entities straddle the line between public and private. For instance, “public-private partnerships” are expressly recognized in Ohio and federal law. See, e.g., R.C. 3313.603(C)(6), 3326.03(B), 10 U.S.C. § 2474(b), 20 U.S.C. § 1153(b)(2). Government sponsored enterprises (known as GSEs) also figure prominently in many sectors—some of them are part privately-held and part publicly-held, while some are publicly chartered but privately held. The Federal Home Loan Mortgage Corporation (“Freddie Mac”), the Federal Home Loan Bank, the Federal Farm Credit Bank, and the Resolution Funding Corporation are just a few examples that defy the School District’s supposedly “clear demarcation” between public and private entities.

Finally, the School District is wrong in suggesting that the *ejusdem generis* canon must limit the term “organization” to non-government entities because the term would otherwise be superfluous by virtue of including all the other terms. (School Dist. Br. at 14.) In fact, that

argument fails right out of the gate. That is, even if all the terms in the relevant clause of subsections (A)(2)(c) and (d) *were* construed as non-governmental, including the term “organization,” the word “organization” would still include non-governmental “corporations,” “partnerships,” and “associations.” In other words, under the School District’s theory, the term “organization” would still be “superfluous” even if it and all the other terms in the clause referred only to non-government entities. Thus, the School District’s argument that “organization” must be limited to avoid superfluosity does not withstand scrutiny. More importantly, the School District’s argument fails because the term “organization” is *not* superfluous. Certainly, as a general rule of statutory construction, courts should not construe different terms within the same statute to possess the same, interchangeable meaning. But that principle does not mean that words in a statute cannot overlap, such that in some cases, both apply. Here, the words in subsections (A)(2)(c) and (d) do *not* have the same, interchangeable meaning. The broadest term, “organization,” embraces many entities that do not fall into the other categories—for example, not all organizations will also be a corporation, partnership, or association. Thus, the term “organization” has a meaning that might sometimes overlap with, but at other times will be independent of, the other terms. That does not offend the rules of statutory construction at all.

In sum, neither the Court of Appeals nor the School District’s theory of *ejusdem generis* is justified here. Thus, the School District cannot use that canon to escape the eligibility tests set forth in subsections (A)(2)(c) and (d) and to carve out for itself the uniquely privileged status of *always* being eligible for fees irrespective of the limits that all other entities are subject to.

D. The School District’s reliance on the federal Equal Access to Justice Act is unavailing.

The School District’s argument about the federal Equal Access to Justice Act, 28 U.S.C. § 2412, proves nothing about the meaning of Ohio’s fee compensation statute. As the State’s

opening brief explained, the federal EAJA's reverse structure, compared to Ohio's statute, means that its value here is limited. (State's Br. at 17-18.) Originally, the federal EAJA did not mention political subdivisions, and the courts debated—and split—about whether they were “organizations.” But because the federal law was written in terms of *inclusion* relative to the thresholds, rather than *exclusion*, the two options for local governments were full exclusion from fee eligibility or being subject to the thresholds. The later amendment to the EAJA, which added “units of local government” to the definition of “party,” rendered them subject to the thresholds. *The School District's goal in this case—blanket inclusion for fees, regardless of thresholds—has never been an option under the federal EAJA.* In short, it takes implausible interpretive acrobatics to use the federal EAJA debate about thresholds versus full exclusion to result in a full *inclusion* rule here.

The School District is also wrong in arguing that its federal EAJA argument is aided by *Comm'rs. of Highways v. United States* (7th Cir. 1982), 684 F.2d 443 and *Central Midwest Interstate Low-Level Radioactive Waste Comm'n v. O'Leary* (C.D. Ill. 1995), 873 F. Supp. 159. As a preliminary matter, because of the reverse structure of the federal EAJA as compared to Ohio's statute, local government entities *wanted* to be considered “organizations” so that they could be eligible for fees under the federal statute. The School District seems to cite the case from the U.S. Court of Appeals for the Seventh Circuit as an example of a court construing “organization” not to include government entities. But that was not the court's analysis. The Seventh Circuit in *Comm'rs of Highways* bristled at the idea of subjecting the United States to such expansive liability, and therefore held that local government entities fell outside the ambit of the statute. *But the Seventh Circuit never undertook a plain meaning analysis of the statute's language (including “organization”).* Rather, the court dispensed of the claim on policy

grounds, concluding that the local government entity had not been deterred in proceeding against the United States, and therefore did not need the assistance or inducement of attorneys fees. 684 F.2d at 445. Thus, the Seventh Circuit’s analysis does nothing to inform this Court’s statutory analysis of the term “organization.” The same is true of *O’Leary*. There, the district court simply noted that the pre-amendment federal EAJA had generally been interpreted “by *Federal departments and agencies*” not to include governmental bodies. 873 F. Supp. at 161. It is hardly surprising, though, that federal *administrative agencies* did not volunteer to pay attorneys fees to local government entities. But that says nothing about how the term “organization” should be interpreted by a *court* when it is actually put at issue in a case—particularly a case involving a different statute with a different structure. In short, *neither of the cases cited by the School District undertook an analysis of the statutory language of the federal EAJA.*

Lastly, to the extent the federal EAJA is instructive at all, it bolsters the State’s case. First, the fact that the federal EAJA subjects local government entities to thresholds for fee eligibility undermines the School District’s claim that it offends public policy to subject government entities to such thresholds. Second, to the extent that some federal courts, before the federal EAJA was amended, held for full *exclusion* of government entities from fee eligibility, this confirms the State’s position here as a much softer and fairer one by comparison, since it *would* award local government entities fees where the thresholds of the statute have been met.

E. The School District’s policy arguments do not support the view that R.C. 2335.39 confers blanket fee eligibility on political subdivisions irrespective of their employee size or net worth.

Finally, in the absence of persuasive statutory arguments, the School District appeals to what it claims is an equitable policy to reimburse entities that litigate against the State. But the School District’s argument ignores the mismatch between how the law applies to all others and what it seeks for itself. As noted above, the State does not seek to categorically exclude all

political subdivisions from eligibility, but only to apply the employee size and net worth thresholds to them, as the fee compensation statute does with all other potentially eligible parties. Indeed, the statute plainly would deny fees to certain non-government entities (for instance, large charities) that are at least as sympathetic as a large school district. The School District, by contrast, wants a pass on the eligibility tests and would render political subdivisions the *sole* category of entities to have such an entitlement.

That view is impossible to square with the statute, as the statute sets out only two categories of entities: (1) those that are potentially eligible to recover fees, subject to the thresholds set forth in subsection (A)(2); and (2) those that are categorically *excluded* from fee eligibility. The first category covers all persons and entities except those in the second category, which include the State itself and any prevailing eligible party in an administrative appeal under R.C. 119.12 where the party was “represented in the appeal by an attorney who was paid pursuant to an appropriation by the federal or state government or a local government.” R.C. 2335.39(A)(2)(a), 2335.39(F)(3)(b). Given those two categories, the School District cannot explain how this Court can divine, from silence, a *third* category of entities that are *always* entitled to fees.

As importantly, and contrary to the School District’s policy arguments, the rest of the statute shows an intent to apply the thresholds, and even outright exclusions, to other parties that are at least as sympathetic as large government entities like the School District. For example, non-profits are expressly subject to the eligibility test involving employee size (although not the net worth limit). This shows that the General Assembly is willing to deny fees to a charity with a large staff. Moreover, under 2335.39(F)(3)(b), some individuals and entities, no matter how poor, are categorically ineligible for fees because they have government-paid lawyers (which

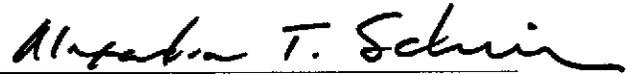
could mean a staff lawyer for a county or city or one of its agencies, or a lawyer working for a legal services organization supported by government appropriations). Awarding fees in those cases would surely serve to replenish the treasuries of the counties, cities, or other worthy organizations providing counsel. But the General Assembly chose not to award fees under those circumstances, showing that its concern was with ensuring that a party has access to counsel, not with categorically shifting the cost of that counsel from one group of taxpayers to another, as the School District seeks.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the First Appellate District and reinstate the trial court's dismissal of the School District's fee motion. If the Court affirms, it should remand for the trial court to apply the statute and determine if any fee award is justified, and if so, in what amount.

Respectfully submitted,

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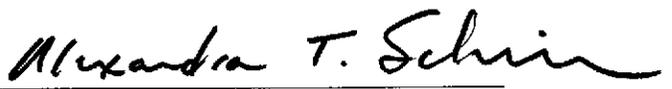
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Defendants-Appellants State Board of Education of Ohio and Ohio Department of Education was served by U.S. mail this 28th day of April, 2009, upon the following counsel:

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