ORIGINAL

In the

Supreme Court of Ohio

BROOKWOOD PRESBYTERIAN CHURCH,	:	Case No. 2009-1926
Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
OHIO DEPARTMENT OF EDUCATION,	:	Court of Appeals Case No. 09-AP-303
Appellee.	:	

MERIT BRIEF OF APPELLEE OHIO DEPARTMENT OF EDUCATION

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INTRODUCTION

This case turns on a limited question of subject matter jurisdiction: Can Brookwood Presbyterian Church ("Brookwood") appeal a determination by the Ohio Department of Education ("Department") that Brookwood is ineligible to apply for sponsorship of a community school? The answer is "no." Unlike a Department decision denying an eligible applicant's sponsorship application on the merits—which is appealable under R.C. 119.12—this threshold determination of Brookwood's ineligibility to apply for sponsorship is entirely within the Department's discretion. It is therefore not appealable.

The statutes governing appeals of community school sponsorship determinations are clear, and the Tenth District Court of Appeals applied them correctly. Under R.C. 3314.02(C)(1)(f), qualified tax-exempt entities may apply to sponsor community schools if they meet various conditions. Some of these conditions are objective, while others are more subjective—for example, only "education-oriented entit[ies]" are eligible to apply. R.C. 3314.02(C)(1)(f)(iii). Under R.C. 3314.015(B)(3), the Department has the *final* say about whether a particular entity is education-oriented. *Id.* ("Such determination of the department is final."). If the Department determines that an entity meets the requisite conditions—and therefore is eligible to apply—then the Department will evaluate the merits of the entity's application and either approve or deny the entity for sponsorship. Under the plain language of the statute, then, the Department's ultimate decision to deny a sponsorship application is appealable under R.C. 119.12, see R.C. 3314.015(D), but its preliminary determination of an entity's eligibility to apply for sponsorship is not, see R.C. 3314.015(B)(3).

As the Tenth District recognized, this statutory framework is logical. A significant difference exists between a threshold eligibility determination and the Department's subsequent decision to approve or deny a qualified entity's sponsorship application. The latter is the product

of an adjudication, but the former is not. The General Assembly recognized this distinction and vested the Department with exclusive discretion to weed out unqualified sponsorship applicants at the earliest step of the application process. By contrast, the General Assembly authorized administrative appeals of the Department's ultimate decision to deny an eligible entity's application for sponsorship. This distinction is appropriate because the Department's threshold assessment of eligibility does not bear any hallmarks of an administrative proceeding appealable under R.C. 119.12: The determination is neither made by the highest or ultimate authority within the Department, nor is it the product of a quasi-judicial proceeding.

This appeal turns entirely on this straightforward jurisdictional question; it does not even present the questions of church-state relations that Brookwood raises. Although Brookwood invokes several constitutional challenges to the Department's determination that Brookwood is ineligible to apply for sponsorship, the lower court has not ruled on these claims. Nor has the lower court weighed in on Brookwood's fourth proposition of law, which asserts that Brookwood is entitled to judgment as a matter of law because the Department failed to certify its (nonexistent) administrative record to the trial court. Brookwood offers no reason why the Court should now resolve these claims in the first instance. But even if the Court were to reach these extraneous arguments, they are meritless.

For these and other reasons, this Court should affirm the Tenth District's dismissal of Brookwood's administrative appeal for lack of subject matter jurisdiction and decline to address Brookwood's remaining claims.

STATEMENT OF THE CASE AND FACTS

A. Entities applying to sponsor community schools must meet several eligibility criteria.

A community school, Ohio's term for a charter school, is a public nonprofit, nonsectarian school that operates independently of any school district. R.C. 3314.01(B); R.C. 3314.03(A)(1),

(A)(11)(c). Community schools are operated by nonprofit corporations under contracts with entities that supervise the schools. R.C. 3314.03. Although those supervising entities are known as "sponsors," they do not provide funding. Instead, the State funds each community school by diverting operating funds from the school district where the community school's students live to the community school. R.C. 3314.08(D).

Any entity seeking to sponsor a community school must apply to the Department for approval as a sponsor. R.C. 3314.015(B)(1). The Department subjects every sponsorship application to two stages of review. First, the Department determines whether the entity meets threshold criteria that make it eligible to apply for sponsorship. A qualified tax-exempt entity under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), is eligible to apply if: (1) it has been in operation for at least five years prior to applying; (2) it has assets of at least $500,000 and a record of financial responsibility; (3) the Department determines that the entity is an "education-oriented entity"—that is, an entity whose mission or operations foster education; (4) the Department determines that the entity has successfully implemented educational programs; and (5) the entity is not itself a community school. R.C. 3314.02(C)(1)(f)(i)–(iv).

If an entity satisfies all of these eligibility criteria, then the Department moves onto the second stage of review: evaluating the merits of the application and either approving or denying the entity as a sponsor.

B. Brookwood submitted an application to be recognized as a community school sponsor, but the Department determined that Brookwood was not eligible to apply because it is not an "education-oriented entity."

Brookwood Presbyterian Church is a tax-exempt, nonprofit church organized for religious purposes. In November 2007, Brookwood submitted an application to the Department requesting approval to sponsor community schools in Ohio under R.C. Chapter 3314. In support of its application, Brookwood included a letter from the Internal Revenue Service confirming

that the national Presbyterian church and all of its subordinate churches are section 501(c)(3) entities. Further, the letter explains that these churches "are organized and operated *exclusively* for religious purposes." Letter from Internal Revenue Service to United Presbyterian Church in the United States of America (Jan. 31, 1964) ("IRS Letter") (emphasis added) (Apx. 1). Brookwood also submitted evidence of the educational endeavors of the national Presbyterian church, but did not submit evidence specific to Brookwood's own educational efforts.

In March 2008, the Department informed Brookwood that it was not eligible to apply to sponsor a community school because it is not an "education-oriented entity" as required by R.C. 3314.02(C)(1)(f)(iii). Brookwood asked the Department to reconsider and the Department reaffirmed its eligibility determination in May 2008.

Because the Department determined that Brookwood was not eligible to apply, it never reached the merits of Brookwood's application.

C. Brookwood appealed, but the trial court dismissed the appeal for lack of jurisdiction and the appeals court affirmed.

Brookwood appealed the Department's eligibility decision to the Franklin County Court of Common Pleas. See *Brookwood Presbyterian Church v. Ohio Dep't of Educ.* (Franklin County C.P. Mar. 2, 2009), No. 08CVF05-07539. Brookwood styled the appeal as an administrative appeal under R.C. 119.12 and R.C. 3314.015(D), and filed a corresponding demand for the Department to prepare and certify a record of the relevant administrative proceedings. *Id.* at 2. The Department informed the trial court that no record existed because the Department had not conducted a public hearing in the matter. The Department therefore could not certify a record to the trial court.

Brookwood moved for judgment based on the Department's failure to certify the record, and the Department moved to dismiss Brookwood's appeal for lack of subject matter jurisdiction. *Id.* at 2-3.

The trial court denied Brookwood's motion and granted the Department's motion to dismiss. The court found that the Department's determination that Brookwood is not an "education-oriented entity"—and thus is ineligible to apply for sponsorship—is "final" under the plain language of R.C. 3314.015(B)(3). *Id.* at 5. Because the General Assembly expressly included statutory language indicating that this decision is "final," the trial court concluded that Brookwood could not appeal under R.C. 119.12. *Id.* at 5-7. The court cited *Heartland Jockey Club, Ltd. v. Ohio State Racing Comm'n* (10th Dist. Aug. 3, 1999), No. 98AP-1465, 1999 Ohio App. Lexis 3530 (unreported), for the proposition that when the General Assembly includes statutory language indicating that an agency's decision is "final," the decision is not appealable under R.C. 119.12. Further, the court held that because R.C. 119.12 does not govern Brookwood's appeal, the Department was not required to certify an administrative record. *Id.* at 7.

The Tenth District affirmed the trial court's judgment. Referring to the plain language of R.C. 3314.015(B)(3), the appeals court similarly concluded that the Department's determination that an entity is not "education-oriented," and thus not eligible to apply for community school sponsorship, is "final." *Brookwood Presbyterian Church v. Ohio Dep't of Educ.* (10th Dist.), 2009-Ohio-4645 ("App. Op."), ¶ 9. The appeals court held that R.C. 3314.015(B)(3) forecloses appeals of the Department's determinations of an entity's eligibility to apply for sponsorship. *Id.* at ¶ 10 (citing *Heartland Jockey Club*, 1999 Ohio App. Lexis 3530). As such, the Department's

decision was not appealable. *Id.* The appeals court declined to address the merits of Brookwood's additional assignments of error. *Id.* at ¶ 11.

Brookwood now appeals the Tenth District's decision and asks the Court to reinstate its appeal. Brookwood also seeks a mandate directing the trial court to enter a final order finding that the Department's decision is not in accordance with law, reversing the Department's decision, determining that Brookwood is eligible to be a community school sponsor, and awarding it fees. (Brookwood's Br. at 21.) Separately, Brookwood initiated a mandamus action in this Court, which has been stayed pending further order. See *State ex rel. Brookwood Presbyterian Church v. Ohio Dep't of Educ.* (Feb. 10, 2010), No. 2009-2005.

ARGUMENT

Appellee Ohio Department of Education's Propositions of Law Nos. 1 & 2:

> *Unlike Department decisions to deny a community school sponsorship application on its merits, the Department's initial determinations of eligibility to apply for sponsorship are not appealable under R.C. 119.12.*
>
> *Initial determinations of eligibility to apply for sponsorship are not appealable under R.C. 119.12 because they are final under R.C. 3314.015(B)(3)'s plain language and they are not the product of an adjudication or quasi-judicial proceeding.*

Because Brookwood's first two propositions of law are interrelated, they are addressed together. Brookwood argues that, despite the plain language of R.C. 3314.015(B)(3), which provides that the Department's threshold decision as to whether an entity is eligible to apply for sponsorship is "final," it nonetheless has the right to appeal this decision using the administrative appeal procedures in R.C. 119.12. But Brookwood's argument depends on its erroneous conflation of two stages of the sponsorship application process. When the Department receives a sponsorship application, it first determines whether the applying entity is eligible to apply for sponsorship. If the entity is eligible to apply, then the Department proceeds to review the eligible entity's application and decides whether to approve or deny it on the merits.

By its plain language, R.C. 3314.015 provides for appellate review *only* of the Department's decision to "disapprove an entity for sponsorship or to revoke approval for such sponsorship." R.C. 3314.015(D). The Department's threshold determination of eligibility to apply is a "final" determination solely within the province of the Department, and it is not appealable under R.C. 119.12. R.C. 3314.015(B)(3). The General Assembly's decision to make eligibility determinations unappealable is consistent with the nature of these determinations. Unlike a final decision to approve or deny a sponsorship application, the Department's initial determination of whether an entity is "education-oriented," and thus eligible to apply, is not the type of order reviewable under R.C. 119.12 because it is not the product of an adjudication or a quasi-judicial proceeding.

A. The plain language of R.C. 3314.015(B)(3) forecloses an appeal on the Department's initial determination that Brookwood is not eligible to apply for sponsorship because it is not "education-oriented."

Ohio courts only have jurisdiction to review administrative decisions where specifically authorized by statute or the Ohio Constitution. The Ohio Constitution expressly gives the General Assembly power to grant "appellate jurisdiction . . . to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies." Ohio Const. art. IV, § 3(B)(2). Where the General Assembly declines to grant jurisdiction, a party has no inherent right to appeal an administrative decision.[1] See, e.g., *Corn v. Bd. of Liquor Control* (1953), 160 Ohio St. 9, 11. Accordingly, even when one type of agency determination is appealable under

[1] If an administrative action is not appealable, a party may seek mandamus relief. See *State ex rel. Pipoly v. State Teachers Ret. Sys.*, 95 Ohio St. 3d 327, 2002-Ohio-2219, ¶ 14; *Carney v. Sch. Employees Ret. Sys. Bd.* (10th Dist. 1987), 39 Ohio App. 3d 71, 72. Brookwood is not entitled to this extraordinary relief, however, because it can show neither that Ohio law confers on Brookwood a clear legal right to be deemed an education-oriented entity for purposes of applying to sponsor community schools (or to be approved as a community school sponsor), nor that the Department has a clear legal duty to declare Brookwood eligible or approve its sponsorship application. See *State ex rel. Ohio Ass'n of Pub. Sch. Employees v. Batavia Local Sch. Dist. Bd. of Educ.*, 89 Ohio St. 3d 191, 198, 2000-Ohio-130.

R.C. Chapter 119, other decisions by the same agency may not be. See *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n* (1981), 66 Ohio St. 2d 192, 194 (describing the Ohio Civil Rights Commission as having an "administrative split personality").

Here, the appeals court properly held that Brookwood had no right to appeal the Department's threshold determination of Brookwood's eligibility to apply for sponsorship under R.C. 3314.015(B)(3). R.C. 3314.015(B)(3) states:

> The department of education shall determine, pursuant to criteria adopted by the department, if any tax-exempt entity under section 501(c)(3) of the Internal Revenue Code that is proposed to be a sponsor of a community school is an education-oriented entity for purpose of satisfying the condition prescribed in division (C)(1)(f)(iii) of section 3314.02 of the Revised Code. *Such determination of the department is final.*

(Emphasis added.)

In construing a statute, this Court first looks to the plain language of the provision. See *Medcorp, Inc. v. Ohio Dep't of Job & Family Servs.*, 121 Ohio St. 3d 622, 2009-Ohio-2058, ¶ 9. The Court must give effect to the words used, and may neither add nor delete words. See *Hall v. Banc One Mgmt. Corp.*, 114 Ohio St. 3d 484, 2007-Ohio-4640, ¶ 24. Where the General Assembly "use[s] certain language in the one instance and wholly different language in the other, it will . . . be presumed that different results were intended." *Metro. Sec. Co. v. Warren State Bank* (1927), 117 Ohio St. 69, 76. If this review yields a clear meaning, the statute must be applied as written. *Medcorp*, 2009-Ohio-2058, at ¶ 9.

Where, as here, a statute says that a State agency's decision is "final" and does not provide for an administrative appeal, the decision may not be appealed under R.C. 119.12. See *Heartland Jockey Club*, 1999 Ohio App. Lexis 3530, at *3. The word "final" means "leaving no further chance for action, discussion, or change; deciding; conclusive." Webster's New World College Dictionary 506 (3d ed. 1997). Its inclusion in R.C. 3314.015(B)(3) sends a clear and unambiguous message: The Department has sole discretion to determine which entities meet the

baseline qualifications needed to apply to be community school sponsors, and no appeal may be taken from this threshold eligibility determination.

Courts interpreting analogous statutory provisions have similarly concluded that appeals are not available. For example, R.C. 3769.089(E)(3) specifies that "[t]he determination of the [Ohio State Racing Commission]" as to whether a permit holder may simulcast a special racing event "is final." As the Tenth District correctly has held, "the legislature intended to foreclose direct administrative appeals from decisions involving R.C. 3769.089 when the legislature included in the statute the sentence 'the determination of the commission is final.'" *Heartland Jockey Club*, 1999 Ohio App. Lexis 3530, at *3. Similarly, R.C. 3309.39(E) states that a determination by the School Employees Retirement System of whether a person qualifies for disability benefits "shall be final," and courts have held that "there is no right to appeal [the] determination." *Carney*, 39 Ohio App. 3d at 72. Likewise, R.C. 3307.501(E), which provides that any determination made by the State Teachers Retirement Board under that subsection "shall be final," does not provide a right to appeal. See *State ex rel. Shumway v. Ohio State Teachers Ret. Bd.* (10th Dist. 1996), 114 Ohio App. 3d 280, 286 (reviewing R.C. 3307.013, which was later amended and renumbered as R.C. 3307.501). None of these final agency determinations are subject to administrative appeal.

Because R.C. 3314.015(B)(3) contains language expressly designating the Department's initial eligibility determination as "final" and does not provide for administrative appeal of this determination, the trial court properly concluded that it lacked subject matter jurisdiction over Brookwood's appeal.

B. Initial eligibility determinations under R.C. 3314.015(B)(3) do not bear any hallmarks of adjudications that are appealable under R.C. 119.12.

The General Assembly's decision to make the Department's initial eligibility decision "final" and not appealable makes sense. R.C. 119.12 is specifically limited to administrative orders issued "pursuant to an adjudication." The Department's initial determination of whether an entity is "education-oriented"—and thus eligible to apply to be a community school sponsor—is not the product of an adjudication and, in fact, lacks any attribute of a quasi-judicial proceeding. In short, the Department's eligibility determination in this case cannot be reviewed through R.C. 119.12 because it was not the product of adjudication. As explained above, it was a final, non-appealable decision.

R.C. 119.12 only authorizes appeals of an "order of an agency issued *pursuant to an adjudication*." (Emphasis added). R.C. 119.01(D) in turn defines "[a]djudication" as "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person." The eligibility determination challenged here does not fit that definition because it was not made by "the highest or ultimate authority of" the Department. Instead, the eligibility determination was made by Joni Cunningham, Associate Director of the Department's Office of Community Schools. (See Brookwood's Apx. 11.) Cunningham is not the Department's "highest or ultimate authority." See R.C. 3301.13 (providing that "the superintendent of public instruction [is] the chief administrative officer of [the] department").

Further, the eligibility determination does not bear any other hallmarks of a quasi-judicial proceeding. "[B]efore an appeal can successfully be brought to the Court of Common Pleas of Franklin County under the provisions of R.C. Chapter 119, the proceedings of the administrative agency must have been quasi-judicial in nature." *State ex rel. Bd. of Educ. v. State Bd. of Educ.*

(1978), 53 Ohio St. 2d 173, 176. This Court has noted that "[p]roceedings of administrative officers and agencies are not quasi-judicial where there is no requirement for notice, hearing and the opportunity for introduction of evidence." *M. J. Kelley Co. v. City of Cleveland* (1972), 32 Ohio St. 2d 150, syl. ¶ 2. Ohio law did not require the Department to give Brookwood notice, conduct a hearing, or give Brookwood an opportunity to introduce evidence. The Department did not appoint a hearing officer or submit a report and recommendation to the State Board, and the State Board made no determination as to Brookwood's eligibility.

Eligibility determinations like this one are made by the Department's Office of Community Schools ("Office"). The Office conducts an internal review of each application and its supporting documentation to determine whether an entity is eligible to apply. This process does not require a formal hearing, no witnesses are called, no record is generated, and the State Board is not involved. Given all this, the Department's determination that Brookwood is ineligible to apply for sponsorship was not quasi-judicial.

Brookwood's invocation of R.C. 119.12 therefore fails as a matter of law.

C. R.C. 3314.015(D) applies only to the Department's ultimate decision to approve or deny a sponsorship application; it does not govern the Department's threshold determination of an entity's eligibility to apply for sponsorship.

Brookwood's arguments are predicated on its misunderstanding of the relationship between the separate provisions in R.C. 3314.015. As explained above, paragraph (B)(3) of this section governs the Department's initial eligibility determination, while paragraph (D) of the same section governs the Department's final decision to deny an eligible applicant for sponsorship. Brookwood improperly conflates these two provisions.

Brookwood mistakenly argues that paragraph (D) applies to appeals of *all* sponsorship-related determinations, and that paragraph (B)(3) merely "limits the scope of appellate review provided under subsection (D)." (Brookwood's Br. at 13 (emphasis omitted).) But, as explained

above, paragraph (D) only provides for an appeal of the Department's decision to deny an *eligible entity* for sponsorship of a community school. It does not provide for appeals of the Department's threshold determination that an entity is not education-oriented and, consequently, is ineligible to apply for sponsorship. See R.C. 3314.015(D) ("The decision . . . to disapprove an entity for sponsorship of a community school or to revoke approval for such sponsorship . . . may be appealed by the entity in accordance with section 119.12 of the Revised Code."); see also O.A.C. 3301-102-03 (concerning the approval and the disapproval, of eligible entities for sponsorship).

Brookwood also claims that the Tenth District misapplied R.C. 3314.015 by "improperly add[ing] words" to both paragraphs (B)(3) and (D). (Brookwood's Br. at 12-13.) To the contrary, the appeals court properly concluded from the plain language of R.C. 3314.015 that paragraph (B)(3), not paragraph (D), governs appeals of the Department's threshold eligibility determinations. See App. Op. at ¶ 9. Brookwood seems to assume that paragraph (B)(3) could not possibly foreclose an appeal unless it expressly states that the Department's eligibility decision may not be appealed. But such language is unnecessary. R.C. 3314.015 clearly indicates that certain Department decisions related to community school sponsorship are appealable, while others are not. Compare R.C. 3314.015(D) (allowing R.C. 119.12 appeals of a Department decision to disapprove an entity for sponsorship or to revoke a sponsor's approval) with R.C. 3314.015(B)(2) & (B)(3) (stating that the Department's threshold eligibility determination is "final"). The Department's decision about whether an entity is eligible to apply for sponsorship is distinct from an ultimate sponsorship decision. Unlike the sponsorship decision, the eligibility decision is exclusively within the Department's discretion and is not appealable under R.C. 3314.015. See *Pipoly*, 2002-Ohio-2219, at ¶ 13 (explaining that an

analogous administrative determination "is *solely within the province of* the [State Teachers Retirement Board]") (emphasis added).

Appellee Ohio Department of Education's Proposition of Law No. 3:

Brookwood's constitutional challenges are not properly before the Court and, even if they were, they fail on the merits.

Brookwood unsuccessfully argues that the Department's initial eligibility determination violates the Equal Protection Clauses of the United States and Ohio Constitutions, as well as Article I, section 7 of the Ohio Constitution. In fact, Brookwood attempts to frame this entire case as a forum for debating the relationship between church and state in the context of Ohio's community schools. See Brookwood's Jur. Mem. at 1 ("This case involves application of a facially neutral law . . . to deny a request by a church to be a sponsor of community (charter) schools in Ohio, solely on the ground that the request was made by a church."). Instead, as explained above, this case involves a narrow question of jurisdiction over administrative appeals. The appeals court did not resolve the merits of Brookwood's constitutional claims, and this Court should not here address them in the first instance. Even on the merits, however, Brookwood's constitutional arguments fail.

A. This Court should not resolve Brookwood's constitutional challenges in the first instance.

As an initial matter, the Court should decline to rule on the merits of Brookwood's constitutional challenges because the Tenth District did not resolve them below. "Courts should not decide constitutional issues if the case can be decided without reaching them." *Consolo v. City of Cleveland*, 103 Ohio St. 3d 362, 2004-Ohio-5389, ¶ 23 (internal quotations omitted). The Tenth District followed this rule when it affirmed the trial court's dismissal of Brookwood's appeal for lack of subject matter jurisdiction. Because the Tenth District dismissed Brookwood's appeal on jurisdictional grounds, its resolution of the case "render[ed] moot [Brookwood's]

remaining assignments of error," App. Op. at ¶ 11, including these constitutional challenges. See *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St. 3d 386, 2007-Ohio-3780, ¶ 48 ("[W]e decline to decide the issue because it is not necessary to the determination of this case.").

This Court typically declines to review issues for the first time on discretionary appeal. See, e.g., *State v. Brooks* (1989), 44 Ohio St. 3d 185, 193 ("We decline to decide this issue before the court of appeals has had an opportunity to address this issue in the first instance."). Thus, even if the Court accepts Brookwood's first two propositions of law and finds that the lower court erred by dismissing, it should remand the case to allow the Tenth District an opportunity to resolve the constitutional issues in the first instance. See *Allstate Ins. Co. v. Cleveland Elec. Illuminating Co.*, 119 Ohio St. 3d 301, 2008-Ohio-3917, ¶ 16 ("Because the court of appeals' erroneous disposition of the issue before us led it to hold that [appellant's] remaining assignments of error were moot, we remand to the court of appeals for consideration of those issues."). This is not the appropriate time to decide first Brookwood's constitutional challenges on the merits.

B. Even if the Court were to take up Brookwood's constitutional arguments, they are meritless.

Even if Brookwood's constitutional arguments were properly before the Court, none of them has traction. Brookwood is grasping at straws in its attempt to portray this as a case of great constitutional significance.

Brookwood first objects that the Department's initial eligibility determination was "arbitrary and contrary to law" because the Department has "never adopted any . . . criteria" for determining whether an entity is "education-oriented." (Brookwood's Br. at 16.) R.C. 3314.015(B)(3) requires the Department to promulgate rules articulating criteria for determining whether an entity is "education-oriented" under R.C. 3314.02(C)(1)(f)(iii). Because this

determination is inherently subjective, the Department did not articulate hard-and-fast criteria for assessing "educational-orient[ation]" when it promulgated a rule to define the term "eligible entity." O.A.C. 3301-102-02(H) defines "eligible entity" to include, among others, a qualified tax-exempt entity under section 501(c)(3) of the Internal Revenue Code if: (1) it has been in operation for at least five years prior to applying; (2) it has assets of at least $500,000 and a record of financial responsibility; (3) the Department determines that the entity is an "education-oriented entity"—that is, an entity whose mission or operations foster education; (4) the Department determines that the entity has successfully implemented educational programs; and (5) the entity is not a community school. The third criterion requires the Department to assess an entity's mission and operations to determine whether they foster education. O.A.C. 3301-102-02(H)(6)(c). Brookwood may desire a more specific rule, but its claim that the Department defied the General Assembly's command to adopt rules in this area is patently false and, even if it were true, would not amount to a constitutional violation.

Brookwood's suggestion that the Department's determinations of educational-orientation are standardless is belied by the Department's record. Far from arbitrarily concluding that entities are ineligible to apply for sponsorship because they are not education-oriented, the Department has approved seven section 501(c)(3) entities to sponsor community schools. By contrast, the Department has only determined that four entities other than Brookwood—only one of which was a church—were ineligible to apply because they were not education-oriented.[2]

Brookwood next attempts, without avail, to make much of the Department's passing observation that the Department has yet to approve a church as a sponsor under R.C. 3314.015. (Brookwood's Br. at 17.) The Department noted, as an aside, in its May 9, 2008, letter notifying

[2] A fifth (non-church) entity withdrew its sponsorship application before the Department determined its eligibility to apply.

Brookwood that it is not eligible to apply for sponsorship that "no church has been approved as a sponsor." (Brookwood's Apx. 11.) Brookwood is correct that Ohio law does not require an entity to "be exclusively organized for educational purposes to become a sponsor." (Brookwood's Br. at 17.) Brookwood is incorrect, however, that the Department's application of R.C. 3314.015(B)(3) and O.A.C. 3301-102-02(H)(6)(c) is "facially discriminatory against religious entities in Ohio." (*Id.*) According to Brookwood, the Department "has applied a religious test and determined that any 501(c)(3) entity organized primarily for religious purposes will not be eligible to apply to [the Department] to become a sponsor of community schools in Ohio, regardless of the scope or degree of that entity's orientation toward education." (*Id.*)

As explained above, Ohio law gives the Department sole discretion to make an initial determination about an entity's eligibility to apply for sponsorship. See R.C. 3314.015(B)(3); R.C. 3314.02(C)(1)(f)(iii); O.A.C. 3301-102-02(H)(6)(c). If the Department reviews the information submitted in support of an entity's sponsorship application and determines that the entity's orientation is something other than educational (or that an entity fails to meet any of the other four threshold criteria for eligibility), the entity is not eligible to apply. Here, the Department determined that Brookwood was ineligible to apply because it concluded that Brookwood was not education-oriented, *not* because the Department concluded that Brookwood was not *exclusively* education-oriented. In its letter stating that Brookwood is not "an entity eligible to apply for sponsorship," the Department concluded that the national Presbyterian Church is "clearly organized for religious purposes." (Brookwood's Apx. 11.) The Department nowhere stated that churches are categorically incapable of satisfying the education-oriented eligibility criterion.

The Department's reasonable conclusion that Brookwood is not an education-oriented entity is well supported by Brookwood's documentation accompanying its request to be considered as an eligible applicant for sponsorship. Among other supporting documentation, Brookwood submitted a letter from the Internal Revenue Service that identifies the national Presbyterian church and all of its subordinate churches (including Brookwood) as entities "organized and operated *exclusively* for religious purposes." IRS Letter, *supra* p. 4 (emphasis added). If Brookwood is organized and operated *exclusively* for religious purposes, then it, by definition, does not have an education-oriented purpose as required under R.C. 3314.015(B)(3). The conclusion is buttressed by the fact that the only evidence of educational endeavors submitted by Brookwood involved the *national* Presbyterian church, not Brookwood itself. The Department reviewed all the information submitted, and in fact reviewed additional information on Brookwood's request for reconsideration, and reasonably determined that Brookwood is not education-oriented.

Appellee Ohio Department of Education's Proposition of Law No. 4:

The Department is not required to certify an administrative record to a trial court when no administrative record exists and the trial court lacks jurisdiction under R.C. 119.12.

Like Brookwood's third proposition of law, Brookwood's argument that it is entitled to judgment because the Department did not timely certify an administrative record to the trial court is not properly before this Court. The appeals court affirmed the trial court's dismissal for lack of jurisdiction and expressly declined to address Brookwood's remaining assignments of error. App. Op. at ¶ 11 ("[W]e overrule appellant's first and second assignments of error, and we render moot appellant's remaining assignments of error."). Brookwood offers no reason why the Court should depart from its typical practice of "declin[ing] to decide [an] issue before the court

of appeals has had an opportunity to address [the] issue in the first instance." *Brooks*, 44 Ohio St. 3d at 193.

Even on the merits, Brookwood's claim fails. Brookwood's argument that it was entitled to judgment because the Department failed to certify a record underscores the differences between the eligibility determination at issue here and an ultimate sponsorship determination (which may be appealed under R.C. 119.12). Stated simply, the Department could not certify a record to the trial court because no record exists. And no record exists precisely because the Department's threshold eligibility determination under R.C. 3314.015(B)(3) is a "final" decision that falls entirely within the Department's province. This determination was neither the product of a quasi-judicial proceeding, nor was it made by the Department's "highest or ultimate authority." In fact, R.C. Chapter 119 does not require the Department to hold a public hearing on these matters. All this is consistent with the conclusion that initial eligibility determinations are not appealable under R.C. 119.12, for all the reasons explained above. The Department cannot be penalized for failing to certify a record that does not exist to a court that does not have jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should affirm the Tenth District's decision and affirm the dismissal of this action from the Court of Common Pleas for lack of jurisdiction.

Respectfully submitted,

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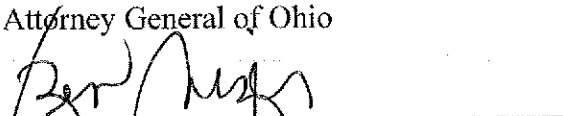

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellee Ohio Department of Education was served by regular U.S. mail this 14th day of April, 2010, upon the following counsel:

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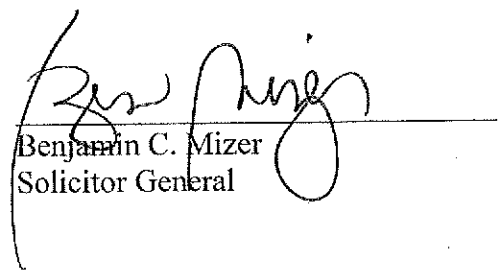

Benjamin C. Mizer
Solicitor General

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U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
WASHINGTON 25, D. C.

JAN 31 1964

T:R:EO:1
JGD

The United Presbyterian Church in the
United States of America
Office of the General Assembly
510 Witherspoon Building
Philadelphia 7, Pennsylvania

Gentlemen:

Your application for a group ruling, holding you and your subordinate units exempt from Federal income tax as organizations described in section 501(c)(3) of the Internal Revenue Code of 1954, has been considered.

Based on the information submitted, it is held that you and your synods, presbyteries and churches whose names appear on pages 542 through 620 inclusive, of the May 1963 edition of part III of the minutes of your general assembly are exempt from Federal income tax as organizations described in section 501(c)(3) of the Internal Revenue Code of 1954 as it is shown that you and your subordinate units are organized and operated exclusively for religious purposes.

You and your synods, presbyteries and churches are not required to file Federal income tax returns so long as a tax exempt status is maintained.

It will not be necessary for you and your synods, presbyteries and churches to file the annual return of information, Form 990-A, generally required of organizations exempt under section 501(c)(3) of the Code, as the specific exceptions contained in section 6033(a) of the Code are applicable.

Contributions made to you and your synods, presbyteries and churches are deductible by the donors as provided by section 170 of the Code. Bequests, legacies, devises, transfers, or gifts, to or for the use of you and your synods, presbyteries and churches are deductible for Federal estate and gift tax purposes as provided by sections 2055, 2106 and 2522 of the Code.

APPENDIX 1

The United Presbyterian
Church in the United
States of America

5. Duplicate copies of any amendments to the charters or bylaws of your organization or those of any of your subordinate units.

This ruling is not applicable to any of your subordinate units organized and operated in a foreign country.

The District Director in Philadelphia is being advised of this action.

Very truly yours,

Acting Chief, Exempt Organizations Branch