

**ORIGINAL**

In the  
**Supreme Court of Ohio**

STATE EX REL., NORTHERN OHIO	:	Case No. 2010-0943
CHAPTER OF ASSOCIATED BUILDERS &	:	
CONTRACTORS, INC., et al.,	:	On Appeal from the
	:	Summit County
Plaintiff-Appellants,	:	Court of Appeals,
	:	Ninth Appellate District
v.	:	
	:	Court of Appeals Case
BARBERTON CITY SCHOOLS BOARD OF	:	No. CV 2009 04 2636
EDUCATION, et al.,	:	
	:	
Defendant-Appellees.	:	

**MERIT BRIEF OF APPELLEE OHIO SCHOOL FACILITIES COMMISSION**

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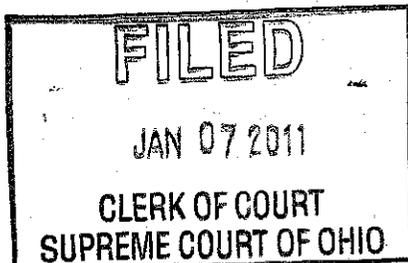
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## INTRODUCTION

The Court accepted this case to determine whether taxpayers, by virtue of paying property taxes that partially fund school construction projects, have common law standing to challenge the terms of a construction contract. Taxpayers Dan Villers and Jason Antill, together with a disappointed bidder and a trade association, tried to enjoin the Barberton School Board from executing a contract with the winning bidder that, among other things, required the contractor to pay its workers the prevailing wage. As all the courts below have recognized, this is nothing but a policy spat, and the plaintiffs' attempt to impose their own preferences on school construction contracts could not get out of the gate. The lower courts dismissed all parties, Taxpayers and Bidders alike, for lack of standing. Articulating the longstanding requirement that taxpayers show a particularized injury to establish standing, the courts concluded that the Taxpayers had not "allege[d] and prove[n] damage to themselves that is different in character from that sustained by the public generally." *State ex rel. N. Ohio Chapter of Assoc. Builders & Contractors, Inc. v. Barberton City School Bd. of Education* (9th Dist.) ("App. Op."), 2010-Ohio-1826 ¶ 21 (quoting *State ex rel. Masterson v. Ohio State Racing Comm'n* (1955), 162 Ohio St. 366 at syll.); see also *State ex rel. N. Ohio Chapter of Assoc. Builders & Contractors, Inc. v. Barberton City School Bd. of Education* (July 31, 2009) ("Trial Op."), Case No. CV 2009 04 2636, 6.

The lower courts were correct, as the Taxpayers' attempt to establish standing through their status as payers of Barberton property tax fails. The Taxpayers have not shown that the allegedly improper contract term injured them in a manner different from any other Barberton taxpayer. Nor can they identify a particularized injury by showing that their property taxes were payments to a "special fund" and misspent. See *Racing Guild of Ohio, Local 304, Service Employees Intern. Union, AFL-CIO, CLC v. Ohio State Racing Comm'n* (1986), 28 Ohio St. 3d

317 (contributions to a “special fund” may establish a special interest sufficient to confer standing). This Court has recognized “special-fund standing” only where the plaintiff can show a direct link between the money he contributed and the allegedly unlawful actions. See, e.g., *State ex rel. Dann v. Taft*, 2006-Ohio-3677 ¶¶ 9, 10. When, as here, the allegedly improper expenditures are from an aggregated fund, the majority of which is general *state* money, the Taxpayers cannot show that *their* taxes went toward the expenses to which they object. See *id.* As such, they lack the particularized injury necessary to establish common-law taxpayer standing.

But ultimately, the plaintiffs have even bigger problems than the merits of their taxpayer standing claim. The Taxpayers *concede* that the lower courts reached and rejected their claim *on the merits*, in addition to finding that they lacked standing. Apt. Br. 6 (“On July 31, 2009, the trial court . . . held that Appellants claims lacked any merit.”); Apt. Br. 7 (“[T]he Ninth District also addressed the merits of the case by holding [that Appellants] ‘failed to identify any basis upon which the provision exempting schools from use of the prevailing wages somehow constitutes a prohibition of the same.’”). And because this Court declined jurisdiction over the merits of the case, any prior merits rulings will remain intact regardless of how this Court resolves the standing issue. In other words, even if the Taxpayers could prevail on standing here, there would be nothing to adjudicate on remand—the Taxpayers admit they have already lost on the merits, and the merits are not before this Court. What is more, the Taxpayers failed to obtain a stay of the lower court rulings, and thus the project they seek to enjoin through this lawsuit has long been completed. These defects leave in the Court’s hands a lifeless claim for which there is no judicial redress. The dispute over standing at this point is just a theoretical one, and therefore, the Court should dismiss the case as improvidently granted.

## STATEMENT OF THE CASE AND FACTS

**A. The Ohio School Facilities Commission financially assists school districts with school facilities projects, while local boards of education maintain discretion over project specifications.**

The General Assembly created the Ohio School Facilities Commission to financially assist school districts with school construction projects. R.C. 3318.30(A). The Commission selects school districts to receive state funding for construction or acquisition projects based on need. R.C. 3318.011; 3318.032. The school districts tapped for state funding also contribute their own funds toward approved projects. R.C. 3318.032. The proportion of state to local funding varies depending on the individual school district's financial need. R.C. 3318.03, R.C. 3318.032.

Once a school facilities project is approved, the local school board secures a contractor for the project through competitive bidding. R.C. 3318.10. To encourage local control over the projects, the Commission passed a resolution in July 2007 recognizing the significant discretion that local boards of education have over the specifications for their construction projects. See Apt. Supp. 274-277 (Ex. C). Each district, the resolution affirms, has "authority . . . to establish responsible bidder criteria." Apt. Supp. 274. Attached to the resolution, the Commission supplied "Model Responsible Bidder Workforce Standards" that districts may—but are not required to—use in their bid advertisements. Apt. Supp. 276. Among those model standards is one stating that the Bidder will pay its workers the prevailing wage. Apt. Supp. 277. As with all of the Commission's model standards, the prevailing wage specification is optional—a school district may choose whether or not to require payment of the prevailing wage.

**B. Barberton and the Commission funded the construction of a new middle school.**

The Barberton City School Board received approval from the Commission to construct a new middle school with a combination of state and local funds. See Am. Comp. ¶¶ 1, 16, 18-19. To raise money for the city's share of the funding, Barberton taxpayers passed a 5.2 mill bond

levy in March 2008. Am. Comp. ¶ 18. Money generated from the levy supplied approximately 40% of the school's construction costs. Am. Comp. ¶ 18. The remaining 60% of the funding came from the Commission's dedication of state funds to the project. Am. Comp. ¶ 19.

After securing the necessary funding, the Board advertised for bids for a contract to perform the early site work on the school construction project. Am. Comp. ¶ 15. Among other bid specifications, the advertisement required that bidders on the early site work contract pay their workers the prevailing wage. Am. Comp. ¶ 20.

The bidders for the early site work contract, including Fechko Excavating, Inc. and Mr. Excavator, submitted sealed bids "using wage rates supplied by the board in its bid specifications, which the contractors believed to be the applicable prevailing wage rates." Am. Comp. ¶ 21. After opening the sealed bids, the Board concluded that Mr. Excavator was the lowest responsive and responsible bidder. Am. Comp. ¶¶ 22-23. The Board and Mr. Excavator executed a contract, which the Commission approved. Am. Comp. ¶ 26.

**C. The disappointed bidder, along with two Barberton taxpayers, sued for injunctive and declaratory relief.**

After the Board awarded the early site work contract to Mr. Excavator, Fechko, the Northern Ohio Associated Builders and Contractors (a trade association to which Fechko belonged), and Barberton residents Dan Villers and Jason Antill filed suit. As amended, the complaint named as defendants the Board, the Commission and Mr. Excavator. It requested that the court enjoin the Board and the Commission "from awarding or executing any contracts . . . that contain a clause requiring compliance" with prevailing wage law and "from commencing any site work . . . with contract(s) already awarded which contain a [prevailing wage] requirement." Am. Comp. 15. In addition, the plaintiffs sought declaratory judgments that the Board "abused its discretion" by including a prevailing wage requirement in the early site work

contract, that school facilities contracts incorporating prevailing wage requirements are unlawful, and that the Commission's model standards are "void, unenforceable and contrary to Ohio law." Am. Comp. 15-16. The plaintiffs reasoned that because R.C. 4115 does not require school facilities projects to comply with the prevailing wage laws, the school district lacks discretion to contractually require its contractors to pay prevailing wages.

The trial court dismissed the complaint, concluding that all of the plaintiffs lacked standing and had failed to state a claim. The Ninth District affirmed. On the issue of taxpayer standing, the Ninth District reasoned that the Taxpayers had not alleged damages any different from those that would have been sustained by any other taxpayer in Barberton who might be burdened by the 2008 levy, and therefore could not meet the particularized-injury requirement for taxpayer standing set out by this Court in *State ex rel. Masterson v. Ohio State Racing Comm'n* (1954), 162 Ohio St. 366 and *Racing Guild of Ohio, Local 304, Service Employees Intern. Union, AFL-CIO, CLC v. Ohio State Racing Comm'n* (1986), 28 Ohio St. 3d 317.

The Bidders and the Taxpayers asked this Court for discretionary review, presenting propositions of law on taxpayer standing, disappointed-bidder standing, as well as on the merits of their claim that the school district lacked authority to require the payment of prevailing wages in its contracts. This Court accepted review of only the first proposition of law—whether the taxpayers had standing to litigate their claim.

## ARGUMENT

### **Ohio School Facilities Commission Proposition of Law I:**

*A case presenting a question about standing should be dismissed as improvidently granted where the underlying claim has already been determined on the merits and the merits are not before the Court.*

The Taxpayers ask the Court to chart the boundaries of common-law taxpayer standing, a potentially significant legal issue. Ordinarily, the weightiness of an issue would underscore the

appropriateness of this Court's review. Not so here. This case arrived at the Court marred by procedural problems that now preclude this Court (or any court) from granting relief, even if it were to determine that the Taxpayers had standing. Because a decision on taxpayer standing would amount to nothing more than an advisory opinion, this Court should dismiss the case as improvidently granted.

"[I]t is the duty of [the Court]" both "to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect," and to abstain from cases that do not fit that bill. *Kincaid v. Erie Ins. Co.*, 2010-Ohio-6036 ¶ 10 (internal citation and quotation omitted). This case no longer presents any actual controversy and should be dismissed.

First and foremost, the Taxpayers *concede* that the lower courts reached and rejected the merits of their claim regarding the prevailing wage term in the early site work contract. The Taxpayers state that the trial court's order dismissing the case "held that their claims lacked any merit," in addition to finding that all the plaintiffs lacked standing. Apt. Br. 6 ("On July 31, 2009, the trial court . . . held that Appellants claims lacked any merit."); see Trial Op. 11 ("[E]ven if the [Plaintiffs'] standing argument were accepted, none of the Plaintiffs have demonstrated that under any existing law that they have any right to relief."). The Taxpayers likewise concede that the Ninth District not only rejected their standing argument, but "also addressed the merits of the case by holding that 'having failed to identify any basis upon which the provision exempting schools from use of the prevailing wages somehow constitutes a prohibition of the same, Bidders and Taxpayers are unable to make 'at least a prima facie showing that they can marshal support for the new matters sought to be pleaded.'" Apt. Br. 7 (citing App. Op. ¶ 31).

Having conceded that the lower courts issued on-the-merits holdings, the Taxpayers have effectively ushered themselves out of this Court. This Court denied review of the merits of the case, leaving any prior merits-based rulings intact regardless of how the Court might decide the issue of standing. Simply stated, because the lower courts have already reached the merits and rejected them, there is nothing further to adjudicate in the event this Court reverses on the standing issue and remands.<sup>1</sup>

Second, owing in part to their own procedural missteps, the Taxpayers failed to obtain a stay of the trial court's ruling. As a result, the primary subject of their complaint—the early site work contract—has long been completed (and the workers of course have been paid) and no longer presents a live controversy. After the Taxpayers lost at trial court, they asked the Ninth District to stay the trial court's decision. But because they did so without first asking the trial court to stay its own ruling—a prerequisite to obtaining relief under Appellate Rule 7(A)—the Ninth District refused to do so. Their efforts to obtain a stay from this Court were similarly ineffective. And as a result of the Taxpayers' failure to properly seek or obtain a stay, work on the early site work contract both commenced and concluded. See Exh. A., Aff. of Gavin Smith, attached as Exh. A to the Joint Response of Defendants/Appellees Ohio School Facilities Commission and Barberton City Schools Board of Education to Plaintiffs/Appellants' Request for Injunctive Relief Pending Appeal filed in *State ex rel. N. Ohio Chapter of Assoc. Builders & Contractors, Inc. v. Barberton City School. Bd. of Education*, (9th Dist.), Case No. CV 2009 04

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<sup>1</sup> The Commission argued in its Opposition to Jurisdiction that the Court should not accept the Taxpayers' invitation to review the merits of their claim because the lower courts had dismissed the case on the threshold issue of standing. See, e.g., Comm. Opp. Jur. 10-11. Now that the Court has agreed to hear the issue of standing without taking up the merits of the case, the Court should give full effect to the Taxpayers' concession and the lower courts' relevant pronouncements on the merits.

2636. At this stage, the Taxpayers' complaint for an injunction is effectively asking the courts to stop a contract whose work is already completed. That bell cannot be unrung.

Nor can the Taxpayers revivify their complaint by shifting their focus to the complaint's broader and more attenuated request that the Court enjoin the Board and Commission "from awarding or executing *any* contracts for *any* project" that contain prevailing wage specifications and "declare *all* contracts with such terms 'unlawful and void.'" Am. Comp. 15 (emphasis added). At the motion to dismiss stage, standing must be evaluated on whether the facts in the complaint, taken as true, allege an injury that is "not so remote . . . as to preclude recovery . . . as a matter of law." *City of Cincinnati v. Beretta U.S.A. Corp.*, 2002-Ohio-2480 ¶ 41. Absent allegations of other impending contracts containing the allegedly impermissible wage specification—and plaintiffs' complaint contained *none*—any future injury the Taxpayers may suffer is too remote to give their standing argument a foothold.

In sum, two fatal defects indicate that this case was accepted improvidently and should now be dismissed: (1) the Taxpayers concede that the lower courts already issued rulings on the merits, which will not be disturbed by the Court's resolution of the standing issue; (2) and the early site work contract (the subject of the complaint for declaratory and injunctive relief) has been completed, which renders the courts unable to grant relief on the focus of the Taxpayers' complaint. These defects leave the Court with nothing but a lifeless case and an invitation to write an advisory opinion on the issue of taxpayer standing. The case should be dismissed as improvidently granted.

## **Ohio School Facilities Commission Proposition of Law II:**

*Paying into a bond levy that partially funds a school district's construction project does not confer common-law taxpayer standing on taxpayers in the school district.*

Should the Court decide to confront the standing issue, its precedents amply demonstrate that the Taxpayers have not made the showing required to establish common-law taxpayer standing. Because the Taxpayers have not demonstrated that the school board's decision to implement a prevailing wage requirement damages them in a manner that is "different in character from that sustained by the public generally," they do not have standing to pursue their claim. See *Masterson*, 162 Ohio St. at 368.

### **A. The Taxpayers have not alleged an injury different from that of any other taxpayer in the Barberton City School District.**

The touchstone of the standing doctrine, taxpayer or otherwise, is the requirement that plaintiffs "show that [they] ha[ve] suffered or [are] threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 469-70. On the premise that the political branches, not the courts, are where generalized grievances should air, requiring that a plaintiff show an individual, particularized injury ensures that his grievance is something in which he has a "personal stake," "not merely a claim of the right, possessed by every citizen, to require that the Government be administered according to law." *Baker v. Carr* (1962), 369 U.S. 186, 204, 208.

The particularized injury requirement plays a significant role in determining common-law taxpayer standing. See *Masterson*, 162 Ohio St. at 368. "[T]he payment of taxes is generally not enough to establish standing to challenge an action by the . . . Government." *Hein v. Freedom from Religion Found. Inc.* (2007), 551 U.S. 587, 593 (interpreting federal standing doctrine); see also *State ex rel. Dann v. Taft*, 2006-Ohio-3677. This is not a matter of formality, but of

necessity. See *Hein*, 551 U.S. at 593. “[I]f every . . . taxpayer could sue to challenge any Government expenditure, . . . courts would cease to function as courts of law and would be cast in the role of general complaint bureaus.” *Id.* Limiting the reach of taxpayer standing doctrines ensures that government “policymakers . . . retain broad discretion to make ‘policy decisions’ concerning state spending . . . depending on their perceptions of wise state fiscal policy and myriad other circumstances.” *DaimlerChrysler Corp. v. Cuno* (2006), 547 U.S. 332, 346 (interpreting federal standing doctrine) (citation and quotations omitted).

This Court has several ground rules that govern how taxpayers can show a particularized injury and thereby establish common-law standing. See *Masterson*, 162 Ohio St. at 368. *Masterson* says that a taxpayer, “[i]n the absence of statutory authority,” “lacks legal capacity to institute an action to enjoin the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy.” *Id.* at syll. A “special interest” is defined as “damage to [the plaintiff] different in character from that sustained by the public generally.” *Id.* at 368. One way for a taxpayer to set himself apart from the general public is by demonstrating that he made payments to a “special fund” that was then misspent. See *Racing Guild*, 28 Ohio St. 3d at 322; *State ex rel. Dann v. Taft*, 2006-Ohio-3677 ¶ 10.

The Taxpayers here have not made the requisite showings. Their complaint asserts three facts related to their claim to common-law taxpayer standing: (1) they “are taxpayers of the City of Barberton and Summit County, Ohio,” who both own homes and reside in Barberton, Am. Comp. ¶ 5; (2) the construction project “is being funded in part by taxpayer funds as a 5.2 mill levy that was passed by Barberton taxpayers in March of 2008 to fund at least 40% of the construction costs, Am. Comp. ¶18; and (3) “60% of the construction costs . . . are being funded

by taxpayer monies received from the Ohio School Facilities Commission,” Am. Comp. ¶ 19. None of these facts establish a special interest sufficient to confer common-law taxpayer standing.

As an initial matter, the allegation that 60% of the construction costs are being funded by general state taxpayer monies—of which the Taxpayers’ state tax dollars are purportedly a part—does not establish a special interest. The state taxes they pay, which might later be funneled to the Commission, are precisely the kind of “general fund” contributions that cannot establish taxpayer standing. “Ohio law does not authorize” taxpayer standing “based on the citizen’s status as a taxpayer of general taxes.” See *State ex rel. Dann v. Taft*, 2006-Ohio-3677 ¶ 9. To the extent that general fund money was funneled to the Barberton construction project, the Taxpayers’ minimal interest in that money is no different than that of any other Ohio taxpayer.

The Taxpayers gain no additional ground by suggesting that their status as *Barberton* taxpayers triggers the necessary special interest. They pay local property taxes, to be sure, but that makes them no different from—and gives them no greater interest than—any property owner in the Barberton School District. The plaintiffs’ complaint admits as much, alleging as the Taxpayers’ only injury increased costs “which will result in economic harm to the *Barberton taxpayers as a whole*.” Am. Comp. ¶ 44 (emphasis added). The source of their alleged injury—that the Board and the Commission impermissibly used tax monies aggregated from taxpayers all around the district and the state—is an undifferentiated interest that falls outside the bounds of common-law taxpayer standing.

The Taxpayers anticipated these obvious defects, but they have responded only by *raising* the level of generality. They may be no differently situated than any other Barberton property

owner, Taxpayers say, but they “differ[] from other taxpayers generally in the State of Ohio” because they pay Barberton property taxes. Apt. Br. 10. Yet this court has never held that the yardstick for measuring particularized injury is a comparison of the plaintiffs’ status to Ohio taxpayers as a whole. Were that the case—and if all taxpayers had to do to show a particularized injury was point to some larger group that pays different taxes—then any person that pays property tax in any of Ohio’s 613 school districts could challenge any term of any contract that their school district enters. That is neither a proper nor workable standard for taxpayer standing.

**B. The Taxpayers have not established standing by showing they contributed to a “special fund.”**

Nor can the Taxpayers establish standing by recharacterizing their property taxes as payments to a “special fund.” While this Court has found some circumstances in which payments to a “special fund” may confer standing to seek relief, the Taxpayers have not shown that the property tax collected as part of a school levy is a “special fund,” or that, even if it is, contributing to it gives them standing.

First, the Taxpayers insist that the property taxes assessed as a result of a school levy are a “special fund.” Apt. Br. 13. The fund is “special,” they reason, because it is earmarked for a particular purpose—to finance the construction of the school. Apt. Br. 13. But tax monies collected for a certain expense do not necessarily create a special fund that can serve as a foundation for taxpayer standing. One of the cases on which the Taxpayers rely suggests as much. See *Dann*, 2006-Ohio-3677 ¶¶ 7, 9. In *Dann*, the Court rejected the argument that a taxpayer could have standing based on the fact that he “paid gasoline taxes used to finance the operations of the Ohio Department of Transportation and the State Highway Patrol.” *Dann*, 2006-Ohio-3677, ¶¶ 7, 9. As here, the tax in *Dann* was collected for a particular purpose. And as here, the taxpayers’ payments did not automatically confer special-fund standing.

Second, even if the Court accepts the Taxpayers' argument that their property taxes were paid into a "special fund," this case does not fit the narrow circumstances in which this Court has permitted "special-fund standing." See *Racing Guild*, 28 Ohio St. 3d at 322; *Dann*, 2006-Ohio-3677 ¶¶ 7-10. In *Racing Guild*, the Court concluded that racetrack clerks have "status as contributors to a special fund" collected by the Racing Commission and therefore have standing to challenge the Commission's alleged failure to collect license fees "from all persons participating in the racing industry." *Racing Guild*, 28 Ohio St. 3d at 322. And in *Dann*, the Court concluded that an employer's payments into the Workers' Compensation Fund gave him an "arguable 'special interest'" in the Fund's management. *Dann*, 2006-Ohio-3677 ¶ 10.

Critically, in both *Racing Guild* and *Dann*, the special-fund contributors could show a direct link between their payments and the alleged injury. *Racing Guild* found that the Commission's alleged failure to collect licensing fees for its fund could result in increased licensing fees for the plaintiffs. 28 Ohio St. 3d at 322. And *Dann* further underscored the importance of a direct link. There, the employer's contributions gave him a special interest in "seeking communications relating to the [Bureau of Workers' Compensation]," but they could not provide him "standing to initiate a taxpayer action based on his speculations of misconduct on the part of departments and agencies other than the [Bureau]." 2006-Ohio-3677 ¶ 10. The takeaway from this is that special-fund standing can extend only as far as a connection between the plaintiff's contributions and the alleged injury can be traced.

The direct connection present in *Racing Guild* and *Dann* is absent here. The majority of the construction project was paid for by state money in which the Taxpayers have no particularized interest. Money from the local levy paid for the rest, but in light of the significant state contributions, there is no way to conclude that even a dollar of the taxpayers' property tax

went to the allegedly improper prevailing wage payments. Without being able to draw a direct line from the taxpayers' wallet to the alleged improper expenditure, Taxpayers cannot show that they suffered an injury for which they have standing to sue.

**C. The Taxpayers' remaining counterarguments are unpersuasive.**

The Taxpayers try to muster additional support for their arguments by insisting that “the Seventh District has already recognized that a common law taxpayer has a ‘special interest’ sufficient to enjoin the construction of a school project being jointly constructed by a school board and the [Commission].” Apt. Br. 12, see *East Liverpool City Sch. Dist. ex rel. Bonnell v. Bd. of Education* (7th Dist.), 2006-Ohio-3482. But *Bonnell* did not examine the issue of standing. In *Bonnell*, a taxpayer attempted to enjoin the execution of the school district’s construction project. 2006-Ohio-3482 ¶ 2. The parties stipulated to dismissal of the complaint at an early stage in the proceedings, *id.* at ¶ 9, and the trial court denied the taxpayer’s subsequent request for attorney’s fees, ¶ 12. The Seventh District, ruling only on the issue of attorneys’ fees, held that the taxpayer “was not entitled to attorney fees under a common law taxpayer action.” *Id.* ¶ 50. The court’s passing comment that the taxpayer’s “complaint state[d] that he is a . . . taxpayer,” which “creates his special interest . . . required to sustain a common law taxpayer cause of action,” *id.* ¶ 21, does not amount to a holding on standing. The issue of standing was neither challenged nor scrutinized, and accordingly the Seventh District’s “drive-by jurisdictional ruling[] . . . [has] no precedential effect.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91; see also *Lewis v. Casey* (1996), 518 U.S. 343, 353 n.2 (“[S]tanding was neither challenged nor discussed in that case, and we have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect.”).

The Taxpayers fare no better in proposing that this Court adopt a sweeping rule that “damages to taxpayers” are “presumed” when the taxpayers challenge “the expenditure of funds

for an unlawful or unconstitutional purpose.” Apt. Br. 17 (quoting *State ex rel. Connors v. Ohio Dept. of Transportation* (10th Dist. 1982), 8 Ohio App. 3d 44, 47-48). Their proposed rule irreconcilably conflicts with the particularized-injury requirement this Court set out in *Masterson*. *Masterson* makes clear that general allegations of unlawful public expenditures are not sufficient to establish common-law taxpayer standing. *Masterson*, 162 Ohio St. at 368. Yet under the plaintiffs’ presumption-of-damages theory, any taxpayer could acquire standing simply by alleging that public monies had been spent improperly. This Court has never doled out taxpayer standing so permissively.

Notably, the Tenth District case from which the Taxpayers derive their theory is an outlier among other appellate court opinions on common-law taxpayer standing. *Connors* has not been cited by any other Ohio court for the proposition that courts should presume damages whenever taxpayers allege unlawful public expenditures. And the Tenth District itself has minimized, if not completely superseded, the *Connors* analysis. Faced with a taxpayer action just last year that claimed that the state’s school funding system was unconstitutional, the Tenth District held that taxpayers could not establish standing when “they could show no personal harm or damage that would result as separate from any harm suffered by the general taxpaying public.” *Brown v. Columbus City Sch. Bd. of Education*, 2009-Ohio-3230 ¶ 13. Because the *Connors* presumption is inconsistent with *Masterson* and unrecognized by any other Ohio court, the Court should reject the Taxpayers’ presumption-of-damages theory.

**D. The taxpayer standing issue masks what is at bottom a meritless claim.**

The lack of merit to the Taxpayers’ underlying claim does not weigh in the analysis of the standing issue before this Court. But even a brief overview of the Taxpayers’ claim proves it to be baseless and suggests that dismissing the case either for lack of standing or as improvidently granted should not give the Court pause.

The Taxpayers offer three points to support their argument that a school board cannot require that its contractors pay prevailing wages. They allege that (1) R.C. 4115.04(B)(3) does not mandate that school boards follow prevailing wage law; (2) no statutory provision grants school boards explicit authority to require payment of prevailing wages; and (3) school boards cannot require payment of prevailing wages without shirking their statutory obligation to contract with the lowest responsible bidder.

This three-part argument has at least as many flaws. First, there is no textual support for the Taxpayers' argument that R.C. 4115.04(B)'s exemption relieving school boards of the obligation to comply with prevailing wage law somehow *prohibits* them from voluntarily doing so. The statute says that prevailing wage provisions of the Code "do not apply to . . . [p]ublic improvements undertaken by, or under contract for, the board of education of any school district or the governing board of any educational service center." R.C. 4115.04(B). All that means is that school districts are not *statutorily required* to comply with prevailing wage requirements. It in no way speaks to the possibility that school boards might, in their discretion, include a prevailing wage requirement as a *contract* term. See *Enertech Elec. Inc. v. Ashtabula Area City Sch. District Bd. of Education* (11th Dist.), 2010-Ohio-2815 ¶¶ 57-58.

Second, there is little import to the fact that R.C. 4115 does not explicitly grant school boards discretion to choose whether to enact prevailing wage requirements for a given project. The Taxpayers point out that the statute includes specific language authorizing other entities—namely, county and municipal hospitals—to elect to pay prevailing wage. See R.C. 4115.04(B)(4). From this, they infer that the General Assembly's silence as to whether school boards have similar discretion should be read as a prohibition. That reads far too much into legislative silence. If the General Assembly had wanted to prohibit school boards from including

prevailing wage requirements in construction contracts, it could have done so specifically. *Enertech*, 2010-Ohio-2815 ¶ 58.

Third, requiring payment of prevailing wages does not interfere with the school board's obligation to accept the "lowest responsible bid." R.C. 3313.46(A)(6). Drawing on a report from the Legislative Service Commission, the Taxpayers posit that because not paying prevailing wage will result in savings on school construction costs, school boards cannot implement prevailing wage requirements without running afoul of their duty to accept the lowest responsible bid. But the "lowest responsible bid" requirement does not, as the Taxpayers suggest, require school boards to solicit only the lowest cost construction. (For instance, nothing requires school districts to install low-cost asphalt shingle roofs everywhere, rather than more costly standing seam metal roofs.) Rather, it requires only that the school board award contracts to the lowest responsible bidder *for whatever bid specifications the school district chose*. See, e.g., *L&M Properties, Inc. v. Burke* (1949), 152 Ohio St. 28 (city may accept bid for concrete runway even though asphalt bids were lower). Were the rule otherwise, the "lowest responsible bidder" requirement would entirely eliminate a school board's discretion to determine the labor and material parameters for its bid specifications.

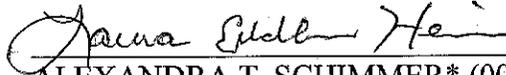
In short, none of the arguments the Taxpayers have offered to support the merits of their claim comes close to demonstrating that school boards lack discretion to enter contracts that require payment of the prevailing wage. It follows that this Court should not hesitate to dismiss this case either for lack of standing or as improvidently granted for all the reasons discussed above.

## CONCLUSION

For these reasons, the Court should dismiss the appeal as improvidently granted, or alternatively, affirm the judgment of the Ninth District on the question of taxpayer standing.

Respectfully submitted,

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Ohio School Facilities Commission

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellee Ohio School Facilities

Commission was served by U.S. mail this 7th day of January, 2011 upon the following counsel:

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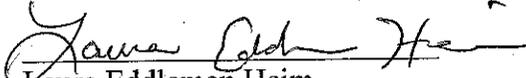
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# **APPENDIX**

**AFFIDAVIT OF GAVIN J. SMITH**

STATE OF OHIO :  
: ss.  
COUNTY OF SUMMIT :

I, Gavin J. Smith, first being sworn, deposes and states that:

1. The following statements are made based on my personal knowledge.
2. I am employed by RICHARD L. BOWEN + ASSOCIATES INC.
3. RICHARD J. BOWEN + ASSOCIATES INC. is the construction manager for the Ohio School Facilities Commission and Barberton City Schools Board of Education (the "School District") for the New Barberton Middle School construction project (the "Project").
4. I am currently the Project Manger for the Project.
5. On behalf of the construction manager, I have been involved with the bidding and award of construction contracts for the Project.
6. The bid opening scheduled for August 11, 2009 is for approximately \$22 million dollars of construction in the next phase of this part of Barberton's school construction program.
7. The estimate for the early site work was approximately \$2.6 million and was performed for approximately \$1.184 million, including change orders.
8. Work on the early site work is now complete and Mr. Excavator, the winning bidder for that work, is off the project.
9. The Notice to Bidders for the remaining work contained contract estimates for approximately \$22 million. This does not include soft costs, the technology package or furniture, fixtures and equipment

**EXHIBIT A**

10. These bids were planned to follow sequentially to the completion of the early site work package that is the only true subject of this litigation.
11. Because Mr. Excavator has completed its work on the site, responsibility for the site needs to be handed off to a new contractor to manage storm water runoff. Failing to do so will allow for deteriorating site conditions.
12. In preparation for continuing the Project, part of the site was compacted and a delay means that compaction may be lost.
13. The building pad and parking lot will begin to deteriorate if there is a delay.
14. This early site work cost approximately \$1.184 million (including change orders) and the length of delay would affect how much of that work would have to be redone.
15. The current bid schedule allows for work to begin before the start of inclement weather. Any delay in the front end of the project is compounded by the additional costs of having to do early construction work in winter work conditions.
16. If there is a delay at the front end of the project, then to maintain the project schedule to have school buildings opened at the appropriate time of the school year would likely require acceleration of contracts and the payment of additional costs.
17. The form contract for this project will be used on the contracts that are scheduled to be opened August 11, 2009. Section 3.3 of that form contract provides for liquidated damages to be paid on a daily basis in an amount based on the size of the contract. The table from Section 3.3 of the form contract is as follows:

<u>Contract Amount</u>	<u>Dollars Per Day</u>
\$1 to \$50,000	\$150
More than \$50,000 to \$150,000	\$250
More than \$150,000 to \$500,000	\$500
More than \$500,000 to \$2,000,000	\$1,000
More than \$2,000,000 to \$5,000,000	\$2,000
More than \$5,000,000 to \$10,000,000	\$2,500
More than \$10,000,000	\$3,000

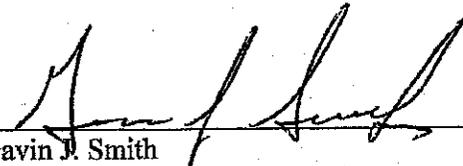
18. The Notice to Bidders identifies the bid packages and contains an estimate of the size of the contract. It contains the following information:

<u>Scaled bids will be received for:</u>	<u>Contract Cost Estimated*</u>
Bid Package 2 – General Trades	\$ 13,362,851
Bid Package 3 – Fire Protection	\$ 402,328
Bid Package 4 – Plumbing	\$ 1,219,142
Bid Package 5 – HVAC	\$ 3,304,316
Bid Package 6 – Electrical	\$ 2,930,868
Bid Package 7 – Instrumentation and Controls	\$ 450,000
TOTAL:	\$ 21,669,505

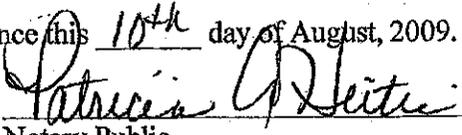
19. Applying the liquidated damages amount for the estimated contracts means that , each day of delay costs approximately \$9,000.00.

20. If the Project is pushed back, then the next project, a renovation and addition to the existing middle school will get delayed because it is being occupied by the students for this new middle school.

FURTHER, AFFIANT SAYETH NAUGHT.

  
 \_\_\_\_\_  
 Gavin J. Smith

Sworn to and subscribed in my presence this 10<sup>th</sup> day of August, 2009.

  
 \_\_\_\_\_  
 Notary Public

Expiration:

PATRICIA A. HEITIC  
 RESIDENT SUMMIT COUNTY  
 NOTARY PUBLIC, STATE OF OHIO  
 MY COMMISSION EXPIRES 3-2-2013