

ORIGINAL

IN THE SUPREME COURT OF OHIO

PROGRESSOHIO.ORG, INC., ET AL.
Appellants

On Appeal from the
Franklin County Court of
Appeals, Tenth Appellate
District
Court of Appeals
Case Number 11AP 1136

v.

JOBSOHIO, ET AL.

Appellees

12-1272

MEMORANDUM IN SUPPORT OF JURISDICTION FOR APPEAL AS OF
RIGHT AND DISCRETIONARY APPEAL OF PROGRESS OHIO, SENATOR
MICHAEL SKINDELL AND REPRESENTATIVE DENNIS MURRAY, JR.

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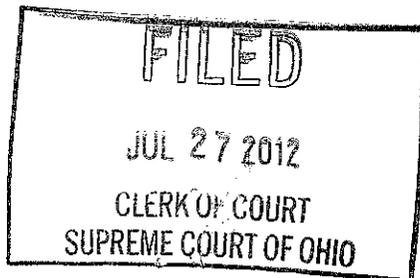


TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS A MATTER OF GREAT PUBLIC INTEREST AND INVOLVES AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	4
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	5
Proposition of Law 1: R.C. 187.09 is a statute of repose which attempts to prevent this court from determining the constitutionality of R.C. 187 in violation of the principles of separation of powers.	5
Proposition of Law 2: R.C. 187.09 is a statute of repose preventing any constitutional challenges to the JobsOhio legislation, R.C. 187 et seq after 90 days of the effective date of the legislation in violation of the open courts provision in Article 1.16 of the Ohio Constitution.	6
Proposition of Law 3: Plaintiffs have standing to bring this action.	7
Proposition of Law 4: R.C. 187.01 et seq violates Article 13 Section 1 of the Ohio Constitution since it is a statute conferring corporate powers on the legislatively created JobsOhio Corporation and this facial violation is sufficient to support standing.	9
Proposition of Law 5: R.C. 187.02 et seq. violates Article 13 Section 2 of the Ohio Constitution because it creates a corporation, JobsOhio, which is not governed by the general laws of the state of Ohio and this facial violation is sufficient to support standing.	11
Proposition of Law 6 JobsOhio Violates the Debt Limits in Article VIII, Sections 1 and 3 of the Ohio Constitution because it allows the state to issue bonds greatly exceeding constitutional requirements and it does not comply with the special funds exception and this facial violation is sufficient to support standing.	12

Proposition of Law 7 The JobsOhio legislative and bonding scheme violate Section 22, Article II of the Ohio Constitution because is an method by which the current General Assembly is attempting to force future General Assemblies to appropriate funds for JobsOhio. 13

CONCLUSION 15

CERTIFICATE OF SERVICE 16

Appendix

Decision of the Court of Appeal and Judgment Entry 1

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION.

During the passage of R.C. 187 *et seq.*, the fact that it is facially unconstitutional was such common knowledge in the General Assembly that the Speaker himself expressed doubts about the issue immediately after passage by the House. Indeed, Members were so well aware that this suit was going to be filed that they initially enacted a 90 day statute of repose on all constitutional claims, R.C. 187.09. After this suit was filed here and this court determined part of R.C. 187.09 to be an unconstitutional infringement of this court's jurisdiction, the General Assembly continued to violate the Ohio Constitution. Then General Assembly and the Administration enacted related legislation allowing the state to transfer to the private, unconstitutional JobsOhio Corp. all of the state owned assets of the state division of liquor control and then issue over a billion dollars of bonds secured by these assets. R.C. 4313 *et seq.*

When Appellants filed this case in common pleas, rather than addressing the fact that R.C. 187 and R.C. 4313 are facially unconstitutional, the executive branch blocked that judicial determination by positing incredible interpretations of this Court's decisions on public interest standing.

Although the Tenth District Court of Appeals rejected many of the state's baseless arguments, it ultimately found that Appellants lacked standing. They did not address the merits of the constitutional claims, beyond noting that there were obvious problems with the Jobs Ohio legislation. Because of the 90 day limitation on all constitutional claims in R.C. 187.09, that decision has now completely insulated R.C. 187 from determinations of its constitutionality in violation of separation of powers. Further, it creates a model by

which the other two branches can coordinate their efforts to strip this Court of its authority to determine the validity of any law. Articles 4 and 1.16 of the Ohio Constitution would be rendered meaningless.

This court has long recognized the existence of public rights standing to allow citizens to bring cases testing the constitutionality of a law before that law injures the government of our state or its citizens. Since a cornerstone of separation of powers is the ability of this court to determine the constitutional validity of acts of the other two branches, preserving public standing enhances this courts ability to preserve separation of powers as well. Although any reasonable reading of *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999) reveals that the case confirms the principles of proactive standing for the most important constitutional cases, the state Attorney General's office has for years perverted the part of the holding on *jurisdiction* to apply to standing determinations. The Tenth District has cleared up some of this morass, but still failed to properly apply this Court's decisions. This case is so important to the future of constitutional review in Ohio, that it provides an appropriate vehicle to clarify standing law.

The Tenth District erroneously determined that public interest standing is available only when government action effects a large number of individuals. Appellants ask this Court to clarify that the doctrine applies not only when a large number of individuals are directly affected, but also when the legislation in question is facially unconstitutional and that matter needs to be addressed as soon as possible. As Justice Pfeifer noted in his dissent the first time this case was before this Court, this case demands early review.

In the 1840's, the General Assembly created a variety of private corporations by law. This created a nightmare of private privilege and straddled the state with massive debt when these companies proved corrupt. Indeed, this is one of the principle reasons that the 1851 Constitutional Convention was convened. And a cornerstone of that document is Article 13 which forbids the General Assembly from creating a private company, especially one that is exempted from the general laws of the state. In blatant disregard Article 13, with full knowledge the it was violating the constitution, the General Assembly passed R.C. 187 creating a private corporation exempt from general law. No General Assembly in the history of the state has so plainly violated the constitution of this state.

Although Jobs Ohio cannot exist under the Ohio Constitution, this administration is poised to imminently transfer state assets to its control and for its benefit. They will then sell bonds on these assets. Appellees' insistence to the contrary notwithstanding, state assets are being encumbered to support over a billion dollars of debt to fund this unconstitutional entity by selling bonds in violation of the constitution. The merits of this matter must be determined before the state is left unable to escape this quagmire because of the debt obligations.

Because the limitation provisions in R.C. 187.09 is a frontal assault on the judicial branch of this state which attacks the principles of separation of powers, this case presents a constitutional question of such magnitude as to be designated a direct appeal as of right. Since determinations regarding public interest standing in turn affect not only the rights of the public but the preservation of separation of powers, the designation of direct appeal protects those foundational principles.

The appeal as of right designation is also appropriate regarding the substantive provisions of R.C. 187 and 4313 which facially violate so many provisions of the constitution that they are truly remarkable in their disregard of the basis of our government. Otherwise, this court should exercise its discretion to accept this case to decide these important issues.

STATEMENT OF THE CASE AND FACTS

This case is on appeal from a complaint for declaratory judgment and permanent injunction challenging the constitutionality of R.C. 187.01 et seq. (also referred to as the JobsOhio Act) and R.C. 4313, the enterprise acquisition project, which purport to create a private corporation in violation of Article XIII and saddle the state with massive debt to fund it.

Prior to the passage of R.C. 4313, Appellants challenged R.C. 187 in its entirety by bringing an action in this Court pursuant to requirements within the act. R.C. 187.09 commanded that this court accept original jurisdiction of any action challenging the constitutionality of the JobsOhio within 90 days of its effective date. This Court struck down that portion of the bill as a violation of separation of powers. *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101 (August 19, 2011). Subsequent to the Appellants' challenge before this court, unconstitutional sections of the legislation were altered in Ohio's biennial budget, H.B. 153.

Despite all the obvious problems with this entire concept, the governor filed the papers to create the private JobsOhio Corporation and named a board of directors. It is receiving funding from the state and is operating and expending funds. JobsOhio is

preparing to issue over a billion dollars of bonds to fund itself -- all backed by liens on state assets.

After this Court dismissed the first case, Appellants filed a complaint for declaratory judgment and an injunction in the Franklin County Court of Common Pleas. Appellees challenged the Appellants' right to bring this suit on grounds that they lacked standing under the public interest standing rules and they further argued that R.C. 187.09 does not grant Appellants standing. The case was dismissed based upon lack of standing and that decision was affirmed by the 10th District Court of Appeals, which used completely different reasoning but found that Appellants lacked standing.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law 1: R.C. 187.09 is a statute of limitations which attempts to prevent this Court from determining the constitutionality of R.C. 187 in violation of the principles of separation of powers.

R.C. 187.09 contains procedures for bringing constitutional challenges regarding JobsOhio:

(B) Except as provided in division (D) of this section, any claim asserting that any one or more sections of the Revised Code amended or enacted by H.B. 1 of the 129th general assembly, any section of Chapter 4313. of the Revised Code enacted by H.B. 153 of the 129th general assembly, or any portion of one or more of those sections, violates any provision of the Ohio Constitution shall be brought in the court of common pleas of Franklin county within ninety days after the effective date of the amendment of this section by H.B. 153 of the 129th general assembly. Amended by 129th General Assembly File No. 28, HB 153, § 101.01, eff. 9/29/2011.

The appellate court essentially found that *no one* had standing to file suit during the 90 day limitations period found in R.C. 187.09. The ninety days to bring an action to challenge the constitutionality of this act has now expired. Because the lower courts

found that no one had standing to bring this case, R.C. 187.01 et seq. would now be totally insulated from any determination of its constitutionality by the courts of Ohio. This is a blatant violation of the principle of separation of powers. As the Ohio Supreme Court found in *Sheward, id.*:

The power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have been firmly established as an essential feature of the Ohio system of separation of powers. See, e.g., *Beagle v. Walden* (1997), 78 Ohio St.3d 59, 62, 676 N.E.2d 9, 506, 508 (“[i]nterpretation of the state and federal Constitutions is a role exclusive to the judicial branch”). However, this was not always so, and a major part of our history involves a continuing effort to establish and secure this power as intrinsic to the judiciary and, indeed, to establish the judiciary as a viable and coequal branch of our government. *at 8.*

As this Court observed in *Sheward*, Ohio courts are periodically subject to outright attacks by the other two branches of government. Ohio’s Attorneys General have been utilizing spurious interpretations of the *Sheward* case for many years to undermine constitutional review by the courts and now this confrontation presents itself as an outright threat to the entire concept of separation of powers.

There is sufficient case law supporting standing for Appellant and baseless allegations of lack of standing should never have prevented the courts from determining this case on the merits. But because the executive branch has used this argument in combination with the legislature’s unreasonable statute of limitations for a constitutional challenge, this case demands that this Court protect its ability to determine the constitutionality of the acts of the other two branches and strike down R.C. 187.09 in its entirety.

Proposition of Law 2: R.C. 187.09 contains a statute of limitations which prevents any constitutional challenges to the JobsOhio legislation, R.C. 187 et

seq after 90 days of the effective date of the legislation in violation of the open courts provision in Article 1.16 of the Ohio Constitution.

R.C. 187.09(C) purports to provide an additional window for constitutional claims, but just against JobsOhio itself. As JobsOhio is set up as a private corporation, it cannot violate the constitution so that section is disingenuous. As for other potential claims against JobsOhio, Revised Code Section 187.07(F) permits JobsOhio to not disclose its investments until the first of March of the following year. Because the 90 day statute of limitations provided by Revised Code Section 187.09(C), the statute of limitations would therefore expire before the public knew about those activities. R.C. 187.01 et seq. therefore violates Ohio's Bill of Rights, specifically Article I Section 16 which mandates that "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Proposition of Law 3: Plaintiffs have standing to bring this action.

Appellants have a variety of bases for arguing that they have standing to bring this action. The claims set forth in the complaint are facial violations of the constitution and RC 187 and 4313 are truly remarkable in the number constitutional violations they contain. The public should not be prevented from appealing to this court to prevent the other two branches from blatant attacks on the constitution before a concrete injury occurs.

As this court has explained in *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, "[i]t has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to

render judgments which can be carried into effect.” Accordingly, “[i]t has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.” *Id. at* 14. Standing nonetheless is a self-imposed judicial rule of restraint, and courts “are free to dispense with the requirement for injury where the public interest so demands.” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3rd 451, 469-470, 1999 Ohio 123. This court has previously stated that “[s]tanding does not flow from the common-law “personal stake” doctrine alone. *Sheward, Id.* And the United States Supreme Court has recognized, standing may also be conferred by a specific statutory grant of authority. *Sierra Club v. Morton* (1972), 405 U.S. 727, 731-732, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636.

R.C. 187.09 appears to allow an immediate public interest lawsuit by citizens or the two legislator plaintiffs. But if the arcane standing argument presented by the Appellees were valid then that would render this entire section unconstitutional because the 90 day limitations period. This highly truncated statute of limitations period would violate the constitution on its face, but there is no doubt of its unconstitutionality if the Appellees’ concept of standing is incorporated into that provision to prevent anyone from ever bringing any constitutional challenge to this legislation.

R.C. 187.09 (B) confers standing for public interest suits to challenge this act and to determine its constitutionality as soon as possible after passage. This provides a legislative grant of standing to bring a suit of this type. Any actual injury requirements are dispensed with by the language of this section and the 90 day statute of limitations on

constitutional challenges. This was should have been the intent of the legislation, despite the executive branches subsequent arguments to the contrary.

The legislator appellants also here have standing as legislators because of the statute's effect on the appropriations process. The legislature alone is granted the constitutional authority to, by law, appropriate money from the treasury of the State. O Const. Article 2, Section 22 limits appropriations to two years. Legislation such as R.C. 187 that obligates state moneys for more than two years violates the constitution and prevents future General Assemblies, and the legislators thereof, from exercising their rights and duties as proscribed in Article 2. *Sorrentino v. Ohio National Guard*, (1990) 53 Ohio St.3d. 214 at 217.

Proposition of Law 4: R.C. 187.01 et seq violates Article 13 Section 1 of the Ohio Constitution because it is a statute conferring corporate powers on the legislatively created JobsOhio Corporation and this facial violation is sufficient to confer standing.

In the 1830 and 1840's, the Ohio state government became entangled with a number of private corporations in joint venture type agreements that resulted in huge financial losses to state and local governments and the transfer of private debt obligations to the taxpayers. In 1851, Ohio amended its constitution to include prohibitions of this sort of entanglement. JobsOhio is just such an unconstitutional arrangement. The legislature also became heavily involved in the subsidization of private companies and the granting of special privileges in corporate charter, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999 Ohio 123.“

Formation and powers of corporate entities were one of the primary foci of the 1851 convention. This resulted in a constitution for Ohio that is very different than other states and it remains so to this day even with some amendments.

There is little case law directly on this issue because the General Assembly, prior to 2011, understood what these sections meant: that the legislature could not charter or create a corporation by law and that the term “special act” means a law creating a corporation. In *The State of Ohio ex rel. John Drake v. James M. Roosa, et al.* 11 Ohio St. 16; 1860, the Supreme Court was asked to determine whether Article XIII Sec. 1 was retroactive with respect to the charter of a railroad company by the General Assembly. This charter is referred to as a special act throughout this case. In *State ex rel. Attorney General v. City of Cincinnati*, (1872) 23 Ohio St. 445; 1872 Ohio LEXIS 132 the court did determine that any grant of corporate powers by the legislature is forbidden:

Nor does it make any difference, within the meaning of the constitutional inhibition, whether the effect of the special act is to confer additional corporate power on an existing corporation or to create a new one. The power is explicitly denied to the legislature of accomplishing such a result by special act.

R.C. 187.01 et seq. creates the nonprofit corporation JobsOhio. . It authorizes the existence of the corporation and includes statutory requirements setting forth everything from the name the organization to its structure and the qualifications of its board of directors. R.C. 187.01 et seq. This is the equivalent to the charters and franchises of the 1800’s and as such is a special act conferring corporate power prohibited by O Const. Article XIII Section 1.

Proposition of Law 5: R.C. 187.02 et seq. violates Article 13 Section 2 of the Ohio Constitution because it creates a corporation, JobsOhio, which is not governed by the general laws of the state of Ohio and this facial violation is sufficient to confer standing.

R.C. 187.03 also exempts JobsOhio from most of the laws controlling corporate formation and governance found in Chapter 1701 et seq. R.C. 187.03 takes the

extraordinary step of exempting JobsOhio from general laws governing corporations.¹ JobsOhio is expressly **not** being formed or governed by the general laws of Ohio. JobsOhio is a specific act conferring specific corporate powers for a specific corporation and therefore the General Assembly exceeded its constitutional authority by violating Article 13, Section 1 of the Ohio Constitution. JobsOhio does not legitimately exist and all its actions are void.

Exempting a single corporation from the general laws that all other business must comply with, is a constitutional violation sufficient to support standing for appellants as representative of the public that do have to comply with the general laws of this state.

Proposition of Law 6 JobsOhio Violates the Debt Limits in Article VIII, Sections 1 and 3 of the Ohio Constitution because it allows the state to issue bonds greatly exceeding constitutional requirements and it does not comply with the special funds exception and this facial violation is sufficient to confer standing.

Following the debacles of earlier bonding adventurism, pursuant to the 1851 Constitution, the people of the state imposed significant limitations on the ability of the state government to borrow money. Unless it is specifically authorized by an amendment to the Constitution permitting the debt, Article VIII Section 1 provides that total debt cannot exceed \$750,000. However, this Court has recognized a narrow exception to the prohibitions of Article VIII, specifically the so-called "special fund" exception created by decisions of the Ohio Supreme Court. See *Kasch v. Miller* (1922), 104 Ohio St. 281, 135 N.E. 813; *State, ex rel. Pub. Institutional Bldg. Auth., v. Griffith* (1939), 135

¹ O.R.C. Sec. 187.03 (A), "JobsOhio and its board of directors are not subject to the following sections of Chapter 1702 of the Revised Code: sections 1702.03, 1702.08, 1702.09, 1702.21, 1702, 24, 1702.26, 1702.27, 1702.28, 1702.29, 1702.301, 1702.33, 1702.34, 1702.37, 1702.38, 1702.40 to 1702.52, 1702.521, 1702.54, 1702.57, 1702.58, 1702.59, 1702.60, 1702.80, and 1702.99".

Ohio St. 604, 14 O.O. 533, 22 N.E. 2d 200; State, ex rel. Bridge Comm. of Ohio, v. Griffith (1940), 136 Ohio St. 334, 16 O.O. 467, 25 N.E. 2d 847; and State, ex rel. Allen, v. Ferguson (1951), 155 Ohio St. 26, 44 O.O. 63, 97 N.E. 2d 660.

In broad terms, the JobsOhio Act and related legislation provide that:

1. The state may transfer to JobsOhio, and JobsOhio may accept the transfer of, all or a portion of the enterprise acquisition project for a transfer price payable by JobsOhio to the state.

2. Notwithstanding the mandatory transfer to the state 25 years later, the transfer is to be a “true and absolute conveyance”, thus giving bondholders the confidence that JobsOhio has clear title to the right to use, buy and sell the stream of revenues.

3. Of necessity, because all of the assets of the division of liquor control will ostensibly no longer be in state custody (even though all existing employees, assets and regulations remain as is), the \$160 million that the division supplies to fund activities of the state of Ohio, relieving pressure on the general revenue fund, will no longer be available to support the state’s activities.²

It is quite evident from the manner in which both R.C. 187 and R.C. 4313 were drafted that the bonding that was proposed to fund JobsOhio was designed to trigger the special fund exception. But *Griffith* and its progeny, particularly *Neffner, supra* have closely “examined the substance of such proposed transactions, not merely their form.” 32 Ohio St. at 428. For a variety of reasons, the substance of the liquor-backed bonds proposed to fund JobsOhio are inextricably intertwined with ongoing state operations and the general revenue fund and therefore do not qualify for the special fund exception. If

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R.C. 4313 cannot meet the requirements of the special fund exception, it violates Article 8 Sections 1 and 3.

Proposition of Law 7 The JobsOhio legislative and bonding scheme violate Section 22, Article II of the Ohio Constitution because is an method by which the current General Assembly is attempting to force future General Assemblies to appropriate funds for JobsOhio and this facial violation is sufficient to support standing.

The entire JobsOhio legislative scheme is an action by which the current General Assembly is attempting to tie the hands of future General Assemblies. The marketability of the liquor bonds turns on a “covenant” to be provided by the executive branch that it will refrain from actions that will have a material impairment on the bondholders’ interests. In 4313.02 (A), the General Assembly provides the power to the executive branch to covenant that they will not, in the future, “materially impair any obligations supported by a pledge of revenues of the enterprise acquisition project”.

The fact that JobsOhio will deprive the state budget of funds that now must be replaced by general revenue fund income is particularly egregious in light of the Supreme Court’s earlier decisions. *Neffner, supra* addressed a substantially similar situation and, when it peeled back the veneer that purported to comply the constitution, much as R.C. 4313.02(G) does (“[t]he transaction and transfer provided for under this section shall comply with all applicable provisions of the Ohio Constitution”), saying it doesn’t make it so. *Neffner* noted that “[w]here substantial funds which have heretofore gone into the general funds of the state treasury are pledged to liquidate such bonds, thereby requiring the state to seek and secure revenues otherwise in order to meet its obligations to care for and support its wards, then the obligation of those bonds does become the ultimate obligation of the state. To hold otherwise would result in an evasion of the constitutional

limitations." *Neffner, supra*, at 399. If JobsOhio does not pay the department of liquor control what the state deems necessary to fund the department, the state general revenue fund must do so as a matter of public safety and health, just as it is already proposed to be required to do to fund the operations previously supported liquor profits.

1. The Multi-Year Transfer of Liquor Profits Outside of the Control of the General Assembly Violates the Biennial Budgeting Stricture in the Ohio Constitution, Section 22, Article II

In *State, ex rel. Dickman v. Defenbacher* (1948), 85 Ohio App. 398, 401, it was held: "Under Article II, Section 22, of the [Ohio] Constitution, the General Assembly may not make an appropriation effective for more than two years," and "[n]o General Assembly can create obligations which extend beyond its own life." See, also, *State, ex rel. Preston v. Ferguson* (1960), 170 Ohio St. 450, and 1965 Ohio Atty.Gen.Ops. No. 65-80, at 2-164. Cf. *State, ex rel. Ross v. Donahey* (1916), 93 Ohio St. 414. Under the Act, the JobsOhio board would be acting to tie up state finances in contravention of Article 2, Section 22. In *Sorrentino v. Ohio National Guard*, the court stated, "This court has long held '[t]hat no officers of the state can enter into any contract, except in cases specified in the constitution, whereby the general assembly will, two years after, be bound to make appropriations either for a particular object or a fixed amount--the power and the discretion, intact, to make appropriations in general devolving on each biennial general assembly, and for the period of two years.'" (1990) 53 Ohio St.3d. 214, quoting *State v. Medbery* (1857), 7 Ohio St. 522, syllabus.

CONCLUSION

In order to preserve the principles of separation of powers and a meaningful review of unconstitutional acts by the executive and legislative branch, the appellants beseech this court to accept jurisdiction of this action.

Respectfully submitted,

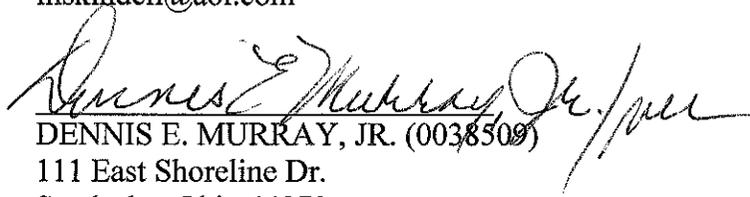


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CERTIFICATE OF SERVICE

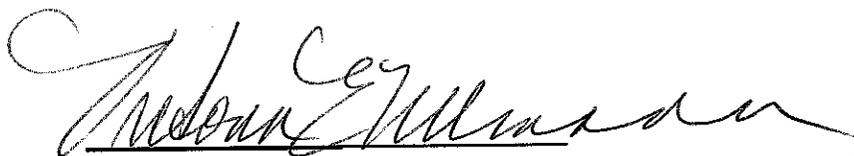
I certify that a copy of this memorandum was sent by e mail 7/27/2012 to the following:

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FILED
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FRANKLIN COUNTY OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2012 JUN 15 PM 2:19
CLERK OF COURTS

ProgressOhio.org, Inc. et al., :

Plaintiffs-Appellants, :

v. :

JobsOhio et al., :

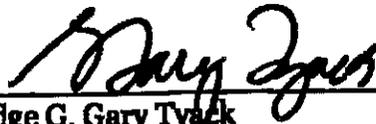
Defendants-Appellees. :

No. 11AP-1136
(C.P.C. No. 11CVHo8-10807)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 14, 2012, appellants' assignments of error are overruled and appellants' motion is rendered moot. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellants.

TYACK, SADLER & DORRIAN, JJ.

By 
Judge G. Gary Tyack

TR 868 - Q32

FILED *Beghty* 12

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

ProgressOhio.org, Inc. et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 11AP-1136
JobsOhio et al.,	:	(C.P.C. No. 11CVH08-10807)
Defendants-Appellees.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 14, 2012

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Plaintiffs-appellants, ProgressOhio.org, Inc. ("ProgressOhio" or "appellants"), Ohio Senator Michael J. Skindell, and Ohio Representative Dennis E. Murray ("legislators" or "appellants") appeal from the December 2, 2011 decision of the Franklin County Court of Common Pleas granting defendants-appellees Ohio Governor John R. Kasich, Director Christiane Schment, Director Timothy S. Keen, Ohio Treasurer

Josh Mandel ("State-defendants"), and not for profit corporation JobsOhio's motions to dismiss and denying in part ProgressOhio's motion to strike. Because appellants have not met their burden to establish that they have standing to bring their action, we affirm the judgment of the trial court.

{¶2} This case originated in the Franklin County Court of Common Pleas as a constitutional challenge to the JobsOhio Act, specifically R.C. 187.01 et seq. and R.C. 4313.01 et seq., enacted by means of Am.Sub.H.B. No. 1 of the 129th General Assembly and amended through Am.Sub.H.B. No. 153 of the 129th General Assembly. JobsOhio is a nonprofit corporation created by statute to promote economic development, job creation, job retention, job training, and the recruitment of business to the state of Ohio. R.C. 187.01. According to statute, it is under the control of a board of directors appointed by the governor, and is not a state agency. R.C. 187.01(B); 187.03(A). JobsOhio is designed to be funded by a combination of public and private revenue, including proceeds from the state's liquor enterprise. R.C. 4313.02(A); R.C. 187.07.

{¶3} According to the complaint, ProgressOhio "is a 501(c)(4) organization¹, * * * created to provide a progressive voice for Ohio citizens." (Amended Complaint, at ¶ 12.) It seeks to inform the public about progressive ideals, values and politics in order to provide a more just and democratic society. ProgressOhio claims a statewide membership of 350,000. *Id.*

{¶4} On August 29, 2011, ProgressOhio filed a complaint in the Franklin County Court of Common Pleas. They later filed an amended complaint on November 16, 2011, alleging that the General Assembly and the current administration had created an unconstitutionally chartered corporation that will spend government revenues secretly and free from accountability. More specifically, ProgressOhio alleges the legislation violates the Ohio Constitution in seven ways, summarized here as follows: (1) the JobsOhio Act violates Article XIII, Section 1 because it is a special act conferring corporate powers; (2) the JobsOhio Act violates Article XIII, Section 2, which requires all

¹ A 501(c)(4) organization is a non-profit entity operated to promote social welfare to benefit the community. Examples include civic leagues, social welfare organizations, and local associations such as volunteer fire companies. IRS Publication 557, at 51 (Rev 2011).

corporations to be filed under the general laws; (3) the JobsOhio Act violates Article VIII, Section 4, which prohibits the state from making equity investments; (4) the JobsOhio Act violates Article I, Section 16, which requires the courts be open so injured parties may obtain a remedy by due process; (5) the JobsOhio Act violates Article II, Section 22, by providing appropriation for JobsOhio for more than two years; (6) the JobsOhio Act violates Article VIII, Section 2(h), by authorizing the state to exceed its bond limit; and (7) the JobsOhio Act violates Article VIII, Section 4, by lending the credit of the state to a private corporation.

{¶5} JobsOhio and the State-defendants responded to the complaint by filing motions to dismiss, arguing that appellants lacked standing to bring their action and that ProgressOhio's claims were not ripe. The parties' arguments overlapped in some respects, but they can be summarized here as follows: (1) appellants lack standing because they have not been threatened with or suffered a direct and concrete injury in a manner or degree different from that suffered by the public in general; (2) appellants lack taxpayer standing because they have not shown a special interest different from that of taxpayers generally; (3) the legislators (who voted against the legislation) lack standing because they have not been prevented from casting an effective vote; (4) there is no statutory basis that confers standing on the plaintiffs; (5) appellants lack standing to bring a declaratory judgment action under R.C. 2721.02 et seq., because they cannot identify a legal right or interest that is affected by the legislation; (6) appellants' claims are premature because they assume future hypothetical events that may or may not occur; (7) appellants lack associational standing because none of its members can point to a legally cognizable injury that is different from anything suffered by the general public; and (8) appellants cannot show public right standing because their action is not one in mandamus or prohibition.

{¶6} The trial court analyzed the various grounds for standing that would allow appellants to move forward with their constitutional claims. The trial court rejected all of appellants' arguments and concluded that none of the appellants had standing to pursue their claims. The trial court dismissed the complaint, and this appeal followed.

{17} On appeal, appellants have asserted the following assignments of error:

[I.] The trial court erred in determining that constitutional challenges can only be brought by way of extraordinary writ.

[II.] The trial court erred in failing to find that R.C. 187.09 grants standing to all the plaintiffs to bring this action.

[III.] The trial court erred in denying Senator Skindell and Representative Murry [sic] legislative standing in this action.

[IV.] The trial court erred in denying plaintiffs' standing to bring this case as a matter of great public interest and importance.

[V.] The court erred in refusing to find that the relationship between the state and corporations is a core value enshrined in the Ohio Constitution that constitutes a matter of great public importance.

VI. The trial court erred in failing to recognize that control of state debt is a core feature in the Ohio Constitution and State Debt, equity and bond issues are matters of great public importance that justify public interest standing.

VII. The court erred in failing to find that privatization of government functions as well as avoiding entanglement with private enterprise is a constitutional matter of great public interest and importance.

VIII. The court erred in failing to find that the statutes of repose in [R.C.] 187.09 violate the Ohio Constitution.

{18} This court recently summarized the doctrine of standing and the standard of review normally applied to a dismissal for lack of standing as follows:

Under the doctrine of standing, a litigant must have a personal stake in the matter he or she wishes to litigate. *Tiemann* at 325, 712 N.E.2d 1258. Standing requires a litigant to have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult * * * questions." *Id.* at 325, 712 N.E.2d 1258, quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663

(1962). In order to have standing, a plaintiff must demonstrate some injury caused by the defendant that has a remedy in law or equity. *Id.* The injury is not required to be large or economic, but it must be palpable. *Id.* Furthermore, the injury cannot be merely speculative, and it must also be an injury to the plaintiff himself or to a class. *Id.* An injury that is borne by the population in general, and which does not affect the plaintiff in particular, is not sufficient to confer standing. *Id.*, citing *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). See also *State ex rel. Masterson v. Ohio State Racing Comm.*, 162 Ohio St. 366, 368, 123 N.E.2d 1 (1954) ("private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally."). (Citation omitted.)

Dismissal for lack of standing is a dismissal pursuant to Civ.R. 12(B)(6). *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio3230, ¶ 4. "A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint." *Volbers-Klarich v. Middletown Mgt.*, 125 Ohio St.3d 494, 929 N.E.2d 434, 2010-Ohio-2057, ¶ 11. In order to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

For purposes of appellate review, a question involving standing is typically a question of law and, as such, it is to be reviewed de novo. *Ohio Concrete Constr. Assn. v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-905, 2009-Ohio-2400, ¶ 9.

League of United Latin Am. Citizens v. Kasich, 10th Dist. No. 10AP-639, 2012-Ohio-947, ¶ 21-23.

{¶9} With these standards in mind, we turn to the assignments of error.

{¶10} In their first assignment of error, appellants assert that the trial court erred in holding that their constitutional challenge to the JobsOhio Act could be brought only by means of an original action seeking an extraordinary writ.

{¶11} The trial court found that appellants' constitutional challenge based on public-right standing, as articulated in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999), is limited to those rare cases that rise to the level of the legislation at issue in *Sheward* (attack on the judiciary) and *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717 (case involving mandatory drug testing of injured workers seeking to participate in workers' compensation system). The trial court then found that public-right standing has been limited solely to actions seeking extraordinary writs, namely, mandamus and prohibition. (Decision, at 24.)

{¶12} In *Sheward*, the Ohio Academy of Trial Lawyers and the Ohio AFL-CIO brought an original action in prohibition and mandamus in the Supreme Court of Ohio challenging legislative tort reform. The Supreme Court of Ohio held that:

Where the object of an action in mandamus and/or prohibition is to procure the enforcement or protection of a public right, the relator need not show any legal or special individual interest in the result to have standing, as it is sufficient that the relator is a citizen of State and as such interested in the execution of laws of State.

Id. at syllabus.

{¶13} The majority indicated that the public-right doctrine is an exception to the personal injury requirement of standing. *Id.* at 503. It is conceived as an action to vindicate the general public interest. *Id.*

{¶14} As can be seen from a close reading of the syllabus in *Sheward*, the Supreme Court of Ohio did not explicitly hold that public-right standing for matters of great public interest might only be brought by means of an original action. In fact, the court in discussing with approval *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130 (1991), stated, " '[a]lthough relators could seek a declaratory judgment coupled with a mandatory injunction in order to achieve nearly the same result we find that the alternative remedy would not be as complete as a writ of mandamus.' " *Sheward* at 508, quoting *Zupancic* at 134.

{¶15} In *Ohio Roundtable v. Taft*, 119 Ohio Misc.2d 49, 2002-Ohio-3669 (C.P.), citizens challenged the legitimacy of Ohio's participation in the multi-state lottery, Mega Millions, by means of declaratory judgment and mandamus actions. The trial court had to decide whether the action should be allowed to proceed as a public action, a private action, neither, or both. The court found both private standing and that the plaintiffs had standing to bring a public action. *Id.* at 44. The standing issue was not raised on appeal to this court. *State ex rel. Ohio Roundtable v. Taft*, 10th Dist. No. 02AP-911, 2003-Ohio-3340, *appeal not allowed*, 100 Ohio St.3d 1484, 2003-Ohio-5992.

{¶16} In at least one instance, the Supreme Court of Ohio has held that jurisdiction in mandamus or prohibition may be lacking in a constitutional challenge due to the existence of an adequate remedy at law by means of an action for declaratory judgment and injunctive relief. The Supreme Court of Ohio found that it lacked jurisdiction to consider the merits of a mandamus action challenging the constitutionality of new legislative enactments because they constituted disguised actions for declaratory judgment and prohibitory injunction. *State ex rel. United Auto. Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶ 41, 43. Since the Supreme Court of Ohio does not have original jurisdiction over actions for declaratory judgment, the only situations in which the Supreme Court of Ohio will initially find public-right standing will be original actions in mandamus or prohibition challenging the constitutionality of a statute. This is not the same as a rule permitting public-right standing only in original actions.

{¶17} Here, the trial court based its analysis on post-*Sheward* cases, one from the Twelfth District Court of Appeals, and one echoing the same language from our own district. In *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶ 11, this court discussed *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007-Ohio-4372, a case in which the court said that Ohio case law makes clear that public-right standing is found overwhelmingly, if not exclusively, in original actions seeking extraordinary writs, or is found in situations where early resolution is necessary. *Id.* at ¶ 59. The court in *Brinkman* disagreed with the trial court finding

standing in *Ohio Roundtable*, stating that only the Supreme Court of Ohio has the discretion to find public-rights standing. *Brinkman* at ¶ 35.

¶18} In *Brown*, the action was not one in mandamus or prohibition, and this court found that significant as did the trial court in the instant case. However, the court in *Brown* stopped short of holding that a case based on public-right standing must inevitably be brought as an original action. Even though it found the type of action filed significant for purposes of standing, the court had another, more primary reason for its decision. The court concluded that the weighted per-pupil funding issue in *Brown* did not rise to the rare and extraordinary nature of an attack on the judiciary as was the case in *Sheward*. *Id.* at ¶ 14.

¶19} In our view, whether appellants have sought a writ of mandamus or a declaratory judgment is ultimately irrelevant. The trial court's denial of public-right standing based on the type of action brought did not prejudice appellants. As discussed in assignments of error four through seven below, appellants cannot find the kind of rare and extraordinary circumstances necessary to invoke public-interest standing, therefore, the public-right exception to the usual personal stake requirement for standing cannot be met.

¶20} Being non-prejudicial, the first assignment of error is overruled.

¶21} In their second assignment of error, appellants contend that R.C. 187.09(B) provides a statutory basis for standing for their constitutional challenge. Common-law standing requirements do not apply when standing is conferred by a specific statute. *Ohio Valley Associated Builders & Contrs. v. DeBra-Kuempel*, 192 Ohio App.3d 504, 2011-Ohio-756, ¶ 22 (2nd Dist.). Under normal rules of statutory construction, a statute will not be deemed to abrogate common-law standing requirements unless the legislature has stated so. *Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 67 Ohio St.3d 302, 304 (1993).

¶22} Here, R.C. 187.09(B) provides as follows:

Except as provided in division (D) of this section, any claim asserting that any one or more sections of the Revised Code amended or enacted by H.B. 1 of the 129th general assembly, any section of Chapter 4313. of the Revised Code enacted by H.B. 153 of the 129th general assembly, or any portion of one or more of those sections, violates any provision of the Ohio

Constitution shall be brought in the court of common pleas of Franklin county within ninety days after the effective date of the amendment of this section by H.B. 153 of the 129th general assembly.

{¶23} The provision cited by appellants does not contain any language conferring standing. Rather, it identifies where and when a suit may be brought. Appellants argue that standing is implied because of the Supreme Court of Ohio's decision in the first action brought by appellants *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101 ("*ProgressOhio.org. I*"). That case did nothing to dispense with standing requirements for a constitutional challenge to legislation. The case was decided solely on jurisdictional grounds, and the court found that it lacked original jurisdiction to grant the requested declaratory and injunctive relief. *Id.* at ¶ 2.

{¶24} The majority's remark that the amended statute provides, "[A] remedy for petitioners to institute an action challenging the constitutionality of amended R.C. 187.01 et seq. by way of an action in the Franklin County Court of Common Pleas" does not state explicitly or even impliedly that traditional standing requirements have been suspended or dispensed with. *Id.* at ¶ 6. The case was decided on jurisdictional grounds, and it appears the court was making clear that the amended statute now vested jurisdiction in the Franklin County Court of Common Pleas.

{¶25} Appellants also argue that the dissent gave no weight whatsoever to the standing issue in *ProgressOhio.org I*. Justice Pfeifer, in dissent, argued for sua sponte converting the action to a mandamus action and granting an alternative writ to begin the briefing process. He indicated that the challenged legislation made significant changes to the organizational structure of state government and did not involve complex factual issues that would benefit from development of a record in a trial court. *Id.* at ¶ 8, 9. The dissent would have found a need for early resolution, statewide public impact, and public-interest standing. *Id.* Even if the rest of the court had agreed with him, the dissent did not find or even imply the existence of standing on any statutory basis, but rather would have found an exception to the general standing requirements under the public-right doctrine.

{¶26} The second assignment of error is overruled.

{¶27} In the third assignment of error, the legislators argue they have legislative standing. Despite voting in the minority on the JobsOhio Act, the legislators argue they have standing because they are threatened with future harm. They claim that the JobsOhio Act will interfere with their ability to legislatively appropriate funds in the future because the JobsOhio Act unconstitutionally encumbers funds for more than two years.

{¶28} Legislative standing stems from vote nullification when the executive branch will not enforce a duly enacted law by the legislature and, therefore, a legislator who voted for a bill could show an injury not suffered by the public in general. In *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, ¶ 17, 20, the Supreme Court of Ohio found standing for the Senate President and Speaker of the House, as legislators who voted with the majority to prevent their votes from being nullified. The court indicated that a legislator voting in the minority would not have standing. *Id.* at ¶ 19. This is the scope of legislator standing recognized by the Supreme Court of Ohio.

{¶29} Here, the legislators, apparently recognizing the futility of arguing their votes were nullified, have theorized that the JobsOhio Act could impair their ability to allocate funds in the future if liquor revenue is obligated for more than two years. Appellants have cited no legal authority for their theory. Such a novel and speculative theory of standing bears no relationship to vote nullification—the narrow grounds for legislative standing recognized in Ohio. The third assignment of error is overruled.

{¶30} In the fourth through seventh assignments of error, appellants reiterate their arguments for the unconstitutionality of the JobsOhio Act. They claim that the matter is one of great public interest and importance because of media attention to the privatization of governmental functions, the historic importance of issues of public debt and the relationship of corporations to public expenditures, and the alleged lack of accountability and commingling of public and private funds.

{¶31} There is no question that appellants' challenge raises significant concerns about at least some of the provisions of the JobsOhio Act. However, in terms of great public interest, the most one can say about the challenged legislation is that it "makes

significant changes to the organizational structure of state government." See *ProgressOhio.org I* at ¶ 9 (Pfeifer, J., dissenting). This is not enough of a public concern to confer standing on appellants.

{¶32} In comparison, the statutory scheme at issue in *Sheward* affected every tort claim filed in Ohio. The statute at issue in *AFL-CIO* affected every injured worker in Ohio seeking to participate in the worker's compensation system. The JobsOhio Act is not the assault on the power of the judicial branch that concerned the Supreme Court of Ohio in *Sheward*. It "does not 'transform[] the civil justice system' " as did the tort reform legislation in that case. *United Auto., Aerospace & Agricultural Implement Workers of Am.*, at ¶ 50. The public-right doctrine exists to vindicate matters of great public interest and societal impact. " 'Not all alleged illegalities or irregularities are thought to be of that high order of concern.' " *Sheward* at 503, quoting Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv.L.Rev. 1265, 1314 (1961).

{¶33} Assignments of error four through seven are overruled.

{¶34} In the eighth assignment of error, appellants argue that the trial court should have found R.C. 187.09 unconstitutional because it has unnaturally short (60 and 90 day) statutes of limitations. Appellants argue that R.C. 187.09(B) that provides 90 days to bring an action to challenge the constitutionality of the act has now expired. Thus, they claim they are insulated from challenging the constitutionality of the statute later if they are found to lack standing in the instant case. They claim that the effect of the trial court's ruling is to deny *anyone* from bringing a constitutional challenge to the JobsOhio Act. They argue this is unconstitutional as it results in a violation of separation of powers. Appellants also argue that the 60-day period in R.C. 187.09(C) for bringing a claim based on any action taken by JobsOhio will result in the statute of limitations running before appellants are able to discover harm from wrongful actions by JobsOhio.

{¶35} Appellants' claims were dismissed because they lacked standing, not because of any issue with the statute of limitations. Until appellants can establish standing, this court cannot address the merits of this argument particularly as it relates to future actions. Appellants argue that a future contingency could affect their ability to

bring another action. As such, they are asking this court for an advisory opinion. Rather than issuing advisory opinions, courts must exercise judicial restraint.

{¶36} Obviously, the future contingency contemplated by appellants has yet to occur. If appellants or other parties can establish standing, and believe the statute fails to provide an adequate remedy at law, they have already demonstrated an awareness of alternative options. The eighth assignment of error is overruled.

{¶37} Additionally, appellants have filed a motion asking this court to declare R.C. 187.09 unconstitutional as a violation of separation of powers because R.C. 187.09(E) directs the court of appeals to expedite any appeal brought under division (B) or (C) and to give the case priority over all other civil cases before the court. Similarly to what was argued in *Sheward*, appellants represent that this is a fundamental assault on the judicial power of the court to regulate its docket.

{¶38} As discussed above, the proper procedure to challenge the constitutionality of a statute is not by way of motion in the court of appeals, but by an original action or by way of an action for declaratory judgment and an injunction. Lack of standing and our deliberation and disposition of the instant case render the motion moot. In accordance with principles of judicial restraint, " 'if it is not necessary to decide more, it is necessary not to decide more.' " *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 2006-Ohio-5202, ¶ 50, quoting *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, ¶ 34, quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Administration*, 362 F.3d 786, 799 (D.C.Cir.2004) (Roberts, J., concurring in part and in judgment).

{¶39} Based on the foregoing, appellants' assignments of error numbered one through eight are overruled and appellants' motion to declare R.C. 187.09 unconstitutional is rendered moot. The judgment of the Franklin County Court of Common Pleas is affirmed.

*Motion rendered moot;
Judgment affirmed.*

SADLER and DORRIAN, JJ., concur.
