

IN THE SUPREME COURT OF OHIO

**STATE OF OHIO, ex rel.
JOBSONO,
41 South High Street, Suite 1500
Columbus, OH 43215,**

**Case No. 12-1356

ORIGINAL ACTION
IN MANDAMUS**

Relator

v.

**DAVID GOODMAN,
DIRECTOR, OHIO DEPARTMENT
OF COMMERCE,
77 South High Street, 23rd Floor
Columbus, OH 43215,**

Respondent.

**MEMORANDUM OF RESPONDENT DAVID GOODMAN, DIRECTOR,
OHIO DEPARTMENT OF COMMERCE, IN OPPOSITION TO
MOTION TO INTERVENE OF PROGRESSOHIO.ORG, SENATOR MICHAEL
SKINDELL, AND REPRESENTATIVE DENNIS MURRAY, JR.**

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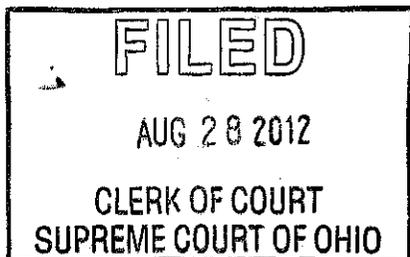
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**MEMORANDUM OF RESPONDENT DAVID GOODMAN, DIRECTOR,
OHIO DEPARTMENT OF COMMERCE, IN OPPOSITION TO
PROGRESSOHIO.ORG'S MOTION TO INTERVENE**

I. INTRODUCTION

On August 20, 2012, ProgressOhio.org, Senator Michael Skindell, and Representative Dennis Murray, Jr. (hereinafter referred to as the “Proposed Intervenors”) filed a Motion to Intervene in this original action. While this Court has a long history of permitting original mandamus actions like the one here in order to resolve matters of constitutional concern,¹ Proposed Intervenors assert that Relator JobsOhio and Respondent David Goodman, Director of the Ohio Department of Commerce, have “actually colluded” to bring this case. (Motion at 1.) In complete disregard of this well-established precedent, none of which is even mentioned in their Motion, Proposed Intervenors claim that “[o]nly by allowing [Proposed Intervenors] to present this Court with genuine opposition and *bona fide* research will separation of powers and the public interest be served.” (*Id.*)

Despite Proposed Intervenors’ arguments to the contrary, the Director is fully capable of representing their alleged interests on the constitutional questions before the Court. Moreover, Proposed Intervenors have not established that they meet the test for

¹ *State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St.3d 111, 579 N.E.2d 705 (1991) (mandamus action brought by State board against State Treasurer); *State ex rel. Ohio Funds Mgt. Bd. v. Walker*, 55 Ohio St.3d 1, 561 N.E.2d 927 (1990) (mandamus action brought by Ohio Funds Management Board against Director, Office of Budget and Management); *State ex rel. Bd. of Cty. Commrs. v. Mong*, 12 Ohio St.3d 66, 465 N.E.2d 428 (1984) (mandamus action brought by board of county commissioners against State Auditor); *State ex rel. Duerk v. Donahey*, 67 Ohio St.2d 216, 423 N.E.2d 429 (1981) (mandamus action brought by Director of Economic and Community Development against State Treasurer). *See also Massillon Saus. & Loan Co. v. Imperial Fin. Co.*, 114 Ohio St. 523, 530, 151 Ohio St. 523 (1926) (Court observed that the parties had previously been in a “friendly suit in common pleas court for the purpose of testing the liability of the parties” under the contract at issue).

intervention under Civ. R. 24. Allowing Proposed Intervenors to intervene as parties would produce nothing other than a needless complication of the legal issues before the Court. Insofar as Proposed Intervenors have any more to say on these issues, the Director has already invited, and indeed encouraged, Proposed Intervenors to submit a brief as *amici curiae*. Under no circumstance, however, should they be permitted to intervene in this action as parties.

II. LAW AND ARGUMENT

A. Proposed Intervenors' Interests Are Adequately Represented.

In their Motion to Intervene, Proposed Intervenors quote the standard for intervention as of right under Civil Rule 24(A), which provides that intervention should not be granted where “the applicant’s interest is adequately represented by existing parties.” But whatever interest that Proposed Intervenors claim to have in this case is already being adequately represented by the existing parties. For example, the parties are presenting to this Court the very same constitutional challenges to the JobsOhio Act, R.C. 187, and the Transfer Act, R.C. 4313, that Proposed Intervenors raise in their proposed Answer *instanter*. (Compare Relator’s Complaint at ¶ 44 (setting forth the seven primary constitutional challenges that have been made regarding the Legislation) with Proposed Intervenors’ Answer *Instanter* at ¶¶ 5-10, 12 (setting forth those constitutional challenges as affirmative defenses).)² Indeed, the Director has already filed a responsive pleading containing these constitutional claims as affirmative defenses, as well as a lengthy Motion for Judgment on the Pleadings that addresses the

² The only additional “affirmative defense” that Proposed Intervenors raise is one based on separation of powers, which apparently is centered on Proposed Intervenors’ contention that the present mandamus action is a product of “collusion.” (See Proposed Intervenors’ Answer *Instanter* at ¶ 11.)

merits of these claims. Many of the arguments expressed in this latter motion were originally advanced by Proposed Intervenors in separate litigation where they were found not to have standing.³

As Relator's Complaint makes clear, the Director has declined to sign the proposed Franchise and Transfer Agreement precisely because of the existence of these constitutional issues. Other than questioning the Director's motives, Proposed Intervenors fail to explain why the Director cannot fully and fairly present these constitutional issues for resolution, as other state officials have done in similar original actions. *See, e.g., State ex rel. Duerk v. Donahey*, 67 Ohio St.2d 216, 423 N.E.2d 429 (1981). If anything, the Director's Motion for Judgment on the Pleadings proves just the opposite.

B. Given The Purely Legal Issues Presented, Proposed Intervenors Can Advance Their Arguments Fully As *Amici Curiae*.

This Court does not hesitate to permit *amici curiae* to participate in original actions like this one in order to express their views on the issues before the Court. Because there are no material facts in dispute, and because this original action presents purely legal, constitutional issues for adjudication, the participation of *amici curiae* is particularly appropriate. The Director has no objection to Proposed Intervenors' participating as *amici curiae*. In fact, as the letter attached to Proposed Intervenors' Motion shows, counsel for the Director affirmatively reached out to Proposed Intervenors' counsel, inviting them to submit an *amicus* brief, "to ensure that *ProgressOhio's* arguments, including the views of Mr. Skindell and Mr. Murray, are

³ *See ProgressOhio.org, Inc. et al. v. JobsOhio*, Franklin C. P. No. 11 CVHo8 10807, Decision and Entry (Dec. 2, 2011); *ProgressOhio.org, Inc. et al. v. JobsOhio*, 10th Dist. No. 11AP-1136, 2012-Ohio-2655.

set out fully and fairly before the Court.” (King Letter, August 17, 2012) (Emphasis added.)

C. The Improper Tone Of Proposed Intervenors’ Motion Reveals That Permitting Them To Intervene Will Needlessly Delay The Court’s Resolution Of The Purely Legal Issues Presented Here.

The Director’s response would not be complete without addressing the hyperbolic nature of Proposed-Intervenors’ Motion. If the unprofessional tenor and *ad hominem* attacks of their Motion are indicative of how Proposed Intervenors intend to conduct themselves in this matter, then allowing them to intervene as parties will unnecessarily complicate this Court’s adjudication of what, at bottom, are solely legal issues. Instead of rewarding this behavior by allowing Proposed Intervenors to intervene - which would effectively allow them to achieve an end-run around the decisions of the Franklin County Common Pleas Court and Tenth District Court of Appeals that they lack standing to pursue their constitutional claims⁴ - the Court should allow Proposed Intervenors to participate in this action as *amici curiae*.

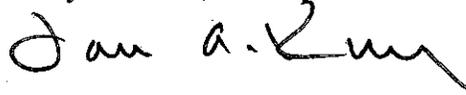
III. CONCLUSION

For the foregoing reasons, the Director submits that he will adequately represent whatever interests that Proposed Intervenors claim to have in the subject matter of this action. Furthermore, the Director has no objection to Proposed Intervenors submitting a brief as *amici curiae*, in the event that this Court issues an alternative writ and sets a briefing schedule.

⁴ See *id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Opposition to the Motion to Intervene of ProgressOhio.org, Senator Michael Skindell, and Representative Dennis Murray, Jr. was served via ordinary U.S. mail, postage, prepaid, upon the following Counsel on this 28th day of August 2012.

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