

IN THE SUPREME COURT OF OHIO

**STATE OF OHIO, ex rel.
JOBSONHIO,**

Relator,

v.

**DAVID GOODMAN,
DIRECTOR, OHIO DEPARTMENT
OF COMMERCE,**

Respondent.

: Case No. 12-1356
:
:
: ORIGINAL ACTION IN
: MANDAMUS
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**MEMORANDUM OF RELATOR JOBSONHIO
IN OPPOSITION TO MOTION TO INTERVENE**

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I. INTRODUCTION

While it is not surprising that the plaintiffs in *ProgressOhio.org et al. v. JobsOhio et al.*, Case No. 2012-1272 (*i.e.*, ProgressOhio.org, a self-styled progressive activist group, and Senator Skindell and Representative Murray, state legislators who voted against the Legislation¹ they are challenging) (collectively “ProgressOhio”), would seek to participate in this mandamus action, they are attempting to do so in the wrong way. ProgressOhio seeks to intervene as a full party, when the proper method for ProgressOhio to participate is as an amicus.

ProgressOhio first claims an absolute right to intervene under Civil Rule 24(A). This fails for two reasons. First, Ohio law only permits intervention as of right when a person has a “*legal* interest” at stake in the lawsuit. *Rumpke Sanitary Landfill, Inc. v. State*, 128 Ohio St.3d 41, 46 (2010) (emphasis added). Here, the courts in ProgressOhio’s separate action have correctly held that it lacks standing to challenge the constitutionality of the Legislation at issue here, and by definition, a party that lacks standing has no legal interests at stake and no right to intervene. *Id.*

Second, even if a person has a legal interest at stake in a matter, it must still prove that that interest is not being adequately protected by the existing parties. Civ. R. 24(A)(2). Here, Respondent will more than adequately protect ProgressOhio’s interests in fleshing out all the potential issues regarding the constitutionality of the Legislation. Indeed, Respondents’ counsel has already filed an extensive motion setting forth not only every constitutional argument ProgressOhio has previously raised but also an argument under the “one subject rule” of Article II, Section 15(D) never raised by ProgressOhio in its separate action. (*See* Resp’t Mot. J.

¹ The “Legislation” refers to Am. Sub. H.B. 1 (129th General Assembly), Am. Sub. H.B. 153 (129th General Assembly), R.C. Chapter 187, and R.C. Chapter 4313.

Pleadings.) In their presentation of these arguments, Respondents' counsel have refined and supplemented the analysis and supported it with additional legal authority.

As an alternative to intervention as of right, ProgressOhio asks the Court to permit discretionary intervention under Civil Rule 24(B). The Court should not do so. The role of an amicus was designed precisely for situations such as this where a party has only practical or political interests in a lawsuit. Neither JobsOhio nor Respondent opposes ProgressOhio's participation as an amicus, and ProgressOhio has not presented any reason why filing as an amicus would be inadequate. To permit intervention here simply because someone has expressed a personal opinion on the merits of a case would set a troubling precedent for future actions challenging the validity of a law.

II. LAW AND ARGUMENT

A. ProgressOhio Does Not Have A Right To Intervene.

ProgressOhio initially claims an absolute right to intervene under Civil Rule 24(A). That Rule only grants a right to intervene in two situations: "(1) when a statute of this state confers an unconditional right to intervene," and "(2) where the applicant claims an interest relating to the property or transaction . . . unless the applicant's interest is adequately represented by existing parties." Neither of those provisions applies here.

1. Civil Rule 24(A)(1) Does Not Apply Because No Statute Gives ProgressOhio An Unconditional Right To Intervene.

In order to fall within Rule 24(A)(1), the proposed intervenor must point to a statute that provides not just a right, but an *unconditional* right, to intervene. *Fairview General Hosp. v. Fletcher*, 69 Ohio App.3d 827, 831 (10 Dist. 1990). Here, the only candidate for such a statute that ProgressOhio identifies is the declaratory judgment statute, R.C. § 2721.12. (Motion at 4.) According to ProgressOhio, notwithstanding that this is a mandamus action, the declaratory

judgment statute grants a right to intervene because the action is really a “disguised declaratory judgment.” This assertion fails on several levels.

First, this is an action in mandamus—not a disguised declaratory judgment action. It is “well-settled” that although this Court does not have jurisdiction over an action for declaratory judgment, an action in mandamus is proper “where declaratory judgment would not be a complete remedy unless coupled with ancillary relief in the nature of mandatory injunction.” *State ex rel. Ohio Civil Serv. Employees Assn, Local 11 v. State Empl. Rels. Bd.*, 104 Ohio St.3d 122, 126 (2004). Here, JobsOhio brought this action in mandamus in part to provide this Court the opportunity to resolve the constitutionality of the Legislation, but that remedy would be incomplete without the additional relief of an order compelling Respondent Goodman to execute the Franchise and Transfer Agreement. Such actions are frequently—and properly—brought in mandamus before this Court. *See, e.g., State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 62 Ohio St.3d 111 (1991); *State ex rel. Ohio Funds Mgt. Bd. v. Walker*, 55 Ohio St.3d 1 (1990); *State ex rel. Shkurti v. Withrow*, 32 Ohio St.3d 424 (1987); *State ex rel. Bd. of Cty. Cornmrs. v. Mong*, 12 Ohio St.3d 66 (1984); *State ex rel. Duerk v. Donahey*, 67 Ohio St.2d 216 (1981). Because this is not a declaratory judgment action, ProgressOhio’s reliance on R.C. § 2721.12 to support intervention is entirely misplaced.

Second, even if ProgressOhio were correct that this action should be treated as a declaratory judgment action for purposes of assessing intervention, ProgressOhio would still have no right to intervene because it has no standing. In order to have standing to intervene in a declaratory judgment action, a person must have “a *legal* interest in the action”—not merely a practical or political interest. *Rumpke Sanitary Landfill, Inc. v. State*, 128 Ohio St.3d 41, 46 (2010) (emphasis added). In *Rumpke*, for example, this Court found that a township could not

intervene in an action challenging the constitutionality of a statute, even though (a) it would be affected by the result, (b) it undoubtedly had a practical interest in the matter, and (c) it had filed a separate lawsuit relating to the same issues:

Although Colerain Township is involved in litigation against Rumpke, it is not the only township affected by the amendment to R.C. 519.211. Virtually any township would be similarly affected, as would any county be affected by the amendment to R.C. 303.211. *Should Colerain prevail, potentially any township and county would be a necessary party to a constitutional challenge to legislation premised on a one-subject-rule violation. This would be a distorted reading of our ruling and create unmanageable litigation in cases of this type.*

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Admittedly, Colerain's interest in its pending litigation with Rumpke may be practically affected by Rumpke's declaratory-judgment action against the state, but Colerain has no legal interest in the authority of the General Assembly to enact amendments to R.C. 303.211 and 519.211 as part of Am.Sub.H.B. No. 562, an appropriations bill, in violation of the one-subject rule of the Ohio Constitution. Based on the foregoing, Colerain is not a necessary party to Rumpke's declaratory-judgment action.

Id. at 47 (emphasis added);² see also *Shoemaker v. City of Piqua*, 2nd Dist. Case No. 00CA32, 37, 2000 Ohio App. LEXIS 4742, at *9 (individuals who filed charges against a politician for violation of campaign finance laws were not necessary parties to a separate declaratory judgment action challenging the validity of those campaign finance laws because their "interests, as the court identified them, were political in nature, not legal").

Here, the Tenth District Court of Appeals and the Franklin County Court of Common Pleas have already properly determined that ProgressOhio has no standing to bring a declaratory judgment action challenging the constitutionality of the Legislation. ProgressOhio completely ignores those findings and brazenly asserts that "there simply is no doubt that Progress Ohio,

² ProgressOhio briefly states that it should be added as a necessary party under Civil Rule 19. (Motion at 7.) However, joinder under Rule 19 is also limited to parties with a "legal interest" in the matter. *Rumpke*, 128 Ohio St.3d at 46 (affirming denial of joinder under Rule 19 "[b]ecause

Skindell and Murray have standing.” (Motion at 5.) The issue of ProgressOhio’s standing is the subject of the appeal in Case No. 2012-1272 and this Court has not accepted (and should not accept) jurisdiction over that issue. Unless and until the Court accepts jurisdiction and reverses the lower courts’ decisions, the law of that case is that ProgressOhio lacks standing. ProgressOhio’s argument here is simply an improper attempt to back-door the standing issue into this Court.

In any event, ProgressOhio’s assertion that this Court recently created or expanded the rule on standing in *State ex rel. Teamsters Local Union No. 436 v. Bd. of County Comm’rs*, 132 Ohio St.3d 47, 2012 Ohio 1861 (2012), is wrong. (Motion at 4-5.) That case involved taxpayer standing under R.C. § 309.12 (not at issue here), and simply found that a union lacked standing where it “failed to allege any concrete taxpayer interest.” *Teamsters*, 132 Ohio St.3d at 51. This Court reaffirmed the rule set forth in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 1999 Ohio 123, 715 N.E.2d 1062 (1999), which is the same rule the Court of Appeals applied in finding that ProgressOhio lacked standing to challenge the Legislation.³

Whatever ProgressOhio’s interests may be in this matter, they are not *legal* interests that permit intervention as of right. As this Court warned in *Rumpke*, if an action concerning the constitutionality of a statute were required to join every person and organization that had an opinion on the matter—but no legal interests at stake—litigation would quickly become “unmanageable.” *Rumpke*, 128 Ohio St.3d at 46. ProgressOhio’s argument under Civil Rule 24(A)(1) therefore fails as a matter of law.

Colerain has no legal interest in the outcome of Rumpke’s challenge to the authority of the General Assembly to enact Am.Sub.H.B. No. 562”).

³ Because this Court found that the union failed to allege a public injury, it had no occasion to inquire whether the alleged constitutional issues were “of a magnitude and scope comparable to”

2. Civil Rule 24(A)(2) Does Not Apply Because ProgressOhio Has No Legal Interest At Stake And Whatever Interests It May Have Are Adequately Represented By Respondent.

Civil Rule 24(A)(2) provides for a second type of mandatory intervention “where the applicant claims an interest relating to the property or transaction” and “the applicant’s interest is [not] adequately represented by existing parties.” Civ. R. 24(A)(2). ProgressOhio cannot satisfy either of these requirements.

As discussed above with respect to Civil Rule 24(A)(1), the “interest” under section (A)(2) must be a “*legal* interest.” *Velocity Dev., LLC v. Perrysburg Twp. Bd. of Trs.*, 2011 Ohio 6192, ¶¶ 15-19 (6th Dist.) (emphasis added) (“Under Civ.R. 24(A)(2), the applicant’s interest must be legally protectable . . .”). A practical or political interest in the subject of the litigation does not permit intervention. *Id.* at ¶ 19 (affirming denial of intervention because “[d]espite their vocal opposition to the zoning reclassification, in their motion appellants failed . . . to demonstrate a legally protected interest in the subject of the declaratory judgment action”). For the reasons discussed above, ProgressOhio does not have any “legal interest” in this lawsuit and therefore has no right to intervene under Civil Rule 24(A)(2).

Civil Rule 24(A)(2) also requires the applicant to prove that its interests are not “adequately represented by the existing parties.” *Id.* at ¶ 15. ProgressOhio has failed to meet that burden. ProgressOhio’s Motion depicts a grand conspiracy to deliberately scuttle this lawsuit in order to have the Legislation declared constitutional—even going so far as to declare that the State “has no intention of filing a motion to dismiss” challenging the Legislation’s constitutionality. (Motion at 6.) These accusations and speculations are not only groundless, they are demonstrably false. Not only is a mandamus action an appropriate vehicle to resolve the

the issues in *Sheward*, 86 Ohio St.3d at 504, which was the specific standing issue addressed by the Court of Appeals in ProgressOhio’s action.

constitutionality of legislation, *see, e.g. State ex rel. Duerk v. Donahey*, 67 Ohio St.2d 216 (1981), but also, on April 24th, Special Counsel for Respondent filed a 31-page Motion for Judgment on the Pleadings advancing in detail all of the constitutional arguments regarding the Legislation that have surfaced to date and adding an argument under the “one subject rule” of Article II, Section 15(D) of the Ohio Constitution. If anything, Special Counsel has done a *superior* job in elucidating ProgressOhio’s ever-shifting array of constitutional accusations, supplementing and refining the analysis and providing further legal authorities in support of the arguments.

It is in both parties’ interests to have these constitutional issues conclusively resolved in this action to eliminate any cloud of uncertainty regarding the Legislation’s validity, and Respondent has clearly accepted his responsibility to ensure that all relevant issues and arguments are presented to this Court. ProgressOhio has failed to identify any interest that could only be protected by making it a party to this action, and as such ProgressOhio has no right to intervene under Civil Rule 24(A)(2).

B. The Court Should Not Permit ProgressOhio To Intervene.

In contrast to intervention as of right under Civil Rule 24(A), Civil Rule 24(B) grants the Court discretion to permit intervention “(1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant’s claim or defense and the main action have a question of law or fact in common.” ProgressOhio argues that the Court should allow it to intervene under Civil Rule 24(B)(2) because this case and ProgressOhio’s separate action have “questions of law and fact in common.” (Motion at 7.) This argument, however, ignores the current posture of ProgressOhio’s separate action in which the only questions of law and fact involve whether ProgressOhio has standing—questions that are not at issue here at all. Absent standing, no Ohio court has jurisdiction to consider the merits of the constitutional challenges brought by

ProgressOhio. Thus there are no common questions, and ProgressOhio cannot rely on Rule 24(B)(2) to support intervention here.

While the Court has discretion under Civil Rule 24(B), JobsOhio respectfully submits that the Court should not permit ProgressOhio to intervene as a party in this case. The Court's Rules of Practice specifically contemplate a person's ability to participate as an amicus even though they lack the requisite legal interests to become an actual party. *See* S. Ct. P. R. 3.5, 6.6. JobsOhio does not oppose ProgressOhio's participation as an amicus,⁴ and ProgressOhio has not explained why participating as an amicus would be inadequate.

Moreover, allowing intervention in this case simply because ProgressOhio has expressed an opinion on the merits of the constitutional issues would set a troubling precedent for similar actions in the future. To do so would obliterate the distinction between the proper roles of a party and an amicus and open a window for interest groups of all perspectives to derail litigation for political purposes. *See* Civ. R. 24(B) ("In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."). Parties lacking a legal interest in a matter should share their views through the means this Court has recognized as proper—as an amicus—and not be allowed to circumvent the legitimate judicial interests protected by this Court's jurisprudence on standing.

C. In The Alternative, If The Court Allows ProgressOhio To Intervene, JobsOhio Reserves The Right To Respond To Any Filings By ProgressOhio.

ProgressOhio attached to its Motion a proposed Answer, a Motion to Dismiss, and a Memorandum in Opposition to the parties' Joint Motion to Expedite. Because ProgressOhio should not be permitted to intervene as a party, none of those additional filings are proper and

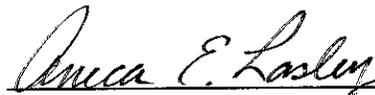
⁴ Contrary to ProgressOhio's assertion, the suggestion that the proper means for ProgressOhio to participate is as an amicus does not in any way concede that ProgressOhio has a legal right to

they warrant no response from JobsOhio. However, should the Court grant ProgressOhio's Motion to Intervene, JobsOhio reserves the right to respond to those other pleadings to the extent permitted under the Court's Rules of Practice. If, in the alternative to intervention, ProgressOhio files an amicus brief, JobsOhio requests the right to respond to such brief.

III. CONCLUSION

For all the foregoing reasons, Relator respectfully requests that the Court deny ProgressOhio's Motion to Intervene. If, however, the Court grants the Motion to Intervene, JobsOhio reserves the right to file responses to any and all of ProgressOhio's filings.

Respectfully submitted,



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intervene as a party. (See Motion at 5-6.) The fundamental purpose of recognizing an amicus is to allow parties to participate *despite the fact* that they have no right to be a party.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 28th day of August, 2012, by U.S. mail and electronic mail to the following:

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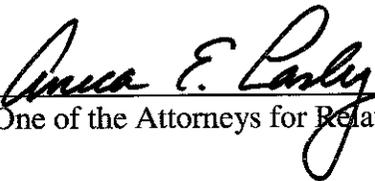
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