

ORIGINAL

IN THE SUPREME COURT OF OHIO

PROGRESSOHIO.ORG, INC., et al.,	:	Case No. 2012-1272
	:	
Appellants,	:	
	:	On Appeal from the
v.	:	Franklin County Court of
	:	Appeals, Tenth Appellate
JOBSSOHIO, et al.,	:	District, Case No. 11-AP-1136
	:	
Appellees.	:	

**APPELLEE JOBSSOHIO'S MEMORANDUM IN
OPPOSITION TO APPELLANTS' MOTION TO
CONSOLIDATE THIS CASE WITH JOBSSOHIO V.
GOODMAN 12-1356**

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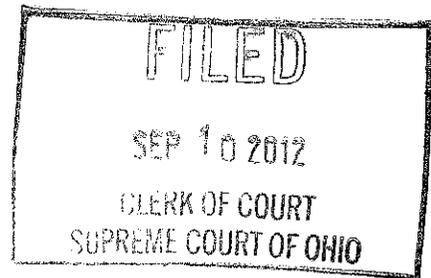
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I. Introduction

Rather than focus on the legal requirements for consolidation, Appellants argue *again* why they believe this case presents issues of public or great general interest. Appellants' Motion thus is nothing more than an attempted end-run around S.Ct. Prac. R. 3.3's prohibition against supplementation of jurisdictional memoranda and should be stricken. Moreover, as set forth in JobsOhio's Response to Appellants' Memorandum in Support of Jurisdiction, this appeal (which involves only the issue of standing) presents no constitutional issues and no issues of public or great general interest. The Court, therefore, should dismiss this appeal and deny Appellants' Motion to Consolidate as moot.

Additionally, Appellants fail to even cite the Rule governing, much less make the requisite showing for, consolidation. They also completely ignore the differences between an appeal—in which this Court will review only those issues *actually decided* by the lower court (here, only the procedural issue of standing)—and an original action—in which a party seeks the unique and extraordinary substantive remedy of mandamus because “there is no plain and adequate remedy in the ordinary course of the law.” *See State ex rel. Pressley v. Indus. Comm'n*, 11 Ohio St.2d 141, 162 (1967). This Court should thus summarily deny Appellants' motion.

Appellants' Motion should be denied in any event. As set forth in the Memorandum of Relator JobsOhio in Opposition to Motion to Intervene, there are no common questions of law or fact between this appeal and JobsOhio's mandamus action, and Appellants cannot establish otherwise. Appellants' unsupported and inaccurate characterization of JobsOhio's mandamus action as anything other than a tried and true judicial process¹ that may provide this Court an

¹ *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 Mgmt. Bd. v. Walker*, 55 Ohio St.3d 1 (1990); *State ex rel.*

opportunity to review the constitutionality of legislation and to compel a state official to perform a required act also fails to justify consolidation.

II. Law and Argument

A. The Court Should Deny Appellants' Motion as Moot.

Appellants seek to consolidate this appeal with JobsOhio's original action, but make no mention of the fact that this Court has not accepted jurisdiction of their appeal. Rather than focus on the requirements for consolidation under Rule 42(A), Appellants argue, as they did in their Memorandum in Support of Jurisdiction, why they believe this case presents issues of public or great general interest. Appellants' arguments are not only improper, they are also incorrect.

Although labeled a "Motion to Consolidate", Appellants' Motion is nothing more than a disguised supplemental or reply memorandum in support of jurisdiction. Appellants' Motion is devoid of any citation to Ohio R. Civ. P. 42(A)—the rule governing consolidation—and fails to make the requisite showing for consolidation. Instead, the primary focus of the Motion is on why Appellants believe this case warrants this Court's review. As such, this Motion should be stricken as violating S.Ct. Prac. R. 3.3, "Prohibition Against Supplemental and Reply Memoranda."

Moreover, as set forth in JobsOhio's Memorandum in Response to Appellants' Memorandum in Support of Jurisdiction, this appeal involves only the question of whether Appellants have standing to pursue their constitutional attacks on the JobsOhio legislation. This appeal thus presents no constitutional questions and does not involve any issue of public or great

Shkurti v. Withrow, 32 Ohio St.3d 424 (1987); *State ex rel. Bd. of Cnty. Comm'rs v. Mong*, 12 Ohio St.3d 66 (1984); *State ex rel. Duerk v. Donahey*, 67 Ohio St.2d 216 (1981).

general interest. The Court should therefore dismiss this appeal and deny Appellants' Motion as moot.

B. Appellants Make No Showing of Commonality.

With their focus on taking a second bite at establishing jurisdiction where none exists, Appellants neither cite the relevant Rule nor make the requisite showing for consolidation.

Under Rule 42(A), consolidation is only permitted when the two actions sought to be consolidated involve common questions of law or fact:

When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all of the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Ohio R. Civ. P. 42(A)(1); *see also Director of Highways v. Kleines*, 38 Ohio St.2d 317, 320 (1974). Before actions may be consolidated, "the court must determine if there is enough commonality of issues to warrant consolidation." *Waterman v. Kitrick*, 60 Ohio App.3d 7, 14 (Franklin Cty. 1990) (holding that court's decision to consolidate cases was erroneous where plaintiff was identical but other parties and claims were different). Here, Appellants make no argument or showing at all of what specific questions of law or fact this discretionary appeal (if granted) has in common with the JobsOhio mandamus action. Having failed to meet their burden on this Motion, the Court should summarily deny it.

C. No Common Questions of Law or Fact Exist Between the Two Actions.

Any attempt by Appellants to show commonality of issues would have fallen short in any event. What minimal commonality exists—primarily the fact that the two cases share *some* common parties—is overwhelmed by the enormous differences in the issues involved in the two

cases. Setting aside Appellants' colorful characterization of the two cases, the *facts* bear out the following with respect to the issues involved in the two cases:²

Appellants' Discretionary Appeal: The *sole* issue decided by the trial court and the Court of Appeals and, therefore, the *only* context for questions of law and fact to be considered by the Court here, is whether Appellants have standing.

JobsOhio's Mandamus Action: There are *no* questions of standing. Rather, the issues to be addressed in this original action are substantive issues relating to whether the JobsOhio legislation is constitutional, thereby warranting an order compelling Respondent Goodman to execute the Franchise and Transfer Agreement.

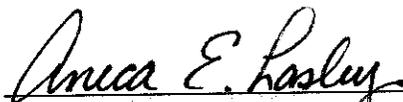
Because the lower courts have declined to reach the merits of Appellants' constitutional claims, those claims do not—and cannot—constitute common questions of law and fact with JobsOhio's mandamus action. *See, e.g., State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, ¶24 (2004) (Court declined to hear additional arguments made to Court of Appeals but not decided because it “generally does not consider issues that the court of appeals did not reach”); *Winslow v. Ohio Bus Line Co.*, 148 Ohio St. 101 (1947) (Court may not pass upon any question unless the record certified to it by Court of Appeals discloses that such question was presented to and passed upon by that court); *Wheeling & L.E.R. Co. v. Richter*, 131 Ohio St. 433 (1936) (Court will not pass on questions which have not had consideration of Court of Appeals). Accordingly, consolidation is not warranted, and Appellants' Motion should be denied.

² Appellants have also sought to intervene in the JobsOhio mandamus action both as a matter of right and discretion. Discretionary intervention, like consolidation, requires a showing that an applicant's claim or defense and the main action have a question of law or fact in common. As here, Appellants could only manufacture common questions by ignoring the current posture of their appeal (i.e., the fact that no court had reached the merits of their constitutional arguments) and the fact that the only issue that this Court would review is whether Appellants have standing.

III. Conclusion

For all of the foregoing reasons, JobsOhio respectfully requests the Court to deny Appellants' Motion to Consolidate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 10th day of September, 2012, by U.S. mail and electronic mail to the following:

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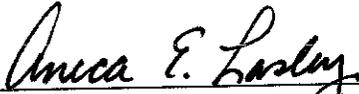
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