

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| MAHONING EDUCATION ASSOC. |) | CASE NO. 2012-1378 |
| OF DEVELOPMENTAL DISABILITIES, |) | |
| |) | On Appeal from the Mahoning County |
| Appellee, |) | Seventh Appellate District |
| |) | |
| v. |) | Court of Appeals Case |
| |) | No. 11 MA 52 |
| STATE EMPLOYMENT RELATIONS |) | |
| BOARD, et al., |) | |
| |) | |
| Appellants. |) | |

MERIT BRIEF OF AMICI CURIAE OHIO SCHOOL BOARDS ASSOCIATION AND OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS

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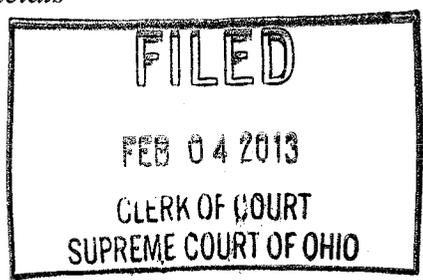


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STATEMENT OF AMICI INTEREST

Today, two of Ohio's statewide educational organizations –the Ohio School Boards Association (“OSBA”) and the Ohio Association of School Business Officials (“OASBO”) – are grateful for the opportunity to appear jointly as *amici curiae* to assist the Court in finding a solution to the vexing problems posed by this litigation.

OSBA is a non-profit, state wide organization whose membership includes 718 school boards of Ohio's local, city, exempted village, career center, and educational service center districts. Its mission and vision is to lead the way to educational excellence by serving Ohio's public school board members and the diverse districts they represent through superior service, unwavering advocacy and creative solutions.

OSBA is the recognized voice of public education, leading through demonstrated expertise, active and engaged membership, and superior service in a competitive, global environment. Through its efforts OSBA provides leadership and support to public boards of education for the nearly 1.8 million public school students in the State of Ohio from the smallest, most rural school districts, to the large urban ones. OSBA assists local boards of education with business and financial business, personnel and financial matters, communication and informational services as well as legal management and legislative assistance and provides policy development assistance to numerous school districts across the state.

The membership of OASBO currently numbers approximately 950 and is comprised primarily of school district treasurers, business managers, and supervisors in the fields of transportation and food service. Founded in 1936, OASBO is dedicated to learning, sharing, and utilizing better methods of school business administration, and realizes its goals through workshops, publications, seminars, networking, and mentorship.

OSBA and OASBO are not only engaged in representing boards of education throughout the State, but in representing their members in relevant litigation to promote the importance of quality public education. To this end, OSBA's and OASBO's appearances in this case as an *amici curiae* are essential. Boards of education throughout Ohio have an acute interest in insuring that school boards as employer and the unions representing their employees converse and resolve differences in a peaceful and professional matter with minimal impact on the students they have pledged to serve. Voiding the 10-day notice requirement before a picket, strike, or work stoppage would have a devastating impact on boards of education as they attempt to serve and educate Ohio's school children.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

OSBA and OASBO adopt the Statement of Case and Statement of Facts as contained in the brief of Appellants, State Employment Relations Board (“SERB”).

INTRODUCTION

The collective bargaining law for public employees in Ohio is contained in Ohio Revised Code Chapter 4117. The collective bargaining law, as designed, is intended to promote peaceful and collaborative negotiations between public employers and bargaining groups with the end result of successful, collective bargaining and resolution of disputes. This law has remained largely unchanged since its inception, regulating labor negotiations and labor disputes between public employers and their represented employees for 30 years.

The application of this law to the process of bargaining collectively and peacefully resolving labor disputes is so cherished by the citizens of Ohio, that the electorate recently rejected a legislative effort to overhaul the statute. Considering how deeply this regulation is valued by the public, courts must take great caution before embarking on any decision to dismantle it.

It is the assertion of the boards and members of the OSBA and OASBO that the opinion expressed by the Seventh Appellate District Court is contrary to the intent of the Ohio legislature, the intent of the citizens of this state, and the manifest rule of law. Ohio boards of education have the honor and responsibility of providing a public education to school-aged children. With this responsibility comes the obligation to ensure that students have safe passage to school, a clean and healthy environment in which to learn, a nourishing breakfast or lunch where appropriate, and the qualified personnel to provide the critical instruction that will shape

these children into our nation's future leaders. Accordingly, any state action that challenges a board's ability to meet this mandate must be questioned and disputed with the utmost fervor.

The case before this Court represents a misdirected effort to maximize the rights of public employees involved in a labor dispute. Unfortunately, the consequence of this decision is an overextension of a legal principle without regard to its impact on our youngest citizens.

LAW AND ARGUMENT

This is an appeal from the decision of the Seventh Appellate District of Mahoning County finding that the provision of the Ohio Public Employees Collective Bargaining Law that requires 10 day advance notice of intention to picket, strike or engage in other work stoppage is an unconstitutional violation of freedom of speech. The decision reviews R.C. §4117.11(B)(8) (hereinafter referred to as "the advance notice provision"), which makes it an unfair labor practice for an employee organization, its agents, or representatives or public employees to "Engage in any picketing, striking, or other concerted refusal to work without giving written notice to the public employer and to the state employment relations board not less than ten days prior to the action." R.C. §4117.11(B)(8). The subsection goes on to provide that "The notice shall state the date and time that the action will commence and, once the notice is given, the parties may extend it by the written agreement of both." *Id.*

This Application of this Notice Requirement is a Unique Concern for Boards of Education

The Collective Bargaining Law regulates the bargaining relationships between public employers and their employees. In the case at hand, the public employer is the Mahoning County Board of Developmental Disabilities. The legislation at issue, however, impacts all public employers. Under Ohio's Collective Bargaining Law a "public employer is defined as the State or any political subdivision of the State including Municipal Corporations, Counties,

Townships, School Districts, governing authority of community school, college preparatory, boarding schools, state institutions of higher learning, public or special districts, state agency, authority, commission or board or any other branch of public employment. R.C. §4117.01 (B). In turn, a public employee is defined as a person holding a position...R.C. §4117.01 (C). Accordingly, any employee of the State or a County, Township or other political subdivision and the boards of education throughout Ohio fit this definition. Concentrating on school boards as public employers, their officials, who are in large part elected by their citizens, have the responsibility for oversight of public education in the community they serve, all school age children and adults seeking a general education development diploma, and providing such things as health education, introduction to the arts, basic curriculum and instruction in creating an environment for children to discover and to develop their talents, vocations and citizenship.

By law, public employers are distinguished from private employers and non-profit corporations. Given that public employers are creatures of statute, all of their rights, privileges and authority are derived from Ohio law. Most importantly, much of what these public employers do and the conduct of their business, is subject to public scrutiny in a way not existing for private companies. For example, all meetings of a public entity must be conducted in a fashion that makes them open to the general public. See Generally, R.C. §121.22. Likewise, the records of a public entity must be kept by the public office and made available to the general public upon request. See Generally, R.C. §149.43. Based on the public nature of what these employers do, it is essential that they have the opportunity to control misinformation, to provide a secure environment not only for their employees but the general public, and to be afforded the opportunity to resolve conflicts before they impact the delivery of services these public entities provide.

The Advance Notice Provision is not a Prior Restraint

This advanced notice provision is constitutional in that it does not constitute a prior restraint of speech, and it is content--neutral in its general application. The notice provision does not constitute a prior restraint as it does not endow a public entity with the power to either grant or prohibit speech. The provision, as written and intended, merely requires notice before action – i.e. notice to public employers such as boards of education and to SERB – without a companion opportunity to prevent the speech, strike or other work stoppage from happening. There is no precedent cited, and none available, to show that after receiving such statutory notice, either a public employer or SERB has prevented an employee group from staging its protest, strike or work stoppage. Indeed, such action may constitute an unfair labor practice under R.C. §4117.11. To that end, it is unconscionable to determine that the language as written or applied constitutes a prior restraint.

Prior restraint involves a censorship of expression before the expression takes place. The advance notice provision of the collective bargaining law merely requires notification of the intended expression before it is exercised. The only action that can be taken concerning this type of expression is after-the-fact, whether through the filing of a ULP or the intervention of law enforcement. Regardless, it is not a barrier to expression connected with a labor dispute. Accordingly, it passes constitutional muster as an appropriate regulation.

The Advance Notice Provision is Content-Neutral

Likewise, the advance notice provision withstands another common constitutional test – that of content-based vs. content-neutral expression. As noted by the Appellate Court in *United Elec. Radio & Mach. v. SERB*, 126 Ohio App.3d 345, 710 N.E.2d 358 (8th Dist. 1998):

“The distinction between content-based and content-neutral regulation of speech is one of the central tenants of contemporary First Amendment jurisprudence. The characterization of law as content-based or content-neutral is enormously important, for it often effectively determines the outcome of First Amendment litigation. Content-based laws generally trigger heightened scrutiny one of its manifestations, and when heightened scrutiny is applied, the odds are quite high that the law will be struck down. Content-neutral laws, on the other hand, qualify for significantly less rigorous levels of review, often resulting in judicial decisions upholding the regulation at issue”. [internal citations omitted].

By its very terminology, a content-neutral regulation is one which does not control the content of a particular expression, but instead regulates other aspects of the expression. On its face, R.C. §4117.11 (B)(8) makes no reference to the content of a particular expression. The provision makes it an unfair labor practice to engage in picketing, striking or other concerted refusal to work without first giving at least ten days advance written notice to the public employer and to the State Employment Relations Board. Nowhere in this section can there be found a restriction on the type of communication that the employee organization, its agents, representatives or public employees may use. The regulation merely requires notification of the date and time that the action will commence.

Reviewing the intended purpose for the regulation clearly supports its content neutrality. The Trial Court recognized that, when the purpose behind a particular regulation is remedial in nature and thus incidental to speech, it can be considered content-neutral. If, however, the purpose focuses on directing the impact the speech will have on the intended listener or

audience, then the regulation is content-based. *City of Seven Hills v. Aryan Nations*, 76 Ohio St.3d 304, 306, 667 N.E.2d 942 (1996). The regulation here does not focus on directing the impact that the speech will have on intended listeners; instead it regulates the time, place and manner of the speech by requiring advance notice to the public employer. Moreover, the intent of the provision is not to stop speech from occurring, but more appropriately, to *manage* the impact on the public at large. This factor is critical for a board of education.

Appellee may attempt to argue that the high court's reasoning in *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), and *Carey v. Brown*, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980), with their dual findings of content-based regulations, is applicable here. However, a closer review of the facts and circumstances of those cases make them clearly distinguishable.

In *Mosley*, a law prohibited pickets or demonstrations within 150 feet of a school building around school hours, except for peaceful picketing of any school involved in a labor dispute. The Court found that the Chicago ordinance identified permissible picketing according to its subject matter, thereby prohibiting all other forms of peaceful picketing. The Court ruled that, by allowing labor dispute picketing and prohibiting all non-labor dispute picketing, the ordinance treated some picketing differently. Therefore, the Court found that the Equal Protection Clause of the Fourteenth Amendment was violated. The *Carey* case dealt with a prohibition against picketing at a residential dwelling, unless the residence was also a place of employment involved in a labor dispute. Looking to its decision in *Mosley*, the Court again found a Fourteenth Amendment violation.

Both *Mosely* and *Carey* were evaluated under the Equal Protection Clause of the Fourteenth Amendment, which would not have any application here. In both *Mosley* - and *Carey*

, the ordinances distinguished between picketing in general and picketing connected with a labor dispute. In the case at hand, the provision makes no such distinction between union involvement in picketing connected with a labor dispute and other picketing. In fact, as it relates to Ohio's advance notice provision as a whole, it is factually insignificant that Appellee and its employer were involved on a labor dispute. Finally, both of the statutes in *Mosley* and *Carey* dealt with prohibiting speech from ever occurring - a point Appellee may incorrectly attempt to use, but which in reality is not the case here. Arguably, a restriction that prohibits the opportunity to speak altogether has a greater likelihood of abuse of discretion in deciding who could speak and who could not. Notwithstanding, the provision at issue herein does not invite abuse of discretion, because no such exercise of discretion is available. Neither SERB nor the employer is given the opportunity to make a discretionary call on whether or not expression can take place. Likewise, a restriction that, on its face, treats a specific facet of the population that is subject to the regulation differently is cause for evaluation under an equal protection theory. However, R.C. §4117.11(B)(8) does not treat the impacted parties differently. For that reason, neither lower court concerned itself with an equal protection claim.

The Appellate Court Failed to Consider the Rights of Unwilling Observers and Listeners

The advance notice requirement of R.C. §4117.11(B)(8) is not only content-neutral, it also serves an important state interest in providing an opportunity to shield unintended observers and listeners from the pickets and work stoppage. Even if the Court were to find that the regulation at hand is content--based as it applied to labor picketing, and therefore is subject to a strict scrutiny analysis, the regulation herein must stand because it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Perry Edn. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

The advance notice provision, as written, applies to all public employers and their public employees. Evaluating the statute, as it applies to boards of education of public school districts throughout Ohio, shows a clear compelling interest in requiring the advanced notice. Consider the decision in *United Elect., Radio, Mach. v. SERB*. Even though the Eighth Appellate District reached the same conclusion regarding the constitutionality of R.C. §4117.11 (B)(8) as the Seventh Appellate District did here, that Court nonetheless recognized there are exceptions to its ruling. Examining the unique circumstances of the health care industry, the Court agreed that the National Labor Relations Act's 10-day advance notice requirement was appropriate because it is only applied to health care institutions, and further recognized that "unique circumstances" of the health care industry justify an exception to their ruling on constitutionality. *Id.* Such exceptional circumstances also exist here.

For example, in *United Elect.*, the Court recognized that health care industries were entitled to receive advance notice of picketing because boards of education, should be entitled to advance notice because as bodies politic they are required to conduct their business in public meetings. It is often the case that school board meetings include an opportunity to showcase students, and recognize student talent and achievement. Therefore, it is not uncommon for groups of youngsters to attend board meetings for performance or special recognition. As the children and their parents are not parties to labor dispute between the board and the employee group, they should not be forced to be unwilling listeners to this type of conflict. To force these young children to walk through a tunnel of disgruntled adults could have a lasting impact on these impressionable young ones. Moreover, when children attend such board meetings, they are routinely accompanied by parents and other family members (including other young children). The parents, upon seeing a mob of picketers, would understandably have immediate concern for

their children's safety. The apprehension and confusion that would accompany such ambush justifies some level of notice to these disinterested parties.

There is a significant difference between regulations on a speaker's right to address a willing audience, and regulations that protect listeners from unwanted communication. *Hill v. Colo.*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). In many cases, a deliberate verbal or visual assault could justify prescription of the right to free speech, since an unwilling listener's interest in avoiding unwanted communication and the right to be let alone are significant and valued rights of every citizen. *Id.* (internal citations omitted).

The events of the case at bar happened during a Commission meeting for the Mahoning County MRDD Board. They took place at a facility dedicated to serve medically fragile and developmentally disabled individuals who were not part of any labor dispute. To require that clientele to be subject to picketing or other uncomfortable labor activity is clearly outside the intention of the regulation's authors.

Even more compelling, the families of school-aged children hold the board of education responsible for their children's safety. By receiving advance notice of the intent to picket a board of education meeting or other board of education forum, a school district can reassess the prudence of continuing with the planned performance or recognition, and if necessary, reschedule the student achievement showcase to ensure that the spotlight remains on the children and their developing talents. Or, at a minimum, the district could provide advance notice to its resident parents and students and ensure that they are aware of the potential disruption to the student's recognition opportunity. In that case, advance notice would permit the board to make any necessary security arrangements to assuage concerns about the safety of children and families.

Moreover, as the Court found in *In re Ohio Civ. Serv. Emp. Assoc., Local 11, AFSCME*, SERB No. 94-009 (May 26, 1994), the ten-day requirement is necessary to fulfill a compelling governmental interest for several reasons:

- (1) It provides all parties an opportunity for at least ten days to resolve and mediate labor disputes through available procedures in Chapter 4117 in the Collective Bargaining Law without heightened emotion, publicity and disruptions, that often accompany picketing;
- (2) It provides the public employer with a ten day period in which to obtain additional security precautions and other arrangements necessary to protect property and carry on the public business and services;
- (3) It provides a ten day cooling off period;
- (4) It gives the employee organization a chance to work with employees to head off confrontations and additional time to reflect on the most productive course of action;
- (5) It allows the public employer a reasonable amount of time to adequately prepare a response to the publicity and media attention that often follows picketing activities, and;
- (6) It notifies SERB of the labor problem so that SERB has time to respond, prepare for and possibly attempt to resolve matters before the picketing actually begins.

Id., at 3-63. The importance of these functions is heightened in the school - setting where young children may inadvertently become involved in the fray. Because of the population served by public education, allowing time for composed and coordinated resolution of disputes when they reach a critical state must be favored over any impulsive reaction to an impasse. In fact, requiring a ten-day notice period prior to a picket would provide the parties with the opportunity to reflect on the situation, determine next steps and attempt to resolve the matter, if

possible. This would not only benefit both parties to the dispute, but it would ultimately avoid a significant impact on the educational environment, and all of the necessary services that are provided to students on a daily basis. As with the health care industry, the education industry serves our nation's most vulnerable citizens. Therefore, exceptional efforts to shield them from disruption of critical educational services is a logical and compelling interest of a body politic. Accordingly, just as the U.S. Supreme Court determined that a special exception exists for health care facilities in limitations on picketing and that health care facilities have a compelling government interest in receiving notice prior to picketing, by analogy, the same should apply to boards of education.

School districts have an increased responsibility to prevent the interruption of services that could cause children to miss critical instructional time. Moreover, since the site for picketing is often a school building, boards of education need as much time as possible to establish security measures for safe ingress and egress for young children to their respective school buildings. Most importantly, providing staff for supervision in this setting is far more compelling than in most others contemplated by the statute. The advanced notice allows boards of education to determine the necessary of alternative staffing for supervision of children. Finally, school districts have an increased responsibility to prevent the dissemination of misinformation to children and parents that may cause children to miss critical instructional time. Boards of education have a heightened obligation in these situations to communicate with parents and students for the purpose of setting and managing expectations concerning the school environment, and to minimize the stress and panic experienced by young children during a labor disruption or work stoppage. Clearly, parents of small children should be afforded some notice and opportunity to make alternate arrangements for their children to the extent such are

necessary. This notice and opportunity to pre-plan can only come through appropriate notice to the public employer. As many children may not have an adult at home during the school day, and understandably cannot provide their own transportation to most destinations, it is imperative that parents know in advance – by the board of education knowing in advance – that the routine children have come to rely upon could be disrupted.

Invalidating R.C. §4117.11(B)(8) in its Entirety is Overreaching

The decision of the Appellate Court is of greatest concern because it fails to consider that fact that the regulation it attempts to remove impacts more than a bargaining unit's right to picket anywhere without notice. The decision has fatal consequences during strikes and other work stoppage. Legislative enactments are presumed to be constitutional. *Rocky River v. SERB*, 443 Ohio St. 3d 1, (1989). The advanced notice section of the Collective Bargaining Law has been faithfully followed by bargaining groups throughout Ohio since its inception, and the cooling off period implied by the statute may have been the catalyst for the peaceful resolutions of numerous labor disputes, as every notice of picketing and strike has not resulted in a protest or work stoppage. Even if R.C. §4117.11 (B)(8) was unconstitutional as applied in the case at hand, it is clearly constitutional on its face; it also regulates notice for work stoppages and strikes. Amici has argued that 4117.11 (B)(8) is a content-neutral regulation and that it does not prohibit what some would consider unpopular speech, but merely regulates the time, place and manner of such speech by requiring advance notice of picketing. However, the statute does not solely regulate the expression at issue. It also regulates the manner of commencing the strike or work stoppage by requiring ten day advance notice of such action. Setting aside the picketing consideration for the moment, the notice requirement has the more compelling purpose for

boards of education in allowing school districts to prepare for strikes or other work stoppage that could railroad the education of thousands of school children.

Although a 10-day prior notice may be an inadequate amount of time to make all necessary arrangements, it does afford boards of education some time to consider (1) alternate means for transporting students, (2) consolidation of building services for ease of maintenance, (3) consolidation of building use for ease of maintenance, (4) the opportunity to line up other food services for children, and most importantly, (5) to ensure that education continues in the classroom. Without this minimal notice and time to plan for such catastrophe, devastating results could ensue. For example, without prior notice of a work stoppage and an opportunity to prepare the following scenarios will inevitably occur:

- Small children who rely on school buses for transportation might have no way to get to school, because bus drivers are involved in a work stoppage.
- Upon arrival at school, children could be impeded from admittance to the building, if the sidewalks and pavement have not been shoveled or de-iced to allow students safe entry into the schools, because maintenance workers are on strike.
- Even if they found a way to school and maneuver the hazardous walkways to enter the building without cafeteria workers, many students would not receive what might be their only balanced meals for the day, because cafeteria workers are in a labor dispute.
- Finally, and most compelling, students could arrive into a classroom with no one to provide instruction if boards of education are not given advance notice of a potential work stoppage and an opportunity to make alternate arrangements for children's education that day.

These scenarios are more frightening when looking at these statistics for the services noted. According to a 2010 study, between 16.1% - 66.7% of children in Ohio receive free and reduced priced meals. Annie E. Casey Foundation, *Kids Count Data Book*,(2010), available at http://www.aecf.org/~media/Pubs/Initiatives/KIDS%20COUNT/123/2010KidsCountDataBook/AEC197_book_final3.pdf For the 2004-2005 school year, 55.3% of the nation's children were bussed to school, and in 2009, Ohio budgeted over 443 million dollars for school transportation. Safe Routes to School National Partnership, *National Statistics on School Transportation*, available at http://www.saferoutespartnership.org/sites/default/files/pdf/school_bus_cuts_national_stats_FN_AL.pdf ; West Virginia University, College of Business and Economics, *Public School Transportation National and Regional Perspectives: An Update*, (2009), available at <http://www.be.wvu.edu/bber/pdfs/BBER-2009-02.pdf>. Bureau of Labor Statistics, *National Occupational Employment and Wage Estimates*,(2011), available at http://www.bls.gov/oes/current/oes_nat.htm. Moreover, the Bureau of Labor Statistics suggests nearly 130,000 Ohioans are employed as school teachers to educate our state's children to the completion of their secondary education. Clearly, there is a compelling government interest in providing an appropriate education to Ohio's children, ensuring their safe passage to school, providing nutritious meals, and offering a secure environment in school conducive to learning. The section of the Ohio Revised Code at issue does not prevent bargaining employees from picketing or striking; it merely requires a brief advance notice of such intent. Therefore, it is nearly tailored to accomplish these compelling government interests.

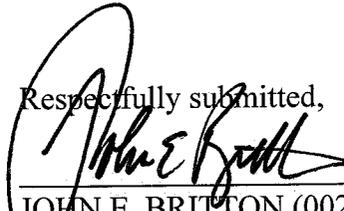
CONCLUSION

During some challenging times in our nation's history, Chief Justice Warren Berger offered these often-quoted thoughts on the role public education plays in the landscape of America.

Today, education is perhaps the most important function of state and local governments. Compulsory attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awaking the child to culture values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child can reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Bd. of Educ., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). As the advance notice provision of R.C. §4117.11 impacts not only more than picketing, but also the significant labor issues of work stoppage and strike, any action to void this regulation solely on free speech grounds, as it relates to boards of education, would be improper and overreaching.

Respectfully submitted,



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Ohio School Boards Association and
Ohio Association of School Business
Officials*

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing *Merit Brief of Amici Curiae Ohio School Boards Association and Ohio Association of School Business Officials* was filed this 4th day of February 2013, via regular U.S. mail, postage prepaid upon the following:

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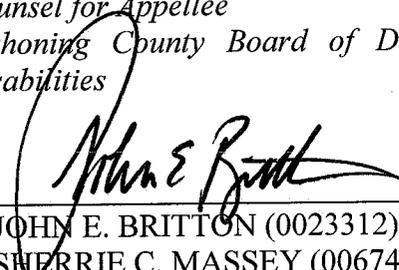
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