

ORIGINAL

IN THE SUPREME COURT OF OHIO

PROGRESSOHIO.ORG, INC., et al.,

Case No. 2012-1272

Appellants,

On Appeal from the
Franklin County Court of
Appeals, Tenth Appellate
District, Case No. 11-AP-1136

v.

JOBSSOHIO, et al.,

Appellees.

**APPELLEE JOBSSOHIO'S MEMORANDUM IN
OPPOSITION TO VICTORIA ULLMAN'S MOTION FOR
JUDICIAL NOTICE AND SUMMARY REVERSAL**

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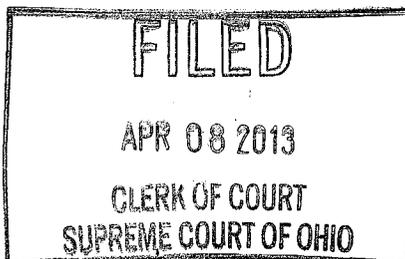
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I. INTRODUCTION

JobsOhio has thus far attempted to avoid the crossfire of motions between the Appellants, amicus, and ProgressOhio's former counsel, but Victoria Ullman's Motion for Judicial Notice and Summary Reversal demands a response. Ms. Ullman is neither a party to this case nor counsel for any party, and yet in an attempt to one-up her former client she asks the Court to skip the standard briefing and argument process and summarily reverse the Tenth District Court of Appeals based on new allegations that are entirely outside the record and ultimately irrelevant. Even if Ms. Ullman were a party, such a motion would be completely improper and should be denied.

Ms. Ullman's motion perpetuates Appellants' pattern of disregard for settled law and procedure, and is based on the same wild and conspiratorial factual speculation that underlies this entire lawsuit. Appellants brought this case alleging a combination of superficial and meritless constitutional claims for the purpose of derailing legislation with which they politically disagree. In this appeal, Appellants ask the Court to abandon the settled rules of standing to allow them to pursue their baseless and obstructionist claims. Now, in an effort to retake control of this litigation, Appellants' former counsel asks the Court to abandon its Rules of Practice and deny JobsOhio the right to brief and argue its case by "summarily reversing" the decision below based on matters entirely outside the record.

Enough is enough. The rules of standing, procedure, and evidence do not cease to apply to this lawsuit merely because they pose obstacles to the personal interests that continue to drive it forward. If the Court is to do anything "summarily," it should deny Ms. Ullman's improper and unauthorized Motion.

II. LAW AND ARGUMENT

A. The Court Should Deny Ms. Ullman's Improper And Unauthorized Motion.

The Court's Rules of Practice provide for the orderly resolution of appeals—parties are given sufficient time and space to brief the issues, followed by an opportunity to argue their case before the Court. Ms. Ullman seeks to circumvent that entire process and asks the Court to “summarily reverse” the appellate court's decision that Appellants lack standing to bring this lawsuit. The Court should deny this improper and unauthorized Motion.

First of all, Ms. Ullman is not currently a party to this appeal and does not represent any party, and the Court's Rules of Practice do not authorize these motions to be made by non-parties. *See, e.g.*, S.Ct.Prac.R. 4.01(B)(1) (“If a *party* files a motion with the Supreme Court, any other party may file a response”) (emphasis added), 4.04(B)(3) (prohibiting amicus from filing motions for recusal), 18.02(C) (prohibiting amicus from filing motions for reconsideration).

Even if Ms. Ullman's Motion could be deemed to be conditional upon the Court permitting her to intervene as a party, there is no legal basis or precedent to dispose of this appeal through motion practice. While the Rules of Practice give the *Court* the power to “enter judgment summarily,” Rule 7.08(B)(3), nowhere do the Rules authorize *parties* to move the Court to dispose of a case summarily. To the contrary, the Rules provide a briefing and argument process designed to give all interested parties and amici an adequate opportunity to present their positions, and to ensure that the issues are squarely presented for the Court's review.

Regardless of whether Ms. Ullman is granted leave to intervene or whether she participates as an amicus, she can raise all the issues in her Motion during the merit briefing

process. Indeed, given that Appellants' merit briefs (and the briefs of any amicus supporting Appellants) are due within a matter of days, the timing of Ms. Ullman's Motion suggests it is simply an attempt to seize control of this case from her former client by filing a preemptive strike in advance of the briefing schedule.

The Court should not condone this type of unauthorized and redundant motion practice, which will only encourage parties to unnecessarily clutter the Court's docket with issues that will ultimately be resolved in the merit briefing. As such, because the Rules of Practice do not authorize Ms. Ullman's Motion and because Ms. Ullman, as a non-party to this appeal, has no grounds to file any motion, the Court should deny her motion in its entirety. To the extent Ms. Ullman wishes to pursue the issues or arguments in her Motion, she can do so during the ordinary briefing process provided for in the Rules.

B. Ms. Ullman's Request For Judicial Notice Is Also Improper.

Although the Court should deny Ms. Ullman's Motion for the reasons stated above, her request for judicial notice warrants a brief response. The alleged "facts" that Ms. Ullman's Motion describes are neither appropriate for judicial notice nor relevant to the standing issue before this Court let alone the Appellants' underlying claims.

Under Evidence Rule 201(B), a fact may only be subject to judicial notice if it is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ms. Ullman's Motion does not mention this standard or even arguably satisfy it.

Ms. Ullman's Motion describes 11 purported "facts" taken from newspaper articles, including the following:

1. The state of Ohio has *leased* its entire liquor wholesale business to the private entity JobsOhio and its separate but subsidiary entity JobsOhio Beverage Systems. (Exhibit 1, 2)

2. Jobs Ohio/JobsOhio Beverage System will control the operations and profits of the wholesale liquor business *which is a state asset*. (Ex. 1, Ex 2)

(Motion at 5 (emphasis added).) These are not “facts” at all and they are absolutely subject to “reasonable dispute.” For example, as consistently and repeatedly presented in its filings with this Court and the courts below, JobsOhio has acquired from the State a “franchise” on the “liquor enterprise” as expressly authorized in R.C. 4313.02(A) with that franchise constituting an “absolute conveyance and true sale”; this is not a “lease” and with the consequence that the liquor revenue received by JobsOhio under that franchise is *not* a state asset. If, as suggested by Ms. Ullman’s motion, these matters are at the core of the underlying constitutional claims in this lawsuit, they cannot be assumed away through the device of judicial notice. If and when a proper plaintiff with standing challenges the JobsOhio Legislation, these disputed issues will be resolved by the courts—not by the Columbus Dispatch.

Appellants’ standing arguments are similarly undermined by Ms. Ullman’s assertions regarding the scope of persons affected by the JobsOhio Legislation. (*See* Motion at 7.) If indeed “[e]very business, every employee and every individual seeking work or to start a business is potentially [a]ffected by how economic development funds are distributed in the state,” (*id.*) the fact remains that not one of those businesses or employees is a party to this action. Either Ms. Ullman’s grandiose assertions overstate the impact of the JobsOhio Legislation (in which case there is certainly no basis for public right standing), or it is a concession that there are numerous persons and businesses with legal interests potentially at stake but none of whom are parties to this lawsuit.

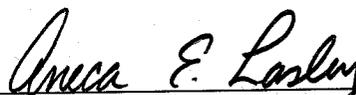
In holding that Appellants lack standing, the Tenth District correctly applied settled law as set forth by this Court, and its reasoning is not at all impacted by the purported “facts” that Ms. Ullman argues in her Motion, nor are those “facts” an appropriate subject of judicial notice. In fact, Ms. Ullman’s Motion and the other recent filings by Appellants and their former counsel illustrate exactly why standing is a fundamental prerequisite to any lawsuit—it ensures that claims are brought by those with a *legal* stake in the matter and that lawsuits are not instituted or commandeered for personal or political agendas. The personal and political bickering this case has created is merely a preview of what awaits if the Court were to abandon the rules of standing for constitutional claims as Appellants and Ms. Ullman propose.

Under S.Ct.Prac.R. 7.10, the Court has the authority to dismiss an appeal sua sponte as improvidently allowed, and JobsOhio respectfully submits that in light of recent events, dismissal of this appeal would be justified and appropriate. Standing is the only issue over which the Court accepted jurisdiction, and recent developments have raised serious questions about who is the real party in interest in this case for standing purposes. It also appears that there may be a contractual dispute about whether ProgressOhio even has the right to pursue or direct this litigation. To the extent the Court wishes to revisit questions regarding the contours of public right standing, it should await a less problematic vehicle for doing so.

III. CONCLUSION

For all of the foregoing reasons, JobsOhio respectfully requests that the Court deny Victoria Ullman's Motion for Judicial Notice and Summary Reversal.

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 8th day of April, 2013, by U.S. mail and electronic mail to the following:

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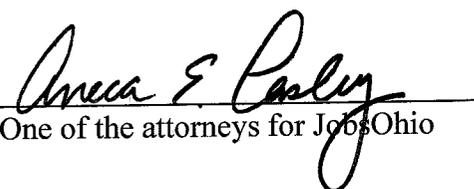
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