

IN THE SUPREME COURT OF OHIO

PROGRESSOHIO.ORG, INC., et al.,

Case No. 2012-1272

Plaintiffs-Appellants,

ON APPEAL from the Court of Appeals for
the Tenth Appellate District of Ohio

vs.

Ct. of Appeals No. 11-AP-1136

JOBSOHIO, et al.,

Defendants-Appellees.

**BRIEF OF *AMICUS CURIAE* OHIO EDUCATION ASSOCIATION IN SUPPORT OF
APPELLANTS PROGRESSOHIO.ORG, INC, SENATOR MICHAEL SKINDELL AND
REPRESENTATIVE DENNIS MURRAY, JR.**

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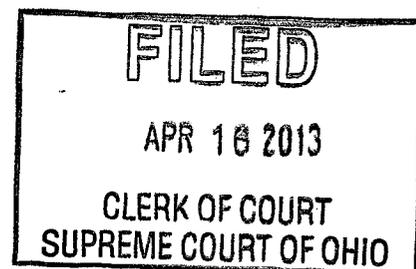
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STATEMENT OF AMICUS INTEREST

The Ohio Education Association submits this brief as *amicus curiae* in support of the position of Plaintiffs-Appellants ProgressOhio.org, Inc., Michael J. Skindell and Dennis E. Murray, Jr. (hereinafter collectively referred to as “Appellant” or “ProgressOhio.org”). The Ohio Education Association (hereinafter referred to as “OEA”) is a non-profit association which represents over one hundred twenty-one thousand (121,000) public school teachers, school support staff and higher education faculty and staff. The OEA is an affiliate of the National Education Association.

The OEA has seven hundred fifty two (752) local affiliated associations throughout the State of Ohio. These local affiliated associations function as “employee organizations” as defined by Ohio Revised Code (hereinafter “R.C.”) 4117.01(D), and as “exclusive representatives” for purposes of collective bargaining, as defined by R.C. 4117.01(E). OEA’s affiliates are signatory to collective bargaining agreements with public employers throughout Ohio. The collective bargaining agreements are executed pursuant to R.C. Chapter 4117, and are predominantly with Ohio public school boards.

The OEA’s Mission Statement is as follows:

The OEA will lead the way for continuous improvement of public education while advocating for members and the learners they serve.

Inherent in the OEA’s mission, both as a statewide entity and on behalf of its affiliated associations, is advocacy in regard to issues that threaten to undermine the resources available to public education in violation of the Constitution and laws of Ohio. The Constitution of Ohio, Article VI, Section 2, mandates a “thorough and efficient system of common schools” in the

state.¹ The OEA, its local affiliates and its members encounter the deficiencies of Ohio's public school funding system on a daily basis.² The continuing deficiencies fostered by Ohio's property tax-dependant school funding system are needlessly compounded by actions in contravention of Ohio's Constitution and by laws that seek to undermine the will of the electors.

The OEA views the legislation at issue in the appeal at bar as an unconstitutional attempt to divert State funding to private interests without accountability to taxpayers and without transparency. The standing issue now before this Court will determine whether the General Assembly's fundamental change in the structure of how the State funds critical public functions will be evaluated for its conformity with the Constitution of Ohio. The OEA therefore submits this *amicus curiae* brief in support of the Constitution and laws of the State of Ohio and in support of the position of Appellant ProgressOhio.org.

¹ Constitution of Ohio, Article VI, Section 2, provides, in its entirety:

The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

² In *DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E. 2d 733 (1997) ("*DeRolph I*"); 89 Ohio St. 3d 1, 728 N.E. 2d 993 (2000) ("*DeRolph II*"); and 97 Ohio St. 3d 434, 2002-Ohio-6750, 780 N.E. 2d 529 (2002) ("*DeRolph IV*"), this Court struck down Ohio's public school funding system as unconstitutional. The Ohio General Assembly's struggle to comply with the *DeRolph* mandate is ongoing.

STATEMENT OF THE FACTS AND OF THE CASE

The OEA defers to the statement of facts as set forth in the Appellant ProgressOhio.org's brief on the merits. To summarize the essential facts, the "JobsOhio Act," R.C. 187.01 *et seq.*, was enacted by the 129th General Assembly's Amended Substitute House Bill No. 1. The Act creates JobsOhio as a privately operated -- yet state-funded -- corporation to create jobs and to promote Ohio economic development. JobsOhio, though not a state agency, is to be controlled by a board of directors appointed by the governor and is to be funded in part by the proceeds of Ohio's wholesale liquor profits for the next twenty-five (25) years. R.C. 187.01(B); 187.03(A); R.C. 4313.02(A). JobsOhio is to report to the governor and legislature once per year. R.C. 187.03(F). The JobsOhio Act requires that any claim asserting that one or more Revised Code sections enacted or amended by its terms violates the Ohio Constitution must be brought within ninety (90) days of September 29, 2011 (the effective date of HB 153's amendments to the Act) in the Franklin County Court of Common Pleas.³ R.C. 187.09(B).

On April 18, 2011, Plaintiffs-Appellants ProgressOhio.org, Inc., Senator Mike Skindell and Representative Dennis Murray (collectively "Appellant ProgressOhio.org") filed a constitutional challenge to the JobsOhio scheme as an original action in this Court. *ProgressOhio.org v. Kasich*, 129 Ohio St. 3d 449, 2011-Ohio-4101, 953 N.E. 2d 329 ("*ProgressOhio.org I*"). This Court dismissed that original action for lack of subject matter jurisdiction on August 19, 2011. Appellant ProgressOhio.org filed this lawsuit on August 29, 2011 in the Franklin County Court of Common Pleas.

³ This limitation does not apply to actions within the original jurisdiction of the Ohio Supreme Court or Ohio Courts of Appeals. R.C. 187.09(D).

ProgressOhio.org's Complaint asserts multiple constitutional defects in the JobsOhio Act. The Trial Court herein dismissed the Complaint upon its finding that ProgressOhio.org lacked standing. In an order dated June 14, 2012, the Court of Appeals of Ohio, Tenth District, Franklin County affirmed the Trial Court's judgment, also citing, *inter alia*, a lack of standing. *ProgressOhio.org, Inc. v. JobsOhio*, 2012-Ohio-2655, 973 NE 2d 307 (2012).

On July 27, 2012, ProgressOhio.org filed a "Notice of Appeal" and "Memorandum in Support of Jurisdiction for Appeal as of Right and Discretionary Appeal" in this Court. On January 23, 2013, this Court accepted ProgressOhio.org's appeal on Appellant's Proposition of Law No. 3 ("Plaintiff's have standing to bring this action"). See "Memorandum in Support of Jurisdiction for Appeal as of Right and Discretionary Appeal of Progress Ohio [*sic*], Senator Michael Skindell and Representative Dennis Murray, Jr." at ii.

The parties are now submitting their merit briefs to this Court. *Amicus Curiae* Ohio Education Association hereby submits this brief urging reversal of the Court of Appeals' June 14, 2012 finding that Appellant ProgressOhio.org lacks standing.

ARGUMENT

PROPOSITION OF LAW NUMBER ONE:

Plaintiffs-Appellants have standing to bring this action.

This Court's benchmark ruling on public-right standing is set forth in *State ex. rel. Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 NE 2d 1062 (1998):

Where the object of an action in mandamus and/or prohibition is to procure the enforcement or protection of a public right, the relator need not show any legal or special individual interest in the result, it being sufficient that the relator is an Ohio citizen and, as such, interested in the execution of the laws of this state.

Syllabus at 1. This Court recognized the public-right doctrine as “an exception to the personal-injury requirement of standing,” elaborating:

But more than that, “the public action is conceived as an action to vindicate the general public interest. Not all alleged illegalities or irregularities are thought to be of that high order of concern.” [4] Thus, this court will entertain a public action “under circumstances when the public injury by its refusal will be serious.” [5]

Sheward, 86 Ohio St. 3d at 503; 715 N.E.2d at 1103. This Court made clear in *Sheward* that it did not create a new judicial doctrine or theory of standing. *Sheward*, 86 Ohio St. 3d at 502-04; 715 N.E.2d at 1103-04. Rather, this Court applied existing “principles to protect or enforce the people’s right to maintain the constitutional system of justice they created[.]” 86 Ohio St. 3d at 503, 715 N.E.2d at 1104. Accord, *State ex rel. Newell v. Brown*, 162 Ohio St. 147, 150-151; 122 N.E. 2d 105 (1954) (citing this Court’s long-standing adherence to the public-right doctrine).

Moreover, this Court did not leave its discussion in *Sheward* before describing the potential scope of its ruling with appropriate constraint:

We have expressed quite clearly ... that this court will entertain a public action only “*in the rare and extraordinary case*” where the challenged statute operates, “*directly and broadly, to divest the courts of judicial power.*” We will not entertain a public action to review the constitutionality of a legislative enactment unless it is of a magnitude and scope comparable to that of Am.Sub.H.B. No. 350.[6]

⁴ Quoting Jaffe, *Standing to Secure Judicial Review: Public Actions* (1961), 74 HARV. L. REV. 1265, 1314.

⁵ Quoting *State ex rel. Trauger*, 66 Ohio St. 612, 616; 64 N.E. 558, 559 (1902), with internal quotation from *People ex rel. Ayres v. Bd. of State Auditors*, 42 Mich. 422, 429; 4 N.W. 274, 279 (1880).

⁶ Am. Sub. H.B. No. 350 was a civil justice reform bill found by this Court to “[intrude] upon judicial power by declaring itself constitutional, by reenacting legislation struck down as

Sheward, 86 Ohio St. 3d at 503-04, 715 N.E.2d at 1104 (emphasis in original). The error in the Court of Appeals' decision below lies in its elevation of this restraint over and above the vindication of the general public interest in regard to the JobsOhio Act. As a result, the Court of Appeals prevented use of the public-right exception in the very context warranting its application.

The Court of Appeals was not unaware of the "significant concerns" that ProgressOhio.org raised in its legal challenge. The Court of Appeals quotes the dissent of Justice Pfeifer in *ProgressOhio.org I*, observing:

[I]n terms of great public interest, the most one can say about the challenged legislation is that it "makes significant changes to the organizational structure of state government." *** This is not enough of a public concern to confer standing on appellants.

ProgressOhio.org, Inc. v. JobsOhio, 2012-Ohio-2655, supra, at ¶31; quoting *ProgressOhio.org I*, 2011-Ohio-4101 at ¶9. To the contrary, the OEA respectfully submits that the foregoing characterization is not merely "the most one can say;" rather is it *all one need say* to justify a finding of public-right standing.

The foregoing quotation from the *ProgressOhio.org I* dissent, in its full context, draws a comparison to *State ex rel Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225, 631 N.E. 2d 582 (1994)—a case cited along with *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St. 3d 504, 2002-Ohio-6717, 780 N.E.2d 981 -- as cases "this court has accepted for exceptional review...involving statutes that had comprehensive reach and wide impact." *ProgressOhio.org I*, 2011-Ohio-4101 at ¶8. Like those cases, the case at bar presents a factual

unconstitutional, and by interfering with this court's power to regulate court procedure." *Sheward*, 86 Ohio St. 3d at 462, 715 N.E.2d at 1076.

scenario that imposes a change upon the structure of state government, and does so in a manner that will elude judicial review of its constitutionality absent a finding of public-right standing.

Absent recognition of Appellant ProgressOhio's standing to bring its constitutional challenges, constitutional redress is only available for those issues in the JobsOhio Act that cause personal injury *and* that are fully ripe within the first ninety days following the law's amendment by H.B. 153. Not only has that time limitation long since lapsed (ninety days after September 29, 2011), it lapsed before the JobsOhio Act even became fully operational. R.C. 187.09(B). JobsOhio, a non-state entity, will therefore circumvent transparency and accountability for its use of public funds beyond the single annual report to the governor and legislature. R.C. 187.03(F).

A characteristic of the post-*Sheward* decisions of the Ohio Courts of Appeals is the conclusory "this is not that case" tenor of the analysis. *See e.g. Brown v. Columbus City Schools*, 2009-Ohio-3230 (10th Dist.), *appeal not allowed by* 123 Ohio St. 3d 1496 (2009) and *Brinkman v. Miami University*, 2007-Ohio-4372 (10th Dist.). While the public-right standing exception is narrow -- and appropriately so -- "narrow" is not the equivalent of "never." Without a clear set of factors to calibrate the appropriateness of public-right standing, the courts are instead left to rule upon questions of public-right standing based upon the *absence* of unspecified indicators of those "rare and extraordinary cases" rather than upon the presence of such indicators. Stated simply, a set of factors that indicate a need for public-right standing provides a common basis for determining whether such standing is justified. The alternative is the current approach. While the current approach does allow the more obvious form of the "rare and extraordinary case" to cry out from the void and reveal itself, it forecloses judicial review of constitutional questions that may present themselves more insidiously.

Amicus curiae OEA respectfully submits that an issue of “a magnitude and scope” similar to the civil justice reform law at issue in *Sheward* may not always present itself with the immediate impact of that law. As a result, laws and legislative schemes that undermine the Ohio Constitution may alter the state’s governmental structure and separation of powers before a personal injury -- or even a public injury of the requisite obviousness -- manifests itself. A judicial remedy for the personal injury will not remedy the systemic constitutional injury.

Judicial reluctance to declare public-right standing is appropriate, but without affirmative guiding factors, reluctance can cause a default to erring on the side of inaction in cases that require constitutional inquiry. Such cases presenting the more insidious form of constitutional injury are to be distinguished from claims calling for “imposition...of premature declarations or advice upon potential controversies” as long prohibited in Ohio law. *Fortner v. Thomas*, 22 Ohio St. 2d 13, 14, 257 N.E. 2d 371 (1970). While advisory opinions must be avoided, the magnitude of an issue for purposes of determining standing cannot be ascertained in total isolation from the facts presented.

The JobsOhio Act represents a new level of legislative insulation from judicial review. *Amicus Curiae* OEA submits that the Act’s impact is extraordinary, yet insidious. If upheld without constitutional scrutiny, the JobsOhio Act and its template will be the leading edge of a change in the structure of government and the role of its three branches as set forth in the Ohio Constitution. The existing post-*Sheward* model for determining public-right standing will no longer effectuate *Sheward’s* purpose of allowing such standing in the rare and extraordinary cases. For example, the Tenth District Court of Appeals’ opinion in *Brown v. Columbus City Schools*, 2009-Ohio-3230, *appeal not allowed by* 123 Ohio St. 3d 1496 (2009), illustrates the OEA’s concern that the change in governmental process presented by the JobsOhio Act will, if

applied in the context of school funding evade judicial review if public-right standing is not applied in the case at bar.

In *Brown*, taxpayers and residents of Columbus were found to lack private standing to challenge per-pupil funding disparities within the district that the plaintiffs deemed inconsistent with the Ohio Constitution's mandate of a "thorough and efficient" system of public schools. Ohio Constitution, Article VI, Section 2. The Court of Appeals upheld the trial court's finding that the plaintiffs lacked private standing for failure to:

allege any facts showing that they have or will suffer a direct and concrete injury stemming from any per-pupil disparities within Columbus City Schools that is different from the injury suffered by the public in general.

2009-Ohio-3230 at ¶7. The Court of Appeals also affirmed that the public-right exception to the standing rule did not apply. In so ruling, the Court was clearly deterred by the cautionary language in *Sheward*:

The [*Sheward*] court made clear that it was not suggesting that citizens have standing to challenge the constitutionality of every legislative enactment that allegedly violates the doctrine of separation of powers or exceeds legislative authority. The court emphasized that it will entertain a public-right action only in the rare and extraordinary case where the challenge statute operates directly and broadly to divest the courts of judicial power.

2000-Ohio-3230 at ¶¶7, 8 (internal citations to *Sheward* omitted). Thus deterred, the Court of Appeals denied public-right standing on the basis that the appellants therein could "*point to no similar case in which a court has permitted a taxpayer to bring a declaratory action against a school district to challenge its method of funding allocation.*" 2009-Ohio-3230 at ¶14 (emphasis added). The per-pupil funding issue was found, without elaboration, to be "not of the same magnitude" as the issue in *Sheward*. *Id.*

The *Brown* decision epitomizes the current void in the law that serves as a substitute for an affirmative standard. Under *Brown*, private-right standing fails due to the inherent difficulty

in demonstrating concrete, individual injury as a result of school funding disparities. Likewise, a school funding issue is found to be of “insufficient magnitude” to warrant public-right standing primarily because such an issue had never served as a basis for such standing in the past. The rationale for *why* the per-pupil funding issue was deemed of insufficient magnitude was glossed over. The rationale was treated as entirely secondary to the fact that a similar issue had not previously warranted public-right standing. The same could be said for virtually every other issue apart from the specific civil justice reform issue presented in *Sheward*. However, this Court did not limit *Sheward*'s acknowledgement of public-right standing to *only* civil justice reform. Rather, this Court acknowledged the appropriateness of public-right standing for issues “of the same magnitude.”

Sheward's magnitude must now be calibrated so that the rule of law in that precedent may be applied where appropriate. The OEA respectfully submits that *Sheward* may be applied appropriately without being applied excessively. *Sheward* need not be applied in contravention of the “rare and extraordinary” limitations which must, of necessity, limit public-right standing. Such clarity is necessary, as the JobsOhio Act foreshadows far more sweeping legislative shifts in methods of state funding. Absent a finding of public-right standing, JobsOhio's level (or absence) of accountability to the state, and level (or absence) of public transparency will elude the judiciary and any testing of the Act's conformity with the Ohio Constitution. The sums of money at issue are significant enough to have an impact upon the level of public services the state provides.

Absent more defined standards to calibrate the comparative “magnitude” of a public-right action on par with *Sheward*, critical shifts in the governmental framework will evade review. If a similar shift in framework is applied to public education, it will fundamentally undermine the

Ohio Constitution's "thorough and efficient" clause and affect all Ohio learners. Yet under current application of *Sheward*, such facts would likely evade judicial review -- as did *Brown* -- merely because "no similar case" has allowed public-right standing on the same basis. The OEA is concerned that the current dearth of defining standards will drive the resolution of analogous standing issues to outcomes identical to *Brown* and to the decision below. The case at bar presents an appropriate opportunity for this Court to correct the constitutional defects in the JobsOhio Act, and to fill the post-*Sheward* void with calibrating criteria that will facilitate meaningful analogy. This will permit future Courts to either apply or distinguish *Sheward* without fear of issuing improper advisory opinions.

CONCLUSION

For all of the foregoing reasons, and upon such additional grounds as set forth in the brief of Plaintiffs-Appellants ProgressOhio.org, Inc., Michael J. Skindell and Dennis E. Murray, Jr., *Amicus Curiae* Ohio Education Association respectfully asks that this Court reverse the June 14, 2012 Order and Opinion of the Franklin County Court of Appeals, Tenth Appellate District, and enter a finding that Plaintiffs-Appellants have standing to advance the claims set forth in the Complaint at bar.

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The undersigned certifies that a copy of the foregoing “**Brief of *Amicus Curiae* Ohio Education Association in Support of Appellants ProgressOhio.Org, Inc, Senator Michael Skindell and Representative Dennis Murray, Jr.**” was served via regular United States Mail this 16th day of April, 2013, upon the following counsel:

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