

ORIGINAL

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.

JOBSOHIO, et al.,

Defendants-Appellees.

**MERIT BRIEF OF APPELLANTS PROGRESSOHIO.ORG, INC., AND STATE
LEGISLATORS DENNIS MURRAY AND MICHAEL SKINDELL**

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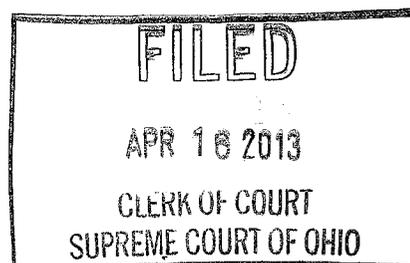
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INTRODUCTION

"[J]udges are cautioned to remember, standing is not a technical rule intended to keep aggrieved parties out of court"

- *Moore v. Middletown*, 133 Ohio St.3d 55 (2012)

Standing is the most critical of constitutional issues because it is the vehicle that provides Ohioans with access to all other rights. Without standing to enforce constitution limits on government, those limits become meaningless, the legislature becomes all-powerful, and the judiciary is of little constitutional consequence.

Appellants here ("ProgressOhio") must have standing to demonstrate that the most critical structural guarantees of Ohio's Constitution prohibit the public-private arrangement created by the JobsOhio legislation. And indeed, by way of common law, constitutional, and statutory principles, ProgressOhio does maintain standing.

In the absence of such standing, the governmental action at issue here would otherwise go unchallenged. Meanwhile, those directly and immediately affected by the complained of matter are beneficially affected, or potentially beneficially affected, and not inclined to challenge the action. Redress through other channels is unavailable, and no other persons are better situated to assert the claim. More globally, denying ProgressOhio standing in this case would have the invariable effect of deleting many of the essential structural limitations on government chronicled in the Ohio Constitution. The need to include these structural limits provided the catalyst for the 1850 constitutional convention. And in this matter, ProgressOhio credibly contends that prohibiting public-private arrangements like JobsOhio is the very reason for which these limitations were devised. Accordingly, judicial review of this matter is appropriate.

In undertaking its analysis, this Court must be mindful that the federal precedent on standing is not governing, the Ohio Constitution does nothing to prohibit standing in a matter such as this, past Ohio precedent supports standing, and the common law precedent of nearly every other state in the nation facilitates standing in matters such as this.

Meanwhile, it must recognize that the lower courts became lost in a malaise of overly-formalized and procedural-heavy analysis, relying too heavily on the non-binding ruling of federal courts and a minority of Ohio's intermediate courts of appeals. These courts lost their way in failing to appreciate the limitations of the "personal stake" requirement's application to structural constitutional safeguards against cronyism, overspending, and indebtedness. And if the Ohio Constitution is to be in force, their rulings must be abrogated: ProgressOhio must be found to maintain standing to maintain a constitutional challenge to the arrangement(s) presented by the JobsOhio legislation.

Despite its criticality, some Ohio courts have, over the past decade, muddled Ohio's standing jurisprudence. Replete with confusion, inconsistencies, and obliviousness to the *Ohio* Constitution, many of these courts have attempted, ironically in the name of "restraint," to impose their own extra-constitutional hurdles on Ohioans' vindication of their right to enforce the constitution designed to protect and benefit them. The most pernicious features of these courts' decisions are (1) ignoring the Ohio Constitution and applying federal standing precedent, which unlike in Ohio, is dependent on the limiting Article III "cases and controversies" requirement; and (2) requiring that an Ohioan have a "personal stake," "special interest," or "unique injury" to enforce structural limitations on government spending and indebtedness. This is even though the violations of these limitations injure all Ohioans in an equally attenuated fashion, but injures none of them in a "personal" way that affords standing under these judicially-imagined rubrics.

The Ohio Constitution must be presumed and construed to be enforceable. Accordingly, the Appellate Court must be reversed, and ProgressOhio must maintain standing to challenge the constitutionality of the JobsOhio arrangement.

STATEMENT OF THE CASE AND FACTS

In 2011, through the passage of House Bill 1, the legislature enacted R.C. 187.01 to R.C. 187.12 ("The JobsOhio legislation" and/or the "The JobsOhio arrangement"). Concomitant with the passage of the

JobsOhio legislation, its architect, Governor Kasich, explained its purpose: "JobsOhio is designed to create an independent not-for-profit entity. . . to manage clusters of industries. . ." ¹ The Governor continued, "[t]he State of Ohio helped [First Solar]. You know what the State of Ohio got for helping [First Solar]? Not a thing. Had we taken a ten percent stake in First Solar, we would now have a stake worth \$150 million . . . that's precisely what we want to do." ² "This program will become a model for other states," he added. ³

The legislation creates a private corporation - - JobsOhio - - and any and all potential subsidiaries; ⁴ designs the articles of incorporation for the JobsOhio; ⁵ provides a board of directors and "chief investment officer" to be appointed by the Governor alone; ⁶ provides for "a contract with the director of development for * * * carrying out the functions or duties of the department, including the operation and management of programs, offices, divisions, or boards, as may be determined by the director of development in consultation with the governor;" ⁷ controls the conduct and compensation of the directors; ⁸ and delineates the specific parameters for eligibility to serve on the private corporation's Board of Directors. ⁹

By virtue of the statute, JobsOhio conducts its public functions with public funds in relative secrecy. ¹⁰ Further, the State of Ohio is required to contract with JobsOhio. ¹¹

¹ Gov. John Kasich speaks about his JobsOhio initiative during the annual meeting of the Wayne Economic Development Council March 24, 2011, in Wooster, Ohio. Kasich spoke at the Shisler Center on the campus of Ohio State University's Ohio Agricultural Research and Development Center. Speech available at <http://www.youtube.com/watch?v=IFrQG7jVWZY>, uploaded on March 24, 2011. Last checked April 8, 2013.

² Id.

³ Id.

⁴ R.C. 187.01.

⁵ Id.

⁶ Id., at Division (B), (E).

⁷ Id., at Division (F)(3).

⁸ Id., at Division (F),(G).

⁹ R.C. 187.02.

¹⁰ R.C. 187.03.

¹¹ R.C. 187.04. ("The director of development, as soon as practical after the effective date of this section, shall execute a contract with JobsOhio for the corporation to assist the director and the department of development with providing services or otherwise carrying out the functions or duties of the department,

To facilitate JobsOhio's acquisition of funding to invest in private corporations, R.C. 4313.01 *et seq.* authorizes an "enterprise acquisition project," whereby all assets of the State of Ohio's spirituous liquor distribution and merchandising operations of the Division of Liquor Control are to be transferred to JobsOhio for a period not exceeding 25 years.

Upon passage of the JobsOhio legislation, ProgressOhio promptly filed an action in *this* Court challenging the constitutionality of the JobsOhio arrangement and the statutory limitations on legal actions challenging JobsOhio. On August 19, 2011, this Court declared the JobsOhio legislation's limitations on jurisdiction unconstitutional, thereby finding the jurisdiction vested in it by the statute unconstitutional, and therefore dismissing ProgressOhio's substantive claims.¹²

At approximately the same time, the legislature amended the JobsOhio legislation's jurisdictional feature, which attempts to narrow the means by which JobsOhio can be challenged. R.C. 187.09(B) now specifies as follows:

Except as provided in division (D) of this section, any claim asserting that any one or more sections of the Revised Code amended or enacted by H.B. 1 of the 129th general assembly, any section of Chapter 4313. of the Revised Code enacted by H.B. 153 of the 129th general assembly, or any portion of one or more of those sections, violates any provision of the Ohio Constitution shall be brought in the court of common pleas of Franklin county within ninety days after the effective date of the amendment of this section by H.B. 153 of the 129th general assembly.

Accordingly, on November 16, 2011, ProgressOhio filed its First Amended Complaint in the Franklin County Court of Common Pleas. That Complaint describes ProgressOhio as a membership organization of 350,000 providing "a progressive voice for Ohio citizens, and alleges that "one of [ProgressOhio's] primary goals is to ensure that the government follows the dictates of the U.S. and Ohio Constitutions and that government is accountable for its actions to the citizens of the state."¹³ State

including the operation and management of programs, offices, divisions, or boards, as may be determined by the director in consultation with the governor.")

¹² 2011-Ohio-0622.

¹³ Plaintiffs' November 16, 2011 First Amended Complaint, Paragraph 12.

Legislators Skindell and Murray join the litigation in their capacities as citizens and taxpayers.¹⁴ ProgressOhio's members are also predominantly Ohio citizens and taxpayers.

ProgressOhio's Complaint alleges that the JobsOhio arrangement violates numerous key structural limitations imposed by the Ohio Constitution on state government, including violations of Section 1, Article XIII (prohibiting legislative acts conferring corporate powers); Section 2, Article XIII (prohibiting formation of corporations under anything other than general laws); Section 4, Article VIII (prohibiting the state from making equity investments in private corporations, prohibiting lending of the state's credit to private corporations, and prohibiting "joint ventures" between the state and private business); Section 16, Article I (mandating that "all courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law* * *"); Section 22, Article II (prohibiting appropriations beyond two years); Section 2h, Article VIII (prohibiting the state from exceeding its bond limit). The Complaint then requests declaratory and injunctive relief, and, notably, "all other relief which this Court may deem appropriate."¹⁵ The Complaint thoroughly supplies facts and statutory citations in support of these allegations.

Further, and importantly, ProgressOhio's Complaint unambiguously alleges that violation of these constitutional limits results in unlawful use of public funds and/or property.¹⁶ All Plaintiff-Appellants claim standing by virtue of statute and common law.¹⁷

Defendant-Appellees responded with Motions to Dismiss attacking ProgressOhio's standing to bring this action. The Trial Court acknowledged ProgressOhio's arguments that it possessed standing as citizens and taxpayers, that it possesses standing under the "public right doctrine" due to the matter's "great

¹⁴ Id., at Paragraph 13.

¹⁵ Id., Prayer for Relief.

¹⁶ Id., at Paragraphs 28-31, 37-43, 48-50, 52-53.

¹⁷ Id., at Paragraph 14.

public interest," and that it was not required to "show any individual injury."¹⁸ However, the Trial Court concluded that (1) "'public right' standing is distinct from taxpayer standing;" (2) "the Court finds no individual harm that could form the basis of taxpayer standing;" (3) "taxpayer standing still requires some form of individual or particularized harm separate from every other taxpayer;" (4) public interest standing is not appropriate in disputes regarding "how funds are allocated," and would "open the floodgates;" and (5) Ohio statutes should not be construed in favor of finding the standing needed to adjudicate cases on the merits, and thus the JobsOhio legislation "cannot be said to abrogate common law standing rules," and does not confer standing on ProgressOhio [or anyone].¹⁹

Upon appeal to the Court of Appeals for the Tenth District, that court rendered a decision that would appear to undermine the integrity of the Ohio Constitution and deny Ohioans the fullest protect of their rights. In a lengthy block quote citing one of its own 2012 rulings, the Court cites federal precedent alone, or state precedent simply borrowing from federal precedent for the propositions that (1) "a litigant must have a personal stake in the matter he or she wishes to litigate;" (2) the injury must be "palpable" and "to the plaintiff himself or to a class;" and (3) "an injury which is borne by the population in general, and which does not affect the plaintiff in particular, is not sufficient to confer standing."²⁰ These requirements stretch well beyond the "irreducible constitutional minimums" of injury, causation, and redressability.

Further, the Appellate Court asserted "appellants cannot find the kind of rare and extraordinary circumstances necessary to invoke public-interest standing, therefore, the public-right exception to the usual personal stake requirement for standing cannot be met * * * in 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."²¹

¹⁸ December 2, 2011 Order of the Franklin Court of Common Pleas granting Defendants' Motions to Dismiss on the grounds that Plaintiffs lack standing, and dismissing Plaintiffs' Complaint, pp. 11, 15.

¹⁹ Trial Court Order, supra., at pp. 22-24, 27.

²⁰ *ProgressOhio.org, Inc. v. JobsOhio*, 2012-Ohio-2655, pp. 4-5.

²¹ *ProgressOhio.org, Inc. v. JobsOhio*, 2012-Ohio-2655, pp. 8-10.

However, the Appellate Court rationales for barring these Appellants' claims are extremely weak. The Appellate Court relied on the following rationales previously posited by the Courts of Appeals for the Twelfth and Tenth Districts, respectively: (1) "such a broad common-law standing rule would subject most government actions to a taxpayer suit because most state activities are funded, in some way and to some degree, with general tax revenues;"²² (2) "[s]uch a rule also would run contrary to clear federal precedent, which Ohio courts regularly follow on matters of standing;"²³ and (3) "public officials should not be subjected to constant judicial interference."²⁴

These rationales fail to withstand scrutiny, and the Appellate Court's denial of standing must be reversed.

LAW AND ARGUMENT

Proposition of Law: The Plaintiff-Appellants maintain standing to bring this action.

This Court should find that ProgressOhio maintain standing to challenge the constitutionality of the JobsOhio arrangement. In *Moore v. Middletown*, this Court recently addressed standing under Ohio's Declaratory Judgment Act. There, this Court explained "[i]t is well settled that standing does not depend on the merits of the plaintiff's contention that particular conduct is illegal or unconstitutional. Rather, standing turns on the nature and source of the claim asserted by the plaintiffs."²⁵ The Court then reiterated that "three factors—injury, causation, and redressability—constitute "the irreducible constitutional minimum of standing."²⁶

Further, this Court explained in *Moore*, "judges are cautioned to remember, standing is not a technical rule intended to keep aggrieved parties out of court."²⁷ "Rather, it is a practical concept designed

²² *Brinkman v. Miami University* 2007-Ohio-4372.

²³ *Brinkman*, supra.

²⁴ *Gildner v. Accenture LLP*, 2009-Ohio-5335.

²⁵ *Moore v. Middletown*, 133 Ohio St.3d 55, 975 N.E.2d 977 (Ohio 2012).

²⁶ Id.

²⁷ Id.

to insure that courts and parties are not vexed by suits brought to vindicate non-justiciable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented.”²⁸

Here, the decision of the Court of Appeals in this case cannot be permitted to stand. That decision relies principally on federal standing limitations for the nonsecuritor that Ohioans have no standing - - and effectively no method at all - - of enforcing constitution limits on state spending, indebtedness, and cronyism. In doing so, it ignores (1) the independent significance of the Ohio Constitution (including its absence of limitations akin to Article III standing requirements in the federal constitution); (2) the fact that the provisions in dispute here are, as the responses to the very issues that precipitated the constitutional convention of 1851, of critical public interest; (3) the inapplicability and illogic of the “personal stake” requirement when citizens seek to enjoin unlawful expenditures of public funds and uses of public property; and (4) the abject absence of an intellectual justification for its contribution to the slow erosion of Ohioans right to enforce the Ohio Constitution in Ohio courts.

However, this Court must recognize that (1) federal precedent plays no role in *prohibiting* ProgressOhio from maintaining standing - - distinguishable Ohio precedent and constitutional provisions govern the analysis; (2) an absence of standing here effectively deletes certain structural constitutional limits on government; (3) the public interest exception to traditional standing requirements applies to this matter; (4) common law taxpayer standing precedents and principles of this state and other require standing; (5) ProgressOhio maintains statutory standing through Ohio's Declaratory Judgment Act and R.C. 187.09; and (6) public policy considerations favor standing in this matter - - multiple limiting principles ameliorate concerns about opening the "floodgates" to endless litigation. All the while, this Court must be mindful of the need to facilitate enforcement of the Ohio Constitution's structural limits on government;

²⁸ Id., citing *Fort Trumbull Conservancy, L.L.C. v. Alves*, 262 Conn. 480, 486, 815 A.2d 1188 (2003), quoting *Maloney v. Pac*, 183 Conn. 313, 320, 439 A.2d 349 (1981).

and the serious burden that truncated statutes of limitation place on plaintiffs seeking to challenge the constitutionality of the relevant legislation.

Meanwhile, Appellants have clearly pled the "irreducible constitutional minimums of standing": their Complaint alleges, either explicitly or inferentially, that (1) they are taxpayers or citizens; (2) public funds and properties, in which they have an equitable interest, are being unlawfully applied; (3) the state is violating key structural constitutional restraints on government that Appellants are entitled to live under; and (4) invalidation of the JobsOhio arrangement will resolve its constitutional infirmities and ameliorate the unlawful use of public funds and property. Indeed, in 2012, this Court found that state taxpayers adequately alleged injury, causation and redressability so as to maintain standing, where they claimed that already-collected public funds were being unconstitutionally misapplied for non-highway purposes.²⁹ Consequently, this Court has the discretion, if not the mandate, to find that ProgressOhio maintains standing. It should exercise that discretion, so that the Ohio Constitution may be enforced and having meaning, to find that ProgressOhio maintains standing through any of the vehicles articulated below.

This Court should reject the Appellate Court's conclusions and rationales, clarify its standing doctrine related to structural limitations of the Ohio Constitution - - the violation of which does not always result in a "personal stake" or "unique injury" for anyone, and implement a standard that facilitates enforcement of the Ohio Constitution's plain limits on government conduct. In the course of doing so, the ostensible result must be that ProgressOhio maintains standing to enforce these limits as against the JobsOhio arrangement.

A. The Appellate Court's reliance on the *federal* constitution to abridge Ohioans' standing under the *Ohio* constitution is misplaced.

Application of explicit demarcations in Article III of the federal constitution to this state-based constitutional dispute cannot be justified. Because it relies on those demarcations, the Court of Appeals' Decision quite clearly insults the dignity of the Ohio Constitution and denies Ohioans the fullest protection

²⁹ *Beaver Excavating Company v. Testa*, *infra*.

of their rights. In a lengthy block quote citing one of its own 2012 rulings, the Court cites federal precedent alone, or state precedent simply borrowing from federal precedent for the propositions that (1) "a litigant must have a personal stake in the matter he or she wishes to litigate;" (2) the injury must be "palpable" and "to the plaintiff himself or to a class;" and (3) "an injury which is borne by the population in general, and which does not affect the plaintiff in particular, is not sufficient to confer standing."³⁰

However, the United States Supreme Court has repeatedly reminded state courts that they are free to construe their state constitutions so as to provide different, and broader, protections of individual liberties than those offered by the federal Constitution.³¹ The Supreme Court has further declared that "state courts' interpretations of state constitutions are to be accepted as final, as long as the state court plainly states that its decision is based on independent and adequate state grounds."³²

Further yet, "[t]he decisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of *state* law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them."³³ In fact, *this* Court has acknowledged "when a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their right,"³⁴ and further "we believe that the Ohio Constitution is a document of independent force."³⁵ More recently, this Court added

³⁰ *ProgressOhio.org, Inc. v. JobsOhio*, 2012-Ohio-2655, pp. 4-5.

³¹ *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing, e.g., *City of Mesquite v. Aladdin's Castle, Inc.* (1982), 455 U.S. 283, 293, 102 S.Ct. 1070, 1077, 71 L.Ed.2d 152, 162 (" * * * [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); See, also, *Pruneyard Shopping Ctr. v. Robins* (1980), 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741, 752.

³² *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing *Michigan v. Long* (1983), 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201, 1214-1215.

³³ Brennan, *State Constitutions and the Protection of Individual Rights* (1977), 90 Harv.L.Rev. 489, 502. (emphasis added).

³⁴ *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163.

³⁵ *Arnold*, *supra*.

“[w]e are, of course, free to determine that the Ohio Constitution confers greater rights on its citizens than those provided by the federal Constitution, and we have not hesitated to do so in cases warranting an expansion,”³⁶ since “state constitutions are a vital and independent source of law.”³⁷ Accordingly, Ohio courts are free to interpret the Ohio Constitution without adherence or deference to federal court decisions - the United States Constitution provides a floor, not a ceiling, for rights enjoyed by state citizens.³⁸

Here, federal limits should not obstruct Ohioans' vindication of their state-based rights. In 1802, 1851, and 1912, the framers of the Ohio Constitution were no doubt aware of the federal constitution's Article III “cases and controversies” requirements; and they were of course mindful of the concept of judicial review. Yet the Ohio Constitution contains no provision analogous to the “cases and controversies” limitation, and does nothing to limit judicial review. In addition, the drafters of the Ohio constitution created neither a “personal stake” or “direct injury” requirement.

Instead, Article IV governs judicial authority, and simply provides “the judicial power of the state is vested in a supreme court. . .” and “the several judges of the Supreme Court . . . shall, respectively, have and exercise such power and jurisdiction . . . as may be directed at law.”³⁹ Consequently, the Ohio Constitution places no prohibitions on Ohioans bringing nor Ohio courts hearing actions regarding the constitutionality of state spending, indebtedness, and cronyism decisions. To the contrary, Section 16, Article I provides “all courts shall be open, and every person * * * shall have remedy by due course of law, and shall have justice administered without denial or delay * * *.” Consequently, the exclusion of a jurisdictional standing bar must be viewed as *deliberate*, and the text of the Ohio Constitution must be read in a manner consistent with rendering its safeguards *actually enforceable*. As Justice John Marshall

³⁶ *State v. Gardner* (2008) 118 Ohio St.3d 420, 889 N.E.2d 995, citing *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (holding that the Ohio Constitution's Takings Clause affords greater protection than the corresponding federal provision).

³⁷ *Gardner*, *supra*, citing generally William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights* (1986), 61 N.Y.U.L.Rev. 535.

³⁸ *PruneYard Shopping Ctr. v. Robbins* (1980), 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741; *State v. Brown* (1992), 63 Ohio St.3d 349, 588 N.E.2d 113.

³⁹ See Section 1, Article IV, Section 19, Article IV, respectively.

famously explained "The enumeration presupposes something unenumerated." And what is not enumerated in the Ohio Constitution is anything remotely resembling the draconian standing requirements fashioned by the Appellate Court.

In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, this Court acknowledged this critical distinction from the federal constitution, and Ohio's obligation to permit broader standing:

In the federal judicial system, where the requirement for injury is grounded in the constitutional requirements of Section 2, Article III of the United States Constitution, the necessity of showing injury in fact prevails irrespective of whether the complaining party seeks to enforce a private or public right. * * * However, the federal decisions in this area are not binding upon this court, and we are free to dispense with the requirement for injury where the public interest so demands. Unlike the federal courts, state courts are not bound by constitutional strictures on standing; with state courts standing is a self-imposed rule of restraint. State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits.⁴⁰

In addition, in *McKee v. Likins*, the Minnesota Supreme Court explained the rationales for limited public interest and taxpayer standing in *federal* courts:

Two principal rationales have been advanced for the use of different tests for taxpayers' suits on the Federal and state level, first, the greater number of taxpayers on the Federal level and hence the greater disruption a single taxpayer might have on the large amount of Federal when compared to state spending, and second, the large percentage of federal funds devoted to the sensitive areas of defense and foreign affairs. Other justifications advanced include the more intense coverage of official activities on the Federal level (and hence greater public exposure), the more stringent "case or controversy" requirement under the Federal constitution, and the sheer size of the Federal budget.⁴¹

None of these rationales carry force in Ohio cases such as this: (1) there are less taxpayers in Ohio, few with the means to underwrite principled litigation, and few public interest organizations; (2) Ohio does not devote funds to "sensitive areas" such as "defense and foreign affairs;" (3) less taxpayers have an interest or awareness in complex state fiscal issues; and (4) there is no "case or controversy" requirement in the Ohio Constitution.

⁴⁰ *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062; see also 59 American Jurisprudence 2d (1987) 415, Parties, Section 30.

⁴¹ 261 N.W.2d 566, 570-71 (Minn. 1977). Internal citations omitted.

Here, “the public interest so demands” that the injury requirement be dispensed with, and this Court must “reject procedural frustrations in favor of just and expeditions determination on the ultimate merits.” Applying federal standing precedent is not mandatory, and Section 16, Article I demands access to courts for redress. Meanwhile, applying federal law here, with respect to spending and indebtedness limitations, renders legislative enactments invincible, the judiciary feckless, and key provisions of the Ohio Constitution a nullity - - if Ohio legislators will not follow the Ohio Constitution and Ohio judges refuse to enforce it, then its words are meaningless, and we live under the arbitrary mercy and beneficence of our fellow man, rather than the rule of law. When in doubt, this Court should presume that the Ohio Constitution was written to be enforced - - and federal principles simply cannot bar ProgressOhio's standing here.

B. Without public interest, taxpayer, or statutory standing here, many of the Ohio Constitution's structural safeguards would be effectively redacted.

Appellants must maintain standing because if the Court of Appeals’ views of public right standing and the requisite “personal stake” required to raise an action before Ohio courts prevails, a number of critical provisions will be read out of the Ohio Constitution. This includes all of Articles VIII and XIII, at issue in this case, but also includes the following important constraints on the legislature- - all responses to the events that gave rise to the 1850-51 Ohio Constitutional Convention (those provisions with an asterisk are directly and explicitly at issue in this case):

- Section 2, Article I: “* * * [N]o special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.”
- Section 15(D), Article II: “No bill shall contain more than one subject, which shall be clearly expressed in its title.”
- Section 26, Article II: “All laws, of a general nature, shall have uniform operation throughout the state.”
- *Section 4, Article VIII: “The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever, nor shall the state ever

hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere * * *."

- *Sections 1, Article XIII: "The General Assembly shall pass no special act conferring corporate powers.
- *Section 2, Article XIII: "Corporations may be formed under general laws * * *."
- *Section 2h, Article VIII: "The state may, from time to time, borrow not to exceed two hundred ninety million dollars and issue bonds or other obligations thereof for any one or more of the following purposes * * *."
- *Section 22, Art. II: "No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."

Pursuant to the Tenth District's decision in this case, this Court must ask and answer the following questions. *Who* has a sufficiently "personal stake" to challenge a state appropriation made for longer than two years, on the basis that it violates a clear structural limit on government? *Who* has a sufficiently "personal stake" to challenge the state's formation of a private corporation with special corporate powers under a special act, on the basis that it violates a clear structural limit on government? *Who* has a sufficiently "personal stake" to prevent the state from borrowing funds in excess of its debt limitation, on the basis that it violates a clear structural limit on government? *Who* has a sufficiently "personal stake" to prevent the evils of logrolling inherent in bills that contain more than one subject or lack uniformity? And *Who* has a sufficiently "personal stake" to prevent the lending of the credit of the state to an individual corporation? With the vast majority of legislative enactments that may transgress these limits, the answer is abundantly clear: If the Tenth District's Decision stands, no Ohioan has the right to enforce these constitutional limits on government. Put another way, in the absence of public interest, taxpayer standing, or statutory standing, no Ohioan has the capacity to use these constitutional provisions to restrain government to its clear constitutional confines. This result is the ultimate judicial activism: *as if this Court had entirely redacted these parts of the Ohio Constitution.*

The Idaho Supreme Court made this same observation. It "entertain[s] taxpayer or citizen challenges based upon that constitutional provision," and the group *most adverse* to" a government arrangement typically maintains standing to challenge the constitutionality of the arrangement."⁴² It does so because "[i]f this Court were to hold that taxpayers do not have standing to challenge the incurring of indebtedness or liability in violation of that specific constitutional provision, we would, in essence, be deleting that provision from the Constitution * * * nobody would have standing * * * there would be nobody who could require that political subdivisions comply with this constitutional provision."⁴³

Ohio's standing jurisprudence should facilitate, rather than thwart, the application and enforceability of the Ohio Constitution. After all, "constitutional provisions are not the kin of statutes; they are the paramount law of Ohio. Constitutional provisions are superior to statutes because they derive from the people, the fount of all political power, whereas statutes derive from the General Assembly, which has only the authority delegated to it by the people."⁴⁴ Indeed, "[c]onstitutions are written so as to constitute the most fundamental law of their jurisdiction."⁴⁵ Likewise, as Chief Justice Marshall wrote in *Marbury v. Madison*, "[t]he Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."⁴⁶ Further, "written constitutions have heretofore been framed chiefly to protect the weak from the strong and to secure to all the people 'equal protection and benefit.' They have been constructed upon the theory that majorities can and will take care of themselves; but that the safety and happiness of individuals and minorities need to be secured by guaranties and limitations in the social compact, called a constitution." These principles demand that, as Justice Pfeifer has recently acknowledged, "[g]iven the

⁴² *Koch v. Canyon County*, 145 Idaho 158, 160, 177 P.3d 372, 374 (2008).

⁴³ *Id.*

⁴⁴ *Cincinnati, Wilmington & Zanesville RR. Co. v. Clinton Cty. Commrs.* (1852), 1 Ohio St. 77, 85, 1852 WL 11 ("all political power resides with the people"); Federalist No. 78; See *Marbury v. Madison* (1803), 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60.

⁴⁵ See *Marbury v. Madison*, 5 U.S. 137 (1803).

⁴⁶ *Id.*, at 177.

obvious supremacy of the Constitution, [the] better rule of construction would be to resolve all doubts in favor of the applicability of the Constitution.”⁴⁷

Consequently, if many of the Ohio Constitution's important structural limits are to be made *applicable* (and they must), ProgressOhio must have public interest, taxpayer, or statutory standing to enforce those provisions in this case.

C. The public interest exception to traditional standing requirements lends Appellants standing to challenge the JobsOhio arrangement.

In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, this Court unambiguously stated “this court has long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves *no rights or obligations peculiar to named parties*.”⁴⁸ *Sheward* was a reiteration of the principles explained by this Court 60 years ago in *State ex rel. Newell v. Brown*, where it held “[o]rdinarily a person is not authorized to attack the constitutionality of a statute, where his private rights have suffered no interference or impairment, but as a matter of public policy a citizen does have such an interest in his government as to give him capacity to maintain a proper action to enforce the performance of a public duty affecting himself and citizens generally.”⁴⁹ The court explained that “[w]here a *public* right, as distinguished from a purely *private* right, is involved, a citizen need not show any special interest therein, but he may maintain a proper action predicated on his citizenship relation to such public right. This doctrine has been steadily adhered to by this court over the years.”⁵⁰

More recently, in *State ex rel. Cater v. N. Olmsted*, the Court held that a taxpayer has standing as such to enforce the public's right to proper execution of city charter removal provisions, regardless of any

⁴⁷ *Ohio Grocers*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 72 (Pfeifer, J., dissenting).

⁴⁸ *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062. (Emphasis added).

⁴⁹ *State ex rel. Newell v. Brown* (1954), 162 Ohio St. 147, 54 O.O. 392, 122 N.E.2d 105. (Emphasis added).

⁵⁰ *Id.* at 150-151, 54 O.O. at 393, 122 N.E.2d at 107. (Emphasis added).

private or personal benefit.⁵¹ Of important note, while the mandamus action in *Cater* was brought pursuant to R.C. 733.59, which specifically provides for judicial review, the Court stated “we have made clear that R.C. 733.56 through 733.61 merely codify the public-right doctrine as to municipal corporations, and that the doctrine exists independent of any statute authorizing invocation of the judicial process.”⁵² “Thus the public action is fully conceived in Ohio as a means to vindicate the general public interest.”⁵³

i. Enforcing well-defined constitutional limits on state spending, indebtedness, and governmental conferral of special corporate privilege is “of great importance and interest to the public.”

In defaming the importance of Articles VIII and XIII of the Ohio Constitution, as opposed to Article IV, the Appellate Court ignores the fact that Article VIII and XIII reflect the policy solutions adopted by the people of Ohio to prevent the very problems that necessitated the 1850-51 Ohio Constitutional Convention. Specifically, the Appellate Court asserted “appellants cannot find the kind of rare and extraordinary circumstances necessary to invoke public-interest standing, therefore, the public-right exception to the usual personal stake requirement for standing cannot be met * * * in 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.”⁵⁴

However, it is wildly unrestrained from any constitutional principle for an Appellate Court to normatively select which provisions of a state’s constitution are sufficiently important to warrant conferral of standing: each provision in the Ohio Constitution reflects the will of the people, and the contract between the people and their government. And while lawyers and judges (perhaps with some degree of

⁵¹ *State ex rel. Cater v. N. Olmsted* (1994), 69 Ohio St.3d 315, 322-323, 631 N.E.2d 1048, 1054-1055

⁵² *State ex rel. Cater v. N. Olmsted* (1994), 69 Ohio St.3d 315, 322-323, 631 N.E.2d 1048, 1054-1055

⁵³ *Sheward*, supra., at 1084. (*State ex rel. Nimon v. Springdale* (1966), 6 Ohio St.2d 1, 4-5, 35 O.O.2d 1, 3, 215 N.E.2d 592, 595. (“In particular, the court in *Nimon* listed a long line of cases in support of the citizen/taxpayer action, and explained that ‘no case cited in the footnote involves (1) a municipal corporation; (2) Section 733.59, Revised Code, or any statute similar thereto; or (3) an extrastatutory demand upon, and refusal of, a county prosecutor, the Attorney General or other public legal officer to institute the suit.’”)

⁵⁴ *ProgressOhio.org, Inc. v. JobsOhio*, 2012-Ohio-2655, pp. 8-10.

bias) presume Article IV to be critical, many citizens may well give greater credence to Articles VIII and XIII. As federal courts frequently explain, “it is *always* in the public interest to prevent the violation of a party’s constitutional rights.”⁵⁵ Indeed the framers who drafted, and the Ohioans to vote to ratify, Ohio’s Constitution no doubt disagreed on which provision were most important, and perhaps even upon which provisions were important at all. All must be presumed to be “important.” And accordingly, this Court need not inquire into its own subjective view of the importance of Ohio’s spending, indebtedness, and special corporate privilege limitations.

Should such an inquiry nevertheless prove helpful, there can be no dispute that enforcement of the structural government spending, indebtedness, and corporate privileges limitations in Articles VIII and XIII of the Ohio Constitution are of great importance to the public. The provisions Appellants seek to enforce in this case were enacted in 1851 in response to the very issues that gave rise to the 1850-51 Ohio Constitutional Convention.

The convention was precipitated by the average citizen’s growing awareness of “the mad rush to rob the state treasury and heap up debts to be paid by generations yet unborn,”⁵⁶ and recognition that the legislature had become “the pliant tool of individual greed.”⁵⁷ Much as with JobsOhio today, it is pled here, this “mad rush” and “individual greed” involved bailouts of and investments in private corporations. Thus, “raids on the public money by private interests,” namely handouts to railroad and canal corporations, furnished the most important issue leading to the Constitutional Convention of 1850-51, and one of the Convention’s main concerns was to stop “the wild debauch on the treasury” by private interests and prevent a recurrence by (among other measures) limiting special legislation.⁵⁸

⁵⁵ See *G & V Lounge, Inc. v. Michigan Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994)

⁵⁶ *Id.*, p. 19.

⁵⁷ *Id.*, p. 20.

⁵⁸ Isaac Franklin Patterson, *The Constitutions of Ohio* 17-20 (The Arthur H. Clark Co 1912).

The 1851 Constitution's remedy for these threats was to "keep the power in the hands of the legislature, and then tie its hands."⁵⁹ To address these issues, the delegates to the 1850-1851 constitutional convention authored the key constitutional provisions in Article VIII, which they felt sufficient to leave behind a "self-acting Constitution."⁶⁰

Article VIII of the Ohio Constitution, even after its modern-day amendments, still largely prohibits state and municipal governments from making loans or becoming a joint owner in private enterprises. It was clear then that these provisions were intended to "prohibit the state from becoming directly involved with private businesses, either by lending its credit or becoming an equity owner or associate," and to halt practices that would "put the state's money and credit at risk in business schemes that often were risky at best."⁶¹ The sections forbid "the union of public and private capital or credit in any enterprise whatsoever"⁶² and prohibit governmental "ventures that subsidize commerce or industry."⁶³

Consequently, the enforcement of Articles VIII and XIII of the Ohio Constitution are of great public importance: these articles mandate foundational structural restraints on state spending, indebtedness, and corporate privilege. Moreover, they are the very provisions that were devised to respond to the issues that precipitated the Ohio Constitution.

In fact, this Court has recognized that Article VIII of the Ohio Constitution was passed in response to the state of Ohio having an ownership stake in dozens of private railroad and canal businesses. Recently, in *C.I.V.I.C. Group v. Warren*, this Court explained "the history behind the adoption" of Article VIII:

⁵⁹ Id., (noting that "no longer could corporate and special interests raid the state treasury under the guise of securing loans and aids," nor could any man "forcibly take tribute from his fellow citizens.").

⁶⁰ Id., at 21 (noting that "the people had learned that the legislature could not always be trusted).

⁶¹ Isaac Franklin Patterson, *The Constitutions of Ohio* 17-20 (The Arthur H. Clark Co 1912). This text is considered the authoritative guide to this history of Ohio Constitutions, both by Ohio Courts and by legal search engines such as *Westlaw*.

⁶² Id.

⁶³ *State ex rel. Tomino v. Brown* (1989), 47 Ohio St.3d 119, 549 N.E.2d 505, citing Gold, Public Aid to Private Enterprises the Ohio Constitution: Sections 4, 6, and 13 of Article VIII in Historical Perspective (1985), 16 U.Tol.L.Rev. 405.

“Since the state's own resources were limited (at least at first), the legislature relied heavily on private enterprise to build and operate roads, bridges, ferries, canals and railroads. Most of the canal system was financed directly by the state, resulting in debts of \$16 million. In the 1830's the state and local governments shifted to a policy of financing turnpike, canal and railroad companies by lending credit or purchasing stock. Insofar as an effective transportation network sprang into being in a remarkably short time, these practices had the desired result. But, they also had undesirable results: they put the state's money and credit at risk in business schemes that often were risky at best, and the demonstrated willingness of the legislature and local bodies to use them was an open invitation for private interests to dip into the public till. Many of these companies failed, the public debt burgeoned as a consequence, and by 1850 the burden was more than the taxpayers could tolerate. This section was adopted to put a halt to these practices.”⁶⁴

This Court continued, observing that “the climate of the times was agitation and anger over the imposition of tax burdens on the citizens for the benefit of private corporations and for the public losses incurred when subsidized corporations failed,” and “[a]lthough times may have changed, the reason for the existence of Section 6, Article VIII [and Section 4, Article VIII] is as valid today as it was in 1851. Its purpose is to prohibit private interests from tapping into public funds at the taxpayers' expense.”⁶⁵

Here, Governor Kasich has implicitly explained that the very purpose of JobsOhio is in variance with the events that catalyzed the enactment of Articles VIII and XIII, stating “JobsOhio is designed to create an independent not-for-profit entity. . . to manage clusters of industries. . . ,”⁶⁶ and “[t]he State of

⁶⁴ 88 Ohio St. 3d 37, 39-40, (Ohio 2000). See also David M. Gold, Public Aid to Private Enterprise under the Ohio Constitution: Sections 4, 6, and 13 of Article VIII in Historical Perspective (1985), 16 U.Tol.L.Rev. 405, 407-408; 2 Baldwin's Ohio Revised Code Annotated (1993) 202.

⁶⁵ *Id.* (“Cases construing Section 6 of Article VIII have found that it forbids the union of public and private capital or credit in any enterprise whatsoever. *Alter v. Cincinnati* (1897), 56 Ohio St. 47, 63, 46 N.E. 69, 70; *McGuire v. Cincinnati* (App.1941), 35 Ohio Law Abs. 423, 22 O.O. 334, 40 N.E.2d 435. It does not matter that the public may, directly or indirectly, benefit from the enterprise. In *Taylor v. Ross Cty. Comms.* (1872), 23 Ohio St. 22, this court was asked to pass judgment on a legislative Act that authorized the building of portions of railroads by local governments and the sale or lease of those portions to private railroad companies. In finding the Act unconstitutional, this court stated: “It may be that, without the aid of this law, projects may fail, which could, under it, have been prosecuted to successful and useful results. But this consideration can have no influence in a judicial tribunal invested with the high trust of seeing, in the administration of justice, that the constitution suffers no detriment, from whatever quarter or in whatever shape the threatened invasion comes.” *Id.* at 84-85.”)

⁶⁶ Gov. John Kasich speaks about his JobsOhio initiative during the annual meeting of the Wayne Economic Development Council March 24, 2011, in Wooster, Ohio. Kasich spoke at the Shisler Center on the campus of Ohio State University's Ohio Agricultural Research and Development Center. Speech

Ohio helped [First Solar]. You know what the State of Ohio got for helping [First Solar]? Not a thing. Had we taken a ten percent stake in First Solar, we would now have a stake worth \$150 million . . . that's precisely what we want to do."⁶⁷

ProgressOhio adequately alleges that the JobsOhio arrangement is itself an impermissible investment of public funds in a private entity; and further, is designed to make equity investments of public funds in private corporations. Due to the pivotal place such arrangement occupy in Ohio constitutional history, the issues of public indebtedness, spending, and corporate privilege at issue here clearly raise issues "of great importance and interest to the public."

ii. The reasoning of state supreme courts that more commonly consider the "public interest standing" doctrine confers standing on Appellants.

This Court frequently, and quite appropriately, looks to other states' supreme courts for guidance when adjudicating the issue of standing.⁶⁸ This Court should apply the principles and rationales below to confer standing on ProgressOhio.

State supreme courts almost universally recognize the importance of conferring standing on citizen-taxpayers without a "personal stake" where case raises issues of "a public right," "public significance," "public interest," or "public importance." The Supreme Court of South Carolina explains that "the rule [of standing] is not an inflexible one."⁶⁹ Standing may be conferred upon a party "when an issue is of such public importance as to require its resolution for future guidance."⁷⁰ Likewise, in Maryland, "where the issues presented are of great public interest and concern, the interest necessary to sustain standing need

available at <http://www.youtube.com/watch?v=IFrQG7jVWZY>, uploaded on March 24, 2011. Last checked April 8, 2013.

⁶⁷ Id.

⁶⁸ See *Moore v. Middletown*, 133 Ohio St.3d 55, 975 N.E.2d 977 (Ohio 2012).

⁶⁹ *Sloan v. Wilkins*, 362 S.C. 430, 436-37, 608 S.E.2d 579, 582-83 (2005). *Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976).

⁷⁰ *Sloan*, supra.

only be slight."⁷¹ And much the same in New Jersey, which this Court has recently relied on for persuasive precedent standing doctrine: "[a]ny slight additional private interest is sufficient to afford standing to private litigants who raise issues of great public interest, such as a constitutional challenge to a statute."⁷² The Arizona Supreme Court similarly observes "[b]ecause our state constitution does not contain a 'case or controversy' provision analogous to that of the federal constitution, we are not constitutionally constrained to decline jurisdiction based on lack of standing. we can waive the requirement of standing * * * in cases involving issues of great public importance that are likely to recur."⁷³

In neighboring Indiana, "Indiana cases recognize certain situations in which public rather than private rights are at issue and hold that the usual standards for establishing standing need not be met."⁷⁴ The Supreme Court holds that when a case involves enforcement of a public rather than a private right the plaintiff need not have a special interest in the matter nor be a public official.⁷⁵ "Specifically, the public standing doctrine eliminates the requirement that the relator have an interest in the outcome of the litigation different from that of the general public."⁷⁶ "In addition to cases involving the enforcement of a public right or duty, the principles embodied in the public standing doctrine have also frequently been applied in cases challenging the constitutionality of governmental action, statutes, or ordinances."⁷⁷

⁷¹ *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore*, 407 Md. 253, 267, 964 A.2d 662, 669-70 (2009)

⁷² *Jordan v. Horsemen's Benev. & Protective Ass'n*, 90 N.J. 422, 432, 448 A.2d 462, 467 (1982). See *Salorio v. Glaser*, 82 N.J. 482, 492, 414 A.2d 943 (1980).

⁷³ *Sears v. Hull*, 192 Ariz. 65, 71-72, 961 P.2d 1013, 1019-20 (1998) ("In *Rios v. Symington*, 172 Ariz. 3, 833 P.2d 20 (1992), we accepted jurisdiction notwithstanding the existence of "potential standing issues." In that case, the President of the State Senate brought a special action challenging the constitutionality of the Governor's use of the line item veto. The action therefore involved a "dispute at the highest levels of state government.")

⁷⁴ *State ex rel. Cittadine v. Indiana Dept. of Transp.*, 790 N.E.2d 978, 981 (Ind. 2003).

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

The Supreme Court of Nebraska holds "[w]e [have] recognized an exception to the standing requirement when the matter involved a great public concern that could otherwise go unchallenged."⁷⁸ The Nebraska Court further identified a limiting principle (where broad taxpayer standing does not apply): "Exceptions to the rule of standing must be carefully applied in order to prevent the exceptions from swallowing the rule. Other than challenges to the unauthorized or illegal expenditure of public funds, our more recent cases have narrowed such exceptions to situations where matters of great public concern are involved and a legislative enactment may go unchallenged unless the plaintiff has the right to bring the action."⁷⁹

In Washington, the state supreme court hold that "when a controversy is of substantial public importance, immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture, this court has been willing to take a 'less rigid and more liberal' approach to standing."⁸⁰ This is particularly so "in cases where the plaintiff whose standing was challenged was the only plaintiff in the case and the liberal approach was necessary to ensure that the important public issues raised did not escape review."⁸¹

The Utah Supreme Court affirms that "this Court will not issue advisory opinions; but if an appellant does not meet the traditional test of standing, that appellant may be granted standing if there is no more appropriate appellant and "the issue is unlikely to be raised at all if the [appellant] is denied standing."⁸² In appropriate cases, the Court may even grant standing where the issues are of "great public

⁷⁸ Id.

⁷⁹ *Project Extra Mile v. Nebraska Liquor Control Comm'n*, 283 Neb. 379, 389-92, 810 N.W.2d 149, 159-61 (Neb. 2012); *State ex rel. Reed v. State, Game & Parks Comm'n*, 278 Neb. 564, 569-71, 773 N.W.2d 349, 354-56 (2009); See *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

⁸⁰ *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wash. 2d 791, 803, 83 P.3d 419, 424 (2004).

⁸¹ Id.

⁸² *Olson v. Salt Lake City Sch. Dist.*, 724 P.2d 960, 962 (Utah 1986)

importance and ought to be judicially resolved."⁸³ "[I]ndividual taxpayers in Salt Lake City would be granted standing on the basis that there are no more likely appellants and the issue is otherwise unlikely to be raised."⁸⁴

In Colorado, a "legally protected interest" sufficient to confer standing includes "a desire to ensure that governmental units conform to the state constitution," and therefore "taxpayers have standing to seek to enjoin an unlawful expenditure of public funds."⁸⁵ Further, "even where no direct economic harm is implicated, a citizen has standing to pursue his or her interest in ensuring that governmental units conform to the state constitution," and thus a plaintiff-taxpayer satisfies Colorado's standing test "because he seeks review of what he claims is an unlawful government expenditure which is contrary to our state constitution."⁸⁶

The Alaska Supreme Court emphasizes "Alaska permits citizen-taxpayer standing when a case raises issues of "public significance" and the person bringing the case is an "appropriate" party to raise the issue." The Court there explains that "our law thus recognizes that declaratory relief is often the simplest and most effective form of judgment in cases involving significant public interest brought pursuant to citizen-taxpayer standing."⁸⁷

In Mississippi, the state's Supreme Court observes that "the constitution of this state does not impose the same "standing" requirements as the United States constitution and "a private citizen has the right to challenge unlawful governmental action. While the challenge there concerned constitutional

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Id.

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Olson v. Salt Lake City Sch. Dist., 724 P.2d 960, 962 (Utah 1986)

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Barber v. Ritter, 196 P.3d 238, 245-47 (Colo. 2008)

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Id.

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Laverty v. Alaska R.R. Corp., 13 P.3d 725, 730 (Alaska 2000).

violations, the decision stands for the proposition that citizens may challenge governmental actions contrary to law where the action would otherwise escape challenge."⁸⁸

In Wyoming, the state's supreme court explains the contours of public interest standing more exhaustively than in any other state, observing "[w]e have recognized a more expansive or relaxed definition of standing when a matter of great public interest or importance is at stake. This exception to the general standing requirements evolved out of a determination of the existence of a justiciable controversy in the context of a declaratory judgment action."⁸⁹ Standing, the court further explains, may be conferred "by way of a declaratory judgment under the doctrine of great public interest or importance."⁹⁰ "We first acknowledged the doctrine of great public interest or importance in connection with the existence of a justiciable controversy to support the invocation of the authority of the court to make a declaratory judgment. We said that the requirement of a justiciable controversy is relaxed or not followed in such instances."⁹¹

Here, (1) ProgressOhio is seeking to enforce the "public right" of enforcing clear constitutional limits, rather than pursuing an action from which it will derive any pecuniary or other discrete benefit; (2) the JobsOhio arrangement "would otherwise escape challenge" if ProgressOhio's lawsuit is dismissed for lack of standing; (3) ProgressOhio maintains a "slight private interest" in enforcing the Ohio Constitution

⁸⁸ *USPCI of Mississippi, Inc. v. State ex rel. McGowan*, 688 So. 2d 783, 789 (Miss. 1997); *Fordice v. Thomas*, 649 So. 2d 835, 841 (Miss. 1995); *Van Slyke v. Bd. of Trustees of State Institutions of Higher Learning*, 613 So. 2d 872, 875 (Miss. 1993).

⁸⁹ *Jolley v. State Loan & Inv. Bd.*, 2002 WY 7, 38 P.3d 1073 (Wyo. 2002); *Brimmer v. Thomson*, 521 P.2d 574 (Wyo.1974).(" Historically, we have applied the great public interest and importance doctrine to find standing where we ordinarily would not in the following instances: *Washakie County School District Number One*, 606 P.2d 310 ("constitutionality of school financing"); *Memorial Hospital of Laramie County*, 770 P.2d 223 (tax exempt status of hospital); *State ex rel. Wyoming Association of Consulting Engineers and Land Surveyors v. Sullivan*, 798 P.2d 826 (Wyo.1990) (constitutionality of the Wyoming Professional Review Panel Act); *Board of County Commissioners of the County of Laramie v. Laramie County School District Number One*, 884 P.2d 946 (Wyo.1994) (entitlement of school district to interest on school district funds held by county treasurer); and *Management Council of the Wyoming Legislature*, 953 P.2d 839 (constitutional scope of governor's veto power").

⁹⁰ *Id.*

⁹¹ *Id.*

and ensuring that state government abides by it; (4) "there is no more appropriate appellant" than ProgressOhio - - indeed, the 90 day window within which to challenge the statute has expired, and no other party has brought legal action; (5) "the issue is unlikely to be raised at all if the [appellant] is denied standing"; (6) according to the Governor himself, the JobsOhio arrangement "immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture, this court has been willing to take a 'less rigid and more liberal' approach to standing;"⁹² (7) these plaintiffs are "the only plaintiffs in the case" and therefore "the liberal approach [is] necessary to ensure that the important public issues raised [do] not escape review."⁹³

Furthermore, just as Washington explains that a "public interest" is at stake when a controversy "significantly impacts a significant segment of the population," Appellees themselves have averred to this Court that issues related to this controversy could "harm JobsOhio and all Ohio taxpayers."⁹⁴ Appellees have also averred that these issues deal with "hundreds of millions of dollars for the State," and "forms an integral part of the State's budget."⁹⁵

Consequently, application of thoughtful and persuasive authorities within and beyond Ohio convincingly demonstrate that ProgressOhio must be found to maintain public interest, or "public right," standing in this matter.

C. Common law taxpayer standing lends Appellants standing here.

Even if this Court wishes to avoid a determination of "public interest" or "public right" standing, ProgressOhio maintains common law taxpayer standing - - because ProgressOhio credibly alleges unconstitutional government use of public funds and property, this Court should apply basic taxpayer standing principles and precedent to confer standing on ProgressOhio to challenge the JobsOhio

⁹² *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wash. 2d 791, 803, 83 P.3d 419, 424 (2004).

⁹³ *Id.*

⁹⁴ *JobsOhio v. Goodman*, supra. Relator JobsOhio's Memorandum in Support of Writ of Mandamus at p. 11-12.

⁹⁵ *Id.*, at p. 33.

arrangement.⁹⁶ While there is significant overlap between taxpayer and "public right" or "public interest" standing, common law taxpayer standing emphasizes the role of taxpayers as the equitable owners of state property and funds, and further emphasizes the need to enjoin unconstitutional or otherwise unlawful government spending and/or misuse of property.

i. This Court should enforce Ohio precedent conferring taxpayer standing.

The only *Ohio* principle of law the Appellate Court relied on to block Appellants' right to taxpayer standing is the 1954 case of *State ex rel. Masterson v. Ohio State Racing Commission*, which sets forth the following proposition: "a taxpayer cannot bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he had some special interest therein by reason of which his own property rights are put in jeopardy. In other words, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally."⁹⁷

This expression, through crude application, has taken on a life of its own, despite several overriding considerations. *First*, the *same case* also explains that the "general rule" is that "[e]ven in the absence of legislation, a taxpayer has a right to call upon a court of equity to interfere to prevent the consummation of a wrong such as occurs when public officers attempt to make an illegal expenditure of public money, or to create an illegal debt, which he, in common with other property holders of the taxing district, may otherwise be compelled to pay."⁹⁸

Second, the *same year as Masterson*, the Ohio Supreme Court further explained that "as a matter of public policy, a citizen of a community does have such an interest in his government as to give him capacity to maintain a proper action to enforce the performance of a public duty affecting himself as a

⁹⁶ Of note, this is not a case of a taxpayer seeking recovery of taxes paid, where a special, individualized injury requirement for standing may well be warranted.

⁹⁷ 162 Ohio St. 366, 123 N.E.2d 1, relying solely on 39 Ohio Jurisprudence, 22, Section 12; 52 American Jurisprudence, 3, Section 3, rather than prior Ohio precedent.

⁹⁸ Id.

citizen and citizens generally. Where a public right, as distinguished from a purely private right, is involved, a citizen need not show any special interest therein, but he may maintain a proper action predicated on his citizenship relation to such public right. This doctrine has been steadily adhered to be this court over the years.⁹⁹ Thus, “it is sufficient to sustain the right of the relator to maintain the suit that he show that he is a citizen and as such interested in the execution of the laws.”¹⁰⁰

Third, the capacity to challenge unlawful government spending and indebtedness in one’s capacity as a citizen or taxpayer who wishes to force adherence to the Ohio Constitution is deeply-rooted in Ohio precedent. In *Mayer v. Ames*, this Court held “[i]f the ordinance is invalid the expenditure for such a station would be improper and constitute a misapplication. Consequently this court is of the opinion that as a taxpayer the plaintiff possesses the necessary capacity to maintain this action [for misapplication of public funds].”¹⁰¹ And in *Green v. State Civil Service Commission*, this Court ruled “a taxpayer has sufficient interest to maintain an action to enjoin public officers from the commission of acts in excess of legal authority and requiring the expenditure of public money.”¹⁰² In *State ex rel. Scott v. Masterson*, the Court held “[i]t appears that the relators as taxpayers and electors have sufficient interest in the execution of the laws to maintain this action.”¹⁰³ And in *State ex rel. Blackwell, a Taxpayer, v. Bachrach et al., City Council of Cincinnati*, this court held “where the relief sought is the enforcement of a public duty by a public officer or board, [an action] may be maintained by the relator, where he shows that he is a citizen and as such is interested in the execution of the laws.”¹⁰⁴ Finally, in 2012, in *Beaver Excavating Co. v.*

⁹⁹ *State ex rel. Newell v. Brown* (1954), 162 Ohio St. 147, at 151, 122 N.E.2d 105; see also *State v. Brown*, 38 Ohio St. 344; *State v. Henderson*, 38 Ohio St. 644, 649; *State ex rel. Gregg v. Tanzey*, 49 Ohio St. 656, 32 N.E. 750; *State ex rel. Trauger v. Nash*, 66 Ohio St. 612, 64 N.E. 558; and *Brissel v. State ex rel. McCammon*, 87 Ohio St. 154, 100 N.E. 348.

¹⁰⁰ *Id.*

¹⁰¹ *Mayer v. Ames* (1938), 133 Ohio St. 458, 14 N.E.2d 617

¹⁰² *Green v. State Civil Service Commission* (1914), 90 Ohio St. 252, 107 N.E. 531; *Elyria Gas & Water Co. v. City of Elyria*, 57 Ohio St. 374, 49 N. E. 335.

¹⁰³ (1962), 173 Ohio St. 402, 183 N.E.2d 376.

¹⁰⁴ (1957), 166 Ohio St. 301, 303, 2 O.O.2d 219, 143 N.E.2d 127

Testa, this Court found that state taxpayers maintained standing to assert the public funds were spent in a manner inconsistent with constitutional precepts.¹⁰⁵

Despite this clear precedent, a genuine split of authority now exists among Ohio's appellate courts; and this Court should enforce Ohio's principles, history, and traditions and side with those granting taxpayer standing to challenge unlawful use of government funds and property. In recent years, Courts of Appeals for the Twelfth and Tenth Districts have aggressively attempted to pound the square peg (judicially-created standing rules that were intended to reach individual rights cases and not cases that affect all Ohioans constitutional rights but impose a unique harm on none of them) into the round hole (cases brought to limit government to its constitutional spending and indebtedness confines).

The poorly-reasoned but little-questioned case of *Brinkman v. Miami Univ.*¹⁰⁶ has become the rule of road in these districts. In *Brinkman*, the Twelfth District concluded, relying solely upon a law review article, the *federal* constitution and a dissenting opinion of an Ohio Supreme Court justice, “[a]lthough the issue perhaps is not without some doubt, we are unconvinced that Ohio law permits a taxpayer who contributes to the state's general-revenue fund to challenge any and all general revenue expenditure.”¹⁰⁷

Meanwhile, constitutional spending limits have not been suspended through judicial artifice in Courts of Appeals for the First and Fourth Districts. In *Washington Cty. Taxpayers Assn. v. Peppel*, the Courts of Appeals for the Fourth District held “Ohio law has long held that a taxpayer generally has the right to contest the creation of an illegal public debt which the taxpayer, in common with other property holders of the taxing district, may otherwise be compelled to pay.”¹⁰⁸ Likewise, in *Fankhauser v.*

¹⁰⁵ 2012 -Ohio- 5776.

¹⁰⁶ *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007-Ohio-4372,

¹⁰⁷ *Id.*, citing Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts* (2004), 51 *Clev.St.L.Rev.* 531, 536 (“Many Ohio cases, both in the supreme court and the lower federal courts, have routinely followed standing doctrines developed in federal courts. Thus, Ohio courts have held that litigants must have ‘standing,’ described in ways very similar to federal court jurisprudence[.]”);

¹⁰⁸ 78 Ohio App.3d 146, 604 N.E.2d 181 (1992), citing 88 Ohio Jurisprudence 3d (1989) 69, *Taxpayers Action*, Section 55.

Rhodes,¹⁰⁹ the Court of Appeals for the First District, while acknowledging the *pro forma* assertion that “[i]n order to have standing to challenge a proposed state activity involving expenditure from a special fund, a taxpayer must have some interest in that special fund,”¹¹⁰ ruled “[h]owever, if the proposed activity involves expenditure from general revenues, any taxpayer will have standing to challenge that activity.”¹¹¹ In support of this conclusion, the Court explained “[i]f the State commits itself to an obligation on general funds in excess of that constitutionally permitted, taxpayers are threatened with being required to pay taxes to satisfy that obligation. Any taxpayer, then, ought to have standing to see that the government abides by this constitutional limitation, since any taxpayer has a pecuniary interest jeopardized by these governmental acts.”¹¹²

This Court must recognize that only the latter line of cases give force and effect to the Ohio Constitution's structural spending restraints and follows longstanding Ohio precedent and legal principles, and apply that line of cases here. Under this Ohio precedent, ProgressOhio, by virtue of having alleged unlawful spending and requested injunctive relief to stop it, maintains standing as and on behalf of Ohio citizen-taxpayers.

ii. To the extent Ohio precedent may be in question, this Court should adopt the reasoning of state supreme courts conferring taxpayer standing.

Although Ohio precedent is squarely in Appellants' corner, this Court should further take notice that the vast majority of other state's supreme courts affirm the right of taxpayers such as ProgressOhio to restrain unlawful use of public funds and property.¹¹³

¹⁰⁹ March 5, 1980, Clermont Co. Case Nos. 810, 878, unreported.

¹¹⁰ *Id.*, citing *State ex rel. Lynch v. Rhodes* (1964), 176 Ohio St. 251, 199 N.E.2d 393.

¹¹¹ *Id.*, citing *Green v. State Civil Service Commission* (1914), 90 Ohio St. 252, 107 N.E. 531; *Mayer v. Ames* (1938), 133 Ohio St. 458, 14 N.E.2d 617.

¹¹² *Id.*

¹¹³ Note to Court: many of the state supreme court precedents and principles discusses in the "public interest standing" section above also stand for the principle that taxpayer standing is appropriate in this case. However, in the interest of brevity, those decision are not recited again in this section.

Idaho's supreme court "entertain[s] taxpayer or citizen challenges based upon that constitutional provision," and the group *most adverse* to" a government arrangement typically maintains standing to challenge the constitutionality of the arrangement."¹¹⁴ Accordingly, the Supreme Court of Idaho has sanctioned standing where "[t]he Plaintiffs allege that by entering into the lease agreement the County violated the specific provision in Article VIII, § 3, of the Idaho Constitution prohibiting counties and other subdivisions of the State from incurring any indebtedness or liability, other than for ordinary and necessary expenses, in excess of their income and revenue for the year without voter approval."¹¹⁵ Instructively here, the Idaho Court explains "[i]f this Court were to hold that taxpayers do not have standing to challenge the incurring of indebtedness or liability in violation of that specific constitutional provision, we would, in essence, be deleting that provision from the Constitution . . . there would be nobody who could require that political subdivisions comply with this constitutional provision."¹¹⁶

In Alabama, "[t]he right of a taxpayer to challenge the unlawful disbursement of state funds likewise is unquestioned."¹¹⁷ While Florida's high court holds that common law requires that "a citizen and taxpayer can challenge the constitutional validity of an exercise of the legislature's taxing and spending power without having to demonstrate a special injury."¹¹⁸

Similarly, the Minnesota Supreme Court carefully explains "it is well settled that a taxpayer may, when the situation warrants, maintain an action to restrain unlawful disbursements of public moneys; * * * as well as to restrain illegal action on the part of public officials."¹¹⁹ "It has been generally recognized that a taxpayer has sufficient interest to enjoin illegal expenditures of both municipal and state funds."¹²⁰

¹¹⁴ *Koch v. Canyon County*, 145 Idaho 158, 160, 177 P.3d 372, 374 (2008).

¹¹⁵ *Id.*

¹¹⁶ *Koch v. Canyon County*, 145 Idaho 158, 160, 177 P.3d 372, 374 (2008).

¹¹⁷ *Jordan v. Siegelman*, 949 So. 2d 887, 890 (Ala. 2006); *Goode v. Tyler*, 237 Ala. 106, 186 So. 129 (1939) ('... this Court is committed to the doctrine that a taxpayer may maintain a suit in equity to restrain a state officer in the unlawful disbursement of state funds.')

¹¹⁸ *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 263 (Fla. 1991).

¹¹⁹ *McKee v. Likins*, 261 N.W.2d 566, 570-71 (Minn. 1977).

¹²⁰ *Id.*

"Thus, while the activities of governmental agencies engaged in public service ought not to be hindered merely because a citizen does not agree with the policy or discretion of those charged with the responsibility of executing the law, the right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied. Taxpayers are legitimately concerned with the performance by public officers of their public duties."¹²¹

In addition, in Kentucky, while a "party plaintiff must have a real, direct, present and substantial right or interest in the subject matter of the controversy," "[t]he misuse of the taxpayers' funds is one form of an alleged injury that can take place," and "Accordingly, *any taxpayer* of the Commonwealth is permitted to sue on this basis."¹²²

In such cases, these courts all dispense with the "personal stake" requirement and the prohibition against "generalized grievances." For instance, Louisiana "recognizes the right of a taxpayer to enjoin unlawful action by a public body" - - "[a] citizen seeking to restrain unlawful action by a public entity is not required to demonstrate a special or particular interest distinct from the public at large. Consequently, taxpayer plaintiffs seeking to restrain action by a public body are afforded a right of action upon a mere showing of an interest, however small and indeterminable."¹²³

Likewise, the South Dakota high court explains "[i]t has become the settled law of this state that a taxpayer need not have a special interest in an action or proceedings nor suffer special injury to himself to entitle him to institute an action to protect public rights."¹²⁴

¹²¹ *McKee v. Likins*, 261 N.W.2d 566, 570-71 (Minn. 1977)

¹²² *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 473 (Ky. 1998)

¹²³ *Ralph v. City of New Orleans*, 928 So.2d 537 (La. 2006) ("When a plaintiff is attempting to restrain action by a public body that affects the public fisc, the plaintiff has an interest, however small and indeterminable, which is sufficient to afford him a right of action. This stretches to a government's 'extending benefits.'")

¹²⁴ *White Eagle Oil & Refining Co. v. Gunderson*, 48 S.D. 608, 205 N. W. 614, 618, 43 A.L.R. 397; *State ex rel. Bryant v. Dolan*, 61 S.D. 530, 249 N.W. 923; *State ex rel. Jensen v. Kelly*, 65 S.D. 345, 274 N.W. 319, 321 (1937).

In Texas, "a taxpayer has standing to sue in equity to enjoin the illegal expenditure of public funds, even without showing a distinct injury. [the Texas Supreme Court has] explained the justification for this broader grant of standing to challenge future expenditures as follows: When a taxpayer brings an action to restrain the illegal expenditure ... of tax money he sues for himself, and it is held that his interest in the subject-matter is sufficient to support the action; but when the money has already been spent, an action for its recovery is for the [taxing entity], The cause of action belongs to it alone. The exception unquestionably impinges on the policies for restricting taxpayer lawsuits, but strictly limited, it provides important protection to the public from the illegal expenditure of public funds without hampering too severely the workings of the government."¹²⁵

Further state supreme courts concisely and powerfully articulate the need for taxpayer standing in cases such as this one. In support of its conferral of taxpayer standing to challenge unlawful use of public property, the Delaware Supreme Court explains that "if suit by taxpayers is not allowed, the governmental action questioned will likely go unchecked."¹²⁶ And the Supreme Court of Wisconsin explains the same: "[u]nless a taxpayer has standing to make the challenge in state courts, no one else would be able to do so. . . if an injured taxpayer is denied standing to challenge the constitutionality of a statute, the legislature could violate the constitutional limitations of its powers . . . with impunity."¹²⁷

The Nebraska Supreme Court recently observed that even though the action was brought by a "citizen and taxpayer," since if the "cannot be challenged by a citizen and taxpayer unless and until he has a special pecuniary interest or injury different from that of the public generally, it is entirely possible that no one may have standing to challenge it."¹²⁸ A "citizen taxpayer should have standing sufficient to maintain an action for a declaratory judgment as to such [issues] without the necessity of showing that he has

¹²⁵ *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555-56 (Tex. 2000)

¹²⁶ *City of Wilmington v. Lord*, 378 A.2d 635, 637-38 (Del. 1977).

¹²⁷ *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878-79, 419 N.W.2d 249, 252-53 (1988).

¹²⁸ *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979).

sustained some special injury peculiar to himself and distinct from that of the public generally. We hold that a citizen and taxpayer has standing to maintain an action for a declaratory judgment. . . ."129

The Supreme Court of Nebraska reasons that "a taxpayer may be the only party who would challenge an unlawful government action because the persons or organizations directly affected by the government action have benefited from it."²⁴ Additionally, a taxpayer's action sometimes raises matters of great public concern that far exceed the type of injury in fact that an individual could normally assert in an action against government officials or entities."²⁵

In all of these cases, the misuse or unlawful dissipation of public funds or property is sufficient reason for taxpayers to have standing. The North Dakota Supreme Court concisely explains "any state taxpayer has standing to challenge a statute on the basis state funds are being unlawfully dissipated."¹³⁰ In Maryland, common law principles are held to require courts to "liberally permits taxpayers to bring claims challenging alleged illegal or ultra vires acts of government officials."¹³¹ "[W]here the issues presented are of great public interest and concern, the interest necessary to sustain standing need only be slight."¹³² For example, in *Boitnott v. Baltimore*, the Court determined that Baltimore taxpayers had standing to challenge an ordinance that amended the urban renewal plan pertaining to Baltimore's Inner Harbor East based upon the taxpayers' allegations that the ordinance violated the City's Charter and that the City had spent 20 million dollars in developing the Inner Harbor East area prior to the litigation.¹³³

Similarly, in West Virginia, one has standing to bring an action "to require cessation of further payments to retired members of the West Virginia Legislature whose pensions are based on legislative service before 1971 and to compel the recovery on behalf of the State of retirement pension benefits which

¹²⁹ *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979).

¹³⁰ *Danzl v. City of Bismarck*, 451 N.W.2d 127, 129 (N.D.1990); *Billey v. N. Dakota Stockmen's Ass'n*, 1998 ND 120, 579 N.W.2d 171, 173

¹³¹ *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore*, 407 Md. 253, 267, 964 A.2d 662, 669-70 (2009)

¹³² *Id.*

¹³³ *Id.*

have already been paid" as a citizen and taxpayer.¹³⁴ And In North Carolina, the "Court has in numerous cases determined the constitutionality of statutes upon suit for injunctive relief by taxpayers where the expenditure of public funds is involved."¹³⁵ Finally, Maine distinguishes between actions "seeking preventive, not remedial, relief," "especially when, as here, the asserted illegality relates to a subject matter of direct interest to any taxpayer, the incurring of governmental indebtedness."¹³⁶

In conclusion, taxpayer standing principles from across the nation stand for the following proposition: state taxpayers, in their capacity as such, need not show a "direct injury" or "personal stake" in order to bring a declaratory judgment action to enjoin unconstitutional state spending and/or use of property. Since that is precisely the action ProgressOhio has brought here, ProgressOhio must be found to maintain taxpayer standing.

iii. Apply Pennsylvania's "Biester Exception" factors, Appellants maintain taxpayer standing.

Amongst the vast majority of states that confer taxpayer standing, the most specific, clear, and judicially-administrable test for determining standing is neighboring Pennsylvania's five-factor *Biester* test. This test synthesizes the principles of taxpayer standing articulated from each state above, while simultaneously supplying a workable limiting principle that restrains purely abstract adjudications. In *Pittsburgh Palisades Park, LLC v. Com.*, the Pennsylvania Supreme Court explained as follows:

While *Biester* curtailed the concept of standing based solely upon taxpayer status, it also recognized that one who was not "aggrieved" so as to satisfy standing requirements might nevertheless be granted standing as a taxpayer if certain preconditions were met. This exception's relaxation of the general rules regarding standing and their requirement of a substantial, direct, and immediate interest in the challenge, is policy driven. This policy, as expressed in *Biester*, revolves around the concept of giving standing to enable the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement. 'Such litigation allows the courts, within the framework of traditional notions of 'standing,' to add to the controls over public officials

¹³⁴ *Campbell v. Kelly*, 157 W. Va. 453, 455, 202 S.E.2d 369, 371-72 (1974).

¹³⁵ *Goldston v. State*, 361 N.C. 26, 30-31, 637 S.E.2d 876, 879-80 (2006)

¹³⁶ *McCorkle v. Town of Falmouth*, 529 A.2d 337, 338 (Me. 1987)

inherent in the elective process the judicial scrutiny of the statutory and constitutional validity of their acts."¹³⁷

The Court, with clarity and specificity, then explained "[c]onsistent with this policy, five requirements have subsequently emerged as the preconditions necessary to satisfy the *Biester* exception for taxpayer standing." Those factors are as follows:

- (1) the governmental action would otherwise go unchallenged;
- (2) those directly and immediately affected by the complained of matter are beneficially affected and not inclined to challenge the action;
- (3) judicial relief is appropriate;
- (4) redress through other channels is unavailable; and
- (5) no other persons are better situated to assert the claim.¹³⁸

Applying the *Biester* exception to the ProgressOhio results in taxpayer standing to challenge the JobsOhio arrangement. First, the JobsOhio arrangement would otherwise go unchallenged: the 90 day window within which to bring a legal action expired without any other parties bringing an action, and no Ohioan has greater standing to bring the action than ProgressOhio. Secondly, those who may potentially have standing - - JobsOhio and the Governor - - are obviously not inclined to sincerely challenge the constitutionality of JobsOhio. Thirdly, redress through other challenges is unavailable: ProgressOhio has instituted a public interest action to challenge the constitutionality of the JobsOhio arrangement, and this Court has already dismissed two previous actions (one by JobsOhio and one by ProgressOhio) seeking to adjudicate these exact same constitutional claims. Fourthly, there are no other parties that are better situated to bring the claims ProgressOhio has raised: no other party has raised *any* claim, and the time for raising claims to challenge JobsOhio has expired; moreover, given that this action is a public interest action

¹³⁷ 585 Pa. 196, 206-07, 888 A.2d 655, 661-62 (2005). *Application of Biester*, 487 Pa. 438, 409 A.2d 848 (1979)

¹³⁸ 585 Pa. 196, 206-07, 888 A.2d 655, 661-62 (2005). *Application of Biester*, 487 Pa. 438, 409 A.2d 848 (1979); *Consumer Party of Pennsylvania v. Commonwealth*, 510 Pa. 158, 507 A.2d 323, 329 (1986)(summarizing *Biester* taxpayer exception standing requirements).

to enforce the structural limitations of the Ohio Constitution, a public interest organization with an interest in doing so, and hundreds of thousands of Ohio members who are Ohio citizens and taxpayers and oppose cronyism and corporate welfare, is the party best situated to bring the substantive claims in this action. For these reasons, judicial relief is appropriate. Consequently, applying the *Biester* test, which Appellants submit adequately synthesizes the principles of taxpayer standing from across the nation while offering a judicially-administrable limiting principle, this Court should find that ProgressOhio maintains common law taxpayer standing to raise the substantive claims asserted in this action.

D. The Declaratory Judgment Act confers standing on Appellants.

Even in the absence of public right or taxpayer standing, Appellant here maintain the statutory right to have their claims adjudicated through a declaratory judgment action.¹³⁹

Ohio's declaratory judgment statute, R.C. 2721.03(A), provides that "any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, * * * may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it." According to R.C. 2721.13 of the Act, "the provisions of the declaratory judgment rules are remedial in nature and are to be liberally administered. Courts have wide latitude in deciding to entertain a declaratory action."¹⁴⁰

At bottom, "declaratory judgment is a civil action and provides a remedy in addition to other legal and equitable remedies available."¹⁴¹ A court may grant declaratory relief so long as it finds the action is within the spirit of the Declaratory Judgments Act, R.C. Chapter 2721, that a real and justiciable controversy exists between the parties, and that speedy relief is necessary to preserve rights

¹³⁹ Declaratory judgment is a proper *vehicle* by which to bring a taxpayer or public interest action. Additionally, however, as this Court has explained, the Declaratory Judgment Act supplies standing in its own right.

¹⁴⁰ *Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.* (1993), 74 Ohio Misc.2d 159, 660 N.E.2d 755.

¹⁴¹ *Aust v. Ohio State Dental Bd.* (2000), 136 Ohio App.3d 677, 681, 737 N.E.2d 605.

that may otherwise be impaired or lost.¹⁴² Thus, the only situations in which a court might decline to render declaratory judgment are: “(1) where there is no real controversy or justiciable issue between the parties, or (2) when the declaratory judgment will not terminate the uncertainty or controversy, under R.C. 2721.07. Otherwise, the court is *required* to issue a judgment declaring the rights or legal relations, or both, of the parties.”¹⁴³ (These factors are analyzed below).

As an initial matter, the Ohio Constitution's broad preference for open courts and remedies should result in this court construing Ohio statutes in favor of standing - - Section 16, Article I of the Ohio Constitution provides as follows: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law." The Declaratory Judgment Act must be construed, interpreted, and applied so as to render all courts truly "open," and all aggrieved Ohioans truly entitled to a "remedy." Meanwhile, this Court has expressed the principle that “[f]airness and justice are best served when a court disposes of a case on the merits,” and therefore “it is a basic tenet of Ohio jurisprudence that cases should be decided whenever possible on their merits after giving all parties their day in court.”¹⁴⁴

Additionally, if a statutory vehicle to enforce the Ohio Constitution's structural limits on state government is to exist (and it must), it must be through declaratory judgment. This Court has already *sua sponte* JobsOhio's writ of mandamus - - implicitly accepting that a constitutional challenge to JobsOhio should take the form of a declaratory judgment action. Last September, in *State ex rel. JobsOhio v. Goodman*, this Court explained "a review of the complaint—as well as Goodman's motion for judgment on

¹⁴² *Schaefer v. First Natl. Bank* (1938), 134 Ohio St. 511, 13 O.O. 129, 18 N.E.2d 263, at paragraph three of the syllabus.

¹⁴³ *Fioresi v. State Farm Mut. Auto. Ins. Co.* (1985), 26 Ohio App.3d 203, 26 OBR 424, 499 N.E.2d 5, at paragraph one of the syllabus.

¹⁴⁴ *DeHart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 193.

the pleadings—indicates that the real object sought is a declaratory judgment, which this court lacks original jurisdiction to grant."¹⁴⁵

i. The Declaratory Judgment Act is a basis for standing.

Contemporaneous with the Tenth District's adverse decision in this case, this Court decided *Moore v. Middletown*. There, the Court explained that "[t]he court of appeals in this case asserted that R.C. 2721.03 merely represents a legislative grant of jurisdiction to Ohio courts to hear declaratory-judgment actions and that the statute does not answer the separate question of whether the plaintiff has standing to sue. Although it is true that R.C. Chapter 2721 is the legislative source of a cause of action for declaratory relief, we do not necessarily agree that the statute does not confer standing. Indeed, standing can be created by legislation."¹⁴⁶ "But aside from whether the statute itself confers standing, our cases make clear that we are generous in considering whether a party has standing."¹⁴⁷ The legislature can indeed confer standing, and the Declaratory Judgment Act does so, so long as it's statutory requirements are met. Because ProgressOhio meets those requirements, as chronicled below, the Declaratory Judgment Act vests ProgressOhio with standing in this matter.

ii. Granting standing to ProgressOhio here is consistent with purpose of the Declaratory Judgment Act.

The statute exists to "eliminate uncertainty regarding * * * legal rights and obligations,"¹⁴⁸ and to dispose of "uncertain or disputed obligations quickly and conclusively," and thus, is to be construed "liberally."¹⁴⁹ That there is uncertainty regarding the constitutionality of the JobsOhio arrangement is beyond dispute: the Appellees here have already conceded it. Recently, in *JobsOhio v. Goodman*, the

¹⁴⁵ *JobsOhio v. Goodman*, 2012-Ohio-4425, 133 Ohio St. 3d 297, 299-300, 978 N.E.2d 153, 155-56

¹⁴⁶ *Moore*, supra.

¹⁴⁷ *Id.*

¹⁴⁸ *Mid-American Fire and Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 863 N.E.2d 142, 2007-Ohio-1248, ¶ 8, citing *Travelers Indemn. Co. v. Cochrane* (1951), 155 Ohio St. 305, 312, 98 N.E.2d 840.

¹⁴⁹ *Id.*, citing *Ohio Farmers Indemn. Co. v. Chames* (1959), 170 Ohio St. 209, 213, 163 N.E.2d 367.

Appellees, though in a manner ostensibly insufficient to invoke this Court's jurisdiction, exhaustively chronicled the uncertainty surrounding the constitutionality of JobsOhio.¹⁵⁰

Since the 90 day window within which to challenge the JobsOhio arrangement, specified by R.C. 187.09(B), has since expired, and ProgressOhio was the only party to bring a compliant cause of action, the constitutionality of JobsOhio would potentially forever remain uncertain if ProgressOhio does not have standing to pursue its claims. Conversely, ProgressOhio's standing would result in instant review of the merits of the substantive claims here. Thus, a finding that the Act confers standing here is consistent with its purpose.

iii. This controversy is "justiciable."

For a controversy to be real or justiciable, the complainant cannot seek a decision which is advisory, which answers a mooted question, or which answers an abstract question based on facts that may or may not actually materialize.¹⁵¹ However, a declaratory judgment need not be the sole remedy available in a controversy: it can be an alternative to other available remedies, so long as it is within the spirit of the Act and complies with the aforementioned requirements.¹⁵² A declaratory judgment also need not be a final and complete remedy to a controversy: a court may issue declaratory relief "whether or not further relief is or could be claimed."¹⁵³ Further, "for a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties."¹⁵⁴

¹⁵⁰ *State ex rel. JobsOhio v. Goodman*, 2012-Ohio-4425, 133 Ohio St. 3d 297, 299-300, 978 N.E.2d 153, 155-56

¹⁵¹ *Thomas v. Cleveland* (2000), 140 Ohio App.3d 136, 142, 746 N.E.2d 1130.

¹⁵² *Swander Ditch Landowners' Ass'n v. Joint Bd. Of Huron and Seneca County Com'rs* (1990), 51 Ohio St.3d 131, 135, 554 N.E.2d 1324.

¹⁵³ R.C. 2721.02(A); *Neal v. Reliance Electric & Engineering Co.* (1963), 118 Ohio App. 501, 504, 26 O.O.2d 12, 196 N.E.2d 128.

¹⁵⁴ *Stewart v. Stewart* (1999), 134 Ohio App.3d 556, 558, 731 N.E.2d 743, quoting *State v. Stambaugh* (1987), 34 Ohio St.3d 34, 38, 517 N.E.2d 526. "

Here, there can be no doubt that the battle lines are sufficiently drawn to constitute a justiciable controversy: Ohio's taxpayers, corporate welfare opponents, and advocates of constitutionally-limited government directly oppose the use of public fund to prop up purely private corporations. To deny that this case is "forged in hot controversy, with each view fairly and vigorously represented," as recommended in *Moore v. Middletown*, would be to deny reality. On January 31, 2013, upon this Court's decision to review this case, Ohio Governor John Kasich, JobsOhio's architect (the Governor also appoints JobsOhio's entire Board of Directors) insisted that those who object to JobsOhio's unconstitutionality are "Nihilists that wants to destroy economic development in Ohio," as "this [case] is about wrecking Ohio's economy and destroying peoples' jobs."¹⁵⁵ The Governor then implied that God will send defenders of these constitutional safeguards to Hell. Specifically, the *Columbus Dispatch* accurately reported "Gov. John Kasich said this morning that those suing him over JobsOhio 'are going to have to answer to a much higher power than me' for their legal challenges against his privatized development agency."¹⁵⁶ If this does not demonstrate sufficient adversity, controversy, and vigorous representation, nothing could.

Moreover, there are simply no contingencies at issue here: the JobsOhio legislation has been enacted, and the JobsOhio arrangement today is being used to provide public funds and property to private corporations. In this case, ProgressOhio credibly alleges that the arrangement violates the Ohio Constitution. A decision in ProgressOhio's favor, on the merits, would enjoin the unconstitutional arrangement and its actions.

Finally, the Wyoming Supreme Court recently explained the need to find justiciability in a declaratory judgment action related to significant constitutional matters. The Court observed "[w]e have

¹⁵⁵ *Kasich Unloads on JobsOhio*, by OhioCapitalBlog. Posted on January 31, 2013 (video of Kasich press conference). Available at http://www.youtube.com/watch?feature=player_embedded&v=3Wx5TcYzi-A. Last checked April 12, 2013.

¹⁵⁶ *Kasich says Critics will Answer to God*, by Joe Vardon, Columbus Dispatch. January 31, 2013. Available at <http://www.dispatch.com/content/stories/local/2013/01/31/kasich-getting-closer-to-introducing-loser-pays-legal-system.html>. Last checked April 12, 2013.

recognized a more expansive or relaxed definition of standing when a matter of great public interest or importance is at stake. This exception to the general standing requirements evolved out of a determination of the existence of a justiciable controversy in the context of a declaratory judgment action.¹⁵⁷ Standing may be conferred "by way of a declaratory judgment under the doctrine of great public interest or importance - - "we first acknowledged the doctrine of great public interest or importance in connection with the existence of a justiciable controversy to support the invocation of the authority of the court to make a declaratory judgment," and further, the requirement of a justiciable controversy is relaxed or not followed in such instances."¹⁵⁸ As such, "[d]eclaratory relief should be liberally administered"¹⁵⁹ in cases like these.

Likewise, the Nebraska Supreme Court recently observed that "issues of great public interest and concern," in that case "state contracts for special education services from secular institutions," required the finding of a "justiciable controversy," even though the action was brought by a "citizen and taxpayer," since if the "cannot be challenged by a citizen and taxpayer unless and until he has a special pecuniary interest or injury different from that of the public generally, it is entirely possible that no one may have standing to challenge it."¹⁶⁰

This Court should follow the guidance of the Wyoming and Nebraska Supreme Courts, along with its own justiciability jurisprudence, while taking note of the clear and concrete constitutional controversy

¹⁵⁷ *Jolley v. State Loan & Inv. Bd.*, 2002 WY 7, 38 P.3d 1073 (Wyo. 2002); *Brimmer v. Thomson*, 521 P.2d 574 (Wyo.1974).(" Historically, we have applied the great public interest and importance doctrine to find standing where we ordinarily would not in the following instances: *Washakie County School District Number One*, 606 P.2d 310 ("constitutionality of school financing); *Memorial Hospital of Laramie County*, 770 P.2d 223 (tax exempt status of hospital); *State ex rel. Wyoming Association of Consulting Engineers and Land Surveyors v. Sullivan*, 798 P.2d 826 (Wyo.1990) (constitutionality of the Wyoming Professional Review Panel Act); *Board of County Commissioners of the County of Laramie v. Laramie County School District Number One*, 884 P.2d 946 (Wyo.1994) (entitlement of school district to interest on school district funds held by county treasurer); and *Management Council of the Wyoming Legislature*, 953 P.2d 839 (constitutional scope of governor's veto power").

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979).

presented by the circumstances of this case, and find that a sufficiently adverse and concrete controversy exists here.

iv. "Speedy relief" was required.

Third, speedy relief was necessary when ProgressOhio filed this action. R.C. 187.09 only permitted 90 days in which to bring this action. Accordingly, the urgency created by R.C. 187.09 created the need for the speedy filing of this action. Any ripeness concerns are ameliorated by the reality that the legislature mandated the filing of an action - - perhaps before any claim could quintessentially ripen - - and excluded any claim that requires greater than 90 days to ripen. For these same reasons, any ripeness concerns must now to be weighed in favor of justiciability.

In *Moore v. Middletown*¹⁶¹, this Court explained that when analyzing these factors, "[w]e must indulge all reasonable inferences from the complaint in favor of the [the party seeking standing]."¹⁶² Further, "the declaratory-judgment chapter of the Revised Code broadly authorizes plaintiffs to bring actions for a declaration of "rights, status, and other legal relations whether or not further relief is or could be claimed."¹⁶³

This Court acknowledged that "we have previously addressed declaratory-judgment actions in which plaintiffs challenged the constitutionality of a municipality's zoning decision, including arguments that the municipality's ordinance did not establish legitimate interests,"¹⁶⁴ and "[i]n so holding, we observe that [a] primary purpose of the declaratory-judgment action is to serve the useful end of disposing of uncertain or disputed obligations quickly and conclusively."¹⁶⁵

Here, it is in the interest of all parties, as well as the public, that the constitutionality of a statewide jobs/economic development program, and its conduct, are resolved as expeditiously as possible.

¹⁶¹ 133 Ohio St.3d 55, 975 N.E.2d 977 (Ohio 2012).

¹⁶² Id.

¹⁶³ Id.

¹⁶⁴ Id., citing *See, e.g., Shemo v. Mayfield Hts.*, 88 Ohio St.3d 7, 10, 722 N.E.2d 1018 (2000). *See also State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶ 1, 10.

¹⁶⁵ *Ohio Farmers Indemn. Co. v. Chames*, 170 Ohio St. 209, 213, 163 N.E.2d 367 (1959).

Meanwhile, ProgressOhio's Complaint expressly and inferentially, sufficiently alleges (1) the irreducible constitutional minimums; and (2) the requisites of the Declaratory Judgment Act, particularly when viewed in a light most favorable to the Plaintiff-Appellants.¹⁶⁶

E. R.C. 187.09 must be construed as conferring standing upon Appellants.

Finally, even if this Court were to look beyond public interest standing, taxpayer standing, and the Declaratory Judgment Act, it should broadly construe the JobsOhio legislation itself as supplying standing to ProgressOhio in this case. Doing so, provides meaning to R.C. 187.09(B), while a denial of standing renders that legislative enactment meaningless. R.C. 187.09 sets forth the procedures for bringing constitutional challenges regarding JobsOhio:

(B) Except as provided in division (D) of this section, any claim asserting that any one or more sections of the Revised Code amended or enacted by H.B. 1 of the 129th general assembly, any section of Chapter 4313. of the Revised Code enacted by H.B. 153 of the 129th general assembly, or any portion of one or more of those sections, violates any provision of the Ohio Constitution shall be brought in the court of common pleas of Franklin county within ninety days after the effective date of the amendment of this section by H.B. 153 of the 129th general assembly.

This section obviously *contemplates* an immediate public interest lawsuit by citizen or legislator plaintiffs for the following reasons: (1) it cannot be presumed that the statute confers standing on no party; but (2) no party other than a public interest plaintiff could maintain standing under the statute. These two recognitions work in tandem.

R.C. 187.09 is unambiguous that *someone* has the capacity to challenge the constitutionality of JobsOhio. It's simply ambiguous as to precisely *who* that party might be. This Court must therefore construe that section in favor of a finding that *these* public interest plaintiffs maintain standing, since, if they don't, nobody does.

¹⁶⁶ It must further be remembered, when analyzing Plaintiffs' Complaint in this case, that Ohio plaintiffs have the capacity to, after a hearing on the merits, amend their complaint to conform to the evidence. See Civ. R. 15(D).

First, basic canons of statutory construction mandate such a construction and finding. The paramount goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute.¹⁶⁷ "When a statute is susceptible of more than one interpretation, courts seek to interpret the statutory provision in a manner that most readily furthers the legislative purpose as reflected in the wording used in the legislation."¹⁶⁸ "In construing an ambiguous statute, the court may consider a number of factors, including . . . the circumstances under which the statute was enacted."¹⁶⁹ "Further, when interpreting a statute, courts must 'avoid an illogical or absurd result.'¹⁷⁰ "Rather, courts must seek to construe the statute to operate sensibly."¹⁷¹

Here, at minimum, the state has envisioned that the capacity to challenge the JobsOhio arrangement exists. Someone, therefore, must have the standing to bring that challenge. Put another way, it would be an absurd result indeed if R.C. 187.09 were to be construed in a manner so as to strip any Ohioan of standing to challenge the arrangement. Likewise, it would be absurd for the legislature to prescribe the terms of a constitutional challenge that no Ohioan could actually bring. Yet these are precisely the conclusions the Appellate Court drew in this case. This Court must construe the ambiguity in R.C. 187.09

¹⁶⁷ *Yonkings v. Wilkinson*, 86 Ohio St.3d 225, 227, 714 N.E.2d 394 (1999); *Brooks v. Ohio State Univ.*, 111 Ohio App.3d 342, 349, 676 N.E.2d 162 (10th Dist.1996), citing *Featzka v. Millcraft Paper Co.*, 62 Ohio St.2d 245, 405 N.E.2d 264 (1980).

¹⁶⁸ *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513, 668 N.E.2d 498 (1996), citing *United Tel. Co. v. Limbach*, 71 Ohio St.3d 369, 372, 643 N.E.2d 1129 (1994), and *Harris v. Van Hoose*, 49 Ohio St.3d 24, 26, 550 N.E.2d 461 (1990)." *AT & T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 969 N.E.2d 1166, 2012-Ohio-1975, ¶ 18.

¹⁶⁹ R.C. 1.49; *Family Medicine Found., Inc. v. Bright*, 96 Ohio St.3d 183, 772 N.E.2d 1177, 2002-Ohio-4034, ¶ 9.

¹⁷⁰ *State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys.*, 122 Ohio St.3d 148, 2009-Ohio-2522, 909 N.E.2d 610, ¶ 34 (Pfeifer, J., dissenting), citing *In re T.R.*, 120 Ohio St.3d 136, 2008-Ohio-5219, 896 N.E.2d 1003, ¶ 16." *AT & T Communications*.

¹⁷¹ *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 967 N.E.2d 193, 2012-Ohio-1484, ¶ 19, quoting *State ex rel. Saltsman v. Burton*, 154 Ohio St. 262, 268, 95 N.E.2d 377 (1950) (noting "[s]tatutes must be construed, if possible, to operate sensibly and not to accomplish foolish results' "); *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 957 N.E.2d 19, 2011-Ohio-5350, ¶ 25 (observing that courts should construe statutes and rules to avoid unreasonable or absurd results).

in favor of providing ProgressOhio with standing, so that this section (1) has meaning; (2) is not rendered absurd; and (3) facilitates an adjudication of the JobsOhio arrangement's constitutionality on the merits.

Finally, Ohio's canons of statutory construction warrant a construction of R.C. 187.09 that confers standing here. First, this Court must presume that when the legislature is enacting a statute, "a just and reasonable result is intended;" and "a result feasible of execution is intended."¹⁷² Second, if a statute is ambiguous, as this statute is to standing, "the court, in determining the intention of the legislature, may consider among other matters: (A) The object sought to be attained; (B) The circumstances under which the statute was enacted; * * * [and] (E) The consequences of a particular construction."¹⁷³ Here, "the object sought to be obtained" is facilitation of a constitutional challenge to the JobsOhio arrangement. Yet a construction whereby ProgressOhio lacks standing means that no "result feasible of execution," the institution of an action in the Franklin Court of Common Pleas, is actually attainable. Thus, this Court is obliged to construe, interpret, and apply R.C. 187.09 so as to supply standing to a public interest/taxpayer plaintiff. And the only such plaintiff is ProgressOhio.

G. Public Policy considerations favor standing here.

The Appellate Court and Appellees' policy rationales (and they clearly are *policy* rather than *legal* rationales) for barring these Appellants' standing in this case are extremely weak. Legitimate public policy considerations instead weigh heavily in favor of adjudicating the merits of significant non-frivolous constitutional cases such as this.

The Appellate Court relied on the following rationales previously posited by the Courts of Appeals for the Twelfth and Tenth Districts, respectively: (1) "such a broad common-law standing rule would subject most government actions to a taxpayer suit because most state activities are funded, in some way and to some degree, with general tax revenues,"¹⁷⁴ and (2) "public officials should not be subjected to

¹⁷² R.C. 1.47(C), (D).

¹⁷³ R.C. 1.49.

¹⁷⁴ *Brinkman*, supra.

constant judicial interference."¹⁷⁵ These are iterations of the prototypical "floodgates" argument, i.e. "permitting this challenge will lead us down the slippery slope to more constitutional litigation than we currently have." This objection is wildly misguided.

First, this concern reflects the activist placement of a normative policy preference in favor of less litigation over enforcement of the state's constitution. It means that unconstitutional government conduct will sometimes be permitted so that there may be fewer cases in Ohio courts. However, meaningful judicial review - - and a meaningful system of separation of powers - - requires that legislative enactments be reviewed by Ohio courts. As law professor Illya Somin explains, "the harm that all citizens suffer when public resources are expended for unconstitutional purposes should be sufficient. For any given individual, that harm may be small. But the same can be said for extremely small direct monetary losses that are enough to justify standing even under the most restrictive interpretations of modern standing doctrine; for example, the imposition of a \$1 fine is universally considered sufficient."¹⁷⁶ Finally, the notion that public officials should not be subjected to judicial interference is wrong as a matter of law: in Ohio, we regularly enjoin official acts that violation the state constitution, and must continue to do so, if that document is to have any meaning.

Second, there are already mechanisms in place for weeding out *frivolous* cases. Civ. R. 12(B)(6) provides that the state may move to dismiss a case immediately when it fails to state a claim upon which relief can be granted. And doing so involves no greater burden than moving to dismiss for lack of standing - - either requires a legal brief from the state. As Professor Somin explains, "judges have many other tools for disposing of frivolous cases. For example, they can be swiftly dismissed for 'failure to state a claim upon which relief can be granted' under Rule 12(b)(6). As a practical matter, dismissing a frivolous case under Rule 12(b)(6) is not significantly more difficult and time-consuming than dismissing it for lack of

¹⁷⁵ *Gildner v. Accenture LLP*, 2009-Ohio-5335.

¹⁷⁶ See George Mason Law Professor Illya Somin, *The Case Against Restrictive Constitutional Standing Requirements* (August 19, 2010), available at <http://www.volokh.com/2010/08/19/the-case-against-restrictive-constitutional-standing-requirements/>.

standing. Defendants routinely brief both issues anyway. In extreme cases, attorneys who bring frivolous suits can be sanctioned under Rule 11.¹⁷⁷ Indeed, here, the state filed a robust legal brief on standing grounds.

Third, Ohio statutes such as R.C. 733.56 *et seq.* generously permit standing against Ohio local governments *now*, and they have not resulted in anything remotely resembling a crisis in the courts. This is even though those statutes, as opposed to the situation here, feature attorneys fees provisions that *may* incentivize attorneys to challenge the constitutionality of legislative enactments.

Fourth, ProgressOhio has herein proposed a series of limiting principles that this Court may employ to limit public interest, taxpayer, and/or statutory standing to cases where it is necessary to safeguard the Ohio Constitution. For instance, recognition of Pennsylvania's *Biester* factors articulated above (or their equivalent) would limit constitutional challenges to those where (1) at issue is a structural constitutional limit on government that protects the general public, but the violation of which does not result in any particular Ohioan having a greater "personal stake" in enforcing it; (2) the government conduct will be unreviewable and go unchecked unless a citizen-taxpayer without a uniquely personal stake has the capacity to challenge it; and (3) the persons who have brought the claim are the best-situated party to bring it, and there is no better-situated, or more adverse, party. Each of these considerations applies here; but each works to curtail an opening of the "floodgates" to litigation.

Fifth, because there is no manner of recouping attorneys fees through a fee-shifting statute at the state level, there is an inherent, pragmatic "limiting principle" in the potential growth in the initiation of cases such as this. Rarely will a private Ohio citizen maintain a sufficient pecuniary interest to spend on the attorneys fees necessary to challenge unlawful government spending. Meanwhile, public interest organizations only have so many resources, and are likely to focus on extraordinary government actions,

¹⁷⁷

Somin, *supra*.

where the likelihood of success is high.¹⁷⁸ There is simply to *market* for frivolous actions to curtail unlawful state spending. That is why cases like this are, and will continue to be, rare.

Finally, and most importantly, the lack of a “personal stake” or “special interest” is a repugnant basis for denying standing. First, the rule simply does not apply to spending, debt, and corporate welfare limits on state government, where all Ohioans have an equal interest that is relatively the same. When government fails to follow the constitution, all are impaired, but absent this Court’s relief, none will be impaired sufficiently to enforce the constitution when the legislature transgresses it. And as Professor Somin explains, “the fact that an unconstitutional law harms many people (even in a diffuse way) makes it all the more urgent that courts be able to strike it down.”¹⁷⁹ Indeed, it would be unconscionable to ostensibly fashion a standing doctrine that would provide standing for a plaintiff with \$1 in nominal damages to hold Ohio to its constitutional limits, while simultaneously insulating from review a program with the potentially vast constitutional and economic implications of JobsOhio.

This Court must answer the following question, in considering whether to bar these appellants from seeking to enforce the Ohio Constitution against their legislature: If Appellants cannot bring this case now, who can? And when? If it cannot identify another party that has standing, then Ohio standing jurisprudence will have swung to the point that the Ohio Constitution is unenforceable, the judiciary has neutered itself, and the Ohio General Assembly is all powerful.

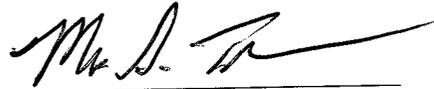
CONCLUSION

For the foregoing reasons, the Appellate Court must be reversed, and these Appellants must be held to maintain standing to raise the substantive constitutional claims articulated in their Complaint.

¹⁷⁸ See *Somin*, supra (“few litigants are willing to pay the cost of filing suits that are doomed to near-certain failure.”).

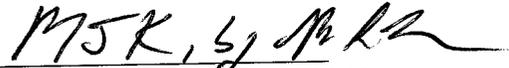
¹⁷⁹ *Somin*, supra.

Respectfully submitted,

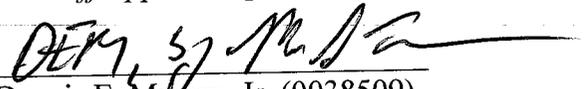


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I certify that a true and correct copy of the foregoing was properly served upon the following via email on April 16, 2013:

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APPENDIX

APPENDIX
NOTICE OF APPEAL

ORIGINAL

IN THE SUPREME COURT OF OHIO

PROGRESSOHIO.ORG, INC., ET AL.
Appellants

On Appeal from the
Franklin County Court of
Appeals, Tenth Appellate
District
Court of Appeals
Case Number 11AP 1136

v.

JOBSSOHIO, ET AL.

Appellees

12-1272

NOTICE OF APPEAL OF APPELLANTS PROGRESS OHIO, SENATOR MICHAEL
SKINDELL AND REPRESENTATIVE DENNIS MURRAY, JR.

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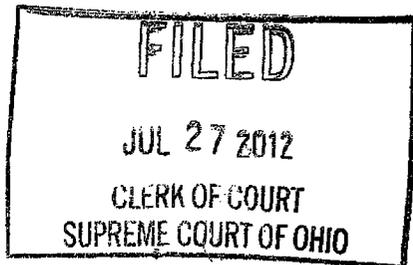
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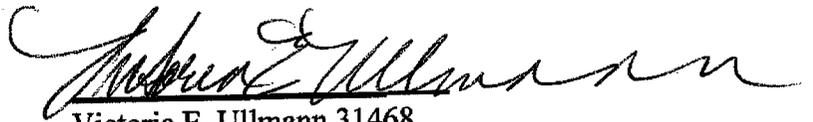


NOTICE OF APPEAL OF APPELLANTS PROGRESS OHIO, INC., SENATOR
MICHAEL SKINDELL AND REPRESENTATIVE DENNIS MURRAY, JR.

Appellants Progress Ohio, Senator Michael Skindell and Representative Dennis Murray,
Jr. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin
County Court of Common Pleas, Tenth Appellate District entered June 15, 2012 in case number
12 AP 1136.

This case raises a substantial constitutional question and is of public or great general
interest.

Respectfully submitted,

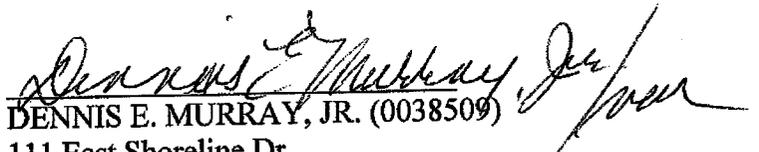


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CERTIFICATE OF SERVICE

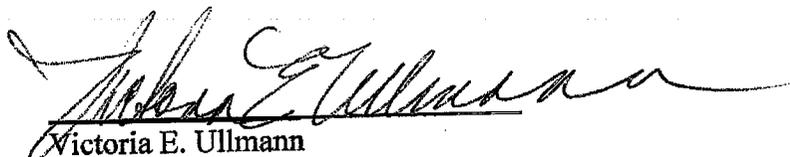
I certify that a copy of this memorandum was sent by e mail 7/27/2012 to the following:

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APPENDIX
TENTH DISTRICT JUDGMENT AND ORDER

FILED *Betty* 12

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

ProgressOhio.org, Inc. et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 11AP-1136
JobsOhio et al.,	:	(C.P.C. No. 11CVH08-10807)
Defendants-Appellees.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on June 14, 2012

Victoria E. Ullmann; Friedman, Domiano, Smith Co., and Michael J. Skindell; Murray & Murray Co., L.P.A., and Dennis E. Murray, for appellants.

Organ Cole + Stock LLP, and Douglas R. Cole; Squire Sanders (US) LLP, and Aneca E. Lasley, for appellee JobsOhio.

Michael DeWine, Attorney General, Aaron D. Epstein and Pearl M. Chin, Constitutional Offices Section.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Plaintiffs-appellants, ProgressOhio.org., Inc. ("ProgressOhio" or "appellants"), Ohio Senator Michael J. Skindell, and Ohio Representative Dennis E. Murray ("legislators" or "appellants") appeal from the December 2, 2011 decision of the Franklin County Court of Common Pleas granting defendants-appellees Ohio Governor John R. Kasich, Director Christiane Schment, Director Timothy S. Keen, Ohio Treasurer

Josh Mandel ("State-defendants"), and not for profit corporation JobsOhio's motions to dismiss and denying in part ProgressOhio's motion to strike. Because appellants have not met their burden to establish that they have standing to bring their action, we affirm the judgment of the trial court.

{¶2} This case originated in the Franklin County Court of Common Pleas as a constitutional challenge to the JobsOhio Act, specifically R.C. 187.01 et seq. and R.C. 4313.01 et seq., enacted by means of Am.Sub.H.B. No. 1 of the 129th General Assembly and amended through Am.Sub.H.B. No. 153 of the 129th General Assembly. JobsOhio is a nonprofit corporation created by statute to promote economic development, job creation, job retention, job training, and the recruitment of business to the state of Ohio. R.C. 187.01. According to statute, it is under the control of a board of directors appointed by the governor, and is not a state agency. R.C. 187.01(B); 187.03(A). JobsOhio is designed to be funded by a combination of public and private revenue, including proceeds from the state's liquor enterprise. R.C. 4313.02(A); R.C. 187.07.

{¶3} According to the complaint, ProgressOhio "is a 501(c)(4) organization", *** created to provide a progressive voice for Ohio citizens." (Amended Complaint, at ¶ 12.) It seeks to inform the public about progressive ideals, values and politics in order to provide a more just and democratic society. ProgressOhio claims a statewide membership of 350,000. *Id.*

{¶4} On August 29, 2011, ProgressOhio filed a complaint in the Franklin County Court of Common Pleas. They later filed an amended complaint on November 16, 2011, alleging that the General Assembly and the current administration had created an unconstitutionally chartered corporation that will spend government revenues secretly and free from accountability. More specifically, ProgressOhio alleges the legislation violates the Ohio Constitution in seven ways, summarized here as follows: (1) the JobsOhio Act violates Article XIII, Section 1 because it is a special act conferring corporate powers; (2) the JobsOhio Act violates Article XIII, Section 2, which requires all

¹ A 501(c)(4) organization is a non-profit entity operated to promote social welfare to benefit the community. Examples include civic leagues, social welfare organizations, and local associations such as volunteer fire companies. IRS Publication 557, at 51 (Rev 2011).

corporations to be filed under the general laws; (3) the JobsOhio Act violates Article VIII, Section 4, which prohibits the state from making equity investments; (4) the JobsOhio Act violates Article I, Section 16, which requires the courts be open so injured parties may obtain a remedy by due process; (5) the JobsOhio Act violates Article II, Section 22, by providing appropriation for JobsOhio for more than two years; (6) the JobsOhio Act violates Article VIII, Section 2(h), by authorizing the state to exceed its bond limit; and (7) the JobsOhio Act violates Article VIII, Section 4, by lending the credit of the state to a private corporation.

{¶5} JobsOhio and the State-defendants responded to the complaint by filing motions to dismiss, arguing that appellants lacked standing to bring their action and that ProgressOhio's claims were not ripe. The parties' arguments overlapped in some respects, but they can be summarized here as follows: (1) appellants lack standing because they have not been threatened with or suffered a direct and concrete injury in a manner or degree different from that suffered by the public in general; (2) appellants lack taxpayer standing because they have not shown a special interest different from that of taxpayers generally; (3) the legislators (who voted against the legislation) lack standing because they have not been prevented from casting an effective vote; (4) there is no statutory basis that confers standing on the plaintiffs; (5) appellants lack standing to bring a declaratory judgment action under R.C. 2721.02 et seq., because they cannot identify a legal right or interest that is affected by the legislation; (6) appellants' claims are premature because they assume future hypothetical events that may or may not occur; (7) appellants lack associational standing because none of its members can point to a legally cognizable injury that is different from anything suffered by the general public; and (8) appellants cannot show public right standing because their action is not one in mandamus or prohibition.

{¶6} The trial court analyzed the various grounds for standing that would allow appellants to move forward with their constitutional claims. The trial court rejected all of appellants' arguments and concluded that none of the appellants had standing to pursue their claims. The trial court dismissed the complaint, and this appeal followed.

{7} On appeal, appellants have asserted the following assignments of error:

[I.] The trial court erred in determining that constitutional challenges can only be brought by way of extraordinary writ.

[II.] The trial court erred in failing to find that R.C. 187.09 grants standing to all the plaintiffs to bring this action.

[III.] The trial court erred in denying Senator Skindell and Representative Murry [sic] legislative standing in this action.

[IV.] The trial court erred in denying plaintiffs' standing to bring this case as a matter of great public interest and importance.

[V.] The court erred in refusing to find that the relationship between the state and corporations is a core value enshrined in the Ohio Constitution that constitutes a matter of great public importance.

VI. The trial court erred in failing to recognize that control of state debt is a core feature in the Ohio Constitution and State Debt, equity and bond issues are matters of great public importance that justify public interest standing.

VII. The court erred in failing to find that privatization of government functions as well as avoiding entanglement with private enterprise is a constitutional matter of great public interest and importance.

VIII. The court erred in failing to find that the statutes of repose in [R.C.] 187.09 violate the Ohio Constitution.

{8} This court recently summarized the doctrine of standing and the standard of review normally applied to a dismissal for lack of standing as follows:

Under the doctrine of standing, a litigant must have a personal stake in the matter he or she wishes to litigate. *Tiemann* at 325, 712 N.E.2d 1258. Standing requires a litigant to have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult * * * questions." *Id.* at 325, 712 N.E.2d 1258, quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663

(1962). In order to have standing, a plaintiff must demonstrate some injury caused by the defendant that has a remedy in law or equity. *Id.* The injury is not required to be large or economic, but it must be palpable. *Id.* Furthermore, the injury cannot be merely speculative, and it must also be an injury to the plaintiff himself or to a class. *Id.* An injury that is borne by the population in general, and which does not affect the plaintiff in particular, is not sufficient to confer standing. *Id.*, citing *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). See also *State ex rel. Masterson v. Ohio State Racing Comm.*, 162 Ohio St. 366, 368, 123 N.E.2d 1 (1954) ("private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally."). (Citation omitted.)

Dismissal for lack of standing is a dismissal pursuant to Civ.R. 12(B)(6). *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio3230, ¶ 4. "A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint." *Volbers-Klarich v. Middletown Mgt.*, 125 Ohio St.3d 494, 929 N.E.2d 434, 2010-Ohio-2057, ¶ 11. In order to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

For purposes of appellate review, a question involving standing is typically a question of law and, as such, it is to be reviewed de novo. *Ohio Concrete Constr. Assn. v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-905, 2009-Ohio-2400, ¶ 9.

League of United Latin Am. Citizens v. Kasich, 10th Dist. No. 10AP-639, 2012-Ohio-947, ¶ 21-23.

{¶9} With these standards in mind, we turn to the assignments of error.

{¶10} In their first assignment of error, appellants assert that the trial court erred in holding that their constitutional challenge to the JobsOhio Act could be brought only by means of an original action seeking an extraordinary writ.

{¶11} The trial court found that appellants' constitutional challenge based on public-right standing, as articulated in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999), is limited to those rare cases that rise to the level of the legislation at issue in *Sheward* (attack on the judiciary) and *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717 (case involving mandatory drug testing of injured workers seeking to participate in workers' compensation system). The trial court then found that public-right standing has been limited solely to actions seeking extraordinary writs, namely, mandamus and prohibition. (Decision, at 24.)

{¶12} In *Sheward*, the Ohio Academy of Trial Lawyers and the Ohio AFL-CIO brought an original action in prohibition and mandamus in the Supreme Court of Ohio challenging legislative tort reform. The Supreme Court of Ohio held that:

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 to have standing, as it is sufficient that the relator is a citizen of State and as such interested in the execution of laws of State.

Id. at syllabus.

{¶13} The majority indicated that the public-right doctrine is an exception to the personal injury requirement of standing. *Id.* at 503. It is conceived as an action to vindicate the general public interest. *Id.*

{¶14} As can be seen from a close reading of the syllabus in *Sheward*, the Supreme Court of Ohio did not explicitly hold that public-right standing for matters of great public interest might only be brought by means of an original action. In fact, the court in discussing with approval *State ex rel. Zupancic v. Limbach*, 58 Ohio St.3d 130 (1991), stated, "[a]lthough relators could seek a declaratory judgment coupled with a mandatory injunction in order to achieve nearly the same result we find that the alternative remedy would not be as complete as a writ of mandamus." *Sheward* at 508, quoting *Zupancic* at 134.

{¶15} In *Ohio Roundtable v. Taft*, 119 Ohio Misc.2d 49, 2002-Ohio-3669 (C.P.), citizens challenged the legitimacy of Ohio's participation in the multi-state lottery, Mega Millions, by means of declaratory judgment and mandamus actions. The trial court had to decide whether the action should be allowed to proceed as a public action, a private action, neither, or both. The court found both private standing and that the plaintiffs had standing to bring a public action. *Id.* at 44. The standing issue was not raised on appeal to this court. *State ex rel. Ohio Roundtable v. Taft*, 10th Dist. No. 02AP-911, 2003-Ohio-3340, *appeal not allowed*, 100 Ohio St.3d 1484, 2003-Ohio-5992.

{¶16} In at least one instance, the Supreme Court of Ohio has held that jurisdiction in mandamus or prohibition may be lacking in a constitutional challenge due to the existence of an adequate remedy at law by means of an action for declaratory judgment and injunctive relief. The Supreme Court of Ohio found that it lacked jurisdiction to consider the merits of a mandamus action challenging the constitutionality of new legislative enactments because they constituted disguised actions for declaratory judgment and prohibitory injunction. *State ex rel. United Auto. Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶ 41, 43. Since the Supreme Court of Ohio does not have original jurisdiction over actions for declaratory judgment, the only situations in which the Supreme Court of Ohio will initially find public-right standing will be original actions in mandamus or prohibition challenging the constitutionality of a statute. This is not the same as a rule permitting public-right standing only in original actions.

{¶17} Here, the trial court based its analysis on post-*Sheward* cases, one from the Twelfth District Court of Appeals, and one echoing the same language from our own district. In *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶ 11, this court discussed *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007-Ohio-4372, a case in which the court said that Ohio case law makes clear that public-right standing is found overwhelmingly, if not exclusively, in original actions seeking extraordinary writs, or is found in situations where early resolution is necessary. *Id.* at ¶ 59. The court in *Brinkman* disagreed with the trial court finding

standing in *Ohio Roundtable*, stating that only the Supreme Court of Ohio has the discretion to find public-rights standing. *Brinkman* at ¶ 35.

{¶18} In *Brown*, the action was not one in mandamus or prohibition, and this court found that significant as did the trial court in the instant case. However, the court in *Brown* stopped short of holding that a case based on public-right standing must *inevitably* be brought as an original action. Even though it found the type of action filed significant for purposes of standing, the court had another, more primary reason for its decision. The court concluded that the weighted per-pupil funding issue in *Brown* did not rise to the rare and extraordinary nature of an attack on the judiciary as was the case in *Sheward. Id.* at ¶ 14.

{¶19} In our view, whether appellants have sought a writ of mandamus or a declaratory judgment is ultimately irrelevant. The trial court's denial of public-right standing based on the type of action brought did not prejudice appellants. As discussed in assignments of error four through seven below, appellants cannot find the kind of rare and extraordinary circumstances necessary to invoke public-interest standing, therefore, the public-right exception to the usual personal stake requirement for standing cannot be met.

{¶20} Being non-prejudicial, the first assignment of error is overruled.

{¶21} In their second assignment of error, appellants contend that R.C. 187.09(B) provides a statutory basis for standing for their constitutional challenge. Common-law standing requirements do not apply when standing is conferred by a specific statute. *Ohio Valley Associated Builders & Contrs. v. DeBra-Kuempel*, 192 Ohio App.3d 504, 2011-Ohio-756, ¶ 22 (2nd Dist.). Under normal rules of statutory construction, a statute will not be deemed to abrogate common-law standing requirements unless the legislature has stated so. *Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 67 Ohio St.3d 302, 304 (1993).

{¶22} Here, R.C. 187.09(B) provides as follows:

Except as provided in division (D) of this section, any claim asserting that any one or more sections of the Revised Code amended or enacted by H.B. 1 of the 129th general assembly, any section of Chapter 4313. of the Revised Code enacted by H.B. 153 of the 129th general assembly, or any portion of one or more of those sections, violates any provision of the Ohio

Constitution shall be brought in the court of common pleas of Franklin county within ninety days after the effective date of the amendment of this section by H.B. 153 of the 129th general assembly.

{¶23} The provision cited by appellants does not contain any language conferring standing. Rather, it identifies where and when a suit may be brought. Appellants argue that standing is implied because of the Supreme Court of Ohio's decision in the first action brought by appellants *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101 ("*ProgressOhio.org. I*"). That case did nothing to dispense with standing requirements for a constitutional challenge to legislation. The case was decided solely on jurisdictional grounds, and the court found that it lacked original jurisdiction to grant the requested declaratory and injunctive relief. *Id.* at ¶ 2.

{¶24} The majority's remark that the amended statute provides, "[A] remedy for petitioners to institute an action challenging the constitutionality of amended R.C. 187.01 et seq. by way of an action in the Franklin County Court of Common Pleas" does not state explicitly or even impliedly that traditional standing requirements have been suspended or dispensed with. *Id.* at ¶ 6. The case was decided on jurisdictional grounds, and it appears the court was making clear that the amended statute now vested jurisdiction in the Franklin County Court of Common Pleas.

{¶25} Appellants also argue that the dissent gave no weight whatsoever to the standing issue in *ProgressOhio.org I*. Justice Pfeifer, in dissent, argued for sua sponte converting the action to a mandamus action and granting an alternative writ to begin the briefing process. He indicated that the challenged legislation made significant changes to the organizational structure of state government and did not involve complex factual issues that would benefit from development of a record in a trial court. *Id.* at ¶ 8, 9. The dissent would have found a need for early resolution, statewide public impact, and public-interest standing. *Id.* Even if the rest of the court had agreed with him, the dissent did not find or even imply the existence of standing on any statutory basis, but rather would have found an exception to the general standing requirements under the public-right doctrine.

{¶26} The second assignment of error is overruled.

{¶27} In the third assignment of error, the legislators argue they have legislative standing. Despite voting in the minority on the JobsOhio Act, the legislators argue they have standing because they are threatened with future harm. They claim that the JobsOhio Act will interfere with their ability to legislatively appropriate funds in the future because the JobsOhio Act unconstitutionally encumbers funds for more than two years.

{¶28} Legislative standing stems from vote nullification when the executive branch will not enforce a duly enacted law by the legislature and, therefore, a legislator who voted for a bill could show an injury not suffered by the public in general. In *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, ¶ 17, 20, the Supreme Court of Ohio found standing for the Senate President and Speaker of the House, as legislators who voted with the majority to prevent their votes from being nullified. The court indicated that a legislator voting in the minority would not have standing. *Id.* at ¶ 19. This is the scope of legislator standing recognized by the Supreme Court of Ohio.

{¶29} Here, the legislators, apparently recognizing the futility of arguing their votes were nullified, have theorized that the JobsOhio Act could impair their ability to allocate funds in the future if liquor revenue is obligated for more than two years. Appellants have cited no legal authority for their theory. Such a novel and speculative theory of standing bears no relationship to vote nullification—the narrow grounds for legislative standing recognized in Ohio. The third assignment of error is overruled.

{¶30} In the fourth through seventh assignments of error, appellants reiterate their arguments for the unconstitutionality of the JobsOhio Act. They claim that the matter is one of great public interest and importance because of media attention to the privatization of governmental functions, the historic importance of issues of public debt and the relationship of corporations to public expenditures, and the alleged lack of accountability and commingling of public and private funds.

{¶31} There is no question that appellants' challenge raises significant concerns about at least some of the provisions of the JobsOhio Act. However, in 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." See *ProgressOhio.org I* at ¶ 9 (Pfeifer, J., dissenting). This is not enough of a public concern to confer standing on appellants.

{¶32} In comparison, the statutory scheme at issue in *Sheward* affected every tort claim filed in Ohio. The statute at issue in *AFL-CIO* affected every injured worker in Ohio seeking to participate in the worker's compensation system. The JobsOhio Act is not the assault on the power of the judicial branch that concerned the Supreme Court of Ohio in *Sheward*. It "does not 'transform[] the civil justice system' " as did the tort reform legislation in that case. *United Auto., Aerospace & Agricultural Implement Workers of Am.*, at ¶ 50. The public-right doctrine exists to vindicate matters of great public interest and societal impact. " 'Not all alleged illegalities or irregularities are thought to be of that high order of concern.' " *Sheward* at 503, quoting Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv.L.Rev. 1265, 1314 (1961).

{¶33} Assignments of error four through seven are overruled.

{¶34} In the eighth assignment of error, appellants argue that the trial court should have found R.C. 187.09 unconstitutional because it has unnaturally short (60 and 90 day) statutes of limitations. Appellants argue that R.C. 187.09(B) that provides 90 days to bring an action to challenge the constitutionality of the act has now expired. Thus, they claim they are insulated from challenging the constitutionality of the statute later if they are found to lack standing in the instant case. They claim that the effect of the trial court's ruling is to deny *anyone* from bringing a constitutional challenge to the JobsOhio Act. They argue this is unconstitutional as it results in a violation of separation of powers. Appellants also argue that the 60-day period in R.C. 187.09(C) for bringing a claim based on any action taken by JobsOhio will result in the statute of limitations running before appellants are able to discover harm from wrongful actions by JobsOhio.

{¶35} Appellants' claims were dismissed because they lacked standing, not because of any issue with the statute of limitations. Until appellants can establish standing, this court cannot address the merits of this argument particularly as it relates to future actions. Appellants argue that a future contingency could affect their ability to

bring another action. As such, they are asking this court for an advisory opinion. Rather than issuing advisory opinions, courts must exercise judicial restraint.

{¶36} Obviously, the future contingency contemplated by appellants has yet to occur. If appellants or other parties can establish standing, and believe the statute fails to provide an adequate remedy at law, they have already demonstrated an awareness of alternative options. The eighth assignment of error is overruled.

{¶37} Additionally, appellants have filed a motion asking this court to declare R.C. 187.09 unconstitutional as a violation of separation of powers because R.C. 187.09(E) directs the court of appeals to expedite any appeal brought under division (B) or (C) and to give the case priority over all other civil cases before the court. Similarly to what was argued in *Sheward*, appellants represent that this is a fundamental assault on the judicial power of the court to regulate its docket.

{¶38} As discussed above, the proper procedure to challenge the constitutionality of a statute is not by way of motion in the court of appeals, but by an original action or by way of an action for declaratory judgment and an injunction. Lack of standing and our deliberation and disposition of the instant case render the motion moot. In accordance with principles of judicial restraint, " 'if it is not necessary to decide more, it is necessary not to decide more.' " *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 2006-Ohio-5202, ¶ 50, quoting *State ex rel. Asti v. Ohio Dept. of Youth Servs.*, 107 Ohio St.3d 262, 2005-Ohio-6432, ¶ 34, quoting *PDK Laboratories, Inc. v. United States Drug Enforcement Administration*, 362 F.3d 786, 799 (D.C.Cir.2004) (Roberts, J., concurring in part and in judgment).

{¶39} Based on the foregoing, appellants' assignments of error numbered one through eight are overruled and appellants' motion to declare R.C. 187.09 unconstitutional is rendered moot. The judgment of the Franklin County Court of Common Pleas is affirmed.

*Motion rendered moot;
Judgment affirmed.*

SADLER and DORRIAN, JJ., concur.

FILED
COURT OF APPEALS
FRANKLIN COUNTY OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

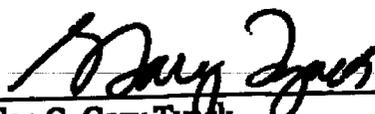
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CLERK OF COURTS

ProgressOhio.org, Inc. et al.,	:	
	:	
Plaintiffs-Appellants,	:	
	:	
v.	:	No. 11AP-1136
	:	(C.P.C. No. 11CVH08-10807)
JobsOhio et al.,	:	
	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 14, 2012, appellants' assignments of error are overruled and appellants' motion is rendered moot. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellants.

TYACK, SADLER & DORRIAN, JJ.

By 
Judge G. Gary Tyack

APPENDIX
FRANKLIN COUNTY COMMON PLEAS JUDGMENT AND ORDER

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for the purpose of promoting economic development in Ohio. That legislation was enacted through Amended Substitute House Bill No. 1 ("H.B. 1") and was amended through Amended Substitute House Bill No. 153 ("H.B. 153"). Plaintiffs filed their First Amended Complaint ("Complaint") on November 16, 2011.

H.B. 1 and H.B. 153 (collectively the "JobsOhio Act") amend a number of Ohio statutes. H.B. 1 also enacts Revised Code Sections 187.01 to 187.12. R.C. 187.01 provides for the formation of JobsOhio and outlines the purpose of the corporation, stating: "The governor is hereby authorized to form a nonprofit corporation, to be named "JobsOhio," with the purposes of promoting economic development, job creation, job retention, job training, and the recruitment of business to this state." It mandates that Ohio's governor sign and file the articles of incorporation and appoint nine directors to the JobsOhio board of directors.

A. Plaintiff's Allegations

Plaintiffs allege that parts of the JobsOhio Act, specifically R.C. 187.07 et seq. and R.C. 4313.01 et seq., are unconstitutional on a number of grounds. In Counts I and II of their Complaint, Plaintiffs allege that R.C. 187.07 et seq. is unconstitutional because it exempts JobsOhio from many general state laws governing corporations, in violation of Sections 1 and 2 of Article XIII of the Ohio Constitution that prohibit the General Assembly from passing a "special act conferring corporate powers" and provide that corporations "may be formed under general laws." Sections 1 and 2, Article XIII, Ohio Constitution, respectively.

In Count III, Plaintiffs allege that R.C. 187.01, in conjunction with Section 5 of H.B. 1, is unconstitutional because it permits the State to make equity investments into JobsOhio and makes the State a shareholder in JobsOhio in contravention of Section 4, Article VIII of the Ohio Constitution. Section 5 of H.B. 1 directs the "Director of Development, in consultation with the

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Director of Budget and Management,” to “find within the Department of Development’s total unexpended and unencumbered fiscal year 2011 General Revenue Fund appropriation an amount not to exceed \$ 1,000,000 in order to establish and operate the JobsOhio corporation.” Section 4, Article VIII of the Ohio Constitution provides that the “credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.”

In Count IV¹ of the Complaint, Plaintiffs allege that R.C. 187.09 is unconstitutional because it prevents parties from challenging in court the actions taken by JobsOhio. R.C. 187.09(C) provides that any constitutional challenge to an action taken by JobsOhio must be brought within sixty days after the action was taken. R.C. 187.07(F), however, only requires JobsOhio to disclose investments once a year, in March. Thus, Plaintiffs argue that JobsOhio may take an action that is unconstitutional that will not be disclosed until after the sixty-day limitations period. Plaintiffs argue that this provision violates Section 16, Article I of the Ohio Constitution, which provides that “[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.”

In Count V, Plaintiffs allege that various sections of R.C. 4313 are unconstitutional because they transfer assets of liquor distribution and merchandising operations from the Division of Liquor Control to JobsOhio for up to twenty-five years. Plaintiffs argue that this constitutes a multi-year appropriation that violates Section 22, Article II of the Ohio Constitution, which provides that “No money shall be drawn from the treasury, except in

¹ The Complaint identifies this as Count VI, however it is the fourth count in the Complaint.

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pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years.”

In Count VI, Plaintiffs allege that R.C. 4313.02(A) is unconstitutional because it authorizes the State to exceed its bond limits. Section 2h, Article VIII of the Ohio Constitution allows the State to “borrow not to exceed two hundred ninety million dollars and issue bonds or other obligations thereof” for a number of purposes related to economic development. Plaintiff alleges that the JobsOhio Act authorizes the State to sell or lease to JobsOhio the State’s liquor operations, thereby giving JobsOhio the right to the revenue collected for liquor distribution. In order to finance the purchase or lease of the State’s liquor operations, though, Plaintiffs allege that “the State and JobsOhio plan to sell bonds using [liquor] assets and/or revenues.” (Complaint at ¶50.) Plaintiffs allege that the State and JobsOhio would need to sell bonds in excess of the debt limitations imposed by Section 2h, Article VIII of the Ohio Constitution.

In their final claim, Plaintiffs allege that R.C. 4313.01 et seq., the portion of the JobsOhio Act that authorizes the State to sell or lease to JobsOhio the State’s liquor operations, violates Section 4, Article VIII of the Ohio Constitution. (Complaint, Count VII.) As previously stated, Section 4 prohibits the State from giving or loaning credit to a private corporation. Plaintiffs allege that R.C. 4313.01 allows the State to retain a reversionary interest in liquor operations and continue to operate liquor operations pursuant to a contract authorized by R.C. 4313.02(E). According to Plaintiffs, the State’s retention of some interest and control in the liquor operations sold or leased to JobsOhio constitutes the giving or loaning of credit to a private corporation. (Complaint at ¶53.)

Plaintiffs seek a declaration that the JobsOhio Act is unconstitutional. Plaintiffs also seek injunctive relief to prevent the operation of JobsOhio and prohibit various government officials

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from taking actions outlined in the JobsOhio Act. Plaintiffs allege that they have standing to bring their action “through the common law and the legislative grant of standing pursuant to Am. Sub. H.B. 1 and Am. Sub. H.B. 153.” (Complaint at ¶9.) Plaintiffs also allege that R.C. 2721.02 and 2721.03, Ohio’s Declaratory Judgment Act, “allows any person, including a corporation to bring an action requesting the court issue a declaratory judgment on the constitutionality of a statutory enactment.” (Complaint at ¶6.)

B. Supreme Court Proceedings

Before filing their action in this Court, Plaintiffs filed their action in the Supreme Court of Ohio, pursuant to Section 3 of H.B. 1. See Supreme Court Case No. 2011-0622. Section 3 of H.B. 1 purported to grant the Supreme Court of Ohio “exclusive, original jurisdiction” over any constitutional claim related to H.B. 1. Plaintiffs challenged Section 3 as unconstitutional. The Supreme Court of Ohio dismissed the action after finding that it lacked original jurisdiction to hear the action under the Constitution and that the legislature could not expand the Court’s original jurisdiction through a statute. *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101. The Court did, however, state that an amendment to the statute, Am.Sub.H.B. 153 “provide[s] a remedy for petitioners to institute an action challenging the constitutionality of amended R.C. 187.01 et seq. by way of an action in the Franklin County Court of Common Pleas.” *ProgressOhio.org*, 2011-Ohio-4101 at ¶6. Plaintiffs named the State Defendants in their action before the Supreme Court but did not list JobsOhio, which had not yet been formally created, as a defendant in that action.

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C. Defendants' Motions to Dismiss

After the Supreme Court dismissed Plaintiffs' Complaint, Plaintiffs filed their action in this Court. Plaintiffs added JobsOhio as a defendant. Defendants responded to the Complaint by filing two motions to dismiss, one on behalf of the State Defendants and one from JobsOhio.²

1. State Defendants' Motions to Dismiss

In their motion to dismiss, filed September 30, 2011, the State Defendants argue that Plaintiffs' Complaint should be dismissed because Plaintiffs lack standing to bring their action and Plaintiffs' claims are not ripe. (See State Defendants' Motion to Dismiss ("State Defendants' Mtn. Dismiss").)

The State Defendants argue that Plaintiffs lack standing because they have not suffered or been threatened with a "direct and concrete injury in a manner or degree different from that suffered by the public in general." (State Defendants' Mtn. Dismiss at 3, citing *Cuyahoga Cty. Bd. of Commrs. v. Ohio*, 112 Ohio St.3d 59, 2006-Ohio-6499, at ¶22.) According to the State Defendants, a personal, direct and concrete injury is necessary where a plaintiff claims standing based upon citizenship, and an association may only have standing if its members have suffered an actual injury. (Id. at 3-4.) Plaintiffs' disagreement with the JobsOhio Act is not sufficient to confer standing, the State Defendants argue.

The State Defendants further argue that Plaintiffs lack taxpayer standing because they have not shown a "special interest" different from that of taxpayers generally. (State Defendants' Mtn. Dismiss at 5, citing *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 366, 368, 123 N.E.2d 1.) The State Defendants argue that merely paying taxes does not confer standing to challenge a general revenue expenditure. (Id.)

² Although both motions to dismiss were filed before Plaintiffs filed their Amended Complaint, the parties agreed that the motions to dismiss would apply to the Amended Complaint. (See Nov. 17, 2011 Case Scheduling Order.)

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As to Plaintiffs Skindell and Murray, the State Defendants argue that they lack standing as state legislators because legislator standing exists only where a legislator has been “prevented from casting an effective vote.” (Id. at 7, citing *State ex rel. Ohio General Assembly v. Brunner* 114 Ohio St.3d 386, 2007-Ohio-3780, at ¶19.) Here, Plaintiffs Skindell and Murray voted against the JobsOhio Act. There are no allegations in the Complaint to suggest that the legislators’ votes were not counted.

The State Defendants next argue that no state statute confers standing on Plaintiffs. (Id. at 8.) In their Complaint, Plaintiffs allege that they have standing under, *inter alia*, “Am. Sub. H.B. 1 and Am. Sub. H.B. 153.” (Complaint at ¶9.) The State Defendants presume that Plaintiffs rely upon R.C. 187.09 to confer standing. (State Defendants’ Mtn. Dismiss at 8.) R.C. 187.09 provides that any claim asserting that any portion of the JobsOhio Act is unconstitutional “shall be brought in the court of common pleas of Franklin county within ninety days after the effective date of the amendment of this section by H.B. 153 of the 129th general assembly.” The State Defendants argue that this provision merely provides a venue and statute of repose but does not confer standing upon anyone. (Id.) According to the State Defendants, common law standing requirements still apply.

The State Defendants contend that in order to have standing under the Declaratory Judgment Act, R.C. 2721.02 et seq., a party must be “legally affected” or have a real justiciable controversy in order to have standing to bring a declaratory judgment action. (Id. at 9, quoting *Driscoll v. Austintown Associates* (1975), 42 Ohio St.2d 263, 273, 328 N.E.2d 395.) According to the State Defendants, Plaintiffs cannot identify a legal right or interest that is affected by the JobsOhio Act; therefore, Plaintiffs lack standing to bring a declaratory judgment claim. (Id.)

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In addition to arguing that Plaintiffs lack standing to bring their claim, the State Defendants argue that Plaintiffs' action must be dismissed because Plaintiffs' claims are not ripe for resolution. (Id. at 10.) The State Defendants contend that Plaintiffs' claims are premature because Plaintiffs make allegations regarding "future, hypothetical events that may not ever occur." (Id. at 11.) As an example, the State Defendants argue that no provision of the JobsOhio Act mandates that the State must make equity investments into a private enterprise as Plaintiffs allege the State *intends* to do.

2. JobsOhio's Motion to Dismiss

Defendant JobsOhio filed its motion to dismiss on October 3, 2011. JobsOhio argues that Plaintiffs' Complaint must be dismissed because Plaintiffs lack standing. JobsOhio also contends that Count II of Plaintiff's Complaint is not ripe for judicial resolution. (JobsOhio's Motion to Dismiss ("JobsOhio's Mtn. Dismiss") at 2.) JobsOhio makes many of the same arguments as the State Defendants do in their motion to dismiss. The Court will not repeat the duplicative arguments but will summarize new or additional arguments JobsOhio raises.

As to whether ProgressOhio has associational standing, JobsOhio contends that ProgressOhio cannot meet any of the three requirements to have associational standing: 1) its members would have standing to sue on their own; 2) it seeks to protect an interest relevant to its collective purpose; and 3) neither the claim nor the relief sought requires participation by any individual members. (Id. at 7, citing *Ohio Trucking Ass'n v. Stickrath*, 10th Dist. No. 10AP-673, 2011-Ohio-4361, at ¶14.) JobsOhio argues that ProgressOhio has not alleged and cannot show that any of its members have suffered any judicially-cognizable injury that is different from that suffered by the general public. (Id. at 7.)

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Furthermore, JobsOhio argues that ProgressOhio has not alleged that the JobsOhio Act is germane to its interests, which is to “inform the public about progressive ideals in order to provide a more just and democratic society,” and “ensure that the government follows the dictates of the U.S. and Ohio Constitutions.” (Id. at 8; Complaint at ¶12.) JobsOhio contends that the JobsOhio Act does not interfere with ProgressOhio’s interests in informing and educating the public, and its goal of ensuring the government follows the constitution is so general that it would eviscerate all associational standing standards if allowed to provide a basis for standing. (JobsOhio’s Mtn. Dismiss at 8.) Finally, because there is no direct harm to any individual ProgressOhio member, JobsOhio argues that the Court cannot even analyze the third requirement for associational standing. (Id. at 8.)

Responding to any claim of taxpayer standing, JobsOhio additionally argues that the JobsOhio Act does not create any new tax expenditure because the money comes from amounts already allocated to the Department of Development. (Id. at 9.) Thus, Plaintiffs do not have standing as taxpayers.

In addition to the State Defendants’ arguments as to why R.C. 187.09 does not confer statutory standing to Plaintiffs, JobsOhio points to a number of other cases and statutes which it argues shows that Ohio requires a statutory abrogation of common law standing rules to expressly identify the categories of plaintiffs who have standing. (Id. at 11.) R.C. 187.09 does not explicitly identify any particular plaintiff or class of plaintiff upon whom it confers standing.

JobsOhio also addresses whether a “public right” exception to the common law standing requirements may apply to Plaintiffs’ action. According to JobsOhio, standing based upon “public right” may be found without an injury where “the issues sought to be litigated are of great importance and interest to the public.” (Id. at 12, quoting *State ex rel. Ohio Academy of*

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Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, 471, 715 N.E.2d 1062.) JobsOhio contends that this exception is very limited and applies only to actions in mandamus and/or prohibition, which Plaintiffs' action is not. (Id.)

Finally, JobsOhio argues that Count II of Plaintiff's Complaint is not ripe for judicial resolution. (Id.) Applying a three-factor ripeness test, JobsOhio contends that the likelihood of alleged future harm is speculative because the structure of JobsOhio's future transactions is unknown such that it is premature to assume that they will be unconstitutional. (Id. at 14.) JobsOhio also argues that a delay would not cause hardship because an action could be brought after an actual transaction has occurred and its details become known. (Id. at 14-15.) JobsOhio also argues that the factual record is not sufficiently developed to allow resolution of the issue because the structure and form of JobsOhio transactions has not yet been determined. JobsOhio contends that the details of any particular transaction must be known before the Court can assess the constitutionality of the transaction. (Id. at 15.)

D. Plaintiffs' Memorandum Contra

Plaintiffs filed their Memorandum Contra to Defendants' two motions to dismiss on October 14, 2011. Plaintiffs devote a large portion of their Memorandum Contra to arguing why the JobsOhio Act is unconstitutional. Relevant to Defendants' motions to dismiss, however, Plaintiffs contend that they have standing to bring their action "pursuant to the legislative grant under R.C. 187.09 and under the common law." (Memo. Contra at 3.) In support of their statutory standing argument, Plaintiffs contend that R.C. 187.09(B)'s language providing that "any [constitutional claim] shall be brought in the court of common pleas of Franklin county within ninety days" clearly "confers standing for public interest suits." (Id. at 7.) Therefore,

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Plaintiffs contend that the statute dispenses of any requirements that they show an actual injury in order to have standing. (Id.)

Plaintiffs further argue that the Supreme Court of Ohio “implied” that Plaintiffs have standing here in its decision in the previous related action wherein it stated that Am.Sub.H.B. 153 “provide[s] a remedy for petitioners to institute an action challenging the constitutionality of amended R.C. 187.01 et seq. by way of an action in the Franklin County Court of Common Pleas.” (Id. at 7, quoting *ProgressOhio.org*, 2011-Ohio-4101 at ¶6.)

As to Plaintiffs Skindell and Murray, Plaintiffs argue that the two plaintiffs have legislator standing. Although Plaintiffs acknowledge that legislator standing typically applies only to cases of voter nullification, Plaintiffs contend that state courts need not adhere to such strict standards in analyzing legislator standing. (Id. at 8.) Instead, Plaintiffs contend that the plaintiff legislators have standing because they suffer a specific injury as a result of the JobsOhio Act. (Id. at 8-9.) Plaintiffs contend that the JobsOhio Act obligates state money for more than two years, despite the Ohio Constitution’s limitation on appropriations to two years. (Id., citing Section 22, Article II of the Ohio Constitution.) Therefore, Plaintiffs contend that the JobsOhio Act prevents the plaintiff legislators from exercising their rights and duties to appropriate money. (Id. at 9.)

Finally, Plaintiffs argue that they have standing as “citizens and taxpayers” to challenge the JobsOhio Act because it is a matter of “great public interest.” (Id. at 10.) Plaintiffs contend that because the JobsOhio Act is of such great public interest, they have standing under the “public right” standing doctrine and do not need to show any individual injury. Plaintiffs contend that “public right” standing is not as limited as JobsOhio contends and may be applied to their circumstances.

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Responding to Defendants' ripeness arguments, Plaintiffs contend that the matter is ripe for review because "JobsOhio has already been allocated a one million-dollar appropriation" in Section 5 of H.B. 1. (Id. at 12.) Plaintiffs contend that this provision immediately violates the Constitution's prohibition against joint ventures, making their action ripe. Plaintiffs further contend that it is not possible to wait until a specific transaction has occurred to find a challenge ripe, as Defendants contend, because the JobsOhio Act only requires JobsOhio to report its investments once a year, and the statute requires that all claims be brought within sixty days of an action being taken. Under this statutory scheme, Plaintiffs contend that they will not necessarily know that a transaction has occurred until JobsOhio is required to report it, which may be more than sixty days after the transaction occurred. Plaintiffs thus urge that if their action is not currently ripe, the statute of limitations contained in the JobsOhio Act must be unconstitutional because it is an illusory remedy. (Id. at 13.)

E. Defendants' Reply Briefs

On October 24, 2011, the State Defendants and JobsOhio filed separate replies in support of their motions to dismiss. In response to Plaintiffs' contention that R.C. 187.09(B) confers standing upon them, both the State Defendants and JobsOhio argue that a statutory grant of standing must be explicit. They contrast the language in R.C. 187.09(B) with other statutes that have standing provisions to show that such provisions are explicit in defining who has standing to bring an action. (State Defendants' Reply at 2-3; JobsOhio's Reply at 3-4.) Defendants continue to argue that the language in R.C. 187.09(B) does not give Plaintiffs standing.

The State Defendants further argue that Defendants Skindell and Murray do not have legislator standing because Plaintiffs cannot prove a constitutional violation has occurred that will cause the specific injury Plaintiffs allege and no legal authority provides for legislator

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standing in this context. (State Defendants' Reply at 4-5.) JobsOhio reiterates its previous argument that legislator standing is limited to cases in which the legislator has been prevented from casting an effective vote. (JobsOhio's Reply at 5-6.) JobsOhio further urges that public policy cautions against expanding legislator standing as Plaintiffs request because it would allow legislators to challenge any spending bill they vote against. (Id. at 6.)

Responding to Plaintiffs' claim of "public right" standing, the State Defendants argue that Plaintiffs cannot meet the high requirements to dispose of a personal injury and confer standing based upon public interest. The State Defendants contend that, under *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062, "public right" standing may only exist where "the challenged statute operates, *directly and broadly*, to *divest the courts of judicial power*," and where the action is for an extraordinary writ such as actions in mandamus and prohibition. (State Defendants' Reply at 6, quoting *Sheward*, 86 Ohio St.3d at 504 (emphasis in original).) Plaintiffs do not allege that the JobsOhio Act divests the Court of judicial power, and Plaintiffs are not seeking an extraordinary writ. Further, according to the State Defendants, the circumstances present here are not so "rare and extraordinary" as to invoke "public right" standing.

JobsOhio also disputes Plaintiffs' contention that the Supreme Court has already implied that Plaintiffs have standing in this action. Instead, JobsOhio argues that the Supreme Court's previous decision addressed only whether the Court had original jurisdiction over the matter. The Court's reference to bringing an action in this Court, JobsOhio contends, was dicta and merely identified the venue where Plaintiffs could institute an action, not that Plaintiffs have standing to maintain an action. (JobsOhio's Reply at 4.)

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Finally, JobsOhio maintains that Plaintiffs' second claim is not ripe. Responding to Plaintiffs' argument that an appropriation has already been made, JobsOhio argues that such appropriation was like a "grant," not an investment, purchase, or loan, and cannot, therefore, be considered an unconstitutional joint venture. (Id. at 7.) Further, JobsOhio contends that Plaintiffs' argument that the JobsOhio Act does not provide enough time to challenge a particular action is based upon a flawed understanding of JobsOhio. JobsOhio argues that its annual reporting is not necessarily the only avenue through which Plaintiffs would learn about the corporation's activities. (Id.) Even if it were, however, JobsOhio contends that a party could presumably argue that the annual report triggers the statute of limitations, not just the date on which the underlying action was taken. (Id.)

F. Defendants' Supplemental Replies to Plaintiffs' Amended Complaint

Plaintiffs filed their Amended Complaint, which included five new claims against Defendants, after Defendants' two motions to dismiss were fully briefed. Nonetheless, the parties agreed that Defendants' motions would apply to the Amended Complaint. (See Nov. 17, 2011 Case Scheduling Order.) Defendants, however, requested an opportunity to supplement their reply briefs to respond to the additional claims included in Plaintiffs' Amended Complaint, which the Court granted. (See Nov. 17, 2011 Case Scheduling Order.) Defendants filed their supplements to their motions to dismiss on November 21, 2011.

The State Defendants argue that Plaintiffs' additional claims do not provide a basis for standing as they do not allege any new facts that would support standing here. The State Defendants also argue that ProgressOhio's discovery responses contain admissions that it has not suffered any actual injury; therefore admitting that it does not have standing. (State Defendants' Supplement to Motion to Dismiss ("State Defendants' Supplement") at 2.) The State Defendants thus incorporate their arguments from their original motion as the basis for dismissing this action.

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JobsOhio states that the basis for its supplement stems primarily from an email from ProgressOhio's counsel, which JobsOhio alleges contains a concession that the organization has not sustained any particularized harm. (JobsOhio's Supplemental Filing in Support of Its Motion to Dismiss ("JobsOhio's Supplement") at 1.) Like the State Defendants, JobsOhio contends that Plaintiffs' Amended Complaint does not include anything new that would provide a basis for Plaintiffs to have standing here. (Id. at 2.) JobsOhio thus summarizes some of the arguments in its Motion to Dismiss to reiterate its contention that Plaintiffs lack standing to pursue their claims.

G. Plaintiff ProgressOhio's Motion to Strike

On November 29, 2011³, ProgressOhio filed a Motion to Strike Defendants' Supplemental Memorandum and Objections to Defendants' Misstatement of the Record in this Case. ProgressOhio contends that Defendants' supplements should be stricken because they simply repeat previous arguments. (Motion to Strike at 1.) ProgressOhio also alleges that Defendants' supplements include material misrepresentations to which ProgressOhio objects. (Id.) ProgressOhio asserts that "Plaintiffs claim public interest standing as taxpayers," and Plaintiffs have never alleged individual harm. (Id. at 2-3.) ProgressOhio claims that "plaintiffs' arguments have been focused on public interest standing." (Id. at 2.) ProgressOhio goes on to argue that "this is a taxpayer suit and standing is based on the common law rules concerning taxpayer suits litigating issues considered to be of great public interest and concern and on 187.09 itself." (Id. at 3.) Although ProgressOhio requests that the Court strike Defendants' supplements as merely repetitive of their previous filings, ProgressOhio moves alternatively to "allow a continuing objection to defendants misrepresentations on the record." (Id. at 3.) Because the Court allowed Defendants to file supplemental materials after Plaintiffs amended

³ Although the Motion to Strike was not formally filed until November 29, 2011, the Motion was sent to the parties and the Court before the November 23, 2011 Hearing. Based upon counsel for ProgressOhio's representation, the Motion to Strike was treated as though it had already been filed before the Hearing.

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their complaint, the Court **DENIES** ProgressOhio's Motion to Strike Defendants' supplemental materials. The Court, however, **GRANTS** ProgressOhio's alternative request and allows a continuing objection to Defendants' alleged misstatements.

H. Hearing

On November 23, 2011, this Court held a hearing on the record on Defendants' motions to dismiss. The Court permitted the parties time to argue for or against the pending motions to dismiss, after which point the Court asked the parties questions to clarify their arguments on the motions. At the hearing, Plaintiffs stated that two bases upon which they all seek standing are through "public right" standing and statutory standing under the JobsOhio Act. The legislator plaintiffs also assert that they have legislator standing. Following the hearing, the Court took the parties arguments under advisement in conjunction with all briefing on the motions to dismiss.

Defendants' motions to dismiss are now before the Court.

II. MOTION TO DISMISS STANDARD

Both JobsOhio and the State Defendants filed their motions to dismiss pursuant to Civ.R. 12(B)(1) and 12(B)(6). Civ.R. 12(B)(1) provides that a claim may be dismissed if the Court lacks subject matter jurisdiction over the claim. The Court must determine "whether the plaintiff has alleged any cause of action cognizable by the forum." *Avco Financial Services Loan, Inc. v. Hale* (1987), 30 Ohio App.3d 65, 67, 520 N.E.2d 1378. In analyzing a motion to dismiss pursuant to Civ.R. 12(B)(1), a court is not required to presume that the allegations in the complaint are true, and it is not confined solely to the allegations in the complaint. *DiFranco v. First Energy*, 8th Dist. No. 2010-G-2990, 2011-Ohio-5434, ¶20 (citations omitted).

Civ.R. 12(B)(6), on the other hand, tests the sufficiency of the claims asserted in a complaint. Dismissal of a complaint pursuant to Civ.R. 12(B)(6) is appropriate only where it

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appears beyond a doubt from the complaint that the plaintiff can prove no set of facts in support of the claim at issue that would entitle him to relief. See *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 144, 573 N.E.2d 1063. The Court, “in construing a complaint upon a motion to dismiss for failure to state a claim, must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.” *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St 3d 190, 192, 532 N.E.2d 753.

Defendants attached additional materials to their reply briefs and supplements in support of their motions to dismiss, namely ProgressOhio’s discovery responses and an email exchange between counsel for ProgressOhio and counsel for Defendants. Because these materials go beyond the pleadings, they generally may not be considered in analyzing a motion to dismiss. Because a court is not confined to the pleadings in analyzing a motion under Civ.R. 12(B)(1), however, “it may consider material pertinent to such inquiry without converting the motion into one for summary judgment.” *DiFranco*, 2011-Ohio-5434, at ¶20 (citations omitted). Under Civ.R. 12(B)(6), though, a court must give the parties notice before converting a motion to dismiss into a motion for summary judgment when extraneous materials are submitted with the motion to dismiss. Here, the Court declines to convert Defendants’ motions to dismiss into motions for summary judgment. Because the Court can reach a determination on the motions to dismiss without the extraneous materials, the Court disregards them and will consider only the original pleadings. See *Keller v. City of Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599, ¶19.

III. LAW AND ANALYSIS

Although Plaintiffs allege that the JobsOhio act is unconstitutional in numerous ways, the Court cannot consider the merits of Plaintiffs’ constitutional challenges without making a preliminary determination that Plaintiffs have standing to bring their action, Plaintiffs’ claims are

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ripe, and the Court otherwise has jurisdiction over the matter. Here, Defendants argue that the Court lacks jurisdiction in this matter and should dismiss the action because Plaintiffs lack standing to bring their action and Plaintiffs' claims are not ripe. Any number of common law standards or statutes may provide the basis for standing in an action. The Court will consider each of them in turn before analyzing whether Plaintiffs' claims are ripe for determination.

A. Standing

"It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469, 715 N.E.2d 1062, citing *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 643 N.E.2d 1088. Under Ohio's common law, standing generally requires that the person bringing the action allege a "personal stake" in the outcome of the action, which generally requires that the plaintiff suffer an actual and concrete injury. *Id.* (citations omitted.); *Bicking*, 71 Ohio St.3d at 320. Thus, the Supreme Court of Ohio has determined that "[i]n order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show that he or she has suffered or is threatened with a direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question caused the injury, and that the relief requested will redress the injury." *Sheward*, 86 Ohio St.3d at 469-470. (citations omitted.)

An organization attempting to litigate on behalf of its members must establish that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Bicking*, 71

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Ohio St.3d at 320, quoting *Simon v. E. Kentucky Welfare Rights Org.* (1976), 426 U.S. 26, 40, 96 S.Ct. 1917. “[T]he association must establish that its members have suffered actual injury.” Id.

Plaintiffs here do not allege that they have suffered an “actual injury” such that they would have standing under traditional common law views of standing outlined above. Instead, they allege that their standing arises from legislator standing, statutory standing pursuant to the JobsOhio Act, and “public right” standing.

1. Taxpayer Standing

Under the common law, Courts have addressed the standards that apply when a plaintiff’s standing is based upon his membership in a particular class, such as standing as a taxpayer and citizen or standing as a legislator. A plaintiff does not have standing to challenge a legislative enactment simply because he is a taxpayer or citizen. Rather, the Ohio Supreme Court has set forth the following rule with respect to taxpayer or citizen standing:

[A]part from statute, a taxpayer cannot bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are put in jeopardy. In other words, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally.

State ex rel. Masterson v. Ohio State Racing Comm. (1954), 162 Ohio St. 366, 368, 123 N.E.2d 1 (citations omitted).

Here, Plaintiffs suggests that they are “bringing this action as citizens and taxpayers.” (Plaintiffs’ Memo. Contra at 9.) A close reading of Plaintiffs’ Memorandum Contra, as confirmed at the hearing on the motions to dismiss, and ProgressOhio’s Motion to Strike, however, makes it clear that Plaintiffs are not seeking taxpayer standing but rather that their classification as taxpayers or citizens qualifies them to assert “public right” standing. (See, e.g., Motion to Strike at 2 (“Plaintiffs claim public interest standing as taxpayers.”) As discussed

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below, “public right” standing is distinct from taxpayer standing. Taxpayer standing still requires some form of individual or particularized harm separate from every other taxpayer. *Masterson*, 162 Ohio St. at 368. Plaintiffs are not alleging individual harm here, though, and the Court finds no individual harm that could form the basis for taxpayer standing. (See Motion to Strike at 3 (stating affirmatively that Plaintiffs have never alleged individual harm).) Thus, Plaintiffs do not have taxpayer standing to bring this action.

2. “Public Right” Standing

The Supreme Court of Ohio has recognized an exception to the general standing requirements that the plaintiff must suffer an “actual injury” and have a “personal stake” in the outcome of the litigation. Known as “public right” standing, the exception allows a party that has not suffered an actual injury to have standing “when the issues sought to be litigated are of great importance and interest to the public.” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469, 715 N.E.2d 1062. In *Sheward*, the leading case on “public right” standing, the Supreme Court of Ohio defined the doctrine as follows:

We hold, therefore, that 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.

Id. at 475. Nonetheless, the Court significantly limited the application of the doctrine. In addressing the dissent’s concerns that the Court’s holding created a new, greatly expanded basis for standing, the *Sheward* Court clarified its holding, stating “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.’” *Id.* at 503-504, quoting with added emphasis its own decision at 467.

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In *Sheward*, the Court found that a trial lawyers association, a labor union, and individual citizens had “public right” standing to challenge the state’s comprehensive tort reform legislation through a prohibition and mandamus action. The Court found the issues were “of such high order of public concern as to justify allowing [the] action as a public action.” *Id.* at 474. Expressing grave concern about the legislature’s defiance of the Court’s authority, the issue of such high concern was separation of powers, keeping judicial power vested in the judiciary instead of allowing the executive branch to usurp such power. *Id.* The usurpation of such power, the Court stated “has been described as the very definition of tyranny.” *Id.* Against this backdrop, the *Sheward* Court made it clear that it would not find “public right” standing to challenge the constitutionality of a legislative enactment unless the legislation was of the same “magnitude and scope” as legislation at issue in *Sheward*. *Id.* at 504.

In *State ex rel. Ohio AFL-CIO v. Ohio Bureau Workers’ Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717, the Supreme Court revisited “public right” standing. There, a state and national labor union, along with a union president, brought an original mandamus action to challenge the constitutionality of legislation that permitted warrantless drug and alcohol testing of injured workers. In analyzing whether the relators had “public right” standing, the Court reviewed the standard set forth in *Sheward*. *Id.* at ¶11. The Court then found that “[t]he granting of writs of mandamus and prohibition to determine the constitutionality of statute will ‘remain extraordinary’ and ‘limited to exceptional circumstances that demand early resolution.’” *Id.* at ¶12, citing *Sheward*, 86 Ohio St.3d at 515 (Pfeifer, J., concurring). Against this standard, the Court found that the relators had “public right” standing:

As the statutory scheme at issue in *Sheward* affected every tort claim filed in Ohio, H.B. 122 affects every injured worker who seeks to participate in the workers’ compensation system. It affects virtually everyone who works in Ohio. The right at stake, to be free from unreasonable searches, is so fundamental as to

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be contained in our Bill of Rights. H.B. 122 has sweeping applicability and affects a core right. Since H.B. 122 therefore implicates a public right, we find that relators meet the standing requirements of *Sheward*.

Id. at ¶12.

Since *Sheward* and *Ohio AFL-CIO*, courts have had a number of occasions to address whether litigants have public right standing on a variety of compelling issues, but declined to apply the public right exception. See, e.g., *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, ¶47 (mandamus claim challenging the Ohio Housing Finance Agency's alleged disbursement of unclaimed funds in the form of illegal loans not "rare and extraordinary"); *State ex rel. Kuhar v. Medina Cty. Bd. of Elections*, 108 Ohio St.3d 515, 2006-Ohio-1079, ¶12 (action challenging as unconstitutional legislation that changed the clerk of court position from being appointed to elected not "a 'rare and extraordinary case' in which the challenged statute operates 'directly and broadly, to divest courts of judicial power.'"); *Bowers v. Ohio State Dental Board* (10th Dist. 2001), 142 Ohio App.3d 376, 755 N.E.2d 948 (decided before *Ohio AFL-CIO*) (mandamus action by dentists to compel regulation state dental board to promulgate rules related to state dentistry licensure not of sufficiently great interest and importance to the general public); *Brown v. Columbus City Schools Board of Education*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230 (action challenging the constitutionality of the State's school funding system "not of the same magnitude as the issue in *Sheward*"); *Brinkman v. Miami University*, 12th Dist. No. CA2006-12-313, 2007-Ohio-4372 (declaratory judgment action challenging the constitutionality of a university's benefits program related to same-sex partners not "rare and extraordinary", not of the same "magnitude as the legislation in *Sheward*, and not an original action seeking an extraordinary writ).⁴

⁴ The Court was only able to locate one other case in which a court found public right standing to exist. See *Ohio Roundtable v. Taft*, 119 Ohio Misc.2d 49, 2002-Ohio-3669, 773 N.E.2d 1113. In *Taft*, the plaintiffs challenged the

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In *Brown v. Columbus City Schools Board of Education*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, the Tenth District Court of Appeals considered whether taxpayers and school district residents had “public right” standing to bring an action for declaratory judgment and injunction challenging the constitutionality of the state’s school funding system. The Court found that the plaintiffs did not have “public right” standing under the standard outlined in *Sheward*. First, the state school funding issue was insufficient to meet that “rare and extraordinary” standard outlined in *Sheward*. *Id.* at ¶14. Second, the *Brown* Court recognized that “public-right standing is found overwhelmingly, if not exclusively, in original actions seeking extraordinary writs.” *Id.*; see also *Brinkman*, 2007-Ohio-4372, at ¶59 (same). The plaintiffs’ action for declaratory judgment and injunctive relief was not an extraordinary writ. *Brown*, 2009-Ohio-3230, at ¶14. Finally, the action did not demand immediate resolution. *Id.*, citing *Brinkman*, 2007-Ohio-4372.

Here, Plaintiffs argue that they have “public right” standing because the JobsOhio Act is unconstitutional and will disassemble the Department of Development and transfer “massive government wealth to a secretive private organization.” (Memo. Contra at 10.) Plaintiffs also argued at the hearing of this matter that there is nothing of greater public interest than “corporate welfare,” which they assert exists in the instant case. Plaintiffs’ action is for a declaratory judgment that the legislation is unconstitutional, and Plaintiffs request an injunction preventing JobsOhio from taking actions authorized by the JobsOhio Act.

Upon review of the current case law on “public right” standing, the Court finds that such standing is limited only to those rare cases that rise to the level of the legislation at issue in *Sheward* and *Ohio AFL-CIO*. This case involves a large amount of money, which is of course of

constitutionality of Ohio’s participation in the multi-state lottery. This Court first found that the plaintiffs had common law standing by showing an actual injury. Nonetheless, the Court also found that the issues presented were “matters of great public importance.” *Ohio Roundtable*, 2002-Ohio-3669, ¶48.

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great concern in Ohio's tough economic climate. However finding standing based on the amount of money involved would open the floodgates to challenges involving any provision in Ohio's multibillion dollar budget. There will always be disagreements about how funds are allocated. It is not the judicial branch's function, though, to evaluate standing based on the wisdom of an expenditure. Although Plaintiffs argue that "public right" standing existed long before *Sheward* and is not limited to the narrow type of case at issue in *Sheward*, (Memo. Contra at 10-12), the Court is bound to follow the standards set forth in *Sheward*, *Ohio AFL-CIO*, and multiple decisions from the Tenth District Court of Appeals.

Further, the Court finds that "public right" standing has been limited solely to actions seeking extraordinary writs, namely mandamus and prohibition actions. Plaintiffs have not sought an extraordinary writ in this matter. The Court has found no case permitting "public right" standing to exist in the absence of a request for an extraordinary writ.⁵ As such, the Court finds that Plaintiffs do not meet the requirements to have "public right" standing.

3. Legislator Standing

As with taxpayer standing, a plaintiff's status as a member of the legislature does not automatically confer standing to challenge legislation. Instead, the Supreme Court of Ohio has found legislator standing only when the legislator plaintiff has been prevented from casting an effective vote, i.e. the legislator claims his vote was nullified. See *State ex rel. Ohio General Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, ¶19-21. In *Brunner*, the general assembly passed legislation, which was not signed by the outgoing governor before he left office. When the new governor entered office, the governor had the secretary of state, with whom the

⁵ Although Plaintiffs asserted at the hearing in this matter that they were unable to conceive of a way to bring their action as a mandamus action, counsel for the State Defendants was able to provide examples of potential mandamus actions that could have been asserted, particularly in light of Plaintiffs' assertions that sufficient action has been taken to withstand Defendants' ripeness arguments.

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bill had been filed, return the bill to him to be vetoed. Legislators who voted to pass the bill brought a mandamus action to compel the secretary of state to treat the bill as valid law. The *Brunner* Court found that the legislators had standing because they were in the majority who voted to pass the bill and their majority votes would be nullified by the governor's veto and the secretary of state's refusal to treat the bill as law. *Id.* at ¶20.

In reaching its decision, the *Brunner* Court recognized legislator standing to challenge executive decisions after reviewing two U.S. Supreme Court decisions. *Id.* at ¶17-20, citing *Coleman v. Miller* (1939), 307 U.S. 433, 59 S.Ct. 972 (legislator standing existed); and *Raines v. Byrd* (1997), 521 U.S. 811, 117 S.Ct. 2312 (no legislator standing). In *Coleman*, the U.S. Supreme Court found that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines*, 521 U.S. at 823 (interpreting *Coleman*). In *Raines*, however, the Court found that the individual members of Congress did not have standing to challenge the Line Item Veto Act. The legislators only alleged that congressional power as a whole was affected by the enacted legislation. The Supreme Court noted the following about the legislators seeking standing:

They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Line Item Veto Act, their votes were given full effect. They simply lost that vote.

Id. at 824. In *Raines*, the legislators alleged that "their votes on *future* appropriations bills" would be "less 'effective' than before." *Id.* at 825 (emphasis added). That was not sufficient to provide a basis for legislative standing, though. The *Raines* Court held that the legislators did not have standing because they did not have a "sufficient 'personal stake'" in the dispute and did not allege a "sufficiently concrete injury." *Id.* at 830.

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The legislator plaintiffs here allege that they have legislator standing because the JobsOhio Act will prevent them from exercising their legislative rights and duties to appropriate money because the JobsOhio Act diverts money away from the state general revenue fund and obligates it to JobsOhio for 25 years. (Memo. Contra at 8-9.) Although Plaintiffs acknowledge that legislator standing typically applies only to cases of voter nullification, Plaintiffs contend that state courts need not adhere to such strict standards in analyzing legislator standing. (Id. at 8.) The legislators asserted that because there had never been such an extraordinary violation of the Ohio Constitution, there was no precedent to support their standing.

Upon review of *Brunner*, *Coleman*, and *Raines*, the Court finds that legislator standing still requires the legislator to have an "individual injury" beyond alleging that the legislative power as a whole will be or was affected. See *Raines*, 521 U.S. at 830. Further, the Court finds that legislator standing has been limited to instances in which the legislator claims his vote was effectively nullified, i.e. that he voted in the majority but the majority vote was not honored. Although the legislator plaintiffs claim that their personal vote in future appropriations bills may be affected and constrained by the JobsOhio Act, the Court finds such claims similar to those made in *Raines*, which the U.S. Supreme Court unequivocally rejected. The Court found no legal authority allowing a legislator who voted in the minority was found to have legislator standing. Like the legislators in *Raines*, the plaintiff legislators here voted against the JobsOhio Act but simply lost that vote. Although Plaintiffs urge the Court to look past the strict standards imposed by federal courts in this context, the Court could find no basis for expanding legislator standing in this context. The Court finds that Plaintiffs Skindell and Murray do not have standing by virtue of being legislators to challenge the JobsOhio Act.

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4. Statutory Standing

In addition to the common law, a plaintiff may also have standing pursuant to a state statute. Where a statute specifically confers standing on certain individuals or classes of people, common law standing requirements generally do not apply. See *Ohio Valley Associated Builders and Contractors v. Kuempel*, 192 Ohio App.3d 504, 2011-Ohio-756, ¶22; *Ohio Valley Associated Builders and Contractors v. Rapier Electric, Inc.*, 192 Ohio App.3d 29, 2011-Ohio-160, ¶20. Nonetheless, the Supreme Court of Ohio has made it clear that “[n]ot every statute is to be read as an abrogation of the common law.” *Bresnik v. Beulah Park Ltd. Partnership, Inc.* (1993), 67 Ohio St.3d 302, 304, 617 N.E.2d 1096. Instead, “[s]tatutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law *unless the language employed by it clearly expresses or imports such intention.*” *Id.* (emphasis in original) (citations omitted). In determining whether a statute confers standing and to whom a statute confers standing, the Court applies general principles of statutory construction. See, e.g., *Kuempel*, 2011-Ohio-756; *Rapier Electric, Inc.*, 2011-Ohio-160. “[T]he words used in the statute are to be taken in their usual, normal, and customary meaning.” *Rapier Electric, Inc.*, 2011-Ohio-160, at ¶24.

Kuempel and *Rapier Electric, Inc.*, provide an example of a statute that confers statutory standing. The statute at issue, R.C. 4115.16, provided: “... the interested party may file a complaint in the court of common pleas of the county in which the violation is alleged to have occurred.” R.C. 4115.16(B). The definitions section of the statute then specifically defined the four types of individuals or organizations that could qualify as an “interested party.” See R.C.

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4115.03(F). The *Kuempel and Rapiere Electric, Inc.* courts thus did not have to determine whether the statute conferred statutory standing, as that was explicit, but instead only had to determine if the plaintiffs met one of the definitions of an “interested party.”

Plaintiffs here contend that R.C. 187.09 gives them standing to bring this action even if they cannot show that they have been personally injured. R.C. 187.09 provides in pertinent part:

...any claim asserting that any one or more sections of the [JobsOhio Act], or any portion of one or more of those sections, violates any provision of the Ohio Constitution shall be brought in the court of common pleas of Franklin county within ninety days after the effective date of the amendment of this section by H.B. 153 of the 129th general assembly.

At the hearing on Defendants’ motions, Plaintiffs stated that R.C. 187.09 confers standing upon anyone to challenge the constitutionality of the JobsOhio Act within a certain time period. Defendants, on the other hand, argue that R.C. 187.09 does not change the common law standing rules but instead only provides the place and time within which a person who otherwise has standing may bring an action.

Upon review of the statute, the Court finds that R.C. 187.09 does not abrogate the common law standing rules and confer standing upon Plaintiffs. Nothing in the plain language of the statute addresses standing or *who* may bring an action to challenge the constitutionality of any portion of the JobsOhio Act. The Court finds that, consistent with the above cited cases and statutes, a statute cannot be said to abrogate common law standing rules unless its statutory grant of standing is explicit.

The explicit language of the statute here only specifies the forum in which an action must first be brought and the time within which such an action must be brought. Although Plaintiffs argued that the legislature intended to confer standing for Plaintiffs to bring their action because R.C. 187.09 was enacted after Plaintiffs filed their action in the Supreme Court of Ohio, this

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Court cannot presume an intention that is not reflected in the language employed by the legislature. Had the legislature intended to confer standing on Plaintiffs to challenge the JobsOhio Act it could have done so explicitly. It did not. As such, Plaintiffs do not have standing under R.C. 187.09 to bring their action.

Nonetheless, Plaintiffs argue that the Supreme Court of Ohio has already determined that Plaintiffs have standing under R.C. 187.09. In the Supreme Court's decision finding that it did not have original jurisdiction to hear Plaintiffs' action initially, and striking down the portion of the JobsOhio Act that purported to give the Court jurisdiction over the action, the Court stated that an amendment to the statute, Am.Sub.H.B. 153 "provide[s] a remedy for petitioners to institute an action challenging the constitutionality of amended R.C. 187.01 et seq. by way of an action in the Franklin County Court of Common Pleas." *ProgressOhio.org*, 2011-Ohio-4101, at ¶6. Plaintiffs contend that this language shows that the Supreme Court already analyzed the issue and determined that Plaintiffs have standing. The Court finds, however, that the Supreme Court's decision does not determine the issue of whether Plaintiffs have standing. In its decision, the Supreme Court determined that it did not have original jurisdiction over the action and dismissed it. Although the parties also raised the issue of standing in their briefing to the Supreme Court, the Court did not reach the issue of standing in its decision because its determination that it lacked jurisdiction disposed of the matter. Thus it is not clear what, if any, analysis the Court conducted with respect to the standing issue. Instead, the Court acknowledged that an amendment to the JobsOhio Act provided a more appropriate forum to raise a constitutional challenge to the Act. Although the Court stated that Plaintiffs had another forum in which to bring their action, nothing in the Court's statement reflects that the Court determined

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that Plaintiffs have standing. As such, the Court finds that Plaintiffs do not have statutory standing under R.C. 187.09 to bring their action.

I. CONCLUSION

Despite understandable concerns regarding some of the provisions of the JobsOhio Act, based upon the foregoing analysis, the Court finds that Plaintiffs do not have standing to bring their action. As such, the Court **GRANTS** Defendants' motions to dismiss. Because the Court has determined that Plaintiffs do not have standing to pursue their action, the Court does not need to address whether Plaintiffs' claims are ripe. **It is hereby ORDERED, ADJUGED, and DECREED that Plaintiffs' claims against Defendants are DISMISSED.**

THIS IS A FINAL APPEALABLE ORDER. THERE IS NO JUST CAUSE FOR DELAY.

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Franklin County Court of Common Pleas

Date: 12-02-2011
Case Title: PROGRESSOHIO ORG INC -VS- JOBSOHIO
Case Number: 11CV010807
Type: DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in cursive that reads "Laurel Beatty". The signature is written over a circular official seal. The seal is partially obscured by the ink of the signature but appears to contain the text "CLERK OF COURTS" and "FRANKLIN COUNTY OHIO".

/s/ Judge Laurel A. Beatty

APPENDIX
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

Ohio Const. Art. XIII, Sec. 1: Special acts conferring corporate powers prohibited

The general assembly shall pass no special act conferring corporate powers.

Ohio Const. Art. XIII, Sec. 2: General corporation laws; regulation of corporations; sale or transfer of personal property

Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual.

Ohio Const. Art. VIII, Sec. 4: State to avoid financial involvement with private enterprise

The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association, in this state, or elsewhere, formed for any purpose whatever.

Ohio Const. Art. I, Sec. 16: Redress for injury; due process

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Ohio Const. Art. II, Sec. 22: Appropriations

No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years.

Ohio Const. Art. VIII, Sec. 2(h)

The State may, from time to time, borrow not to exceed two hundred ninety million dollars and issue bonds or other obligations thereof for any one or more of the following purposes: acquiring, constructing, reconstructing or otherwise improving and equipping buildings and structures of the state and state supported and assisted institutions of higher education, including

those for research and development; acquiring lands and interests in lands for sites for such buildings and structures; assisting in the development of the State, to acquire and develop lands and interests in lands and develop other state lands for water impoundment sites, flood control, parks and recreational uses, or conservation of natural resources; to develop state parks and recreational facilities including the construction, reconstruction, and improvement of roads and highways therein; to assist the political subdivisions of the state to finance the cost of constructing and extending water and sewerage lines and mains; for use in conjunction with Federal grants or loans for any of such purposes; and for use in conjunction with other governmental entities in acquiring, constructing, reconstructing, improving, and equipping water pipelines, stream flow improvements, airports, historical or educational facilities. The aggregate total amount of such borrowing outstanding under authority of this section shall not, at any time, exceed such sum as will require, during any calendar year, more than \$20,000,000 to meet the principal and interest requirements of any such bonds and other obligations, and the charges for the issuance and retirement of such bonds and other obligations, falling due that year. No part of such borrowing shall be contracted after the last day of December, 1970. All bonds or other obligations issued pursuant to this section shall mature within thirty years from the date of issue. The faith and credit of the state are hereby pledged for the payment of such bonds or other obligations or the interest thereon, and they shall be payable from all excises and taxes of the state, except ad valorem taxes on real and personal property, income taxes, and fees, excises or license taxes relating to the registration, operation, or use of vehicles on the public highways, or to fuels used for propelling such vehicles, after making provision for payment of amounts pledged from such excises and taxes for payment of bonds issued under authority of Sections 2e and 2f of this Article.

During the period beginning with the effective date of the first authorization to issue bonds or other obligations under authority of this section and continuing during such time as such bonds or other obligations are outstanding, and so long as moneys in the Development Bond Retirement Fund are insufficient to pay all interest, principal and charges of such bonds or other obligations issued under authority of this section and becoming due in each year, a sufficient amount of moneys derived from such excises and taxes of the state is hereby appropriated in each year for the purpose of paying the interest, principal and charges for the issuance and retirement of bonds or other obligations issued under authority of this section becoming due in that year without other appropriation but according to law. The moneys derived from such excises and taxes and hereby appropriated shall be paid into a distinct bond retirement fund designated "Development Bond Retirement Fund," hereby created. Such moneys shall be expended as provided by law for the purpose of paying interest, principal and charges for the issuance and retirement of bonds and other obligations issued under authority of this section. Sufficient amounts of such moneys in the Development Bond Retirement Fund are hereby appropriated for the purpose of paying interest, principal and charges for the issuance and retirement of bonds or other obligations issued under authority of this section, so long as any of them are outstanding, without other appropriations but according to law.

Any balance remaining in the Development Bond Retirement Fund after payment of all interest, principal and charges for the issuance and retirement of bonds and other obligations issued under authority of this section, shall be disposed of as shall be provided by law.

As long as any of such bonds or other obligations are outstanding there shall be levied and collected, in amounts sufficient to pay the principal of and the interest on such bonds or other obligations, excises and taxes, excluding those above excepted.

STATUTES

R.C. 187.01: Formation; purpose; terms of articles of incorporation

As used in this chapter, "JobsOhio" means the nonprofit corporation formed under this section, and includes any subsidiary of that corporation. In any section of law that refers to the nonprofit corporation formed under this section, reference to the corporation includes reference to any such subsidiary unless otherwise specified or clearly appearing from the context.

The governor is hereby authorized to form a nonprofit corporation, to be named "JobsOhio," with the purposes of promoting economic development, job creation, job retention, job training, and the recruitment of business to this state. Except as otherwise provided in this chapter, the corporation shall be organized and operated in accordance with Chapter 1702. of the Revised Code. The governor shall sign and file articles of incorporation for the corporation with the secretary of state. The legal existence of the corporation shall begin upon the filing of the articles.

In addition to meeting the requirements for articles of incorporation in Chapter 1702. of the Revised Code, the articles of incorporation for the nonprofit corporation shall set forth the following:

(A) The designation of the name of the corporation as JobsOhio;

(B) The creation of a board of directors consisting of nine directors, to be appointed by the governor, who satisfy the qualifications prescribed by section 187.02 of the Revised Code;

(C) A requirement that the governor make initial appointments to the board within sixty days after the filing of the articles of incorporation. Of the initial appointments made to the board, two shall be for a term ending one year after the date the articles were filed, two shall be for a term ending two years after the date the articles were filed, and five shall be for a term ending four years after the date the articles were filed. The articles shall state that, following the initial appointments, the governor shall appoint directors to terms of office of four years, with each term of office ending on the same day of the same month as did the term that it succeeds. If any director dies, resigns, or the director's status changes such that any of the requirements of division (C) of section 187.02 of the Revised Code are no longer met, that director's seat on the board shall become immediately vacant. The governor shall forthwith fill the vacancy by appointment for the remainder of the term of office of the vacated seat.

(D) A requirement that the governor appoint one director to be chairperson of the board and procedures for electing directors to serve as officers of the corporation and members of an executive committee;

(E) A provision for the appointment of a chief investment officer of the corporation by the recommendation of the board and approval of the governor. The chief investment officer shall serve at the pleasure of the board and shall have the power to execute contracts, spend corporation funds, and hire employees on behalf of the corporation. If the position of chief investment officer becomes vacant for any reason, the vacancy shall be filled in the same manner as provided in this division.

(F) Provisions requiring the board to do all of the following:

(1) Adopt one or more resolutions providing for compensation of the chief investment officer;

(2) Approve an employee compensation plan recommended by the chief investment officer;

(3) Approve a contract with the director of development services for the corporation to assist the director and the development services agency with providing services or otherwise carrying out the functions or duties of the agency, including the operation and management of programs, offices, divisions, or boards, as may be determined by the director of development services in consultation with the governor;

(4) Approve all major contracts for services recommended by the chief investment officer;

(5) Establish an annual strategic plan and standards of measure to be used in evaluating the corporation's success in executing the plan;

(6) Establish a conflicts of interest policy that, at a minimum, complies with section 187.06 of the Revised Code;

(7) Hold a minimum of four board of directors meetings per year at which a quorum of the board is physically present, and such other meetings, at which directors' physical presence is not required, as may be necessary. Meetings at which a quorum of the board is required to be physically present are subject to divisions (C), (D), and (E) of section 187.03 of the Revised Code.

(8) Establish a records retention policy and present the policy, and any subsequent changes to the policy, at a meeting of the board of directors at which a quorum of the board is required to be physically present pursuant to division (F)(7) of this section;

(9) Adopt standards of conduct for the directors.

(G) A statement that directors shall not receive any compensation from the corporation, except that directors may be reimbursed for actual and necessary expenses incurred in connection with services performed for the corporation;

(H) A provision authorizing the board to amend provisions of the corporation's articles of incorporation or regulations, except provisions required by this chapter;

(I) Procedures by which the corporation would be dissolved and by which all corporation rights and assets would be distributed to the state or to another corporation organized under this chapter. These procedures shall incorporate any separate procedures subsequently set forth in this chapter for the dissolution of the corporation. The articles shall state that no dissolution shall take effect until the corporation has made adequate provision for the payment of any outstanding bonds, notes, or other obligations.

(J) A provision establishing an audit committee to be comprised of directors. The articles shall require that the audit committee hire an independent certified public accountant to perform a financial audit of the corporation at least once every year.

(K) A provision authorizing a majority of the disinterested directors to remove a director for misconduct, as that term may be defined in the articles or regulations of the corporation. The removal of a director under this division creates a vacancy on the board that the governor shall fill by appointment for the remainder of the term of office of the vacated seat.

R.C. 187.02 Qualifications for appointment to board

(A) To qualify for appointment to the board of directors of JobsOhio, an individual must satisfy all of the following:

- (1) Has an understanding of generally accepted accounting principles and financial statements;
- (2) Possesses the ability to assess the general application of such principles in connection with the accounting for estimates, accruals, and reserves;
- (3) Has experience preparing, auditing, analyzing, or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be presented by the JobsOhio corporation's financial statements, or experience actively supervising one or more persons engaged in such activities;
- (4) Has an understanding of internal controls and the procedures for financial reporting;
- (5) Has an understanding of audit committee functions.

(B) Specific experience demonstrating the qualifications required by division (A) of this section may be evidenced by any of the following:

- (1) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor, or experience in one or more positions that involve the performance of similar functions;
- (2) Experience actively supervising a principal financial officer, principal accounting officer, controller, public accountant, auditor, or person performing similar functions;
- (3) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing, or evaluation of financial statements.

(C) Each individual appointed to the board of directors shall be a citizen of the United States. At least six of the individuals appointed to the board shall be residents of or domiciled in this state.

R.C. 187.03

(A) JobsOhio may perform such functions as permitted and shall perform such duties as prescribed by law and as set forth in any contract entered into under section 187.04 of the Revised Code, but shall not be considered a state or public department, agency, office, body, institution, or instrumentality for purposes of section 1.60 or Chapter 102., 121., 125., or 149. of the Revised Code. JobsOhio and its board of directors are not subject to the following sections of Chapter 1702. of the Revised Code: sections 1702.03, 1702.08, 1702.09, 1702.21, 1702.24, 1702.26, 1702.27, 1702.28, 1702.29, 1702.301, 1702.33, 1702.34, 1702.37, 1702.38, 1702.40 to 1702.52, 1702.521, 1702.54, 1702.57, 1702.58, 1702.59, 1702.60, 1702.80, and 1702.99.

Nothing in this division shall be construed to impair the powers and duties of the Ohio ethics commission described in section 102.06 of the Revised Code to investigate and enforce section 102.02 of the Revised Code with regard to individuals required to file statements under division (B)(2) of this section.

(B)(1) Directors and employees of JobsOhio are not employees or officials of the state and, except as provided in division (B)(2) of this section, are not subject to Chapter 102., 124., 145., or 4117. of the Revised Code.

(2) The chief investment officer, any other officer or employee with significant administrative, supervisory, contracting, or investment authority, and any director of JobsOhio shall file, with the Ohio ethics commission, a financial disclosure statement pursuant to section 102.02 of the Revised Code that includes, in place of the information required by divisions (A)(2), (7), (8), and (9) of that section, the information required by divisions (A) and (B) of section 102.022 of the

Revised Code. The governor shall comply with all applicable requirements of section 102.02 of the Revised Code.

(3) Actual or in-kind expenditures for the travel, meals, or lodging of the governor or of any public official or employee designated by the governor for the purpose of this division shall not be considered a violation of section 102.03 of the Revised Code if the expenditures are made by the corporation, or on behalf of the corporation by any person, in connection with the governor's performance of official duties related to JobsOhio. The governor may designate any person, including a person who is a public official or employee as defined in section 102.01 of the Revised Code, for the purpose of this division if such expenditures are made on behalf of the person in connection with the governor's performance of official duties related to JobsOhio. A public official or employee so designated by the governor shall comply with all applicable requirements of section 102.02 of the Revised Code.

At the times and frequency agreed to under division (B)(2)(b) of section 187.04 of the Revised Code, beginning in 2012, the corporation shall file with the development services agency a written report of all such expenditures paid or incurred during the preceding calendar year. The report shall state the dollar value and purpose of each expenditure, the date of each expenditure, the name of the person that paid or incurred each expenditure, and the location, if any, where services or benefits of an expenditure were received, provided that any such information that may disclose proprietary information as defined in division (C) of this section shall not be included in the report.

(4) The prohibition applicable to former public officials or employees in division (A)(1) of section 102.03 of the Revised Code does not apply to any person appointed to be a director or hired as an employee of JobsOhio.

(5) Notwithstanding division (A)(2) of section 145.01 of the Revised Code, any person who is a former state employee shall no longer be considered a public employee for purposes of Chapter 145. of the Revised Code upon commencement of employment with JobsOhio.

(6) Any director, officer, or employee of JobsOhio may request an advisory opinion from the Ohio ethics commission with regard to questions concerning the provisions of sections 102.02 and 102.022 of the Revised Code to which the person is subject.

(C) Meetings of the board of directors at which a quorum of the board is required to be physically present pursuant to division (F) of section 187.01 of the Revised Code shall be open to the public except, by a majority vote of the directors present at the meeting, such a meeting may be closed to the public only for one or more of the following purposes:

(1) To consider business strategy of the corporation;

(2) To consider proprietary information belonging to potential applicants or potential recipients of business recruitment, retention, or creation incentives. For the purposes of this division, "proprietary information" means marketing plans, specific business strategy, production techniques and trade secrets, financial projections, or personal financial statements of applicants or members of the applicants' immediate family, including, but not limited to, tax records or other similar information not open to the public inspection.

(3) To consider legal matters, including litigation, in which the corporation is or may be involved;

(4) To consider personnel matters related to an individual employee of the corporation.

(D) The board of directors shall establish a reasonable method whereby any person may obtain the time and place of all public meetings described in division (C) of this section. The method

shall provide that any person, upon request and payment of a reasonable fee, may obtain reasonable advance notification of all such meetings.

(E) The board of directors shall promptly prepare, file, and maintain minutes of all public meetings described in division (C) of this section.

(F) Not later than March 1, 2012, and the first day of March of each year thereafter, the chief investment officer of JobsOhio shall prepare and submit a report of the corporation's activities for the preceding year to the governor, the speaker and minority leader of the house of representatives, and the president and minority leader of the senate. The annual report shall include the following:

(1) An analysis of the state's economy;

(2) A description of the structure, operation, and financial status of the corporation;

(3) A description of the corporation's strategy to improve the state economy and the standards of measure used to evaluate its progress;

(4) An evaluation of the performance of current strategies and major initiatives;

(5) An analysis of any statutory or administrative barriers to successful economic development, business recruitment, and job growth in the state identified by JobsOhio during the preceding year.

R.C. 187.04

(A) The director of development services, as soon as practical after February 18, 2011, shall execute a contract with JobsOhio for the corporation to assist the director and the development services agency with providing services or otherwise carrying out the functions or duties of the agency, including the operation and management of programs, offices, divisions, or boards, as may be determined by the director in consultation with the governor. The approval or disapproval of awards involving public money shall remain functions of the agency. All contracts for grants, loans, and tax incentives involving public money shall be between the agency and the recipient and shall be enforced by the agency. JobsOhio may not execute contracts obligating the agency for loans, grants, tax credits, or incentive awards recommended by JobsOhio to the agency. Prior to execution, all contracts between the director and JobsOhio entered into under this section that obligate the agency to pay JobsOhio for services rendered are subject to controlling board approval.

The term of an initial contract entered into under this section shall not extend beyond June 30, 2013. Thereafter, the director and JobsOhio may renew the contract for subsequent fiscal biennia, but at no time shall a particular contract be effective for longer than a fiscal biennium of the general assembly.

JobsOhio's provision of services to the agency as described in this section shall be pursuant to a contract entered into under this section. If at any time the director determines that the contract with JobsOhio may not be renewed for the subsequent fiscal biennium, the director shall notify JobsOhio of the director's decision not later than one hundred twenty days prior to the end of the current fiscal biennium. If the director does not provide such written notice to JobsOhio prior to one hundred days before the end of the current fiscal biennium, the contract shall be renewed upon such terms as the parties may agree, subject to the requirements of this section.

(B) A contract entered into under this section shall include all of the following:

(1) Terms assigning to the corporation the duties of advising and assisting the director in the director's evaluation of the agency and the formulation of recommendations under section 187.05 of the Revised Code;

(2) Terms designating records created or received by JobsOhio that shall be made available to the public under the same conditions as are public records under section 149.43 of the Revised Code. Documents designated to be made available to the public pursuant to the contract shall be kept on file with the agency.

Among records to be designated under this division shall be the following:

(a) The corporation's federal income tax returns;

(b) The report of expenditures described in division (B)(3) of section 187.03 of the Revised Code. The records shall be filed with the agency at such times and frequency as agreed to by the corporation and the agency, which shall not be less frequently than quarterly.

(c) The annual total compensation paid to each officer and employee of the corporation;

(d) A copy of the audit report for each financial audit of the corporation performed by an independent certified public accountant pursuant to division (J) of section 187.01 of the Revised Code.

(e) Records of any fully executed incentive proposals, to be filed annually;

(f) Records pertaining to the monitoring of commitments made by incentive recipients, to be filed annually;

(g) A copy of the minutes of all public meetings described in division (C) of section 187.03 of the Revised Code not otherwise closed to the public.

(3) The following statement acknowledging that JobsOhio is not acting as an agent of the state: "JobsOhio shall have no power or authority to bind the state or to assume or create an obligation or responsibility, expressed or implied, on behalf of the state or in its name, nor shall JobsOhio represent to any person that it has any such power or authority, except as expressly provided in this contract."

(C)(1) Records created by JobsOhio are not public records for the purposes of Chapter 149. of the Revised Code, regardless of who may have custody of the records, unless the record is designated to be available to the public by the contract under division (B)(2) of this section.

(2) Records received by JobsOhio from any person or entity that is not subject to section 149.43 of the Revised Code are not public records for purposes of Chapter 149. of the Revised Code, regardless of who may have custody of the records, unless the record is designated to be available to the public by the contract under division (B)(2) of this section.

(3) Records received by JobsOhio from a public office as defined in section 149.011 of the Revised Code that are not public records under section 149.43 of the Revised Code when in the custody of the public office are not public records for the purposes of section 149.43 of the Revised Code regardless of who has custody of the records.

(D) Any contract executed under authority of this section shall not negate, impair, or otherwise adversely affect the obligation of this state to pay debt charges on securities executed by the director or issued by the treasurer of state, Ohio public facilities commission, or any other issuing authority under Chapter 122., 151., 165., or 166. of the Revised Code to fund economic development programs of the state, or to abide by any pledge or covenant relating to the payment of those debt charges made in any related proceedings. As used in this division, "debt charges," "proceedings," and "securities" have the same meanings as in section 133.01 of the Revised Code.

(E) Nothing in this section, other than the requirement of controlling board approval, shall prohibit the agency from contracting with JobsOhio to perform any of the following functions:

- (1) Promoting and advocating for the state;
- (2) Making recommendations to the agency;
- (3) Performing research for the agency;
- (4) Establishing and managing programs or offices on behalf of the agency, by contract;
- (5) Negotiating on behalf of the state.

(F) Nothing in this section, other than the requirement of controlling board approval, shall prohibit the agency from compensating JobsOhio from funds currently appropriated to the agency to perform the functions described in division (E) of this section.

R.C. 187.09

(A) Any action brought by or on behalf of JobsOhio against a director or former director in that individual's capacity as a director shall be brought in the court of common pleas of Franklin county.

(B) Except as provided in division (D) of this section, any claim asserting that any one or more sections of the Revised Code amended or enacted by H.B. 1 of the 129th general assembly, any section of Chapter 4313. of the Revised Code enacted by H.B. 153 of the 129th general assembly, or any portion of one or more of those sections, violates any provision of the Ohio Constitution shall be brought in the court of common pleas of Franklin county within ninety days after the effective date of the amendment of this section by H.B. 153 of the 129th general assembly.

(C) Except as provided in division (D) of this section, any claim asserting that any action taken by JobsOhio violates any provision of the Ohio Constitution shall be brought in the court of common pleas of Franklin county within sixty days after the action is taken.

(D) Divisions (B) and (C) of this section shall not apply to any claim within the original jurisdiction of the supreme court or a court of appeals pursuant to Article IV of the Ohio Constitution.

(E) The court of common pleas of Franklin county shall give any claim filed pursuant to division (B) or (C) of this section priority over all other civil cases before the court, irrespective of position on the court's calendar, and shall make a determination on the claim expeditiously. A court of appeals shall give any appeal from a final order issued in a case brought pursuant to division (B) or (C) of this section priority over all other civil cases before the court, irrespective of position on the court's calendar, and shall make a determination on the appeal expeditiously.

R.C. 2721.03 Construction and validity of instrument

Subject to division (B) of section 2721.02 of the Revised Code, any person interested under a deed, will, written contract, or other writing constituting a contract or any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, rule as defined in section 119.01 of the Revised Code, municipal ordinance, township resolution, contract, or franchise may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration of rights, status, or other legal relations under it.

The testator of a will may have the validity of the will determined at any time during the testator's lifetime pursuant to sections 2107.081 to 2107.085 of the Revised Code.

R.C. 2721.07: Court may refuse judgment

Courts of record may refuse to render or enter a declaratory judgment or decree under this chapter if the judgment or decree would not terminate the uncertainty or controversy giving rise to the action or proceeding in which the declaratory relief is sought.

R.C. 2721.13 Construction

The provisions of this chapter are remedial and shall be liberally construed and administered.

R.C. 4313.01

As used in this chapter:

(A) "Enterprise acquisition project" means, as applicable, all or any portion of the capital or other assets of the spirituous liquor distribution and merchandising operations of the division of liquor control, including, without limitation, inventory, real property rights, equipment, furnishings, the spirituous liquor distribution system including transportation, the monetary management system, warehouses, contract rights, rights to take assignment of contracts and related receipts and revenues, accounts receivable, the exclusive right to manage and control spirituous liquor distribution and merchandising and to sell spirituous liquor in the state subject to the control of the division of liquor control pursuant to the terms of the transfer agreement, and all necessary appurtenances thereto, or leasehold interests therein, and the assets and liabilities of the facilities establishment fund.

(B) "JobsOhio" means the nonprofit corporation formed under section 187.01 of the Revised Code and includes any subsidiary of that corporation unless otherwise specified or clearly implied from the context, together with any successor or assignee of that corporation or any such subsidiary if and to the extent permitted by the transfer agreement or Chapter 187. of the Revised Code.

(C) "Spirituous liquor profits" means all receipts representing the gross profit on the sale of spirituous liquor, as referred to in division (B)(4) of section 4301.10 of the Revised Code, less the costs, expenses, and working capital provided for therein, but excluding the sum required by the second paragraph of section 4301.12 of the Revised Code, as in effect on May 2, 1980, to be paid into the state treasury, provided that from and after the initial transfer of the enterprise acquisition project to JobsOhio and until the transfer back to the state under division (D) of section 4313.02 of the Revised Code, the reference in division (B)(4) of section 4301.10 of the Revised Code to all costs and expenses of the division and also an adequate working capital reserve for the division shall be to all costs and expenses of JobsOhio and providing an adequate working capital reserve for JobsOhio.

(D) "Transfer" means an assignment and sale, conveyance, granting of a franchise, lease, or transfer of all or an interest.

(E) "Transfer agreement" means the agreement entered into between the state and JobsOhio providing for the transfer of the enterprise acquisition project pursuant to section 4313.02 of the Revised Code and any amendments or supplements thereto.

(A) The state may transfer to JobsOhio, and JobsOhio may accept the transfer of, all or a portion of the enterprise acquisition project for a transfer price payable by JobsOhio to the state. Any such transfer shall be treated as an absolute conveyance and true sale of the interest in the enterprise acquisition project purported to be conveyed for all purposes, and not as a pledge or other security interest. The characterization of any such transfer as a true sale and absolute conveyance shall not be negated or adversely affected by the acquisition or retention by the state of a residual or reversionary interest in the enterprise acquisition project, the participation of any state officer or employee as a member or officer of, or contracting for staff support to, JobsOhio or any subsidiary of JobsOhio, any regulatory responsibility of an officer or employee of the state, including the authority to collect amounts to be received in connection therewith, the retention of the state of any legal title to or interest in any portion of the enterprise acquisition project for the purpose of regulatory activities, or any characterization of JobsOhio or obligations of JobsOhio under accounting, taxation, or securities regulations, or any other reason whatsoever. An absolute conveyance and true sale or lease shall exist under this section regardless of whether JobsOhio has any recourse against the state or the treatment or characterization of the transfer as a financing for any purpose. Upon and following the transfer, the state shall not have any right, title, or interest in the enterprise acquisition project so transferred other than any residual interest that may be described in the transfer agreement pursuant to the following paragraph and division (D) of this section. Any determination of the fair market value of the enterprise acquisition project reflected in the transfer agreement shall be conclusive and binding on the state and JobsOhio.

Any transfer of the enterprise acquisition project that is a lease or grant of a franchise shall be for a term not to exceed twenty-five years. Any transfer of the enterprise acquisition project that is an assignment and sale, conveyance, or other transfer shall contain a provision that the state shall have the option to have conveyed or transferred back to it, at no cost, the enterprise acquisition project, as it then exists, no later than twenty-five years after the original transfer authorized in the transfer agreement on such other terms as shall be provided in the transfer agreement. The exercise of the powers granted by this section will be for the benefit of the people of the state. All or any portion of the enterprise acquisition project transferred pursuant to the transfer agreement that would be exempt from real property taxes or assessments or real property taxes or assessments in the absence of such transfer shall, as it may from time to time exist thereafter, remain exempt from real property taxes or assessments levied by the state and its subdivisions to the same extent as if not transferred. The gross receipts and income of JobsOhio derived from the enterprise acquisition project shall be exempt from taxation levied by the state and its subdivisions, including, but not limited to, the taxes levied pursuant to Chapters 718., 5739., 5741., 5747., and 5751. of the Revised Code. Any transfer from the state to JobsOhio of the enterprise acquisition project, or item included or to be included in the project, shall be exempt from the taxes levied pursuant to Chapters 5739. and 5741. of the Revised Code.

(B) The proceeds of any transfer under division (A) of this section may be expended as provided in the transfer agreement for any one or more of the following purposes:

(1) Funding, payment, or defeasance of outstanding bonds issued pursuant to Chapters 151. and 166. of the Revised Code and secured by pledged liquor profits as defined in section 151.40 of the Revised Code;

(2) Deposit into the general revenue fund;

(3) Deposit into the clean Ohio revitalization fund created pursuant to section 122.658 of the Revised Code, the innovation Ohio loan fund created pursuant to section 166.16 of the Revised Code, the research and development loan fund created pursuant to section 166.20 of the Revised Code, the logistics and distribution infrastructure fund created pursuant to section 166.26 of the Revised Code, the advanced energy research and development fund created pursuant to section 3706.27 of the Revised Code, and the advanced energy research and development taxable fund created pursuant to section 3706.27 of the Revised Code;

(4) Conveyance to JobsOhio for the purposes for which it was created.

(C)(1) The state may covenant, pledge, and agree in the transfer agreement, with and for the benefit of JobsOhio, that it shall maintain statutory authority for the enterprise acquisition project and the revenues of the enterprise acquisition project and not otherwise materially impair any obligations supported by a pledge of revenues of the enterprise acquisition project. The transfer agreement may provide or authorize the manner for determining material impairment of the security for any such outstanding obligations, including by assessing and evaluating the revenues of the enterprise acquisition project.

(2) The director of budget and management, in consultation with the director of commerce, may, without need for any other approval, negotiate terms of any documents, including the transfer agreement, necessary to effect the transfer and the acceptance of the transfer of the enterprise acquisition project. The director of budget and management and the director of commerce shall execute the transfer agreement on behalf of the state. The director of budget and management may also, without need for any other approval, retain or contract for the services of commercial appraisers, underwriters, investment bankers, and financial advisers, as are necessary in the judgment of the director of budget and management to effect the transfer agreement. Any transfer agreement may contain terms and conditions established by the state to carry out and effectuate the purposes of this section, including, without limitation, covenants binding the state in favor of JobsOhio. Any such transfer agreement shall be sufficient to effectuate the transfer without regard to any other laws governing other property sales or financial transactions by the state. The director of budget and management may create any funds or accounts, within or without the state treasury, as are needed for the transactions and activities authorized by this section.

(3) The transfer agreement may authorize JobsOhio, in the ordinary course of doing business, to convey, lease, release, or otherwise dispose of any regular inventory or tangible personal property. Ownership of the interest in the enterprise acquisition project that is transferred to JobsOhio under this section and the transfer agreement shall be maintained in JobsOhio or a nonprofit entity the sole member of which is JobsOhio until the enterprise acquisition project is transferred back to the state pursuant to the second paragraph of division (A) and division (D) of this section.

(D) The transfer agreement may authorize JobsOhio to fix, alter, and collect rentals and other charges for the use and occupancy of all or any portion of the enterprise acquisition project and to lease any portion of the enterprise acquisition project to the state, and shall include a contract with, or the granting of an option to, the state to have the enterprise acquisition project, as it then exists, transferred back to it without charge in accordance with the terms of the transfer

agreement after retirement or redemption, or provision therefor, of all obligations supported by a pledge of spirituous liquor profits.

(E) JobsOhio, the director of budget and management, and the director of commerce shall, subject to approval by the controlling board, enter into a contract, which may be part of the transfer agreement, for the continuing operation by the division of liquor control of spirituous liquor distribution and merchandising subject to standards for performance provided in that contract that may relate to or support division (C)(1) of this section. The contract shall establish other terms and conditions for the assignment of duties to, and the provision of advice, services, and other assistance by, the division of liquor control, including providing for the necessary staffing and payment by JobsOhio of appropriate compensation to the division for the performance of such duties and the provision of such advice, services, and other assistance. The division of liquor control shall manage and actively supervise the activities required or authorized under sections 4301.10 and 4301.17 of the Revised Code as those sections exist on September 29, 2011, including, but not limited to, controlling the traffic in intoxicating liquor in this state and fixing the wholesale and retail prices at which the various classes, varieties, and brands of spirituous liquor are sold.

(F) The transfer agreement shall require JobsOhio to pay for the operations of the division of liquor control with regard to the spirituous liquor merchandising operations of the division. The payments from JobsOhio shall be deposited into the state treasury to the credit of the liquor operating services fund, which is hereby created in the state treasury. The fund shall be used to pay for the operations of the division specified in this division.

(G) The transaction and transfer provided for under this section shall comply with all applicable provisions of the Ohio Constitution.

R.C. 733.56 Application for injunction

The village solicitor or city director of law shall apply, in the name of the municipal corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption.

R.C. 733.57 Specific performance

When an obligation or contract made on behalf of a municipal corporation, granting a right or easement or creating a public duty, is being evaded or violated, the village solicitor or city director of law shall apply for the forfeiture or the specific performance thereof as the nature of the case requires.

R.C. 733.58 Mandamus

In case an officer or board of a municipal corporation fails to perform any duty expressly enjoined by law or ordinance, the village solicitor or city director of law shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of the duty.

R.C. 733.581 Taxpayer as defendant in certain actions; intervention

If the village solicitor or city director of law, upon the written request of any taxpayer of the municipal corporation, makes any application provided for by section 733.56, 733.57, or 733.58 of the Revised Code, the taxpayer may be named as a party defendant and if so named shall have the right to assist in presenting all issues of law and fact to the court in order that a full and complete adjudication of the controversy may be had.

In any civil action or proceeding involving the public interest the court shall grant the application of any person to intervene if the court believes that the public interest will be better protected or justice will be furthered.

R.C. 733.59 Suit by taxpayer

If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

R.C. 733.60 Limitation of action

No action to enjoin the performance of a contract entered into or the payment of any bonds issued by a municipal corporation shall be brought or maintained unless commenced within one year from the date of such contract or bonds.

R.C. 733.61 Duty of court

If the court hearing a case under section 733.59 of the Revised Code is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity of the case demands. In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed, as part of the costs, a reasonable compensation for his attorney.