

ORIGINAL

IN THE SUPREME COURT OF OHIO

PROGRESSOHIO.ORG, INC., et al.,)	Case No. 2012-1272
)	
Plaintiffs-Appellants,)	
)	
-vs-)	ON APPEAL from the Court of Appeals for
)	the Tenth Appellate District of Ohio
)	
JOBSONHIO, et al.,)	
)	Ct. of Appeals No. 11-AP-1136
Defendants-Appellees.)	

**BRIEF OF *AMICUS CURIAE* FORMER PRESIDENT OF THE OHIO SENATE
THOMAS NIEHAUS AND FORMER STATE SENATOR MARK WAGONER
IN SUPPORT OF APPELLEES**

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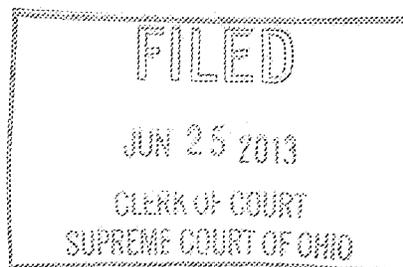
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I. INTRODUCTION AND STATEMENT OF AMICUS INTEREST

To ensure the delicate balance of the tripartite allocation of power set forth in the Ohio Constitution, the separation of powers inherent in the Ohio Constitution requires that a party have proper standing when addressing the constitutionality of an enactment of the Ohio General Assembly. Appellants are two legislators on the losing end of the vote on House Bill 1 (the bill that created JobsOhio), and an advocacy group that has long and loudly protested the policies behind JobsOhio. Appellants now seek to have this Court do through one branch of government what they could not do in another branch – stop the implementation of JobsOhio. In other words, Appellants seek to effectively enact their own form of legislation through this litigation. Yet our carefully crafted tripartite form of government requires Appellants to resolve these issues through the legislative branch of government. And, if they are not successful in that endeavor, Appellants have recourse to convince Ohioans as to the merits of their position in future elections. The drafters of Ohio's Constitution intended the Ohio General Assembly to play this much needed role in Ohio's delicate balance of tripartite government.

The issue presented in this appeal is not whether the merits of JobsOhio *can* be challenged, but *how* and *where* such a challenge should take place. Appellants argue that if they are not found to have standing in this action, then (in their words) "the governmental action at issue here would otherwise go unchallenged." That is simply not true. JobsOhio *can* be challenged.

At issue is the question of *how* and *where* JobsOhio should be challenged. To answer these questions, the Court need only look to its longstanding precedent of whether Appellants need standing to bring this action. And the Court's longstanding precedent requires that, absent a finding (1) that a direct and concrete injury in a manner different from that suffered by the public in general, (2) that the law in question has caused the injury, and (3) that the relief

requested will redress the injury, the Ohio General Assembly is the proper branch of government to resolve these public policy debates. While Appellants contend that "redress through other challenges is unavailable," this *amicus curiae* brief will prove this statement is inaccurate.

The *amicus curiae* are two former members of The Ohio General Assembly who voted for House Bill 1 and the creation of JobsOhio, believing firmly that it was a carefully crafted and constitutional reorganization of Ohio's economic development efforts. But more importantly, both *amicus curiae* recognize the important role the separation of powers plays in Ohio's constitutional form of government and how this Court's current jurisprudence on standing maintains that delicate balance among the three branches of state government. Thomas Niehaus was a member of The Ohio General Assembly for twelve years, with four years as a Representative of the 88th District in The Ohio House of Representatives, followed by eight years as a Senator for the 14th District in The Ohio Senate. President Niehaus served as President of The Ohio Senate for the 129th General Assembly from 2011 to 2012. Mark Wagoner was a member of The Ohio General Assembly for eight years, with three years as a Representative of the 46th District in The Ohio House of Representatives, followed by five years as a Senator for the 2nd District in The Ohio Senate. Senator Wagoner served as Chairman of The Ohio Senate Judiciary Committee during the 129th General Assembly from 2011 to 2012.

II. STATEMENT OF FACTS

Amicus curiae defer to the statement of the facts in Appellees merit briefs. To provide the proper legislative context, *amicus curiae* provide a brief overview of the legislative history of Amended Substitute House Bill 1 (“House Bill 1”).

House Bill 1 of the 129th General Assembly was introduced in The Ohio House of Representatives on January 11, 2011. The Ohio House Reference Committee referred House Bill to the State Government and Elections Committee. The State Government and Elections Committee adopted a substitute bill for House Bill 1 on January 25, 2011. House Bill 1 was later amended and voted out of the State Government and Elections Committee on January 26, 2011. The Reference Committee re-referred House Bill 1 to the House Finance and Appropriations Committee, which amended House Bill 1, and voted the bill of the House Finance and Appropriations Committee on January 27, 2011. The Ohio House amended House Bill 1 on the floor and passed it by a 59-37 vote on February 1, 2011, with 42 member of The Ohio House joining as co-sponsors. Representative Murray, an Appellant, voted against adoption of the bill.

After passage from The Ohio House, House Bill 1 was then referred to The Ohio Senate on February 8, 2011. The Ohio Senate Reference Committee referred House Bill 1 to the Senate Finance Committee, which held four hearings on the bill. After the four hearings, the Senate Finance Committee further amended House Bill 1 and voted the bill out of committee on February 16, 2011. The Ohio Senate then passed House Bill 1 by a vote of 31 to 2, with 18 Senators joining as co-sponsors. Senator Skindell, an Appellant, was one of the two votes in The Ohio Senate against the adoption of House Bill 1.

The Ohio House concurred with the Senate amendments to House Bill 1 by a vote of 60-35. Governor Kasich signed House Bill 1 into law on February 18, 2011.

III. ARGUMENT

Proposition of Law: To ensure the delicate balance of the tripartite allocation of power set forth in the Ohio Constitution, the separation of powers inherent in the Ohio Constitution requires that a party have proper standing when addressing the constitutionality of an enactment of the Ohio General Assembly.

A. The Separation of Powers Inherent in the Ohio Constitution Requires a Party to Have Proper Standing.

The drafters of the Ohio Constitution carefully intended for each of Ohio's three branches of government to play equally important roles. While Ohio does not have a constitutional provision expressly regulating the separation of power among the branches of government, this Court has long held that the doctrine of separation of powers "is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and the scope of power granted to the three branches of government." *City of S. Euclid v. Jemison*, 28 Ohio St. 3d 157, 159, 503 N.E.2d 136 (1986), quoting *Fairview v. Giffie*, 73 Ohio St. 183, 187, 76 N.E. 865 (1905); *see also State v. Sterling*, 113 Ohio St. 3d 255, 2007-Ohio-1790, 864 N.E.2d 630, ¶33. As this Court has explained, "[w]hile no exact rule can be set forth for determining what powers of government may or may not be assigned by law to each branch... [i]t is nevertheless true, in the American theory of government, that each of the three grand divisions of the government must be protected from encroachments by the others so far that its integrity and independence may be preserved." *City of S. Euclid* at 159.

Based on this "American theory of government," the Ohio Constitution largely follows the federal form in which the separation of powers is implied from the powers granted to the legislative, executive, and judicial branches. *See* Steinglass and Searcelli, *The Ohio State Constitution: A Reference Guide*, Article II, Section 1 at 120-21. And in these implied powers, "[a] fundamental principle of the constitutional separation of powers among the three branches

of government is that the legislative branch is the ultimate arbiter of public policy.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶21, citing *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163. To fulfill the Ohio General Assembly’s role as “the ultimate arbiter of public policy,” “[i]t necessarily follows that the legislature has the power to continually create and refine the laws to meet the needs of the citizens of Ohio.” *Id.* at ¶ 21.

The Court’s standing precedent plays a critical role in protecting the Ohio Constitution’s delicate balance among the three branches of government. Different from Ohio, some state constitutions expressly permit their state courts to render advisory opinions. For instance, the Michigan Constitution provides that “either house of the legislature or the governor may request the opinion of the Supreme Court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.” Michigan Constitution, Article III, Section 8. But Article IV of the Ohio Constitution, like Article III of the United States Constitution, is silent as to whether the Court may issue advisory opinions. This silence begets the conclusion, which is reinforced by this Court’s longstanding precedent, that advisory opinions must be avoided so “that each of the three grand divisions of the government... be protected from encroachments by the other.” *City of S. Euclid* at 159.

Like Ohio, the United States Supreme Court has recognized that standing under federal law is crucial in maintaining the “tripartite allocation of power set forth in the Constitution.” *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). And like Ohio, the United States Supreme Court has properly prohibited federal courts from rendering advisory opinions. Ohio courts have adhered to a similar long-standing tradition to refuse to issue advisory opinions:

It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies. The extension of this principle includes enactments of the General Assembly.

Fortner v. Thomas, 22 Ohio St. 2d 13, 14, 257 N.E.2d 371 (1970), citing *Pfeiffer v. Graves*, 88 Ohio St. 473, 104 N.E. 529 (1913) and *Foster v. Commrs. of Wood County*, 9 Ohio St. 540, 544 (1859).

Here, Appellants ask the Court to overlook years of its jurisprudence to render an advisory opinion about whether certain provisions of JobsOhio comply with the Ohio Constitution. Realizing that there is little Ohio law to support their position, Appellants dedicate several pages of their brief to argue that the Court should look to how states other than Ohio have interpreted their own state constitutions. But this exercise is not helpful. Like the example of Michigan, the fifty state constitutions are drafted in myriad different ways. It should go without saying that this Court should be guided only by the Ohio Constitutions' carefully created balance in the separation of powers, which this Court recognizes has been greatly influenced by our federal system. And to this end, the Court's jurisprudence on the separation of powers inherent in the Ohio Constitution requires a party to have proper standing when challenging the constitutionality of an enactment of the Ohio General Assembly in Ohio courts.

B. The Court's Precedent on Standing has Ensured Our Delicate Balance of the Tripartite Allocation of Power.

Keeping the principles of separation of powers in mind, a question that must be answered in every case, and the only issue currently before the Court, is whether Appellants have standing to assert their claims. "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*, 86 Ohio St.3d 451, 469, 715 N.E.2d 1062 (1999). The Court has explained that its role in considering the constitutionality of a new statute does not begin until the "law is about to be enforced against a citizen to his prejudice." *Id.*, quoting *Pfeifer v. Graves*, 88 Ohio St. 473, 488, 104 N.E. 529 (1913). Otherwise, if "no private rights of person or property are in jeopardy... [w]e are simply asked to regulate the affairs of another branch of government." *Id.*

Perhaps the most important reason for enforcing standing is to maintain the separation of powers set forth in the Ohio Constitution. "If the judiciary were to assume to decide hypothetical questions of law not involved in a judicial proceeding in a cause before it, even though the decision 'would be of great value to the general assembly' in the discharge of its duties, it would, nevertheless, be an unwarranted interference with the functions of the legislative department that would be unauthorized, and dangerous in its tendency." *State v. Baughman*, 38 Ohio St. 455, 459 (1882).

To avoid "an unwarranted interference with the functions of the legislative branch," Ohio courts have long respected the function of each branch of government by requiring litigants who disagree with the Ohio General Assembly, but do not have a distinct injury, to seek redress through the legislative process. "The requirement of standing is not designed to shield agencies and officials from accountability to taxpayers; instead, it denies the use of the courts to those who, while not sustaining a legal injury, nevertheless seek to air their grievances concerning the conduct of government. The doctrine of standing directs those persons to other forums." *Racing Guild of Ohio, Local 304, Service Employees Internatl. Union, AFL-CIO, CLC v. Ohio State Racing Comm.*, 28 Ohio St.3d 317, 321, 503 N.E.2d 1025 (1986). If every Ohio resident who

disagreed with an action by the Ohio General Assembly could resort to litigation, Ohio's courts would be flooded with cases. Absent standing, the efforts of those who disagree with a legislative action should be directed to focus their efforts on the Ohio General Assembly and its power "to continually create and refine the laws to meet the needs of the citizens of Ohio." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶21.

Moreover, standing serves to protect the interests of those who are not before the court. The Court has properly recognized that to litigate without standing "would be an attempt to settle questions of law involving the rights of persons without parties before it, or a case to be decided in due course of law, thus violating that provision of the Bill of Rights which declares that every person shall have a remedy for an injury done him by due course of law." *Baughman* at 459, citing Ohio Constitution, Article I, Section 16. The Court elaborated on this point in *Sheward* noting that "in the vast majority of cases brought by a private litigant, 'the question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy, as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.'" *Sheward*, 86 Ohio St.3d at 469, 715 N.E.2d 1062, quoting *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 178–179, 298 N.E.2d 515 (1973). To ensure that a dispute is capable of judicial resolution, the Court further explained 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 direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury." *Id.*, citing *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994).

The Court of Appeals in its decision in this case correctly recognized this Court's long-standing precedent, reinforcing that "[i]n order to have standing, a plaintiff must demonstrate some injury caused by the defendant that has a remedy in law or equity... 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." *ProgressOhio.org, Inc. v. JobsOhio*, 10th Dist. No. 11AP-1136, 2012-Ohio-2655, ¶8.

C. Appellants' Do Not Have Standing Under the Court's Precedent.

Despite both the Trial Court and Court of Appeals issuing well-reasoned decisions that explained Appellants' lack of standing, Appellants persist with this appeal. Yet Appellants concede that they lack standing under Ohio's general rule, which requires a plaintiff to demonstrate a particularized harm that is distinct from the general harm being suffered by the public. But Appellants claim this general rule is not controlling in this case. This brief will next address the Appellants' two primary arguments in this regard, each of which if accepted would set precedent opening the litigation floodgates for any unhappy Ohio citizen to challenge nearly any legislative action.

First, Appellants argue that simply because they have alleged that the relevant statutes are unconstitutional that—by itself—confers standing. Appellants base this argument primarily on *Sheward* and the "great public importance" exception to Ohio's long-standing precedent that a plaintiff must show a distinct harm before that plaintiff has standing to challenge a statute as unconstitutional. Appellants contend that because Courts are incapable of making decisions as to which portions of the Ohio Constitution are of "great public importance" and which are not, then all constitutional challenges must be considered of "great public importance." From this erroneous premise, Appellants then assert that any person that contends that a statute is

unconstitutional has standing to pursue that claim in the courts. (Appellants Merit Brief, p.17-18). Second, Appellants claim that because the challenged statutes involve expenditures from the state's general revenue fund, then as taxpayers who contribute to the general revenue, they must have standing to challenge those statutes. (Appellants Merit Brief, p. 26-27). Neither argument has merit. But perhaps more importantly, both arguments would, if adopted, flood the court with countless possible lawsuits from any disgruntled Ohioan upset with any legislative act of the General Assembly. Should that occur, the operations of the Ohio General Assembly would be greatly hampered and would upset the delicate balance of Ohio's separation of powers.

a. The Court of Appeals correctly concluded that Appellants do not have standing as a matter of the "rare and extraordinary" exception of an issue of "great public importance."

First, the "rare and extraordinary" exception of "great public importance" does not apply here, both because this is not an action seeking an extraordinary writ and because the legislation at issue simply does not rise to the level of "great public importance" in *Sheward*.

In the fifty years prior to *Sheward*, this Court rendered two rulings cited in *Sheward* to support applying the "great public importance" exception in that case. Each of those cases involved extraordinary writs, and each involved an explicit public duty that the relator contended was not being carried out. Those issues are not present in this current case.

First, in *State ex rel. Newell v. Brown* 162 Ohio St. 147, 122 N.E. 2d 105 (1954), the relator sought a writ of prohibition against the secretary of state and members of the county board of elections to prohibit the respondents from placing the names of certain persons on an upcoming ballot. Forty years later, in *State ex rel. Cater v. North Olmstead*, 69 Ohio St. 3d 315, 631 N.E. 2d 1048 (1994), an Ohio citizen brought a mandamus action against the city, its mayor, and members of city council. The citizen challenged the city's removal of a public official,

contending that the city had not followed its explicit duties set forth in its charter governing the requirements for the removal of public officials. As in *Newell*, this Court found that because the city had an explicit duty, set forth in its charter, to follow the charter's requirements for removal of a public official, the relator had standing to pursue his extraordinary writ. *Id.* at 323. These two cases stand for the proposition that a relator seeking an extraordinary writ could have standing to pursue his action if the relator was seeking to enforce an explicit public duty owed by a public officer. But this is not an issue in this current case, which does not seek an extraordinary writ.

In *Sheward*, this Court was again faced with relators seeking mandamus. This time, though, the relators were not seeking to enforce an explicit public duty owed by a public officer, rather they were seeking the enforcement of an implicit public duty owed by our state's common pleas court judges to not enforce what the relators contended were unconstitutional provisions of the recently-passed tort reform laws. While the Court concluded the relators had suffered no distinct harm by passage of the tort reform bill, the Court nevertheless conferred standing through the "rare and extraordinary" application of the issue of "great public importance" exception.

In *Sheward*, the Court explained that the challenged legislative enactment had usurped "judicial power in violation of the Ohio constitutional doctrine of separation of powers." *Sheward*, 86 Ohio St.3d at paragraph two of the syllabus. *Sheward* was the culmination of a decade-long "conflict over the necessity and propriety of transforming the civil justice system," which had "created turbulence among our coordinate branches of government." *Id.* at 455-457. The Court stated that the General Assembly's enactment of Am. Sub. H.B. 350 had "changed the

complexion of the reform debate into a challenge to the judiciary as a coordinate branch of government." *Id.* at 459.

The Court's conclusion in *Sheward* was based on the fact that, prior to the enactment of Am. Sub. H.B. 350, numerous nearly identical provisions had been repeatedly struck down by this Court as per se unconstitutional, yet were reenacted by the Ohio General Assembly. Because of that highly unusual history, the Court emphasized that its decision conferring standing in *Sheward* was "rare and extraordinary" rather than the rule:

We have not proposed... that our citizens have standing as such to challenge the constitutionality of every legislative enactment that allegedly violates the doctrine of separation of powers or exceeds legislative authority. We have expressed quite clearly in our preamble to the issue of relators' standing that this court will entertain a public action only "*in the rare and extraordinary case*" where the challenged statute operates, "*directly and broadly, to divest the courts of judicial power.*" (Emphasis added.) We will not entertain a public action to review the constitutionality of a legislative enactment unless it is of a magnitude and scope comparable to that of Am.Sub.H.B. No. 350.

Id. at 503-504. To justify the "great public importance" exception under *Sheward*, a party must show that the statute presents a "rare and extraordinary" case that "directly and broadly" divests the courts of judicial power.

The issues in this case fall far short of this "rare and extraordinary" need for the "great public importance" exception for two reasons. First, this case is not one seeking an extraordinary writ. In each of the very few instances where this Court has applied this "rare and extraordinary" exception, those cases have involved extraordinary writs. Following *Sheward*, Ohio courts have repeatedly and properly denied application of this exception in matters not involving extraordinary writs. See, e.g., *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230; *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313,

2007-Ohio-4372, ¶59 (“Ohio case law makes clear that public-right standing is found overwhelmingly, if not exclusively, in original actions seeking extraordinary writs.”). As discussed above, Appellants do not seek an extraordinary writ in this case.

Second, this case does not involve a statute that seeks to “directly and broadly divest the court of judicial power” as in *Sheward*. As explained above, to justify the “great public importance” exception under *Sheward*, a party must challenge a statute that threatens the delicate balance of Ohio’s separation of power. Here, the statutes at issue are not usurping judicial power. Instead, the statutes are a reorganization of Ohio’s economic development efforts. Indeed, the Court of Appeals in this case properly characterized the statutes that “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.” *ProgressOhio.org, Inc. v. JobsOhio*, 10th Dist. No. 11AP-1136, 2012-Ohio-2655, ¶31. The Court of Appeals correctly held that the issues raised by this case simply do not rise to the level of “great public importance” as those issues in *Sheward*.

Knowing that this case does not fall within the *Sheward* exception, Appellants invite the Court to dramatically extend the reasoning of *Sheward* to allow standing when any litigant alleges that a statute is unconstitutional. Such an erosion of standing requirements is unnecessary and inappropriate. As explained above, this Court has long recognized that the judiciary should not address actions of the Ohio General Assembly until there exists an action brought by an individual who suffered a concrete injury. Anything less would result in “an unwarranted interference with the functions of the legislative department that would be unauthorized, and dangerous in its tendency.” *Baughman*, 38 Ohio St. at 459.

Instead, this Court has long respected the function of the legislative branch, requiring potential litigants who have an issue with a statute passed by the Ohio General Assembly, yet do not have a distinct injury, to seek redress through the legislative process. “The requirement of standing is not designed to shield agencies and officials from accountability to taxpayers; instead, it denies the use of the courts to those who, while not sustaining a legal injury, nevertheless seek to air their grievances concerning the conduct of government. The doctrine of standing directs those persons to other forums.” *Racing Guild*, 28 Ohio St.3d at 321, 503 N.E.2d 1025. The Court’s precedent aptly applies here.

b. The Court of Appeals correctly concluded that Appellants do not have taxpayer standing.

Appellants also claim taxpayer standing. But “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.” *State ex rel. Masterson v. Ohio State Racing Commission*, 162 Ohio St. 366, 368 123 N.E.2d 1 (1954). The Court’s precedent requires that there is no standing where, as here, the taxpayer is not alleging any damage different in character from that sustained by the public generally and is only challenging expenditures from the state’s general revenue fund.

i. No standing exists based solely on a taxpayer’s contribution to the state’s general fund.

A taxpayer who lacks allegations of a distinct harm and whose complaint relates solely to expenditures from the state's general fund lacks standing to pursue their claims. The Court discussed this rule in *State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 254, 853 N.E. 2d 263

(2006). There, then-State Senator Marc Dann filed an action in mandamus to seek an order requiring the Governor to disclose certain weekly reports related to the Bureau of Workers' Compensation. The Governor asserted a qualified privilege, but Dann claimed a particularized need for the documents. In analyzing the issue, this Court suggested that Dann would likely lack taxpayer standing, writing:

Dann's status as a taxpayer who paid taxes into the general fund and paid gasoline taxes is shared by nearly all adult Ohio citizens. There is nothing particularized about a need asserted on that basis. Nor would the fact that Dann may be contemplating the filing of a taxpayer suit alleging unspecified misconduct on the part of government officials demonstrate a particularized need, because, in the absence of statutory authority, a taxpayer in his position lacks standing to file a taxpayer suit. Ohio law does not authorize a private Ohio citizen, acting individually and without official authority, to prosecute government officials suspected of misconduct based on the citizen's status as a taxpayer of general taxes, including the gasoline tax.

(Citation omitted.) *Id.* at 254.

Two recent appellate courts since *Dann* have properly reinforced this precedent, concluding that a taxpayer's contribution to the general revenue fund is not sufficient—by itself—to confer standing for the taxpayer to challenge expenditures from the general fund. First, in *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006–12–313, 2007-Ohio-4372, then-State Representative Tom Brinkman challenged Miami University's policy of providing health benefits to same-sex domestic partners. The Twelfth District Court of Appeals concluded that Brinkman did not have standing under this Court's discussion in *Dann*. The Twelfth District explained that "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." *Brinkman* at ¶43. And the Twelfth District noted there was sound policy justification for their conclusion. To this end, the Twelfth District concluded that "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. Such a rule also would run contrary to clear federal precedent, which Ohio courts regularly follow on matters of standing." *Id.*, citing Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 Clev.St.L.Rev. 531 (2004). The Twelfth District's reasoning in *Brinkman* aptly applies to the current case as well.

In a second case, *Gildner v. Accenture, L.L.P.*, 10th Dist. No. 09AP-167, 2009-Ohio-5335, taxpayers brought an action seeking to invalidate a settlement between the ODJFS and its contractor. The Tenth District Court of Appeals was faced with the same standing question as in *Brinkman*: Does a taxpayer's contribution to the general fund—by itself—create standing for the taxpayer's challenge to an expenditure from the state's general revenue? And, like the Twelfth District in *Brinkman*, the Tenth District correctly concluded that was not a sufficient basis for standing. *Gildner* at ¶24.

In an attempt to overcome this overwhelming precedent, Appellants cite two post-*Masterson* cases that address challenges to expenditures from the general fund where the sole basis for standing is the taxpayers' contribution to the general fund. Neither case is helpful. First, Appellants cite *Washington Cty. Taxpayers Assn. v. Peppel*, 78 Ohio App. 3d 146, 604 N.E. 2d 181 (4th Dist. 1992). The entire standing "discussion" in that case is found in a footnote and not a single case was cited in support of the court's holding. Next, Appellants cite *Fankhauser v. Rhodes*, 12th Dist. Nos. 810, 878, 1980 WL 353189 (Mar. 5, 1980). There, the court held that "any taxpayer" has standing to challenge any proposed activity that "involves expenditures from the general revenue..." *Id.* at *2. However, the *Fankhauser* court again provided no analysis of this issue. Notably, the Twelfth District rejected its own ruling in

Fankhauser when it decided the *Brinkman* case, and no other court besides *Brinkman* has ever cited *Fankhauser* as controlling precedent.

The Court should not be persuaded by the poorly-reasoned decisions in *Washington Cty* and *Fankhauser*. Indeed, these decisions run contrary to this Court's precedent in *Dann* and other cases, and provide no compelling discussion in support of their novel conclusions. Instead, the better-reasoned decisions in *Brinkman* and *Gildner* are more appropriately followed. Not only are those decisions consistent with this Court's precedent, but they rest on sound policy grounds.

ii. **Federal law regarding Ohio taxpayer standing reinforces that Appellants do not have standing.**

Appellants argue that "because ProgressOhio credibly alleges unconstitutional government use of public funds and property" that it should be conferred standing based on "basic taxpayer standing principles and precedent." (See Appellants Merit Brief at 26). But despite this bold statement, Appellants provide little basis under Ohio law of what constitutes "basic taxpayer standing principles and precedent." Surprisingly, Appellants make no mention of the United States Supreme Court's relatively recent decision in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006), where the Court rejected federal taxpayer standing in a case brought by Ohio taxpayers challenging whether an economic development initiative passed by the Ohio General Assembly violated the commerce clause of the United States Constitution.

In *Cuno*, Ohio taxpayers brought a state court action challenging local property tax abatements and investment tax credits granted to DaimlerChrysler to induce the company to remain in Toledo. The case was removed to federal court. Plaintiffs principally claimed standing "by virtue of their status as Ohio taxpayers" alleging that the tax credits "deplete[d] the

funds of the State of Ohio to which the Plaintiffs contribute through their tax payments” and thus “diminish[ed] the total funds available for lawful uses and impos[ed] disproportionate burdens on them.” *Cuno*, 547 U.S. at 342-43. The Court rejected standing to Ohio taxpayers on those grounds, holding:

The ... rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers. We indicated as much in *Doremus v. Board of Ed. of Hawthorne*.... In that case, we noted our earlier holdings that “the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect” to support standing to challenge “their manner of expenditure.”... We then “reiterate[d]” what we had said in rejecting a federal taxpayer challenge to a federal statute “as equally true” when a state Act is assailed: “The [taxpayer] must be able to show ... that he has sustained ... some direct injury ... and not merely that he suffers in some indefinite way in common with people generally.”

(Citations omitted.) *Id.* at 345. In *Cuno*, Chief Justice Roberts properly noted that “[s]tate policymakers, no less than their federal counterparts, retain broad discretion to make ‘policy decisions’ concerning state spending ‘in different ways... depending on their perceptions of wise state fiscal policy and myriad other circumstances.’” *Id.* at 346, quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). Chief Justice Roberts concluded that “[b]ecause state budgets frequently contain an array of tax and spending provisions, any number of which may be challenged on a variety of bases, affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts.” *Id.*, quoting *Laird v. Tatum*, 408 U.S. 1, 15, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972).

The United States Supreme Court’s reasoning in *Cuno* can easily be applied to concerns for broad taxpayer standing in Ohio courts. Adopting Appellants’ proposed broad taxpayer

standing would—borrowing from the words of Chief Justice Roberts—unwisely interpose state courts as “virtually continuing monitors of the wisdom and of state fiscal administration.” *Cuno* at 346.

Not considering federal guidance on taxpayer standing could also create confusion when Ohio taxpayers challenge the constitutionality of Ohio statutes. If Appellants’ invitation of broad Ohio taxpayer standing is adopted, different standing rules depending on whether a party’s case was filed in federal or state court. In other contexts, this Court has raised concern when “statutes may or may not be enforced depending on which forum, state or federal, in which the subsequent challenge is brought.” *State v. Burnett*, 93 Ohio St.3d 419, 424, 755 N.E.2d 857 (2001). That concern could easily occur here should the Court accept Appellants’ unwise invitation. An Ohio taxpayer challenging the constitutionality of a statute passed by the Ohio General Assembly could conceivably be faced with different standing rules depending on whether they file in federal or state court. This Court should prevent that dichotomy by considering federal law for guidance when considering the requirements for taxpayer standing in Ohio courts. *See Solimine, Recalibrating Justiciability in Ohio Courts*, 51 Clev.St.L.Rev. 531, 554 (2004) (“Ohio courts have generally chosen to voluntarily follow justiciability doctrines developed by federal courts. Given that default position, Ohio courts should proceed cautiously when departing from federal law.”)

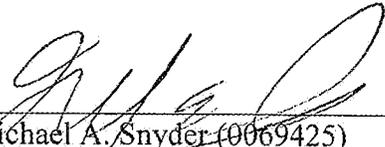
iii. Appellants are not individuals with a “special interest” in a “particular public fund.”

The Court’s precedent that standing can be conferred when a party has a “special interest” in a particular fund does not apply here. The Court has recognized an exception to the general requirement in “taxpayer standing” cases for matters involving particular public funds. “[L]ongstanding Ohio law does recognize that a taxpayer with a ‘special interest’ in particular

public funds has standing to seek equitable relief in a court of equity to remedy a wrong committed by public officers in the management of those funds." *Dann*, 110 Ohio St. 3d at 254, 853 N.E. 2d 263. For example, in *Beaver Excavating Co. v. Testa*, 134 Ohio St. 3d 565, 983 N.E.2d 1317 (2012), the plaintiffs were county engineers and contractors who were among a limited number of Ohioans subject to Ohio's Commercial Activity Tax (the "CAT"). The plaintiffs contended that the CAT violated the Ohio Constitution's prohibition on using taxes collected from the sale of motor fuel on matters other than highway improvement and related matters. Unlike Appellants here, the plaintiffs in *Beaver Excavating* were members of a group that contributed to a special fund (ie, the CAT) and were challenging how those special funds that the state collected were being used. By contrast, Appellants here seek standing based on their interest in Ohio's general revenue fund. This is key distinction that makes the reasoning in *Beaver Excavating* not applicable to Appellants in this case.

IV. CONCLUSION

For the reasons set forth above, the Court of Appeals correctly concluded that the Appellants lack standing and, for this reason, and the Court of Appeals' decision should be **AFFIRMED**.



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CERTIFICATE OF SERVICE

I certify that a copy of this *Brief of Amicus Curiae Former President of The Ohio Senate Thomas Niehaus and Former State Senator Mark Wagoner in Support of Defendants-Appellees* was sent by ordinary U.S. mail to the following on this 25th day of June, 2013:

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