

ORIGINAL

IN THE SUPREME COURT OF OHIO

PROGRESSOHIO.ORG, INC., *et al.*,

Plaintiffs-Appellants,

Case No. 2012-1272

v.

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

JOBSONHIO, *et al.*,

Court of Appeals Case No. 11 AP 1136

Defendants-Appellees.

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OF DEFENDANTS-APPELLEES JOBSOHIO, ET AL.

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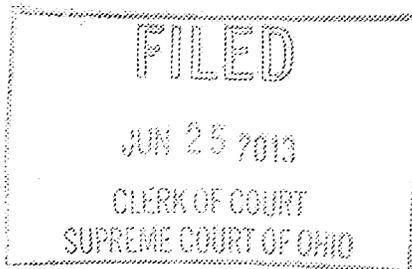
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## STATEMENT OF INTEREST

Amici Curiae are professors of law at Ohio law schools. They teach, publish books and articles, and lecture on topics concerning procedure and standing issues. Their expertise can aid the Court in the resolution of this case. Their employment and titles are listed for identification purposes only.

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### STATEMENT OF THE CASE AND FACTS

Amici Curiae adopt the Statement of the Case and Facts found in the brief on the merits filed by Defendants-Appellees.

### ARGUMENT

Plaintiffs have not been directly injured by the formation or operation of JobsOhio. Rather, they assert a generalized grievance applicable to anyone who happens to be an Ohio citizen or taxpayer. But identifying a particularized injury is a threshold requirement for invoking the time and attention of our court system. Thus, the lower courts rightly concluded that Plaintiffs do not have legal standing to bring the case and correctly dismissed it without reaching the merits.

The decisions below adhere to fundamental principles underlying the standing doctrine, starting with the requirement that a plaintiff demonstrate a concrete injury, caused by the defendant, and redressable by the lawsuit. *Moore v. Middletown*, 33 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). These requirements serve to protect the separation of powers between the branches of government, especially to ensure that the judicial branch stays within its authority to decide actual legal disputes rather than opine on abstract, generalized matters

dedicated to the legislative branch and the political process. *Arizona Christian School Tuition Org. v. Winn*, 131 S.Ct. 1436, 1441-1442, 179 L.Ed.2d 523 (2011). Indeed, “[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” (Internal quotation marks omitted.) *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

Ohio courts, following the lead of their federal brethren, have similarly adhered to formal standing requirements, not only to protect the State’s deep interest in preserving the separation of powers, but also to ensure the efficient presentation and pursuit of cases by the parties, and to guard against issuing advisory opinions. *See, e.g., Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 41 (following federal precedents and strictly enforcing standing requirements). Insofar as broader citizen standing to challenge given laws or programs might enhance democratic accountability and ensure proper execution of the laws of this State, the General Assembly retains the ability to authorize such suits within the constraints imposed by the Ohio Constitution. Judicial intervention is thus both unnecessary and unwise.

Plaintiffs err in asserting that an exception to these standing requirements saves their generalized claims. Because of the critical nature standing requirements play in our system of separation of powers, any exceptions are “rare and extraordinary.” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 504, 715 N.E.2d 1062 (1999). While Plaintiffs invoke the “public right” exception, their claims do not meet the high bar set in *Sheward*, which recognized this limited exception to “preserve the integrity and independence of the judiciary.” (Capitalization omitted.) *Id.* at 462. Those concerns are not at issue here. The off-criticized

*Sheward* decision thus does not control today's case and, more to the point, should be overruled as "wrongly decided." See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 226, 2003-Ohio-5849, 797 N.E.2d 1256, paragraph one of the syllabus.

Nor do Plaintiffs have automatic standing as state taxpayers to challenge state laws. If that were true, any legislator, lobbyist, or interest group that loses a political battle in the legislative branch could (as here) simply carry that political fight to the courts, particularized injury aside. Likewise, anyone who pays just one dollar of tax to our State, whether that taxpayer lives in Akron or Anchorage, could challenge any Ohio rule or regulation she deems unwise without regard to direct impact or concrete injury.

All told, allowing Plaintiffs to challenge public laws, as they attempt here, without a concrete grievance would eviscerate existing traditional standing requirements. As have the courts below, this Court too should require Plaintiffs to assert a concrete, personalized injury before they can invoke the Ohio courts to address their challenges to Ohio public policy.

**I. Proposition of Law No. 1: Plaintiffs Lack Standing Because Ohio Follows the Established Requirement That A Plaintiff Must Demonstrate A Cognizable Injury-in-Fact.**

**A. To Respect The Separation of Powers, A Plaintiff Must Demonstrate A Concrete, Particularized Injury To Bring Suit.**

American courts, most notably in our federal court system, have long required that a plaintiff have legal standing before bringing suit to challenge governmental action as unconstitutional or otherwise unlawful. See, e.g., *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130, 119 L.Ed.2d 351. At the federal level, this requirement is settled and well-understood. While the federal Constitution does not include the word "standing," the requirement that a plaintiff show legal "standing" derives from the language in Article III, Section 2, clause 1, which limits federal courts to hearing "Cases" or "Controversies." *Lujan* at 559. This Court, in turn, has held that

federal principles of standing apply to cases brought in Ohio state courts. *See Moore*, 33 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, at ¶ 22.

The “irreducible constitutional minimum of standing” contains three requirements. *Lujan* at 560. First, a plaintiff must demonstrate that she has suffered an “injury in fact,” which is an “invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent,” rather than conjectural or hypothetical. (Internal quotation marks omitted.) *Id.* Second, the plaintiff must show “causation,” more precisely, that her injury is fairly traceable to the challenged action of the defendant. Lastly, it must be likely—not merely speculative—that her injury will be “redressed by a favorable decision.” (Internal quotation marks omitted.) *Id.* Consistent with these requirements, the United States Supreme Court has long required a plaintiff to assert more than the “generalized interest of all citizens in constitutional governance” to have standing. *Winn*, 131 S.Ct. at 1441-1442, 179 L.Ed.2d 523 (2011) (describing the “longstanding practices of Anglo-American courts”), quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217, 94 S.Ct. 2962, 41 L.Ed.2d 706 (1974). Instead, the “injury must affect the plaintiff in a personal and individual way.” *Id.* at 1442, quoting *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130, 119 L.Ed.2d 351, fn. 1.

Standing requirements are not simply ends in themselves. Rather, they serve important aims of governmental structure as well as the efficient adjudication of individual litigation. First and foremost, standing requirements serve to reflect and enforce the separation of powers. Specifically, they “prevent the judicial process from being used to usurp the powers of the political branches.” *Clapper v. Amnesty Internatl. USA*, 133 S.Ct. 1138, 1146, 185 L.Ed.2d 264 (2013); *see also Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (standing requirements reflect the “idea of separation of powers” and the “concern about the

proper—and properly limited—role of the courts in a democratic society”), quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (standing helps insure that “courts will not intrude into areas committed to the other branches of government”). This balance of power is preserved, in part, by limiting the exercise of judicial power to those cases where standing requirements are met, in which case “the Judicial Branch [should not] shrink from confrontation with the other two coequal branches.” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Nor, by the same token, should courts “hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered a cognizable injury.” *Id.*

Standing requirements thus appropriately balance the roles of our branches of government. No one needs standing to petition the political branches (legislative and executive) to enact, repeal, enforce, or not enforce laws or policies. But an expansive conception of standing could allow one to seek a political result from the third branch, actual injury aside, thereby conflating the branches. Indeed, as Chief Justice Marshall long ago explained, if the judicial power were ““extended to every *question* under the constitution,”” courts might take possession of ““almost every subject proper for legislative discussion and decision.”” *Winn*, 131 S.Ct. at 1442, 179 L.Ed.2d 523, quoting *4 Papers of John Marshall* 95 (C. Cullen Ed. 1984). Similarly, broad notions of standing could lead to frequent stand-offs between the judicial branch ““and the representative branches of government [which] will not, in the long run, be beneficial to either.”” *Valley Forge* at 474, quoting *United States v. Richardson*, 418 U.S. 166, 188, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (Powell, J., concurring). Standing requirements thus serve to protect “democratic prerogatives by ensuring that the judicial process is invoked only when

necessary to resolve a concrete dispute and that generalized grievances widely shared by the public are vindicated through the political process.” (Footnote omitted.) Richard H. Fallon, Jr., et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 114-115 (5th Ed. 2009). Or, in the words of Chief Justice John Roberts, by adhering to standing doctrine, “the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution.” John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 *Duke L.J.* 1219, 1229 (1993).

**B. Standing Requirements Likewise Create Optimal Conditions For The Efficient Resolution of Disputes.**

In addition to core separation-of-powers concerns, standing requirements also serve more functional rationales concerning the proper adjudication of adversarial controversies before courts. For instance, standing promotes effective advocacy by insisting that litigants have a “personal stake in the outcome of the controversy,” and thus the incentive to vigorously litigate the case. *Fed. Home Loan Mtge. Corp.*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214 at ¶ 21, quoting *Cleveland v. Shaker Hts.*, 30 Ohio St.3d 49, 51, 507 N.E.2d 323 (1987); *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The parties to a case have the primary (if not exclusive) responsibility to present relevant factual information and legal arguments to the court. And vigorous litigation, including the thorough presentation of law and fact and the serious consideration of contrary assertions, is necessary in an adversarial system to inform a court’s ultimate disposition.

Similarly, standing requirements ensure that a court will render its decision in ideal conditions—in a fact-specific controversy where the court can test its principles and precedents against real facts with consequences for the parties involved. Standing requirements help “assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a

debating society, but in the concrete factual context conducive to a realistic appreciation for the consequences of judicial action.” *Valley Forge* at 472. A court’s responsibility to determine the constitutionality of actions by the other branches of government is best served when the parties present a genuine dispute to the judiciary, not a request for an advisory opinion. Indeed, “concrete adverseness,” rather than abstract controversies, is best suited for judicial resolution. *Baker* at 204.

Finally, standing requirements serve personal autonomy by preventing parties without personal stakes (for instance, a non-profit policy group) from initiating litigation on behalf of others or the public in general. “Self-appointed champions may have interests that depart from the concerns of those they purport to represent. Moreover, if they make a poor fist of things, they saddle others with unfavorable judgments—thus doing actual harm.” Larry W. Yackle, *Federal Courts* 321 (3d Ed. 2009). Standing requirements thus help ensure that the judicial process is not engaged to serve the purposes of interest groups of any ideological stripe, (*i.e.*, “concerned bystanders,”) rather than those who will be actually affected by a court judgment. (Internal quotation marks omitted.) *Valley Forge* at 473.

### **C. Ohio Follows These Settled Standing Requirements.**

#### **1. Traditional Standing Rules Comport With The Ohio Constitution.**

Just as the federal courts have interpreted our federal Constitution to require that a plaintiff show standing, the Ohio Constitution carries similar force. While the Ohio Constitution does not have a formal “Case” or “Controversy” requirement like its federal counterpart, in multiple places Ohio’s framers indicated a similar desire to preserve the proper role of the courts in our system of balanced government. To that end, both the 1802 Constitution (in Article III, Section 1) and the 1851 Constitution (in Article IV, Section 1) provide that the “judicial power of the state is vested” in the courts. Section 4(A) of Article IV, moreover, states that the

common pleas courts shall have jurisdiction over “justiciable matters.” Article IV, Section 2(B)(2) adds that this Court has appellate jurisdiction over certain categories of “cases.” And Article IV, Section 3(B)(4) refers to the Court of Appeals certifying the “record of the case.” The Ohio Constitution, moreover, like the federal Constitution, is built on similar separation of powers concerns, specifically, that each branch endeavor to cabin its powers and responsibilities to those appropriate for the particular branch. *See Sheward*, 86 Ohio St.3d at 493-494, 715 N.E.2d 1062.

As these provisions indicate, and as the leading modern reference guide to the Ohio Constitution confirms, the logical interpretation of the language in the state constitution is that it tracks federal standing requirements. *See* Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution: A Reference Guide* 180 (2004). For instance, unlike some other states, the Ohio Constitution does not provide that courts may issue advisory opinions, and this Court has (rightly) disclaimed the authority to issue such opinions. *Id.*, citing, *inter alia*, *BancOhio Natl. Bank v. Rubicon Cadillac, Inc.*, 11 Ohio St.3d 32, 462 N.E.2d 1379 (1984); *see also Fed. Home Loan Mtge. Corp.* 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, at ¶ 22 (citing this section of the Steinglass and Scarselli treatise with approval). Put another way, neither the plain text of the Ohio Constitution nor any information about the adoption, ratification, or original public meaning of the relevant provisions justifies departure in Ohio from the application of federal standing requirements. *See* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich.L.Rev. 689 (2004) (extensive review of early nineteenth century United States Supreme Court and state court cases indicates that courts of that era required private parties have standing to bring suit, even though that word was not used in opinions); Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 Case Wes.Res.L.Rev. 1061, 1066

(2009) (“the roots of standing (and other contemporary justiciability doctrines) can be unearthed in the founding period”).

## 2. This Court Has Adhered To Federal Standing Requirements.

The Court has a long history of following federal standing requirements when interpreting what grounds must be shown for a plaintiff to bring a case in Ohio courts. Indeed, while not bound to follow federal standing requirements, *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989); *Sheward*, 86 Ohio St.3d at 470, 715 N.E.2d 1062, the Court nonetheless has an extensive doctrinal commitment to citing and adhering to those requirements.

This history dates back to before the common usage of the term “standing.” As early as 1910, this Court—citing to a decision of the United State Supreme Court—rendered decisions holding that Ohio courts can only decide ““actual controversies by a judgment [that] can be carried into effect, and [is] not to give opinions upon moot questions or abstract propositions.”” *Miner v. Witt*, 82 Ohio St. 237, 238, 92 N.E. 21 (1910), quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895); *see also* Steinglass & Scarselli at 180. In a host of cases that followed, the Court reaffirmed its practice of adhering to federal precedent and requiring that an actual injury be asserted by a putative plaintiff. *See, e.g., Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994) (adopting federal limits on associational standing and dismissing case because no member of the association had a “concrete” injury), citing *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 40, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), and *Warth*, 422 U.S. at 511, 95 S.Ct. 2197, 45 L.Ed.2d 343; *State ex rel. Dallman v. Ct. of C.P.*, 35 Ohio St.2d 176, 178-179, 298 N.E.2d 515 (1973) (plaintiff did not have standing because he did not have a “personal stake” in the outcome of the case),

citing *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), *Baker*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, and *Flast*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947; *Fortner v. Thomas*, 22 Ohio St.2d 13, 14-15, 257 N.E.2d 371 (1970) (holding that plaintiff cannot invoke “judicial review of quasi-legislative proceedings of administrative officers and agencies” where he has not been subject to the application of the regulation), citing *Poe v. Ullman*, 367 U.S. 497, 6 L.Ed.2d 989 (1961).

The Court continues with this approach today. For instance, last year in *Federal Home Loan Mortgage Corporation v. Schwartzwald*, the Court relied on no less than eight United States Supreme Court cases and five federal appellate court cases in concluding that the plaintiff lacked standing. 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. Noting that the jurisdiction of the courts of common pleas is constitutionally limited to “justiciable matters,” (internal quotation marks and alteration omitted), *id.* at ¶ 20, the Court held that the term “justiciable matters” meant that the plaintiff needed “standing to sue,” (alterations omitted), *id.* at ¶ 21, and proceeded to evaluate whether the plaintiff had a sufficient “personal stake” in line with United States Supreme Court decisions. (Internal quotation marks omitted.) *Id.*, citing *Sierra Club* at 731-732; *Baker*, 369 U.S. at 204, 82 S.Ct. 691, 7 L.Ed.2d 663; and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Relying on *Lujan*, among other federal authorities, the Court held not only that standing was absent when the suit commenced, but also that ““standing is to be determined as of the commencement of suit,”” *id.* at ¶ 24, 27, quoting *Lujan*, 504 U.S. at 570-571, 112 S.Ct. 2130, 119 L.Ed.2d 351, and could not be cured after its commencement, if, for example, a party obtained a legal interest due to injury after the filing of the complaint. *Id.* at ¶ 24, 27.

Despite this mountain of authority and the Court's settled practice, Plaintiffs ask the Court to abandon federal standing principles. Not only would such an approach be unexpected and upset years of precedent, it would also be unwise. To be sure, the Court is not required to read the Ohio Constitution to comport with its federal counterpart, nor can it be doubted that in our federal system states are often "laboratories of experiment." That said, as a constitutional matter, "where the provisions are similar and no persuasive reason for a differing interpretation is presented," this Court has interpreted the Ohio constitutional language "coextensive[ly]" with federal precedent. *State v. Robinette*, 80 Ohio St.3d 234, 238, 685 N.E.2d 762 (1997). And here there are sound reasons based in the pertinent language of the Ohio Constitution, the historical practice of this Court, and separation of powers principles, to follow traditional standing rules.

**3. The Legislature Is Best Suited To Authorize Particular Types of Suits Where Standing Would Otherwise Be Lacking.**

Within the constraints of the Ohio Constitution, the General Assembly has the power to cloak parties with the degree of personal interest necessary to satisfy standing requirements by enacting a "specific statute authorizing invocation of the judicial process." See *Fed. Home Loan Mtge. Corp.* at ¶ 21, quoting *Cleveland v. Shaker Heights*, 30 Ohio St.3d at 51, 507 N.E.2d 323; see also *State ex rel. Dallman*, 35 Ohio St.2d at 178-179, 298 N.E.2d 515 ("Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy" (internal quotation marks omitted)), quoting *Sierra Club*, 405 U.S. at 732, 92 S.Ct. 1361, 31 L.Ed.2d 636. Much the same is true at the federal level, where "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts v. EPA*, 549 U.S. 497, 516, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), quoting *Lujan*, 504 U. S. at 580, 112 S.Ct. 2130, 119

L.Ed.2d 351 (Kennedy, J., concurring in part and concurring in judgment); *see also Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Both federal and state standing doctrines, in other words, are sufficiently flexible to allow the legislative branch to authorize suits in instances where the courts would otherwise bar the case on traditional standing grounds.

For example, the legislature has authorized municipal taxpayers who seemingly lack traditional standing to bring suit when the municipality decides not to do so. *See* R.C. 733.59 (if the village solicitor fails to bring suit upon request, “the taxpayer may institute suit in his own name, on behalf of the municipal corporation”). Likewise, the legislature has authorized a county taxpayer to bring suits in some instances where the county prosecutor fails to do so. *See* R.C. 309.13; *AARTI Hospitality, LLC v. Grove City*, 486 F.Supp.2d 696, 704 (S.D. Ohio 2007) *aff’d*, 350 Fed.Appx. 1 (6th Cir.2009). As these enactments reflect, the legislative branch can better weigh the necessity, and the advantages and disadvantages, of such provisions. And when the legislature has authorized a suit, there is no concern that the judiciary’s consideration of a case will infringe upon the domain of the legislature.

In sum, within the bounds of constitutional authority, the General Assembly is the best forum for authorizing special invocation of the judicial process. Here, the General Assembly has not authorized any such special invocation. The Court should not step in where the legislature has declined to do so.

\* \* \* \* \*

Plaintiffs have failed to meet settled standing requirements. This Court should not jettison those requirements, over a century old in our State alone, simply because a lawmaker, a former lawmaker, and a non-profit policy group disagree with recent decisions by the political

branches of our government. The courthouse doors remain open to plaintiffs with cognizable claims and an asserted actual injury. But our system requires just that—an actual injury—before a party may invoke the mighty judicial power.

**II. Proposition of Law No. 2: There Is No “Public Right” Exception Applicable To Save Plaintiffs’ Action.**

**A. The So-Called “Public Right” Exception Is At Odds With Traditional Standing Rules And Is Thus Rarely If Ever Applied.**

Against the backdrop of these settled standing principles, Plaintiffs argue that Ohio recognizes an exception to traditional standing requirements for cases that are of great “public interest” or concern a “public right.” (Appellants’ Br. at 16.) Their principal authority is *Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062, where the Court held that a constitutional challenge in mandamus to the 1996 Tort Reform Act (“Act”) concerned a public right of such importance that the Court would hear the case despite the fact that the plaintiffs lacked the individualized injury normally required. *Id.* at 470, 474-475. *Sheward*, which tread new ground in Ohio standing jurisprudence, turned on the asserted overriding importance of quickly reviewing the Act which attempted, in the Court’s words, to destroy the separation of powers between the judicial and legislative branches. *Id.* at 492.

The Act at issue in *Sheward* was “no ordinary piece of legislation that happens to inadvertently cross the boundaries of legislative authority.” *Id.* Instead, the General Assembly had reenacted legislation previously stricken as unconstitutional, and declared it to be constitutional, “mark[ing] the first time in modern history that the General Assembly . . . openly challenged this [C]ourt’s authority to prescribe rules governing the courts of Ohio and to render definitive interpretations of the Ohio Constitution binding on other branches.” *Id.* at 459. The Court believed it had a “constitutional duty” to “preserve the integrity and independence of the judiciary and ensure that the judicial power of the state remains vested in the courts,” which, in

the majority's view, could be accomplished only by hearing the case even absent a concrete, personalized injury to the plaintiffs. (Capitalization omitted.) *Id.* at 462. Accordingly, the Court let the case proceed as a "public right" action to vindicate the "judicial power to the courts," despite the fact that the plaintiffs did not meet the traditional standing requirements. *Id.* at 474.

Notably, while the Court created this "public right" exception in *Sheward*, it was also careful to narrow its scope. The Court stated that the exception would not permit citizens to "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." *Id.* at 503-504. Instead, the Court held, the public right exception will operate in the "rare and extraordinary case" where the statute is "of a magnitude and scope comparable to [the Act]." *Id.* at 504. And that, the Court made clear, is a high bar indeed. After all, the *Sheward* majority found it "difficult to imagine a right more public in nature than one whose usurpation has been described as the very definition of tyranny." *Id.* at 474. It is thus perhaps no surprise that in the years that have followed, the Court has accepted public right standing in only one other case, where it similarly emphasized that the exception remained "extraordinary." *See State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Compensation*, 97 Ohio St.3d 504, 506, 2002-Ohio-6717, 780 N.E.2d 981 ("*OBWC*").

**B. The "Public Right" Exception Is Inapplicable To This Case.**

The "public right" exception, even if jurisprudentially justified, does not apply here. In determining that Plaintiffs do not have standing to challenge the constitutionality of JobsOhio, both Judge Beatty from the Franklin County Court of Common Pleas and Judge Tyack, writing for the unanimous panel of the Tenth District Court of Appeals, carefully considered *Sheward*

and found that today's case fell far short of meriting an exception to the traditional standing rules. Their decisions were sound for two main reasons.

First, those decisions correctly acknowledged that the public right doctrine is narrow at best. Given the separation-of-powers concerns underlying traditional standing rules, exceptions, if any, should be construed narrowly. The political branches of government, not the courts, are charged with vindicating public rights: "Vindicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576, 112 S.Ct. 2130, 119 L.Ed.2d 351. Accordingly, to the extent Ohio allows a public right exception, it plainly cannot apply to simply any case involving public interest or alleged constitutional violation.

Resisting this conclusion, Plaintiffs advocate for their view that *any* state statute that arguably violates any constitutional provision is perforce a "public rights" or "public interest" case. (Appellants' Br. at 17.) According to Plaintiffs, it would be "wildly unrestrained" for a court to decide in "its own subjective view" which constitutional principles are sufficiently important to merit the *Sheward* exception. And, it follows, say Plaintiffs, because all constitutional provisions reflect the will of the people, all must be presumed "important." (Appellants' Br. at 17-18.)

Plaintiffs' argument succumbs to the pressure of its own weight. By their reading of the so-called "public right" exception, the exception has no limiting principle. Indeed, *every* constitutional claim any party in Ohio can drum up, no matter the circumstances, would demand immediate court review. Any legislative act would be amenable to court challenge and review, regardless whether the plaintiff has been impacted (let alone injured) by the act, and regardless the plaintiff's motives or interests in pursuing the case. Plaintiffs' reasoning not only

dramatically extends the “public right” exception beyond the strictures set in *Sheward*, but it would also eviscerate traditional standing requirements.

Second, the courts below properly articulated why the facts of this case did not present issues of nearly the same magnitude as those presented in *Sheward*. As Judge Tyack’s opinion for the Tenth District noted, the Act at issue in *Sheward* would have applied in every single tort action in the trial courts of the State. See *ProgressOhio.org, Inc. v. JobsOhio*, 10th Dist. No. 11AP-1136, 2012-Ohio-2655, 973 N.E.2d 307, ¶ 32 (Appellants’ Br. App., Tenth District Judgment and Order at 11). The legislative enactment, moreover, threatened the judicial power of the courts. *JobsOhio*, on the other hand, has no such force; “it does not transform the civil justice system” as did the Act in *Sheward*. (Internal quotation marks omitted.) *Id.* Similarly, in *OBWC*, the statute at issue “affected every injured worker in Ohio seeking to participate in the worker’s compensation system.” *Id.* Indeed, it affected “virtually everyone who works in Ohio” with respect to violating the right to be free from unreasonable searches—a “core right” so “fundamental as to be contained in our Bill of Rights.” *OBWC*, 97 Ohio St.3d at 504, 2002-Ohio-6717, 780 N.E.2d 981, at ¶ 12. This case, on the other hand, does not impact core rights contained in the Bill of Rights. Nor does it affect virtually every Ohio worker. Instead, it centers on an appropriation of the State treasury, which, while important, is not within the scope of *Sheward*. As Judge Beatty aptly reasoned, while money is of “great concern,” “finding standing based on the amount of money involved would open the floodgates to challenges involving any provision in Ohio’s multibillion dollar budget.” (Appellants’ Br. App., Franklin County Common Pleas Judgment and Order at 24.) It is “not the judicial branch’s function \*\*\* to evaluate standing based on the wisdom of an expenditure.” (*Id.*)

**C. *Sheward* Satisfies The *Galatis* Requirements And Should Be Overruled.**

Alternatively, if the Court concludes that this case cannot be meaningfully distinguished from *Sheward*, it should consider overruling or further cabining that precedent. No one doubts the importance of stare decisis; it is a first principle of American jurisprudence. At the same time, the Court is trusted “with the duty to examine its former decisions and \*\*\* discard its former errors.” *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 43. Recognizing this duty, *Galatis* established the criteria appropriate for determining when a prior decision should be overruled: “(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.” *Id.*, paragraph one of the syllabus. Based on this test, *Sheward* is ripe for overruling.

As to the first prong, *Sheward* was wrongly decided from the outset. Given its unprecedented nature, *Sheward* was—and remains—highly controversial. The 4-3 majority decision was criticized in a vigorous dissent from then-Chief Justice Moyer. Among other things, Chief Justice Moyer worried that the majority’s decision had the potential to be dramatically overbroad because “public rights” are difficult to objectively define or apply. *Sheward*, 86 Ohio St.3d at 526, 715 N.E.2d 1062 (Moyer, C.J., dissenting). Justice Stratton offered her own dissenting opinion, worrying that the majority had “created a whole new arena of jurisdiction—advisory opinions on the constitutionality of a statute challenged by a special interest group” (*i.e.*, the exact type of case that is presented here). (Internal quotation marks omitted.) *Id.* at 531 (Stratton, J., dissenting).

Particularly problematic in *Sheward* was the fact that there was no sound reason for creating an exception to the Court's longstanding duty to decide only "actual controversies between parties legitimately affected by specific facts." (Internal quotation marks omitted.) *Id.* at 525 (Moyer, C.J., dissenting). That the General Assembly purportedly reenacted a statute previously deemed unconstitutional was no basis for creating new-found exceptions to bedrock legal rules. For one thing, the Court maintained the power "to strike down the new statute as well" when challenged by any party with a cognizable injury. *Id.* at 529. For another thing, as Chief Justice Moyer emphasized, "[j]udicial power is no more infringed by the General Assembly's statements of intent than by the expression of disagreement with [the Court's] ruling by a legislator in debate over proposed legislation, or in a newspaper editorial." *Id.* And not only Chief Justice Moyer, but also Chief Justice Roberts has emphasized the critical basis for consistent standing requirements. *See* Roberts, 42 Duke L.J. at 1220 (the doctrine of standing was "designed to implement the Framers' concept of 'the proper—and properly limited—role of the courts in a democratic society,'" quoting *Allen*, 468 U.S. at 750, 104 S.Ct. 3315, 82 L.Ed.2d 556).

Commentators have roundly criticized *Sheward*, from publications in Ohio to the Harvard Law Review. *See, e.g.*, Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 Clev.St.L.Rev. 531, 542 (2004) (*Sheward* exception "could considerably undermine standing requirements" and is not "particularly well grounded in Ohio jurisprudence"); Jonathan I. Blake, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward: The Extraordinary Application of Extraordinary Writs and Other Issues; The Case That Never Should Have Been*, 29 Cap.U.L.Rev. 434 (2001) (*Sheward* majority "moved jurisdictional and procedural mountains to address the unjusticiable issue of tort reform"); Brian M. Loeb, *Comment, Abuse of Power: Certain State*

*Courts are Disregarding Standing And Original Jurisdiction Principles So They Can Declare Tort Reform Unconstitutional*, 84 Marq.L.Rev. 491, 492 (2000) (*Sheward* reflects “an example of blatant judicial violation of jurisdictional doctrine”); Note, *State Tort Reform—Ohio Supreme Court Strikes Down State General Assembly’s Tort Reform Initiative*, 113 Harv.L.Rev. 804, 807 (2000) (criticizing *Sheward* in multiple respects). Cf. David J. Owsiany, *The General Assembly v. The Supreme Court: Who Makes Public Policy in Ohio?*, 32 U.Tol.L.Rev. 549, 555 (2001) (criticizing the Court in *Sheward* for policymaking).

Nor is a “public interest” or “public right” exception to standing a trend elsewhere; indeed, quite the opposite. Since *Sheward* was decided, other States have declined to adopt such an exception. See, e.g., *Chattanooga v. Davis*, 54 S.W.3d 248, 280 (Tenn.2001); *Goldman v. Landsidle*, 262 Va. 364, 373-374, 552 S.E.2d 67 (2001). In sum, *Sheward* was an anomalous decision that departed from a century of adherence to traditional standing rules, an unnecessary departure for protecting the power of the judiciary.

With respect to the second *Galatis* prong, *Sheward* has not provided a workable standard. Though *Sheward* states that the public rights exception is narrow, it gives virtually no guidance as to when it should be applied. It states that a case must have “magnitude and scope” comparable to the Act. *Sheward*, 86 Ohio St.3d at 504, 715 N.E.2d 1062. But what rights and interests are as important as those in *Sheward*? That is a question not suited for a workable answer. For instance, though a *Sheward* exception has been found in only one other case, *OBWC*, there too the decision was 4-3, in part because there was no clear way of determining whether the facts met the standard set forth in *Sheward*. See *OBWC*, 97 Ohio St.3d at 504, 2002-Ohio-6717, 780 N.E.2d 981, at ¶ 67 (“Nothing even approaching the circumstances described in

*Sheward* exists in the case before us.”) (Moyer, C.J., dissenting). This problem plagues every case where *Sheward*'s public rights exception is invoked.

Indeed, even while Plaintiffs invoke *Sheward*, they themselves cannot make sense of the holding. After all, they argue there is *no* way of determining that one public right is more important than another. And they contend that the drafters of the Ohio Constitution would have *themselves* disagreed about what public rights were most important. (Appellants' Br. at 18). Yet *Sheward* requires modern day jurists and practitioners to provide those answers. That Plaintiffs seek a rule allowing any constitutional violation to give rise to public right standing confirms not only the unworkability of the rule in *Sheward*, but also that the rule sets litigants and jurists down a seemingly endless path of unfettered court access, leaving traditional standing rules in their wake. Because there is no workable way to determine which public rights are entitled to an exception, the second *Galatis* prong counsels in favor of overruling *Sheward*.

Nor, as a third and final matter, are there reliance interests that would be upset by undoing the damage of *Sheward*. No party has depended on the existence of the *Sheward* exception. Parties aggrieved by the actions of defendants will still have access to redress under the traditional standing doctrine, and the legislative branch will retain its authority to authorize citizen suits where necessary or appropriate to vindicate the public interest. Overruling *Sheward* would cause no “undue hardship for those who have relied on it.” *Galatis*, 100 Ohio St.3d at 228. Thus, if the Court cannot distinguish *Sheward* on its facts, it should take this opportunity to overrule it or further narrow its already slender reach.

### **III. Proposition of Law No. 3: State Taxpayers Do Not Have Automatic Standing to Challenge State Laws.**

Plaintiffs also argue they should be granted standing as state taxpayers. If accepted, this argument would drastically expand the standing rights of parties with only a tangential or

generalized interest. Indeed, it would do so even more than a “public right” exception, and it would counteract the critical purpose of limiting standing to those cases where the parties demonstrate a concrete interest. Millions of Ohioans would satisfy that test. No matter how obscure the statute, disinterested the party, or generalized the grievance, one would be able to challenge any action by the State simply because she is a taxpayer. The exception would often swallow the traditional standing rules in controversies with the State.

With one limited exception (relating to the Establishment Clause) not applicable here, federal and state courts—including Ohio’s—have consistently held that the status of being a federal or state taxpayer does not supply standing. *See Winn*, 131 S.Ct. 1436, 179 L.Ed.2d 523; *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 127 S.Ct. 2553, 168 L.Ed.2d 424 (2007); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006); *Flast*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947; *Baer v. New Hampshire Dept. of Edn.*, 160 N.H. 727, 730-731, 8 A.3d 48 (2010); *Goldman*, 262 Va. at 372-373, 552 S.E.2d 67; *State ex. rel. Masterson v. Ohio State Racing Comm.*, 162 Ohio St. 366, 368, 123 N.E.2d 1 (1954). The United States Supreme Court recently reiterated that, absent special circumstances, “standing cannot be based on a plaintiff’s mere status as a taxpayer,” because a taxpayer does not have a “continuing, legally cognizable interest in ensuring that those funds are not *used* by the Government in a way that violates the Constitution.” *Winn* at 1442-1443, quoting *Hein* at 599. Indeed, the United States Supreme Court set forth the doctrinal basis for this rule back in 1923, when it rejected a plaintiff’s argument that she had standing because of her interest in the government treasury, and because governmental expenditures affected her personal tax liability. *See Frothingham v. Mellon*, 262 U.S. 447, 487, 43 S.Ct. 597, 67 L.Ed.2d 1078 (1923) (decided with *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923)). The “effect

upon future taxation, of any payment out of funds,” was too “remote, fluctuating and uncertain” to give rise to a case or controversy. *Id.* And a taxpayer’s “interest in the moneys of the Treasury” is “shared with millions of others,” and therefore a “matter of public . . . concern” that could be pursued through the political process. *Id.* at 487-489; *Winn* at 1443. For these same reasons, the Court should reject Plaintiffs’ contention that their status as taxpayers can confer standing in this case.

### CONCLUSION

Plaintiffs ask this Court to drastically depart from the traditional standing requirements the Court (and its federal brethren) has followed for generations. For the reasons stated above, the Court should reject their proposition and affirm the decision of the Court of Appeals.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Amicus Brief of Ohio Law Professors was served by

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