ORIGINAL

In the
Supreme Court of Ohio

PROGRESSOHIO.ORG, INC., *et al.*,	:	Case No. 2012-1272
Appellants,	:	
v.	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District, Case No. 11-AP-1136
JOBSOHIO, *et al.*,	:	
Appellees.	:	

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INTRODUCTION

Under the guise of "enforcing the Constitution," appellants ProgressOhio, former-Representative Murray and Senator Skindell (collectively "ProgressOhio") along with their amici, ask this Court to cast aside decades of settled law concerning the scope of judicial power in Ohio—settled law that is based on fundamental principles that have guided the exercise of judicial power in the American legal tradition since its inception. ProgressOhio proposes a legal framework under which any one of Ohio's 11.5 million citizens could impose substantial delay on the legislative process merely by filing a complaint asserting that a new statute violates some provision of the Ohio Constitution. The plaintiff in such an action, according to appellants here, would not need to identify any individual harm or injury—a mere allegation of unconstitutionality would suffice to force the common pleas court to decide the merits of the constitutional claims. And, of course, the judicial train would not stop there. The plaintiff would undoubtedly appeal any adverse determination, injecting yet more delay.

Not only would appellants' injury-free standing framework impose disastrous delays on the legislative process, it would portend a breathtaking expansion of the judicial branch's role in the tripartite form of government that Ohio's citizens enacted through our Constitution. Ohio's Constitution envisions a limited role for each of the three branches. The judiciary's role is to resolve cases and provide remedies for persons who have suffered a wrong. To be sure, in the course of such an action, courts have the power to interpret and enforce the Constitution. But, in all but the most "rare and extraordinary" cases, the power of judicial review is not a free-standing power that allows judicial intrusion into a coordinate branch of government. Standing rules exist to police these constitutionally-established boundaries, ensuring that the judicial power is exercised in appropriately judicial circumstances. As such, standing is not a

technicality as appellants suggest, but a vital component of Ohio's constitutional design. In fact, far from ***enforcing*** Ohio's Constitution, the judicial expansionism that appellants advocate here would ***eviscerate*** it.

If appellants are required to operate within existing standing rules, as they should be, their claims cannot go forward, as appellants cannot show that they fall within any recognized category of standing in Ohio. Appellants principally rely on so-called *Sheward* standing. Their reliance is misplaced, however, for three independent reasons. First, *Sheward* standing is limited to cases, such as *Sheward* itself (*see State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999)), that invoke ***this Court's*** original jurisdiction ***in mandamus***. *Sheward* does not hold, nor even suggest, that affording broader standing for such original actions in this Court somehow translates into providing Ohio's hundreds of common pleas court judges with unfettered power to ignore standing requirements on an individual basis as each judge sees fit. Such a rule would threaten a startling lack of uniformity.

Second, *Sheward* applies only to those cases where the statute at issue "acts broadly to deprive courts of jurisdiction." In other words, when legislation unconstitutionally intrudes on the judicial branch by directly targeting judicial power, this Court will relax standing rules in order to police constitutional boundaries between the coordinate branches of government. That principle has no application here, though, as the JobsOhio statutes do not deprive courts of jurisdiction or otherwise alter the balance of powers among the branches of government.

Finally, even if *Sheward* ***could*** apply to common pleas court actions, there is no call for such standing here. *Sheward* is limited to "rare and extraordinary cases," such as the statutes at issue in *Sheward* or *Ohio AFL-CIO* which directly affected hundreds of thousands of employees in Ohio (*State ex rel. Ohio AFL-CIO v. Ohio Bur. Of Workers Comp.* 97 Ohio St.3d 504, 2002-

Ohio-6717, 780 N.E.2d 981 ("*Ohio AFL-CIO*")), or every litigant with a pending matter (*Sheward*). Try as they might, appellants have failed to show that the JobsOhio legislation even comes close to this in scope. Indeed, there is no way to draw a meaningful line between the constitutional challenge appellants assert here and ***any*** constitutional challenge to ***any*** statute—a point that appellants essentially concede. (*See* Br. at 18 (asserting that ***all*** constitutional provisions "must be presumed to be 'important'")). In short, the result appellants seek here would throw the floodgates open wide, drowning Ohio's courts in a sea of questionable constitutional challenges and drawing Ohio's judicial branch into constant and ongoing intrusion into its co-equal branches of government.

Appellants' efforts to invoke taxpayer standing likewise fall flat. To start, appellants ***expressly waived*** that argument below. But even putting that aside, appellants here do not fall within Ohio's taxpayer standing doctrine. Ohio law limits taxpayer standing to cases in which the taxpayer is challenging a tax collected from him, or challenging an expenditure from a special fund in which he has some interest. Here, it is undisputed that neither applies. As with appellants' *Sheward* standing argument, recognizing taxpayer standing here would necessarily mean taxpayer standing exists for ***all*** constitutional challenges to ***any*** governmental spending.

Finally, appellants make two statutory standing arguments, both equally flawed. First, they claim statutory standing under the Declaratory Judgment Act, an argument they never pressed below and thus have waived here. Even were that not so, the Declaratory Judgment Act merely creates a procedural vehicle for asserting otherwise viable claims—it does not independently create standing. As for appellants' second statutory standing argument, based on R.C. 187.09, they did at least raise it below. But as both the trial court and the Tenth District unanimously held, that statute merely specifies ***where*** suit may be brought; it does not confer

standing on any particular plaintiff—let alone every citizen in Ohio—to maintain an action in that identified forum.

At bottom, appellants are asking this Court to rewrite the fundamental precepts of our tripartite form of government in a way that will allow for unlimited judicial encroachment on the legislative and executive domains. Far from enforcing our Constitution, the appellants' proposed standing framework makes a mockery of it. JobsOhio respectfully urges the Court to affirm the unanimous decisions below that appellants lack standing.

STATEMENT OF THE FACTS AND CASE

This case involves Am. Sub. H.B. 1, Am. Sub. H.B. 153 (which amends Am. Sub. H.B. 1) (collectively the "JobsOhio Act") and R.C. Chapter 4313 (the "Liquor Enterprise Act"). The JobsOhio Act authorizes the Governor to file articles of incorporation creating JobsOhio, a non-profit corporation designed to assist the State in economic development activities. In this action, appellants sought to challenge both the validity of JobsOhio's existence, as well as the validity of certain transactions that JobsOhio and various state agencies are statutorily authorized to undertake (including those authorized under the Liquor Enterprise Act).

Importantly, however, this appeal does not involve the ***merits*** of appellants' challenges to those statutes. Rather, both the trial court and the Tenth District Court of Appeals unanimously held that appellants lack ***standing***, a threshold requirement plaintiffs must meet ***before*** moving to the merits of their claims. Likewise, the only proposition of law on which this Court accepted review was limited to standing. (*See* 1/23/2013 Entry). Thus, the facts relating to standing, and in particular to the standing arguments pressed below, are the key facts to this appeal. In that regard, as more fully described below, appellants have repeatedly conceded that the statutes they seek to attack have not caused them any unique or individualized harm. Rather, in the courts

below, appellants strictly limited their standing claims to (1) standing under *Sheward*, (2) statutory standing under the JobsOhio Act, and (3) legislator standing.[1]

A. The General Assembly Passed The JobsOhio Legislation In Early 2011 And Amended It In June Of That Year.

Over two years ago, in February 2011, the General Assembly passed and the Governor signed Am. Sub. H.B. 1, the law that enacted R.C. Chapter 187. (*See* First Am. Cmplt. ¶ 1). That summer, the General Assembly passed, and the Governor signed, Am. Sub. H.B. 153, amending the original JobsOhio legislation. (*Id.* at ¶ 5).

The JobsOhio Act does not create any corporate entity by statute, but rather "authorize(s) ***the Governor*** to form a non-profit corporation." (Am. Sub. H.B. 1 (Title); *see also* First Am. Cmplt. ¶ 1 (emphasis added)). Pursuant to the JobsOhio legislation, that non-profit corporation—called JobsOhio—has "the purposes of promoting economic development, job creation, job retention, job training, and the recruitment of business to this state." R.C. 187.01. Subject to certain limitations set forth in Chapter 187, the legislation provides that JobsOhio will be "organized and operated in accordance with Chapter 1702 of the Revised Code." *Id.* Chapter 1702 is Ohio's general non-profit corporation law.

Chapter 187 also provides that, if the Governor decides to form the non-profit entity, the Governor "shall sign and file articles of incorporation" for JobsOhio. R.C. 187.01. Once the articles of incorporation are filed, the Governor is required to appoint a board of directors consisting of nine directors who must meet certain qualifications. *See* R.C. 187.02.

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[1] In their brief here, appellants seek to add two additional standing arguments: (1) taxpayer standing (which they expressly ***disclaimed*** below), and (2) statutory standing under the Declaratory Judgment Act (which they never raised below). Conversely, they are apparently dropping any assertion of legislator standing.

Chapter 187 does not confer any special powers on JobsOhio. Rather, the statute provides that "JobsOhio may perform such functions as are permitted by law ...." R.C. 187.03. Consistent with JobsOhio's status as a non-profit corporation, the statute expressly provides that "[d]irectors and employees of JobsOhio are not employees or officials of the state." *Id.*

The General Assembly also provided a funding mechanism in the bill to defray the initial costs that JobsOhio incurs. In Section 5 of Am. Sub. H.B. 1, the General Assembly ordered the Director of Development to find in that Department's "unexpended and unencumbered fiscal year 2011 General Fund appropriation an amount not to exceed $1,000,000" for JobsOhio to use for "transition and start-up costs."[2] That appropriation has been fully repaid, and the JobsOhio legislation does not authorize any further appropriations for JobsOhio.

B. The JobsOhio Legislation Authorizes The Ohio Department of Development To Enter A Services Contract With JobsOhio To Advise The Department.

In addition to authorizing the Governor to form JobsOhio, Chapter 187 also directs the Director of the Ohio Department of Development ("ODOD")[3] to enter into a services contract with JobsOhio. More specifically, R.C. 187.04 requires the Director of the ODOD to "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 and duties of the department ...." The statute expressly provides that JobsOhio's function under this contract will be ***advisory***. The statute states, for example, that "the approval or disapproval of awards shall remain functions of the department [of development]," and that "[a]ll contracts for grants, loans

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[2] A nonprofit affiliate of JobsOhio—the former Ohio Business Development Coalition, now known as JobsOhio Beverage System—received grants from the Ohio Department of Development to market and sell Ohio. Those funds have also been fully repaid.

[3] The Ohio Department of Development was renamed the Development Services Agency by Am. Sub. S.B. 314 (129th G.A.), §1, eff. 9/28/2012.

and tax incentives shall be between the department and the recipient." *Id.* Likewise, the statute provides that "JobsOhio may not execute contracts obligating the department for loans, grants, tax credits or incentive awards ...." *Id.* Indeed, the statute specifically states that the contract between JobsOhio and the Department must include the following language:

> 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.

R.C. 187.04(B)(3).

That statute further provides that any contract between the ODOD and JobsOhio is valid only for the current biennium, and provides that the parties may renew or amend the contract in future biennia. R.C. 187.04(A). Also, once JobsOhio and the ODOD have reached agreement on a contract, the contract is subject to Controlling Board approval to the extent that it "obligate[s] the agency to pay JobsOhio for services." *Id.*[4]

C. The JobsOhio Legislation Authorizes The State To Undertake A Liquor Enterprise Transaction With JobsOhio.

In addition to the contract with the ODOD, the General Assembly also enacted a separate statute, the "Liquor Enterprise Act," authorizing the State to negotiate and execute a transaction involving JobsOhio and the Ohio Division of Liquor Control. In particular, R.C. Chapter 4313 allows the State to enter into an agreement through which JobsOhio (or a non-profit affiliate) pays the State a lump sum amount in exchange for receiving a franchise on the merchandising and sale of spirituous liquor on the State (the "Liquor Enterprise") for up to 25 years.

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[4] JobsOhio and the Department of Development have executed, and the Controlling Board has approved, the agreement called for under R.C. 187.04, as this Court noted in *State ex rel. JobsOhio v. Goodman*, 133 Ohio St.3d 297, 2012-Ohio-4425, 978 N.E.2d 153, ¶ 3.

In connection with the Liquor Enterprise transaction, R.C. 4313.02(E) requires the director of budget and management and the director of commerce, subject to Controlling Board approval, to contract with JobsOhio to provide for the continuing operation of the State's Division of Liquor Control of the Liquor Enterprise, at JobsOhio's expense and subject to standards for performance set forth in the contract. In other words, State employees will continue to perform many of the actual operational functions under this contract, and JobsOhio will be required to compensate the State for the performance of those functions.

The contract between JobsOhio and the State does not call for the State to pay JobsOhio anything. Rather, the Liquor Enterprise transaction generated a payment of approximately $1.46 billion on February 1, 2013, including $500 million for the State's General Fund. This amount was originally intended to be received by the State in Fiscal Year 2012, but receipt did not occur until 2013 due to delays caused by this lawsuit. *See* Am. Sub. H.B. No. 153, Section 801.20, and R.C. 4313.02(B)(2). In addition to the substantial amount of General Fund revenues, the Liquor Enterprise transaction's closing provided sufficient funds to the State (more than $800 million) to discharge all of its then outstanding bonds that were payable from and secured by profits from the Liquor Enterprise, as well as an additional $100 million for the State's Clean Ohio program. R.C. 4313.02(B).

D. The JobsOhio Legislation Addresses Where And When Challenges Should Be Brought, But Does Not Address Who Should Bring Them.

In addition to the provisions authorizing the Governor to form JobsOhio and authorizing the State to undertake transactions with JobsOhio, the legislature also enacted R.C. 187.09, the provision on which appellants base their claim to statutory standing. That statute contains two provisions potentially relevant to appellants' suit here. Division B directs that any claim

asserting that H.B. 1 or H.B. 153 is unconstitutional "shall be brought in the court of common pleas of Franklin county within ninety days after the effective date of the amendment":

> (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.

Division C then directs that constitutional challenges predicated on later actions involving JobsOhio shall be "brought in the court of common pleas of Franklin county within sixty days after the action is taken":

> (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.

While both statutory provisions address where and when the actions should be brought, nothing in R.C. 187.09 addresses ***who*** is allowed to bring such actions.

E. At Every Stage Below, Appellants Acknowledged That They Have Not Suffered Any Individualized Injury And Confirmed That They Are Solely Asserting (1) Public Right Standing Under *Sheward*, (2) Legislator Standing, And (3) Statutory Standing Under The JobsOhio Legislation.

Appellants brought suit in August 2011 challenging the JobsOhio legislation. In their First Amended Complaint, appellants allege that the legislation violates the Ohio Constitution in seven different ways: as an impermissible special act conferring corporate powers (Count I), by violating the requirement that corporations be formed under general laws (Count II), by violating the lending aid or credit provision (Counts III and VII), by violating the open-courts provision (Count IV), by creating an appropriation extending across a biennium (Count V), and by purporting to allow the State to exceed its bond limit (Count VI).

With regard to standing, appellants asserted only that:

> 14. Plaintiffs have standing to bring this action through the common law and the legislative grant of standing pursuant to Am. Sub. H.B. 1 and Am. Sub. H.B. 153.

(First Amended Cmplt.)

Defendants moved to dismiss the suit, *inter alia*, on the ground that appellants lacked standing. During oral argument on that motion, appellants acknowledged that they had not suffered ***any*** particularized harm and, as a result, expressly disclaimed any reliance on typical common-law standing. They likewise conceded that they had not suffered any unique or particularized harm as individual taxpayers. Accordingly, appellants expressly confirmed that they were not relying on common-law standing or taxpayer standing, but rather were asserting standing on precisely three grounds: (1) standing under *Sheward*, (2) legislator standing, and (3) statutory standing (which they predicated ***exclusively*** on R.C. 187.09).

F. In An Extensive Opinion The Trial Judge Determined That Appellants Lacked Standing On Any Of The Three Asserted Grounds.

In a carefully written 30-page decision, the trial court rejected each of appellants' three standing theories. As to *Sheward* standing, the court observed that under this Court's precedent, 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*." (12/2/2011 Op. at 23).[5] The court rejected appellants' notion that the amount of money involved made this case "rare and extraordinary":

> [F]inding 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

[5] The decisions from both the Franklin County Court of Common Pleas and the Tenth District Court of Appeals are available in the Appendix to appellants' brief. The brief refers to those decisions by the page or paragraph numbers listed on the decisions.

> not the judicial branch's function, though, to evaluate standing based on the wisdom of an expenditure.

(*Id.* at 24).

With regard to legislator standing, the court noted that "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." (*Id.* at 24). Here, Senator Skindell and Representative Murray are not claiming that their votes were nullified. Rather, "the plaintiff legislators here voted against the JobsOhio Act but simply lost that vote." (*Id.* at 26).

Finally, as to statutory standing, the court started from the well-settled proposition that "'statutes 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.* at 27 (quoting *Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 67 Ohio St.3d 302, 617 N.E.2d 1096 (1993) (emphasis in original))).

Applying that principle to R.C. 187.09, the court noted that "[n]othing 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." (*Id.* at 28 (emphasis in original)). Rather, "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." (*Id.*) Thus, the statute did not create standing.

The trial court also rejected appellants' alternative argument that ***this*** Court had already decided the statutory-standing issue. Before filing their suit in the Common Pleas Court, appellants filed a challenge to the JobsOhio Act in this Court based on an earlier provision in the

Act stating that challenges to the JobsOhio legislation must be filed here. This Court dismissed that action, finding the grant of original jurisdiction in this Court unconstitutional. In its order dismissing for lack of subject-matter jurisdiction, this Court noted that the General Assembly had amended the statute by changing R.C. 187.09 to instead require actions to be filed in the Franklin County Court of Common Pleas, and that the amendment "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." (*Id.* at 29 (quoting *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶ 6)). The Common Pleas Court recognized, however, that this language was not a determination that appellants would have standing to bring such an action (as this Court had dismissed the case on subject matter jurisdiction grounds), but merely an identification of the forum in which such a suit should be brought. (*Id.*). Having rejected appellants' three asserted grounds for standing, the trial court dismissed the suit.

G. The Tenth District Unanimously Held That Appellants Lack Standing.

Appellants sought review in the Tenth District. In their briefing, appellants raised eight assignments of error directed at the three standing arguments raised in the trial court: *Sheward* standing, legislator standing, and statutory standing under R.C. 187.09. Nowhere in their papers or at argument did appellants press ***any*** issue relating to taxpayer standing (other than asserting that their status as taxpayers supported their claim to *Sheward* standing), nor did they claim (as they do here) that the Declaratory Judgment Act provided statutory standing.

The Tenth District unanimously affirmed the trial court. As to *Sheward* standing, the court found that the statute here was not a rare and extraordinary case where it was appropriate to dispense with standing requirements. The court contrasted the more narrow scope of the

JobsOhio legislation with (1) the statutes at issue in *Sheward* which, as the court noted, "affected every tort claim filed in Ohio," and (2) "the statute at issue in *AFL-CIO* [which] affected every injured worker in Ohio seeking to participate in the worker's compensation system." (6/14/2012 Op. at ¶ 32). The court further held that "[t]he JobsOhio Act is not the assault on the power of the judicial branch that concerned the Supreme Court of Ohio in *Sheward*." (*Id.*).

The court also rejected appellants' claim to statutory standing. Like the trial court, the appeals court began with the proposition that "[u]nder normal rules of statutory construction, a statute will not be deemed to abrogate common-law standing requirements unless the legislature has stated so." (*Id.* at ¶ 21). Here, R.C. 187.02 did not "contain any language conferring standing," but merely "identifies where and when a suit may be brought." (*Id.* at ¶ 23).

Finally, as to legislator standing, the appeals court agreed with the trial court that "[l]egislative 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." (*Id.* at ¶ 28). Here, the legislators made no claim of vote nullification, nor could they.

Finding that appellants lacked standing, the appeals court unanimously affirmed the order dismissing the case. Appellants then sought discretionary review in this Court raising seven different propositions of law, six of which were directed to the merits of their challenges to the JobsOhio legislation. This Court granted jurisdiction only as to Proposition of Law No. 3: "Plaintiffs have standing to bring this action." (1/23/2013 Entry).

ARGUMENT

Proposition of Law: *A plaintiff lacks standing where the plaintiff concedes that he or she has not suffered any concrete or individualized injury, does not otherwise fall within the contours of* Sheward *standing or common-law taxpayer standing, and cannot point to any legislative grant of standing.*

I. Ohio's Standing Requirements Are Vitally Important To Preserving The Appropriate Role For The Judicial Branch In Ohio's Constitutional Framework For Tripartite Government.

Appellants urge this Court to treat standing as some kind of hyper-technical, legalistic makeweight, to be dispensed with freely on an ad hoc, case-by-case basis at an individual trial court's discretion. Nothing could be further from the truth. Standing serves a vital role in our judicial system, perhaps nowhere moreso than in cases involving challenges to statutes under the Ohio Constitution. Standing rules ensures that courts exercise their powers of judicial review only in those cases that come to the court in a form suitable for judicial resolution. This limitation in turn prevents unwarranted judicial intrusion into the legislative and executive domains, thereby fostering respect and cooperation among the coordinate branches of government, all of which share in the obligation to abide by and uphold Ohio's Constitution.

To promote these important ends, Ohio courts have adopted standing rules both as a matter of jurisprudential wisdom and constitutional command, borrowing liberally from federal court standing principles along the way as state courts are free to do. Now, under the guise of protecting our Constitution, appellants ask this Court to cast aside these settled standing principles. The irony, of course, is that acceding to appellants' request would cause greater harm to our constitutionally-mandated tripartite system of government than the harm that appellants allege would arise from the legislation they attack.

A. Ohio's Well-Settled Standing Requirements Ensure That Courts Exercise Their Power Of Constitutional Review In Cases That Come To The Court In A Form That Is Suitable For Judicial Resolution.

As this Court has confirmed time and again, "'[i]t 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.'" *Clifton v. Blanchester*, 131 Ohio St.3d 287, 2012-Ohio-780, 964 N.E.2d 414, ¶ 15 (quoting *Sheward*, 86 Ohio St.3d at 469, 715 N.E.2d 1062); *see also, e.g., State ex rel. Am. Subcontractors Assn., Inc. v. Ohio State Univ.*, 129 Ohio St.3d 111, 2011-Ohio-2881, 950 N.E.2d 535, ¶¶ 11-12 (same); *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27 (same); *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 62, 2006-Ohio-6499 858 N.E.2d 330, ¶ 22 ("A preliminary inquiry in all legal claims is the issue of standing.").

"'Standing' is defined at its most basic as '[a] party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Clifton* at ¶ 15 (quoting *Ohio Pyro Inc.* at ¶ 27, in turn quoting Black's Law Dictionary 1442 (8th Ed. 2004)); *see also Cuyahoga Cty. Bd. of Commrs.* at ¶ 22 ("The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented.") (citing *Ohio Contractors Assn. v Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994)). Typically, the question of standing "depends upon whether the party has alleged … a personal stake in the outcome of the controversy." *Clifton* at ¶ 15 (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)). As this Court has explained, "[i]n Ohio, it is well established that standing to attack the constitutionality of a legislative enactment exists only where a litigant 'has suffered or is threated 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.'" *Cuyahoga Cty. Bd. of Commrs.* at 62 (quoting *Sheward*, 86 Ohio St.3d at 469-470, 715 N.E.2d 1062). There is also an additional standing requirement for an organization such as ProgressOhio that seeks to sue on behalf of its members (rather than based on harm the organization itself suffered)—it 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." *Ohio Contractors Assn.* at 320.

The reason that the Court limits its power of judicial review to those cases in which a plaintiff has standing is "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.'" *Ohio Pyro, Inc.* at 381 (quoting *Dallman* at 178–179, in turn quoting *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); and *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)). As the U.S. Supreme Court has explained in words equally applicable to the tripartite form of government enacted by Ohio's Constitution:

> Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the [government], nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury. Thus, this Court has refrained from passing upon the constitutionality of an act of the representative branches unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it. ***The importance of this precondition should not be underestimated as a means of defining the role assigned to the judiciary in a tripartite allocation of power.***

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) (emphasis added, citations and

quotations omitted). To that end, as a matter of sound "prudential principles" courts "refrain[] from adjudicating abstract questions of wide public significance which amount to generalized grievances" about the conduct of government. *Id.* For similar reasons, the U.S. Supreme Court "has repeatedly rejected claims of standing predicated on the right, possessed by every citizen, to require the Government be administered according to the law." *Id.* (citing *Fairchild v. Hughes*, 258 U.S. 126, 129, 42 S.Ct. 274, 66 L.Ed. 499 (1922) and *Baker* at 208). Yet, such "generalized grievances" are all that appellants offer here.

B. Ohio Is Free To Incorporate Federal Law Standing Principles Into Ohio's Standing Law.

In their efforts to have this Court rewrite Ohio's settled law on standing, appellants start by invoking a straw man. They contend that the court below treated federal standing law under Article III of the U.S. Constitution as mandatory in Ohio, and that the decision thus "clearly insults the dignity of the Ohio Constitution." (Br. at 9-10). That contention is simply not true.

No one disputes that Article III does not apply to Ohio courts. Indeed, this Court and other Ohio courts have recognized that fact time and again. *Sheward*, 86 Ohio St.3d at 470, 715 N.E.2d 1062 ("[T]he federal decisions [on standing] are not binding upon this court, and we are free to dispense with the requirement of injury where the public interest so demands."); *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007-Ohio-4372, ¶ 43, fn. 5 ("We recognize, of courts, that federal decisions on the issue of standing are not binding on Ohio state courts."); *State v. Jeffery*, 2d Dist. No. 24850, 2012-Ohio-3104, ¶ 17 ("While Ohio has no constitutional counterpart to Section 2, Article III, the courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question.") (quotation omitted). But, as noted

above, this Court has also held time and again that the jurisprudential concept of standing is part of the fabric of judicial power in this State.

Certainly, in defining the appropriate contours of standing, this Court is free to borrow from federal standing law as it deems appropriate. Such borrowing does not reflect blind obeisance to inapplicable Article III language, as appellants suggest, but rather reflects an open-minded willingness to recognize and adopt the jurisprudential wisdom reflected in the federal case law discussing appropriate limits on the exercise of the judicial power in a tripartite form of government. This Court's right to recognize and adopt jurisprudentially sound reasoning should be celebrated, not derided.

C. The Ohio Constitution Expressly Limits Common Pleas Court Jurisdiction To "Justiciable Matters," Which Includes A Standing Requirement.

Relatedly, appellants are wrong in asserting that the Ohio Constitution imposes no limits on the exercise of judicial power, at least in the courts of common pleas. While the issue of standing in state courts is largely jurisprudential, the Ohio Constitution strictly limits the original jurisdiction of the courts of common pleas to "justiciable matters". *See* Ohio Constitution, Article IV, Section 4(B).

Courts, including this Court, have explained that the constitutional reference to "justiciable matters" limits common pleas court jurisdiction, as a matter of the Ohio Constitution, to cases in which the plaintiff has standing. *See, e.g., Federal Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 20 (tying standing analysis to the "all justiciable matters" language); *Self Help Ventures Fund v. Jones*, 11th Dist. No. 2012–A–0014, 2013-Ohio-868, ¶¶ 15-16 (same); *Bank of Am. v. Kutcha*, 9th Dist. No. 12CA0025-M, 2012-Ohio-5562, ¶ 13 (same); *Brinkman v. Miami Univ.*, 139 Ohio Misc.2d 114,

2005-Ohio-7161, 861 N.E.2d 925, ¶ 13 (C.P.) ("In order for a matter to be justiciable, however, there needs to be more than just subject-matter jurisdiction. The parties must have standing."); *Kachovec v. City of Akron*, 9th Dist. No. 9948, 1981 WL 3982, *3 (May 20, 1981) (The original jurisdiction of the courts of common pleas is limited to justiciable matters. ... Standing is an aspect of justiciability.").

Because the Ohio Constitution limits common pleas court jurisdiction to "justiciable matters," which incorporates principles of standing, this Court is not free to simply dispense with standing requirements in this case as appellants suggest. Rather, common pleas court standing requirements are, at least in part, a matter of constitutional command.

II. Appellants Do Not Fall Within Any Recognized Category Of Standing Under Ohio Law.

No one disputes that the burden was on appellants to establish below that they had standing to sue. They failed to meet that burden. They have conceded from the outset that they lack the personal injury required for typical common-law standing. Instead, in this Court, they advance three standing theories: *Sheward* standing, common-law taxpayer standing, and statutory standing.[6] None of the three, however, provides any basis for appellants to prosecute their constitutional challenges to the JobsOhio legislation.

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[6] It appears that appellants have dropped any claim to legislator standing for Rep. Murray or Sen. Skindell. If so, that was a prudent choice, as they could not hope to make out a claim of legislator standing on the facts here. Legislator standing is strictly limited to those cases in which the legislators are claiming an inability to effectively cast a vote, not cases in which the legislators are merely seeking to change the outcome of the voting process. It is not a vehicle for disappointed members of the legislative minority to seek a new venue to revisit their unsuccessful legislative vote. *See State ex rel. Ohio General Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912, ¶¶ 18-20 (citing *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997)).

A. Appellants Do Not Have Standing Under *Sheward.*

Appellants principally rely on so-called *Sheward* standing. (*See* Br. at 12-26). *Sheward* standing relaxes traditional standing requirements in certain "rare and extraordinary cases" involving constitutional challenges under this Court's mandamus jurisdiction to statutes that act broadly to divest Ohio's courts of jurisdiction. Appellants cannot lay claim to *Sheward* standing, though, as this case is not rare or extraordinary, the case does not invoke this Court's original jurisdiction in mandamus, and the JobsOhio legislation does not act to divest courts of jurisdiction. Indeed, notwithstanding the criticism that the *Sheward* standing doctrine has engendered, appellants actually ask this Court to create a new and even ***broader*** exception to traditional standing rules that would effectively eliminate traditional standing requirements for ***all*** constitutional claims. What appellants fail to recognize is that standing requirements have stood the test of time because they perform the critical function of maintaining the proper boundaries between the judiciary and its coordinate branches of government. This Court should decline appellants' invitation to toss aside hundreds of years of precedent, and should instead reaffirm the proper role of the judiciary as the arbiter of legal disputes involving parties who have actually been harmed.

1. Appellants Do Not Satisfy The Requirements For *Sheward* Standing.

Despite their numerous references to *Sheward* standing, appellants ignore the limited nature of this Court's decision in that case. In *Sheward*, the plaintiffs were challenging Am. Sub. H.B. 350, a law this Court described as a "comprehensive and multifarious" tort-reform statute, 86 Ohio St.3d at 458, 715 N.E.2d 1062, that sought to "reenact[] legislation struck down as unconstitutional," and "interfer[ed] with this court's power to regulate court procedure." *Id.* at 462. This Court found that relators had citizen standing under the public rights doctrine, which

this Court traced to cases such as *State ex rel. Meyer v. Henderson*, 38 Ohio St. 644 (1883); *State ex rel. Trauger v. Nash*, 66 Ohio St. 612, 64 N.E. 558 (1902); *State ex rel. Newell v. Brown*, 162 Ohio St. 147, 122 N.E.2d 105 (1954); and *State ex rel. Cater v. N. Olmsted,* 69 Ohio St.3d 315, 631 N.E.2d 1048 (1994). *Sheward* at 471-73. Relying on those cases, the Court held that:

> [W]here 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 relator is an Ohio citizen and, as such, interested in the execution of the laws of this state.

Sheward at 475.

The precedent on which the Court relied all involved a public official's alleged failure to undertake some specific legislatively-mandated duty, often involving an election. The decisions concluded that the failure to perform that "public duty" gave rise to a "public right" enforceable in mandamus by any citizen. In *Sheward,* however, a bare majority of this Court concluded that the concept of "public right" also could arise where "the issues sought to be litigated ... are of ... a high order of public concern," *id.* at 474, including most notably, legislative attempts to violate separation of powers by invading the judicial province. Given that the statute there applied to every litigant with a pending matter, and that constitutional review could occur otherwise only on a piecemeal basis, the Court concluded that "[f]airness and judicial economy, as well as the preservation of judicial independence" required the Court to act. *Id.* at 501.

Even in announcing its expanded conception of "public right"standing in *Sheward,* however, this Court was careful to note just how limited this expansion was. In responding to the dissenting Justices' concerns that "public right" standing might be broadly construed in future cases, this Court expressly rejected the notion that litigants could generally rely on *Sheward* standing to press their constitutional claims that a statute exceeds legislative authority:

> We have not proposed, as the dissent suggests, 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." 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.

True to its promise, the only time since *Sheward* in which this Court has allowed public right standing is *Ohio AFL-CIO*. Like *Sheward, Ohio AFL-CIO* was a mandamus action. There, the AFL-CIO was challenging on Fourth Amendment grounds a statute that allowed employers to test for intoxication workers who were injured on the job. In another 4-3 decision, this Court found public right standing, but again stressed that the case was exceptional:

> 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 worker's 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 be contained in our Bill of Rights.

Ohio AFL-CIO, 97 Ohio St.3d 504, 2002-Ohio-6717, 780 N.E.2d 981, at ¶ 12. In every other instance in which parties have sought *Sheward* standing, this Court has rejected it. *See State ex rel. Kuhar v. Medina Cty. Bd. of Elections*, 108 Ohio St.3d 515, 2006-Ohio-1079, 844 N.E.2d 1179, ¶ 12; *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d, 2005-Ohio-1508, 824 N.E.2d 990.

In sum, this Court has recognized *Sheward* standing for constitutional challenges ***solely*** in original actions invoking this Court's mandamus jurisdiction. Moreover, it has done so only in the rare and extraordinary case where the statute at issue involved either a broad scale attack on separation of powers that directly and concretely impacted every litigant in the state

(*Sheward*), or a wholesale invasion of every Ohioan worker's individual right to bodily integrity (*Ohio AFL-CIO*). And, even in doing so, this Court has stressed just how narrow *Sheward* standing is.

For at least three reasons, *Sheward's* narrow theory of standing provides no basis for appellants to claim standing here. First, unlike both *Sheward* and *AFL-CIO*, this case is not a mandamus action invoking ***this Court's*** original jurisdiction. Limiting *Sheward* standing to such actions is important. It is one thing for this Court to dispense with typical standing requirements in those "rare and extraordinary" circumstances where the Court concludes that an "early resolution" in a particular case is necessary or appropriate to preserve the balance of powers between the coordinate branches of government. *Sheward*, 186 Ohio St.3d at 515, 715 N.E.2d 1062. It is quite another thing to grant to each of Ohio's 300-plus common pleas court judges the ability to expand the scope of the judicial power in that manner—a result that will almost certainly lead to a lack of uniformity and an explosion in *Sheward*-type actions. Appellants contend that this is not the case, but their own amici show just the opposite—champing at the bit for freedom to file their own *Sheward*-type challenges to other statutes.

At the very least, such standing must be limited to ***mandamus*** actions, as opposed to the declaratory judgment action here. This Court itself identified prior ***mandamus*** actions as the basis for its holding in *Sheward*. Indeed, the whole public right/public duty notion rests squarely on concepts arising from mandamus jurisprudence—where a statute imposes a specific duty on a public official, the public has a right to see that the duty is performed. Transplanting such standing to the declaratory judgment context, however, would be a dramatic, and unwarranted, expansion of this Court's *Sheward* decision.

Second, this Court went out of its way in *Sheward* to justify standing there based on the impact of the proposed legislation ***on the judicial branch***. Time and again, the Court pointed to the need to police the separation of powers and protect the judicial branch from legislative intrusion. *See, e.g.*, *Sheward* at 458 (noting that the legislature "has endeavored to comport with the principle of separation of powers ... until now"); 459 (describing statute as the "General Assembly ... openly challeng[ing] this court's authority to prescribe rules governing the courts"); 462 (noting need to "establish the judiciary as a viable and coequal branch of government"); 467 (noting the need to "jealously guard the judicial power against encroachment from the other two branches"). *Sheward* standing was used as a ***shield*** to protect the judicial branch from a perceived legislative attack. Here, however, appellants ask this Court to transform *Sheward*-standing into a ***sword*** that can be used to attack any statute on constitutional grounds at the behest of a plaintiff who has not even suffered any identifiable harm. This was just the type of *Sheward* expansion, of course, that Chief Justice Moyer warned of in his dissent in *Sheward*. 86 Ohio St.3d at 517 (noting that instead of being "rare and extraordinary" litigants will consider a *Sheward* action the "remedy of choice" for those "dissatisfied with enactments of the General Assembly"). The majority, however, promised that such fears were unfounded, and the Court should make good on that promise here. The JobsOhio legislation is not an attack on the separation of powers or an intrusion on the judicial branch, and even appellants do not claim it is. Accordingly, *Sheward* provides no basis for standing.

Third, this Court expressly held that *Sheward* standing was limited to "rare and extraordinary" cases. Although this Court has yet to fully explicate the test used to identify such cases, the statute at issue here does not qualify under any conceivable test. In contrast to the statute at issue in *Sheward*, which directly and concretely impacted every tort litigant in the state,

or the statute at issue in *AFL-CIO*, which directly and concretely impacted every injured worker (many of whom were AFL-CIO members, thus justifying representational standing), the statute at issue here directly and concretely impacts only a very small number of Ohioans (*e.g.*, those in the Department of Development who may lose their jobs due to outsourcing of certain economic development responsibilities to JobsOhio), and that small group does not include ***any*** of the appellants. Nor do the specific constitutional provisions the appellants challenge here, *see supra* at 9, rise to some greater level of importance than other constitutional provisions, thereby rendering the case "rare and extraordinary" on those grounds. Indeed, appellants admit as much, arguing that "[a]ll [constitutional provisions] must be presumed to be 'important,'" (Br. at 18), meaning, of course, that under their theory violations of ***any*** provision would equally give rise to *Sheward* standing. But in pressing that argument, appellants clearly reveal their position for what it is—a call for far broader *Sheward* standing than this Court has ever authorized.

2. This Court Should Not Expand The *Sheward* Standing Doctrine.

Perhaps recognizing that they cannot justify this expanded notion of standing under existing ***Ohio*** law, appellants instead urge this Court to look at decisions from ***other*** States and rely on those decisions to effectively eliminate the standing requirement for constitutional claims altogether. (*See* Br. at 21-26). To start, other States' decisions are, of course, not binding on this Court. Unlike federal standing cases, to which this Court voluntarily has elected to look for guidance, this Court has never suggested that Indiana's standing law, for example, (*see id.* at 22), should govern Ohio's standing doctrine. In any event, to the extent that the Court indulges appellants' invitation to review standing law in other States, the great weight of authority does not support the open-ended standing that appellants seek here.

Appellants, for example, simply ignore the many States that have explicitly ***rejected*** their theory that every citizen has standing to challenge the constitutionality of legislation. In doing so, those States have frequently noted that such standing would constitute an unwarranted and undesirable expansion of judicial power. *See, e.g.*, *Muhammad v. Ford*, 986 So. 2d 1158, 1162-1163 (Ala. 2007) ("[W]ere a court to make a binding judgment on an underlying issue in spite of absence of injury, it would be exceeding the scope of its authority and intruding into the province of the Legislature."); *Town of Berlin v. Santaguida*, 181 Conn. 421, 422-426, 435 A.2d 980 (1980) ("No taxpayer is entitled to seek by declaratory judgment the construction of a statute if the effect of that construction will not affect his personal rights."); *Reeder v. Wagner*, 974 A.2d 858 (Table), 2009 WL 1525945, *2 (Del. June 2, 2009) ("To allow plaintiffs to pursue their claims, which do not fall within the scope of recognized taxpayer standing cases, would 'impermissibly expand the scope of claims recognized under taxpayer standing doctrine in Delaware (thereby not only eviscerating traditional notions of standing analysis where challenges to governmental conduct are concerned, but also undermining certain principles of separation of powers, as well).'") (citation omitted); *Gallagher v. State*, 141 Idaho 665, 667, 115 P.3d 756 (2005) ("Taxpayers who have a 'generalized grievance' shared by a large class of citizens do not have standing. The taxpayer's remedy is through the political process."); *Godfrey v. State*, 752 N.W.2d 413, 424 (Iowa 2008) ("Godfrey claims nothing more than the general vindication of the public interest in seeing that the legislature acts in conformity with the constitution. This is an admirable interest, but not one that is alone sufficient to establish the personal injury required for standing."); *Evans v. State*, 396 Md. 256, 329, 914 A.2d 25 (2006) ("The mere fact that an individual or group is opposed to a particular public policy does not confer standing to challenge that policy in court. If it were otherwise—if any person or group disenchanted with some public

policy but not adversely affected by it in some special way were free to seek a judicial declaration that the policy is invalid—the courts, rather than the legislative branch, would end up setting public policy, and that is not the proper role of the Judiciary."); *Tax Equity Alliance for Mass. v. Comm'r of Revenue*, 423 Mass. 708, 714, 672 N.E.2d 504 (1996) ("The public right doctrine does not apply to a challenge to the constitutionality of a statute. . . . A court can inquire into the general constitutionality of a statute only at the instance of a plaintiff whose 'liberty, rights, or property was invaded through its operation.'"); *Detroit Fire Fighters Assn. v. City of Detroit*, 449 Mich. 629, 634, 537 N.W.2d 436 (1995) ("Traditionally, a private citizen has no standing to vindicate a public wrong or enforce a public right where he is not hurt in any manner differently than the citizenry at large.") (citation omitted); *City of Chatanooga v. Davis*, 54 S.W.3d 248, 280 (Tenn. 2001) ("[T]he courts of this state have yet to recognize a general 'public rights' exception to the standing requirement, and we decline to do so in this case."); *Andrade v. Venable*, 372 S.W.3d 134 (Tex. 2012) ("Governments cannot operate if every citizen who concludes that a public official has abused his discretion is granted the right to come into court and bring such official's public acts under judicial review.") (citation omitted).

Even among the States that appellants cite, which purportedly recognize a *Sheward*-type of standing, the decisions provide little help to appellants. New Jersey, for example, (Br. at 22), even in relaxing standing rules, requires litigants to have some "additional private interest" to obtain standing. *Jordan v. Horsemen's Benev. & Protective Assn.*, 90 N.J. 422, 432, 448 A.2d 462 (1982). So, for example, in the New Jersey case that appellants cite, the plaintiffs were thoroughbred owners who faced a reduction in prize money as a result of a new statute. *Id.* at 431 ("[E]ach plaintiff is the owner of thoroughbred racehorses that have won in races at New Jersey tracks. ... Because the statute [being challenged] reduces the amount distributed as purse

money, plaintiffs are directly affected."). Appellants here have no such "additional private interest."

In other States on which appellants rely (Br. at 22-23), the courts recognized public rights standing, but did so only in the context of ***mandamus*** actions, *see, e.g., State ex rel. Cittadine v. Indiana Dept. of Transp.*, 790 N.E.2d 978 (Ind. 2003), or ***original*** actions in that State's ***Supreme Court,*** *see e.g., Rios v. Simington*, 172 Ariz. 3, 833 P.2d 20 (1992) (accepting broader standing in extraordinary writ matter). Still others (*see* Br. at 23, fn. 79) did not involve public rights standing ***at all***, but rather rested on ***taxpayer*** standing. *See, e.g., Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012) ("Contrary to the Commission's contention, we have permitted ***a taxpayer*** to seek declaratory relief in an action against state officials when ***the taxpayer*** alleged an unauthorized expenditure of funds.") (emphasis added); *Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008) ("In this appeal, Petitioners seek standing as Colorado citizens ***who pay taxes into the state's General Fund***.") (emphasis added); *120 W. Fayette St., LLLP v. Mayor and City Council of Baltimore*, 407 Md. 253, 268, 964 A.2d 662 (2009) ("In our view, the allegations contained in 120 West Fayette's complaint are sufficient ***to establish taxpayer standing*** as a matter of law.") (emphasis added). In short, case law from other jurisdictions provides no sound basis for the broad *Sheward* expansion appellants request here.

If anything, rather than expanding *Sheward*, this Court should consider ***overruling*** it. In *Westfield Insurance Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, paragraph one of the syllabus, this Court held that a prior decision should be overruled when three elements are met: (1) it was wrongly decided at the time, (2) it has proven unworkable in

practice, and (3) abandoning the precedent would not create an undue hardship for those who have relied on it. Here all three factors are met.

First, as noted above, *Sheward* itself was a 4-3 decision that expanded "public rights" standing well beyond the precedent on which it was based. The two dissents clearly articulated the jurisprudential and practical problems with the majority's approach to standing. Commentators have likewise criticized the holding. *See Ohio AFL-CIO*, 97 Ohio St.3d 504, 2002-Ohio-6717, 780 N.E.2d 981, at ¶ 62 (Moyer, C.J. dissenting) (citing collection of scholars who have "joined [him] in vociferously criticizing *Sheward*"). Second, the decision has proven unworkable in practice. Lower courts are uncertain as to *Sheward*'s bounds, including whether it even applies in lower courts, and the ambiguity inherent in the "rare and extraordinary" language will necessarily create ongoing difficulties establishing uniform statewide rules if such standing does indeed apply in common pleas courts. Nor would abandoning the precedent create any undue hardship. No one has "relied" on *Sheward* standing to their detriment in any meaningful fashion. Overruling the case would merely reconfirm the judicial branch's role as adjudicator of harms, rather than creator of public policy.

The real problem with the vast *Sheward* expansion that appellants advocate here is that it fails to give the other two branches of government their due. Contrary to appellants' arguments, overruling *Sheward* would not render constitutional provisions unenforceable. Rather, doing so would reflect this Court's recognition that the two other branches of government in Ohio also have a duty to obey and enforce the Ohio Constitution, a duty that they take seriously. Overruling *Sheward* would limit the Court's intrusion into its two coordinate branches to those cases in which a party or parties have suffered a concrete and particularized injury that is amenable to judicial redress. Far from eviscerating Ohio's Constitution, as appellants claim,

such a result respects the allocation of power among the branches reflected in Ohio's constitutional design. Indeed, as noted above, in seeking to expand judicial review, it is appellants, not appellees, who are effectively rewriting Ohio's Constitution.

B. Appellants Do Not Have Common-Law Taxpayer Standing.

Perhaps recognizing the flaws in their *Sheward* argument, appellants next seek to invoke common-law taxpayer standing. That argument, however, fails for at least two reasons. First, appellants ***expressly waived*** common-law taxpayer standing in the courts below. Second, even if they had not done so, appellants do not fall within the settled parameters of common-law taxpayer standing in Ohio. Indeed, as further described below, their own former attorney asserts that it is "frivolous" for appellants to assert taxpayer standing on the facts here.

1. Appellants Expressly And Unequivocally Waived Taxpayer Standing In The Courts Below, And Cannot Seek To Resurrect It Here.

This Court has expressly held that a party waives any argument regarding standing that it fails to raise in the lower courts. *State ex rel. E. Cleveland Fire Fighters' Assn., Local 500, IAFF v. Jenkins*, 96 Ohio St.3d 68, 2002-Ohio-3527, 771 N.E.2d 251, ¶ 12 ("The association, however, waived this [standing argument] by failing to raise it in the court of appeals.") (citing *State ex rel. Spencer v. E. Liverpool Planning Comm.*, 85 Ohio St.3d 678, 680, 710 N.E.2d 1129 (1999); *State ex rel. Porter v. Cleveland Dept. of Pub. Safety*, 84 Ohio St.3d 258, 259, 703 N.E.2d 308 (1998)). That holding is merely a specific application of the long-standing and well-settled rule of Ohio law that once a party waives an issue in a lower court, it cannot seek to raise that issue when appealing the lower court ruling. *See, e.g., State v. Nields*, 93 Ohio St.3d 6, 17, 752 N.E.2d 859 (2001) (party waives issue "by failing to raise it before the trial court"); *Gibson v. Meadow Gold Dairy*, 88 Ohio St.3d 201, 724 N.E.2d 787 (1999) (holding that where party failed to raise argument in the trial court, those arguments are waived on appeal); *State v. Awan*,

22 Ohio St.3d 120, 489 N.E.2d 277 (1986) (same); *State ex rel. Stevens v. Indus. Comm.*, 10th Dist No. 10AP–1147, 2012-Ohio-4408, ¶ 55 ("Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.") (quoting *Goldberg v. Indus. Comm.*, 131 Ohio St. 399, 404, 3 N.E.2d 364 (1936)).

The reason that the rule is both long-standing and well-settled is because it makes sense. As this Court has acknowledged in other contexts, "a plaintiff is the master of his or her cause of action," *Saunders v. Choi*, 12 Ohio St.3d 247, 250, 466 N.E.2d 889 (1984), so if a party chooses to waive an argument in support of that cause of action, the party's choice is binding upon them. Moreover, appellate jurisdiction is a power of ***review*** and does not extend to resolving issues that the parties did not press below. *See Gilchrist v. Saxon Mtge. Servs.*, 10th Dist. No. 12AP–556, 2013-Ohio-949, ¶ 22 ("An appellant cannot change the theory of his case and present new arguments for the first time on appeal. Generally, appellate courts will not consider arguments that were never presented to the trial court whose judgment is sought to be reversed."). This Court has recognized that these waiver rules are "deeply embedded in a just regard for the fair administration of justice":

> These rules are deeply embedded in a just regard for the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause [and] do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal.

State ex rel. Quarto Mining Co. v. Forman, 79 Ohio St.3d 78, 81, 679 N.E.2d 706 (1997); *see also Chase Home Fin., LLC v. Mustafa*, 10th Dist. No. 11AP–846, 2012-Ohio-3764, ¶ 13 ("Because appellant's first two arguments under her second assignment of error were not properly raised in the trial court, we decline to consider them for the first time on appeal.").

If ever an argument can be waived, appellants' reliance on taxpayer standing has been waived here. Indeed, not only did appellants fail to raise the issue of common-law taxpayer standing below, but they expressly noted that they were intentionally ***waiving*** it. Moreover, they did so not once, but ***repeatedly***. As the trial court judge observed: "A close reading of Plaintiffs' Memorandum Contra, as confirmed at the hearing on the motion to dismiss, and ProgressOhio's Motion to Strike ... 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.***" (12/2/2011 Op. at 19). On appeal, appellants listed eight separate assignments of error. ***Nowhere*** among those many assignments, however, did appellants challenge the trial court's assertion that "plaintiffs are not seeking taxpayer standing," nor did they otherwise raise such standing in their briefing or argument on appeal.

Even more to the point, ProgressOhio's counsel of record below has expressly confirmed to ***this*** Court that appellants intentionally waived common-law taxpayer standing below. (*See* Motion to Withdraw as Counsel at 10 ("Thompson had also announced to the press and on his web page that he was commandeering this case. He states he plans to use it as [a] vehicle to promote his personal and organizational goal of expanding taxpayer standing. ***Taxpayer standing has nothing to do with this case and it was never pled or argued. This case is a public interest standing case. Any attempt to add taxpayer standing as an issue at this time is completely improper.***") (emphasis added)). In another filing before this Court, the same counsel noted that she had "waived this issue on the record throughout this litigation," and that "[a]ttempting to raise this issue now is frivolous and violates the most basic rules of appellate practice." (*See* Motion to Require Counsel for The 1851 Center to File Proof of Compliance With Rules of Conduct of the Bar Regarding Improper Contact With A Represented Party and

Conflict of Interest or Withdraw from the Case at 5-6 ("[Thompson] also announced on his web page that he was going to change the issues in this appeal. He announced he was going to turn this into a taxpayer standing case. He stated this to Ullmann repeatedly. Ullmann told him that the issue is not appropriate for the JobsOhio statute ***and she waived this issue on the record throughout this litigation. ... There is no basis for any claim of taxpayer standing in this matter. ... Attempting to raise this issue now is frivolous and violates the most basic rules of appellate practice.***") (emphasis added)). Appellants voluntarily and expressly chose not to assert common law taxpayer standing below. They cannot seek to present that theory for the first time here.

2. In Any Event, Appellants Do Not Meet Settled Requirements For Taxpayer Standing Under Ohio Law.

Even if appellants had raised common-law taxpayer standing below, the end result is the same. Appellants cannot meet the settled requirements to claim such standing under Ohio law.

As even appellants are forced to acknowledge, this Court has clearly articulated the limited bounds of common-law taxpayer standing in Ohio:

> In the absence of statutory authority, a taxpayer lacks legal capacity to institute an action to enjoin the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy.

State ex rel. Masterson v. Ohio State Racing Comm., 162 Ohio St. 366, 368, 123 N.E.2d 1 (1954). This Court went on to explain that "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." *Id.* In other words, consistent with common-law standing generally, taxpayers must prove some kind of unique harm in their capacity as taxpayers that is different from that suffered by taxpayers in general.

More recently, this Court reaffirmed the ongoing vitality of this principle in *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 2007-Ohio-3677, 853 N.E.2d 263, ¶ 9:

> 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.

Based on that principle, this Court denied taxpayer standing to challenge a government official's use of public funds, noting that the plaintiff's status as a taxpayer was "shared by nearly all adult Ohio citizens." *Id.* Ohio's courts of appeals likewise have not hesitated to dismiss actions founded on taxpayer standing when the plaintiff lacked any special interest in the funds at issue. *See, e.g.*, *State ex rel. Walgate v. Kasich*, 10th Dist. No. 12AP–548, 2013-Ohio-946, ¶ 20; *State ex rel. N. Ohio Chapter of Associated Builders & Contrs., Inc. v. Barberton City Schools*, 188 Ohio App.3d 395, 2010-Ohio-1826, 935 N.E.2d 861, ¶ 23 (9th Dist.).

Under these settled principles, appellants cannot establish taxpayer standing here. Appellants do not allege, nor could they, any "special interest" in any funds at issue here. Nor do they assert that they have "damage to themselves different in character from that sustained by the public." Rather, just as in *Dann*, the taxpayer interest they assert is shared "by nearly all of the adult citizens of Ohio." Thus, they fail to clear the necessary hurdles to establish common law taxpayer standing.

Unable to clear those hurdles, they instead ask the Court to remove them—essentially asking this Court to overrule *Masterson* and change settled law on taxpayer standing. Their arguments, however, provide no meaningful support for the result that they urge. First, they claim that taxpayers have 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," language they quote from *Masterson*.

(Br. at 27). But as *Masterson* itself shows, any broad reading of that language must yield to the fundamental principle actually adopted in *Masterson*—that taxpayers must "prove damage to themselves different in character from that sustained by the public generally." 162 Ohio St. at 368, 123 N.E.2d 1. In other words, appellants cannot rely on broad ***dicta*** from *Masterson* to urge a result directly contrary to the case's actual ***holding***.

Second, appellants point to cases such as *State ex rel. Newell v. Brown*, 162 Ohio St. 147, 122 N.E.2d 105 (1954), and *State ex rel. Trauger v. Nash*, 66 Ohio St. 612, 64 N.E. 558 (1902), (Br. at 28, fn. 99). But those are not taxpayer standing cases at all. Rather, they are mandamus decisions that were the precursor to the public right standing doctrine set forth in *Sheward*. In those cases, the court was not relying on the litigants' status ***as taxpayers***, but rather on their status ***as citizens***. Appellants' own quotes from those cases demonstrate that fact: "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 ...." (Br. at 27 (quoting *Newell* at 151 (emphasis added)); *see also* Br. at 28 ("[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.") (quoting *State ex rel. Blackwell v. Bachrach*, 166 Ohio St. 301, 303, 143 N.E.2d 127 (1957) (emphasis added))). Public right standing, though, fails for all of the reasons set forth above, and appellants should not be allowed to sneak their failed public right standing argument in through the back door by recasting it as taxpayer standing. Rather, their *Sheward* standing argument must stand or, more accurately here, fall on its own accord.

Nor can appellants find solace in cases such as *Green v. State Civil Service Commission*, 90 Ohio St. 252, 107 N.E. 531 (1914), or *Beaver Excavating Co. v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, or others, which they assert stand for some broad proposition

that taxpayers have standing to enjoin public officials from expending public money or creating public debt. (Br. at 28). First, those cases do not stand for any such broad proposition. In *Green*, for example, the plaintiff ***himself*** was the subject of an investigation by the State Civil Service Commission that he contended exceeded the scope of the Commission's powers. *Id.* at 252 ("This was a proceeding to enjoin the state civil service commission from conducting a contemplated investigation concerning certain acts of the plaintiff, David M. Green ...."). Clearly, as the target of the investigation, he was suffering a concrete injury from the allegedly illegal conduct that was different from taxpayers generally. Likewise, in *Beaver Excavating*, the plaintiff challenged the legality of a tax that the plaintiff was paying. As this Court noted, challenges to "the legality of an exaction [of taxes]" by those on whom the tax has been levied are of a different character from open-ended challenges to expenditures of general revenue funds, which is what appellants seek to advance here. *Id.* at ¶¶ 13-15.

Appellants are also wrong to claim confusion among the intermediate appellate courts regarding the contours of taxpayer standing. As appellants correctly acknowledge, the Tenth and Twelfth Districts have held, consistent with this Court's precedent, that Ohio law does not permit "a taxpayer who contributes to the state's general revenue fund to challenge any and all general revenue expenditures." (Br. at 29). What appellants fail to mention is that at least four other districts have reached this same result, including the Second, Seventh, Ninth, and Eleventh Districts. *See S. Christian Leadership Conference v. Combined Health Dist.*, 191 Ohio App.3d 405, 2010-Ohio-6550, 946 N.E.2d 282 (2d Dist.); *Satow v. Columbiana Cty. Budget Comm.*, 7th Dist. No. 04-CO-13, 2005-Ohio-5312 (finding no taxpayer standing where taxpayer litigant lacked any "special interest" in funds) (citing *Masterson*); *State ex rel. N. Ohio Chapter of Associated Builders & Contrs., Inc. v. Barberton City Schools*, 188 Ohio App.3d 395, 2010-

Ohio-1826, 935 N.E.2d 861, ¶ 24 (9th Dist.) ("[W]e are persuaded by the thorough analysis and sound reasoning of the Tenth and Twelfth Districts, which have held that a taxpayer who pays into a general revenue fund lacks standing to challenge the expenditure of those funds, unless he can satisfy *Masterson's* requirement of proving damages that were different in kind."); *Fisher v. Morr*, 11th Dist. No. 984, 1979 WL 208160, *2 (Sept. 24, 1979) (denying taxpayer standing where litigants did "not offer any claim or proof of any injury to them different in character from that sustained by the public generally").

Appellants contend that the First and Fourth Districts have adopted a contrary rule, but that is not so. The Fourth District decision in *Washington County Taxpayers Assn. v. Peppel*, 78 Ohio App.3d 146, 604 N.E.2d 181 (4th Dist. 1992), on which appellants rely (*see* Br. at 29-30) involved a taxpayer's challenge to the validity of a tax ***that applied to the litigant***, which, as this Court stated in *Beaver Excavating*, is a different situation and falls squarely within the bounds of taxpayer standing. And the First District's unreported decision in *Fankhauser v. Rhodes*, 1st Dist. Nos. 810, 878, 1980 WL 353189 (Mar. 5, 1980), has been cited exactly once in thirty-plus years, by *Brinkman*, 2007-Ohio-4372, the very case that appellants seek to distinguish. In short, there is no confusion about the basic point that common-law taxpayer standing is limited to cases where taxpayers are challenging a tax applied to them, or otherwise have a property interest or interest in a special fund that is under attack, thus giving them an individualized stake in the dispute. Common-law taxpayer standing is not the blunderbuss weapon that appellants contend.

Moreover, even if the Court were to reject settled doctrine and find that taxpayers have a broad ability to invoke a court's equitable jurisdiction to attack allegedly illegal expenditures of general revenue funds, that principle still would not provide appellants standing here. Appellants have failed to allege ***any*** ongoing illegal expenditure of public funds. For example, in Count II

of their Complaint, they challenge the original $1,000,000 appropriation to fund JobsOhio start-up costs. That expenditure, however, cannot confer standing for two reasons. First, JobsOhio paid back those funds, mooting any challenge to the expenditure. Second, the statute required the funds to come from already-appropriated GRF funds, and thus the expenditure did not "increas[e] . . . the Department of Development's total fiscal year 2011 General Revenue Fund appropriation." *See* Am. Sub. H.B. 1, section 5, 129th Gen. Assm. (Ohio 2011). As the General Assembly had already appropriated (*i.e.*, spent) the money, there is no new "expenditure" that could harm these plaintiffs as taxpayers (even if such harms counted, which, again, they do not).

Furthermore, appellants' principal challenge appears to be directed at the Liquor Enterprise Transaction. But that transaction does not involve any public expenditure ***at all***, nor does it involve the creation of a public debt. To the contrary, the transaction calls for the State to ***receive*** more than ***$1.46 billion***, including more than $800 million to ***retire*** outstanding state bonds secured by liquor revenues. Thus, even if generalized expenditures or the creation of state debt could give rise to taxpayer standing, such standing still would not exist here.

Finally, the eight pages that appellants devote to their attempt to justify taxpayer standing based on the laws of ***other*** States is no more compelling here than it was in the context of *Sheward* standing. (*See* Br. at 30-37). As noted above, standing in ***Ohio*** courts is governed by ***Ohio*** law. Moreover, the States that appellants cite largely, if not exclusively, limit taxpayer standing to suits seeking to enjoin the ***expenditure*** of public funds—*see, e.g.*, Br. at 31, *citing Jordan v. Segelman*, 949 So. 2d 887 (Ala. 2006) (taxpayer standing to challenge "unlawful disbursement"); *McKee v. Likins*, 261 N.W.2d 566, 570-571 (Minn. 1977) (same); *Yeoman v. Com. Health Policy Bd.*, 983 S.W.2d 459, 473 (Ky. 1998) (allowing taxpayer action to challenge "misuse of public funds")—or to cases involving specific constitutional limits on the

legislature's taxing and spending authority (*see* Br. at 31 (citing *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 263 (Fla. 1991)), a topic simply not at issue here, as the State is ***receiving*** funds.

Appellants spend much time and effort on the Pennsylvania Supreme Court's decision in *In re Application of Biester*, 487 Pa. 438, 409 A.2d 848 (1979), but it does appellants no good. (Br. at 35-37). To start, *Biester* actually represents Pennsylvania's ***rejection*** of its "once liberal approach granting individuals standing based upon their interest as taxpayers." *Pittsburgh Pallisades Park, LLC v. Commonwealth*, 585 Pa. 196, 206, 888 A.2d 655 (2005) ("The once liberal approach granting individuals standing based upon their interest as taxpayers was rejected by our Court in the seminal decision of [*Biester*], which reinvigorated the traditional requirements of standing that an individual must establish an interest in an action that surpasses the common interest of all taxpaying citizens."). Moreover, both *Biester* and *Pittsburgh Pallisades* (the other Pennsylvania case on which appellants principally rely, *see* Br. at 35) actually ***denied*** taxpayer standing, hardly a ringing endorsement for appellants' efforts to ***create*** such standing here. Even putting that aside, in Pennsylvania standing is ***purely*** a prudential matter. *See Fumo v. City of Philadelphia*, 601 Pa. 322, 336, 972 A.2d 487 (2009) ("In Pennsylvania, the requirement of standing is prudential in nature."). In Ohio's common pleas courts, by contrast, standing is a constitutional ***mandate***. *See* Ohio Constitution, Article IV, Section 4(B) (limiting jurisdiction to "justiciable matters"). Finally, even if this constitutional difference did not preclude appellants' efforts to transplant the *Biester* doctrine here, appellants nonetheless would lose under it. As appellants concede, *Biester* allows taxpayer standing only when there are no other litigants better situated to maintain a challenge. Here, as noted below (*see infra* at 42-43), there are parties who meet traditional standing requirements.

In the end, grabbing scattered sentences out of context from cases in other States creates more smoke than light. What is clear is that under ***Ohio*** law, the only law relevant here, appellants lack taxpayer standing.

C. Appellants Do Not Have Statutory Standing.

Unable to meet the requirements for standing under *Sheward* or common-law taxpayer standing doctrine, appellants next try statutory standing under both the JobsOhio legislation and the Declaratory Judgment Act. Those arguments fail, however, for three reasons. First, the JobsOhio legislation does not confer standing—it merely identifies the forum in which a suit must be brought. Second, appellants did not argue standing under the Declaratory Judgment Act below, and thus have waived it here. Finally, any such argument is meritless, as the Declaratory Judgment Act merely provides a procedural vehicle for seeking judicial redress for an actual harm—it does not independently vest plaintiffs with standing absent such harm.

1. R.C. 187.09 Only Identifies The *Forum* In Which Challenges May Be Brought; It Does Not Confer Standing.

The courts below unanimously—and properly—rejected appellants' claim that R.C. 187.09(B) confers standing. The statute, which contains no specific authorization to sue, does not abrogate common-law standing requirements.

As the Tenth District acknowledged in its opinion below, it is well-settled that statutes will not be read to abrogate common law rules absent plain language clearly expressing that intent. (*See* 6/14/2012 Op. at 8 (citing *Bresnik*, 67 Ohio St.3d at 304, 617 N.E.2d 1096)). To be sure, consistent with that principle, the legislature can abandon the common-law injury requirement, *see, e.g.*, *Ohio Valley Associated Builders & Contractors v. Kuempel*, 192 Ohio App.3d 504, 2011-Ohio-756, 949 N.E.2d 582 (2d. Dist), but courts, in interpreting a statute, will not lightly infer such an intent.

Revised Code Section 187.09(B) lacks any provision clearly abrogating common law standing rules; indeed, it lacks any language—***express or otherwise***—directed at standing ***at all***. The subsection, which bears the functional heading "Venue and jurisdiction for actions brought by or on behalf of corporation; constitutional challenges," merely states that:

> 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 [C]ourt of [C]ommon [P]leas of Franklin [C]ounty within ninety days after the effective date of the amendment of this section by H.B. 153 of the 129th general assembly.

Id. As the title suggests, the statute identifies the court of original jurisdiction and establishes a statute of repose for constitutional challenges. Appellants essentially claim the ability to intuit some hidden message about standing from this provision, but that approach runs directly contrary to basic principles of statutory construction: "[When determining standing,] the words used in a statute are to be taken in their usual, normal, and customary meaning .... If the words of the statute are plain and unambiguous, [the judiciary] cannot engage in statutory interpretation." *Ohio Valley Associated Builders & Contractors v. Rapier Elec., Inc.*, 192 Ohio App.3d 29, 2011-Ohio-160, 947 N.E.2d 1261, ¶ 24 (12th Dist.).

Comparing the language of R.C. 187.09(B) with that of statutes that Ohio courts have found to create standing further belies appellants' argument here. For example, *Rapier Electric* held that R.C. 4115.16(A) conferred statutory standing for prevailing wage claims, but that statute expressly states that any "interested party may file a complaint in the court of common pleas in the county in which the violation is alleged to have occurred." (Another subsection of the statute provides a detailed definition of "interested party." *See* R.C. 4115.16(F).) Similarly,

in *City of Middletown v. Ferguson*, 25 Ohio St.3d 71, 495 N.E.2d 380 (1986), this Court found that R.C. 133.71(B) authorized the plaintiff city (which was the bond issuer) to bring a bond validation suit. *Id.* at 74-76. But there, the statutory provision expressly stated that "an issuer, at any time prior to its issuance or entering into of securities, may file a complaint for validation and . . . adjudication of its authority [to issue such debt]." *Id.* (reviewing R.C. 133.71(B) (now relabeled R.C. 133.70(B))).

The differences between those statutory grants of standing and the JobsOhio legislation here are obvious. Unlike those statutes, R.C. 187.09(B) contains neither language permitting a party to file an action (*e.g.*, "may file a complaint") nor any indication regarding ***who*** can bring suit. Instead, it merely serves—as its title shows—to define the proper time and venue for a suit.

In their brief here, appellants do not address any of this case law, despite the fact that the State and JobsOhio cited it below. Rather, appellants claim that R.C. 187.09(B) is "ambiguous" regarding who can bring a suit, and they then invite the Court to apply "basic canons of statutory construction" to resolve that alleged ambiguity. (Br. at 45). The problem with that approach is that the statute is not "ambiguous" in identifying litigants—it simply does not address that issue ***at all***. Thus, the common-law standing rules prevail. Indeed, because a clear statement is required to abrogate common law standing rules, *see Bresnik*, 67 Ohio St.3d at 304, 617 N.E.2d 1096, even if R.C. 187.09 were ambiguous, that ambiguity must be resolved in favor of ***preserving*** those common law rules, not in favor of abdicating them as appellants contend here.

Appellants do not improve their statutory standing argument by claiming that the statute must be interpreted to confer standing on them because otherwise no one would have standing to sue, (*see* Br. at 44-46), an alleged concern which they also raised in connection with their *Sheward* argument, (*id.* at 25), and their taxpayer standing argument, (*id.* at 36). Appellants are

simply wrong. As JobsOhio noted below, anyone who faces a concrete and personalized injury from the challenged legislation would have standing. This would include, for example, government employees who lost their jobs when development functions were outsourced. Similarly, Liquor Department vendors whose contracts are no longer subject to state contracting rules, and who lost contract renewals as a result, could assert an individualized harm. Alternatively, an owner of one of the State's then-outstanding revenue bonds secured by Liquor Enterprise profits who was displeased with the prospect that its bonds would be discharged as a result of the Liquor Enterprise transaction also may have been able to challenge the transaction. JobsOhio does not dispute that "harm" is a relatively broad concept for standing purposes. Rather, JobsOhio merely claims that it is an ***important*** concept in defining the contours of standing. Given the existence of these (and undoubtedly other) directly impacted stakeholders, there is simply no need, nor any legal basis, to vest every one of Ohio's 11.5 million citizens with standing on the if-not-these-appellants-then-who theory that appellants seek to foist upon this Court. Nor, contrary to appellants' claims, does the 90-day statute of repose change that result—R.C. 187.09(C) specifically provides a ***new*** 60-day clock for anyone seeking to challenge a particular JobsOhio action, meaning that any party that suffers actual harm will have an opportunity to obtain relief, and a statutorily-identified forum in which to seek it.

In short, R.C. 187.09(B) creates subject-matter jurisdiction for challenges to the JobsOhio Act in the Franklin County Court of Common Pleas. The statute does not abrogate traditional common law standing rules for such challenges.

2. Appellants Cannot Rely On The Declaratory Judgment Act As A Basis For Standing.

Appellants' efforts to rely on the Declaratory Judgment Act as a basis for standing fail for two independent, but equally dispositive, reasons. First, appellants have waived this basis for standing by failing to raise it below. Second, the Declaratory Judgment Act does not by itself confer standing, but rather merely provides a procedural vehicle for those litigants who have standing under some recognized standing theory.

a. Appellants Waived The Argument By Failing To Raise It Below.

As described above, parties waive standing arguments in this Court when they fail to raise them below. (*See supra* at 29-30). Here, prior to their merits brief in this Court, appellants have ***never*** asserted statutory standing predicated on the Declaratory Judgment Act. To be sure, they raised the concept of statutory standing below, but they asserted such standing based ***solely*** on the JobsOhio Act itself. To use the trial court's own words: "At the hearing, Plaintiffs stated that two arguments based 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." (Op. at 16 (emphasis added)). Nowhere did appellants mention statutory standing under the Declaratory Judgment Act. Having failed to raise the argument below, they cannot raise it for the first time on appeal here.

b. The Declaratory Judgment Act Does Not Confer Standing.

Even if appellants had not waived the argument that the Declaratory Judgment Act confers standing, the argument is meritless. The well-settled rule in Ohio, reflected in decisions from this Court and others, is that a Declaratory Judgment Act plaintiff must separately establish

standing in order to maintain a claim. The Declaratory Judgment Act merely provides a vehicle for those who have suffered the requisite injury to pursue relief—it does not confer standing.

In case after case, Ohio courts have acknowledged that a plaintiff must allege that they are suffering a direct adverse effect from the legislation that they are challenging. For example, in *North Canton v. Canton*, 114 Ohio St.3d 253, 2007-Ohio-4005, 871 N.E.2d 586, this Court affirmed a dismissal for lack of standing in a constitutional challenge to legislation, finding that the litigant had failed to establish that it had "a direct interest in the legislation of such a nature that his or her rights will be adversely affected by its enforcement." *Id.* at ¶ 11. Ohio's intermediate courts likewise have held that litigants seeking to assert a constitutional challenge under the Declaratory Judgment Act must still meet the "personal stake" standing test. *See, e.g., Kruppa v. Warren*, 11th Dist. No. 2009-T-0017, 2009-Ohio-4927 (dismissing plaintiff for lack of standing where plaintiff failed "personal stake" test). As the court put it in *Kuhar v. Medina Cty Bd. of Elections*, 9th Dist. No. 06CA0076-M, 2006-Ohio-5427, a Declaratory Judgment Act plaintiff must be able to allege "a direct and concrete injury to himself different than to the general public." *Id.* at ¶ 15. Such cases reflect this Court's long-standing admonition that "[in] order to obtain a declaration of one's rights under the Declaratory Judgment Act, the moving party must have sufficient standing to bring its action," meaning that "[a] party must have sufficient stake in an otherwise justiciable controversy in order to have standing to obtain judicial resolution of that controversy." *Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St.2d 93, 97, 296 N.E.2d 261 (1973).

Further, this Court's recent decision in *Beaver Excavating*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, dispels any notion that the Declaratory Judgment Act relieves plaintiffs of an obligation to establish standing. To be sure, in *Beaver Excavating* the Court

found that the litigants had standing, but not because the Declaratory Judgment Act constituted a legislative conferral of such standing. To the contrary, this Court confirmed that even in a Declaratory Judgment Act case "[s]tanding exists only when (1) the complaining party has suffered or has been threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, (2) the law in question caused the injury, and (3) the relief requested will redress the injury." *Id.* at ¶ 8. The litigants there suffered injury, and thus were able to claim standing, ***because they "generated gross receipts derived from motor-vehicle-fuel sales," and thus were subject to a tax (the CAT tax) that they were alleging was unconstitutional.*** *Id.* at ¶ 3. That particularized injury "in a manner or degree" different from the public at large was what allowed the case to go forward—not the Declaratory Judgment Act.

Here, of course, appellants have conceded ***repeatedly*** throughout this litigation that they have not suffered a "direct and concrete injury" different from the public at large. Thus, under settled Ohio law, the Declaratory Judgment Act does not supply standing for their claims.

In an effort to overcome this well-settled case law (none of which appellants bother to cite or even acknowledge), appellants point to exactly one Ohio case—this Court's decision in *Moore v. Middleton*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 97. (Br. at 36). *Moore*, however, provides no support for their argument, as it involved a plaintiff who satisfied traditional standing rules. There, this Court considered whether an adjacent land owner had standing to bring a declaratory judgment action challenging a municipal zoning ordinance when his property was outside the municipal boundaries. *Id.* at ¶¶ 2-3. There was no question that the adjacent property owner was alleging a direct and concrete injury different from the public at large—the complaint alleged that the surrounding land owners (including the plaintiff) had suffered "a drastic diminution in [the] value" of their property. *Id.* at ¶ 9. Rather, the only

question there was whether standing to challenge a municipal ordinance through a declaratory judgment action stopped at the municipal boundary, a question left open in this Court's earlier decision in *Clifton v. Blanchester*, 131 Ohio St.3d 287, 2012-Ohio-780, 964 N.E.2d 414. *See Moore* at ¶¶ 29-32. In *Moore*, this Court said "no." *Moore* does not suggest, however, that parties can proceed with declaratory judgment actions where they lack an injury different from the public in general, as is the case here. Indeed, in finding standing in *Moore*, this Court specifically observed that "[c]ourts honor the people and their Constitution by giving careful consideration to property owners' challenges to the propriety of government actions ***that affect their property.***" *Id.* at ¶ 40 (emphasis added). Of course, if the Declaratory Judgment Act broadly conferred standing absent particularized injury, as appellants contend here, no such effect on the litigant's property would have been necessary in *Moore*—anyone would presumably have *carte blanche* to challenge the constitutionality of legislation under the Declaratory Judgment Act, whether or not they could demonstrate "government actions that affect their property." But that is not what this Court said.

In short, the Declaratory Judgment Act does not provide an "escape hatch" from settled standing requirements. It merely provides a vehicle for plaintiffs who can meet settled standing rules to pursue their claims. Thus, appellants' invocation of the Declaratory Judgment Act does nothing to cure their lack of standing.

D. "Public Policy" Does Not Provide A Free-Standing Basis For Standing; Rather, Public Policy Requires Ohio Courts To Respect Standing Rules.

In the last refuge of the desperate, appellants finally invoke alleged "public policy considerations" as some sort of free-standing basis for this Court to ignore settled standing doctrine. (Br. at 46-49). In making that argument, though, appellants have it exactly backward.

"Public policy" is better served when this Court abides by settled precedent and observes proper limitations on what would otherwise be an unbridled expansion of judicial power.

As appellants acknowledge, courts have properly expressed concern that, absent standing rules, the floodgates would be open to endless constitutional challenges. (*See* Br. at 47). Appellants assert that these floodgate concerns are "misguided," but the arguments they press prove the exact ***opposite***. Indeed, appellants ***celebrate*** the prospect of greater constitutional litigation, claiming that "the notion that public officials should not be subjected to judicial interference is wrong as a matter of law," and that such interference is necessary if Ohio's Constitution "is to have any meaning at all." (Br. at 47). That view, however, reflects a misplaced court-centric view of government. ***All*** of Ohio's public officials have sworn an oath to uphold Ohio's Constitution. Appellants' view that the General Assembly and Governor are constantly attempting to shirk or evade their constitutional obligations, held in check only by an ever-vigilant Court, is, quite simply, offensive. To be sure, the Court has the power of constitutional review, but as it has recognized, it must be ever-careful to exercise that power only in the context of cases that properly invoke the ***judicial*** power. The notion that every statute must be subject to constitutional challenge by every citizen, whether that citizen is affected by the legislation or not, is, to put it charitably, absurd. Yet that is exactly the "public policy" that appellants advocate here.

Nor do appellants ameliorate this concern by asserting that there are "already mechanisms in place for weeding out ***frivolous*** cases," so that the Court need not worry about the floodgates problem. (Br. at 47 (emphasis in original)). Indeed, in even pressing this argument, appellants are once again seeking to overturn decades of settled case law holding that courts must address standing ***before*** turning to the merits of the plaintiff's claim. *See, e.g.*, *Ohio*

Pyro, Inc., 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, at ¶ 27 ("Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue.") (citing *Ohio Contractors Assn. v Bicking*, 71 Ohio St.3d 318, 643 N.E.2d 1088 (1994)). Citing as their principal "authority" ***a blog post*** on the Volokh Conspiracy website, (*see* Br. at 47-48), appellants ask this Court to adopt just the opposite rule, requiring courts to consider the merits of a constitutional claim ***before*** addressing standing concerns. According to appellants, such a rule is not problematic because "dismissing a frivolous case under 12(b)(6) is not significantly more difficult and time-consuming than dismissing it for lack of standing." (*Id.*). What appellants fail to appreciate, though, is that the former inquiry (*i.e.*, is the constitutional claim frivolous?) involves judicial resolution of a constitutional question, while the latter (*i.e.*, does the plaintiff have standing?) does not. And, as this Court has correctly observed, "Ohio law abounds with precedent to the effect that constitutional issues should not be decided unless absolutely necessary." *Hall China Co. v. Public Utilities Comm.*, 50 Ohio St.2d 206, 210, 364 N.E.2d 852 (1977); *see also State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 9 ("It is well settled that this court will not reach constitutional issues unless absolutely necessary.") (citing cases). If the Court is going to reach the merits of a constitutional question, it should do so in a case in which the plaintiff actually has standing.

Finally, appellants argue that the Court should not be concerned with the floodgates problem because the lack of a fee-shifting provision is an "inherent, pragmatic limiting principle." (Br. at 48). Events in this very case belie that claim. So-called "public interest" law firms may file constitutional challenges as a way of raising their profile and generating potential fund-raising opportunities, much like ProgressOhio has done here. And even apart from that, appellants' own amici vividly demonstrate that the lack of attorneys' fees does not serve as any

kind of meaningful limiting principle. As the amici briefs show, potential litigants who lack standing under settled rules are waiting in the wings to challenge school funding, casino gaming, and (one can safely assume) many other such issues.

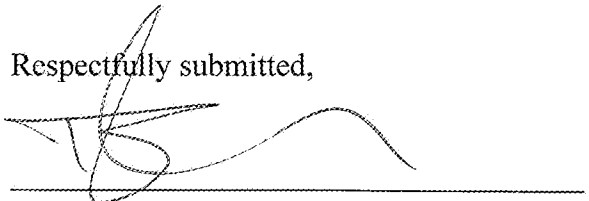
In short, the result appellants advocate here will ineluctably lead to greater politicization of the judicial branch, which would find itself constantly enmeshed in an endless parade of constitutional review on hotly-contested public policy issues, all at the behest of any one of Ohio's 11.5 million citizens, or of countless politically-motivated entities, none of whom have a meaningful personalized stake in the outcome of the case (as if they did, they would have standing under traditional rules). That would not be a good result for the judicial branch, nor for the rule of law, nor, most importantly, for Ohio's citizens.

CONCLUSION

For the above-stated reasons, JobsOhio respectfully urges this Court to affirm the unanimous decisions of the Tenth District and the Franklin County Court of Common Pleas dismissing this case for lack of standing.

Dated: June 25, 2013

Respectfully submitted,



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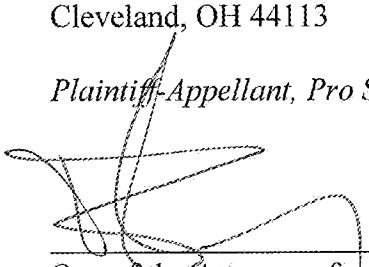

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APPENDIX

Ohio Constitution, Article IV, Section 4

(A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the Supreme Court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.