

IN THE SUPREME COURT OF OHIO

PROGRESSOHIO.ORG, INC., et al.,)	
)	
Appellants,)	On Appeal from the Franklin County
)	Court of Appeals, Tenth Appellate
v.)	District Court of Appeals
)	Case No. 11AP 1136
)	
)	CASE NO. 12-1272
JOBSOHIO, et al.,)	
)	
Appellees.)	
)	

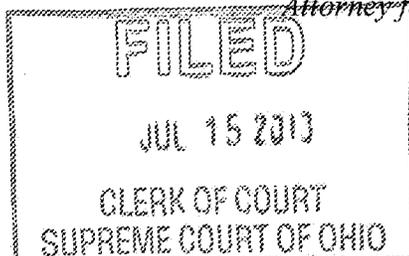
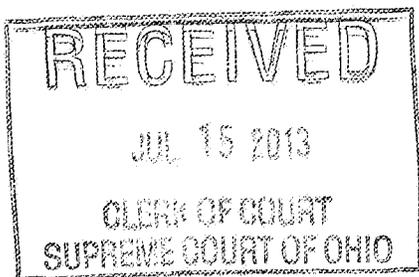
REPLY BRIEF OF AMICUS CURIAE OHIO ROUNDTABLE IN SUPPORT OF APPELLANTS

THOMAS W. CONNORS (0007226)
 BLACK McCUSKEY SOUERS &
 ARBAUGH
 220 Market Ave. S, Suite 1000
 Canton, OH 44702
 (330) 456-8341
tconnors@bmsa.com
*Attorney for Amicus Curiae The American
 Policy Roundtable dba Ohio Roundtable*

MAURICE A. THOMPSON (0078548)
 Counsel of Record
 1851 Center for Constitutional Law
 208 E. State Street
 Columbus, Ohio 43215
 (614) 340-9817
 Fax: 365-9565
MThompson@OhioConstitution.org
*Attorney for Plaintiff/Appellant
 ProgressOhio.org, Inc.*

MICHAEL DEWINE (0009181)
 Ohio Attorney General
 ALEXANDRA T. SCHIMMER (0075732)
 Solicitor General
 STEPHEN P. CARNEY (0063460)
 Deputy Solicitor
 Counsel of Record
 PEARL M. CHIN (0078810)
 Assistant Attorneys General
 30 E. Broad Street, 16th Floor
 Columbus, Ohio 43215
*Attorney for Defendants/Appellees
 Ohio Governor John R. Kasich, et al.*

ANECA LASLEY (0072366)
 Counsel of Record
 SQUIRES, SANDERS DEMPSEY
 41 South High Street, Suite 2000
 Columbus, Ohio 43215
 (614) 365-2830
Anece.lasley@squiressanders.com
Attorney for Defendant/Appellee JobsOhio



MICHAEL J. SKINDELL (0039041)
55 Public Square, Suite 1055
Cleveland, Ohio 44113
(216) 621-0070
Plaintiff/Appellant, Pro Se

DENNIS E. MURRAY, JR. (0038509)
111 East Shoreline Drive
Sandusky, Ohio 44870
(419) 624-3126
Plaintiff/Appellant, Pro Se

DOUGLAS R. COLE (0070665)
ORGAN, COLE AND STOCK
1335 Dublin Road
Columbus, Ohio 43215
(614) 481-0902
drcole@ocslawfirm.com
Attorney for Defendant/Appellee JobsOhio

DONALD McTIGUE (0022849)
JOHN COLUMBO (0072398)
MARK A. McGINNIS (0076275)
McTIGUE & McGINNIS, LLC
545 East Town Street
Columbus, Ohio 43255
*Attorneys for Plaintiff/Appellant
ProgressOhio.org, Inc.*

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Such standing does not offend the doctrine of separation of powers since it is constitutionally contemplated to protect against encroachment on the people's reservation of undelegated powers. Furthermore, such standing would not necessarily extend to encroachments by the legislative, executive and judicial branches on each other's powers, and therefore would be subject to a limiting principle respecting the doctrine of separation of powers.

Appellees' criticism of the *Sheward* case can be addressed by limiting the scope of its precedential value to its syllabus. It appears that the parties in this case agree that the dicta regarding a 'rare and extraordinary' limit is not valid law, albeit for different reasons.

Finally, appellees and their amici do not dispute that the mandamus statute confers standing on beneficially interested parties such as appellants, and that such right may be the subject of declaratory relief. Accordingly, appellants have statutory standing to pursue such claims in this case.

B. COMMON LAW STANDING

1. Traditional Public Duty/Taxpayer Case Law Confers Common Law Standing to Maintain Mandamus Claims.

Appellees do not dispute that appellants' general relief claim entitles them to all relief justified by the facts pled. Nor do appellees dispute that a dismissal for failure to state a claim for lack of standing is only available if they demonstrate beyond doubt that appellants can prove no set of facts entitling them to standing. This Court has previously acknowledged common law taxpayer standing to pursue mandamus relief to enforce the type of constitutional duties at issue in this case. *State ex rel. Ryan v. City Counsel of Gahanna*, 9 Ohio St.3d 126, 459 N.E.2d 208 (1984). Accordingly, there is no real argument against availability of a mandamus

claim in this case. In fact, Justice Pfiefer of this Court has already acknowledged that a mandamus claim is available in this case. *ProgressOhio.org, Inc. v. Kasich*, 129 Ohio St.3d 449, 953 N.E.2d 329, 2011-Ohio-4101, ¶8.

Appellees have also not disputed that both the majority and minority opinions in the *Sheward* case support Ohio's traditional public duty/taxpayer case law conferring standing to seek mandamus relief to enforce public duties. The only real issue is whether *Sheward's* dicta regarding a 'rare and extraordinary' limit precludes standing to seek mandamus relief in this case. Nonetheless, appellants argue that *Sheward* and the 'rare and extraordinary' limit should be overruled. Ohio Roundtable does not believe that there is a need to overrule the 'rare and extraordinary' limitation, since it is only found in dicta which is inconsistent with the syllabus. This court need only apply the rule that the law of a case is found in the syllabus, to avoid the further application of that principle.

In any event, without the 'rare and extraordinary' limit, the traditional public duty/taxpayer standing case law is unquestionably applicable. This case law provides ample precedent supporting conferral of standing on appellants as discussed in Ohio Roundtable's amicus merit brief. Moreover, the 'rare and extraordinary' limit extends only to common law standing. Since standing is conferred on beneficially interested parties by the mandamus statute, as discussed below, such limit is not applicable to mandamus claims.

2. The Doctrine of Separation of Powers does not Preclude Standing for Mandamus Claims.

Granting standing for mandamus claims could not reasonably be considered encroachment by the judiciary on legislative or executive powers delegated by the Ohio

Constitution, since the constitution specifically grants this Court jurisdiction over mandamus claims. Ohio Constitution, Article 4, Section 2.

3. Federal Standing Theory is not Relevant to Ohio Law on Standing for Mandamus Claims.

Article III, Section 2 of the U.S. Constitution requires a showing of individualized injury irrespective of whether a party seeks to enforce a private or public right. *The State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 470, 715 N.E.2d 1062. There is no similar requirement in the Ohio Constitution, and this Court has made clear that federal decisions regarding standing are therefore not binding on it. *Id.* at 470.

Moreover, the Ohio Constitution's direct grant of jurisdiction to this Court over mandamus claims, and this Court's precedent conferring standing on citizens as beneficially interested in mandamus relief, makes federal standard theory irrelevant to Ohio law on standing for mandamus claims.

4. Mandamus Claims are Justiciable by Common Pleas Courts.

The legislature has codified mandamus claims, making clear that they are justiciable by common pleas courts. R.C. 2731.02.

5. Appellants' Standing Theories are not Completely Contrary and Inconsistent with Standing Theories Argued Below and are Therefore not Waived.

This Court described the standard for waivers of issues on appeal as follows:

“Issues not raised in the lower court and not there tried and which are completely inconsistent with and contrary to the theory upon which appellants proceeded below cannot be raised for the first time on appeal.”

Republic Steel Corp. v. Board of Revision of Cuyahoga County, 175 Ohio St. 179, 192 N.E.2d 47, syllabus (1963).

In *State ex rel. Jones v. Hendon*, 66 Ohio St.3d 115, 118, FN2, 609 N.E.2d 541 (1993), this Court applied this principle in considering a constitutional argument not specifically raised in the court of appeals because it was not completely inconsistent with the lower court argument.

Appellees argue that appellants have waived the taxpayer standing theory based on the trial court's observation that "Plaintiffs are not seeking taxpayer standing but rather that their classification as taxpayers or citizens qualified them to assert 'public right' standing". (12/2/2011 Op at 19). The court of appeals summarized the trial court issues as including "(2) appellants lack taxpayer standing because they have not shown a special interest different from that of taxpayers generally". *ProgressOhio.org, Inc. v. JobsOhio*, 973 N.E.2d 307, 2012-Ohio-2655, ¶5. Appellants' assignments of error in the court of appeals included "[IV] The trial court erred in denying plaintiffs' standing to bring this case as a matter of great public interest and importance." *Id.*, ¶7. The proposition of law on which this case was accepted by this Court is "Plaintiffs have standing to bring this action."

Appellants' argument that standing should be conferred on them as taxpayers to seek enforcement of a public duty or right is well within the scope of the issues raised in the lower courts. The quoted statements from appellants' former counsel that taxpayer standing was not an issue are clearly contradicted by the court of appeals' opinion.

Appellees argue that there is a distinction between appellants' status as citizens and taxpayers that somehow justifies their waiver argument. This Court, however, has equated the two statuses in *State ex rel. Spencer v. East Liverpool Planning Commissioner*, 80 Ohio St.3d 297, 299, 685 N.E.2d 1251 (1997). ("Residents are normally taxpayers," "Therefore, Spencer's allegation in his complaint that he is a resident of East Liverpool conferred sufficient standing on him to bring the mandamus action.")

In any event appellants' arguments are not completely inconsistent with and contrary to the theories argued below and therefore they are not waived.

6. The Ohio Constitution Provides for Public Right Standing in Cases Involving Encroachment on Undelegated Powers.

Section 20, Article I of the Bill of Rights in the Ohio Constitution of 1851 provides:

“This enumeration of rights shall not be construed to impair or deny others retained by the people and all powers not herein delegated, remain with the people.”

This Court has noted that:

‘[t]his section was adopted from Section 28, Article VII of the Constitution of 1802, which read:

‘To guard against the transgression of the high powers, which we have delegated, we declare, that all powers not hereby delegated, remain with the people.’

The State ex rel. Ely v. Brenneman, Judge, 176 Ohio St. 311, 314, 199 N.E.2d 47 (1964).

This Court in describing the status of a relator in a mandamus case explained that “where the purpose of the application is the enforcement of a public right ... the people at large are the real party in interest”. *Sheward*, 86 Ohio St.3d at 472, quoting *State ex rel. Meyer v. Henderson*, 38 Ohio St. 644, 648-649 (1888).

The right to protection of the undelegated powers retained by the people is the quintessential public right. Since this case involves a claim of encroachment by the legislative and executive branches on the undelegated powers, the people are the real party in interest.

The doctrine of separation of powers is concerned with the encroachment of one branch on the power of the other branches. It is not applicable where there is action in excess of delegated authority. This principle was explained by this Court in analogous circumstances in

Racing Guild of Ohio, Local 304 v. Ohio State Racing Commission, 28 Ohio St.3d 317, 322, 503 N.E.2d 1025 (1986):

“Clearly, where the executive or the legislature lawfully grants administrative agencies discretionary power to make choices among competing alternatives, standing does not lie to challenge these discretionary decisions based solely upon a disagreement with the choice made. The proper remedy for such a disagreement is not judicial, but rather is political; the remedial measures of petitioning the executive or the legislature and the casting of an informed ballot on election day provide a solution to this problem. See, *e.g.*, *Coleman v. Miller* (1939), 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385; *United States v. Richardson* (1974), 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678; *cf.* *Baker v. Carr* (1962), 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663. Where, however, illegal agency action or agency action in excess of delegated authority is at issue, the judiciary provides the proper forum for the resolution of the dispute.”

Judicial resolution of claims of actions in excess of delegated authority do not involve encroachment by the judiciary on legislative and executive powers, because such claims only involve circumstances where these branches are acting outside of their delegated powers.

Section 20, Article I provides a constitutional basis for standing to protect the public right to protection against encroachment on the undelegated powers. Such standing is logically distinct from standing to enforce public duties which is grounded in the constitutional provision for mandamus jurisdiction. Public right standing is grounded in a different constitutional provision from the constitutional provision on which traditional public duty/taxpayer standing is grounded.

However, the scope of Article I, Section 20 is limited to the public right to protection from encroachment on undelegated powers. It does not necessarily extend to circumstances where a branch is acting within its delegated powers, but encroaches on the power of another branch. For instance when the executive branch violated a statute passed by the legislature, such

would not necessarily involve encroachment on undelegated power and may not implicate Article I, Section 20. Public right standing based on Article I, Section 20 would therefore not potentially result in judicial involvement in all government action. Such standing would be limited to constitutional violations involving actions outside the scope of delegated powers.

As detailed in Ohio Roundtable's amicus merit brief, this Court has long allowed injunctive relief against constitutional violations of the type alleged in this case. Common law standing to bring such actions is grounded in Article I, Section 20 and should continue to be recognized in this case.

C. STATUTORY STANDING

Appellees do not dispute that R.C. 2731.02 confers standing on beneficially interested parties to seek mandamus relief or that citizens and taxpayers are beneficially interested in the performance of public duties under this Court's precedent. These undisputed principles confer statutory standing on appellants to seek mandamus relief in this case. The right to such relief may be the subject of declaratory relief under R.C. 2721.03, which broadly confers standing to bring declaratory actions. The above statutorily authorized standing exists regardless of whether appellants have common law standing.

CONCLUSION

Accordingly, amicus curiae Ohio Roundtable requests this Court to reverse the court of appeals' decision and remand this case for further proceedings in accordance with law.

Respectfully submitted,

BLACK, McCUSKEY, SOUERS & ARBAUGH

By: Thomas W. Connors

Thomas W. Connors (0007226)

220 Market Avenue South

Suite 1000

Canton, OH 44702

Phone No. (330) 456-8341

Fax No. (330) 456-5756

tconnors@bmsa.com

*Counsel for Amicus Curiae The American
Policy Roundtable dba Ohio Roundtable*

CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Amicus Curiae Ohio Roundtable in Support of Appellants was sent by ordinary U.S. mail to the following on this 12th day of July, 2013:

THOMAS W. CONNORS (0007226)
BLACK McCUSKEY SOUERS &
ARBAUGH
220 Market Ave. S, Suite 1000
Canton, OH 44702
(330) 456-8341
tconnors@bmsa.com
*Attorney for Amicus Curiae The American
Policy Roundtable dba Ohio Roundtable*

MAURICE A. THOMPSON (0078548)
Counsel of Record
1851 Center for Constitutional Law
208 E. State Street
Columbus, Ohio 43215
(614) 340-9817
Fax: 365-9565
MThompson@OhioConstitution.org
*Attorney for Plaintiff/Appellant
ProgressOhio.org, Inc.*

MICHAEL J. SKINDELL (0039041)
55 Public Square, Suite 1055
Cleveland, Ohio 44113
(216) 621-0070
Plaintiff/Appellant, Pro Se

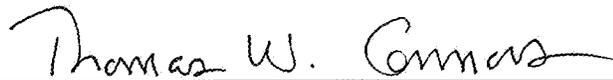
DENNIS E. MURRAY, JR. (0038509)
111 East Shoreline Drive
Sandusky, Ohio 44870
(419) 624-3126
Plaintiff/Appellant, Pro Se

MICHAEL DEWINE (0009181)
Ohio Attorney General
ALEXANDRA T. SCHIMMER (0075732)
Solicitor General
STEPHEN P. CARNEY (0063460)
Deputy Solicitor
Counsel of Record
PEARL M. CHIN (0078810)
Assistant Attorneys General
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
*Attorney for Defendants/Appellees
Ohio Governor John R. Kasich, et al.*

ANECA LASLEY (0072366)
Counsel of Record
SQUIRES, SANDERS DEMPSEY
41 South High Street, Suite 2000
Columbus, Ohio 43215
(614) 365-2830
Anece.lasley@squinessanders.com
Attorney for Defendant/Appellee JobsOhio

DOUGLAS R. COLE (0070665)
ORGAN, COLE AND STOCK
1335 Dublin Road
Columbus, Ohio 43215
(614) 481-0902
drcole@ocslawfirm.com
Attorney for Defendant/Appellee JobsOhio

DONALD McTIGUE (0022849)
JOHN COLUMBO (0072398)
MARK A. McGINNIS (0076275)
McTIGUE & McGINNIS, LLC
545 East Town Street
Columbus, Ohio 43255
*Attorneys for Plaintiff/Appellant
ProgressOhio.org, Inc.*



Thomas W. Connors
*Counsel for Amicus Curiae The American Policy
Roundtable dba Ohio Roundtable*

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