

ORIGINAL

IN THE SUPREME COURT OF OHIO

PROGRESSOHIO.ORG, INC., ET AL.	)	Case No.: 2012-1272
	)	
Plaintiffs,	)	On Appeal From the Tenth District
	)	Court of Appeals
v.	)	
	)	
JOBSOHIO, ET AL	)	
	)	
Defendants.	)	
	)	

REPLY BRIEF OF VICTORIA E. ULLMANN,

AMICUS CURIAE/ APPELLANTS

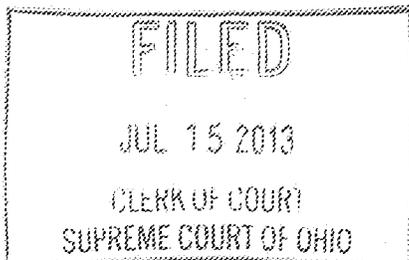
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## TABLE OF CONTENTS

<b>I. Introduction</b>	<b>1</b>
<b>II. R.C. 187.09 either provides for public interest standing to challenge JobsOhio or it is unconstitutional.</b>	<b>3</b>
<b>III. The standards created by this Court which allow for great public interest standing for appellants are a vital part of Ohio jurisprudence in this state that should be preserved.</b>	<b>4</b>
<i>A. This court has never held that public interest standing is only available in an extraordinary writ case.</i>	<b>5</b>
<i>B. Public interest standing does not offend separation of powers and supports both the requirements of checks and balances and separation of powers.</i>	<b>8</b>
<i>C. The standards for public interest standing are not too complex.</i>	<b>9</b>
<b>IV. Conclusion</b>	<b>9</b>
<b>Certificate of Service</b>	<b>10</b>

## TABLE OF AUTHORITIES

<i>Progress Ohio.org v. Kasich</i> 2011 Ohio-4101	2, 7
<i>State ex rel. Grendell v. Davidson</i> (1999), 86 Ohio St.3d 629.	8
<i>State ex rel. Ohio Academy of Trial Lawyers v. Sheward</i> (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062	passim
<i>State ex rel. Teamsters Local Union No. 436 v. Cuyahoga Cty. Bd. of Commrs.</i> , 32 Ohio St.3d 47, 2012-Ohio-1861.	9
Ohio Const. 4.02	7
Ohio Const. 4.04	7
R.C. 187.09	2-4
R.C. 4313	3

## **I. Introduction**

This is a case of great public interest not only because of the substantive claims involved, but also because the standing issue as raised and litigated here effects the right of the public to ensure that the General Assembly does not intentionally and with impunity violate the Ohio Constitution, causing harm to the general public or the state as an entity. Although the appellants have suffered no individualized harm that would automatically provide regular standing to sue, the JobsOhio legislation harms the public as a whole in many ways. The only way to redress this injury is for this Court to determine that great injury done to the public provides standing in this case.

Ohio Const. Article 13 forbids the General Assembly from passing a law creating a corporation or exempting a corporation from the general law. The General Assembly pushed R.C. 187 through knowing full well it was likely unconstitutional *in toto*. This administration is doing everything it can think of to insulate this decision from the Court's review in the hopes that it can continue violating the Ohio Constitution unabated. This Court has the authority under well established public interest standing rules to step in to protect the public and it should do so here.

This case was carefully designed and litigated by Victoria E. Ullmann with Dennis Murray and Michael Skindell for the past two years. It was focused and created to fall within the narrow requirements of public interest standing as established by this Court. Although the case may yet be salvaged, a great tragedy is occurring in this litigation as a result of improper actions

by the amicus curiae, 1851 Center for Constitutional Law (“1851 Center”) in hijacking the case. These shenanigans not only damage this litigation, but demonstrate disrespect for the judiciary.<sup>1</sup>

The appellees and their amici are correct that the 1851 Center’s brief improperly contains arguments that were not litigated below and the groundless taxpayer standing argument that was waived below. The appellant’s brief was written entirely by 1851 Center, which did not participate in this case in any way until it was before this court. This brief is disconnected from the Tenth District Court of Appeals decision which is the subject of this appeal. Amicus requests that since she was the individual who has done the largest percentage of work on this case, that her brief be viewed by the court as the primary brief in this case and that the reply brief to be filed by appellants Senator Skindell and Dennis Murray, Jr. be viewed as the primary reply brief in this case regardless of anything that the 1851 Center has filed or will file. The interloper 1851 Center has driven this case off the rails and it is too important for that to happen.

**II. R.C. 187.09 either provides for public interest standing to challenge JobsOhio or it is unconstitutional.**

This Court has already determined that earlier provisions in R.C. 187.09 which commanded this court take original jurisdiction of any action determining the constitutionality of JobsOhio were invalid. This was struck down in *Progress Ohio.org v. Kasich* 2011 Ohio-4101 as an unconstitutional infringement on separation of powers. If the new version of R.C. 187.09, which sets a 90 day statute of limitations for any and all constitutional challenges against any

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<sup>1</sup> Amicus urges the Court to change its rules to prevent any amici from becoming attorney of record on a case, or to do so only with leave of court. Only this Court should determine what role an amicus should play in any case. The 1851 Center does not represent any of the parties and neither are they required by the Model Rules to properly represent the interests of the party since no attorney client relationship exists.

part of the statute, is not determined to grant standing, it to must be struck down as a violation of separation of powers as well.<sup>2</sup>

(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.

The appellees and their amici argue that R.C. 187.09 has nothing to do with standing and only sets provisions for where and when a case may be brought. They totally ignore the fact that this argument renders this section wholly and completely unconstitutional as a violation of separation of powers. This section sets a statute of limitation for all constitutional challenges to any of any part of R.C. 187 or R.C. 4313 at 90 days. This is a blatant attempt to insulate this facially unconstitutional statute from judicial review and a remarkable attempt by the General Assembly and Governor Kasich to violate separation of powers with impunity. As this is an obvious violation of separation of powers as enshrined in the Ohio Constitution, this section must be ruled unconstitutional. As this Court found in *State ex rel Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062.:

The power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have been firmly established as an essential feature of the Ohio system of separation of powers. See, e.g., *Beagle v. Walden* (1997), 78 Ohio St.3d 59, 62, 676 N.E.2d 9, 506, 508 (“[i]nterpretation of the state and federal Constitutions is a role exclusive to the judicial branch”). However, this was not always so, and a major part of our history involves a continuing effort to establish and secure this power as intrinsic to the judiciary and, indeed, to establish the judiciary as a viable and coequal branch of our government. *at 8*.

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<sup>2</sup> This issue is further complicated since this section includes specific General Assembly session numbers. Appellees have offered no explanation to the court as to how this affects this statute of limitations.

During its history, this Court has been vigilant in protecting its position as a co-equal branch of government regardless of the periodic attacks on separation of powers instituted by an over bearing General Assembly. But it also is required to read a statute in such a way as to render it constitutional if possible. Because appellants and this amicus brought this case within the 90 day limitation period, this court can salvage this unconstitutional language by determining that appellants have standing to sue. The appellees and their amici offer absolutely no way to salvage this section without this grant of standing. As such, they have fully conceded that without a determination of standing for the appellants' here, that the 90 statute of limitation on constitutional claims is fully and completely invalid and that constitutional claims challenging R.C. 187 can be brought at any time.

Appellee JobsOhio argues that employees who lost their jobs at the Department of Development or others could challenge the constitutionality of R.C. 187. The gigantic flaw in this argument, however, is that no one at Development had been fired within the 90 day period to create regular standing. The state had taken virtually no action in furtherance of this legislation within the 90 day period that would have created regular standing.

**III. The standards created by this Court which allow for great public interest standing are a vital part of Ohio jurisprudence in this state that should be preserved.**

Because of the improper attempt by the 1851 Center to throw the kitchen sink into this appeal at this level, the appellees and their amicus were able to argue that the broad and sweeping approach argued for the first time in that merit brief would lead to a flood of litigation.<sup>3</sup>

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<sup>3</sup> This may be an attempt by the 1851 Center to magically merge this case with *State ex rel. Robert L. Walgate, Jr., et al. v. John R. Kasich et al.* 2013-656. *Walgate* is another standing case that this court has not yet accepted for review. It also employs a kitchen sink approach to standing, including taxpayer standing. The facts there offer more support to that approach. The 10<sup>th</sup> District opinion in that *Walgate* contains a lengthy discussion of federal standing law. The 10<sup>th</sup> District did not in any way rely on federal standing standards in this case and any allegation of that by 1851 is false. Of course this case cannot be consolidated with *Walgate* on the whim of the 1851 Center.

This is true. That is why Thompson is making the argument. But that is not the basis of this case. When Ullmann, Murray and Skindell designed this litigation it was narrowly focused to avoid this concern. The propositions of law set forth in the memorandum in support of jurisdiction which include discussion of the allegations within the substantive claims in the complaint were not intended to argue for the court to reach the merits as appellees contend, but instead were intended as a way to limit the any application of current public interest standing holdings specifically to the case at hand. To determine whether great public interest standing is present, the allegations in the complaint have to be determined to fit that standard.

The Tenth District Appeals decision was also narrowly focused. Although amicus disagrees with the decision, the Tenth District's opinion perfectly framed this issue for this court and this appeal. With Ullmann's brief and reply, and the Murray/Skindell reply brief this case can return to the focus it is supposed to have. The fact that the 1851 Center chooses to ignore basic rules of appellate advocacy should not prevent this court from adjudicating the standing issues properly before it. This court can simply ignore the improper arguments.

The issues in this case have always been and remain whether R.C. 187.09 operates as a grant of standing to all appellants and whether this case is sufficiently important that it constitutes a matter of great public interest and importance. This Court should not allow a charlatan from the 1851 Center to damage the rights of the people of the state of Ohio.

*A. This court has never held that public interest standing is only available in an extraordinary writ case.*

As a result of bad law in the 10<sup>th</sup> District, this case has become mired in the issue of whether public interest standing is only available in writs cases. After years of error, the Tenth District finally corrected itself in this case and determined standing is not determined by whether the case is filed as a complaint for declaratory judgment or for an extraordinary writ. Despite this holding, the appellees and their amici keep trying to drag this case back into that morass. Of course the goal of this is to obfuscate the case in order to deprive the citizens of Ohio of this valuable right forever.

In an attempt to justify this argument in light of the 10<sup>th</sup> District's correction, the State Solicitor spends a great deal of time discussing the meaning of "justiciable matters" pursuant to Ohio Const. 4.04. This is the first time this argument has appeared in this case. The state argues that the fact that term "justiciable matters" is included in Ohio Const. 4.04 governing common pleas court, it somehow forecloses public interest standing if the case is filed in common pleas as is required for a declaratory judgment action. The state argues that public interest cases can only be brought by alternative writ in this Court because the standards for what cases are justiciable are different for this court than the court of common pleas. She argues that this is why this court's decision in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 515, 715 N.E.2d 1062. requires that a public interest standing case can only be filed in a writ case. Aside from the fact that *Ohio Academy of Trial Lawyers, Id.* does not hold an alternative writ is required to grant public interest standing, this argument is thoroughly flawed.

The controversy in *Ohio Academy of Trial Lawyers, Id.* regarding the use of extraordinary writs in a public interest case has nothing whatsoever to do with standing. It has to do with using a complaint for a writ in a public interest case in order to move it into this Court as

an original action to get an immediate response. This was concisely acknowledged in Justice Pfeifer's dissent in this case 2012-Ohio-4101:

I would sua sponte convert this action to a mandamus action and grant an alternative writ to begin the briefing process. It is my long-held view that this court has not only the constitutional power but also the responsibility to exercise original jurisdiction in matters that demand early resolution. Although the granting of writs of mandamus and prohibition to determine the constitutionality of statutes is “ ‘limited to exceptional circumstances that demand early resolution,’ ” this court has accepted for exceptional review cases involving statutes that had comprehensive reach and wide impact. *State ex rel. Ohio AFLCIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717, 780 N.E.2d 981, ¶ 12, quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 515, 715 N.E.2d 1062 (Pfeifer, J., concurring); see also *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 631 N.E.2d 582.

This is the writs issue in *Ohio Academy, Id.* Not standing is not the issue. *Id. at*

62

The state's newly concocted “justiciable matters” line of reasoning does not offer the slightest justification the grossly erroneous “writs only” argument they have made regarding standing throughout this case. The fact that the term appears in Ohio Const. 4.04 and may indicate a standing requirement, does not mean it excludes the public interest standing option that this court had created prior to the passage of the amendment in 1968. In fact, it should be presumed it is included.

Ohio Const. 4.02(B)(2)(e) states: “In cases of *public or great general interest*, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals.” (Emphasis added) Public rights standing in cases of public or great general interest is intimately intertwined with this Court's *appellate* jurisdiction. This is fully consistent with the law of the case here that appellants had to seek redress through a declaratory judgment action. *Progressohio.org v.*

*Kasich*, 2011-Ohio-4101. This court has consistently held that challenges to new legislation are to be brought as declaratory judgment actions. *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St.3d 629. The unconstitutionality of new legislation is one of the few issues that rise to the level of great public interest and importance.

This was pivotal to the 10<sup>th</sup> District panel who heard this case. Judge Tyack, who wrote the decision, asked Ullmann during oral argument whether or not the standard for public interest standing was the same standard as for a discretionary appeal before this court. Of course it clearly is. This was followed by an opinion that states public interest standing does not occur solely in extraordinary writ cases.

This case has always been and remains a matter of great public importance since it involves handing over the functions of an entire state department and giving control of a state owned asset to a private company for 25 years. This is a matter of public importance and the arbitrary and unconstitutional method in which the General Assembly accomplished this questionable goal has created a public issue of great importance.

***B. Public interest standing does not offend separation of powers and supports both the requirements of checks and balances and separation of powers.***

The Neihaus/Wagoner brief argues that appellants' claims with regard to JobsOhio can only be addressed by obtaining repeal in the General Assembly or perhaps a referendum. This argument ignores the fact that only this Court has the authority to determine whether the General Assembly as violated the Ohio Constitution. This is not a political matter, it is a legal one. Although one can hope that the General Assembly complies with the requirements of the Ohio Constitution, constitutional violations are not resolved by a vote of the legislature. This Court

determines whether a violation has occurred. Furthermore, allowing a narrow right to redress in the courts to allow members of the public to redress urgent matters of public importance does not violate separation of powers. It enhances the ultimate right of the citizenry to control its government. Recently this Court reiterated that “there are serious objections against allowing mere interlopers to meddle with the affairs of the state, and it is not usually allowed *unless under circumstances when the public injury by its refusal will be serious.*” ’ (Emphasis added.)” *State ex rel. Teamsters Local Union No. 436 v. Cuyahoga Cty. Bd. of Commrs.*, 132 Ohio St.3d 47, 2012-Ohio-1861.

***C. The standards for public interest standing are not too complex to be applied.***

The law professor appellee amici appear here to argue that the standard of “great public interest and importance” is too hard to be applied as a standard and therefore should be abolished. Of course the law professors are missing the salient fact that this is the same standard of “great public interest and importance” that this court uses in determining whether to grant jurisdiction on a discretionary appeal. The fact that this area of law has been muddied by state defendants who sought to discredit the standard does not mean it is unworkable.

Although this approach allows the court of appeals to pass on determining the standing issue to allow this Court to ultimately determine the cases that in fact fit this standard on appeal, this is not a hard or unworkable. The 10<sup>th</sup> District provided a focused decision that should have allowed for a straightforward appeal on this issue. Determining whether a case presents a matter of great public interest and importance is something this Court does every single day. If any inferior court has doubts as to whether the a given case fits the standard, all they have to do is to

deny standing and the great public interest standard will be applied by this Court in determining whether to accept the appeal. This is not difficult.

### **Conclusion**

Public interest standing remains one of the vital tools to maintain a constitutionally balanced and separated government in Ohio. JobsOhio represents a move to privatize government on such a large scale that it effects the composition of the executive branch and how the laws of the state are to be administered. It is important issue that this court should determine now not at some hypothetical time in the future after scandal and damage take its toll on this dangerous entity and the people of this state.

Respectfully submitted,



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### **Certificate of Service**

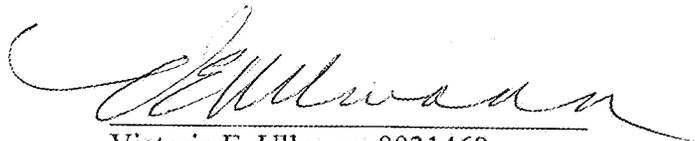
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