

IN THE SUPREME COURT OF OHIO

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

Reply Brief of Plaintiffs-Appellants Michael Skindell and Dennis Murray

Maurice A. Thompson (0078548)
 1851 CENTER FOR CONSTITUTIONAL LAW
 208 E. State Street
 Columbus, Ohio 43215
 Tel: (614) 340-9817
 Fax: (614) 365-9564
mthompson@ohioconstitution.org
Counsel of Record

*Co-Counsel for Plaintiff/Appellant
 ProgressOhio.org, Inc.*

*and Counsel for Amicus Curiae 1851
 Center for Constitutional Law*

Donald J. McTigue (0022849)
 Mark A. McGinnis (0076275)
 J. Corey Colombo (0072398)
 MCTIGUE & MCGINNIS LLC
 545 East Town Street
 Columbus, Ohio 43215
 Tel: (614) 263-7000
 Fax: (614) 263-7078
dmctigue@electionlawgroup.com
mmcginnis@electionlawgroup.com
ccolombo@electionlawgroup.com

*Co-Counsel for Plaintiff-Appellant
 ProgressOhio.org, Inc.*

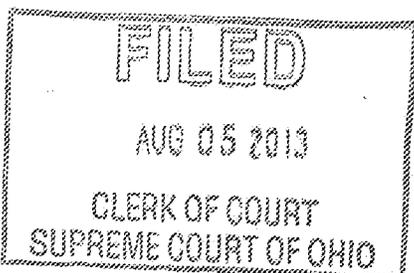
Aneca E. Lasley (0072366)
 SQUIRE SANDERS LLP
 41 South High Street, Suite 2000
 Columbus, Ohio 43215
 Tel: (614) 365-2830
aneca.lasley@squiresanders.com
Counsel of Record

Douglas R. Cole (0070665)
 ORGAN COLE + STOCK
 1335 Dublin Road
 Columbus, Ohio 43215
 Tel: (614) 481-0902
drcole@ocslawfirm.com

Counsel for Defendant/Appellee JobsOhio

R. Michael DeWine (0009181)
 Ohio Attorney General
 Michael Hendershot (0081842)
 Chief Deputy Solicitor
Counsel of Record

Stephen P. Carney (0063460)
 Pearl M. Chin (0078810)
 Alexandra Schimmer
 OHIO ATTORNEY GENERAL'S OFFICE
 30 E. Broad Street, 16th Floor
 Columbus, Ohio 43215
 Tel: (614) 995-2273
alexandra.schimmer@ohioattorneygeneral.gov
stephen.carney@ohioattorneygeneral.gov
pearl.chin@ohioattorneygeneral.gov



Michael J. Skindell (0039041)
55 Public Square, Suite 1055
Cleveland, Ohio 44113
Tel: (216) 621-0070
mkindell@aol.com

*Counsel for Defendant/Appellee
Ohio Governor John R. Kasich*

Plaintiff/Appellant, pro se

Dennis E. Murray, Jr. (0038509)
111 East Shoreline Drive
Sandusky, Ohio 44870
Tel: (419) 624-3126
dmj@murrayandmurray.com

Plaintiff/Appellant, pro se

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Proposition of Law: The Plaintiff-Appellants maintain standing to bring this action.

None of Appellees' contentions alter the fact that if the Ohio Constitution is to be fully-enforceable, this Court must find that ProgressOhio maintains standing to challenge the constitutionality of the JobsOhio arrangement. Here, the decision of the Court of Appeals in this case, which Appellees' Briefs barely attempt to defend (Appellees seem more interested in supplying rationales that the Court *could have* adopted instead of defending the holding it made), cannot be permitted to stand. That decision relies principally on federal standing limitations for the non-sequitur that Ohioans have no standing - - and effectively no method at all - - of enforcing constitutional limits on state spending, indebtedness, and cronyism. In doing so, it ignores (1) the independent significance of the Ohio Constitution; (2) the fact that the provisions in dispute here are, as the responses to the very issues that precipitated the constitutional convention of 1851, of critical public interest; (3) the inapplicability and illogic of the "individualized personal stake" requirement when citizens seek to enjoin unlawful expenditures of public funds and uses of public property; and (4) the absence of an intellectual justification for its contribution to the slow erosion of Ohioans right to enforce the Ohio Constitution in Ohio courts.

However, this Court must recognize that (1) federal precedent plays no role in *prohibiting* ProgressOhio from maintaining standing - - distinguishable Ohio precedent and constitutional provisions govern the analysis; (2) an absences of standing here effectively deletes certain structural constitutional limits on government; (3) the public interest exception to traditional standing requirements applies to this matter; (4) common law taxpayer standing precedents and principles of this state and other require standing; (5) ProgressOhio maintains statutory standing through Ohio's Declaratory Judgment Act and R.C. 187.09; and (6) public policy considerations favor standing in this matter - - multiple limiting principles ameliorate concerns about opening the "floodgates" to endless litigation. All the while, this Court must be mindful of the need to facilitate enforcement of the Ohio Constitution's structural limits on government;

and the serious burden that truncated statutes of limitation place on plaintiffs seeking to challenge the constitutionality of the relevant legislation.

Meanwhile, this Court should reject Appellees' stretching of the Ohio Constitution's text, misstatement of its precedent, misunderstanding of the nature of this case, and hyperbolic and exaggerated caricatures of ProgressOhio's simple bases for citizen-taxpayer standing with clear limiting principles.

At the end of the day, Appellees' briefs attempt to interject a smoke-screen of complexity into issues that, though somewhat nuanced, are relatively straightforward. The crux of this matter remains whether Ohioans have standing to obtain judicial review, in equitable actions where no Ohioan has a unique personal stake or direct injury, to enforce the Ohio Constitution's limits against state government. The answer, of course, must be "yes," and the Tenth District's reasoning must be abrogated.

A. The Text of the Ohio Constitution certainly does nothing to *forbid* standing here.

Appellees' fail in their efforts to stretch the meaning of the term "justiciable" to a previously-unimaginable meaning: ProgressOhio's claim is sufficiently "justiciable" to warrant standing under the Ohio Constitution. Appellees' go so far as to contend that this Court lacks even the discretion to find that ProgressOhio maintains standing to challenge the JobsOhio arrangement - - they submit that the Ohio Constitution's requirement of "justiciability" presents a clear and insurmountable hurdle to public interest cases brought by taxpayers and citizens seeking to enforce the Ohio Constitution's limits on government. They exaggerate that ProgressOhio advocates "ignoring the text of the Constitution - namely Article IV, Section 4- and it advocates unlimited government by judiciary," so the Court should continue "guarding the limited role of the courts" by finding that the Ohio Constitution's justiciability requirement forbids this case.¹ They are unable to cite support for this provocative position, because there is none. And for numerous other reasons, this proposition must be rejected.

¹ State's Merit Brief, at p. 40.

First, the plain meaning of "justiciable" does not prevent challenges such as this. Section 4(B), Article IV, added to the Ohio Constitution in 1968, merely indicates that Ohio *Courts of Common Pleas* have jurisdiction over "all justiciable matters." Because of this indefinite-at-best clause alone, the State contends "[s]tanding is not a judge-made prudential policy," and "ProgressOhio's case ends on that point."² However, this implies that the Court would lend a meaning to the term "justiciable" that it never has in the past. Indeed, the State would have this Court, for the first time, revolutionize the meaning of that term. But Black's Law Dictionary defines "justiciability" as merely "[t]he quality or state of being appropriate or suitable for adjudication by a court;"³ or a "matter appropriate for court review."⁴ This term is quite obviously not a prohibition on equitable citizen-taxpayer cases brought to confine government to its otherwise-enforceable constitutional limits.

Secondly, to the extent that this Court may view the term "justiciable" as requiring interpretation or construction, it certainly could not be construed or interpreted to prohibit standing here. As initial matter, the Constitution must be construed as consistent with itself throughout, and it would be absurd to construe an otherwise-unremarkable 1968 amendment as having stripped Ohio's trial courts of the capacity to hear citizen-taxpayer constitutional actions.

Further, Ohio precedent has never construed the term as broadly as the State asks this Court to do here. This court, in interpreting Section 4(B), Article IV, has declared, at most, the following: "it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and render judgments which can be carried into effect."⁵ This is far from the prohibition of citizen-taxpayer standing that Appellees are so desperately in search of. Indeed, former Justice Duncan, concurring in *Fortner v. Thomas*, explained the non-event that was the enactment of the justiciability requirement: "[a]s I understand it, the underlying premise of the majority is that the 1968 amendment to

² Id, at 19.

³ Black's Law Dictionary, Fourth Pocket Edition (2011), p. 427.

⁴ *Klien v. Klien*, 141 Misc. 2d 174, 177, 533 N.Y.S.2d 211, 213 (Sup. Ct. 1988):

⁵ *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas* 74 Ohio St.3d 536; *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14.

Section 4, Article IV of the Ohio Constitution was the enactment of this court's justiciable case or controversy construction placed upon the original version of Section 2, Article IV. The majority opinion states that the use of the phrase 'proceedings of administrative officers' shows an intent by the framers of the amendment to maintain the impact of the decisions of the court. *I agree, and add that the insertion of the word 'justiciable' flavors the entire amendment and represents definite ratification of the interpretations previously issued by this court.*"⁶

Thirdly, it would be nonsensical to construe the term "justiciable" as identical to the federal constitution's Article III "cases and controversies" requirement. In 1802, 1851, and 1912, and 1968, the framers of the Ohio Constitution were no doubt aware of the federal constitution's Article III "cases and controversies" requirement and its accompanying precedent; and they were of course mindful of the concept of judicial review. Yet the Ohio Constitution contains no provision analogous to the "cases and controversies" limitation, and does nothing to limit judicial review. In addition, the drafters of the Ohio constitution created neither a "personal stake" or "direct injury" requirement. Consequently, the exclusion of a jurisdictional standing bar mirroring that of the federal constitution must be viewed as *deliberate*. Indeed, well subsequent to the amendment, this Court has ruled as follows: "[u]nlike the federal courts, state courts are not bound by constitutional strictures on standing; with state courts standing is a self-imposed rule of restraint. State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits."⁷

Fourth, if the State's construction of "justiciable" were correct, no plaintiff could ever bring a "public right" mandamus claim in an Ohio court of common pleas. This would mean that all cases decided pursuant to R.C. 733 and R.C. 319 in common pleas courts or on appeal from common pleas courts have been decided without jurisdiction. R.C. 733.56 through R.C. 733.59, governing "Taxpayer Suits,"

⁶ 22 Ohio St. 2d 13, 20, 257 N.E.2d 371, 375-76 (1970)(Duncan, J., concurring):

⁷ *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062; see also 59 American Jurisprudence 2d (1987) 415, Parties, Section 30.

frequently used by taxpayers in common pleas courts, is unconstitutional, and that R.C. 733.56 permits the filing of a civil complaint "*to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract * * *.*" R.C. 733.581 demonstrates that there is sufficient "adversity" to render a matter "justiciable" where a taxpayer merely request an injunction against such unlawful public spending: "If the village solicitor or city director of law, upon the written request of any taxpayer of the municipal corporation, makes any application provided for by section 733.56, 733.57, or 733.58 of the Revised Code, the taxpayer may be named as a party defendant and if so named shall have the right to assist in presenting all issues of law and fact to the court in order that a full and complete adjudication of the controversy may be had." That section adds "[i]n any civil action or proceeding involving the public interest the court shall grant the application of any person to intervene if the court believes that the public interest will be better protected or justice will be furthered." Finally, R.C. 733.59, entitled "Suit by Taxpayer," provides "the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation."

Likewise, all actions brought in common pleas pursuant to R.C. 319 would be "non-justiciable." That Section authorizes initiation against their county, by "taxpayers," of "legal action to restrain the contemplated misapplication of county funds or completion of illegal contracts." Accordingly, an infinite number of cases have been instituted in common pleas where "the taxpayer's aim must be to enforce a public right, regardless of any personal or private motive."⁸

Both R.C. 319 and R.C. 733 claims are typically brought in Ohio Courts of Common Pleas, and correctly, never dismissed for lack of justiciability. This dispels the Appellees' myth of a clear

⁸ *Cincinnati ex rel. Zimmer v. Cincinnati* (Ohio App. 1 Dist., 06-27-2008) 176 Ohio App.3d 588, 2008-Ohio-3156, appeal not allowed 120 Ohio St.3d 1420, 89, 2008-Ohio-6166, on subsequent appeal 2010-Ohio-4597, 2010 WL 3782440. (For a taxpayer to maintain an action on behalf of the municipal corporation, the aim must be to enforce a public right, regardless of any personal or private motive or advantage).

constitutional prohibition against taxpayer and public right standing in such courts. The body of R.C. 319 and R.C. 733 precedent also dispels the myth that ProgressOhio's standing is unprecedented, or that judicial Armageddon would ensue were ProgressOhio granted standing here.

And importantly, such standing exists even when not conferred by statute. Recently, in *State ex rel. Cater v. N. Olmsted*, the Court held that a taxpayer has standing as such to enforce the public's right to proper execution of city charter removal provisions, regardless of any private or personal benefit.⁹ Of important note, while the action in *Cater* was brought pursuant to R.C. 733.59, which specifically provides for judicial review, the Court stated "we have made clear that R.C. 733.56 through 733.61 merely codify the public-right doctrine as to municipal corporations, and that the doctrine exists independent of any statute authorizing invocation of the judicial process."¹⁰ "Thus the public action is fully conceived in Ohio as a means to vindicate the general public interest."¹¹ To this end, courts of common pleas have adjudicated Article VIII claims for declaratory relief, despite a taxpayer-citizen plaintiff without an individualized "personal stake," in *Grendell v. Ohio Env'tl. Prot. Agency*¹² and *State ex rel. Eichenberger v. Neff*.¹³

Fifth, guidance from other states supreme courts exists: those courts have more robustly addressed the term "justiciable" in this context, and have construed it as favoring, rather than obstructing, citizen-taxpayer standing. For instance, the Wyoming Supreme Court recently explained the need to find justiciability in a declaratory judgment action related to significant constitutional matters. The Court

⁹ *State ex rel. Cater v. N. Olmsted* (1994), 69 Ohio St.3d 315, 322-323, 631 N.E.2d 1048, 1054-1055

¹⁰ *Id.*

¹¹ *Sheward*, supra., at 1084. (*State ex rel. Nimon v. Springdale* (1966), 6 Ohio St.2d 1, 4-5, 35 O.O.2d 1, 3, 215 N.E.2d 592, 595. ("In particular, the court in *Nimon* listed a long line of cases in support of the citizen/taxpayer action, and explained that 'no case cited in the footnote involves (1) a municipal corporation; (2) Section 733.59, Revised Code, or any statute similar thereto; or (3) an extrastatutory demand upon, and refusal of, a county prosecutor, the Attorney General or other public legal officer to institute the suit.'")

¹² 146 Ohio App. 3d 1, 14-15, 764 N.E.2d 1067, 1078 (2001)

¹³ 42 Ohio App. 2d 69, 330 N.E.2d 454 (Ohio Ct. App. 1974) ("This matter involves the appeal of a judgment of the Common Pleas Court of Franklin County wherein the court entered an order on behalf of R. Wilson Neff, the director of the Ohio Department of Public Works and the other defendants, the latter being the president and the trustees of Ohio University, *in an action seeking a declaratory judgment, as well as equitable relief, brought by Jerry A. Eichenberger and others, who are noted in the caption of the case to be taxpayers.*")

observed "[w]e have recognized a more expansive or relaxed definition of standing when a matter of great public interest or importance is at stake. This exception to the general standing requirements evolved out of a determination of the existence of a justiciable controversy in the context of a declaratory judgment action."¹⁴ Standing may be conferred "by way of a declaratory judgment under the doctrine of great public interest or importance - - "we first acknowledged the doctrine of great public interest or importance in connection with the existence of a justiciable controversy to support the invocation of the authority of the court to make a declaratory judgment."¹⁵ Likewise, the Nebraska Supreme Court recently observed that "issues of great public interest and concern," in that case "state contracts for special education services from secular institutions," required the finding of a "justiciable controversy," even though the action was brought by a "citizen and taxpayer," since if the "cannot be challenged by a citizen and taxpayer unless and until he has a special pecuniary interest or injury different from that of the public generally, it is entirely possible that no one may have standing to challenge it."¹⁶

These rationales apply here. There is an injury *per se* to the citizens and taxpayers of Ohio when their state government strays from the structural limits of the constitution designed to protect those very citizen and taxpayers. That impact is no doubt *more personal* when a government authority transgresses a guarantee of the Ohio Bill of Rights, such as one's free speech, due process, property, or health care rights; or when government takes action that results in monetary damages. And where monetary damages or such a personal stake exists, such a stake or direct injury may be required (ProgressOhio is not suggesting otherwise). However, the Ohio Constitution, like those of the states above, features many restrictions on government the transgression of which do not result in immediate personal and acute harm. In such cases,

¹⁴ *Jolley v. State Loan & Inv. Bd.*, 2002 WY 7, 38 P.3d 1073 (Wyo. 2002); *Brimmer v. Thomson*, 521 P.2d 574 (Wyo.1974).(" Historically, we have applied the great public interest and importance doctrine to find standing where we ordinarily would not in the following instances: *Memorial Hospital of Laramie County*, 770 P.2d 223 (tax exempt status of hospital); *State ex rel. Wyoming Association of Consulting Engineers and Land Surveyors v. Sullivan*, 798 P.2d 826 (Wyo.1990) (constitutionality of the Wyoming Professional Review Panel Act).

¹⁵ *Id.*

¹⁶ *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979).

the citizen-taxpayer is in the party with the greatest interest - - the party who the constitution was designed to protect.

Finally, how strangely inconvenient for the independence of the judiciary and Ohio citizens that the State (1) promulgates a statute requiring that challenges to it be brought in a court of common pleas within 90 days; and then (2) argues that this same court is without jurisdiction to hear such constitutional challenges to have materialized in those 90 days. R.C. 187.09(B) sets forth the procedures for bringing constitutional challenges regarding JobsOhio, and requires that "any claim * * * 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." Appellees can't have it both ways: the state cannot require an action be brought in common pleas within 90 days, before an injury may be proven; but then attempt to assert a revolutionary new standard for limiting the jurisdiction of Ohio's courts of common pleas.

B. There is no binding precedent forbidding standing here.

As established above, there is an absence of a *textual* constitutional prohibition on ProgressOhio's standing here. In addition, there is no binding Ohio *precedent* forbidding ProgressOhio's standing: this Court has *never* forbidden a citizen-taxpayer from maintaining standing to enforce the structural limits of the state constitution (those provisions forbidding special interest legislation and spending, amongst others) against state government in cases where there could be no individualized personal stake.

First and foremost, when addressing constitutional cases, this Court has recently and illustriously observed the limited value of tangential precedents only loosely addressing similar subject matter - - such as those relied upon by the Appellees here. In *State v. Bodyke*, this Court explained (1) "stare decisis applies to rulings rendered in regard to specific statutes, [but] it is limited to circumstances 'where the facts of a subsequent case are substantially the same as a former case;'" (2) "stare decisis 'does not apply with the same force and effect *when constitutional interpretation is at issue*'" (Emphasis in original), and "*Stare*

decisis is not inflexibly applicable to constitutional interpretation;" (3) "Stare decisis remains a controlling doctrine in cases presenting questions on the law of contracts, property, and torts, but it is not controlling in cases presenting a constitutional question."¹⁷

The State claims the law is clearly settled in its favor. But in support of this claim, it must resort to citing isolated, open-ended, and out-of-context statements from distinguishable cases - - the exact type of precedent that this Court explained, in *Bodyke*, to be of little or no value. In *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, a case involving - - unlike here - - personal stakes and discreet self-interests, the Court simply declared that "'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.' Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue,"¹⁸ and "the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy * * * as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."¹⁹ Thus, the Court merely observed the value of a *sufficiently*, rather than an *individualized* personal stake, and observed this in the context of a case where there *were* individualized personal stakes available.

Likewise, in *Cuyahoga Cty. Bd. of Commrs. v. State*, the Court simply observed "in Ohio, it is well established that standing to attack the constitutionality of a legislative enactment exists only where a litigant 'has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury."²⁰ However, the Court has *never* enforced the "personal stake" or

¹⁷ *State v. Bodyke*, 126 Ohio St.3d 266, citing *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 23, quoting *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 5, 539 N.E.2d 103.

¹⁸ 115 Ohio St.3d 375, 875 N.E.2d 550; *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320.

¹⁹ *Id.* (Emphasis added), citing *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176, 178-179, 64 O.O.2d 103, 298 N.E.2d 515, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 732, 92 S.Ct. 1361, 31 L.Ed.2d 636, quoting *Baker v. Carr* (1962), 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663, and *Flast v. Cohen* (1968), 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947.

²⁰ 112 Ohio St.3d 59, 858 N.E.2d 330 (2006)

"direct injury" requirements against those attempting to vindicate the public interest through enforcing a clear structural constitutional limit on state government. In *Cuyahoga County*, the Court explained "[t]he state argues that the county lacks standing to challenge the law allowing the transfer of the TANF funds because the county cannot show that it is entitled to any of the money."²¹ However, "[a]lthough the county hoped that the state would cover the county's expenditures over its base allocations, the state was under no duty to provide such funds" and "[b]ecause distribution of the TANF funds in question was discretionary, the county has not shown that it has a concrete right to any part of those funds."²² On *those* bases, the Court concluded "[w]e, therefore, hold that the county lacks standing."

Conversely here, the Ohio General Assembly is under a mandatory duty to promulgate constitutionally-compliant legislation. Past proclamations made within the context of dramatically divergent cases are not only easily distinguishable, but they are neither on-point nor binding on this Court. Simply put: this Court has never before made the proclamation that citizen-taxpayers are forbidden from challenging state programs advancing spending, indebtedness, or cronyism in violation of the state constitution. And its limited and divergent past precedents do nothing to require that it make such a proclamation in this case. Consequently, this Court maintains unencumbered authority to control the destiny of citizen-taxpayer standing to enforce public rights through equitable actions. And it must (1) reinforce the existence of such standing; and (2) find that ProgressOhio maintains such standing here.

C. This Court's past precedent mitigates against the need for an individualized personal stake in public interest actions.

Appellees overlook a wealth of precedent and legal principle in attacking ProgressOhio's standing as "unprecedented." Contrary to the individualized "personal stake" requirement imposed by the Tenth District, and emphasized by Appellees, this Court's recent public interest standing precedent finds that citizen-taxpayer standing is not available when the case centers on an individualized personal stake, and is instead only available when the citizen/taxpayer is acting in the public interest, as ProgressOhio is here. In

²¹ Id.

²² Id. (Former R.C. 5101.46(H) was discretionary.)

fact (and noticeably absent from Appellees' Briefs), just one year ago in *State ex rel. Teamsters Local Union 436 v. Cuyahoga Cty. Bd. of Commrs.*,²³ this Court explained the taxpayer must demonstrate "that the remedy sought will benefit the public in order to have standing."²⁴ And "when a remedy being pursued is one that is merely for the individual taxpayer's benefit, the taxpayer cannot claim that he is vindicating a public right, and he will not have standing to pursue a taxpayer action."²⁵ In other words, a citizen-taxpayer such as ProgressOhio is actually prohibited from attempting to vindicate a "personal stake" or "direct injury" when bringing a public action to enforce the constitution: in an action brought as a citizen-taxpayer to vindicate a public right, this Court has fashioned a jurisprudence whereby standing is *lost*, not *gained*, if one's primary interest is a "personal stake" or "direct injury."²⁶ Indeed, the primary concern the Court seeks to guard against is "interlopers" using public right actions to disguise *private* interests, rather than the use of public actions by those without a self-interest, for *sincere* public purposes.

Further, as this Court rightly explained over a century ago in *Pierce v. Hagans*, (1) "[t]he general right of the resident taxpayer to maintain an action of this character is recognized by a number of decisions

²³ 132 Ohio St.3d 47, 969 N.E.2d 224 (2012) (The ultimate outcome in this case is distinguishable because ProgressOhio here is seeking to enforce the constitution, rather than merely seeking to force a political subdivision to abide by a statute. See *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent the violation of a party's constitutional rights").

²⁴ *Id.*, citing *State ex rel. White v. Cleveland*, 34 Ohio St.2d 37, 295 N.E.2d 665 (1973).

²⁵ *Id.*, citing *State ex rel. Caspar v. Dayton*, 53 Ohio St.3d 16, 20 (1990) (the goal of compelling fringe benefits for the police officers' own benefit did not constitute the goal of enforcing a public right and that the police officers' right to vacation pay did not constitute a public right for purposes of a statutory taxpayer action.)

²⁶ See *Cleveland ex rel. O'Malley v. White*, 148 Ohio App.3d 564, 2002-Ohio-3633, 774 N.E.2d 337, ¶ 42–47 (8th Dist.) (holding that electricians' union lacked taxpayer standing to enjoin the city from using non-electricians to perform certain work, because public safety was not a true concern, and the union was merely protecting its members' interests in keeping the work for themselves); *Assn. of Cleveland Fire Fighters, Local 93 v. Cleveland*, 156 Ohio App.3d 368, 2004-Ohio-994, 806 N.E.2d 170, ¶ 16 (8th Dist.) (holding that firefighters' union lacked taxpayer standing to compel back pay and wage differentiation between different ranks of officers because the allegation of a public benefit was a pretext for seeking a private benefit); *Cincinnati ex rel. Radford v. Cincinnati*, 1st Dist. No. C-030749, 2004-Ohio-3501, 2004 WL 1486072, ¶ 12–13 (holding that retirement-system trustees lacked taxpayer standing because their goal was not to enforce a public right but was merely to benefit the retirement system and its members); *Home Builders Assn. of Dayton & Miami Valley v. Lebanon*, 167 Ohio App.3d 247, 2006-Ohio-595, 854 N.E.2d 1097, ¶ 54 (12th Dist.) (holding that homebuilders lacked standing in a taxpayer action seeking a declaration of unconstitutionality of a city ordinance requiring telecommunications connection fees, because the action was primarily to enforce the homebuilders' private interests, not a public right).

of courts in other jurisdictions;" (2) "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases;" (3) "in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why, a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers;" and (4) "[t]he courts may be safely trusted to prevent the abuse of their process in such cases."²⁷ Appellees call upon this Court to not only abandon these clear legal principles, but further, to abandon this trust in Ohio Courts. However, judicial review of the constitutionality of the General Assembly's actions exists for a reason, and "the courts may be trusted to prevent abuse."²⁸

Moreover, Appellees ignore that this Court has recently and frequently, within the context of its jurisdictional mootness jurisprudence, rejected the notion that each plaintiff maintain an individualized personal stake for constitutional matters of public importance to be decided. In *Franchise Developers, Inc. v. City of Cincinnati*," this Court explained that "[a]lthough a case may be moot with respect to one of the litigants, this court may hear the appeal where there remains a debatable constitutional question to resolve, or where the matter appealed is one of great public or general interest."²⁹ The Court added "[u]pon a careful review of the entire record, we believe that although the instant matter is technically moot with respect to the plaintiffs, there still remains a *debatable constitutional question for this court to resolve*," and "[i]n addition, we believe that the cause sub judice involves matters of great public interest, thereby vesting this court with jurisdiction to entertain this appeal, even though the controversy is moot with respect to the

²⁷ *Pierce v. Hagans* 79 Ohio St. 9, 86 N.E. 519 (1908).

²⁸ Id.

²⁹ *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, paragraph one of the syllabus.

plaintiffs.³⁰ In other words, important constitutional questions should be decided even in the absence of an individualized personal stake for the non-governmental litigant. This adjudication of matters of constitutional importance in such circumstances was reaffirmed in 2002 and 2005.³¹ Also of note, this is an example of another significant departure - - to accommodate enforcement of the Ohio Constitution - - from *federal* standing precedent, and further undermines Appellees' prediction of judicial Armageddon.

Finally, these precedents and principles demonstrate that *Sheward*, at least as to public interest standing, was not some activist aberration. *Sheward* simply confirmed public interest citizen-taxpayer standing and the need for adjudication of important constitutional claims, and further made it available through original writ to the Ohio Supreme Court. Even without reference to *Sheward*, ProgressOhio would maintain standing to challenge the constitutionality of the JobsOhio arrangement.

Thus, while Appellees assert that dispensing with the individualized "direct injury" or "personal stake" requirements for equitable public interest actions to enforce the Ohio Constitution would be unprecedented and would yield judicial Armageddon, they ignore that this Court has already fashioned legal principles consistent with doing so. Confirming Standing for ProgressOhio here would simply reaffirm these principles in a sphere sorely in need of clarification: actions against the state to enforce structural restraints on government. Accordingly, this Court should reject Appellees' radical proposals, and confirm ProgressOhio's standing to challenge the JobsOhio arrangement here.

D. This Court's precedents do nothing to overtly limit citizen-taxpayer standing for equitable constitutional relief to mandamus actions, much less mandamus actions in the Ohio Supreme Court.

Despite Appellees' objections that ProgressOhio was required to bring an original action in mandamus in this Court to maintain standing to challenge JobsOhio, this Court is not restricted from

³⁰ Id., citing See *Wallace v. University Hospitals of Cleveland* (1961), 171 Ohio St. 487. *In re Popp* (1973), 35 Ohio St.2d 142, and *State, ex rel. Rudes, v. Rofkar* (1984), 15 Ohio St.3d 69.

³¹ *State ex rel. White v. Kilbane Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, ¶ 16, quoting *Franchise Developers, Inc. v. Cincinnati* (1987), 30 Ohio St.3d 28, paragraph one of the syllabus.

conferring standing on ProgressOhio simply because (1) this case was not brought in the Ohio Supreme Court; or because (2) this case was not brought in mandamus.

i. Declaratory Relief is a proper remedy.

An action for declaratory and injunctive relief is an appropriate method of determining the constitutionality of state statutes, such as those composing the JobsOhio arrangement. And not only is mandamus unavailable, but requiring mandamus would impermissibly place form over substance. Specifically, the State objects that "[i]n this case, [ProgressOhio] is using the wrong form of lawsuit - a declaratory judgment in a common pleas court - to proceed as 'public right' relators;" and "ProgressOhio has never even attempted a mandamus case - - whether the first time or now,"³² "[w]hile the State believes such an attempt would be unsuccessful, the point here is that they did not even try. This Court should not bend or eliminate settled standing rules to accommodate the approach this plaintiff has taken."³³ Appellees are grossly mistaken that mandamus is the proper form of relief here.

First, availability of declaratory and injunctive relief renders mandamus unavailable in this case. In the second episode of this ongoing dispute, *State ex rel. JobsOhio v. Goodman*, this Court determined that "a review of the complaint—as well as Goodman's motion for judgment on the pleadings—indicates that *the real object sought is a declaratory judgment.*"³⁴ And "[i]f the allegations of a mandamus complaint indicate that the real object sought is a declaratory judgment, the complaint does not state a viable claim in mandamus."³⁵ Thus, *this Court has already concluded* that a constitutional challenge to the JobsOhio

³² p. 27.

³³ p. 27.

³⁴ *State ex rel. JobsOhio v. Goodman* 133 Ohio St.3d 297, 978 N.E.2d 153, at 156 (2012); *ProgressOhio.org, Inc. v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶ 2, citing *State ex rel. Ministerial Day Care Assn. v. Zelman*, 100 Ohio St.3d 347, 2003-Ohio-6447, 800 N.E.2d 21, ¶ 22 ("neither this court nor the court of appeals has original jurisdiction over claims for declaratory judgment").

³⁵ *State ex rel. JobsOhio*, supra, citing *State ex rel. Miller v. Warren Cty. Bd. of Elections*, 130 Ohio St.3d 24, 2011-Ohio-4623, 955 N.E.2d 379, ¶ 21.

arrangement - - and one brought to mirror the constitutional claims ProgressOhio and theretofore lodged -- is an action for declaratory and injunctive relief, rather than an action in mandamus."³⁶

Moreover, "mandamus is not available if the relator has an adequate remedy in the ordinary course of law."³⁷ In *State ex rel. JobsOhio v. Goodman*, this Court specifically found that "JobsOhio has an adequate remedy by way of a declaratory-judgment action in common pleas court to raise its claim that H.B. 1 and 153 are constitutional." Quite obviously, the Court has already concluded that the proper form of action to address the constitutionality of JobsOhio, by JobsOhio and *a fortiori* by ProgressOhio, is declaratory and injunctive relief, rather than mandamus. Declaratory judgment is available to challenge the constitutionality of JobsOhio. And because this is so, there is no *lack* of an "adequate remedy." This renders mandamus not only inappropriate, but actually *unavailable*. Put another way, to concur with Appellees' contention that mandamus is the proper form of action here, this Court would have to find that declaratory and injunctive relief is *unavailable*, despite holding just months ago that it *is available*.

Further, declaratory and injunctive relief actions to enforce Article VIII are often brought and adjudicated in Ohio's courts of common pleas. This Court, Ohio's intermediate appellate courts, and even Appellees' own briefs, frequently rely upon *Grendell v. Ohio Env'tl. Prot. Agency*.³⁸ That case, like this one, featured no mandamus claim, but instead was a claim for declaratory and injunctive relief brought by State Senator Tim Grendell in his capacity as a taxpayer.³⁹ There, the Court of Appeals for the Ninth District, in a decision authored by now-Speaker of the House Batchelder, who abstained from signing on to an amicus brief for Appellees in this case, explained that "[t]he trial court found that the plaintiffs cannot show that they suffered an individual injury different from an injury that would have been suffered by the

³⁶ *State ex rel. JobsOhio*, supra. ("In assessing the true nature of a mandamus claim, we examine the complaint. Although JobsOhio's complaint is couched in terms of compelling ODC Director Goodman to comply with his affirmative duty under R.C. 4313.02(C)(2) to execute the franchise-and-transfer agreement, it actually seeks an expedited ruling from this court declaring H.B. 1 and 153 constitutional, so as to preclude any further challenges.")

³⁷ *State ex rel. Nickleson v. Mayberry*, 131 Ohio St.3d 416, 2012-Ohio-1300 ¶ 2; R.C. 2731.05.

³⁸ 146 Ohio App. 3d 1, 14-15 (2001).

³⁹ 146 Ohio App. 3d 1, 14-15, 764 N.E.2d 1067, 1078 (2001)

public in general. The trial court, however, relied upon *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* to find that the issues sought to be litigated are 'of such a high order of public concern as to justify allowing [the] action as a public action."⁴⁰ Specifically, the Trial Court found that "since the public actions is a valid means to vindicate the public interest, it is the opinion of this Court that Plaintiff does have standing."⁴¹ The Court, over the defendants' objections, then adjudicated the merits of the constitutional claim, thus implicitly affirming Grendell's taxpayer standing under the Declaratory Judgment Act, at least as to efforts to enforce structural limits on state government through Article VIII.

Moreover, the Appellees argument that ProgressOhio may not maintain standing simply because it has brought a declaratory judgment action is - - at least in contexts such as this - - the ultimate placement of form over substance. This Court has, many times, declared "we will not elevate form over substance."⁴² And indeed, "[i]t is a familiar maxim of equity that equity regards substance, not form."⁴³ To that end, "[t]his court has utilized its equitable powers when appropriate," and "[A] court's equitable powers may be invoked to provide the flexibility necessary to moderate unjust results."⁴⁴

The distinction between mandamus action and a disguised declaratory judgment action may be critical when this Court is policing the constitutional boundaries of its original jurisdiction. However, it is a distinction without a difference when cases are brought in courts of common pleas to challenge the constitutionality of a state statute. Ohio's declaratory judgment statute, R.C. 2721.03(A), provides that "any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, *

* * may have determined any question of construction or validity arising under the instrument, constitutional provision, statute, rule, ordinance, resolution, contract, or franchise and obtain a declaration

⁴⁰ *Grendell v. Ohio Env'tl. Prot. Agency*, 146 Ohio App. 3d 1, 14-15, 764 N.E.2d 1067, 1078 (2001).

⁴¹ *Grendell v. Ohio Env'tl. Prot. Agency*, Summit County Case No. 1998-11-4502 ("Final Order").

⁴² *Hollon v. Clary*, 104 Ohio St.3d 526, 2004 -Ohio- 6772.

⁴³ *N. Olmsted City School Dist. Bd. of Edn. v. Cleveland Mun. School Dist. Bd. of Edn.* 108 Ohio St.3d 479, 2006 -Ohio- 1504 (Stratton, dissenting), citing *Stern v. Cuyahoga Cty. Bd. of Elections* (1968), 14 Ohio St.2d 175, 188, 43 O.O.2d 286, 237 N.E.2d 313.

⁴⁴ See *State v. West* (1993), 66 Ohio St.3d 508, 512, 613 N.E.2d 622; *Barone v. Barone*, Geauga App. No. 2004-G-2575, 2005-Ohio-4479, 2005 WL 2077319, ¶ 17. Ohio,2006.

of rights, status, or other legal relations under it." According to R.C. 2721.13 of the Act, "the provisions of the declaratory judgment rules are remedial in nature and are to be liberally administered. Courts have wide latitude in deciding to entertain a declaratory action."⁴⁵

Meanwhile, R.C. 2731.01-.02 explain "Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station," and it "may be allowed by the supreme court, the court of appeals, or the court of common pleas." The "[a]pplication for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit."⁴⁶ In each case, the plaintiff or petitioner may seek the invalidation of a government action or arrangement; and the two forms of actions proceed through a civil case docket in identical fashion. The only practical difference in a matter such as this is that the "[a]pplication for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit." The absence from the Complaint of the prefix "*State ex rel.*" and a paragraph averring that the case is brought in the name of the state is hardly a basis for deciding the extent of citizen-taxpayer's standing to curtail unconstitutional state government policies.

ii. ProgressOhio was not required to bring an original action in the Ohio Supreme Court to maintain standing.

Appellees next assert that ProgressOhio could only have standing through bringing an original action in the Ohio Supreme Court - - labeling such standing as "*Sheward* standing." This assertion is wholly misguided.

First, to establish this principle, the State simply cherry-picks a quote from *Sheward*, and then places the emphasis on the subservient part of that quote.⁴⁷ It is true that in *Sheward* this Court indicated "[w]e hold that where the object of a mandamus action and/or prohibition is to procure the enforcement or

⁴⁵ *Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.* (1993), 74 Ohio Misc.2d 159, 660 N.E.2d 755.

⁴⁶ R.C. 2731.02-04.

⁴⁷ State's Brief, at p. 42.

protection of a public right, the relator need not show any legal or special individual interest."⁴⁸ However, contrary to Appellees' suggestion, the emphasis is rightly placed on "to procure the enforcement or protection of a public right," *not* on "where the object of a mandamus and/or prohibition action is to. . ." This latter clause merely identified the type of issue before the Court in *Sheward*. It does nothing to preclude or exclude other forms of action brought in lower courts to procure the enforcement or protection of a public right. Indeed the Court said nothing in *Sheward* or elsewhere to foreclose an understanding that "where the object of a declaratory and injunctive relief action is to procure enforcement or protection of a public right, the relator need not show any special individual interest." This Court has rarely had the opportunity to make such a statement, since most public right standing cases have originated in this Court (the JobsOhio legislation itself precluded that here). The State misconstrues the Court's silence as antagonism to lower courts' adjudication of public interest constitutional claims.

Second, when this Court or the Ohio Constitution limits actions to the Supreme Court only, *it is explicitly and clearly states this*. For instance, Section 1g, Article II provides "The Ohio Supreme Court shall have original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section." Neither the Ohio Constitution nor this Court has ever declared that only the Ohio Supreme Court shall have exclusive jurisdiction over citizen-taxpayer equitable actions to enjoin violations of the Ohio Constitution's structural limits on state government. The lack of constitutional provision of such exclusive jurisdiction counsel against this Court creating it here.

Third, the State quite disingenuously insists that standing is only available through an original action in *this* Court to challenge a state *that requires that any legal challenge be brought in the Court of Common Pleas!* How truly convenient for Appellees. R.C. 187.09(B) requires that an action be brought in the Franklin County Court of Common Pleas: it would be, at minimum, inequitable to strip ProgressOhio of standing for merely following the edicts of the statute's venue requirement.

⁴⁸ *Sheward*, supra., at 475.

Moreover, this argument amounts to a rather serious attack on the Ohio judiciary's independence. Were public interest standing only available through an original action in this Court, the Ohio General Assembly could simply, when passing legislation unlikely to implicate an immediate "personal stake" or "direct injury," require venue in the Franklin County Court of Common Pleas within 90 days. This would immunize the statute from constitutional challenge. Thus were the Court to adopt Appellees' arguments here, it would surrender its roles as a co-equal independent branch of government, and surrender judicial review of the constitutionality of potentially much state legislation.

However, this Court recently explained the importance of disallowing the legislature the power under to undermine the judiciary's constitutional review. In *State v. Bodyke*, this Court explained "[t]he essential principle underlying the policy of the division of powers of government into three departments is that * * * none of them ought to possess directly or indirectly an overruling influence over the others."⁴⁹ Further, "[t]he administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers."⁵⁰ And further yet, "[t]he judiciary has both the power and the solemn duty to determine the constitutionality and validity of acts by other branches of the government and to ensure that the boundaries between branches remain intact."⁵¹ Accordingly, "jurists have long understood that they must be wary of any usurpation of the powers conferred on the judiciary by constitutional mandate and any intrusion upon the courts' inherent powers."⁵² The Court "therefore must 'jealously guard the judicial power against encroachment from the other two branches of government and * * * conscientiously perform [its] constitutional duties and continue [its] most precious legacy.'"⁵³ Indeed, "the Madisonian vision of the separation of powers * * * was designed to

⁴⁹ *State v. Bodyke*, 126 Ohio St.3d 266, 933 N.E.2d 753, at 764, citing *State ex rel. Bryant v. Akron Metro. Park Dist. of Summit Cty.* (1929), 120 Ohio St. 464, 473, 166 N.E. 407.

⁵⁰ *Bodyke*, supra., citing *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, 20 O.O.3d 361, 423 N.E.2d 80, paragraph one of the syllabus.

⁵¹ *Bodyke*, supra., citing *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 462, 715 N.E.2d 1062.

⁵² *Bodyke*, supra., citing *Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 115.

⁵³ *Bodyke*, supra., citing *Sheward* at 467.

protect against [a] case [where] 'the fundamental principles of a free constitution, are subverted,'"⁵⁴ And, "[t]he General Assembly cannot require the courts 'to treat as valid laws those which are unconstitutional. If this could be permitted, the whole power of the government would at once become absorbed and taken into itself by the Legislature."⁵⁵ This Court should not now divest itself of the same judicial review that the Ohio Constitution prohibits the legislature from divesting.

Finally, Appellees are mistaken to contend that *Sheward* "offers a limiting principle" as to "the type of action and relief at issue," and that otherwise "virtually anyone can sue, and seek any relief."⁵⁶ There are only certain types of statutes and constitutional provisions under which the need for standing without an individualized personal stake or direct injury arise, so the standing here would be self-limiting. Further, Appellees' prescription would flood *this* court with original actions. It is wiser to permit Ohio's 88 courts of common pleas to field 12(b)(6) motions to dismiss for failures to state claims upon which relief could be granted, as is done now.

For the judiciary to serve its proper constitutional function in this capacity, the legislature cannot subvert jurisdiction to insulate its statutes from constitutional review, Ohioans must have standing to enforce the state Constitution in Ohio Courts, ProgressOhio must have standing *here*.

CONCLUSION

For the foregoing reasons, the Appellate Court must be reversed, and these Appellants must be held to maintain standing to raise the substantive constitutional claims articulated in their Complaint.

⁵⁴ *Bodyke*, supra., citing *Mistretta*, 488 U.S. at 382, quoting *Immigration & Naturalization Serv. v. Chadha* (1983), 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317.

⁵⁵ *Bodyke*, supra., citing *Bartlett v. State* (1905), 73 Ohio St. 54, 58, 75 N.E. 939.

⁵⁶ State's Brief, at p. 39.

Respectfully submitted,

MICHAEL J. SKINDELL /
PER AUTHORITY

Michael J. Skindell (0039041)
55 Public Square, Suite 1055
Cleveland, Ohio 44113
Tel: (216) 621-0070
mskindell@aol.com

Plaintiff/Appellant, pro se
DENNIS E. MURRAY, JR. /
PER AUTHORITY

Dennis E. Murray, Jr. (0038509)
111 East Shoreline Drive
Sandusky, Ohio 44870
Tel: (419) 624-3126
dmj@murrayandmurray.com
Plaintiff/Appellant, pro se

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Reply Brief of Plaintiffs/Appellants Michael Skindell and Dennis Murray* was served upon the following parties on the 5th day of August, 2013.

Aneca E. Lasley (0072366)
SQUIRE SANDERS LLP
41 South High Street, Suite 2000
Columbus, Ohio 43215
Tel: (614) 365-2830
aneca.lasley@squiresanders.com
Counsel of Record

Douglas R. Cole (0070665)
ORGAN COLE + STOCK
1335 Dublin Road
Columbus, Ohio 43215
Tel: (614) 481-0902
drcole@ocslawfirm.com
Counsel for Defendant/Appellee JobsOhio

R. Michael DeWine (0009181)
Ohio Attorney General
Michael Hendershot (0081842)
Chief Deputy Solicitor
Counsel of Record

Stephen P. Carney (0063460)
Pearl M. Chin (0078810)

Alexandra Schimmer
OHIO ATTORNEY GENERAL'S OFFICE
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: (614) 995-2273
alexandra.schimmer@ohioattorneygeneral.gov
stephen.carney@ohioattorneygeneral.gov
pearl.chin@ohioattorneygeneral.gov
Counsel for Defendant/Appellee
Ohio Governor John R. Kasich

Maurice A. Thompson (0078548)
1851 CENTER FOR CONSTITUTIONAL LAW
208 E. State Street
Columbus, Ohio 43215
Tel: (614) 340-9817
Fax: (614) 365-9564
mthompson@ohioconstitution.org
Counsel of Record

Donald J. McTigue (0022849)
Mark A. McGinnis (0076275)
J. Corey Colombo (0072398)
MCTIGUE & MCGINNIS LLC
545 East Town Street
Columbus, Ohio 43215
Tel: (614) 263-7000
Fax: (614) 263-7078
dmctigue@electionlawgroup.com
mmcginnis@electionlawgroup.com
ccolombo@electionlawgroup.com

Co-Counsel for Plaintiff-Appellant
ProgressOhio.org, Inc.

/s/ Maurice A. Thompson for Michael Skindell and Dennis Murray