ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Plaintiffs-Appellants,

vs.

JOBSOHIO, *et al.*,

Defendants-Appellees.

Case No. 2012-1272

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

Ct. of Appeals No. 11-AP-1136

Reply Brief of Plaintiff-Appellant ProgressOhio.org Inc.

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<u>Proposition of Law</u>: The Plaintiff-Appellants maintain standing to bring this action.

"We must give such a construction to the constitution, as will preserve its great leading objects intact."

- Atkinson et al. v. The M. & C. R.R. Co., as Reorganized (1864), 15 Ohio St. 21.

Appellants contentions do nothing to alter the reality that ProgressOhio is and must be entitled to standing to enforce Articles VIII and XIII and other structural constitutional limits against the JobsOhio legislation, where that legislation fails to create an acute and individualized direct injury or personal stake that could otherwise give rise to standing. First, federal standing is not governing, and the rulings of other state supreme courts with similar constitutional provisions more persuasive. Second, ProgressOhio has not waived its taxpayer or declaratory judgment standing. Third, ProgressOhio maintains citizen-taxpayer public interest standing to posit the constitutional claims articulated in its Complaint. Fourth, Appellees inflammatory, exaggerated, hyperbolic, and misplaced attacks on ProgressOhio's standing demonstrate a quarrel with judicial review, rather than legitimate objections. And fifth, Appellees are unable to demonstrate that any Ohioan maintains an acute and individualized personal stake that could give rise to a claim under *their* proposed standing requirements. For each of these reasons, ProgressOhio can and must be found to maintain standing to challenge the JobsOhio arrangement.

A. Federal standing principles do not control, and other state's principles are more persuasive.

Appellees attack ProgressOhio's observation that this Court is not bound by federal standing precedent, and indeed should and must abandon it here. The State argues "[f]or decades - from *Dallman* in the 1970s, through *Barclays* in the 1990s, to *Schwartzwald* last year - this Court has done what ProgressOhio says the lower courts are improperly doing."[1] But this misses the point.

First, in none of the cases cited by Appellees was the distinction between the federal and Ohio Constitution the focus of the Court's analysis - - in this case, as opposed to those, that

[1] State's Merit Brief, at p. 22.

distinction runs to the heart of this case: ProgressOhio seeks to enforce the Ohio Constitution's unique structural limits on government - - limits that have no federal counterpart. Thus the federally-fashioned tools, fashioned to address federal constitutional issues under the limits of Article III, are of limited, not supreme, use. This does not mean that past cases were erroneous in *drawing from* federal standing precedent - - there may well be circumstances where such reference is appropriate. This simply is not one of those cases.

Second, ProgressOhio does not "bemoan" the "comparing of analogous federal law."[2] This is a strawman: ProgressOhio simply reiterates what this Court itself has already stated. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* this Court acknowledged this critical distinction from the federal constitution, and Ohio's obligation to permit broader standing:

> In the federal judicial system, where the requirement for injury is grounded in the constitutional requirements of Section 2, Article III of the United States Constitution, the necessity of showing injury in fact prevails irrespective of whether the complaining party seeks to enforce a private or public right. * * * However, the federal decisions in this area are not binding upon this court, and we are free to dispense with the requirement for injury where the public interest so demands. Unlike 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.[3]

This is a case "where the public interest so demands" a "dispensing with the requirement for injury," at least as that term is traditionally understood. This is because Articles VIII and XIII have no counterparts in the federal constitution, so federal courts have never needed to fashion standing rules

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[2] State's Brief, at p. 23.

[3] *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.

to address such issues. As scholars correctly observe, *"The Ohio Constitution departs significantly from the federal constitution."*[4]

However, nearly every state constitution has a counterpart to the aforementioned Articles. Consequently, these states' constitutions have more in common with the Ohio Constitution than does the federal constitution.[5] Consequently, taxpayer and public interest standing doctrines that developed to accommodate those states' more analogous constitutions (thoroughly documented in ProgressOhio's Merit Brief) typically allow plaintiffs like ProgressOhio to maintain standing in matters such as this.[6] This precedent is well-reasoned and more applicable, and this Court should draw upon it to confer standing on ProgressOhio here.

B. ProgressOhio has waived neither taxpayer nor declaratory judgment standing.

Appellees claim "ProgressOhio has waived any taxpayer-standing claim," because "it did not pursue it in the trial court or the appeals court," and it "did not raise that issue in its jurisdictional memorandum to this Court."[7] They contend the same with respect to ProgressOhio's claim of standing under the Declaratory Judgment Act. When reviewing these contention, this Court must be mindful that whether a party has established standing to bring an action before the court is a question

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[4] *The Ohio Constitution: An Introduction.* G Alan Tarr, Center for State Constitutional Studies at Rutgers University School of Law, available at http://camlaw.rutgers.edu/statecon/publications/ohio.pdf

[5] See *State Constitutional Prohibitions on Special Laws*, available a http://law.wayne.edu/state_constitutional_prohibitions_on_special_laws.pdf; *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, by Richard Briffault, available at http://www2.law.columbia.edu/faculty_franke/Thursday%20Lunch/Briffault%20Paper.pdf; David Gold, *Public Aid to Private Enterprise Under the Ohio Constitution*, 16 U.TOL.L.REV. 405, 406–07 (1985).

[6] See ProgressOhio's Merit Brief, pp. 20-25, 30-35.

[7] Id., at p. 29.

of law, which this Court reviews *de novo*.[8] Under this review, each of Appellees' contentions proves to be hollow.

First and foremost, the scope of this Court's review is governed by the Proposition of Law it accepts for review.[9] Here, to raise *all* bases upon which they it maintains standing, ProgressOhio posited the Proposition of Law "The Plaintiffs maintain standing to bring this action." This Court could have rejected this Proposition as too broad; however its acceptance of this Proposition is acceptance of review of any basis by which ProgressOhio maintains standing to maintain this action. It is the Proposition of Law, and not Appellees' expectations, that govern the scope of review. And this is entirely appropriate - - if the trial court had jurisdiction, for any reason, this action should not have been dismissed.

Secondly, Appellees are disingenuous in asserting that the issue has been "smuggled in," and that they have not had an opportunity to respond.[10] *Amici* 1851 Center for Constitutional Law explicitly emphasized the issue of taxpayer standing in its obviously-influential *Amicus Brief in Support of Jurisdiction on Standing Only*. And Appellees spent several pages explicitly *responding* to these arguments in their memoranda opposing jurisdiction. Further, Appellees were granted 60 days and a combined 100 pages to brief the issue, and they have again done so.

Third, ProgressOhio's' Complaint sufficiently alleges taxpayer standing, Appellees' have already briefed the issue of taxpayer standing, and the Trial Court explicitly ruled on the issue. However, the Trial Court concluded that (1) "'public right' standing is distinct from taxpayer standing;" (2) "the Court finds no individual harm that could form the basis of taxpayer standing;" (3)

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[8] *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 23.

[9] *Supportive Solutions, LLC v. Electronic Classroom of Tomorrow*, --- N.E.2d ----, 2013 WL 2631528, 2013 -Ohio- 2410, *Stammco, L.L.C. v. United Tel. Co. of Ohio*, --- N.E.2d ----, 2013 WL 3748432 (2013); *Westfield Ins. Co. v. Hunter*, 128 Ohio St.3d 540, 948 N.E.2d 931 (2011).

[10] State's Brief, at p. 30.

"taxpayer standing still requires some form of individual or particularized harm separate from every other taxpayer;" and (4) public interest standing is not appropriate in disputes regarding "how funds are allocated."[11]

Fourth, ProgressOhio must be permitted to brief new developments in the law that support its standing. This Court decided both *Moore v. Middletown,* addressing declaratory judgment standing, and *State ex rel. Teamsters Local Union 436 v. Cuyahoga Cty. Bd. of Commrs,* on taxpayer standing, subsequent to ProgressOhio's briefing of the issues before the Tenth District. As documented in Appellants' Merit and Reply Briefs, each case bares favorably on ProgressOhio's standing.

Finally, "citizen" and "taxpayer" public interest standing claims are identical whether labeled "taxpayer standing" or not. Appellees attempt to draw an artificial line between taxpayer and public right cases, as though there were some relevant distinction. However, no such line exists, at least in this context. If an pivotal change in this Court's standing precedent were to be made, it should be to clarify the artificial distinction between "taxpayers" and "citizens" who bring equitable actions, i.e. actions not for money damages, to enforce a public right against government.

Indeed this Court has continuously reaffirmed that the two are one in the same. In *State ex rel. Nimon v. Village of Springdale,* this Court explained that "the word, 'taxpayer,' is employed in the statutes neither assists relators, nor defeats them * * *As resident freeholders and electors, they are necessarily taxpayers. Even if they were permitted to abjure their capacity as resident freeholders which they insist upon doing, it is difficult to see how they can escape the condition precedent in Section 733.59, Revised Code. An 'elector' necessarily is a domiciliary and it would be an extreme situation wherein such person might not in fact pay any tax, directly or indirectly, to the political subdivision of his domicile. <u>But the sounder view is that the word, 'taxpayer,' is to be construed generally, not literally. It includes, in fact, freeholders and tenants, both resident and</u>

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[11] Trial Court Order, at pp. 22-24, 27.

nonresident, citizens and electors. It also includes a nonresident and nonfreeholder municipal income taxpayer."[12] Accordingly, "taxpayer" and "public right" or "public interest" standing are one in the same - - equitable actions brought to enjoin unconstitutional or otherwise unlawful government activity.

Consequently, this Court should grant ProgressOhio standing as a taxpayer. It cannot be said that ProgressOhio has waived one type of standing, but not the other, or *maintains* one type, but not the other. Further, the sufficient breadth of the allegations in ProgressOhio's Complaint, concomitant with new developments in this Court's standing jurisprudence and the Proposition of Law accepted for review here demonstrate that ProgressOhio has waived neither taxpayer standing nor declaratory judgment bases for standing and jurisdiction.

C. ProgressOhio maintains public interest citizen-taxpayer standing despite Appellees' objections.

Appellees allege that ProgressOhio may not maintain taxpayer standing because (1) ProgressOhio has not, and doesn't even claim to have, paid into a "special fund;" (2) "[t]axpayers who have the same objection as virtually every other citizen cannot sue on that basis. Only when special circumstances are present can the claim proceed;" (3) "ProgressOhio does not even clearly identify the spending it objects to, as it attacks more broadly the entire existence and operation of JobsOhio;" and "the Court's special funding standing is limited to cases seeking to restrain unlawful - and imminent - spending of public money;" and (4) JobsOhio has refunded the public funds,

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[12] *State ex rel. Nimon v. Village of Springdale* (Ohio 1966) 6 Ohio St.2d 1, 215 N.E.2d 592, 35 O.O.2d 1, citing *State ex rel. Miller v. Price, City Aud.*, 3 Ohio St.2d 177, 209 N.E.2d 578. See also *Cleveland ex rel. O'Malley v. White*, 148 Ohio App.3d 564, 2002-Ohio-3633 (The word "taxpayer," for purposes of instituting a taxpayer suit on behalf of a municipal corporation, contemplates and includes any person who, in a private capacity as a citizen, elector, freeholder or taxpayer, volunteers to enforce a right of action on behalf of and for the benefit of the public, and any such person is subject to the conditions imposed by that section, unless waived); *Mihocka v. Ziegler* (Ohio Com.Pl. 1971) 28 Ohio Misc. 105 ("Taxpayer" for purposes of RC 733.59 contemplates and includes any person who, in a private capacity as citizen, elector, freeholder, or taxpayer, volunteers to enforce a right of action on behalf and for benefit of the public.)

therefore supposedly "mooting any challenge that might have existed on that score."[13] Each of these attacks is mistaken, and ProgressOhio should be held to maintain citizen-taxpayer standing to vindicate the public interest and enforce Articles VIII and XIII of the Ohio Constitution.

First, Appellees are wrong to assert that discrete spending must be challenged to maintain taxpayer standing. R.C. 733.56 through R.C. 733.59, governing "Taxpayer Suits," frequently used by taxpayers in common pleas courts, is unconstitutional, and that R.C. 733.56 permits the filing of a civil complaint "to restrain the misapplication of funds of the municipal corporation," but also "the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance governing it." And such standing exists even when not conferred by statute. Recently, in *State ex rel. Cater v. N. Olmsted*,, the Court stated "we have made clear that R.C. 733.56 through 733.61 merely codify the public-right doctrine," which "exists independent of any statute authorizing invocation of the judicial process."[14] Thus, it is well within the scope of a routine taxpayer action to challenge not just the misapplication of public funds or property (which ProgressOhio clearly does here), but further any agreement or arrangement that violates the Ohio Constitution.

Second, this Court's "special fund" jurisprudence is predicated on *the actual existence of an actual special fund.* Were it otherwise, government programs could be insulated from review by simply using general funds, and abstaining from creating a special fund. ProgressOhio has as much of a stake in enjoining JobsOhio as any Ohioan could maintain - - and this is sufficient.

Third, whether JobsOhio has refunded public funds, and not partaken in a zero interest rate loan, are weighty factual issues that could and perhaps will be the subject of some dispute at a later date. However, this Court's duty is to construe the spending allegations in ProgressOhio's Complaint

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13 State's Brief, pp. 31-32.

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

in a manner most favorable to ProgessOhio's standing. Moreover, this Court's mootness doctrine favors adjudication of constitutional issues even where there *is* mootness.

Fourth, ProgressOhio thoroughly refutes the State's argument against "generalized grievances" in its Merit Brief - - in this context, where "generalized grievances" are the only type of grievances to be maintained, standing must be permitted to ensure the enforceability of Articles VIII and XIII. Consequently, for these reasons and the reasons more elaborately identified in ProgressOhio's Merit Brief, this Court should find that ProgressOhio maintains citizen-taxpayer standing and/or separate public interest standing to enforce the structural limits of the Ohio Constitution as against the JobsOhio arrangement.

D. Appellees fail to distinguish persuasive precedent from other states.

Next, JobsOhio's attempt to undermine the value of the on-point precedent ProgressOhio has supplied in its Merit Brief from other states' high courts falls flat. First, virtually every state in the nation, including those cited by JobsOhio, recognize the importance of nontraditional standing in narrow circumstances, where it is necessary to enforce the state's constitution. And each of JobsOhio's attempts to undermine other states' precedents that support standing here is without force.

For instance, Alabama's Supreme Court has had no trouble for the past eighty years finding standing to allow a taxpayer to challenge an unlawful state expenditure, observing "[t]he right of a taxpayer to challenge the unlawful disbursement of state funds likewise is unquestioned."[15] As to Texas, JobsOhio cites *Andrade v. Venable*, but perhaps it should have read the *entire* case, which goes beyond JobsOhio's citation to state "[h]owever, under Texas law, a narrow, judicially-created exception exists: a taxpayer has standing to sue to enjoin the illegal expenditure of public funds, and

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[15] *Jordan v. Siegelman, 949 So. 2d 887, 890 (Ala. 2006), citing Goode v. Tyler*, 237 Ala. 106, 186 So. 129 (1939) ('... this Court is committed to the doctrine that a taxpayer may maintain a suit in equity to restrain a state officer in the unlawful disbursement of state funds.'); Hall v. Blan, 227 Ala. 64, 148 So. 601 (1933); Turnipseed v. Blan, 226 Ala. 549, 148 So. 116 (1933).

need not demonstrate a particularized injury."[16] This narrow exception "provides important protection to the public from the illegal expenditure of public funds without hampering too severely the workings of the government."[17]

The Connecticut Supreme Court has recognized it is the *exception* to the general rule cited by JobsOhio, observing "[w]e recognize that an overwhelming majority of jurisdictions confer standing on taxpayers to challenge the misappropriation of municipal funds."[18] That Court even explained the justification: "The primary basis for taxpayer suits arises from the need to ensure that government officials conform to the law. It rests upon the indispensable need to keep public corporations, their officers, agents and servants strictly within the limits of their obligations and faithful to the service of the citizens and taxpayers * * * public policy demand[s] a system of checks and balances whereby taxpayers can hold public officials accountable for their acts."[19]

As to Delaware, JobsOhio cites *Reeder v. Wagner*, but again, JobsOhio's contention that ProgressOhio has "ignored" Delaware's rejection of unfettered standing is a mischaracterization of ProgressOhio's argument supporting standing in the narrow circumstance presented here. ProgressOhio does not assert that nontraditional standing is appropriate *in every case challenging the constitutional basis of every statute*. Rather, as the Delaware Supreme Court has recognized for decades, taxpayer standing is important because "[a] taxpayer has a direct interest in the proper use and allocation of tax receipts."[20]

As to Idaho, JobsOhio cites *Gallagher v. State*. Once again, while JobsOhio has correctly cited the *general rule* regarding standing, it has failed to grasp that an important, (and limited)

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16 *Andrade v. Venable*, 372 S.W.3d 134, 137 (Tex. 2012).
17 *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555-56 (Tex. 2000).
18 *W. Farms Mall, LLC v. Town of W. Hartford*, 279 Conn. 1, 19, 901 A.2d 649, 660 (2006).
19 Id.
20 *City of Wilmington v. Lord*, 378 A.2d 635, 637-38 (Del. 1977).

exception is made for challenges grounded in the unconstitutional misuse of government funds.[21] In Iowa, JobsOhio cites *Godfrey v. State*. JobsOhio has accurately stated the *general rule* for standing, which requires particularized injury, but has once again failed to notice that important exceptions are made.[22] For Maryland, JobsOhio cites *Evans v. State*. But once more JobsOhio has overplayed its hand by trying to mischaracterize a small exception to traditional standing to be a complete erasure of it.[23] In Massachusetts, JobsOhio cites *Tax Equity Alliance for Mass. v. Comm'r of Revenue*, but "public right doctrine" is just one form of nontraditional standing – and other forms of nontraditional standing do exist in Massachusetts and would apply here.[24]

As to Michigan, JobsOhio cites *Detroit Fire Fighters Assn. v. City of Detroit*, and while it is true that the Michigan courts have not allowed nontraditional standing in some cases, it is also true that Michigan's state constitution specifically grants it in challenges similar to what ProgressOhio posits here. For Tennessee, JobsOhio cites *City of Chattanooga v. Davis*, but just three years ago the Tennessee Supreme Court acknowledged the general standing requirements, and then found that: "[t]here are, however, exceptions to this general rule, and our courts typically confer standing when a

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21 In *Koch v. Canyon County, 145 Idaho 158, 160, 177 P.3d 372, 374 (2008)*

22 For instance, in *State ex rel. Turner v. Iowa State Highway Comm.*, 186 N.W.2d 141 (1971), the court concluded that the Attorney General of Iowa lacked standing to enforce certain provisions of the state constitution, but that "had the intervenors brought this action as original party plaintiffs in their capacities as citizens and taxpayers to restrain allegedly illegal use of funds, they would have stated a proper cause of action."

23 Like the Ohio Supreme Court in *Sheward*, the Maryland Supreme Court has made a limited yet important exception to traditional standing. *Baltimore County v. Churchill, Ltd.*, 271 Md. 1, 5, 313 A.2d 829, 832 (1974)("[W]here the issues presented are of great public interest and concern, the interest necessary to sustain standing need only be slight.")

24 For instance, citizen-standing and standing for qualified voters are both available to challenge the constitutionality of an enacted law. *Massachusetts Teachers Ass'n v. Sec'y of Com.*, 384 Mass. 209, 214, 424 N.E.2d 469, 473-74 (1981)("The individual plaintiffs who are citizens and qualified voters have standing to argue that Proposition 2 ½ was not constitutionally adopted." See also *Cohen v. Attorney Gen.*, 354 Mass. 384, 387, 237 N.E.2d 657 (1968) (qualified voters); *Sears v. Treasurer & Receiver Gen.*, 327 Mass. 310, 314-315, 98 N.E.2d 621 (1951) (citizens).

taxpayer (1) alleges a "specific illegality in the expenditure of public funds" and (2) has made a prior demand on the governmental entity asking it to correct the alleged illegality.[25]

Further, JobsOhio states that even in states where public rights standing does exist, it does not translate here. But the Indiana Supreme Court does not limit the invocation of public right doctrine "only in the context of mandamus" as JobsOhio contends. Likewise, Arizona does not limit such standing to "original actions," as ProgressOhio contends.[26] Consequently, the great weight of authority amongst state supreme courts - - whether as to public right or taxpayer standing or the two in harmony - - favors a finding of standing for ProgressOhio here.

E. Appellees' policy-based attacks on judicial review over claims like this are hyperbolic, exaggerated, and without basis.

Appellees each engage in a series of calculated but careless slanders of ProgressOhio's standing claim, endeavoring to paint that claim as inherently unreasonable. These slanders are shallow and without substance. Appellees indicate "ProgressOhio wants the Court to rewrite the law to eliminate traditional standing requirements;" ProgressOhio advocates "throwing out standing requirements and allowing every citizen or activist to clog Ohio's courts with policy disputes;" "ProgressOhio mis-describes the jurisprudence as a blank slate for the Court to draw on," and "ignores existing law in several respects;" ProgressOhio's arguments are "for eliminating standing," and "there should be no doubt that ProgressOhio indeed seeks to eliminate, not merely loosen, the

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[25] *Fannon v. City of LaFollette*, 329 S.W.3d 418, 427-28 (Tenn. 2010), citing *Cobb v. Shelby Cnty. Bd. of Comm'rs*, 771 S.W.2d 124, 126 (Tenn.1989).

[26] *Rios v. Simington*, 172 Ariz. 3 (1992). In Rios, the Court stated, "Because this case involves a dispute at the highest levels of state government, the issues are substantial and present matters of first impression in this state, and a prompt determination is required, we accepted jurisdiction following oral argument." But Rios did not hold that public rights standing is *only* appropriate in original actions involving extraordinary writs before the Supreme Court.

requirement;" "ProgressOhio's view would mean that. . . any citizen can challenge any spending, period;" and "hot topic is not a proxy for standing."[27]

Appellees ratchet up this parade of alleged horribles even further, suggesting ProgressOhio's argument amounts to "we have standing because we should because it would be a good idea to have more lawsuits like this;" "is tantamount to eliminating all standing requirements, at least for any government program that involves a dollar of spending;" ProgressOhio seeks a "revolution" here, that is "exponentially broader than any expanded Sheward standing could be;" and "the proliferation of lawsuits will be overwhelming. And each brings with it the danger of even preliminary injunctions while the trial court proceeds, gumming up public business for year."[28] Each of these attacks is a mis-statement of ProgressOhio's case, and a naked and hollow appeal to the canard of "judicial activism." And none should intimidate the court into surrendering its independence.

First, it is patently false to contend that ProgressOhio seeks to "eliminate all standing requirements," and the Court's conferral of standing here will not have that effect. ProgressOhio's claim for standing arises in response to a narrow and unique, but critically important subset of cases -- those cases where (1) the Plaintiff states a claim for which relief could be granted (2) against the state; (3) for violation of sections Article VIII, Article XIII, the Single Subject Rule, the Uniformity Clause, the Special Privileges Clause, or some other structural, rather than individual-rights-based constitutional constraint on state government (there are not that many such restraints); and (4) no Ohioan could posit anything but a "generalized grievance" or non-individualized stake because the constitutional violations impairs or threatens to impair all Ohioans' entitlement to constitutional government, without particularly affecting any Ohioan in a unique and acute manner.

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27 State's Brief, at pp. 13, 20, 23, 24, and 45, respectively.

28 State's Brief, pp. 36-38.

This is hardly a "wide category" of cases. In fact, these cases are sufficiently infrequent that this Court has yet to have ever prohibited standing in this context in these past. Further, these are factors that place inherent limiting principles on the Court's conferral of standing in this case, and do nothing to "eliminate" or "throw out" standing in Ohio, or allow "any spending" to be challenged in a way that is inconsistent with Ohio's Constitution.

Secondly the assertion that cases like this will "clog Ohio's courts" is a policy argument - - and one with no basis in fact. Ohio already permits standing in cases exactly like this, against hundreds of Ohio city and county governments, pursuant to R.C. 733 and R.C. 319. Other states, without trouble, permit standing for plaintiffs like ProgressOhio in cases like this. And while there is a constitutional mandate for sufficient judicial review to enforce the Ohio Constitution against the General Assembly, there is no constitutional prohibition against what *could* be a *handful* of additional cases each year - - to the contrary, the possibility of several additional cases, to ensure thorough enforcement of the Ohio Constitution, was the expressed preference of those who ratified the 1851 Constitution. Finally, because constitutional cases, like any other civil case, can swiftly be dismissed if they are frivolous, they are unlikely to "clog" the courts.

Indeed, if this is truly nothing more than a "policy dispute," then Appellees should simply put their money where their mouth is, and quickly file Civ. R. 12(b)(6) motions to dismiss upon remand of this case. But in fact, it is Appellees who have "clogged" the courts in this case, simply moving for dismissal on standing grounds, and putting this case on a two-tiered track of review, when they could have simultaneously moved for dismissal on Civ. R. 12(b)(6). Obviously, when given the opportunity, Appellees demonstrated a lack of faith in their "this is merely a policy dispute" rhetoric.

For the same reasons, ProgressOhio's claim of standing here is anything but a "revolution" in Ohio's standing doctrine - - public interest, common law, and statutory standing already exist to challenge unconstitutional government conduct; and each exists where the plaintiff has no

individualized personal stake greater than other citizens or taxpayers. Moreover, as documented in ProgressOhio's Merit Brief, they are consistent with what other states have done.

Third, the Appellees' arguments on these fronts are simply a glamorized manner of contending that they don't trust Ohio judges to adjudicate constitutional claims. They lament the possibility of inconsistent decisions and improvident injunctions. They insist that the work of the legislature is too important to be interfered with by the co-equal judicial branch or even the people the legislature is employed to represent. To be sure, the Appellees' quarrel is with the concept of judicial review, not with the technicalities of ProgressOhio's standing.

However, in *State v. Bodyke*, this Court explained "[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."[29] 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."[30] 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.'"[31]

Indeed, "the Madisonian vision of the separation of powers * * * was designed to protect against [a] case [where] 'the fundamental principles of a free constitution, are subverted,'" and maintain vigilance against the "'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'"[32] This Court "must be wary that the legislature, in discharging

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

[30] *Bodyke,* supra., citing *Norwood,* 110 Ohio St.3d 353, 2006-Ohio-3799, at ¶ 115.

[31] *Bodyke*, supa., citing *Sheward* at 467.

[32] *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.

its own duties, does not accrete power and encroach on the province of the judiciary."[33] These principles make it clear that important checks and balances - - safeguards at the heart of our constitutional design - -would be sacrificed were this Court to follow Appellees' advice, and fashion standing requirements that essentially prohibit constitutional challenges to certain types of legislation (state spending, indebtedness, and special privilege/cronyism legislation).

To this end, the fallout from denying standing here dramatically outweighs the fallout from granting it. In our criminal justice system, we abide by sometimes burdensome procedural safeguards with the understanding that is better that a guilty man go free than that an innocent man's liberty be wrongly shackled. Likewise here, it is superior to err in favor of permissive standing, to ensure that no unconstitutional legislation, with all of is long-term risks, is wrongly permitted to stand. The Ohio judiciary's independence should not be sacrificed, and no jurisprudence insulating legislation from review should be fashioned. ProgressOhio does and must maintain standing here.

F. The Appellees' proposed standing requirements strip every Ohioan of standing here.

No other Ohioan maintains standing to enforce the Ohio Constitution. The state contends that tests used in other states, such as Pennsylvania's multifactor *Beister* test is impermissible, and doesn't apply here, because ProgressOhio cannot show that "no others *can* sue."[34] However, ProgressOhio obviously *can* demonstrate that no other Ohioan had a great stake in bringing an action to enforce the Ohio Constitution here: the R.C. 187.09(B) 90 day statute of limitations has run, and no other person has brought an action.[35] Nor has any action been brought beyond that window over the past two years. This is because the primary threat posed by JobsOhio is to the citizens and taxpayers in their capacity as just that.

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

34 State's Brief, at p. 33.

35 The 60 day window is for a distinctly different type of challenge -- one to its actions, rather than the contract, arrangement, or founding documents.

Appellees attempt to shift the burden of this analysis to ProgressOhio, urging "[i]t is somewhat a natural question to ask 'who has standing,' to understand the contours of the rules but that does not translate into a mandate to anoint a plaintiff now."[36] But if not now, when? And if not ProgressOhio, who? If this Court cannot imagine *any* Ohioan with an unique and individualized personal stake - - and it cannot - - then this illustrates the incompatibility of the personal stake requirement with public interest actions, judicial review, and key constitutional safegaurds. After all, <u>even JobsOhio itself has been denied judicial review to adjudicate the constitutionality of JobsOhio.</u>

Recognizing this infirmity in their defense, Appellees make a weak-hearted effort to identify plaintiffs that could have met the ill-suited standing requirements they have proposed here. The State claims that "legally-possible plaintiffs abound."[37] For instance, it posits that "companies who are denied help given to competitors," "bondholders with a financial stake in JobsOhio," "public employees or former employees of ODOD," and "public officials who interact with JobsOhio might be litigants."[38]

Each example falls remarkably flat. *First,* there were no bondholders within 90 days of the enactment of the JobsOhio legislation. And even if one ignored the statute of limitations, why would a bondholder sue to have JobsOhio found unconstitutional, thereby *completely collapsing the value of his or her investment?*

Second, the Ohio Constitution exists *to protect* Ohio taxpayers and citizens from public officials and public employees, not to aggrandize those officials with an elite status, whereby only *they* can enforce that same constitution. The Ohio Constitution was designed so that the public is not beholden to public officials to self-police.

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36 State's Brief, at p. 24.
37 State's Brief, at p 25.
38 Id.

Third, Ohio business, under current law, will not know whether their competitors receive JobsOhio funds - - all deals are conducted behind closed doors. And they certainly won't know within the 60 days required by R.C. 187.09(C). In any event, each business has may hope to benefit from the ostensible receipt of these funds, and is thus beneficially interested. Indeed, JobsOhio amounts to a massive redistribution of wealth away from average Ohioans and towards recipient businesses. Why would a recipient or potential recipient lodge a challenge? Perhaps this is why no business has done so.

Finally, and perhaps most importantly, this Court's jurisprudence rejects public interest constitutional claims that are brought not to confer a public benefit, but instead, to advance a thinly-veiled self-interest.[39] Consequently, the standing of bondholders, spurned public employees, and overlooked businesses, each - - in Appellees' outlandish examples - - seeking to have JobsOhio declared unconstitutional to merely advance their own personal interest, would lack standing as to their constitutional claim. And in any event, why would this court fashion a standing jurisprudence that leaves the self-interested fox guarding the henhouse, while leaving the equally adversarial public-spirited public interest plaintiff out in the cold? Would the Court not rather entertain an action from a plaintiff who actually *cares* whether the statutes are declared unconstitutional, rather than one agnostically fronting a constitutional argument as a ploy to seek his or her own gain?

Finally, in any event, none of these hypothetical parties has lodged a challenge in the past two years, and the applicable statute of limitations for doing so has long since expired. Consequently, Appellees can point to no Ohioan, under their proposed standing restrictions, who would maintain the capacity to hold state government to its constitutional confines. And this is a end-run around judicial review, and Ohio's independent judiciary. ProgressOhio must have standing to enforce the Ohio Constitution in this instance.

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[39] See *State ex rel. Teamsters Local Union 436 v. Cuyahoga Cty. Bd. of Commrs,* supra.

G. Appellees proposed standing requirements result in insufficiently thorough enforcement of the Ohio Constitution.

Appellees contend that standing for ProgressOhio is not necessary here because "the Court's precedents" show that even if ProgressOhio does not have standing here, Articles VIII and XIII, and other structural limits on government can remain intact because "litigants have reached the merits of Article VIII challenges."[40] But this misses the point.

First, just because some statutes implicating Articles VIII, XIII, or the Single Subject Rule trigger an acute individualized direct injury or personal stake does not mean that all such statutes do so. Second, "litigants have reached the merits" because the Court *has typically permitted standing in cases such as this.*

This is for a variety of reasons: sometimes standing is not challenged and the court implicitly confirm standing by not raising the issue *sua sponte,* irrespective of whether an acute individualized stake exists or is found;[41] frequently these actions are brought pursuant to R.C. 733, and standing is not challenged; and sometimes standing is challenged, but Courts, recognizing the necessity of it, grant standing and proceed to the merits (Appellees are so confused on this front that they argue that State Senator Grendell was "concretely affected by the challenged law" despite doing exactly what ProgressOhio is doing here - - raising an Article VIII challenge a state arrangement through a declaratory judgment action as a taxpayer only).[42]

What is clear is that there is a glitch of clarity in this Court's precedent when such an action is brought against the state, challenging a statute that does not yield an individualized personal stake However, the current status quo has sufficed because despite statements about standing made in other

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[40] State's Brief, at p. 27.

[41] See *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512.

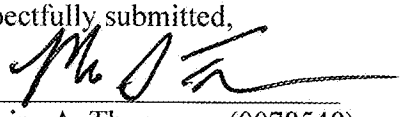
[42] *Grendell v. Ohio Envtl. Prot. Agency*, 146 Ohio App. 3d 1, 14-15, 764 N.E.2d 1067, 1078 (2001).

contexts, Ohio has typically recognized the necessity of affording litigants like ProgressOhio standing in actions of this nature. This Court should now confirm that citizen-taxpayer standing must and does exist in such circumstances.

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.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Reply Brief of PlaintiffsAppellant ProgressOhio* was served upon the following parties on the 5th day of August, 2013.

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