

IN THE SUPREME COURT OF OHIO

STATE ex rel. CLEVELAND RIGHT
TO LIFE, INC., et al.,

Relators

v.

STATE OF OHIO CONTROLLING
BOARD, et al.,

Respondents.

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Case No. 2013-1668

**ORIGINAL ACTION IN
MANDAMUS AND
PROHIBITION**

BRIEF OF AMICUS CURIAE OHIO ROUNDTABLE IN SUPPORT OF RELATORS

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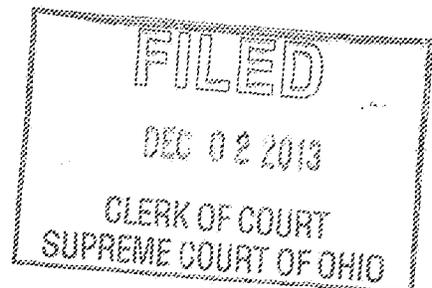


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STATEMENT OF INTEREST

Amicus curiae The American Policy Roundtable dba Ohio Roundtable ("Ohio Roundtable") is an Ohio-based public organization. It was founded in 1980 and is an Ohio nonprofit corporation. A guiding principle of its public policy pursuits has been adherence to the rule of constitutional law. Ohio Roundtable, and its staff and thousands of Ohio citizen volunteers, have worked for the proper application of the rule of law in Ohio through numerous activities. Ohio Roundtable has a network of supporters in excess of 10,000 Ohio citizens, businesses, churches and civic organizations who subscribe to and participate in regular briefings and communications regarding Ohio Roundtable activities.

Ohio Roundtable is a party in a case involving issues similar to those presented in this case, *State ex rel. Walgate v. Kasich*, Ohio Supreme Court Case No. 2013-0656. The *Walgate* case involves claims arising from enforcement of public duties under the lottery and casino provisions of the Ohio Constitution.

ARGUMENT

A. Jurisdiction

This court has original jurisdiction over relators' mandamus claims pursuant to Article IV, Section 2 of the Ohio Constitution. The last sentence of Article IV, Section 2 provides that "[n]o law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court". As a result, [w]here a petition stating a proper cause of action in mandamus is filed originally in the Supreme Court, the Supreme Court has no authority to exercise jurisdictional discretion..." *State ex rel. Pressley v. Industrial Commission*, 11 Ohio St.2d 141, paragraph five of the syllabus (1967). As this court has acknowledged, "with state courts standing is a self imposed rule of restraint." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 471, quoting 59 American Jurisprudence 2d 415, Parties, Section 30 (1987). Accordingly, standing rules may not be applied to prevent any person from invoking this court's original jurisdiction, except to determine whether a proper cause of action has been stated.

The *Pressley* court detailed the history of a rule previously applied by this court limiting the filing of original actions in mandamus in this court. *Id.* at 145. Article IV, Section 2 was amended in 1912 to preclude any rules preventing the invocation of original jurisdiction. *Id.* at 145. The argument that *Sheward* promulgates a rule that limits mandamus actions in this court to those which are "rare and extraordinary" or have a broad effect, is precluded by Article IV, Section 2.

Standing analysis would be constitutionally permissible to determine whether a party has invoked the original jurisdiction of the court by stating an appropriate claim. Original jurisdiction is defined by the contours of certain causes of action, and certain elements of

standing analysis are implicit in determining whether a party's claims fall within these contours. For example, a mandamus claim requires the element of a clear legal right to the requested relief. *State ex rel. General Motors Corp. v. Industrial Commission*, 117 Ohio St.3d 480, ¶9. However, once a party's claims fall within the contours of causes of action invoking original jurisdiction, this Court is required to exercise such jurisdiction.

Article IV, Section 2(B) was amended in 1912 in response to the rule that this Court's original mandamus jurisdiction could not be invoked without permission, since such claims could be more speedily and conveniently heard in a lower court. *Pressley*, 11 Ohio St.2d at 146. The argument that *Sheward's* dicta limits mandamus claims to those that have broad impact would promulgate a rule similar to that which led to the 1912 amendment. This similarity is reflected in the concurring opinion in *Sheward* by Justice Pfeiffer. He opined that the concern regarding "gridlock of our justice system" would be alleviated by a rule limiting original actions to exceptional circumstances. *Sheward*, 56 Ohio St.3d at 515 (Justice Pfeiffer, concurring opinion).

The policy argument for limits on this Court's docket may be quite legitimate. However, the explicit language of the 1912 amendment precludes accomplishing that result by a rule of this Court.

B. Standing

Standing determines 'whether a litigant is entitled to have a court determine the merits of the issues presented' *Moore v. Middleton*, 133 Ohio St.3d 55, 2012-Ohio-387, ¶ 20, 975 N.E.2d 977, quoting *State ex rel. Teamsters Local Union No. 436 v. Cuyahoga County Board of Commissioners*, 132 Ohio St.3d 47, 2012-Ohio-1861, ¶ 10, 969 N.E.2d 224. Standing may be

determined by principles of common law. *Middletown v. Ferguson*, 25 Ohio St.3d 21, 25, 25 OBR 125, 495 N.E.2d 380.

Relators as citizens have common law standing in the present case under the traditional public duty/citizen standing case law of this Court, as well as by reason of certain relators status as legislators.

This case law regarding public duty/citizen standing was summarized in *Sheward* and reaffirmed in paragraph one of its syllabus:

Where the object of an action in mandamus and/or prohibition is to procure the enforcement or protection of a public right, the relator need not show any legal or special individual interest in the result, it being sufficient that the relator is an Ohio citizen and, as such, interested in the execution of the laws of this state.

The *Sheward* syllabus was essentially a restatement of the syllabus of *Brissel v. State ex rel. McCammon*, 87 Ohio St. 154, 100 N.E. 348 (1912), which provides at paragraph four: "In a proceeding in mandamus, where the relief sought is the enforcement of a public duty by a public officer or board, it is sufficient to sustain the right of the relator to maintain the suit that he show that he is a citizen and as such interested in the execution of the laws."

The *Sheward* majority explained that public right standing was "...fully conceived in Ohio as a means to vindicate the general public interest". *Sheward*, 86 Ohio St.3d at 473. The *Sheward* court particularly noted *State ex rel. Nimon v. Springdale* (1966), 6 Ohio St.2d 1, 4, 215 N.E.2d 592 (1966) which 'listed a long line of cases in support of the citizen/taxpayer – mandamus action', including the *Brissel* case. *Id.* at 473. See also, *State ex rel. Meyer v. Henderson*, 38 Ohio St. 644, 648-649 (1883); *State ex rel. Newell v. Brown*, 162 Ohio St. 147 (1954).

The *Sheward* dissent by Chief Justice Moyer also affirmed the traditional public duty/citizen standing case law in Ohio, while objecting to its extension to a public duty to preserve judicial power:

While it is true that the trial courts of this state have a clear legal duty to recognize and enforce only those statutes that are constitutional, that duty is not imposed by the challenged statutes created by Am.Sub.H.B. No. 350. *This distinguishes the case at bar from Zupancic, and from the traditional 'public duty/taxpayer' case in Ohio.* The majority notes that the public-right doctrine (defined by the majority as permitting an individual to obtain a writ of mandamus to enforce a public right without the showing of a personal interest in the subject matter) dates from the last century as an exception to the personal-injury requirement of standing. However, the extension of that doctrine so as to equate public duty with enforcement of the doctrine of separation of powers, or with preservation of judicial power within the judiciary, is not a long-standing legal principle. The majority has indeed created a new theory of standing, and one not justified by *Zupancic*. *Id.* at 522. (Emphasis added.)

As noted by this court in *Sheward*, the federal judicial system requires a showing of injury to establish standing to enforce a public duty or right. *Sheward*, 86 Ohio St.3d at 470. However, this requirement derives from the federal constitution and is not binding on this court, which is “free to dispense with the requirement for injury where the public interest so demands.” *Id.* at 470. In an unusual response to dissenting opinion, the *Sheward* court went on to explain that this court “will entertain a public action” “under circumstances where the public injury by its refusal will be serious” *Sheward*, 86 Ohio St.3d at 503, citing *State ex rel. Trauger*, 66 Ohio St. 612, 616, 64 N.E. 558 (1902), quoting *Ayers v. Board of State Auditors*, 42 Mich. 422, 429, 4 N.W. 274 (1880). The *Trauger* case is the basis for the much vaunted rule limiting public duty/citizen standing to ‘rare and extraordinary’ cases.

Trauger, however, does not refer to serious public injury as a criterion for standing, but as a criterion for determining whether to grant relief in mandamus, which involves a

discretionary writ. *Trauger* was quoting a Michigan case, *Ayers*, which explained that mandamus relief “is not usually allowed unless under circumstances when the public injury by its refusal will be serious. * * * But we find no reason to consider the matter as one lying outside of judicial discretion, *which is always involved in mandamus cases*, concerning the relief, as well as other questions” *Trauger*, 66 Ohio St. at 616, quoting *Ayers*, 42 Mich. at 429. (Emphasis added).

C. Mandamus Relief

1. Relators Are Entitled to Mandamus Relief Compelling Respondents’ to Comply With Their Public Duties Under the Constitutional and Statutory Provisions Requiring an Appropriation Before Withdrawing Money From the Treasury. Article II, Section 22 of the Ohio Constitution; R.C. 127.07

In order to be entitled to a writ of mandamus, relators must establish a clear legal right to the requested relief, a clear legal duty on the part of the respondents to provide the relief, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. General Motors*, 117 Ohio St.3d at ¶ 9. A mandamus action is thus appropriate where there is a legal basis to compel a public entity to perform its duties under the law. *Id.* at ¶ 9. Although a writ of mandamus cannot control the entity’s discretion, a writ can compel the entity to exercise its discretion when it has a clear legal duty to do so. *Id.* at ¶ 9. Likewise, a writ of mandamus may lie if the public entity has abused its discretion in carrying out its duties. *Id.* at ¶ 9. In addition, if the public entity has misinterpreted a statute, a writ of mandamus may be an available remedy. *Id.* at ¶ 9.

A mandamus claim must seek to compel, rather than prevent, an action. *Id.* at ¶ 11. Relators seek an order compelling compliance with the constitutional duty that “[n]o money shall be drawn from the treasury, except in pursuance of a specific appropriation”, Article II, Section 22 of the Ohio Constitution, and related statutory duties in R.C. 127.07 and R.C. 113.08. R.C. 127.07 precludes the controlling board from taking any action which does not carry out

legislative intent expressed in the appropriation acts of the general assembly. R.C. 113.08 requires every state official to pay to the treasurer monies received for their use, except as otherwise provided by law.

The traditional public duty/citizen standing cases include cases requiring compliance with constitutional duties which establish limitations on the actions of public officials. In *State ex rel. Ryan v. City Council of Gahanna*, 9 Ohio St.3d 126, 459 N.E.2d 208 (1984), a citizen obtained a writ of mandamus "compelling respondents to comply with the provisions of Sections 6 and 13 of Article VIII of the Ohio Constitution", which forbade municipal and private joint ventures and precluded the use of tax money for payment of industrial development bonds. *Id.* at 131. This Court concluded that an urban development project planned by Gahanna violated these provisions and granted the requested writ. In *State ex rel. Ohio Motorists Association v. Masten*, 8 Ohio App.3d 123, 456 N.E.2d 567 (1982), the court granted a writ of mandamus compelling compliance with statewide standards governing the placement of traffic control devices.

In *Masten*, officials from the village of Linndale installed traffic control devices which did not comply with state standards. The *Masten* court noted that the pertinent state statute provided that local authorities shall place traffic control devices in accordance with state standards. *Id.* at 571. The court concluded that:

It is thus well-settled that where the legislative body of a municipality is under a clear legal duty to take action consistent with an express provision of the Ohio Constitution, state statute, or municipal charter, that this legislative body is subject to a writ of mandamus enjoining such action.

In similar fashion, Article II, Section 22 of the Ohio Constitution and R.C. 127.07 require that no money be withdrawn from the treasury except pursuant to appropriation, and that the controlling board shall only act in accordance with the general assembly's intent. These

requirements establish standards which state officials have an affirmative duty to comply with. While arguments may be made regarding whether these duties may be framed as affirmative or negative, the distinction is merely one of semantics. The Gahanna case is precedent that such duties are to be framed as affirmative duties subject to mandamus, and such precedent should control the result in this case.

2. Relators are Entitled to Mandamus Relief Compelling Respondents to Comply with their Statutory Duty to Transfer Funds they Receive, Which are not Duly Authorized for Expenditure, to the Treasurer

If the controlling board's duties, as described above, are not deemed subject to mandamus relief, the Department of Medicaid's duties under R.C. 113.08 would clearly be so enforceable. R.C. 113.08 provides that except as otherwise provided by law, every state official shall pay to the treasurer monies received for their use. Given that expenditure of funds for the subject expansion of medicaid is not duly authorized by law, any state official receiving money for this purpose, is under a duty imposed by R.C. 113.08 to transfer it to the treasurer. This issue is ripe for this court's consideration, because the violation of this duty is imminent. *State ex rel. Elyria Foundry Company v. Industrial Commission*, 82 Ohio St.3d 88, 89, 694 N.E.2d 459 (1998). Relators are entitled to mandamus relief compelling respondents to comply with their statutory duty to transfer funds they receive which are not duly authorized for expenditure. R.C. 113.08.

3. The Governor's Line Item Veto of the Condition Limiting the Controlling Board's Authority is Void Because it is not a Separate and Distinct Item. Article II, Section 16 of the Ohio Constitution

The argument that R.C. 5163.03 constitutes legislative authorization of the appropriation for the subject medicaid expansion fails for two reasons. First, R.C. 127.07 requires compliance with legislative intent not executive intent. Second, the governor's attempted line-item veto is

unconstitutional because it does not constitute disapproval of a separate and distinct "item or items in any bill making an appropriation of money..." Article II, Section 16 of the Ohio Constitution. This court has emphasized that only "...provisions in an appropriation bill which are separate and distinct from other provisions in the same bill...are items within the meaning of Section 16, Article IV of the Ohio Constitution." *State ex rel. Brown v. Ferguson*, 32 Ohio St.2d 245, 252 (1972). The governor is not constitutionally authorized to line-item veto language which conditions an authorization for appropriation because such condition is not considered a separate item under Article II, Section 16. This was clearly addressed by the Ohio Attorney General in Opinion 1961-241 at paragraph four of the syllabus:

Where the expenditure of funds appropriated for a certain purpose in a bill making an appropriation of money is conditioned on compliance with requirements written into the bill, the language stating such requirements is not a distinct and severable part of the bill, and is, therefore, not an "item" which may be disapproved by the Governor under Section 16 of Article II, Ohio Constitution.

The rationale for this opinion was explained by the Ohio Attorney General as follows:

It will be noted that the language here in question requires that the expenditure of any funds appropriated by the bill, for the purchase of any motor vehicle, is *contingent* upon compliance with certain regulatory procedures which are set forth in the language concerned. Thus, said language is inextricably linked to other provisions of the bill and can not be considered a distinct and severable part. The removal of said language constitutes a condition which must be met before certain funds may be expended. Thus, in disapproving this language the Governor would be taking affirmative action rather than the negative action which is allowed under the power of veto.

The Ohio Attorney General cited numerous precedents for his opinion:

In the case of *In re Opinion of the Justices*, 294 Mass., 616 2 N.E.2d, 789 (1936), a somewhat similar situation was considered. The Massachusetts Constitution authorizes the governor to "disapprove or reduce items or parts of items in any bill appropriating money." The question was whether the governor could disapprove language which placed a condition on an appropriation of funds. The court said:

“ * * * Power is conferred upon the Governor to reduce a sum of money appropriated, or to disapprove the appropriation entirely. No power is conferred to change the terms of an appropriation except by reducing the amount thereof. Words or phrases are not ‘items or parts of items.’ This principle applies to the condition attached to the appropriation now in question. That condition is not an item or a part of an item.”

Also, in *Commonwealth v. Dodson*, 176 Va. 296, 11 S.E.2d, 120 (1940) the court considered whether language creating the “Legislative Director of the Budget” could be vetoed by the governor. After first holding that such language was germane to the bill, the court further held that under a constitutional provision declaring that the Governor shall have power to veto any particular item or items of an appropriation bill, an “item” is an “indivisible sum of money dedicated to a stated purpose” and it is something different from a provision or condition, and where conditions are attached they must be observed. The provision creating the legislative director of the budget was held to be a condition and not an item, which could be vetoed.

In *State, ex rel. Teachers and Officers of Industrial Institute and College v. Holder*, 76 Miss., 158, 23 So. 643 (1898), the bill in question, after appropriating money for a certain college, contained a long proviso conferring certain duties on the president of the college. The governor vetoed the proviso, but not the appropriation. The court held this action unconstitutional, saying:

If the governor may select, dissent, and disapprove, where is the limit of his right? Must it be a section, or any part of a section, that may meet with executive disapprobation? May the governor transform a conditional or contingent appropriation into an absolute one, in disregard and defiance of the legislative will?

And in the case of *Fulmore v. Lane*, 104 Tex. 499, the court said:

Nowhere in the Constitution is the authority given the Governor to approve in part and disapprove in part a bill. The only additional authority to disapproving a bill in whole is that given to object to an item or items where a bill contains several items of appropriation. It follows conclusively that where the veto power is attempted to be exercised to object to a paragraph or portion of a bill other than an item or items, or to language qualifying an appropriation or directing the method of its uses, he exceeds the constitutional authority vested in him, and his

objection to such paragraph, or portion of a bill, or *language qualifying an appropriation*, or directing the method of its use, becomes noneffective.

1961 Ohio Atty. Gen. Ops. No. 61-2411 at pp. 416-417.

R.C. 5136.03, as passed by the General Assembly in HB59, specifically made the authorization to expand medicaid coverage subject to R.C. 5163.04, which prohibited the subject medicaid expansion. The governor lined out the word "R.C. 5163.04" in the clause limiting R.C. 5163.03 authority, in an effort to transform R.C. 5163.03 from a prohibition of authority, to a grant of authority, for the subject medicaid expansion.

The governor's attempted line-item veto of the condition limiting the controlling board's authority, is unauthorized by law, and is therefore null and void. *State ex rel. Akron Educ. Assoc. v. Essex*, 47 Ohio St.2d 47, 50 (1976). As a result, the provision precluding the controlling board from authorizing the subject expansion of medicaid is now effective as law, and the controlling board is under a clear legal duty to carry out this provision. *Essex* at 50.

4. The Secretary of State Has a Clear Legal Duty to Maintain and Preserve R.C. 5163.03 Without the Governor's Invalid Line-Item Veto and Make it Available for Codification

Additionally, respondents do not contest relators' argument in their merit brief that the Ohio secretary of state has a clear legal duty to fulfill all of the secretary's statutory duties concerning this provision of law, including maintaining and preserving it, making it available to the Legislative Services Commission for completion of codification duties, and fulfilling other statutory duties imposed by R.C. Chapter 149. *State ex rel. Ohio General Assembly v. Brunner*, 114 Ohio St.3d 386, 398, 2007-Ohio-3780, at ¶ 51.

CONCLUSION

For the above reasons, relators should be granted a writ of mandamus as described above.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular U.S. mail this 2nd day of December, 2013 upon the following:

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