Supreme Court of Ohio Clerk of Court - Filed December 10, 2014 - Case No. 2014-1769

In the
Supreme Court of Ohio

TOLEDO CITY SCHOOL DISTRICT BOARD OF EDUCATION, *et al*,	:	Case No. 2014-1769
Appellees/Cross-Appellants,	:	On appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
STATE BOARD OF EDUCATION OF OHIO, *et al*,	:	Court of Appeals Case Nos. 14AP-93 14AP-94 14AP-95
Appellants/Cross-Appellees.	:	

MEMORANDUM OF CROSS-APPELLEES, THE OHIO DEPARTMENT OF EDUCATION, STATE BOARD OF EDUCATION, AND DR. RICHARD ROSS IN OPPOSITION TO JURISDICTION

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INTRODUCTION

This cross-appeal arises in a case asking an important question about legislative power to set and adjust school funding. But the cross-appeal itself asks a mundane question of settled standing law that does not merit further review in this Court. Indeed, the plaintiffs who bring the cross-appeal (mainly parents of students in the school districts that are also plaintiffs) think so little of it that they urge the Court to review *only* the question of their standing, but to decline review over the merits of their claims. If the substantive merits are not worthy of this Court's jurisdiction, surely the procedural standing question does not merit this Court's time and attention. That common-sense conclusion is bolstered by three points.

First, the standing of the individual plaintiffs is irrelevant to this case because it is undisputed that at least one other party has standing. As this Court has held, if one of several plaintiffs has standing to advance a claim, there is no need to evaluate the standing of other plaintiffs with respect to that same claim. *See, e.g.*, *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St. 3d 386, 2007-Ohio-3780 ¶ 22, *amended in part on other grounds*, 115 Ohio St. 3d 103, 2007-Ohio-4460. This Court and the lower courts have jurisdiction to decide the important constitutional question in this case regardless of whether the individual plaintiffs have standing. Any pronouncement by this Court about the individual plaintiffs' standing will have no effect on the constitutional question. Accordingly, deciding whether the individual plaintiffs have standing will amount to an advisory opinion. Review of the cross-appeal is therefore inappropriate.

Second, because the individual plaintiffs ask for the same relief as the school districts, the individuals effectively seek to litigate the rights of the districts as third parties. This Court disfavors that kind of indirect litigation, particularly when the other party can easily litigate those rights itself. That consideration is in full force where, as here, the other party *is* litigating those

rights, and (so far) has been doing so successfully. Adding the disfavored status of third-party claims to the irrelevancy of the individual plaintiffs' standing is a recipe for declining jurisdiction.

Third, the standing question involves a routine (and correct) application of settled law. This Court has addressed all manner of standing questions in the last few years, and this case would add nothing to that corpus. Instead, the individual plaintiffs take issue with how the common pleas court and the Tenth District applied these settled cases to the two paragraphs of their complaints stating their alleged injuries. That application involves no novel issue, no legal matter dividing the district courts of appeals, and no substantial constitutional question. A suit next week or next year could well raise legal questions about school funding and a court could rightly conclude that the plaintiffs there had standing. That would open no split with the decisions below. It would all depend on whether the plaintiffs in the future suit alleged concrete facts showing their injury, the link to the disputed action, and a court's ability to redress the injury. That possibility underscores the pedestrian result here. The outcome depends on the particulars, not any overarching principle in need of clarification by this Court.

All told, the cross-appeal seeks an advisory opinion about standing where other parties are forcefully litigating the merits of the same claims and the cross-appellants affirmatively want to *avoid* the merits. To boot, that request is packaged in a fact-driven application to a few sentences of alleged facts. The cross-appeal is not worthy of review.

STATEMENT OF THE CASE AND FACTS

This cross-appeal involves eight individual plaintiffs-appellees ("Individuals") as distinct from the school districts ("Districts") that are also appellees to the State Defendants' appeal on the merits of a constitutional question about the retroactivity of certain school-funding legislation.

The core of the merits case involves the Districts' allegation that the State Defendants violated R.C. 3317.02, 3317.022(A), and 3317.03 in distributing funds based on their calculation of charter-school students residing in the Districts and R.C. 3317.03(C)(2) and (F)(3) in their calculation of charter-school students moving into the Districts after the first week of October 2004 (the "disputed funds"). For their part, the Individuals raised no separate claims of their own. Instead, the Individuals pleaded that they are "interested in the execution of the laws of the state" and have an "interest in the levels of educational resources" available to the Districts. *See, e.g.*, Compl. in *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, No. CI0201101496 ¶ 4 (Lucas Cnty. C.P. Jan 31, 2011). They further alleged that, as taxpayers, they are "subject to the reduction in the value of their property." *Id.* Rounding out the allegations, the Individuals alleged a "beneficial interest" in the relief requested by the Districts (payment of the disputed funds). *Id.*

The trial court dismissed all the Individuals in response to the State Defendants' motion for judgment on the pleadings. *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, No. 11 CV 111809 (Franklin Cnty. C.P. Jan. 16, 2014). The trial court reasoned that the Individuals alleged no harm "distinct from" every other taxpayer in the school districts, and therefore lacked standing under this Court's precedent. *Id*. at 13.

After the State Defendants appealed the merits of a judgment in favor of the Districts, the Individuals cross-appealed. On the cross-appeal, the Tenth District agreed with the trial court's holding that the Individuals lacked standing, and affirmed that part of the judgment. The panel initially agreed with the Individuals that parents with children enrolled in a district may "have a greater interest in public school funding issues than the general public." *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 18 N.E.3d 505, 2014-Ohio-3741 ¶ 57 (10th Dist.). Even so,

the panel reasoned, that fact alone did not translate into the kind of "specific harm" distinct from the "public in general" necessary to confer standing. *Id.* ¶ 59. Without some allegation distinguishing them from the rest of the students in the District, the court observed, the Individuals' allegations of harm were "nothing more than unsupported legal conclusions" that were insufficient to bestow standing. *Id*.

After the State Defendants appealed the merits of the funding question to this Court, the Individuals timely cross-appealed the Tenth District's standing holding.

EXPLANATION OF WHY THIS CROSS-APPEAL DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The cross-appeal is not separately worthy of this Court's jurisdiction as it calls for an answer to an irrelevant question. Specifically, the cross-appeal (1) asks the Court to declare the law about the Individuals' standing, but *not decide* the substance of the Individuals' claims, (2) involves the Individuals asserting the rights of others who themselves have already established standing (and prevailed below), and (3) challenges the application of well-established law to undeveloped facts in a motion-to-dismiss posture. All of that shows why the Court should decline jurisdiction over the cross-appeal while exercising jurisdiction over the State Defendants' initial appeal.

A. The cross-appeal seeks an answer to an irrelevant question.

Taking the cross-appeal at its word, it asks the Court to answer an irrelevant question about the Individuals' standing. The Individuals seek the same relief as the Districts. No one contests the District's standing to sue. When this Court concludes that one party has standing to sue, it does "not reach the question" whether other parties also have standing so long as those other parties seek the same relief. *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St. 3d 386, 2007-Ohio-3780 ¶ 22, *amended in part on other grounds*, 115 Ohio St. 3d 103, 2007-Ohio-

4460; *see also Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 54 n.2 (2006) (noting that the presence of one party with standing was sufficient to satisfy standing requirements). The question whether the Individuals *also* have standing is irrelevant. That is because standing "is required to invoke the jurisdiction of the common pleas court," *Fed. Home Loan Mortgage Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017 ¶ 24, but is not necessary for *every* plaintiff before the court that seeks the same relief as the plaintiff that possesses standing. Deciding whether the Individuals have standing makes no difference here.

The Individuals' description of their cross-appeal underscores that they ask a question that does not need answered. The Individuals want the Court to review their standing *without* considering the merits of their claim. On the one hand, the Individuals ask the court to "hear this appeal" over questions of their standing and the standard for judgment on the pleadings. Cross-Appeal Br. 6, 9, 12. On the other, the Individuals tell the Court *not to hear* the merits of those claims because they do not raise a substantial constitutional question or matter of public or great general interest. *Id.* at 16. Taking that course would mean reversing the Tenth District's judgment on standing, but making *no change* to the ultimate holding below that the law about the disputed funds is unconstitutional. That is so because the Districts have standing and can vindicate any interests of their own and their constituents as a result of the Tenth District's constitutional holding. Put another way, the Individuals argue that their cross-appeal is more significant when it is shorn of the merits. That speaks louder than anything the State Defendants can say about whether the Court should review the cross-appeal. If the Individuals do not think the merits are important, the threshold standing question of *some* plaintiffs is not important. Indeed, the Individuals perfectly capture the reason their cross-appeal should be declined. They ask (at 17): "[W]hat if there were no School District Plaintiffs" in this case? Indeed. This Court

does not sit to answer what-if hypotheticals. What the Individuals seek is a classic advisory opinion—an archetypical reason to deny jurisdiction.

"It is well settled that this court does not issue advisory opinions." *Dohme v. Eurand Am., Inc*., 130 Ohio St. 3d 168, 2011-Ohio-4609 ¶ 27 (collecting cases). Applying that principle, the Court routinely declines to consider legal questions that would have made no difference in the outcome of a case. *See, e.g., State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St. 3d 481, 2012-Ohio-3328 ¶ 42 (noting that "because relators have established their entitlement to the requested extraordinary relief on [one basis] . . . we need not address other bases") (citation omitted); *State ex rel. Murray v. Scioto Cty. Bd. of Elections*, 127 Ohio St. 3d 280, 2010-Ohio-5846 ¶ 59 (declining to address question that would have not have changed result). Thus, when a proposition of law will not change the outcome in this Court, the proposition should not be reviewed. *See Dohme*, 2011-Ohio-4609 ¶ 27 (dismissing as improvidently granted two propositions of law that would not have changed the judgment).

Whatever the Court decides about accepting the State's appeal, including whatever the Court decides about the merits of that appeal, the standing of the Individuals is irrelevant.

B. The cross-appeal is essentially brought to vindicate the rights of other plaintiffs who do have standing and who have already prevailed below.

Beyond the explicit request for an advisory opinion, the cross-appeal is not an appropriate candidate for jurisdiction because the Individuals essentially ask to vindicate the rights of the Districts. This Court disfavors claims of third-party standing. *See, e.g., Util. Serv. Partners, Inc. v. Pub. Util. Comm'n*, 124 Ohio St. 3d 284, 2009-Ohio-6764 ¶ 49. And it especially disfavors it when the other party can pursue the claims itself. *See, e.g., N. Canton v. Canton*, 114 Ohio St. 3d 253, 2007-Ohio-4005 ¶ 17 (no third-party standing where other party was not hindered in pursuing claims). The Individuals' standing is little more than a request to litigate the rights of

the Districts. Since the Districts have actively (and successfully) litigated those claims, there is no reason to consider the Individuals' standing to litigate the Districts' rights.

The overlap between the Individuals and the Districts is evident in three respects. Each emphasizes the inappropriateness of reviewing the cross-appeal. *First*, the Individuals make no distinct claims of their own. Each claim is derivative of the Districts' claims. *Second*, the Individuals assert the statutory rights of the Districts. *See, e.g.*, Compl. in *Toledo* at ¶¶ 48-69 (citing R.C. 3317.02, 3317.022, and 3317.03 (2004)). These statutes are aimed at the Districts, not others such as the Individuals. *Third*, any relief in these cases would flow to the Districts directly, not the Individuals. Any benefit to the Individuals would be incidental.

Any doubt about the vicarious pursuit by the Individuals is removed by the language of the cross-appeal. The Individuals consistently frame the case in terms of the *Districts'* interests and harms. The brief describes (at 1) the harm as loss of funds to the Districts, "together with" the Individuals. Later (at 2), the brief touts the importance of the case by pointing to the Districts' obligation to carry out the constitutional mandate of public education. At another point (at 4), the brief emphasizes the dollars that flow to public schools (not to constituent subgroups). When even the Individuals struggle to make this cross-appeal about anything other than the Districts' claim to funding, jurisdiction over a question unique to the Individuals is not warranted.

C. The lower courts' standing holdings correctly applied well-settled law.

The cross-appeal finally does not merit further review because the portion of the judgment dealing with the Individuals' standing applied settled law. There is no need to review *this* particular application of that law to unique facts. The Court has recently and repeatedly addressed questions of standing. *See, e.g.*, *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 2014-Ohio-2382 (reaffirming elements); *Clifton v. Blanchester*, 131 Ohio St. 3d 287, 2012-

Ohio-780 (exploring causation and redressability); *Beaver Excavating Co. v. Testa*, 134 Ohio St. 3d 565, 2012-Ohio-5776 (exploring injury). There is nothing new to decide here and therefore no reason to grant review over the cross-appeal.

The generality of the complaint reinforces the conclusion that the lower courts simply applied settled principles. "Traditional standing principles require litigants to show, at a minimum, that they have suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." *ProgressOhio.org, Inc*., 2014-Ohio-2382 ¶ 7 (citation omitted). Those elements are lacking in the complaint as to the Individuals.

For starters, the Individuals primarily couch their injury in terms of their interest in the execution of the State's laws. *See* Compl. in *Toledo* at ¶ 4. This Court has long said that a general interest in enforcing the laws cannot ground standing. *See, e.g., Ohio Trucking Assn. v. Charles*, 134 Ohio St. 3d 502, 2012-Ohio-5679 ¶ 7 (plaintiff had standing because it was "threatened with an injury that is different in kind from that suffered by the public in general"); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) ("[w]e have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws" does not have standing). The Individuals' own words show that there is nothing new to decide here. They claim a "clear legal right to the lawful execution" of statutes and the Constitution. Compl. in *Toledo* at ¶ 4. That is not a basis for standing. And that is not a question in need of further clarification in this Court.

The Individuals fare no better when looking at causation and redressability. Their allegations do not explain how withholding the disputed funds caused the asserted harms of

"reduction in the value of their property" or "reduction in educational resources," let alone how a judgment in their favor would redress those alleged harms. *E.g.*, Compl. in *Toledo* at ¶ 4. Causation tests the "logical nexus," *Clifton*, 2012-Ohio-780 ¶ 18 (citation omitted), between the claimed injury and the defendant's actions, while redressability in cases like this one accounts for the possibility that "unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict" effectively impedes a court's ability to fix the harm, *id*. ¶ 16 (citation omitted). The Individuals' own words again show that the cross-appeal offers nothing new to decide under either element. The Individuals say they are "subject to" additional taxes, without alleging that these taxes were actually levied or alleging any facts that connect those taxes to the disputed funds. *E.g.*, Compl. in *Toledo* at ¶ 4. The Individuals also express an interest in the "level" of resources available to the schools without alleging whether the level of resources has declined or that payment of the disputed funds would increase the resources available. *Id*.

The Individuals' disagreement with the Tenth District does not make it a matter of public or great general interest. The Court should decline jurisdiction over the cross-appeal.

ARGUMENT

State Defendants' Proposition of Law I:

The Individuals have no standing based on the allegations in the complaints.

The Individuals generally assert standing on the basis of their status as taxpayers and as parents of students enrolled in the Districts. They fail to demonstrate standing on either front.

As to either status, the "irreducible constitutional minimum of standing" requires a showing that the Individuals "suffered (1) an injury that is (2) fairly traceable to the defendant's

allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." *Moore v. Middletown*, 133 Ohio St. 3d 55, 2012-Ohio-3897 ¶ 22 (citation omitted).

As taxpayers, the Individuals offer nothing more than their general interest in enforcing the law. That is insufficient. *See, e.g.*, *Ohio Trucking Assn.*, 2012-Ohio-5679 ¶ 7 (plaintiff had standing because it was "threatened with an injury that is different in kind from that suffered by the public in general"); *Lujan*, 504 U.S. 555, 574 ("generally available grievance about government" does not confer standing); *Duncan v. State*, ___ A.3d ___, 2014 WL 4241774, at *9 (N.H. Aug. 28, 2014) ("generalized interest in an efficient and lawful government . . . are not sufficient to meet the constitutional requirements necessary for standing to exist"). Notably, the Individuals' cross-appeal does not dwell on their status as taxpayers. Instead, they focus on their status as "parents." *E.g.*, Jur. Mem. at 1.

But even as parents, the Individuals have an insufficiently direct stake in the amount of funds the State pays to the Districts. Here too, the Individuals have not distinguished their complaint from that of all parents of students in the Districts. They have not, for example, alleged any loss of scholarships, classes, activities, or specific resources.

In similar circumstances, other courts have rejected these kinds of all-students-have-standing arguments. A federal suit was resolved on standing grounds at the motion-to-dismiss stage where the complaint alleged injury to a school district "and its students" from a loss of funds. *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 of Pima Cnty., Ariz. v. Kirk*, 91 F.3d 1240, 1245 (9th Cir. 1996) (affirming dismissal), *dismissed for lack of jurisdiction on reh'g en banc*, 109 F.3d 634 (9th Cir. 1997). As here, none of the students "alleged a program that affects him as an individual that will be scaled back." *Id.* Thus, the complaint offered "no basis" for believing that the students suffered "particularized harm or distinct injury." *Id.* Summarizing,

the court noted that the "students simply r[o]de the districts' coattails and aver[red] no facts that suggest[ed] direct, distinct and tangible injury to themselves." *Id*.

In another case, the Washington Supreme Court concluded that "individual parent[s], student[s], and teacher[s]" did not establish "any benefit they are personally being denied" by a funding change and thus had no standing. *Fed. Way Sch. Dist. No. 210 v. State*, 219 P.3d 941, 949 (Wash. 2009). The court reasoned that these plaintiffs had "no personal claim to education funding allocations; the funds are a benefit paid to the school district." *Id*. So too here. The disputed funds are the concern of the Districts. At best, they may also be the concern of *certain* students and their parents. But the Individuals have not shown how they are those certain constituents distinct from the whole of the student body. They therefore lack standing to pursue their claims.

In a recent case, the New Hampshire Supreme Court found no standing on behalf of parents and teachers in a suit alleging that a state law took "state funding away from the public schools." *Duncan*, 2014 WL 4241774, at *8 (quoting complaint). As that court explained, even though some of the plaintiffs had "school-aged children or [were] public school teachers, at best" those facts established only a "special interest in education," but did not constitute a definite and concrete injury "sufficient to confer standing." *Id*. The same reasoning applied here shows that the lower courts correctly held that the Individuals have no standing.

Finally, whether as taxpayers or parents, the Individuals offer nothing that meets their burden to allege facts that connect the District's loss of disputed funds to their injuries or that shows how an order to restore those funds would redress their generic claims of lessened educational resources. Without those showings, the lower courts properly determined that the Individuals have no standing. *See, generally Clifton*, 2012-Ohio-780. There is nothing in the

allegations to determine whether a single dollar of the disputed funds went to a program (or even a building) that benefitted one of the parents' children. Nor is there an allegation that the Districts actually changed anything in their budgets that affected the education of the parents' children. And there is nothing in the allegations even suggesting that a victory in court would translate into a change in educational opportunities. Perhaps the Districts reacted to the loss of disputed funds through early retirement incentives. Maybe they reacted by curtailing extracurricular activities. We do not know. And because we do not know, the Individuals (as distinct from the Districts) have not alleged the kind of "personal stake in the outcome of the controversy" to prove standing. *Clifton*, 2012-Ohio-780 ¶ 15 (citation omitted).

It is no answer, as the Individuals posit (at 2), that the lower court decision means "Ohio school children have no personal, protected interest in the funding mandated for their education by the General Assembly." A plaintiff may have standing where a generic taxpayer does not if she alleges injury "different in kind" from that generic taxpayer. *See, e.g.*, *Ohio Trucking Ass'n*, 2012-Ohio-5679 ¶ 7. But the Individuals here do not distinguish themselves from all other parents with children in the Districts. Perhaps that is with good reason. The Individuals may be participating because they care deeply about the issues, and no doubt the Districts welcome their support. That may be a reason they and the Districts want them to participate even though they cannot allege facts that give them standing. Judging by the complaints, the Individuals are plaintiffs because they care about the issue, not because they have the kind of personal stake necessary to be plaintiffs. Whatever the motives of the Individuals, the Districts have standing and have the apparent motivation to litigate this case to conclusion. But the Individuals have not shown that they are more than mere bystanders with the same stake in the controversy common

to all citizens or taxpayers that have an interest in the execution of the laws. That does not confer standing.

Most have some interest in whether the laws are faithfully executed. That makes them good citizens; it does not, without more, make them proper plaintiffs.

State Defendants' Proposition of Law II:

The lower courts appropriately resolved this case on the pleadings.

Given the generality of the complaints regarding the Individuals' allegations, the lower courts properly resolved those claims on the pleadings. The standard for these kinds of dismissals is well known. The facts of a complaint are taken "as true" and construed in favor of the plaintiff, but "[u]nsupported conclusions" are "not sufficient to withstand" a motion to dismiss. *Mitchell v. Lawson Milk Co.*, 40 Ohio St. 3d 190, 192-93 (1988) (emphasis deleted). As the Court has said, this principle "is important in resolving" claims because disregarding it means that "[v]irtually every injury . . . can be made the basis for a claim . . . if [an] unsupported conclusion [about injury] . . . is allowed to prevail over factual allegations which preclude the possibility" of a claim. *Id.* at 193. Thus, bare allegations of injury do not equal standing. Bare allegations of injury instead should equal dismissal for lack of standing. *See, e.g.*, *Thomas v. Jackson Hewitt, Inc*., 192 Ohio App. 3d 732, 2011-Ohio-618 ¶ 22 (8th Dist.) (affirming dismissal for lack of standing where "sole allegation" of injury was "conclusory assertion" that plaintiffs "were damaged").

The lower courts' straightforward application of the *Mitchell* standard to the allegations here was correct. Although the Individuals couch their injury in terms of higher taxes and decreased educational resources, those allegations are no more than various ways of stating a conclusion that they suffered harm. Absent from the complaints is any allegation that the

Individuals suffered injury distinct from the whole of the Districts' constituents. If the kind of pleading on display here survives a motion for judgment on the pleading, any complaint will pass muster. Neither Civil Rule 12 nor the separation-of-powers principles that undergird standing limitations are so hollow.

CONCLUSION

For these reasons, the Court should deny jurisdiction over the cross-appeal.

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I certify that a copy of the foregoing was served by regular U.S. mail this 10th day of December, 2014, upon the following counsel:

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