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IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

PROGRESSOHIO.ORG, Inc., et al.,	:	
	:	
Plaintiffs,	:	Case No. 11 CVH 08-10807
	:	
v.	:	Judge Laurel A. Beatty
	:	
JOBSOHIO, et al.,	:	
	:	
Defendants.	::	

DEFENDANT JOBSOHIO'S REPLY IN SUPPORT OF MOTION TO DISMISS

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Despite spending a large portion of their brief discussing the alleged ***merits*** of their claims, plaintiffs concede that standing is a threshold issue that the Court must address "***before*** a court can consider the merits of a constitutional challenge to a statute[.]" (Plaintiffs' Mem. Contra Motions to Dismiss ("Opp'n") at 3 (citation omitted) (emphasis added)). Plaintiffs also recognize that as "the [people] or entity seeking relief," it is they who "must establish standing to sue." (*Id.*) But having acknowledged that they bear the burden, plaintiffs do not meet it.

Defendants showed in their opening briefs: (1) that plaintiffs lacked any "direct and concrete injury" in their capacities as citizens or taxpayers, foreclosing typical common-law standing; (2) that the statute on which plaintiffs rely as a basis for statutory standing, R.C. 187.09, merely provides the ***where*** and ***when*** for lawsuits challenging the JobsOhio legislation, but says not a word about ***who*** may bring them, which is the only relevant inquiry for standing purposes; (3) that legislative standing is limited to situations involving claims of "vote-nullification," which no one asserts is the situation here; and (4) that *Sheward* public-right standing is limited to cases, unlike this one, involving extraordinary writs. (See Def. JobsOhio Mot. to Dismiss ("JobsOhio Mot."); State Defs.' Mot. to Dismiss ("State Mot.").)

In response, plaintiffs essentially concede that they cannot meet the "direct and concrete injury" standard as citizens or taxpayers, making typical common law standing a non-starter. As for statutory standing, plaintiffs baldly assert that R.C. 187.09 "obviously contemplated an immediate public interest lawsuit by taxpayer plaintiffs." (Opp'n at 6.) But statutory ***language***, not divined (or assumed) statutory "contemplations," controls, and, as noted above, the language here says ***nothing*** about who can sue. As for public-right standing, while plaintiffs expend much effort seeking to show that this case is important, they have no answer for the many cases showing that such standing is limited to extraordinary writs. Finally, their theory of legislative standing is so broad that it would give any disgruntled legislator the right to attack any statute in

court, so long as the statute involves an appropriation. (Opp'n at 8-9.) That is not the law, nor should it be.

Plaintiffs similarly fail to overcome Defendants' showing that, at least as to the "joint venture" count, the plaintiffs' claim is not ripe. Plaintiffs do not dispute that JobsOhio has made no investments in private companies. They seek to overcome that obstacle by now resting their claim on the transfer of funds from the State *to* JobsOhio, but that claim is a non-starter. (See Opp'n at 12.) It is undisputed that the $1 million to which the plaintiffs refer is not an "investment," as the State has taken no stake in JobsOhio, nor is it even seeking repayment of the funds. And plaintiffs' only other argument, that if they can't sue now, they won't be able to later, rests on a flawed reading of the very statutes on which they purport to rely. (See *id.* at 13.)

A. STANDING IS A THRESHOLD ISSUE, ON WHICH THE PLAINTIFFS BEAR THE BURDEN, AND THEY HAVE FAILED TO MEET THEIR BURDEN HERE.

As JobsOhio pointed out in its opening brief, the Court must address standing *before* turning to the merits of the constitutional claims. (JobsOhio Mot. at 4.) Plaintiffs concede this is true (Opp'n at 3) but inexplicably spend much of their brief discussing the alleged merits of their claims. JobsOhio vigorously disputes that plaintiffs' claims have *any* merit, but that is beside the point. Standing comes first and, as plaintiffs also concede, it is their burden to establish it. (*Id.*) They have failed to do so, rendering any consideration of the merits of their claims inappropriate.

1. Plaintiffs essentially concede that they have suffered no "direct and concrete injury" as "citizens" or "taxpayers."

In their opening briefs, Defendants showed that plaintiffs had alleged no direct and concrete injury from the JobsOhio legislation different from the public at large, the typical basis for showing common-law standing. (See JobsOhio Mot. at 4-8; State Mot. at 3-5.) Despite openly acknowledging this argument (Opp'n at 3, 9), plaintiffs fail to identify even one way in

which they have allegedly been harmed as citizens or taxpayers.[1] Their silence speaks volumes. Plaintiffs do not, and cannot, rest their claim to standing, as citizens and taxpayers, on any actual injury; they have suffered none.

2. By its plain language, the statute on which plaintiffs rely, R.C. 187.09, does not grant plaintiffs standing.

Having failed to identify an actual injury, plaintiffs seek to sidestep this requirement by claiming that through R.C. 187.09, the General Assembly has statutorily authorized "an immediate public interest lawsuit by taxpayer plaintiffs." (Opp'n at 6.) They are wrong. To be sure, the General Assembly ***can*** alter common law standing rules by statute and thereby give plaintiffs power to sue even in the absence of an actual injury. But the plaintiffs have failed to show that the General Assembly in fact did so here.

As JobsOhio showed previously, statutes are not presumed to abrogate common-law rules, such as the actual-injury requirement for standing, absent express language to that effect. (JobsOhio Mot. at 10-11 (citing, in part, *Bresnik v. Beulah Park Ltd. P'ship, Inc.* (1993), 67 Ohio St.3d 302, 304, 617 N.E.2d 1096.) Plaintiffs do not dispute this case law requiring a clear statement. Yet, the sole statute to which plaintiffs point, R.C. 187.09 (Opp'n at 6.), comes nowhere close to meeting that standard. The statute addresses only where and when a plaintiff may file suit, requiring any claim to "be brought in the court of common pleas of Franklin County within ninety days[.]" R.C. 187.09(B). It says ***nothing*** about ***who*** can sue—a sharp contrast to statutes that have been found to create standing:

- "***An issuer*** . . . may file a complaint . . . and thereby commence an action." R.C. 133.70(B).
- "***Interested party*** may file a complaint in the court of common pleas[.]" R.C. 4115.16(A).
- Court of common pleas to vacate arbitral award "upon the application of ***any party to the arbitration***." R.C. 2711.10.

[1] The only instance of alleged "concrete injury" that they identify in their brief is alleged harm to plaintiffs Skindell and Murray ***as legislators***. As even plaintiffs appear to acknowledge, this goes to the question of legislative standing, not common law citizen or taxpayer standing. (Opp'n at 8-9.) Legislative standing is addressed below.

(See also JobsOhio Mot. at 10-11 (citing add'l statutes).) Plaintiffs do not even try to address this distinction, blithely asserting only that the statute here "obviously contemplate[s]" taxpayer challenges. (Opp'n at 6.) But "obvious contemplations"—whatever those may be—are not clear statements, and abrogation of the common law requires the latter. *Bresnik*, 67 Ohio St.3d at 304.

Nor does plaintiffs' statutory-standing argument find support in their claim that the Ohio Supreme Court has somehow "implied in its jurisdiction determination that they consider plaintiffs to have standing here[.]" (Opp'n at 7.) The Court did no such thing. The Court held only that it lacked original jurisdiction to hear the action. *ProgressOhio.org. v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, at ¶1, 7. Its passing reference to an action in the Franklin County Court of Common Pleas was dicta at best. And even then, the Court said only that plaintiffs could "institute" an action, it did not hold that they would have standing to pursue it. *Id.* at ¶6. And of course, that only makes sense, as the Court had no need to undertake a standing analysis, given its disposition of the case.

3. Plaintiffs cannot rely on *Sheward* to show standing.

Perhaps recognizing the shortcomings in their statutory standing argument, plaintiffs also seek to invoke common law standing under the "public-right" exception to typical standing rules. (Opp'n at 10-11 (citing *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 715 N.E.2d 1062).) But it is well settled that "public-right" standing is extremely limited, and plaintiffs' claims do not fall within its bounds.

Perhaps most importantly, public right standing extends only to ***extraordinary writs***. Indeed, the *Sheward* Court traced the development of public-right standing doctrine through a series of mandamus or prohibition cases. See *Sheward* 86 Ohio St.3d at 471-473 (citing *State v. Brown* (1882), 38 Ohio St. 344 (mandamus); *State ex rel. Meyer v. Henderson* (1883), 38 Ohio St. 644 (mandamus); *State ex rel. Trauger v. Nash* (1902), 66 Ohio St. 612, 64 N.E. 558

(mandamus); *State ex rel. Newell v. Brown* (1954), 162 Ohio St. 147, 122 N.E.2d 105 (prohibition); and *State ex rel. Cater v. N. Olmsted* (1994), 69 Ohio St.3d 315, 631 N.E.2d 1048 (mandamus)).[2] The same is true of the cases that plaintiffs cite in support of their argument here. (See Opp'n at 11-12.) Based on such cases, the Court in *Sheward* held that, "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[.]" 86 Ohio St.3d at 471. Unlike those cases, though, this case does not involve "an action in mandamus and/or prohibition," nor are plaintiffs "relators." Thus, "public-right standing" provides no basis for plaintiffs to avoid the actual injury requirement. See *Brinkman v. Miami Univ.*, Butler Co. No. CV 2005-11-3736, 139 Ohio Misc.2d 114, 2005-Ohio-7161, 861 N.E.2d 925, at ¶27 (rejecting public-right standing in case seeking injunction because such standing "is bestowed only when the petitioner is seeking the extraordinary remedy of a peremptory writ"). Indeed, the *Sheward* Court was emphatic that it was *not* suggesting that "citizens have standing as such to challenge the constitutionality of every legislative enactment that allegedly . . . exceeds legislative authority." 86 Ohio St. 3d at 503-04. Yet, that is exactly the unwarranted rule that plaintiffs seek to torture from *Sheward* here.

4. Plaintiffs' legislative standing theory is contrary to case law and would be disastrous.

In their opening briefs, Defendants explained that legislative standing is strictly limited to those cases in which a legislator is claiming that he or she has been prevented from casting an effective vote. (JobsOhio Mot. at 10.) In *State ex rel. Ohio General Assembly v. Brunner*, for example, the Court concluded that legislators who voted to pass a statute had standing to seek a

[2] The only other case the *Sheward* Court cited, *In re Assignment of Judges to Hold Dist. Courts* (1878), 34 Ohio St. 431, did not expressly state that it was an extraordinary writ, but it was clearly some kind of an original action in the Supreme Court. The statute at issue required the Court to appoint Judges. In connection with doing so, the Court appeared to have sua sponte taken up the question of whether the act it was ordered to perform was constitutional. In short, the case was a one-off original action and offers no support for standing in this common pleas court action.

writ of mandamus requiring the Secretary of State to take certain steps required to make the law effective. 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912, at ¶17-22. According to the *Brunner* Court, "we conclude that the Senate president and Speaker of the House have standing to sue, as legislators who vote with the majority . . . to prevent nullification of their individual votes." *Id.* at ¶22. But even plaintiffs admit that this "voter nullification" scenario is simply not present here. (See Opp'n at 8.) These legislators' votes were counted; there just were not enough votes on their side. Merely falling short of a majority vote provides no basis for a legislator to challenge the resulting act in court.

Nor is plaintiffs' claim improved through their argument that this statute involves an appropriation, which is a power that the Constitution grants to the legislature. (*Id.* at 8-9.) The legislature ***exercised*** its power, through majority vote. It is these legislators who seek to interfere with that constitutional allocation of power by now asking the judiciary to involve itself in what these legislator-plaintiffs themselves characterize as an appropriation decision.

At bottom, plaintiffs ask this Court to create a never-before-seen form of legislative standing, solely on the ground that "state courts need not be as restrictive as federal courts when it comes to standing." (*Id.* at 9.) But the lack of such limitation is not an affirmative reason to actually grant standing here, and public policy strongly cautions against any such grant. Providing dissenting legislators standing to challenge any bill that involves an expenditure would almost certainly result in unprecedented judicial involvement in legislative spending decisions. Such involvement comports neither with constitutional design, nor common sense.

B. PLAINTIFFS HAVE FAILED TO SHOW THAT THEIR CHALLENGE IS RIPE, AS THEY DO NOT DISPUTE THAT JOBSOHIO HAS YET TO MAKE ANY INVESTMENTS IN PRIVATE CORPORATIONS.

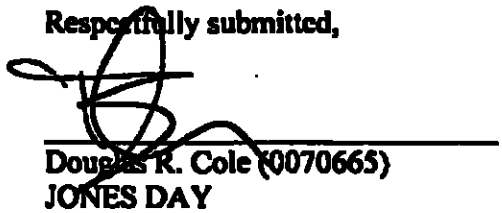
In their opening briefs, Defendants noted that Count II of the complaint was not justiciable for another reason as well. (JobsOhio Mot. at 12-15; State Mot. at 10-11.) In

particular, plaintiffs are challenging investments that had not yet occurred as constituting impermissible "joint ventures" between the State and private industry. (See, e.g., Compl. ¶ 20-21.) Plaintiffs' response is twofold, but fails in both regards.

First, plaintiffs assert that "JobsOhio has already been allocated a one million-dollar appropriation," and that this money is a "direct investment" in JobsOhio. (Opp'n at 12.) That approach may help plaintiffs from a ripeness perspective (as the allocation has occurred), but it dooms them on the substance. The money from the State is not an "investment." The State did not use the money to purchase a stake in JobsOhio, nor is the money even a loan to JobsOhio. Rather, the transfer was akin to a grant, designed to assist JobsOhio with start-up costs. Because the money is not an "investment," it cannot raise constitutional "joint venture" concerns.

Second, plaintiffs assert that if they are not allowed to challenge the "investments" that JobsOhio may make in private companies now, they will never be able to do so. (*Id.* at 13.) But that argument rests on a flawed reading of the statutes on which it relies. According to plaintiffs, "per R.C. 187.03(F), JobsOhio is only required to disclose its investments once per year, by March 1, or 59 days after the close of the last year," which, in turn, they assert would give someone challenging those transactions only one day to file suit under the 60-day period R.C. 187.09(C) provides. (*Id.*) That is wrong in at least two regards. First, nothing suggests that the report under R.C. 187.03(F) is the exclusive vehicle for reporting JobsOhio's activities, or that it is even designed to report activities (or "investments") as to specific companies at all. See R.C. 187.03(F) (specifying information to be included in the report). Second, if the R.C. 187.03(F) report were the first opportunity for an interested party (with an actual injury) to learn of an "investment," that party would presumably be free to argue that the report triggered the 60-day period for initiating suit. At bottom, all of this uncertainty surrounding the hypothetical situations that may or may not arise just proves the point—this claim is premature.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant JobsOhio's Reply in Support of Motion to Dismiss was sent by regular U.S. Mail on October 24, 2011 to the following:

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