

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

PROGRESSOHIO.ORG, Inc., et al.,

Plaintiffs,

v.

JOBSONHIO, et al.

Defendants.

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Case No. 11 CVH 08-10807


Judge Laurel A. Beatty

STATE DEFENDANTS' MOTION TO DISMISS

Defendants Ohio Governor John R. Kasich, Ohio Department of Development Director Christiane Schmenk, Ohio Office of Budget & Management Director Timothy S. Keen, and Ohio Treasurer of State Josh Mandel ("State Defendants") move to dismiss Plaintiffs' Complaint pursuant to Ohio Civ. R. 12(B)(1) and (6) for lack of standing and failure to bring a justiciable or ripe claim over which the Court may exercise jurisdiction. A memorandum in support follows.

Respectfully submitted,

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INTRODUCTION

To promote economic development, job creation, job retention, job training, and the recruitment of business to the State of Ohio, the 129th Ohio General Assembly enacted Amended Substitute House Bill No. 1 ("H.B.1"), as amended by Amended Substitute House Bill No. 153 ("H.B. 153") (collectively, the "JobsOhio Act"). At its core, the JobsOhio Act authorizes the Governor to create a nonprofit corporation named JobsOhio (hereinafter, "JobsOhio") for the public purpose of assisting the Ohio Department of Development in advancing Ohio's economic interests.

In an effort to thwart the General Assembly's efforts to promote economic development and create jobs for the citizens of the State of Ohio, two state legislators who voted against the JobsOhio Act and a political organization named ProgressOhio.org, Inc. have filed this action against JobsOhio and the State Defendants (i.e., Ohio Governor John R. Kasich, Ohio Department of Development Director Christiane Schmenk, Ohio Office of Budget & Management Director Timothy S. Keen, and Ohio Treasurer of State Josh Mandel). Plaintiffs ask the Court to enjoin and invalidate the Act on two grounds: (1) it is a "special act conferring corporate powers" in violation of Section 1, Article XIII of the Ohio Constitution (Count One); and (2) it constitutes a loan to JobsOhio and creates a joint venture in violation of Section 4, Article VIII of the Ohio Constitution. For two reasons, the Court must dismiss this action at the outset without ruling on the merits of either count of the Complaint.

First, Plaintiffs lack standing to challenge the constitutionality of the JobsOhio Act. It is well-settled that "standing to attack the constitutionality of a legislative enactment exists only where a litigant *has suffered or is threatened with direct and concrete injury* in a manner or degree different from that suffered by the public in general." *Cuyahoga Cty. Bd. of Commrs. v.*

State of Ohio, 112 Ohio St. 3d 59, 2006-Ohio-6499, ¶ 22 (emphasis added). The Complaint contains not a single allegation that any of the Plaintiffs has suffered or is threatened with any direct and concrete injury resulting from the JobsOhio Act. Plaintiffs' political preferences alone do not suffice to entitle them to an advisory opinion from this Court absent any claimed injury.

Second, the Complaint must be dismissed for failure to bring a ripe claim ready for the Court's review. For an action to be justiciable, "there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct immediate impact on the parties." *State v. Stambaugh* (1987), 34 Ohio St. 3d 34, 38. The mere existence of a state law objectionable to the Plaintiffs does not give rise to a claim ripe for judicial resolution. Rather, "it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts." *Fortner v. Thomas* (1970), 22 Ohio St. 2d 13, 14. In the absence of any factual dispute of sufficient immediacy, Plaintiffs fail to bring an action that is ripe for this Court to review and seek an impermissible advisory opinion on the lawfulness of the JobsOhio Act.

For these reasons, the State Defendants respectfully ask the Court to dismiss Plaintiffs' Complaint in its entirety.

LAW AND ARGUMENT

I. Plaintiffs lack standing to challenge the constitutionality of the JobsOhio Act.

Three Plaintiffs bring this action challenging the constitutionality of the JobsOhio Act: (1) ProgressOhio.org, a nonprofit political organization "created to provide a progressive voice for Ohio citizens," (Compl. ¶ 7); (2) Michael J. Skindell, an Ohio citizen, taxpayer, and member of the Ohio Senate (*id.* ¶ 8); and (3) Dennis E. Murray, an Ohio citizen, taxpayer, and member of the Ohio House of Representatives (*id.*). None of these Plaintiffs has standing; therefore, the

Court should dismiss this case under Ohio Civ. Rule 12(B)(6). See *Washington Mutual Bank. v. Beatley* (10th Dist.), 2008-Ohio-1679, ¶ 10-11 (dismissing for lack of standing under Civ. R. 12(B)(6)).

Before ruling on the merits of any claims, the Court must conduct a preliminary inquiry into whether any of the Plaintiffs is a proper party to bring this action in the first place. *State ex rel. Cordray v. Marshall* (2009), 123 Ohio St. 3d 229, ¶ 11. See also *Cuyahoga Cty. Bd. of Commrs. v. State of Ohio*, 112 Ohio St. 3d 59, 2006-Ohio-6499, at ¶ 22 (“[a] preliminary inquiry in all legal claims is the issue of standing”). “[S]tanding to attack the constitutionality of a legislative enactment exists only where a litigant has suffered or is threatened with *direct and concrete injury in a manner or degree different from that suffered by the public in general*, that the law in question has caused the injury, and that the relief requested will redress the injury.” *Cuyahoga Cty. Bd.*, 2006-Ohio-6499 at ¶ 22 (emphasis added). All private litigants, whether an individual or an association, challenging a governmental policy or legislative enactment must demonstrate more than an abstract disagreement with that policy. *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App. 3d 312, 325. A plaintiff must demonstrate “a personal stake in the matter he or she seeks to litigate” and “an injury that affects the plaintiff in particular.” *Id.* The Complaint contains no allegations of any such injury resulting to any Plaintiff as a result of the JobsOhio Act. Accordingly, none of the Plaintiffs – either as an Ohio citizen, taxpayer, or state legislator – has standing to bring this action.

A. Ohio citizenship alone does not confer standing upon Plaintiffs to challenge a legislative enactment.

None of the Plaintiffs has standing as an Ohio citizen because each fails to allege any direct and concrete injury either to himself (in the case of Plaintiffs Skindell and Murray) or to any members of its organization (in the case of ProgressOhio) from the enactment of the

JobsOhio Act. The Complaint contains no allegations that the JobsOhio Act interferes with or impairs any particularized legal right of the Plaintiffs.

ProgressOhio alleges that it “seeks to inform and educate the public about progressive ideals, values and politics in order to provide a more just and democratic society” and purports to bring this action on behalf of its 350,000 members statewide. (Compl. ¶ 7). However, ProgressOhio fails to point to any provision in the JobsOhio Act that interferes with its educational or informational mission. Moreover, to the extent that it seeks to bring an action on behalf of other like-minded Ohio citizens, ProgressOhio lacks standing to do so. Associational standing exists only when an association’s “members have suffered actual injury” and thus “have standing to sue in their own right.” *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St. 3d 318, 320. ProgressOhio fails to allege that any of its individual members has suffered or is threatened with an actual injury from the JobsOhio Act; therefore, ProgressOhio lacks any purported associational standing to seek legal redress on behalf of any of its members.

The allegations, if any, supporting Plaintiffs Skindell and Murray’s standing to sue are even more tenuous, as the Complaint merely identifies them as citizens, taxpayers, and legislators. (Compl. ¶ 8). However, neither Plaintiff identifies any concrete, specific legal right affected by the operation of the JobsOhio Act. At best, they merely assert a generalized political opposition against the Act. A plaintiff’s political interest in the outcome of a declaratory judgment action simply does not constitute a legal interest forming a justiciable controversy. See *Shoemaker v. City of Piqua*, 2nd Dist. Nos. 00CA32, 00CA37 (Oct. 13, 2000), 2000 Ohio App. LEXIS 4742 (dismissing declaratory judgment action that presented nothing more than a “political controversy” that “must ultimately be determined at the ballot box, not in court”).

Ohio law simply does not recognize one's status as an Ohio citizen as the sole basis to challenge state law. To argue otherwise would eviscerate the doctrine of standing, as any legislative enactment would be subject to challenge by any Ohio citizen. However, Ohio law requires more from plaintiffs, including Plaintiffs in this case. Having failed to allege any injury conferring standing, each of the Plaintiffs lack standing to bring this action.

B. Plaintiffs lack taxpayer standing.

Plaintiffs also lack standing as Ohio taxpayers to file this action. The law is clear: mere taxpayer status does not confer standing to challenge a legislative enactment. The Ohio Supreme Court set forth this rule in *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 355:

In the absence of statutory authority, a taxpayer lacks legal capacity to institute an action to enjoin the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy.

Id. at 368. As further explained by the Court, "private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally." *Id.* Fifty-two years later, the Court restated this rule in *State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 2007-Ohio-3677:

Ohio law does not authorize a private Ohio citizen, acting individually and without official authority, to prosecute government officials suspected of misconduct based on the citizen's status as a taxpayer of general taxes.

Id. at ¶ 9.

Applying these principles, Ohio courts have found that merely paying taxes into the State's general revenue fund does not confer standing to challenge any general revenue expenditure. The Ohio Supreme Court, for example, ruled that a state legislator did not have general taxpayer standing to challenge executive use of public funds, as his taxpayer status "is

shared by nearly all adult Ohio citizens.” *State ex rel. Dann v. Taft*, 2007-Ohio-3677 at ¶ 9. Thus, “there is nothing particularized about a need asserted on that basis.” *Id.* See also *Gildner v. Accenture, LLP*, 10th Dist. No. 09AP-167, 2009-Ohio-5335, ¶¶ 20-24 (taxpayers lacked standing to challenge agreement between state agency and computer services vendor); *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007-Ohio 4372, ¶¶ 36-43 (taxpayer lacked standing to challenge public university payment of domestic partner benefits from general revenue fund); *Tiemann*, 127 Ohio App. 3d at 320-323 (no standing to challenge construction project where taxpayer failed to show any special interest in funds paying for project).

Plaintiffs’ Complaint contains only one allegation with respect to their purported taxpayer standing to bring this claim: that Plaintiffs Skindell and Murray are taxpayers of the State of Ohio who reside in Cuyahoga and Erie counties, respectively. (Compl. ¶ 8). However, Plaintiffs have not alleged any injury to a cognizable property interest resulting from the implementation of the JobsOhio Act. Where the Court has alluded to the concept of common-law taxpayer standing, it has done so only in the limited circumstance where a plaintiff contributed to a special fund and thus can demonstrate some special interest in that fund because his own property rights are placed in jeopardy. See, e.g., *Racing Guild of Ohio v. Ohio State Racing Comm.* (1986), 28 Ohio St. 3d 317, 321 (plaintiffs had standing as “license-fee payors” to challenge the Commission’s issuance of operating permits and tax abatements to an illegally-operated race track facility); *State ex rel. Dann v. Taft*, 2006-Ohio-3677 at ¶ 13 (state legislator did not have general taxpayer standing to challenge executive use of public funds but “arguably had a special interest” in the management of the Worker’s Compensation Fund because he paid into that fund as an employer).

Where, as here, a taxpayer seeks to challenge a state legislative enactment merely because he has paid into the general revenue fund, such taxpayer status is insufficient to confer standing. Therefore, none of the Plaintiffs here has standing to bring this challenge in their capacity as taxpayers.

C. Plaintiffs Skindell and Murray lack standing as state legislators to challenge the JobsOhio Act.

Plaintiffs Skindell and Murray do not acquire standing to challenge the JobsOhio Act simply by virtue of their status as state legislators. In the absence of any injury or deprivation of a right specific to their offices, membership in a legislative body does not in itself confer standing to challenge the constitutionality of enacted law. Legislators have standing only when they have been prevented from casting an effective vote. *State ex rel. Ohio General Assembly v. Brunner*, 2007-Ohio-3780 at ¶ 19. Legislators do not have standing where, like the Plaintiffs here, they voted with the minority and then seek to challenge the constitutionality of passed legislation. *Id.*, citing *Raines v. Byrd* (1997), 521 U.S. 811, 814. In *Raines*, for example, six plaintiff-legislators who voted with the minority in opposition to the Line Item Veto Act then brought suit challenging the constitutionality of the Act after it was enacted by Congress. *Raines, supra*. The Court ruled that the plaintiffs lacked standing, as “their votes were given full effect” but “they simply lost that vote.” *Raines*, 521 U.S. at 824.

Here, Plaintiffs Skindell and Murray voted in the minority in opposition to the JobsOhio Act.¹ They do not allege any vote nullification or any interference in their ability to cast an

¹ The Court may take judicial notice of the fact that Plaintiffs Skindell and Murray voted with the minority in opposing the JobsOhio Act. See Ohio House of Representatives Journal (Feb. 1, 2011), at 132 (59 yeas, 37 nays, with Rep. Murray voting in the negative); Ohio Senate Journal (Feb. 16, 2011), at 134 (31 yeas, 2 nays, with Sen. Skindell voting in the negative). See also *Neff v. Corrigan*, 75 Ohio St. 3d 12, 16, 1996-Ohio-231 (courts may take judicial notice of “adjudicative facts” under Ohio Evid. R. 201 when considering a motion to dismiss without converting it to a motion for summary judgment) (collecting cases); Ohio Evid. R. 201 (an adjudicative fact of which a court may take judicial notice is one that is “not subject to reasonable dispute in that it is either (1) generally

effective vote. Rather, like the plaintiffs in *Raines*, Plaintiffs Skindell and Murray voted with the minority and lost. Having participated fully in the legislative process, Plaintiffs cannot invoke the Court's powers to interfere with duly enacted legislation. In the absence of any individualized injury or curtailment of their rights as members of the General Assembly, Plaintiffs Skindell and Murray lack standing to challenge the constitutionality of the JobsOhio Act.

D. Plaintiffs lack statutory standing under the JobsOhio Act and Ohio's Declaratory Judgment Act.

In addition to Plaintiffs' lack of standing under Ohio common law, neither the JobsOhio Act nor the Ohio Declaratory Judgment Act, R.C. 2721.02, et seq., confers statutory standing to bring this challenge.

First, the JobsOhio Act does not confer statutory standing, as alleged by Plaintiffs (See Compl. ¶ 9). Although Plaintiffs fail to cite their statutory standing authority with any specificity in their Complaint, presumably Plaintiffs rely on the following provision in R.C. 187.09:

Except as provided in division (D) of this section [actions within the original jurisdiction of the Ohio Supreme Court or courts of appeal], any claim asserting that any one or more sections of the Revised Code amended or enacted by H.B. 1 of the 129th general assembly, any section of Chapter 4313 of the Revised Code enacted by H.B. 153 of the 129th general assembly, or any portion of one or more of those sections, violates any provision of the Ohio Constitution shall be brought in the court of common pleas of Franklin county within ninety days after the effective date of the amendment of this section by H.B. 153 of the 129th general assembly.

R.C. 187.09(B) (H.B.153). A plain reading of this statute shows that it is (1) a venue provision, and (2) a statute of repose. Nothing in this statute speaks to, or confers standing upon anyone, including Plaintiffs. As such, R.C. 187.09 does not abrogate the common law requirement of a

known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

particularized injury for standing. See, e.g., *Bresnik v. Beulah Park Ltd. Partnership, Inc.* (1993), 67 Ohio St. 3d 302, 304 (“Statutes. . . will not be presumed or held, to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention.”) (citations omitted).

Second, Ohio’s Declaratory Judgment Act, R.C. 2721.02, et seq., does not confer broad standing on “*any* person to bring an action requesting the court issue a declaratory judgment on the constitutionality of a statutory enactment,” as Plaintiffs contend. (Compl. ¶ 6). “Only those persons who are *legally affected* are proper parties to a lawsuit” for declaratory judgment. *Driscoll v. Austintown Associates* (1975), 42 Ohio St. 2d 263, 273 (emphasis added). To be entitled to declaratory judgment, it is well settled in Ohio that a plaintiff must assert a real, justiciable controversy over the legal rights of parties with adverse interests. See *Aust v. Ohio State Dental Bd.* (10th Dist. 2000), 136 Ohio App. 3d 677, 681 (construing R.C. 2721.02); *Wilburn v. Ohio Dept. of Rehab. & Corr.* (10th Dist.), 2001-Ohio-4047, *4-5 (a “justiciable issue” is one that requires the existence of a legal interest or right). See also R.C. 2721.02 (courts may declare “rights, status, and other legal relations” among parties); R.C. 2721.03 (declaratory judgment limited to “any person whose *rights, status, or other legal relations are affected* by a constitutional provision [or] statute”) (emphasis added).

Plaintiffs have not asserted a real, justiciable controversy. They can identify no legal right or interest that might be affected by the JobsOhio Act. For the same reason that Plaintiffs lack standing, they also fail to bring a claim for declaratory relief. Even a declaratory action addressing the validity of State law must have a justiciable controversy. For example, in a case where a non-profit group like ProgressOhio sought declaratory relief to prevent the State from enforcing a wildlife management program, the Court held that the group had no pecuniary,

ownership, or otherwise legally cognizable interest in the affected wildlife. *In Defense of Deer v. Cleveland Metroparks* (8th Dist.), 138 Ohio App. 3d 153, 162-163. Thus, the Court dismissed plaintiffs' declaratory judgment action for failure to state a justiciable controversy. *Id.* at 163.

Similarly, no particular legal right of any Plaintiff here is affected by the JobsOhio Act. A political interest is not the same as a legal interest that is the proper subject of declaratory relief under Ohio's Declaratory Judgment Act. See *Shoemaker, supra*, 2nd Dist. Nos. 00CA32, 00CA37 (Oct. 13, 2000), 2000 Ohio App. LEXIS 4742. Without pointing to any legal right or interest of their own that will be affected by the JobsOhio Act, Plaintiffs have not brought a proper challenge under Ohio's Declaratory Judgment Act that the Court can adjudicate.

Therefore, because Plaintiffs fail to demonstrate the requisite standing to bring suit in the first place, the Court should dismiss Plaintiffs' Complaint without considering the merits of their constitutional challenges. See, e.g., *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, ¶ 114 ("We decline to answer the . . . question on the constitutionality of R.C. 2315.20 for lack of standing."); *Util. Serv. Partners v. PUC*, 124 Ohio St. 3d 284, 294, 2009-Ohio-6764, ¶ 48 (party "lacks standing to raise the constitutional rights of property owners, so we do not reach the merits of the takings claim."); *Bicking*, 71 Ohio St. 3d at 320 (dismissing for lack of standing without deciding merits).

II. Plaintiffs fail to bring a ripe claim suitable for judicial resolution.

Dismissal is also required under Civ. R. 12(B)(1) because Plaintiffs' claims are not ripe. The doctrine of ripeness, an issue inherent in justiciability, addresses timing and seeks "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" over questions that are "abstract, hypothetical, or remote." *State ex rel. Elyria Foundry Co. v. Indus. Comm. of Ohio*, 82 Ohio St. 3d 88, 89, 1998-Ohio-366 (citations

omitted). Where, as here, Plaintiffs seek a ruling on state law based on hypothetical, future contingencies, it is the “settled. . . responsibility” of the Court “to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.” *Fortner*, 22 Ohio St. 2d at 14. Indeed, trial courts lack jurisdiction to review premature claims. See *Thomson v. Ohio Dept. of Rehabilitation and Corr.* (10th Dist.), 2010-Ohio-416, ¶ 10. Accordingly, the Court is required to review ripeness *sua sponte*. *Stewart v. Stewart* (4th Dist. 1999), 134 Ohio App. 3d 556, 557 (citing Section 4(B), Article IV, Ohio Constitution).


Plaintiffs’ challenge is not ripe for review because it is based solely on allegations of a future, hypothetical event that may not ever occur. Plaintiffs allege that the State “intends to make equity investments in private companies through JobsOhio” in violation of the Ohio Constitution. (Compl. ¶ 23). However, any such alleged investment by the State is unlikely and speculative, at best. In fact, there is no provision in the JobsOhio Act that speaks to the State making equity investments in any private enterprise. In the absence of a ripe or imminent controversy, the Court cannot exercise jurisdiction over hypothetical questions like the one alleged here by Plaintiffs. See *American Municipal Power-Ohio, supra*, 1983 Ohio App. LEXIS 15196, *4 (issuance of declaratory judgment based on “contingencies that may never occur” was an improper “advisory opinion concerning whether a contemplated course of conduct is lawful”); *Stewart*, 134 Ohio App. 3d at 559 (trial court “exceeded its jurisdictional powers by ruling upon future events which may or may not occur”); *State ex rel. Bolin v. Ohio Environ. Protection Agy.* (9th Dist. 1992), 82 Ohio App. 3d 410 (no present, justiciable controversy where plaintiff seek ruling on state law based on hypothetical set of facts).

CONCLUSION

For the reasons stated above, the State Defendants respectfully ask the Court to dismiss Plaintiffs' Complaint in its entirety for lack of standing and failure to bring a justiciable or ripe claim over which the Court may exercise jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing State Defendants' Motion to Dismiss was sent by regular U.S. Mail on September 30, 2011 to the following:

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