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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.	:	

REPLY BRIEF IN SUPPORT OF
STATE DEFENDANTS' MOTION TO DISMISS

The question before the Court is simple: does Ohio law permit private individuals and advocacy groups to challenge the constitutionality of legislation in the absence of a direct and concrete injury to them in particular. The answer is clearly "no." These Plaintiffs lack standing, so the lawsuit must be dismissed.

Plaintiffs have suggested three theories of standing: (1) statutory standing; (2) standing as legislators; and (3) public interest standing.[1] However, none of Plaintiffs' theories has merit.

I. Legal Argument

A. The Merits of Plaintiffs' Case Are Irrelevant To The Question of Standing

"Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief **must** establish standing to sue." *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, ¶ 12 (quoting *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 115 Ohio St.3d 375, 2007-Ohio-5024, ¶ 27) (emphasis added). Curiously, although standing is the question before the Court and was the sole subject of the State

[1] It is unclear the extent to which Plaintiffs are still arguing for taxpayer standing. However, they have not pled the necessary "special interest" in the funds at issue to sustain standing as taxpayers. *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 200- Ohio-3677; *State ex rel. Masterson v. Ohio St. Racing Comm.* (1954), 162 Ohio St. 355.

Defendants' Motion to Dismiss, Plaintiffs devote the first five-plus pages of their Brief to vilifying the JobsOhio Act as unconstitutional and/or bad public policy. The Court should recognize Plaintiffs' rhetoric for what it is: an attempt to distract the Court from the glaring standing defect.

B. Plaintiffs Have Failed To Establish Their Standing

1. Plaintiffs Do Not Have Statutory Standing

The constitutionality of a statute can only be challenged by someone who is "within the class against whom the operation of the statute is alleged to have been unconstitutionally applied" and who has been injured thereby. *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169, syllabus. Plaintiffs correctly note that standing may also be conferred by statute, but nothing in the JobsOhio Act even purports to confer standing on Plaintiffs (or anyone else).

As the State Defendants correctly anticipated in their Motion to Dismiss, Plaintiffs attempt to read a standing provision into R.C. 187.09(B), which provides, in relevant part:

> Except as provided in division (D) of this section, any claim asserting that any one or more sections of the [JobsOhio Act] 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) contains a venue provision and establishes a statute of limitations, but says absolutely nothing about who can or cannot sue.

A statutory grant of standing does not typically require an act of imagination to locate; standing provisions are expressly set forth in the Revised Code. See, e.g., *Middletown v. Ferguson* (1986), 25 Ohio St.3d 71, 75-76 (holding that R.C. 133.71(B) (now R.C. 133.70) expressly authorizes an issuer of bonds to file a bond validation action); *Ohio Valley Associated Builders & Contrs. v. Kuempel* (2nd Dist.), 192 Ohio App.3d 504, 2011-Ohio-756 (Ohio's

prevailing wage law grants an "interested party" standing to file a complaint (R.C. 4115.16(A)) and specifically defines who is an "interested party" (R.C. 4115.03(F)). A person who does not meet the statutory definition simply does not have standing. *Sheet Metal Workers' Int'l Ass'n v. Gene's Refrigeration, Heating & Air Conditioning, Inc.* (2009), 122 Ohio St.3d 248 (labor organization that obtains written authorization to represent one employee does not have standing as an "interested party" under R.C. 4115.03(F) to pursue violations on behalf of any other employee).

Plaintiffs believe the JobsOhio Act confers standing upon absolutely *any* entity or person who cares to file a lawsuit. No court has ever adopted such a theory of "universal standing." To the contrary, when the scope of statutory standing is uncertain, courts have retreated back to common law concepts of actual injury. See *Sierra Club v. Morton* (1972), 405 U.S. 727, 734 (holding that the broad grant of standing under §10 of the Administrative Procedure Act to any "person suffering legal wrong because of agency action" did not extend to aesthetic, non-economic objections to a development project, but rather required the plaintiff to show a concrete, particularized injury).

Plaintiffs theorize that the General Assembly, by enacting a statute of repose for constitutional challenges, "obviously contemplated an immediate public interest lawsuit by taxpayer plaintiffs." (Plaintiffs' Memorandum Contra, p. 6). This is of course a non-sequitor: even if one assumes the General Assembly anticipated an immediate legal challenge to JobsOhio, it does not follow that the Legislature authorized that challenge to be brought by anyone who disagreed with the policy and was willing to pay the filing fee. The duration of a statute of repose has nothing whatsoever to do with the question of standing. (As to Plaintiffs'

contention that the 90-day window is unconstitutionally short, that question is not before the Court in this case).

Standing is not a picayune or hyper-technical objection. The requirement of an actual injury is the bulwark that prevents the Court from issuing advisory opinions. *Thompson v. Joint Township Dist. Memorial Hospital* (3rd Dist. June 23, 1983), No. 2-82-8, 1983 Ohio App. LEXIS 11519 at *8 ("by mandating a standing requirement, the courts avoid making advisory opinions between non-adversarial parties"). The Plaintiffs cannot identify a statutory basis for their claim of standing, so their Complaint must be dismissed.[2]

2. Skindell and Murray Do Not Have Standing As Legislators

Members of the General Assembly do not have standing merely by virtue of their office, and they certainly do not have standing to challenge the constitutionality of legislation they unsuccessfully opposed. *State ex rel. Ohio General Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, ¶ 19 (citing *Raines v. Byrd* (1997), 521 U.S. 811, 830). Plaintiffs Skindell and Murray have not alleged that they have been prevented from casting an effective vote, which could theoretically create standing given the right set of facts. *Brunner, supra*, 2007-Ohio-3780 at ¶ 20.

Instead, Skindell and Murray allege they have standing because the JobsOhio Act obligates General Revenue Funds for more than two years, contrary to Section 22, Article II of the Ohio Constitution. (Plaintiffs' Memorandum Contra, pp. 8-9). However, they cannot identify any section of the JobsOhio Act that encumbers state funds for longer than the current biennium. Their Memorandum talks about "$1,000,000," which is the amount that the

[2] The Court should disregard Plaintiffs' attempt to use dicta from the Supreme Court's decision dismissing their lawsuit as proof that the Court agreed Plaintiffs have standing. Without question, the Supreme Court did not address the matter of standing and in fact there was no reason for the Court to address standing given its emphatic conclusion that it lacked subject matter jurisdiction. *ProgressOhio.org, Inc. v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-449, ¶ 1.

Department of Development is to set aside from its existing General Revenue fund appropriation to pay for the transition costs of JobsOhio. (See Section 5, H.B.1; Section 605.10, H.B.153). But they never explain how an appropriation for a specific fiscal year can be a violation of Section 22, Article II.

In addition, R.C. 187.04(A) requires the Department of Development to enter into a contract for services with JobsOhio, but this too is not a violation of Section 22, Article II. *State ex rel. Preston v. Ferguson* (1960), 170 Ohio St. 450.

Because their theory of "legislator standing" depends on finding a violation of Section 22, Article II, Skindell and Murray have the burden of identifying the appropriation that allegedly violates the Constitution. They cannot meet this burden because no such provision exists.

Even if such a provision did exist, Plaintiffs Skindell and Murray cannot explain why they, as legislators, would automatically have standing (they merely assume this to be true). There is absolutely no legal authority for the proposition that members of the General Assembly have standing to bring a constitutional challenge. The cases Plaintiffs cite in their brief certainly do not stand for this proposition. *Sorrentino v. Ohio Nat'l Guard* (1990), 53 Ohio St.3d 214, does speak to the two-year limit on appropriations, but says absolutely nothing about standing, much less legislator standing. And *Cuyahoga Cty. Bd. Of Commr's v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, ¶ 22, reiterates the standard boilerplate language that a litigant will only have standing where he or she is threatened with an injury "in a manner different from that suffered by the public in general," but does nothing to support the argument that a violation of Section 22, Article II, causes a unique injury to legislators different from the harm to the general public.

3. The Fact That Chapter 187 of the Revised Code Is "A Matter of Great Public Interest" Is Inconsequential For Standing Purposes

Plaintiffs argue at great length that the creation of JobsOhio is a matter of great public interest. (See Plaintiffs' Memorandum Contra, pp. 9-10). However, "public interest" standing is reserved for rare and extraordinary circumstances, and this Complaint does not meet the test.

Plaintiffs cite *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451 for the proposition that standing is no longer limited by the need to plead and prove a direct injury. However, that case has been limited in two fundamental ways. In *Sheward* itself, the Court said the "public interest" exception applies "only *in the rare and extraordinary case* where the challenged statute operates, *directly and broadly, to divest the courts of judicial power.*" *Id.* at 504 (emphasis in original). Clearly, the legislation under attack in this case does not "divest the courts of judicial power."

Moreover, the *Sheward* exception only applies to actions for extraordinary writs, not for declaratory judgment. *Kuhar v. Medina County Bd. of Elections* (9th Dist.), 2006-Ohio-5427, ¶ 11 (citing *Sheward*, 86 Ohio St.3d at 467-471); see also *Brown v. Columbus City Schools, Bd. of Educ.* (10th Dist.), 2009-Ohio-3230, ¶ 11 ("Ohio case law makes clear that public-right standing is found overwhelmingly, if not exclusively, in original actions seeking extraordinary writs") (citing *Brinkman v. Miami Univ.* (12th Dist.), 2007-Ohio-4372, ¶ 59).

The Tenth District Court of Appeals has not been friendly in recent years to constitutional challenges based on "public interest" standing. In addition to the limitations noted above, the Tenth District has rejected numerous suits on the grounds that the challenged legislation was not of sufficient general application to affect the citizenry as a whole. See *Smith v. Hayes* (10th Dist.), 2005-Ohio-2961, ¶ 11 (Desertion of Child Under 72 Hours Old Act, allowing person to surrender newborn to a safe haven without fear of criminal prosecution, was not legislation of

magnitude sufficient to invoke public interest exception); *Brown v. Columbus City Schools, Bd. of Educ.* (10th Dist.), 2009-Ohio-3230, ¶ 14 (challenge to public school funding allocation methods not of sufficient magnitude); *Bowers v. State Dental Bd.* (10th Dist. 2001), 142 Ohio App.3d 376, 381 (licensure examinations for dentists not of sufficient public import). It is unlikely the Tenth District would regard JobsOhio as having the same significance for all Ohioans as the wholesale alterations to the tort system at issue in *Sheward*.

II. Conclusion

Ohio law does not permit litigants to challenge legislation simply because they disagree with the policies implemented by the General Assembly. In the absence of a concrete, particularized injury, a litigant lacks standing to sue. The State Defendants therefore respectfully ask the Court to dismiss this action.

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CERTIFICATE OF SERVICE

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

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