OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

Thursday, November 13, 2014
9:30 a.m.
Statehouse Room 017

Agenda

Note: if you wish to make comments during the meeting please turn on and speak into your microphone.

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of September 11, 2014

IV. Presentations

- Article IV, Section 2(B)(1) (Supreme Court Original Jurisdiction)
  Justice Paul E. Pfeifer
  Supreme Court of Ohio

V. Reports and Recommendations

- Article IV, Section 19 (Courts of Conciliation)
- Article IV, Section 22 (Supreme Court Commission)

VI. Committee Discussion

- Future topics for consideration

VII. Adjourn

Paul E. Pfeifer

Senior Associate Justice

Jan. 2, 1993 - Paul E. Pfeifer became the 146th Justice of the Supreme Court of Ohio. His current terms ends on Jan. 1, 2017.

Justice **Paul E. Pfeifer** grew up on his family's dairy farm near Bucyrus. He still resides just down the road. As a teenager, he raised purebred Yorkshire hogs to finance his college education. Those years taught him the value of hard work, determination and clean overalls.

Justice Pfeifer's first job after graduating from OSU's law school was as an assistant attorney general trying eminent-domain cases associated with the building of Ohio's highway system. Traveling the state gave him an appreciation for Ohio's county courthouses, architectural jewels that are the crossroads of life in our towns and cities. He always tries to keep in mind how the Supreme Court's decisions might affect the people seeking justice in county courthouses every day.

In 1972, he became a partner in the law firm of Cory, Brown & Pfeifer, where he practiced – primarily as a trial and tax lawyer – for 20 years. He also served several years as an assistant county prosecutor.

Justice Pfeifer served in both houses of the Ohio General Assembly, including one term in the House of Representatives and four terms in the Senate. He held a variety of leadership posts in the Senate, and served as chairman of the Senate Judiciary Committee for 10 years. His proudest legislative accomplishment was crafting the legislation creating the Ohio Tuition Trust Authority.

Justice Pfeifer was first elected to the Supreme Court in 1992. For him, the most inspiring thing about the Court is that every voice gets heard, from that of the widow fighting for her husband's workers' compensation benefits, to those of corporations battling over tens of millions of dollars.

He began his fourth Supreme Court term in January 2011. At Justice Pfeifer's side was his wife, Julie, whom he first met when their steers were tied across from each other at the Crawford County Fair "more years ago than it would be polite to mention." Together, they have two daughters, Lisa and Beth, a son, Kurt, four granddaughters and one grandson.

Because of his career in state government, Justice Pfeifer has one foot in the capital city, but the other always remained firmly planted in his hometown, where he has his own farm now. He raises Black Angus cattle, and enjoys the time spent outdoors doing chores. He says there is clarity to life in the country, where there is no pomp and circumstance, just the green fields of Crawford County, a gaggle of grandkids who call him "Papa" and a herd of Angus that know him as the guy with the hay.

COURTROOM CAREER

The Supreme Court of Ohio, Associate Justice, elected 1992, 1998, 2004, 2010

Cory, Brown & Pfeifer, Partner, 1973-1992

Crawford County Prosecuting Attorney's office, Assistant Crawford County Prosecuting Attorney, 1973-1976

Ohio Attorney General William B. Saxbe's office, Assistant Ohio Attorney General, 1967-1970

LEGISLATIVE CAREER

The Ohio Senate (26th District, elected 1976, 1980, 1984, 1988)

Assistant President Pro-Tempore, 1985-1986
Minority Floor Leader, 1983-1984
Ten years as Senate Judiciary Committee Chairman

The Ohio House of Representatives (15th District, elected 1970)

Judiciary Committee member
State Government Committee member

BUSINESS INTERESTS

Raises Angus cattle on his Crawford County farm

EDUCATION

Juris Doctor, The Ohio State University, 1966
Bachelor of Arts, Economics, Political Science and History, The Ohio State University, 1963

PERSONAL

Born in 1942 in Bucyrus, Ohio
Wife, Julia; three children; five grandchildren
Member, Grace United Methodist Church, Bucyrus, Ohio

The three attached cases all relate to the JobsOhio decisions and concern the question of original jurisdiction.

Section 2(B)(1), Article IV of the Ohio Constitution states:

> (B)(1) The Supreme Court shall have original jurisdiction in the following:
>
> (a) Quo warranto;
>
> (b)Mandamus;
>
> (c) Habeas corpus;
>
> (d) Prohibition;
>
> (e) Procedendo;
>
> (f) In any cause on review as may be necessary to its complete determination;
>
> g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

Justice Pfeifer wrote dissents in all three cases, consistently maintaining that the Supreme Court of Ohio not only has the constitutional power but also the responsibility to exercise original jurisdiction in matters that demand early resolution.

The cases are:

***ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101**.

***State ex rel. JobsOhio v. Goodman*, 133 Ohio St.3d 297, 2012-Ohio-4425**

***ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio ST.3d 520, 2014-Ohio-2382**

PROGRESSOHIO.ORG, INC., ET AL. *v.* KASICH, GOVERNOR, ET AL.

[Cite as *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101.]

Section 3 of 2011 Am.Sub.H.B. No. 1 is unconstitutional insofar as it attempts to confer exclusive, original jurisdiction on this court to consider the constitutionality of the act's provisions — Cause dismissed for lack of subject-matter jurisdiction.

(No. 2011-0622 — Submitted August 8, 2011 — Decided August 19, 2011.)

ORIGINAL ACTION filed pursuant to Section 3 of
2011 Am.Sub.H.B. No. 1.

Per Curiam.

{¶ 1} This cause originated upon the filing of an original action pursuant to Section 3 of 2011 Am.Sub.H.B. No. 1 ("H.B. 1").[1] We dismiss this cause for lack of subject-matter jurisdiction.

{¶ 2} Under Section 2(B)(1), Article IV of the Ohio Constitution, this court has original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition, procedendo, any cause on review as may be necessary to its complete determination, and all matters relating to the practice of law, including the admission of persons to the practice of law and the discipline of persons so

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1. {¶ a} Section 3 of H.B. 1 provides:

{¶ b} "The Supreme Court of Ohio shall have exclusive, original jurisdiction over any claim asserting that any one or more sections of the Revised Code amended or enacted by this act, or any portion of one or more of those sections, or any rule adopted under one or more of those sections, violates any provision of the Ohio Constitution; and over any claim asserting that any action taken pursuant to those sections by the Governor or the nonprofit corporation formed under section 187.01 of the Revised Code violates any provision of the Ohio Constitution or any provision of the Revised Code. Any such claim shall be filed as otherwise required by the Court's rules of practice not later than the sixtieth day after the effective date of this act. If any claim over which the Supreme Court is granted exclusive, original jurisdiction by this section is filed in any lower court, the claim shall be dismissed by the court on the ground that the court lacks jurisdiction to review it."

admitted. The parties do not claim that this action falls under our original jurisdiction as set forth in the Constitution. Instead, petitioners request a declaratory judgment that H.B. 1 is unconstitutional and a prohibitory injunction preventing respondents from acting pursuant to its provisions. We lack original jurisdiction to grant this relief. See *State ex rel. Ministerial Day Care Assn. v. Zelman*, 100 Ohio St.3d 347, 2003-Ohio-6447, 800 N.E.2d 21, ¶ 22 ("neither this court nor the court of appeals has original jurisdiction over claims for declaratory judgment"); *State ex rel. Lanham v. Ohio Adult Parole Auth.* (1997), 80 Ohio St.3d 425, 427, 687 N.E.2d 283 ("We * * * lack original jurisdiction to grant relators' request for prohibitory injunctive relief"); see also *Kent v. Mahaffy* (1853), 2 Ohio St. 498, 499, wherein we held that a statutory provision that purported to confer upon this court jurisdiction to grant an injunction in a case pending in another court was ineffective ("We can exercise only such powers as the constitution itself confers, or authorizes the legislature to grant. We can derive no power elsewhere").

{¶ 3} "It is a well-established principle of constitutional law that when the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution. This principle is grounded on the separation of powers provisions found in many American constitutions * * *." See *Smith v. State* (1976), 289 N.C. 303, 328, 222 S.E.2d 412, and cases cited therein.

{¶ 4} Although *Smith* is from another jurisdiction, the principle set forth above is true in Ohio. "[N]either statute nor rule of court can expand our jurisdiction." *Scott v. Bank One Trust Co., N.A.* (1991), 62 Ohio St.3d 39, 41, 577 N.E.2d 1077; see also *State ex rel. Cleveland Mun. Court v. Cleveland City Council* (1973), 34 Ohio St.2d 120, 122, 63 O.O.2d 199, 296 N.E.2d 544 ("neither the Civil Rules nor statutes can expand this court's original jurisdiction and require it to hear an action not authorized by the Ohio Constitution"); *Classic*

Pictures, Inc. v. Dept. of Edn. (1952), 158 Ohio St. 229, 229-230, 48 O.O. 453, 108 N.E.2d 319 ("If plaintiff's contention were true, the General Assembly would have conferred upon the Supreme Court original jurisdiction in addition to that conferred by the Constitution. Such legislation would be void"); *State ex rel. Richards v. Pittsburgh, Cincinnati, Chicago, & St. Louis Ry. Co.* (1895), 53 Ohio St. 189, 237, 41 N.E. 205 ("That the original jurisdiction of this court cannot be enlarged or diminished by legislative action, but is such, only, as the constitution confers, was settled at an early day after the present constitution was adopted").

{¶ 5} Therefore, insofar as Section 3 of H.B. 1 attempts to confer exclusive, original jurisdiction on this court to consider the constitutionality of the act's provisions, it is unconstitutional. Neither legislation nor rule of court can expand our jurisdiction under Section 2, Article IV of the Ohio Constitution.

{¶ 6} The provisions of 2011 Am.Sub.H.B. No. 153 do not apply retroactively and, therefore, do not resolve this present action. They do, however, provide a remedy for petitioners to institute an action challenging the constitutionality of amended R.C. 187.01 et seq. by way of an action in the Franklin County Court of Common Pleas.

{¶ 7} Based on the foregoing, we dismiss this cause for lack of subject-matter jurisdiction. Our holding renders moot petitioners' motions for preliminary injunctive relief and to strike respondents' notice of supplemental authority and request for an expedited hearing.

Cause dismissed.

O'CONNOR, C.J., and LUNDBERG STRATTON, O'DONNELL, LANZINGER, CUPP, and MCGEE BROWN, JJ., concur.

PFEIFER, J., dissents.

PFEIFER, J., dissenting.

{¶ 8} I would sua sponte convert this action to a mandamus action and grant an alternative writ to begin the briefing process. It is my long-held view that this court has not only the constitutional power but also the responsibility to exercise original jurisdiction in matters that demand early resolution. Although the granting of writs of mandamus and prohibition to determine the constitutionality of statutes is " 'limited to exceptional circumstances that demand early resolution,' " this court has accepted for exceptional review cases involving statutes that had comprehensive reach and wide impact. *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717, 780 N.E.2d 981, ¶ 12, quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 515, 715 N.E.2d 1062 (Pfeifer, J., concurring); see also *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 631 N.E.2d 582.

{¶ 9} This is such a case. Like *Voinovich*, this case challenges the constitutionality of legislation that makes significant changes to the organizational structure of state government but does not involve a complex factual scenario that would benefit from the development of a record in a trial court. We would be serving the interests of the state and of judicial economy by addressing petitioners' claims now.

Victoria E. Ullmann, for petitioners.

Michael DeWine, Attorney General, and Aaron D. Epstein and Pearl M. Chin, Assistant Attorneys General, for respondents.

THE STATE EX REL. JOBSOHIO *v.* GOODMAN, DIR.

**[Cite as *State ex rel. JobsOhio v. Goodman,*
133 Ohio St.3d 297, 2012-Ohio-4425.]

Cause dismissed—Relator essentially seeks a declaratory judgment or an advisory opinion on the constitutionality of 2011 Am.Sub.H.B. No. 1 and 2011 Am.Sub.H.B. No. 153.

(No. 2012-1356—Submitted September 11, 2012—Decided September 28, 2012.)

IN MANDAMUS.

Per Curiam.

{¶ 1} This is an original action in mandamus by relator, JobsOhio, asking this court to (1) find that legislation authorizing the creation of JobsOhio to promote economic development in the state and to assume responsibility for the merchandising and sale of alcohol in the state is constitutional and (2) compel respondent, Ohio Department of Commerce Director David Goodman, to execute an agreement to transfer the state's liquor business to JobsOhio. We dismiss the cause because it does not raise a justiciable controversy, essentially seeking either a declaratory judgment or an advisory opinion on the constitutionality of the statute.

Facts

{¶ 2} The General Assembly enacted and Governor John Kasich signed 2011 Am.Sub.H.B. No. 1 ("H.B. 1"), effective February 18, 2011. Under H.B. 1, the governor is "authorized to form a nonprofit corporation, to be named 'JobsOhio,' with the purposes of promoting economic development, job creation, job retention, job training, and the recruitment of business to this state." R.C. 187.01. R.C. 187.01(B) through (D) provide that the governor is the chair of the

board of directors of JobsOhio and that he shall appoint the remaining eight directors.

{¶ 3} In accordance with R.C. 187.01, the governor filed articles of incorporation for JobsOhio with the secretary of state's office on July 5, 2011. According to its articles of incorporation, JobsOhio was organized and is to be operated "for the purposes of promoting economic development, job creation, job retention, job training, and the recruitment of business to the State of Ohio." The governor thereafter appointed people to serve on the board of directors for JobsOhio. R.C. 187.01(B) and 187.02. Pursuant to Section 5 of H.B. 1, the Ohio Department of Development ("ODOD") set aside $1,000,000 "to establish and operate the JobsOhio corporation established in Chapter 187. of the Revised Code." JobsOhio and ODOD negotiated and executed an "agreement for services" pursuant to R.C. 187.04(A), and that agreement was approved by the Controlling Board of the state.

{¶ 4} In June 2011, the General Assembly enacted and the governor signed 2011 Am.Sub.H.B. No. 153 ("H.B. 153"), which, inter alia, authorized the state to transfer to JobsOhio all or a portion of its alcohol-distribution system for a transfer price payable by JobsOhio to the state. *See* R.C. 4313.02(A) and 4313.01(A).

{¶ 5} Pursuant to R.C. 4313.02(E), as enacted in H.B. 153, JobsOhio, the Ohio Office of Budget and Management ("OBM"), and the Ohio Department of Commerce ("ODC"), negotiated a contract to provide for the continuing operation of the state's alcohol business by the state's division of liquor control. The terms of the "operations services agreement" were finalized, and it was approved by the Controlling Board.

{¶ 6} In September 2011, in accordance with R.C. 4313.02(C)(2), JobsOhio and OBM began negotiating the terms of a "franchise-and-transfer agreement" in which the state would grant to JobsOhio or its nonprofit corporate

affiliate, in exchange for a payment from JobsOhio to the state, a franchise on the state's liquor business for up to 25 years. As required by the statute, respondent, ODC Director David Goodman, was consulted regarding the terms of the agreement. R.C. 4313.02(C)(2).

{¶ 7} After negotiations were concluded, JobsOhio and its wholly owned subsidiary, JobsOhio Beverage System, signed the franchise-and-transfer agreement on August 7, 2012. OBM Director Timothy Keen also signed the agreement on August 7. *See* R.C. 4313.02(C)(2).

{¶ 8} By letter dated August 8, 2012, Mark Kvamme, the JobsOhio interim president and chief investment officer, forwarded a copy of the signed franchise-and-transfer agreement to ODC Director Goodman for his signature and advised Goodman that his "signature is the only step remaining before we may proceed with the proposed transfer."

{¶ 9} By letter dated and delivered August 9, 2012, Goodman refused to execute the franchise-and-transfer agreement. His letter explains that although he supports JobsOhio and its mission, acknowledges that the agreement and the negotiating process complied with R.C. Chapter 4313, and questions the validity of constitutional challenges raised against H.B. 1 and H.B. 153, he believes that his oath of office to uphold the Ohio Constitution precludes him from executing the agreement until the Ohio Supreme Court addresses the merits of the constitutional claims.

{¶ 10} On the day following ODC Director Goodman's refusal to sign the franchise-and-transfer agreement, August 10, 2012, JobsOhio filed this action for a writ of mandamus to "be issued to Respondent Goodman finding that the Legislation [H.B. 1 and 153] is constitutional and ordering Respondent to execute the Franchise and Transfer Agreement on behalf of the State, in accordance with R.C. § 4313.02(C)(2)." Goodman filed an answer and a motion for judgment on the pleadings. In his answer, Goodman admits all the pertinent facts and concurs

with JobsOhio's allegation that "[e]xercise of the Court's jurisdiction is necessary to allow [JobsOhio] the opportunity to timely adjudicate its claim against [Goodman], and to provide a swift and conclusive resolution to any and all questions regarding the constitutionality of the Legislation." JobsOhio filed a memorandum in opposition to Goodman's motion for judgment on the pleadings.

{¶ 11} This cause is now before the court for S.Ct.Prac.R. 10.5 determination.

Analysis

{¶ 12} We must now determine whether dismissal, an alternative writ, or a peremptory writ is appropriate. S.Ct.Prac.R. 10.5(C). Dismissal is required if it appears beyond doubt, after presuming the truth of all material factual allegations of JobsOhio's complaint and making all reasonable inferences in its favor, that JobsOhio is not entitled to the requested extraordinary relief in mandamus. *See State ex rel. Johnson v. Richardson*, 131 Ohio St.3d 120, 2012-Ohio-57, 961 N.E.2d 187, ¶ 12.

{¶ 13} For the reasons that follow, sua sponte dismissal of this case without reaching the merits of the constitutional claims is warranted.

{¶ 14} First, a review of the complaint—as well as Goodman's motion for judgment on the pleadings—indicates that the real object sought is a declaratory judgment, which this court lacks original jurisdiction to grant. *ProgressOhio.org, Inc. v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶ 2, citing *State ex rel. Ministerial Day Care Assn. v. Zelman*, 100 Ohio St.3d 347, 2003-Ohio-6447, 800 N.E.2d 21, ¶ 22 ("neither this court nor the court of appeals has original jurisdiction over claims for declaratory judgment"). If the allegations of a mandamus complaint indicate that the real object sought is a declaratory judgment, the complaint does not state a viable claim in mandamus and must be dismissed for lack of jurisdiction. *State ex rel. Miller v. Warren Cty. Bd. of Elections*, 130 Ohio St.3d 24, 2011-Ohio-4623, 955 N.E.2d 379, ¶ 21. In

assessing the true nature of a mandamus claim, we examine the complaint. *State ex rel. Obojski v. Perciak*, 113 Ohio St.3d 486, 2007-Ohio-2453, 866 N.E.2d 1070, ¶ 13. Although JobsOhio's complaint is couched in terms of compelling ODC Director Goodman to comply with his affirmative duty under R.C. 4313.02(C)(2) to execute the franchise-and-transfer agreement, it actually seeks an expedited ruling from this court declaring H.B. 1 and 153 constitutional, so as to preclude any further challenges.

{¶ 15} Second, mandamus is not available if the relator has an adequate remedy in the ordinary course of law. *State ex rel. Nickleson v. Mayberry*, 131 Ohio St.3d 416, 2012-Ohio-1300, 965 N.E.2d 1000, ¶ 2; R.C. 2731.05. JobsOhio has an adequate remedy by way of a declaratory-judgment action in common pleas court to raise its claim that H.B. 1 and 153 are constitutional. The cases that JobsOhio and Director Goodman cite in which the court decided the constitutionality of legislation in the context of mandamus cases, *see, e.g., State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912; *State ex rel. Duerk v. Donahey*, 67 Ohio St.2d 216, 423 N.E.2d 429 (1981); and *State ex rel. Shkurti v. Withrow*, 32 Ohio St.3d 424, 513 N.E.2d 1332 (1987), are distinguishable because in those cases, there was no evidence or inference of any agreement on the part of the parties to obtain an advisory opinion on the constitutionality of legislation. Instead, all the cited cases involved actual controversies between genuinely adverse parties.

Conclusion

{¶ 16} Based on the foregoing, it appears beyond doubt that JobsOhio's mandamus claim does not properly invoke the original jurisdiction of the court. We will not decide constitutional claims raised by parties who seek an advisory declaratory judgment for which they have adequate remedies in the ordinary course of law. Thus, we sua sponte dismiss the cause. This result renders moot

all pending motions, including the motion to intervene and the motions of amici curiae for leave to submit briefs on the merits of the constitutional claims.

Cause dismissed.

O'CONNOR, C.J., and LUNDBERG STRATTON, LANZINGER, and MCGEE BROWN, JJ., concur.

PFEIFER, J., dissents.

CUPP, J., dissents and would (1) grant the motions of the Ohio Manufacturers' Association, the Columbus Partnership, Ohio Bankers League, the Ohio Chamber of Commerce, and the Ohio Council of Retail Merchants for leave to file briefs in support of relator, (2) grant the motion to intervene as respondents filed by ProgressOhio.org, Senator Michael Skindell, and Representative Dennis Murray Jr., (3) expressly reserve ruling on the motion to dismiss filed by the prospective intervenors at this time, and (4) grant an alternative writ and issue a schedule for the presentation of evidence and briefs.

O'DONNELL, J., not participating.

PFEIFER, J., dissenting.

{¶ 17} I dissent. I would grant an alternative writ. This court's consideration of original actions that address the constitutionality of statutes is "limited to exceptional circumstances that demand early resolution." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 515, 715 N.E.2d 1062 (1999) (Pfeifer, J., concurring). *See also State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St.3d 225, 631 N.E.2d 582 (1994); *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 2002-Ohio-6717, 780 N.E.2d 981. This is one of those extraordinary cases.

Squire Sanders, L.L.P., Aneca E. Lasley, and Gregory W. Stype; Organ, Cole & Stock, L.L.P., and Douglas R. Cole, for relator.

Michael DeWine, Attorney General; Porter, Wright, Morris & Arthur, L.L.P., James A. King, and L. Bradfield Hughes, for respondent.

PROGRESSOHIO.ORG, INC., ET AL., APPELLANTS, *v.* JOBSOHIO ET AL., APPELLEES.

[Cite as *ProgressOhio.org, Inc. v. JobsOhio,* 139 Ohio St.3d 520, 2014-Ohio-2382.]

Standing—Constitutionality of JobsOhio Act—R.C. 187.01 et seq. and 4313.01 et seq.—Plaintiffs failed to show that they have a personal stake in the outcome of the litigation or a cognizable basis for statutory standing.

(No. 2012-1272—Submitted November 6, 2013—Decided June 10, 2014.)

APPEAL from the Court of Appeals for Franklin County, No. 11AP-1136, 2012-Ohio-2655.

FRENCH, J.

{¶ 1} In this appeal, we consider whether appellants, ProgressOhio.org, Inc., Michael J. Skindell, and Dennis E. Murray Jr., have standing to challenge the JobsOhio Act, R.C. 187.01 et seq. and 4313.01 et seq. We have long held that a party wishing to sue must have a direct, personal stake in the outcome of his or her case; ideological opposition to a program or legislative enactment is not enough. Applying that precedent here, we conclude that appellants have failed to show that they have any personal stake in the outcome of this litigation. They therefore lack the direct injury required for common-law standing. Appellants similarly fail to allege a cognizable basis for statutory standing. Accordingly, we conclude that appellants are not proper parties to challenge the constitutionality of the JobsOhio legislation.

Facts and Procedural History

{¶ 2} This case concerns appellants' constitutional challenge to the JobsOhio Act. The act authorized the creation of a nonprofit corporation,

JobsOhio, for "the purposes of promoting economic development, job creation, job retention, job training, and the recruitment of business" to Ohio. R.C. 187.01. An appropriation from the Department of Development initially funded and established JobsOhio. 2011 Am.Sub.H.B. No. 1, Section 5. Thereafter, JobsOhio was given the right to purchase the state's liquor distribution and merchandising operations and to operate from revenues of the liquor enterprise. R.C. 4313.02(A).

{¶ 3} Appellant, ProgressOhio.org, Inc., is an entity organized under 26 U.S.C. 501(c)(4). It was "created to provide a progressive voice for Ohio citizens[,] * * * to inform and educate the public about progressive ideals, values and politics [and] to ensure that the government follows the dictates of the U.S. and Ohio Constitutions." Joining ProgressOhio as appellants are Michael J. Skindell, a member of the Ohio Senate, and Dennis E. Murray, a former member of the Ohio House of Representatives.

{¶ 4} Appellants filed this action for declaratory and injunctive relief in the Franklin County Common Pleas Court. Appellants sought a declaration that the act violated the Ohio Constitution and an injunction prohibiting the formation and continued operation of JobsOhio. Appellants primarily claimed that JobsOhio violated constitutional prohibitions on spending, corporate creation, and corporate investment.

{¶ 5} The trial court dismissed the case, finding that appellants lacked standing to sue. The Tenth District Court of Appeals agreed. It held that appellants lacked the personal stake and direct injury necessary for standing. 2012-Ohio-2655, 973 N.E.2d 307, ¶ 19 (10th Dist.). It also held that appellants did not present an issue of public interest great enough to otherwise warrant standing under *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999). 2012-Ohio-2655, 973 N.E.2d 307, at ¶ 32.

{¶ 6} This court accepted appellants' discretionary appeal. The only issue before us is whether appellants have standing to bring this action.

Analysis

{¶ 7} "Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue." *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27. 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." *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22. Standing does not depend on the merits of the plaintiff's claim. *Id.* at ¶ 23. Rather, standing depends on whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case. *Clifton v. Blanchester*, 131 Ohio St.3d 287, 2012-Ohio-780, 964 N.E.2d 414, ¶ 15; *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 178-179, 298 N.E.2d 515 (1973).

{¶ 8} Appellants concede that they have no personal stake in the outcome of this litigation. Consequently, they are admittedly unable to meet the requirements to establish traditional standing. Instead, appellants claim that they possess standing through four alternative means: (1) the public-right doctrine, (2) taxpayer standing, (3) statutory standing under a portion of the Declaratory Judgment Act, R.C. 2721.03(A), and (4) statutory standing under a portion of the JobsOhio Act, R.C. 187.09. We disagree on all counts, which we address in turn.

I. *The Public-Right Doctrine*

{¶ 9} First, appellants claim that they have standing under the public-right doctrine outlined in *Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062. The public-right doctrine represents "an exception to the personal-injury requirement of

standing." *Id.* at 503. The doctrine provides that "when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties." *Id.* at 471. To succeed in bringing a public-right case, a litigant must allege "rare and extraordinary" issues that threaten serious public injury. (Emphasis deleted.) *Id.* at 504. Not all allegedly illegal or unconstitutional government actions rise to this level of importance. *Id.* at 503.

{¶ 10} Appellants do not have standing under the public-right doctrine. As *Sheward* makes clear, the public-right doctrine applies only to original actions in mandamus and/or prohibition. *Id.* at paragraph one of the 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 * * *" [emphasis added]). It does not apply to declaratory-judgment actions filed in common pleas courts, and we have never used the doctrine in such a case.

{¶ 11} Nor could we. The Ohio Constitution expressly requires standing for cases filed in common pleas courts. Article IV, Section 4(B) provides that the courts of common pleas "shall have such original jurisdiction over all *justiciable matters*." (Emphasis added.) A matter is justiciable only if the complaining party has standing to sue. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 41 ("It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy"). Indeed, for a cause to be justiciable, it must present issues that have a "direct and immediate" impact on the plaintiffs. *Burger Brewing Co. v. Liquor Control Comm., Dept. of Liquor Control*, 34 Ohio St.2d 93, 97-98, 296 N.E.2d 261 (1973). Thus, if a common pleas court proceeds in an action in which the plaintiff lacks standing, the court violates Article IV of the Ohio Constitution.

Article IV requires justiciability, and justiciability requires standing. These constitutional requirements cannot be bent to accommodate *Sheward*.

{¶ 12} Even assuming that *Sheward* could apply to common-pleas actions, it would not apply in this case. Appellants make little effort to present a rare and extraordinary public issue. Instead, they assert that citizens should be able to challenge any alleged constitutional violations, regardless of rarity or magnitude. Appellants' position is incompatible with *Sheward*, which clearly states that not all allegations of constitutional harm warrant an exception to the personal-stake requirement of standing. 86 Ohio St.3d at 503, 715 N.E.2d 1062; *see also State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, quoting *Sheward* at 504 (constitutional challenge to state spending measures was "not a 'rare and extraordinary case' warranting invocation of the public-right exception to the personal-stake requirement of standing"). Thus, another reason that appellants' *Sheward* argument fails is that they do not show the type of rare and extraordinary public-interest issue required by *Sheward*. Accordingly, we find that appellants cannot establish standing under the public-right doctrine.

{¶ 13} We recognize that this case presents broader concerns about the overall validity of *Sheward* and the public-right doctrine. *Sheward* was a deeply divided, four-to-three decision, and it remains controversial today. JobsOhio and its amici criticize *Sheward* heavily, urging that we take this opportunity to overrule *Sheward* and settle the law of standing in Ohio. Nevertheless, given our holding today, we must decline JobsOhio's invitation to reevaluate *Sheward*. *Sheward* does not apply in this common-pleas action, and thus we express no opinion as to *Sheward*'s continued vitality.

II. *Taxpayer Standing*

{¶ 14} Next, appellants argue that they have common-law taxpayer standing to challenge the JobsOhio Act. We conclude, however, that appellants

have waived any claim to taxpayer standing by failing to raise the issue in the lower courts.

{¶ 15} The trial court made two rulings on the issue of taxpayer standing: (1) that appellants never asserted taxpayer standing in their complaint and (2) that, regardless, appellants failed to qualify for taxpayer standing. Appellants did not appeal that holding, and they did not brief or argue the issue of taxpayer standing in the court of appeals. Instead, appellants' assignments of error focused only on the public-right doctrine, legislative standing, and statutory standing under R.C. 187.09.

{¶ 16} Appellants maintain that they have not waived the issue of taxpayer standing, because their broad proposition of law ("Plaintiffs have standing to bring this action") allows them to assert all possible bases for standing. Even if we were to agree that appellants' proposition of law is broad enough to encompass the issue of taxpayer standing, appellants still waived that claim by not raising and arguing it in the court of appeals. *See State ex rel. E. Cleveland Fire Fighters' Assn., Loc. 500, Internatl. Assn. of Fire Fighters v. Jenkins*, 96 Ohio St.3d 68, 2002-Ohio-3527, 771 N.E.2d 251, ¶ 12 (holding that appellant waived a claim of standing by failing to raise it in the court of appeals). Accordingly, we reject appellants' purported taxpayer standing.

III. *Standing Under the Declaratory Judgment Act*

{¶ 17} In addition to standing authorized by common law, standing may also be conferred by statute. *Middletown v. Ferguson*, 25 Ohio St.3d 71, 75, 495 N.E.2d 380 (1986). To that end, appellants assert that they have standing under R.C. 2721.03, a portion of the Declaratory Judgment Act. We conclude that appellants have similarly waived any claim to standing under R.C. 2721.03.

{¶ 18} Appellants raised no claim of standing under R.C. 2721.03 in the lower courts. They argue, however, that they must be able to raise the issue now because of developments in the law—specifically, this court's decision in *Moore*,

133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977. In *Moore*, this court held that property owners could bring a declaratory-judgment action to challenge the constitutionality of rezoning if the owners pled an injury caused by the rezoning. *Id.* at ¶ 56. In dicta, the majority addressed the court of appeals' holding that R.C. 2721.03 does not itself determine standing to bring a declaratory-judgment action: "Although it is true that R.C. Chapter 2721 is the legislative source of a cause of action for declaratory relief, we do not necessarily agree that the statute does not confer standing." *Id.* at ¶ 48. This court did not, however, decide that question.

{¶ 19} The equivocal statement in *Moore* hardly qualifies as a change in law that warrants overlooking appellants' waiver here. But even if it did, appellants' statutory-standing claim would still fail, as they do not meet the requirements of R.C. 2721.03. R.C. 2721.03 applies only to "person[s] *whose rights, status, or other legal relations are affected* by a constitutional provision [or] statute." (Emphasis added.) *See also Moore* at ¶ 49 (declaratory relief available only when there is a real, justiciable controversy and relief is necessary "to preserve the rights of the parties"). Indeed, the three prerequisites to declaratory relief are (1) a real controversy between the parties, (2) justiciability, and (3) the necessity of speedy relief to preserve the parties' rights. *Burger Brewing Co.*, 34 Ohio St.2d at 97, 296 N.E.2d 261, citing *Am. Life & Acc. Ins. Co. of Kentucky v. Jones*, 152 Ohio St. 287, 296, 89 N.E.2d 301 (1949). Appellants ignore these requirements. They do not show that they have any rights at stake or that speedy resolution will bring them any concrete relief. They simply argue that they have an idealistic opposition to the government's "use of public fund[s] to prop up purely private corporations." This is insufficient under the Declaratory Judgment Act, and we reject appellants' contrary assertion.

IV. *Standing Under the JobsOhio Act*

{¶ 20} Finally, appellants contend that the JobsOhio Act itself, and particularly R.C. 187.09(B), cloaks them with standing to challenge JobsOhio.

R.C. 187.09(B) sets out time and place requirements for challenging the constitutionality of the JobsOhio legislation and provides as follows:

> Except as provided in division (D) of this section, any claim asserting that [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 this section * * *.

{¶ 21} R.C. 187.09(B) makes no mention of standing. Nevertheless, appellants argue that the statute is ambiguous and that this court must broadly construe it to provide standing to avoid rendering the statute meaningless. Appellants claim that R.C. 187.09(B) is ambiguous because it contemplates that someone will have standing to challenge the JobsOhio Act, but does not specify who has this standing. We disagree.

{¶ 22} R.C. 187.09 conveys a clear and definite meaning. The statute unambiguously provides that with the exception of claims within the original jurisdiction of this court or a court of appeals, any constitutional challenge to the JobsOhio legislation must lie in the Franklin County Court of Common Pleas and must be brought within 90 days after September 29, 2011. R.C. 187.09(B) and (D). The fact that R.C. 187.09 is silent as to who has standing to maintain a constitutional challenge to the legislation does not render the statute ambiguous. Nor will we read the statutory silence as clearly expressing an intention to abrogate the common-law requirements for standing. *See Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 67 Ohio St.3d 302, 304, 617 N.E.2d 1096 (1993) (this court will not read a statute as abrogating the common law unless the statutory language clearly expresses or imports that intention). Accordingly, we reject

appellants' argument that R.C. 187.09(B) grants them standing to challenge the JobsOhio Act.

V. *Appellants' Policy Concerns*

{¶ 23} Throughout their brief, appellants contend that it is a practical necessity for us to grant them standing. Unless we allow them to pursue this action, appellants argue, no one will ever be able to challenge JobsOhio or enforce the Ohio Constitution. We disagree.

{¶ 24} Appellants stress that they were the only litigants to file a lawsuit within the 90-day time frame set by R.C. 187.09(B). Thus, they argue, if this court does not grant appellants standing, no one will ever be able to challenge JobsOhio. Appellants are mistaken. Both R.C. 187.09(C) and (D) provide extended statutes of limitations for challenges to JobsOhio. R.C. 187.09(C) provides that "any claim asserting that any action taken by JobsOhio violates any provision of the Ohio Constitution shall be brought * * * within sixty days after the action is taken." And R.C. 187.09(D) allows aggrieved parties to bring an original action in this court, without any time limitation. Additionally, to the extent that the 90-day time limit in R.C. 187.09(B) is unconstitutional,[1] as appellants have suggested, a person with standing could still sue and challenge the time limitation as part of that suit. In short, appellants are not the last line of defense against JobsOhio, despite the dire picture they paint.

{¶ 25} Justice Pfeifer's dissent expresses similar concerns, erroneously concluding that today's decision "ensures that no court will ever address the question of the constitutionality of the JobsOhio legislation," because "[n]either the state, nor its counsel, nor the majority opinion has been able to conjure a

1. The issue of whether the 90-day time limit is constitutional is not before us today. Although appellants initially asked this court to review the constitutionality of R.C. 187.09(B), we specifically declined to exercise our discretionary jurisdiction over that issue. 134 Ohio St.3d 1416, 2013-Ohio-158, 981 N.E.2d 883. And even if we had accepted the issue for review, appellants' lack of standing would still prevent us from considering it here.

realistic example of a person or entity that would have the requisite standing and inclination to bring a claim." Justice Pfeifer's statements are demonstrably incorrect; in reality, all of the parties in this case—*including* appellants—identified multiple persons and entities that could potentially bring a claim. Thus, despite Justice Pfeifer's protestations to the contrary, we do not hold, and the parties do not suggest, that no person could ever have standing to challenge JobsOhio. A proper party—i.e., one with legal standing—may unquestionably contest the constitutionality of JobsOhio. As to that proper party, the courthouse doors remain open.

Conclusion

{¶ 26} Appellants have no personal stake in the outcome of this litigation and therefore lack common-law standing to challenge the JobsOhio Act. The public-right doctrine cannot save appellants, as it does not apply to actions brought in common pleas courts. Appellants' alternative claims to statutory standing likewise fail.

{¶ 27} If and when an injured party seeks to challenge JobsOhio, we may entertain such a case. But an injured party is not before us today. Appellants lack standing to bring this suit, and they may pursue it no further.

Judgment affirmed.

O'CONNOR, C.J., and WHITMORE and LANZINGER, JJ., concur.

KENNEDY, J., concurs in judgment only.

PFEIFER and O'NEILL, JJ., dissent.

BETH WHITMORE, J., of the Ninth Appellate District, sitting for O'DONNELL, J.

KENNEDY, J., concurring in judgment only.

{¶ 28} I concur in the majority's judgment that ProgressOhio, Michael Skindell, and Dennis Murray lack standing, in this case, to challenge the

constitutionality of R.C. 187.01 et seq. and 4313.01 et seq. ("the JobsOhio legislation"). However, I write separately to address the public-policy concerns that the majority summarily dismisses.

{¶ 29} Appellants argue that if they do not have standing, no one will be able to challenge the constitutionality of the JobsOhio legislation, because they are the only group to have done so within the 90-day statutory time limitation. R.C. 187.09(B). In dismissing appellants' claim that they are the only ones who timely filed an action challenging the constitutionality of the JobsOhio legislation, the majority writes, "Appellants are mistaken. Both R.C. 187.09(C) and (D) provide extended statutes of limitations for challenges to JobsOhio." Majority opinion at ¶ 24. I disagree.

R.C. 187.09

{¶ 30} R.C. 187.09 provides:

> (B) Except as provided in division (D) of this section, 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.
>
> (C) Except as provided in division (D) of this section, any claim asserting that *any action taken by JobsOhio* violates any provision of the Ohio Constitution shall be brought in the court of common pleas of Franklin County within sixty days after the action is taken.

(Emphasis added.)

{¶ 31} The divisions within R.C. 187.09 are separate and distinct.

{¶ 32} Am.Sub.H.B. No. 1, effective February 18, 2011, and Am.Sub.H.B. No. 153, effective September 29, 2011, created JobsOhio. R.C. 187.09(B) sets forth a time limitation on challenging the constitutionality of the *creation of JobsOhio*, while division (C) sets forth a time limitation on challenging the constitutionality of an *action by JobsOhio*.

{¶ 33} The majority declares that an individual with proper standing could challenge the constitutionality of the 90-day time limitation in R.C. 187.09(B). But who could meet the justiciability requirement, because cases filed in a common pleas court require a concrete injury? *See Ohio Trucking Assn. v. Charles*, 134 Ohio St.3d 502, 2012-Ohio-5679, 983 N.E.2d 1262, quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469-470, 715 N.E.2d 1062 (1999) (" 'In order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show that he or she 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' ").

{¶ 34} At oral argument, the state appellees, the governor, the directors of development and the office of budget and management, and the treasurer suggested that those holding the bonds secured by profits from the sale of liquor and liquor-permit holders may have standing under R.C. 187.09(C). However, those arguments ring hollow. Pursuant to R.C. Chapters 151 and 166, the state has authority only to issue a bond, while JobsOhio has authority only to *pay off* a bond, pursuant to R.C. 4313.02(B)(1). Moreover, only the proceeds from the sales of liquor flow through to JobsOhio, while the state retains the right to issue permits and regulate or sanction permit holders. *See State ex rel. JobsOhio v.*

Goodman, 133 Ohio St.3d 297, 2012-Ohio-4425, 978 N.E.2d 153, ¶ 4, 5; R.C. 4313.02(E). Therefore, it is unclear how a party would have standing to challenge the constitutionality of the JobsOhio legislation, because it is the state that issues bonds and regulates the liquor business.

{¶ 35} However, while appellants have raised valid policy concerns and the possibility exists that no one will have standing to bring an action pursuant to R.C. 187.09(B), those concerns and possibilities alone cannot confer standing on appellants.

{¶ 36} Therefore, I concur in the majority's judgment.

PFEIFER, J., dissenting.

{¶ 37} With today's decision, this court for the third time has refused to determine the constitutionality of the JobsOhio legislation. In *ProgressOhio.org, Inc. v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, this court said, "Not here," finding unconstitutional the provision in the original JobsOhio bill that required cases regarding the constitutionality of the legislation to be brought exclusively in this court. In *State ex rel. JobsOhio v. Goodman*, 133 Ohio St.3d 297, 2012-Ohio-4425, 978 N.E.2d 153, this court said, "Not now," holding that the mandamus case brought by JobsOhio against Ohio Department of Commerce Director David Goodman was actually a declaratory-judgment action that should be brought first in the court of common pleas. Today, this court ends all doubt about when it will determine the constitutionality of the JobsOhio legislation, essentially responding, "Not ever." Not here. Not now. Not ever.

{¶ 38} An Ohio citizen who possesses no personal stake in the outcome of a case other than ensuring that his or her government live up to the Ohio Constitution has a means to vindicate that cause: "This court has long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no

rights or obligations peculiar to named parties." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 471, 715 N.E.2d 1062 (1999).

{¶ 39} The majority reluctantly accepts the concept of public-right standing, but tries to find a way to nullify it in this case. First, the majority claims that the public-right doctrine applies only to actions in mandamus and or prohibition. This is based upon the partial quotation of a statement in Sheward: "Where the object of an action in mandamus and/or prohibition is to procure the enforcement of a public right, the relator need not show any legal or special individual interest in the result * * *." Majority opinion at ¶ 10. However, the full quote reads:

> 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.

Sheward, paragraph one of the syllabus.

{¶ 40} That statement from *Sheward* is about standing in general, and in no way limits public-right standing to mandamus or prohibition actions. The object of the action is the essential element of public-right standing, not the type of suit used to bring the action.

{¶ 41} Further, as the court of appeals in this case pointed out, it is the nature of this court's jurisdiction that results in this court finding public-right standing in original actions rather than in declaratory-judgment actions:

> Since the Supreme Court of Ohio does not have original jurisdiction over actions for declaratory judgment, the only situations in which the Supreme Court of Ohio will initially find public-right standing will be original actions in mandamus or prohibition challenging the constitutionality of a statute. This is not the same as a rule permitting public-right standing only in original actions.

2012-Ohio-2655, 973 N.E.2d 307, ¶ 16 (10th Dist.).

{¶ 42} The majority engages in circular reasoning when it states that Article IV, Section 4(B) of the Ohio Constitution prevents appellants from asserting their claims in common pleas court. Article IV, Section 4(B) states:

> The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

{¶ 43} The majority argues that a cause is justiciable only if the plaintiff has standing, and that if a common pleas court proceeds in an action where the plaintiff lacks standing, that court violates the justiciability requirement of the Ohio Constitution. But the appellants here do not lack standing—they have public-right standing. Their cause is therefore justiciable. "[T]he public action is fully conceived in Ohio as a means to vindicate the general public interest." *Sheward*, 86 Ohio St.3d at 473, 715 N.E.2d 1062.

{¶ 44} Finally, the majority characterizes the JobsOhio legislation as not rising to the level of importance that a public-right case requires. This court's own docket suggests otherwise. The General Assembly thought that a resolution

of the constitutionality of the JobsOhio legislation was important enough to create, through Section 3 of 2011 Am.Sub.H.B. No. 1 ("H.B. 1"), "exclusive, original jurisdiction" in this court to quickly deal with constitutional claims brought against the legislation—it installed a 60-day statute of limitations running from the effective date of the act. In *ProgressOhio.org,* this court declared Section 3 of H.B. 1 unconstitutional. 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶ 5. However, during the pendency of *ProgressOhio.org,* the General Assembly passed 2011 Am.Sub.H.B. No. 153 ("H.B. 153"), which put in place another method for contesting the constitutionality of JobsOhio: in the common pleas court of Franklin County, with a statute of limitations for bringing claims within 90 days after the effective date of the statute. R.C. 187.09(B). In ProgressOhio.org, this court helpfully instructed the petitioners—the same petitioners as in this case—that the provisions of H.B. 153 "provide a remedy for petitioners to institute an action challenging the constitutionality of amended R.C. 187.01 et seq. by way of an action in the Franklin County Court of Common Pleas." 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶ 6. Today, we see how well that advice worked out.

{¶ 45} In August 2012, JobsOhio itself was here seeking relief in mandamus. It requested that this court rule on constitutional questions regarding the legitimacy of the JobsOhio legislation, H.B. 1 and 153. Director Goodman of the Department of Commerce refused to execute the franchise-and-transfer agreement necessary to grant JobsOhio a franchise on the state's liquor business, claiming that he could not execute the agreement until this court addressed the merits of constitutional claims against the legislation. *JobsOhio,* 133 Ohio St.3d 297, 2012-Ohio-4425, 978 N.E.2d 153, ¶ 9. JobsOhio's complaint in mandamus sought a writ that would find the JobsOhio legislation constitutional and order Goodman to exercise the franchise-and-transfer agreement. *Id.*, ¶ 10. The complaint focused on seven constitutional concerns:

> (1) Whether the JobsOhio Act violates Article XIII, Section 1, which forbids the General Assembly from conferring corporate powers via special act;
>
> (2) Whether the JobsOhio Act violates Article XIII, Section 2, which requires all corporations to be formed under the general laws;
>
> (3) Whether the JobsOhio Act violates Article I, Section 16, which requires the courts to be open so injured parties may obtain a remedy by due process;
>
> (4) Whether the Legislation authorizes the State to lend credit to a private corporation, in violation of Article VIII, Section 4;
>
> (5) Whether the Transfer Act would require legislative appropriations extending past a biennium, in violation of Article II, Section 22;
>
> (6) Whether the Transfer Act would result in the State's issuing debt in excess of limits provided in Article VIII; and
>
> (7) Whether Am. Sub. H.B. 153 violates the "one-subject rule" of Article II, Section 15.

Complaint at ¶ 44, *JobsOhio*, case No. 2012-1356, available at http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=712126.pdf.

{¶ 46} But this court held that the true object of the claim brought by JobsOhio was a declaratory judgment that this court lacked the jurisdiction to grant. *JobsOhio*, ¶ 14. Further, this court held that JobsOhio had "an adequate remedy by way of a declaratory-judgment action in common pleas court to raise its claim that H.B. 1 and 153 are constitutional." *Id.*, ¶ 15.

{¶ 47} It is clear that both the governor and the General Assembly were fully aware that the JobsOhio legislation might exceed the boundaries of what is constitutionally permissible or that the threat of a finding of unconstitutionality could taint the program. They sought, through legislation and through lawsuit, our timely review so that any infirmities could be corrected either legislatively or, if necessary, by way of constitutional amendment. That we failed to act timely does not mean that review is no longer important. It simply means that if we now find the legislative scheme unconstitutional, a fix becomes messy.

{¶ 48} We should be mindful of history when considering whether "the issues sought to be litigated in this case are of such a high order of public concern as to justify allowing this action as a public action." *Sheward*, 86 Ohio St.3d at 474, 715 N.E.2d 1062. Many of the claims brought by appellants involve Articles VIII and XIII of the Ohio Constitution. Those provisions were enacted in response to the issues that generated the call for a constitutional convention in 1850-1851, the convention that created the Constitution of 1851, which is the bedrock of Ohio law; it has been amended but remains our foundational document. In *C.I.V.I.C. Group v. Warren*, 88 Ohio St.3d 37, 39-40, 723 N.E.2d 106 (2000), this court explained some of the history behind Article VIII, Section 4:

> "Since the state's own resources were limited (at least at first), the legislature relied heavily on private enterprise to build and operate roads, bridges, ferries, canals and railroads. Most of the canal system was financed directly by the state, resulting in debts of $16 million. In the 1830's the state and local governments shifted to a policy of financing turnpike, canal and railroad companies by lending credit or purchasing stock. Insofar as an effective transportation network sprang into being in a remarkably

> short time, these practices had the desired result. But, they also had undesirable results: they put the state's money and credit at risk in business schemes that often were risky at best, and the demonstrated willingness of the legislature and local bodies to use them was an open invitation for private interests to dip into the public till. Many of these companies failed, the public debt burgeoned as a consequence, and by 1850 the burden was more than the taxpayers could tolerate. This section was adopted to put a halt to these practices." [Editorial Comment to Section 4, Article VIII] Baldwin's Ohio Revised Code Annotated (1993) 202.
>
> The climate of the times was agitation and anger over the imposition of tax burdens on the citizens for the benefit of private corporations and for the public losses incurred when subsidized corporations failed. Gold [Public Aid to Private Enterprises under the Ohio Constitution: Section 4, 6, and 13 of Article VIII in Historical Perspective], 16 Toledo Law Review [405] at 411 [(1985)].

{¶ 49} Ohio was part of a national trend: "Between 1842 and 1852, eleven states adopted new constitutions, simultaneously creating procedures for issuing government debt and for chartering corporations through general incorporation acts." Wallis, *Constitutions, Corporations and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J.Econ.Hist. 211 (2005). These states were emerging from crises of public debt and corruption. This emergence in Ohio has been described as follows:

> It was the period when the people awakened to consciousness of the state and that the state was a unit of the

> individuals. This consciousness came about largely as the result of the mad rush to rob the state treasury and heap up debts to be paid by generations yet unborn.
>
> * * *
>
> Finally, the demand for relief grew so strong that, in 1849, the legislature was compelled to allow people to vote on the question of making a new Constitution. It carried, and the convention met.

Isaac Franklin Patterson, *The Constitutions of Ohio,* 18-19 (1912).

{¶ 50} The issues appellants raise concern the structure of government rather than individual rights. The fact that those issues do not lead to an injury to an individual should not prevent this court from ensuring that the principles and requirements of those constitutional provisions are maintained. By doing so, we implicitly recognize the standing of our founders. This court bears a responsibility to today's citizens and to the framers to answer the questions appellants pose.

{¶ 51} This case presents issues easily as important as those involved in the Medicaid expansion case, *State ex rel. Cleveland Right to Life v. State of Ohio Controlling Bd.*, 138 Ohio St.3d 57, 2013-Ohio-5632, 3 N.E.3d 185, where this court dealt with the question "Did the Ohio Controlling Board violate R.C. 127.17 by approving the Ohio Department of Medicaid's request for increased appropriation authority for the Hospital Care Assurance Match Fund?" *Id.*, ¶ 4. This court answered that question without even addressing the respondents' argument that the relators lacked standing.

{¶ 52} Today, this court ensures that no court will ever address the question of the constitutionality of the JobsOhio legislation. Neither the state, nor its counsel, nor the majority opinion has been able to conjure a realistic example of a person or entity that would have the requisite standing and inclination to

bring a claim. Ohioans will never know whether their government is violating the constitution. Apparently, they do not deserve to know.

{¶ 53} It is understandable that once the bonds have been sold and the program is up and running, neither the governor nor the legislature wishes to have our review. We, however, should not compound past errors in judgment by making another momentous error and limiting Ohio citizens' access to our court to question the constitutionality of legislation establishing the state's direct involvement into the finances of private corporations. It is a limitation that will live far beyond this present controversy. This decision will be the lodestar opinion offered as the reason to block judicial review of constitutionally questionable legislation for decades to come.

{¶ 54} Across our state, in every county, there is a courthouse; many of them are historic buildings that sit in the center of town and are the center of civic life. In those courthouses are dedicated staff and judges who have sworn to "administer justice without respect to persons," R.C. 3.23; there, no lobbyists, no connections, no special relationships are necessary before a citizen can be heard. Today, we slam the doors on all those courthouses, denying Ohioans the opportunity to discover whether their government has been true to the Constitution.

{¶ 55} On the north side of this court's own building, in the reflecting pool, granite words have been installed by the artist Malcolm Cochran in a piece called "In Principle and In Practice." The words are Reason, Honor, Wisdom, Compassion, Justice, Truth, Equity, Peace, Integrity, and Honesty. Mr. Cochran would have been more accurate using just six of those letters: "We Pass."

O'NEILL, J., concurs in the foregoing opinion.

O'NEILL, J., dissenting.

{¶ 56} I join Justice Pfeifer's well-reasoned dissent. Hundreds of millions of dollars in public funds are being funneled into a dark hole to be disbursed without public scrutiny, and the highest court in the land is looking the other way. The Supreme Court of Ohio is the last house on the street, and passing on this case is an abdication of our duty as protectors of the Constitution.

{¶ 57} The risks presented by the court's failure to act today are obvious, preventable, and unnecessary. They are obvious, because it is alleged that hundreds of millions of taxpayer dollars are being spent in direct violation of the Ohio Constitution. They are preventable, because as Justice Pfeifer correctly observes, the legislative scheme implemented does not foreclose a remedy—it simply means that any remedy will be messy.

{¶ 58} And ultimately, those risks are unnecessary. The governor and the Ohio General Assembly may very well be right here. Maybe it is permissible to permit a private entity to spend hundreds of millions of taxpayer dollars without the annoyance of public audits and the state auditor asking an occasional question. Maybe this new-era form of governmental accountability does not violate Ohio's Constitution. But unless we examine the issue, the people of Ohio will never have an answer to that question. It is simply shameful that the court has refused to do its job.

{¶ 59} Today's ruling brings the triumph of form over substance to a whole new level. And although this court has once again dodged the merits of this case, I have little doubt that it will be back. When that time comes, it is likely that the economic loss and damage to public confidence will be substantial. It is never too late to do the right thing. What we are doing here is simply wrong.

1851 Center for Constitutional Law and Maurice A. Thompson; and McTigue & McGinnis, L.L.C., Donald J. McTigue, Mark A. McGinnis, and J. Corey Colombo, for appellant ProgressOhio.org, Inc.

Michael J. Skindell, pro se.

Dennis E. Murray Jr., pro se.

Squire Sanders (US), L.L.P., and Aneca E. Lasley; and Organ Cole & Stock, L.L.P., and Douglas R. Cole, for appellee JobsOhio.

Michael DeWine, Attorney General, Michael J. Hendershot, Chief Deputy Solicitor, Stephen P. Carney, Deputy Solicitor, and Pearl M. Chin, Assistant Attorney General, for appellees Governor John R. Kasich, Christiane Schmenk, Timothy S. Keen, and Treasurer Josh Mandel.

Linda K. Fiely; and Kalniz, Iorio & Feldstein Co., L.P.A., and Christine Reardon, urging reversal for amicus curiae Ohio Education Association.

Victoria E. Ullman, pro se, urging reversal as amicus curiae.

Black McCuskey Souers & Arbough, L.P.A., and Thomas W. Connors, urging reversal for amicus curiae American Policy Roundtable, d.b.a. Ohio Roundtable.

Shumaker, Loop & Kendrick, L.L.P., and Michael A. Snyder, urging affirmance for amici curiae Thomas Niehaus and Mark Wagoner.

Jones Day and Chad A. Readler, urging affirmance for amici curiae Jonathan H. Adler, Bradford D. Mank, Andrew S. Pollis, Michael E. Solimine, Cassandra Burke Robertson, Lee J. Strang, and Christopher J. Walker.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

OHIO CONSTITUTION ARTICLE IV, SECTION 19

COURTS OF CONCILIATION

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article IV, Section 19 of the Ohio Constitution concerning courts of conciliation. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee finds that Article IV, Section 19 is obsolete and therefore recommends its repeal.

Background

Article IV, Section 19 reads as follows:

> The General Assembly may establish courts of conciliation, and prescribe their powers and duties; but such courts shall not render final judgment in any case, except upon submission, by the parties, of the matter in dispute, and their agreement to abide such judgment.

Article IV governs the judicial branch, specifically vesting judicial power in the state supreme court, courts of appeals, courts of common pleas, and other courts as may be established by law.[1]

Section 19, which is original to the 1851 Constitution, was proposed at the 1850-51 Constitutional Convention to allow the resolution of disputes without resorting to the traditional legal process.[2]

George B. Holt, a delegate from Montgomery County whose long career in the law included

serving terms as a state representative, state senator, and common pleas court judge, was the leading proponent of the proposal to permit the General Assembly to create courts of conciliation. Holt's comments during the discussion of courts of conciliation suggest that the adoption of Section 19 was motivated by concern over the adversarial and formal nature of litigation under the established court system:

> The plan of a court of conciliation has many advocates, who desire to see it established. It has been tried in other countries, with excellent effect—greatly diminishing litigation, and subduing a litigious spirit—a spirit which is the bane of a community. It sets neighbor against neighbor, brother against brother and even father against son, and son against father. Such litigation have I often witnessed, and in some cases seen it prosecuted with an embittered spirit, little short of devilish. Every means which promises only a mitigation of the evil should be employed. The expense and time wasted in such controversies, employing judges, jurors, witnesses, lawyers and suitors, is but a little of the mischief. The monstrous evil consists in the engendering and perpetuating of strife and contention among neighbors, begetting and nursing discord and hatred in families, and in disturbing the harmony and peace of society. A judicious peace loving and peace making officer of this kind may be more useful, far more useful than the first judge of your State, whom you propose to dignify with title of Chief Justice of Ohio.[3]

Despite the authority provided by Section 19, the General Assembly has never established courts of conciliation; rather it has created arbitration proceedings and other methods for litigants wishing to avoid using the courts.[4]

Amendments, Proposed Amendments, and Other Review

Article IV, Section 19 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Ohio Constitutional Revision Commission recommended the repeal of Section 19, based upon its conclusion that the General Assembly had never exercised its constitutional authorization to establish courts of conciliation. In making this recommendation, the commission noted that its repeal would not affect current or future alternative dispute resolution provisions under Ohio law.[5] Despite this recommendation, the General Assembly did not submit the proposed repeal of Section 19 to the voters.

In 2011, the 129th General Assembly adopted Amended House Joint Resolution Number 1, intended, in part, to repeal Section 19.[6] The question was presented to voters as "Issue 1" on the November 8, 2011 ballot, which also included a proposal to repeal Article IV, Section 22 (authorizing the creation of supreme court commissions) as well as a proposal to amend Article IV, Section 6 to increase the maximum age for assuming elected or appointed judicial office from 70 to 75. This last proposal, involving age eligibility requirements for judicial office, was

the principal focus of the opposition to Issue 1 and was likely the reason for its sound defeat at the polls.[7]

Litigation Involving the Provision

There has been no litigation involving this provision, and no court of conciliation has ever been established by the General Assembly.

Presentations and Resources Considered

On September 11, 2014, Jo Ellen Cline, Government Relations Counsel for the Ohio Supreme Court, presented to the committee on Article IV, Section 19. Ms. Cline noted that it is unlikely under the current structure of the judicial branch that courts of conciliation would be necessary.

Also on September 11, 2014, William K. Weisenberg, Senior Policy Advisor to the Ohio State Bar Association, presented his perspective on Section 19. He observed that the judicial and legislative branches have collaborated to enact laws and encourage alternative dispute resolution measures such as arbitration, mediation, and private judging. Mr. Weisenberg stated that he does not believe Section 19 is necessary to allow for alternative dispute resolution but, instead, the section is a remnant of history and properly should be repealed.

Conclusion

The Judicial Branch and Administration of Justice Committee concludes that Article IV, Section 19 serves no purpose, is not necessary to authorize any existing or future alternative dispute resolution mechanisms, and has never been used since its adoption in 1851. Therefore, the committee concludes that the provision is obsolete and recommends that Article IV, Section 19 be repealed.

Date Adopted

After formal consideration by the Judicial Branch and Administration of Justice Committee on _____ and_____, the committee voted to adopt this report and recommendation on _____.

Endnotes

[1] Ohio Constitution, Article IV, Section 1.

[2] Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), p. 207.

[3] Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio 1850-51 (Columbus: S. Medary, 1851), p. 391.

[4] Steinglass & Scarselli, *supra*, p. 208, citing R.C. Chapter 2711, and R.C. 2701.10.

[5] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 10, The Judiciary, March 15, 1976, p. 65, and p. 420 of Appendix J of the Final Report.

[6] As it appeared on the ballot, Issue 1 read as follows:

> Proposed Constitutional Amendment
>
> TO INCREASE THE MAXIMUM AGE AT WHICH A PERSON MAY BE ELECTED OR APPOINTED JUDGE, TO ELIMINATE THE AUTHORITY OF THE GENERAL ASSEMBLY TO ESTABLISH COURTS OF CONCILIATION, AND TO ELIMINATE THE AUTHORITY OF THE GOVERNOR TO APPOINT A SUPREME COURT COMMISSION.
>
> Proposed by Joint Resolution of the General Assembly:
>
> To amend Section 6 of Article IV and to repeal Sections 19 and 22 of Article IV of the Constitution of the State of Ohio. A majority yes vote is required for the amendment to Section 6 and the repeal of Sections 19 and 22 to pass.
>
> This proposed amendment would:
>
> 1. Increase the maximum age for assuming elected or appointed judicial office from seventy to seventy-five.
>
> 2. Eliminate the General Assembly's authority to establish courts of conciliation.
>
> 3. Eliminate the Governor's authority to appoint members to a Supreme Court Commission.
>
> If approved, the amendment shall take effect immediately.
>
> A "YES" vote means approval of the amendment to Section 6 and the repeal of Sections 19 and 22.
>
> A "NO" vote means disapproval of the amendment to Section 6 and the repeal of Sections 19 and 22.

[7] The voters rejected Issue 1 by a vote of 2,080,207 to 1,273,536, a margin of 62.03 percent to 37.97 percent. Source: Secretary of State's website; State Issue 1: November 8, 2011 (Official Results); https://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2011results/20111108Issue1.aspx (last visited 10-27-2014).

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

OHIO CONSTITUTION
ARTICLE IV, SECTION 22

SUPREME COURT COMMISSION

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article IV, Section 22 of the Ohio Constitution concerning supreme court commissions. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee finds that Article IV, Section 22 is obsolete and therefore recommends its repeal.

Background

Article IV, Section 22, reads as follows:

> A commission, which shall consist of five members, shall be appointed by the governor, with the advice and consent of the senate, the members of which shall hold office for the term of three years from and after the first day of February, 1876, to dispose of such part of the business then on the dockets of the supreme court, as shall, by arrangement between said commission and said court, be transferred to such commission; and said commission shall have like jurisdiction and power in respect to such business as are or may be vested in said court; and the members of said commission shall receive a like compensation for the time being, with the judges of said court. A majority of the members of said commission shall be necessary to form a quorum or pronounce a decision, and its decision shall be certified, entered, and enforced as the judgments of the supreme court, and at the expiration of the term of said commission, all business undisposed of shall by it be certified to the supreme court and disposed of as if said commission had never existed. The clerk and reporter of said court shall be

> the clerk and reporter of said commission, and the commission shall have such other attendants not exceeding in number those provided by law for said court, which attendants said commission may appoint and remove at its pleasure. Any vacancy occurring in said commission, shall be filled by appointment of the governor, with the advice and consent of the senate, if the senate be in session, and if the senate be not in session, by the governor, but in such last case, such appointment shall expire at the end of the next session of the general assembly. The general assembly may, on application of the supreme court duly entered on the journal of the court and certified, provide by law, whenever two-thirds of such [each] house shall concur therein, from time to time, for the appointment, in like manner, of a like commission with like powers, jurisdiction and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years.[1]

Article IV governs the judicial branch, specifically vesting judicial power in the state supreme court, courts of appeals, courts of common pleas, and other courts as may be established by law.[2]

Section 22 is not original to the 1851 Constitution, but it was adopted by Ohio voters in 1875.

The creation of a supreme court commission to alleviate the court's backlog was a topic of considerable discussion at the 1873-74 Constitutional Convention. Some delegates felt that the creation of a commission to assist the court in dealing with its burgeoning docket would dilute the authority of the court; others were concerned that it would be difficult to recruit lawyers willing to leave successful practices in order to render this public service. Proponents of the use of commissions pointed out the difficulties faced by the court in attempting to keep up with the workload: despite 14-hour workdays and diligent attention to its responsibilities, the court was unable to reduce its significant backlog.[3]

After extensive debate, the Convention approved provisions to create an initial commission for a three-year term and to authorize the General Assembly to create subsequent commissions.[4] The voters, however, rejected the proposed Ohio Constitution of 1874.

In 1875, after the rejection of the 1874 Constitution, the General Assembly proposed Section 22, a variant of the earlier plan to create supreme court commissions. Voters approved the amendment on October 12, 1875[5] by a 77.5 to 22.5 percent margin of those voting on the proposal.[6] This was the first amendment approved by the voters under the authority given the General Assembly in the 1851 Constitution to propose amendments directly to the voters.[7]

The first supreme court commission was created by direct operation of this largely self-executing amendment. Section 22 required the governor to appoint the five members of the initial commission with advice and consent of the Senate for a three-year term beginning in February 1876. Additionally, the amendment gave the General Assembly authority to create subsequent commissions for two-year terms by a two-thirds vote (after application by the Ohio Supreme Court), and the General Assembly created a second commission in 1883. The second commission ceased operation in 1885, and since then there have not been any commissions to provide docket relief to the Ohio Supreme Court.[8]

Amendments, Proposed Amendments, and Other Review

Article IV, Section 22 has not been amended since its approval by voters in 1875.

In the 1970s, the Ohio Constitutional Revision Commission twice recommended that Section 22 be repealed. It first recommended the change as part of its review of the General Assembly's administration, organization, and procedures. In May 1973, however, the voters rejected a ballot issue proposing repeal of Section 22. The 1970s Commission attributed this rejection to a lack of appropriate voter education.[9] Then, in 1976, it again recommended the repeal of this provision,[10] but the General Assembly did not resubmit this renewed recommendation to repeal Section 22 to the voters.

In recommending repeal of the authority to create commissions, the 1970s Commission noted that the case backlog in the 1870s arose out of an organizational system that expected supreme court judges to hear cases in multiple districts around the state. At the time, the delegates thought that the use of commissions could help resolve the problem. Subsequent to adoption of Section 22 in 1875, the voters approved an amendment in 1883 reorganizing the court system and relieving the judges of their remaining circuit-riding responsibilities. Finally, in 1912, the voters again amended Article IV to create courts of appeals, thus significantly reducing the caseload burden on the Ohio Supreme Court and removing the need for supreme court commissions.

In 2011, the 129th General Assembly adopted Amended House Joint Resolution Number 1, intended, in part, to repeal Section 22.[11] The question was presented to voters as "Issue 1" on the November 8, 2011, ballot, which also included a proposal to repeal Article IV, Section 19 (authorizing the General Assembly to create courts of conciliation), as well as a proposal to amend Article IV, Section 6 to increase the maximum age for assuming elected or appointed judicial office from 70 to 75. This last proposal involving age eligibility requirements for judicial office was the principal focus of the opposition to Issue 1 and was likely the reason for its defeat at the polls.[12]

Litigation Involving the Provision

During the relatively brief existence of supreme court commissions, there was no significant litigation concerning the operation of commissions and their relationship to other constitutional courts.

Presentations and Resources Considered

On September 11, 2014, Jo Ellen Cline, Government Relations Counsel for the Ohio Supreme Court, presented to the committee on the topic of Article IV, Section 22. Ms. Cline noted that, in practice, the section essentially allows for the simultaneous operation of two supreme courts. She observed that the requirement that the Ohio Supreme Court hold court in each county annually was not an onerous requirement in 1803, when Ohio only had nine counties. However, by 1850, Ohio had 87 counties and a fast-growing population, thus resulting in a heavier burden

for the court and a backlog of cases. The elimination of most circuit-riding responsibilities for members of the Ohio Supreme Court in 1851 Constitution did not solve the problem of delay, and by the 1870's the court was four years behind in its docket. Based upon 2013 statistics showing that the current court has a 99 percent clearance rate for cases, Ms. Cline asserted that "the need for such a drastic docket management tool no longer exists."

Conclusion

The Judicial Branch and Administration of Justice Committee concludes that Article IV, Section 22 serves no purpose, has not been utilized since 1885, and no longer is necessary to assist the Supreme Court in reducing any backlog. Further, the committee observes that subsequent changes to the Ohio Constitution have resolved the challenges created by the judicial branch's former organizational structure, and so a future need to create a supreme court commission is unlikely.

Therefore, the committee concludes that the provision is obsolete and recommends that Article IV, Section 22 be repealed.

Date Adopted

After formal consideration by the Judicial Branch and Administration of Justice Committee on _____ and_____, the committee voted to adopt this report and recommendation on _____.

Endnotes

[1] This provision is sometimes erroneously referred to as Section 21[22]. There has never been a Section 21 of Article IV of the 1851 Constitution, but for reasons that are not clear some commentators treat Section 22 as once having been Section 21 and thus use a bracketed citation. *See, e.g.,* Isaac F. Patterson, The Constitution of Ohio: Amendments and Proposed Amendments (Cleveland: Arthur H. Clark Co. 1912), p. 238 (referring to section "21[22]).

[2] Ohio Constitution, Article IV, Section 1.

[3] Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio (Cleveland: W.S. Robison & Co., 1873-74), pp. 751-74.

[4] *See* Patterson, *supra*, Proposed 1874 Constitution, Article IV, Sections 4-6, pp. 198-99.

[5] *See* Laws of Ohio, vol. 72, p. 269-70 (1874).

[6] There were 339,076 favorable votes, comprising 57.3 percent of the 595,248 votes that were cast in that election, thus satisfying the super-majority requirement. *Id.*, p. 238.

[7] Article XVI, Section 1, as it existed from 1851 to 1912, provided that an amendment proposed by the General Assembly had to receive a majority of votes cast in the election, as opposed to a majority of votes on the proposed amendment. All seven amendments proposed by the General Assembly under the 1851 Constitution between 1857 and 1874 failed because they did not receive a majority of the votes cast at the election; six of the proposed amendments that failed received more affirmative than negative votes but still failed under the super-majority requirement. See Steven H. Steinglass & Gino J. Scarselli, The Ohio State Constitution (2nd prtg. 2011), pp. 373-74.

[8] *See id.* at p. 209.

[9] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, Part 1, Administration, Organization, and Procedures of the General Assembly, December 31, 1971, pp. 65-67.

[10] Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Final Report, Part 10, The Judiciary, March 15, 1976, pp. 67-68, and pp. 422-23 of Appendix J of the Final Report.

[11] As it appeared on the ballot, Issue 1 read as follows:

> Proposed Constitutional Amendment
>
> TO INCREASE THE MAXIMUM AGE AT WHICH A PERSON MAY BE ELECTED OR APPOINTED JUDGE, TO ELIMINATE THE AUTHORITY OF THE GENERAL ASSEMBLY TO ESTABLISH COURTS OF CONCILIATION, AND TO ELIMINATE THE AUTHORITY OF THE GOVERNOR TO APPOINT A SUPREME COURT COMMISSION.
>
> Proposed by Joint Resolution of the General Assembly:
>
> To amend Section 6 of Article IV and to repeal Sections 19 and 22 of Article IV of the Constitution of the State of Ohio. A majority yes vote is required for the amendment to Section 6 and the repeal of Sections 19 and 22 to pass.

This proposed amendment would:

1. Increase the maximum age for assuming elected or appointed judicial office from seventy to seventy-five.

2. Eliminate the General Assembly's authority to establish courts of conciliation.

3. Eliminate the Governor's authority to appoint members to a Supreme Court Commission.

If approved, the amendment shall take effect immediately.

A "YES" vote means approval of the amendment to Section 6 and the repeal of Sections 19 and 22.

A "NO" vote means disapproval of the amendment to Section 6 and the repeal of Sections 19 and 22.

[12] Issue 1 was defeated by a vote of 2,080,207 to 1,273,536, a margin of 62.03 percent to 37.97 percent. Source: Secretary of State's website; State Issue 1: November 8, 2011 (Official Results); https://www.sos.state.oh.us/SOS/