

Case No. 2024-1687

Supreme Court of Ohio

CITY OF CINCINNATI *ex rel.* MARK MILLER,

Relator-Appellant,

v.

CITY OF CINCINNATI, *et al.*,

Respondents-Appellees,

and

OVER-THE-RHINE COMMUNITY HOUSING,

Intervening Respondent-Appellee.

Hamilton County Court of Appeals, First Appellate District, Case No. C-23-0683

**AMICUS BRIEF OF 1851 CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF
APPELLANT’S PROPOSITIONS OF LAW**

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INTRODUCTION

The 1851 Center posits no opinion on the merits – characterized as whether a “notwithstanding ordinances like the one at issue in this case . . . constitute an unconstitutional abuse of power in violation of the City of Cincinnati Charter.” However, the 1851 Center writes to express its concern over the ongoing impact of adding unwritten and nontextual standing requirements to statutes conferring taxpayer standing, displayed through the Appellate Court’s conclusion that “Miller lacks standing to challenge the notwithstanding ordinance,” because “[h]e has not shown that he is seeking to vindicate a public interest and therefore does not have standing to bring a taxpayer action under R.C. 733.59.” *Cincinnati ex rel. Miller v. Cincinnati*, 2024-Ohio-4805, ¶2. The holding, which - it must be acknowledged - echoes past words of appellate courts and even this Court, impermissibly adds words to a statute that significantly changes its meaning, and does so in a manner that severely restricts the intended impact of the statute. There is neither a textual nor foundational basis for this continuing truncation of R.C. 733.59. Moreover, this truncation significantly hampers the General Assembly’s plain intention to empower the very people (engaged local taxpayers) who are best situated to know of and counteract corruption, abuse, and unlawfulness by their local governments.

As such, the 1851 Center supports Appellant’s Propositions of Law.

INTERESTS OF AMICUS CURIAE

Formed to advance Ohioans’ constitutional liberties, individual rights, and prosperity through limiting government overreach, the 1851 Center for Constitutional Law is dedicated to protecting Ohioans’ control over their lives, their families, their property, and thus, ultimately, their destinies. In doing so, the 1851 Center has developed particular expertise and experience in state constitutional law, authored numerous publications on this topic, and achieved favorable results for Ohioans in many cases.

More relevant here, the 1851 Center represents Ohioans *pro bono* in constitutional rights cases *against Ohio municipalities*. For most litigants who do so, the first option is to initiate such claims in federal court. When there is no federal claim, the decision to take the case become much more difficult. Ohio courts' awards of attorneys fees to prevailing parties pursuant to R.C. 733.56-59 are already far less reliable than awards of fees federal courts make pursuant to 42 U.S.C. § 1988. Compounding the matter is the obstacle here: nontextual concerns over whether a public interest plaintiff will be bounced out of court on an otherwise perfectly-meritorious claim because the state court believes the plaintiff is (1) *too uniquely injured* to take advantage of R.C. 733.56-59; (2) *not injured enough* to bring a claim; or (3) not "conferring a public benefit" or "enforcing a public right" through the litigation. The result is that many otherwise important and viable constitutional claims are never brought – especially claims attempting to vindicate structural (rather than individual rights) guarantees, like the one at issue here. This artificial suppression will persist so long as R.C. 733.56-59 remain arbitrarily construed and applied.

STATEMENT OF THE CASE AND FACTS

The 1851 Center respectfully defers to the parties' recitation.

LAW AND ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 2: To the extent the vindication of the public interest or providing a public benefit is required before a taxpayer has standing to proceed under the municipal statutory taxpayer-lawsuit provisions, when a city council has allegedly assumed and exercised a power not grant to it under the city charter, a taxpayer has standing to challenge such action under the municipal statutory taxpayer-lawsuit provisions as the effort to restrain such *ultra vires* actions by the city council vindicates the public interest and/or provides a public benefit.

A. The addition of a "public interest" or "public benefit" element is not textual.

First, some courts' fabricated requirement that, to maintain standing, the taxpayer must be "seeking to vindicate the public interest" is simply not present in the text of R.C. 733.56 or 733.59 (the

plaintiff brings his claim in this case pursuant to R.C. 733.56). The elements of a 733.59 claim are as follows: (1) “the village solicitor or city director of law fails . . . to make any application provided for in sections 733.56 to 733.58 of the Revised Code;” (2) “upon the written request of any taxpayer of the municipal corporation;” and (3) “the taxpayer may institute suit in his own name, on behalf of the municipal corporation.” Here, the Appellate Court does not dispute that the plaintiff met each of these textual requirements (the taxpayer posited a letter, pursuant to R.C. 733.56, asking the city director of law to “apply . . . for an order of injunction to restrain . . . the abuse of its corporate powers”).

This Court recently acknowledged “we’re all textualists now.” *Maple Heights v. Netflix, Inc.*, 2022-Ohio-4174, 171 Ohio St. 3d 53, 62–63, ¶¶37-38. But here, the Appellate Court engages in virtually no textual analysis of 733.56 *et seq.* Instead, it engages in a Talmudic deduction of caselaw alone, piling inference upon inference based on nontextual “well-established principles of taxpayer standing,” and the predicate that “standing is not dispensed in gross.” *Miller*, at ¶16, 20. The Twelfth District more recently did the same, continuously acknowledging, seemingly begrudgingly, in its analysis, that the statutes are “restricted by court decisions,” “courts,” and “case law” rather than text. *Donovan v. Lebanon*, 2024-Ohio-6059, ¶¶ 22-23.

Second, the Appellate Court adopted a hyper-technical interpretation of the identity “taxpayer” *not* in the plain sense of “someone who pays taxes to the city,” but rather as “an individual who volunteers to enforce a right of action on behalf of and for the benefit of the public.” *Miller*, at ¶21.¹ But this is not an “ordinary public meaning.” *Maple Heights, supra*. And “normal meaning may of course include an idiomatic meaning, but *it excludes secret or technical meanings that would not have been known to ordinary citizens.*” *D.C. v. Heller*, 554 U.S. 570, 577 (2008). No method of interpretation may be employed that renders a statutory provision “nonsensical” or “incoherent.” *Id.*, at

¹ Notably, the Appellate Court later abruptly shifts from grafting the public interest requirement onto the identity of the “taxpayer,” and instead, continuing its nontextual and attenuated inference-piling even further, shifts to holding “taxpayer actions must be filed to enforce a public right.” *Miller*, at ¶21.

577-578. The outcome here is reminiscent of the manner in which courts, until correction by this Court in *Norwood*, altered the requirement of “public use” in Section 19, Article I to be “public purpose” or “public benefit.” See *Norwood v. Horney*, 2006-Ohio-3799, ¶ 45, 110 Ohio St. 3d 353, 366 (noting the historical error theretofore whereby “‘public use’ was often equated to ‘public benefit’”).

Third, the Ohio General Assembly has demonstrated that it knows how to attach a “public benefit” requirement to a taxpayer standing provision. For instance, in its *county* taxpayer standing provision, the General Assembly expressly provides that “such action shall be for the benefit of the county.” R.C. 309.13. This demonstrates the reality that the legislature knew how to deploy such language to confer taxpayer standing. But deliberately abstained from doing so anywhere within R.C. 733.56, *et seq.* Likewise, the General Assembly knows how to confer standing upon “any person adversely affected.” See R.C. 1509.36; R.C. 3745.07. But here, it also abstained from imposing such a private harm requirement. Together, these abstentions “clearly express an intention to abrogate the common law requirements” of standing, *and replace it with nothing more or less* than the text of R.C. 733.56, *et seq.*

Ultimately, “in considering the statutory language, it is the duty of the court to give effect to the words used in a statute, not to delete words used or to insert words not used.” *Bailey v. Republic Engineered Steels, Inc.*, 2001-Ohio-236, 91 Ohio St. 3d 38, 39–40. With respect taxpayer standing regime, courts have failed this duty, and that must now be corrected: the legislative branch has already spoken dispositively on the matter on whether taxpayer standing actions are matters of “public interest” and “public right” by enacting R.C. 733.56, R.C. 733.57, and R.C. 733.59.

B. Linguistic drift has resulted in a standard that is unclear and unworkable.

This Court must strive to avoid “linguistic drift” when interpreting and applying statutes. *Butt v. Butt*, 2024-Ohio-4689, ¶ 37, 254 N.E.3d 683, 693. “After all, if judges could freely invest old statutory

terms with new meanings, we would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure the Constitution commands.” *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113–14, 139 S. Ct. 532, 539 (2019).

But with respect to R.C. 733.59, this “drift” is both constantly on display and frequently dispositive. The Court of Appeals for the Tenth District last year claimed one is not a “taxpayer,” as contemplated by R.C. 733 unless he is enforcing a right “on behalf of and of the benefit of the public,” citing this Court’s explanatory *dicta* in *Nimon v. Springdale. Acad. Ridge v. Gahanna*, 2024-Ohio-2699, at ¶ 17, citing 96 Ohio St.2d 1 (1966). The Tenth District was not at liberty to *properly* interpret *Nimon* or apply the plain text of the statute because of the type of “unreasoned pronouncement” this Court recently chided: this Court in 1990 transformed a *discussion Nimon* into a rule of law “the taxpayer’s aim must be to enforce a public rights.” *Id.*, citing *Caspar v. Dayton*, 530 Ohio St.3d 16, at 20.

Acknowledging and correcting this linguistic drift is entirely appropriate. *State ex rel. Cincinnati Enquirer v. Bloom*, 2024-Ohio-5029, 177 Ohio St. 3d 174, ¶ 31(“[I]t is appropriate to revisit unreasoned prior precedent. Notwithstanding principles of stare decisis, when presented with the appropriate opportunity, we may reexamine unreasoned pronouncements”).

Doing so is also advisable. In this post-textual framework, attempting to measure whether “the taxpayer’s aim,” is to “enforce public rights” is unworkable.

First, disqualified are taxpayers bringing claims that a court subjectively believes “are issues peculiar to and of interest only to them.” *Acad. Ridge*, at ¶ 21. Even when taxpayers outright tell court that they are concerned with the public interest, courts respond in a manner they do not in virtually any other context - reflexively finding any such attestation “appears to be a pretext.” *Id.* Appellate courts thus manufacture a vague and subjective standard and then castigate plaintiffs who claim to meet it as liars.

Second, also disqualified are taxpayers like those here, who bring claims in no way peculiar to themselves, but which are deemed to be of simply not enough public interest or benefit by courts.

Third, courts of appeals cannot help but to lapse into mistakenly judging the adequacy of the injury to the taxpayer *rather than the injury to the municipal body upon whom the taxpayer is acting*. *Acad. Ridge*, at ¶ 21. This mistake occurs even as other appellate districts simultaneously acknowledge (properly) that “the taxpayers stand in the shoes of their municipal corporation,” and “the municipal corporation or the state is the actual party in interest.” *Shaker Heights ex rel. Friends of Horseshoe Lake v. Shaker Heights*, 2024-Ohio-3007, ¶ 23, and *State ex rel. Neilsen v. Tieman*, 2025-Ohio-780, ¶18

This Court should now take the opportunity to elevate textualism over this unreasoned game of *telephone* gone wrong. The outcome of the game is not just incoherent doctrine, subjectivity, and a usurpation of legislative authority. It also includes the guarantee that unlawful acts of local governments will too-often remain unquestioned, unchecked, and carried out to their completion.

C. This Court should avoid applying judicially-created standards that require subjectivity and policymaking.

Judicial employment of a “public right,” “public interest,” or “public benefit” test places courts in several entirely subjective positions in which they need not and ought not be.

First, employment of the “public right” test apparently requires courts to channel the subjective mental intentions of the plaintiff. Is this a pleading requirement, or an evidence-based inquiry? A factual or legal question? We do not know. Because the unreasoned test is fabricated, the dispositive issue of who bears what burden has never been fleshed out. What we do know is that courts struggle with this – especially because they often opt to analyze the issue *sua sponte*. In an appellate case adjudicating the same statute(s) just months later in an adjacent appellate district, the Court of Appeals for the Twelfth District pontificated on the plaintiff’s “personal or private motive or advantage,” and

probed into his deposition in an attempt to second-guess his “true” motives in bringing the litigation (without the benefit of briefing). *Donovan v. Lebanon*, 2024-Ohio-6059, ¶¶ 24-25.

Second, whether a case, cause, or concern is a matter within “the public interest” or adjudicating a “public right” is an arbitrary inquiry that will dramatically vary depending on the subjective viewpoint of the court deciding the case. This Court recently concurred that any concept of “public-right standing” is “so vague and amorphous as to make principled judicial application of the doctrine nearly impossible. *State ex rel. Martens v. Findlay Mun. Ct.*, 2024-Ohio-5667, ¶ 21. More specifically, this Court observed the fatally flawed nature of the judicial branch taking up such a standard: “[h]ow is a court to determine when something is of such ‘great importance and interest to the public . . . On what basis is tort reform of such public importance but not state economic-development policy,” and “[w]hy are challenges to worker's compensation reforms of sufficient importance to ignore the standing requirement, but not the protection of the environment?” *Id.*, citing *ProgressOhio.org, Inc.*, 2014-Ohio-2382; *Ohio AFL-CIO*, 2002-Ohio-6717; *with Food & Water Watch*, 2018-Ohio-555; *Elia*, 86 U.Cin.L.Rev. at 1039 (Because the “public-rights exception has no set parameters ... it [is] nearly impossible to apply”).

Thus, this Court has *just* explained why employing a test saturated with standardless policymaking is impermissible. *Martens*, ¶ 21 (“Indeed, the continued existence of the [public right standing] doctrine in our caselaw invites judges to engage in standardless policymaking”). When making this statement, even if not wittingly, was speaking not just about the *Sheward* doctrine, but also about the “public right standing” doctrine *now* before this Court. This Court’s analysis of the materially-identical first doctrine dictated the fate of the second doctrine here.

Third, in recent high-profile Seventh Amendment litigation, the Fifth Circuit and United States Supreme Court concurred that a test like that virtually any inquiry into whether a claim raises a “public right” invites undue arbitrariness. As the Fifth Circuit recently observed in *Jarkesy*, “[t]he dissenting

opinion cannot define a “public right” without using the term itself in the definition. That leads to a good bit of question-begging.” *Jarkesy v. Sec. & Exch. Comm’n*, 34 F.4th 446, 457–58 (5th Cir. 2022), *aff’d and remanded*. When requiring a “public right” as one’s bright-line rule, this “bright-line rule burns out.” *Id.*

Indeed, on appeal, the Supreme Court of the United States abandoned this bright-line in determining attachment of the Right to Trial by Jury, acknowledging “our opinions governing the public rights exception have not always spoken in precise terms. This is an ‘area of frequently arcane distinctions and confusing precedents.’” *Sec. & Exch. Comm’n v. Jarkesy*, 603 U.S. 109, 130–31, 144 S. Ct. 2117, 2133–34 (2024)(“The Court ‘has not definitively explained’ the distinction between public and private rights, and we do not claim to do so today”).²

Ultimately, no court, including the Appellate Court here, has bothered to define what it means to be “enforcing a public right of action on behalf of and for the benefit of the public.” Why is correcting an unlawful overreach by one’s city council, perhaps inconsistently applied, *not* “for the benefit of the public”? Does not the Appellate Court’s conclusion, later in its holding, that Mr. Miller lacks a personal stake in the matter essentially *guarantee* that the only remaining motivation for his litigation is to benefit

² The dissent in *Jarkesy* also makes astute observations warranting caution in too narrowly construing the meaning of a phrase like “public right.” See 2158–59 (“The majority says that aspects of the public-rights doctrine have been confusing. That might be true for cases involving wholly private disputes, but not for cases where the Government is a party. It has long been settled and undisputed that, at a minimum, a matter of public rights arises ‘between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments’”). The Dissent’s delineation would council for standing in cases like this: “from the time the doctrine of public rights was born, in 1856,” everyone understood that public rights “‘arise ‘between the government and others,’ and refer to ‘rights *of the public*—that is, rights pertaining to claims brought by or against the United States.” *Id.*

the public”? That begs the question: what is a “public right,” and *who* decides? In requiring this feature beyond the text of the statute, the threshold response of the Appellate Court is “not the Ohio General Assembly, but us.” This fails on its own terms.

Nevertheless, the Appellate Court here bypassed any serious analysis of whether the Plaintiff’s claims actually implicated a “public right” through attempted to define and apply that term. And months later, the Twelfth District acknowledged why, when it tried the same: “Case law is not particularly clear on what constitutes a ‘public right’ for the purposes of taxpayer standing,” and the matter is “perhaps confusing.” *Donovan*, ¶ 23, 27.

Finally, the creation and weaponization of a “public right,” “public benefit,” and/or “public interest” element appears to be a policy decision in and of itself. But government officials’ elitist proclamations of antipathy towards the very taxpayers who government officials are entrusted to serve is insufficient to cure the textual and doctrinal shortcomings identified above. The Appellate Court claims this “public right” doctrine is an ideal *policy outcome* because citizens attempting to relegate their local government to its lawful confines are “mere interlopers” daring to “meddle with the affairs of the state.” *Miller*, at ¶22. To be fair to the Appellate Court, it is quoting not a soviet dictator or a colonializing king: it is quoting *past Ohio Supreme Court Justices*. Justices who, in “meddling” with the plain text of the statute, seemingly overlooked the Ohio Constitution’s acknowledgment that “all political power is inherent in the people.” Section 2, Article I. This Court should take this opportunity to repudiate these corrosive philosophical proclamations that did not fit our form of government (or the reason it was brought into being) then or now.

D. Supplementing R.C. Chapter 733 with a public interest or benefit element is not a proper exercise of the avoidance canon.

Judicial rewriting of the taxpayer standing statutes here cannot be viewed as a savings construction or application of the avoidance canon, i.e. necessary to “save the constitutionality” of these

statutes from invalidation. This is because this Court has already stated, recently, that implication of “the public interest” is not a basis that may convert a “non-justiciable matter” to a “justiciable” one. See *State ex rel. Martens v. Findlay Municipal Court*, 2024-Ohio-5667; see also Section 4(B), Article IV of the Ohio Constitution (Notably, while the confusion of the Appellate Court here took place pre-*Martens*, the Twelfth District’s struggles were post-*Martens*).

Additionally, if statutes conferring standing require judicial amendment to save their constitutionality, this would apply with equal force not just to county and township taxpayer statutes, to statutes empowering *municipalities* with standing to initiate litigation in matters such as nuisance abatement. For instance, R.C. 3767.03 provides that “whenever a nuisance exists, the . . . city director of law, or other similar chief legal officer of the municipal corporation in which the nuisance exists . . . may bring an action in equity . . . to abate the nuisance and to perpetually enjoin the person maintaining the nuisance from further maintaining it.” R.C. 3767.03; see also R.C. 713.13 (authorizing municipalities to seek injunctions for land uses in instances where a regulation enacted pursuant to R.C. 713.06 through R.C. 713.12 is at issue); R.C. 715.30 (also authorizing municipal actions for injunctive relief). The 1851 Center encounters many such cases where local governments could not meet such a “public interest” or “public rights” standard, if grafted on top of the foregoing statutes.

CONCLUSION

The decision of the Court of Appeals in this case cannot be permitted to stand. This Court should concur with one or more of Appellants’ Propositions of Law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Ohio Rules of Civil Procedure 5(B)(2)(c) and 5(B)(2)(f), the undersigned does hereby certify that a true and accurate copy of the foregoing was served upon all counsel via electronic mail on this 9th day of June, 2025.

/s/ Maurice A. Thompson
Maurice A. Thompson