

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI <i>ex rel.</i>	:	CASE No. 2024-1687
MARK MILLER,	:	
	:	
RELATOR-APPELLANT,	:	
	:	ON APPEAL FROM THE HAMILTON
VS.	:	COUNTY COURT OF APPEALS, FIRST
	:	DISTRICT COURT OF APPEALS CASE No.
	:	C-23-0683
	:	
CITY OF CINCINNATI, <i>et al.</i>,	:	
	:	
RESPONDENTS-APPELLEES.		

MERIT BRIEF OF RESPONDENTS-APPELLEES CITY OF CINCINNATI

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I. STATEMENT OF THE CASE

Realtor Mark Miller (“Miller”) asks this Court to adopt a reading of the municipal taxpayer-lawsuit statute that would authorize any taxpayer to file suit without alleging the vindication of a public right or an injury. Such an expansive reading of the statute disregards this Court’s well-established precedent and the Ohio Constitution’s limits on the judicial power, which requires Ohio courts to only hear justiciable controversies. In addition, it would authorize courts to adjudicate cases without an aggrieved party properly before it. If this Court were to adopt Miller’s interpretation, it would fundamentally change Ohio law, transforming personal disagreement with a law into a constitutionally redressable injury.

If this Court concludes that it is improper to now construe R.C. 733.59 to impose a public-right requirement on standing, it nonetheless should find that a taxpayer who wishes to bring a statutory taxpayer action must demonstrate an injury-in-fact, which is necessary to establish both common law standing if a statute does not clearly express an intention to abrogate standing requirements, and separately, to invoke the jurisdiction of Ohio courts which emanates from Article IV, Section 1, of the Ohio Constitution.

II. STATEMENT OF FACTS

A. City of Cincinnati Processes

The series of events relevant to this matter began when Respondent-Appellee Over-the-Rhine Community Housing (“OTRCH”), which owns the property located at 2000 Dunlap Street (“Property”), sought a historic certificate of appropriateness (“COA”) and certain zoning variances from the City of Cincinnati (“City”) Historic Conservation Board (“HCB”) to construct a new residential housing development on the Property. T.d. 8. The HCB approved OTRCH’s request for a COA and most of the other zoning approvals, but it denied the zoning variance to exceed

normal density regulations. *Id.* Notably, Miller did not attend the HCB hearing to voice his opposition to the project, nor did he submit written opposition to the project.

Several Cincinnati City Council Councilmembers subsequently sponsored a notwithstanding ordinance that would set aside the density regulations and other zoning regulations that presented barriers to the property owner's proposed development. T.d. 2. On November 7, 2022, Relator-Appellant Mark Miller ("Miller") sent a taxpayer demand letter to the Cincinnati city solicitor pursuant to Ohio Revised Code 733.56. *Id.* Despite the broad grant of power to the Cincinnati City Council ("Council") in Article II, Section 1 of the City's charter, Miller argued that the Council lacked the authority to adopt zoning-related notwithstanding ordinances. *Id.* The City Solicitor responded the next day, declining to file suit and stating that the Council's use of zoning-related notwithstanding ordinances is a proper exercise of its legislative authority. *Id.* On November 9, 2022, the Council passed Ordinance 346-2022 (the "Dunlap Ordinance"). T.d. 8. Despite his opposition to the Dunlap ordinance, Miller did not allege or establish that he attended or participated in the November 9, 2022, City Council meeting.

B. Procedural history of the lawsuit

Miller subsequently filed the present lawsuit seeking to invalidate the new law. T.d. 2. In simplest terms, he contended that the Council's adoption of the Dunlap Ordinance was an improper exercise of administrative authority by the Council. He sought (i) declarations that CMC § 111-05(d) and the Dunlap Ordinance violate the City Charter; and (ii) an injunction permanently enjoining the City from adopting zoning notwithstanding ordinances and from implementing or undertaking any action effectuating the Dunlap Ordinance. *Id.* Importantly, Miller failed to allege how an injunction would benefit the public or vindicate a public right, nor did he explain how he would be injured by the passage of the Dunlap Ordinance. *Id.*

OTRCH subsequently intervened in the lawsuit. T.d. 15. The trial court denied Miller's request for a temporary restraining order, and, on December 18, 2023, granted the City and OTRCH's motions for summary judgment, and denied Miller's motion for summary judgment. T.d. 16; 46. Miller appealed the trial court's decision to the First District Court of Appeals and moved for a stay of the decision that was promptly denied. T.d. 49.

The issue presented to the First District was whether the trial court properly found that the Council's passage of a zoning-related notwithstanding ordinance is a legislative act within the power granted to it under Section 1 of the Charter of the City of Cincinnati. The First District, however, did not address the merits of the case, and instead vacated the trial court's decision and found that Miller lacked standing because he provided no explanation for how an injunction in this case would benefit the public or vindicate a public right and that it had no potential to affect any of Miller's private rights. *City of Cincinnati ex rel. Miller v. City of Cincinnati*, 2024-Ohio-4805, at ¶ 26-27 (1st District).

III. ARGUMENT

Proposition of Law No. 1: Under the statutory municipal taxpayer-lawsuit provisions, a taxpayer may file an action on 'behalf of a municipal corporation,' R.C. 733.59, if the government fails to pursue a lawsuit after a written request from the taxpayer. In such cases, the standing requirement is satisfied because the municipal corporation is the actual party in interest and the General Assembly has explicitly given the taxpayer authority to sue on the government's behalf.

Miller's contention that the municipal taxpayer-lawsuit statute authorizes any taxpayer to file suit without alleging the vindication of a public right or an injury disregards this Court's well-established precedent and the Ohio Constitution's limits on the judicial power. Adopting Miller's interpretation would be a sea change, authorizing courts to adjudicate cases in the absence of an aggrieved party and transforming personal disagreement with a law into a redressable injury. *See*

Donovan v. City of Lebanon, 2024-Ohio-6059, at ¶ 25 (“Taxpayers’ personal opposition to the ordinance is not a proper basis for taxpayer standing because it does not constitute enforcement of a public right.”); *See also Columbus ex rel. Willits v. Cremean*, 27 Ohio App.2d 137, 149 (10th Dist. 1971) (noting that taxpayer actions alleging “an abuse of corporate powers” (as opposed to a misapplication of funds) are “carefully restricted by court decisions”).

Should this Court conclude that it is improper to now construe R.C. 733.59 to impose a public-right requirement on standing, it nonetheless should find that a taxpayer who wishes to bring a statutory taxpayer action must demonstrate an injury-in-fact. This Court has already rejected the notion that an uninjured plaintiff seeking to vindicate a public right has common-law or traditional standing to sue in Ohio’s common pleas courts. *See generally ProgressOhio.org, Inc. v. JobsOhio*, 2014-Ohio-2382. An injury-in-fact is a necessary ingredient to establish both common law standing if a statute does not clearly express an intention to abrogate standing requirements, and separately, to invoke the jurisdiction of Ohio courts which emanates from the Ohio Constitution.

A. Stare decisis should control the outcome of this case.

Miller casually bats away decades of law interpreting R.C. 733.59 and its predecessor statutes to include a public-right requirement for the purpose of establishing standing to proceed with a statutory taxpayer action. But this Court requires a more substantial demonstration before taking such a significant step.

The doctrine of stare decisis mandates that a previous court holding will only be overturned when it is incumbent to do so. *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, ¶ 42. This doctrine brings continuity and stability to the legal system and avoids the arbitrary administration of justice by providing a clear rule of law. *Id.* at ¶ 43. The long-revered doctrine is fundamental to the rule

of law and departure from the doctrine requires special justification. *Id.* at ¶ 44, quoting *Wampler v. Higgins*, 93 Ohio St.3d 111, 120 (2001). “Stare decisis is the bedrock of the American judicial system.” *Id.* at ¶ 1.

This Court has long recognized a public-right prerequisite for taxpayers to have standing under Ohio’s taxpayer-lawsuit statute. This Court first interpreted R.C. 733.59 to include a public-right requirement in 1966, and this decision was reaffirmed just a few years later in 1973. *State ex rel. Nimon v. Springdale*, 6 Ohio St.2d 1 (1966), paragraph two of the syllabus; *State ex rel. White v. Cleveland*, 34 Ohio St.2d 37, 40 (1973). Since *Nimon* and *White*, this Court has repeatedly reaffirmed this holding finding that a taxpayer under R.C. 733.59 is a person who seeks to “enforce a right of action on behalf of *and for the benefit of the public*.” *Ohioans for Concealed Carry*, 2020-Ohio-6724, at ¶ 23, quoting *State ex rel. White* at 40, quoting *State ex rel. Nimon* at paragraph two of the syllabus; *State ex rel. Caspar v. Dayton*, 53 Ohio St.3d 16, 20 (1990); *See also State ex rel. Fisher v. City of Cleveland*, 2006-Ohio-1827, ¶ 12. The reasoning given by this Court is simple: “the taxpayer’s aim must be to enforce a public right, regardless of any personal or private motive or advantage.” *State ex rel. Caspar* at 20; *State ex rel. Fisher v. Cleveland*, 2006-Ohio-1827, ¶ 12; *Ohioans for Concealed Carry v. City of Columbus*, 2019-Ohio-3105, ¶ 19 (10th Dist.), citing *State ex rel. White* at 40.

Importantly, the General Assembly has had nearly 60 years to amend the Ohio taxpayer-lawsuit statute if it disagreed with this Court’s interpretation of the public-right prerequisite, but it has not. “[W]hile stare decisis can be applied with varying force, [this Court] ha[s] described precedent that ‘involves statutory interpretation . . . as more sacrosanct than the common-law precedents.’ ” *Id.*, quoting *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 6 (1989). “[T]he legislature can always amend a statute in light of a court’s construction.” *Id.*, quoting

State v. Wilson, 2022-Ohio-3202, ¶ 51 (DeWine, J., dissenting), and also citing *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, 2019-Ohio-2851, ¶ 19; *State v. Bodyke*, 2010-Ohio-2424, ¶ 33 (lead opinion), quoting *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 23.

The First District Court of Appeals properly applied this Court’s well-established precedent and found that Miller lacks standing to bring this case under R.C. 733.59 because he failed to allege the vindication of a public-right and lacks standing under the common law because he does not have a personal stake in the outcome of the lawsuit. *City of Cincinnati ex rel. Miller*, 2024-Ohio-4805, at ¶ 26-27 (1st District). Miller has provided no basis for this Court to abandon stare decisis on this issue, and his attempt to overturn this long and well-established principle of Ohio law should be rejected by this Court.

B. This Court should affirm the First District, regardless of the public-right requirement’s application, because Miller has failed to establish common law standing which requires an injury-in-fact

1. To rely solely upon statutory standing, a plaintiff must show that the statute clearly expresses an intention to abrogate standing requirements.

Miller’s first proposition of law is premised on statutory standing. Statutory standing in Ohio has been described as “the statutory grant of authority to sue.” *Smith v. Ohio State Univ.*, 2017-Ohio-8836, ¶ 13 (10th Dist.). This Court has recognized that, in addition to common-law standing requiring an injury-in-fact, causation and redressability, “standing may also be conferred by statute.” *ProgressOhio.org*, 2014-Ohio-2382, at ¶ 17. “For a statute to confer standing in the absence of a concrete injury, the statute must ‘clearly express[] an intention to abrogate the common-law requirements for standing.’” *Smith* at ¶ 13, quoting *ProgressOhio.org* at ¶ 22. “Courts may not presume that the statute was intended to abrogate the common law.” *LaCourse v. Fleitz*, 28 Ohio St.3d 209, 212 (1986).

Here, Miller argues that “the plain and unambiguous language of R.C. 733.59 confirms that the General Assembly conferred statutory standing upon a municipal taxpayer who satisfies the conditions precedent therein.” Appellant’s Br. at 8. But R.C. 733.59 is silent as to whether it abrogated the common-law standing requirements and merely instructs taxpayers on how to remedy a law director’s failure to meet certain statutory duties. This Court has previously refused to read “*statutory silence as clearly expressing an intention to abrogate the common-law requirements for standing.*” *ProgressOhio.org* at ¶ 22 (emphasis added).

This case is analogous to *ProgressOhio.org*. There, the JobsOhio Act provided that “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 the statute. *Id.* at ¶ 20. The appellants argued that this provision conferred standing upon them. *Id.* This Court noted that the statute “makes no mention of standing.” *Id.* at ¶ 21. The appellants also argued that the statute was ambiguous and therefore should be “broadly construe[d]” to provide standing “to avoid rendering the statute meaningless.” *Id.* This Court held that the appellants did not have standing under the JobsOhio Act because “statutory silence” is not a clear expression of an “intention to abrogate the common-law requirements for standing.” *Id.* at ¶ 22.

R.C. 733.59, the statute at issue here, is equivalent to the JobsOhio Act in *ProgressOhio.org*. Just like the JobsOhio Act, R.C. 733.59 does not make any “mention of standing.” *Id.* at ¶ 21; *See also Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 2014-Ohio-5511, ¶ 23 (noting that courts may not make “additions nor deletions from words chosen by the General Assembly”). Nor is R.C. 733.59 meaningless if it is not read to confer standing on any taxpayer, regardless of whether they have suffered an injury. The statute explains what taxpayers must do if

a village solicitor or city director of law fails to fulfill their statutory duties under Chapter 733 of the Revised Code. For example, as relevant here, R.C. 733.56 states that a village solicitor or city law director “*shall apply . . . to a court of competent jurisdiction for an order of injunction*” if the municipal corporation abuses its corporate powers. R.C. 733.56 (emphasis added). And if “an officer or board of a municipal corporation fails to perform any duty expressly enjoined by law or ordinance, the village solicitor or city director of law *shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of the duty.*” R.C. 733.58 (emphasis added).

Returning to the taxpayer-lawsuit statute, R.C. 733.59 directs taxpayers on what to do if a village solicitor or city law director fails to fulfill any of those statutory duties. The taxpayer must make a “written request” to the village solicitor or city law director. R.C. 733.59. They may not file suit unless the village solicitor or city law director, after receiving the written request, still fails to apply for the injunction or writ discussed in R.C. 733.56 or 733.58. In other words, the taxpayer-lawsuit statute sets forth certain necessary conditions that must be met before a taxpayer brings suit (i.e., an ignored written request). But there is no indication that those conditions are *sufficient* for a taxpayer to bring suit. They must still allege an injury. *See ProgressOhio.org* at ¶ 22. (declining to read statutory silence as clearly expressing an intention to abrogate standing requirements).

Miller cites *New Richmond v. Greene*, 2004-Ohio-3540 (12th Dist.), for the proposition that remedial statutes should be given “the broadest interpretation possible to protect the rights of taxpayers from unauthorized acts on the part of municipalities.” Appellant’s Br. at 9, quoting *New Richmond*, 2004-Ohio-3540, ¶ 26. But *New Richmond* did not deal with standing; it dealt with attorneys’ fees. *Id.* To allow judges to give statutes “the broadest interpretation possible” when it

comes to standing—a jurisdictional issue of the Ohio Constitution—would upend the limitation found in Article IV, Section 1 that courts exercise only the “judicial power.” Ohio Const., art. IV, § 1.

2. Miller analogizes to shareholder derivative actions, but plaintiffs in derivative suits must “fairly and adequately represent” others’ interests.

Miller argues that taxpayer suits are derivative in nature. Appellant’s Br. at 10–13. He still must show, though, that R.C. 733.59 clearly expresses “*an intention to abrogate the common-law requirements for standing.*” *ProgressOhio.org*, 2014-Ohio-2382, at ¶ 22(emphasis added). Given that Ohio has a statute governing municipal taxpayer suits (unlike Wisconsin in the case cited by Miller, *Appleton v. Menasha*, 142 Wis. 2d 870 (1988)), the proper analysis is whether R.C. 733.59 abrogates the common law. *Smith*, 2017-Ohio-8836, at ¶ 13 (“For a statute to confer standing in the absence of a concrete injury, the statute must ‘clearly express[] an intention to abrogate the common-law requirements for standing.’”), quoting *ProgressOhio.org* at ¶ 22.

Even assuming Miller is correct that taxpayer suits are derivative, that does not mean that there is no injury requirement. In fact, in shareholder derivative suits, the plaintiff must show that he “fairly and adequately represent[s] the interests of the shareholders similarly situated in enforcing the right of the corporation.” Civ. R. 23.1. When only a very small percentage of individuals complain about a particular transaction, those individuals likely do not fairly and adequately represent the interests of others. *Goulder v. Luntz*, 2005-Ohio-87, ¶ 20 (“The evidence establishes [two individuals] were the only shareholders who objected to the settlement[.]”).

In *Appleton*, the Wisconsin Supreme Court held that a taxpayer has standing to challenge the constitutionality of a municipal statute, but it reached that holding because the taxpayer “ha[d] a direct and personal pecuniary interest in this litigation.” *Appleton*, 142 Wis. 2d at 883. The

taxpayer had alleged that the complained-of statute would “require him and other [town] property owners to pay additional taxes.” *Id.* at 874. Miller has made no similar allegation here.

In sum, Miller is incorrect when he argues that “the focus should not be on the individual taxpayer bringing the action.” Appellant’s Br. at 13. That is exactly where the focus must be. *See State ex rel. Martens v. Findlay Mun. Court*, 2024-Ohio-5667, ¶ 10 (noting that courts “can only ‘decide actual controversies between parties legitimately affected by specific facts’”), quoting *Fortner v. Thomas*, 22 Ohio St.2d 13, 14 (1970).

3. *Martens* did not hold that taxpayers who have not suffered an injury may nevertheless proceed under R.C. 733.59.

Miller’s reliance on *Martens* is misguided, and his interpretation of the case would turn the decision on its head. This Court recently addressed R.C. 733.59 in *Martens*. *Martens* at ¶¶ 24–26. In *Martens*, the relator, a City of Findlay taxpayer and property owner, brought a mandamus action against various courts and judges, arguing that they were “improperly exercising jurisdiction over cases in which the government [sought] to recover unpaid municipal income taxes.” *Id.* at ¶ 5. The relator failed to allege that he was a party to a tax case in either court, but he argued that he could rely on “public right” standing based on *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 1999-Ohio-123. *Id.* at ¶¶ 5, 13. This Court overruled *Sheward*, holding that “neither *Martens* nor future litigants may rely on it to bypass our well-established standing requirement.” *Id.* at ¶ 23. In doing so, this Court approvingly cited Chief Justice Moyer’s dissent, where he wrote that public-right standing diverges from the bedrock principle that “courts decide only cases or controversies between litigants whose interests are adverse to each other, and do not issue advisory opinions.” *Id.* at ¶ 15, quoting *Sheward* at ¶ 213.

Having overruled *Sheward*, preventing the relator from relying on public-right standing, this Court turned to the question of whether the relator had taxpayer standing. *Id.* at ¶ 24. But

because the relator had not followed the requirements of R.C. 733.59, this Court held that he did not have taxpayer standing either. *Id.* at ¶ 25 (“Nor has he cited any statutory authority authorizing him to bring a taxpayer suit in this case.”). In dicta, this Court suggested that if the relator had sent a written request to the government, and if the government had failed to pursue a lawsuit in response, the relator would have had standing. *Id.* at ¶ 24. But the issue here—whether a taxpayer has standing when they comply with R.C. 733.59’s requirements but have not alleged an injury—was not before this Court. *Martens* is therefore not instructive here.

4. Miller’s assertion that “[l]ongstanding, historical precedent of this Court” recognizes municipal taxpayers have standing simply because they follow the procedural requirements of R.C. 733.59 is incorrect.

Miller argues that this Court’s precedent establishes “that, upon satisfying the conditions precedent set forth in R.C. 733.59, a municipal taxpayer has standing to bring such an action on behalf of the corporation.” Appellant’s Br. at 14. But none of the cases he cites involved a taxpayer who had not alleged that they had been injured by the municipality’s actions. *See Donovan*, 2024-Ohio-6059, at ¶ 25 (“Taxpayers’ personal opposition to the ordinance is not a proper basis for taxpayer standing because it does not constitute enforcement of a public right.”).

First, in *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374 (1898), whether the taxpayer had suffered an injury was not in dispute. The taxpayer was the Elyria Gas and Water Company, and the City of Elyria was seeking to issue bonds “for the purpose of erecting or purchasing water-works and supplying water to the corporation and its inhabitants[.]” *Elyria Gas & Water* at 377. The question was whether, by rejecting the taxpayer’s demand, the solicitor had failed to fulfill their statutory duty to “apply in the name of the corporation to . . . restrain the misapplication of funds of the corporation or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinance governing

the same, which was procured by fraud or corruption.” *Id.* at 382–83. This Court held simply that the taxpayer did not need “to wait until the fund is actually raised ready for expenditure, before instituting the suit[.]” *Id.* at 383. *Elyria Gas & Water* was not a standing case.

The injury in *Butler v. Karb*, 96 Ohio St. 472 (1917), was every bit as obvious as the injury in *Elyria Gas & Water*. In *Butler*, the City of Columbus operated a plan to furnish light and power for the city. *Butler* at 473. The plaintiff, a taxpayer, alleged that Columbus was charging private consumers “very substantially less” than it was charging taxpayers. *Id.* at 474. As a result, taxpayers were “required to pay substantially more taxes[.]” *Id.* Here, unlike in *Butler*, Miller has not alleged any increased financial burden on him as a taxpayer.

The taxpayer injury was also clear in *Parks v. Cleveland R. Co.*, 124 Ohio St. 79 (1931). In *Parks*, a railway company was granted a franchise from the City of East Cleveland, “affording its citizens continuous transportation of the most extensive nature.” *Parks* at 81. After operating in East Cleveland for almost 10 years, the railway company notified the City “of its desire to obtain a change of the rate of fare[.]” *Id.* at 83. After an arbitration, the fare nearly doubled from five cents to nine cents, and an East Cleveland taxpayer sought to enjoin the execution of the arbitration award. *Id.* He argued that the new fare was “oppressive and unreasonable.” *Id.* at 85. The railway company “challenge[d] the right of a taxpayer to bring this suit” because “whether the rates are high or low, does not affect taxpayers.” *Id.* at 85. On those facts—clear pecuniary harm—this Court concluded that the public interest may be imperiled. *Id.* at 86.

In *State ex rel. Scott v. Masterson*, 173 Ohio St. 402 (1962), the relators were voters in the City of Cleveland. *Masterson* at 403. The city council failed to redistrict the city into wards after federal censuses. *Id.* This Court held that “the relators as taxpayers and electors have sufficient

interest in the execution of the laws to maintain this action.” *Id.* at 404. Thus, the fact that the relators were voters was indispensable to this Court’s analysis.

Porter v. Oberlin, 1 Ohio St.2d 143 (1965), also did not involve a dispute over whether the plaintiff had suffered an injury. Instead, it involved the City of Oberlin’s fair housing ordinance. *Porter* at 144. The issue was whether the solicitor had a duty, after receiving a written taxpayer demand, to “apply . . . for an order of injunction to restrain the misapplication of funds of the municipal corporation[.]” *Porter* at 146, quoting R.C. 733.56. This Court noted that there was “evidence in the record that the enforcement of this ordinance will involve the expenditure of public funds.” *Id.* Thus, there was a statutory duty under R.C. 733.56 for the solicitor to apply for an order of injunction after receiving the written taxpayer demand, and therefore the plaintiff had “a right to maintain this action.” *Id.* In other words, *Porter* was simply about whether Oberlin’s fair housing ordinance would involve “the misapplication of funds of the municipal corporation,” such that the solicitor was required under R.C. 733.56 to seek an injunction. The issue was not the issue here: whether R.C. 733.59’s procedural requirements are sufficient to confer standing on any taxpayer, regardless of injury.

Finally, *Brauer v. Cleveland*, 7 Ohio St. 2d 94 (1966), is also not relevant to the precise issue here; it dealt with the availability of attorney’s fees in a taxpayer action, not whether taxpayer actions have an injury requirement. In *Brauer*, a taxpayer sought to prevent his municipality from requiring him and others in a “limited class of property owners” to pay certain fees. *Brauer* at 96. This Court held that, unlike here, there were “private rights” being protected in the action, which “was filed primarily for the benefit of the plaintiff’s own interests.” *Id.* Thus, because “the public obtain[ed] no benefit,” it was an abuse of discretion to award the plaintiff’s attorney’s fees and tax them as costs. *Id.*

In sum, none of the cases relied upon by Miller dealt with the issue here: whether a relator has standing to bring suit under R.C. 733.59 despite having suffered no injury. And the cases that have considered the issue have concluded that taxpayers must allege an injury before proceeding under the statute. *See State ex rel. Nimon*, 6 Ohio St. 2d at 1 (1966) (“The word, ‘taxpayer,’ as used in section 733.59, Revised Code, contemplates and includes any person who, in a private capacity as a citizen, elector, freeholder or taxpayer, volunteers to enforce a right of action on behalf of and for the benefit of the public, and any such person is subject to the conditions imposed by that section, unless waived.”); *State ex rel. White*, 34 Ohio St.2d at 41 (1973) (noting that *Nimon* “stat[ed] the conditions necessary to maintain” a taxpayer action); *Donovan*, 2024-Ohio-6059, at ¶ 23 (“holding that taxpayers “cannot establish taxpayer standing under R.C. 733.59 merely by asserting that the ordinance was unlawful under Ohio state law. They must show something else—some public right that they seek to enforce—to establish taxpayer standing”).

C. Miller failed to establish that he was injured-in-fact, a jurisdictional requirement of the Ohio Constitution.

There is no justiciable controversy between Miller and the City relating to this case because Miller has not suffered, nor alleged, an injury-in fact.¹ The Ohio Constitution vests Ohio courts with the “judicial power.” *State ex rel. Martens*, 2024-Ohio-5667 at ¶ 10. Article IV, Section 1 of the Ohio Constitution vests Ohio courts with only “[t]he judicial power of the state.” Ohio Const., art. IV, § 1. “What constitutes judicial power, within the meaning of the constitution, is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution.” *State v. Harmon*, 31 Ohio St. 250, 258 (1877); *See also* Justice R. Patrick DeWine, *Ohio Constitutional Interpretation*, 86 OHIO ST.

¹ Even if this Court finds that Miller is correct on the standing issue, this Court does not have jurisdiction to hear the case because there is not a justiciable controversy. Article IV, Section 1 of the Ohio Constitution. Lack of jurisdiction can be raised at any time during a case. *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dep't*, 82 Ohio St. 3d 37, 39-40, 693 N.E.2d 789, 791 (1998).

L.J. (forthcoming 2025) (“There is a compelling argument for an original public meaning methodology when it comes to interpreting the Ohio Constitution.”).

As this Court recently recognized, “[t]he judicial power is the power to decide specific cases between conflicting parties.” *Martens*, 2024-Ohio-5667, at ¶ 10. Courts may only “decide actual controversies between parties legitimately affected by specific facts.” *Fortner*, 22 Ohio St.2d at 14. The Ohio Constitution limits courts’ jurisdiction “to cases where the parties have standing.” *Martens*, 2024-Ohio-5667, at ¶¶ 10 -11 (“The standing requirement is deeply rooted in our caselaw.”). Thus, an injury-in-fact is necessary to invoke the jurisdiction of Ohio courts under the Ohio Constitution.

Here, Miller has not alleged that he suffered an injury-in-fact. *See generally* Complaint (T.d.2); *City of Cincinnati ex rel. Miller*, 2024-Ohio-4805, at ¶ 26-27 (1st District). Miller personally opposes the Dunlap Ordinance, but he cannot show that he or the public is injured by it. *Donovan v. City of Lebanon*, 2024-Ohio-6059, at ¶ 25 (“Taxpayers’ personal opposition to the ordinance is not a proper basis for taxpayer standing because it does not constitute enforcement of a public right.”).

Miller argues that the imposition of “an extra-statutory requirement upon a taxpayer seeking to proceed under R.C. 733.59 has no basis in the plain and unambiguous language of the statute itself nor in historical precedent of this Court spanning the 150 years in which the municipal statutory taxpayer-lawsuit provisions have been on the books.” Appellant’s Br. at 20. But this argument fundamentally misidentifies the source of the injury requirement, which is Article IV, Section 1 of the Ohio Constitution. *Martens*, 2024-Ohio-5667, at ¶ 10 (“The judicial power is the power to decide specific cases between conflicting parties.”). “This Court has repeatedly emphasized the need for there to be an actual controversy in a case before a court may exercise its

judicial power over the case.” *In re Application for Corr. Of Birth Rec. of Adelaide*, 2024-Ohio-5393, ¶ 101 (separate opinion of Deters, J.).

Far from being a “recent phenomenon,” Appellant’s Br. at 20, the injury requirement for invocations of the judicial power has been recognized at least since William Blackstone in 1768. 3 William Blackstone, *Commentaries on the Laws of England* 25 (1768) (noting that a judicial proceeding requires three components “the *actor*, or plaintiff, who complains of an injury doe; the *resus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power”) (emphases in original); *See also State v. Harmon*, 31 Ohio St. at 258 (“What constitutes judicial power, within the meaning of the constitution, is to be determined in the light of the common law and of the history of our institutions as they existed anterior to and at the time of the adoption of the constitution.”).

In Ohio, the judicial power extends only “to decide actual controversies between parties legitimately affected by specific facts[.]” *Fortner*, 22 Ohio St.2d at 14. “Actual controversies are presented only when the plaintiff sues an adverse party.” *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas*, 1996-Ohio-286, ¶ 21. “This means not merely a party in sharp and acrimonious disagreement . . . but a party from whose adverse conduct or adverse property interest the plaintiff properly claims the protection of the law.” *Id.*

The Ohio Constitution limits courts only to the “judicial power,” which this Court has long recognized requires an actual controversy between conflicting parties, so it does not matter whether the text of R.C. 733.59 specifically imposes an injury requirement because the Ohio Constitution requires an injury for a case to be justiciable.

D. Miller’s position is impractical and would waste valuable judicial resources.

Miller’s argument to eliminate the injury prerequisite to standing would grossly expand the jurisdiction of Ohio courts to include cases without justiciable controversies, wasting valuable judicial resources and opening the proverbial “flood gates” for plaintiffs to file suits against governments and innocent third parties solely because the taxpayer disagrees with legislative decision-making. *See Fortner*, 22 Ohio St.2d at 14 (noting the “long and well established” principle that courts “decide actual controversies between parties legitimately affected by specific facts”). The Ohio Constitution limits courts to the exercise of “judicial power,” which assumes a justiciable controversy. *M.R. v. Niesen*, 167 Ohio St.3d 404, 406 (2022); Ohio Constitution, Article IV, Section 1 (limiting courts’ authority to the “judicial power”).

The city solicitor’s decision not to bring a lawsuit in this case is suggestive that there is no case or controversy between the City and Miller. The purpose of the taxpayer-lawsuit statute is undermined if some weight is not attributed to this decision. It is not enough for someone to simply disagree with a decision of the government. At their core, standing requirements prevent “mere interlopers” attempting to ““““meddle with the affairs of the state, and [taxpayer suits are] not usually allowed *unless under circumstances when the public injury by its refusal will be serious.*”””” (Emphasis in *Teamsters*.) *State ex rel. Teamsters Local Union No. 436 v. Bd. of Cty. Commrs.*, 2012-Ohio-1861, ¶ 12, quoting *State ex rel. Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 472 (1999), quoting *State ex rel. Trauger v. Nash*, 66 Ohio St. 612, 616 (1902), quoting *People ex rel. Ayres v. Bd. of State Auds.*, 42 Mich. 422 (1888).

This case illustrates the importance of these fundamental principles of Ohio law. The Dunlap Ordinance does not concern or affect Miller, and he has no personal stake in the outcome of the case. The Dunlap Ordinance merely eliminates the Cincinnati Zoning Code’s density

limitation for a single parcel to which Miller has no perceivable connection. This is nothing but an ordinary zoning dispute.

E. Miller lacks standing under this Court’s current interpretation of taxpayer standing, the common law, and the case is not justiciable because Miller has not alleged the vindication of a public right or an injury-in-fact.

Miller cannot establish taxpayer standing to challenge the Dunlap Ordinance in this case under this Court’s current interpretation of taxpayer standing because the law has made clear that neighborhood-based zoning disputes are not of “public interest” and insufficient to serve as a basis of a taxpayer action under R.C. 733.59 because they are based on personal concerns, and not that of the public. *Home Builders Assn. of Dayton v. City of Lebanon*, 167 Ohio App.3d 247, ¶ 54 (12th Dist.) (where the court determined that the interests pursued by the relators in a taxpayer action benefited only those engaging in new construction within the city); *State ex rel. Phillips Supply Co. v. City of Cincinnati*, 2012-Ohio-6096, ¶¶ 21-23 (1st Dist.) (no taxpayer standing where the relators challenged a city ordinance that would negatively affect relators' individual property values in only one of the city's 52 neighborhoods); *City of Cincinnati ex rel. Radford v. City of Cincinnati*, 2004-Ohio-3501, ¶ 12 (1st Dist.) (holding that relators did not seek to enforce a public right in a taxpayer action where the relators claimed that the city had wrongfully withheld insurance proceeds from the city's retirement system, which benefitted only the retirement system's participants and beneficiaries). Regardless, Miller failed to allege how an injunction in this case would benefit the public or vindicate a public-right.

Similarly, Miller did he explain in his complaint or his briefing how he would be injured by the passage of the Dunlap Ordinance. There is no evidence in the record that Miller has a personal stake in the outcome of this case or evidence that he lives or owns a business in the same neighborhood as the property covered by the Dunlap Ordinance. Miller simply disagrees with the

Council’s decision to pass the ordinance. But personal disagreement with a law is not a redressable injury. *Donovan*, 2024-Ohio-6059, at ¶ 25 (“Taxpayers’ personal opposition to the ordinance is not a proper basis for taxpayer standing because it does not constitute enforcement of a public right.”); *see also Columbus ex rel. Willits*, 27 Ohio App.2d at 149 (10th Dist. 1971) (noting that taxpayer actions alleging “an abuse of corporate powers” (as opposed to a misapplication of funds) are “carefully restricted by court decisions”).

This Court will surely see this case for what it truly is: a garden-variety zoning dispute over the development of a property in the Over-the-Rhine neighborhood of Cincinnati. The law is clear that there is not a “public interest” at stake in this matter that justified taxpayer standing and that Miller has not and will not suffer an injury. This Court should affirm the First District because Miller lacks standing and has failed to present this Court with an actual, justiciable controversy for this Court to consider.

Appellee’s 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 statutory municipal taxpayer lawsuit provisions, when a city council has allegedly assumed and exercised a power not granted to it under the city charter, a taxpayer has standing to challenge such action under the statutory municipal taxpayer lawsuit provisions as the effort to restrain such abuse of corporate power by the city council vindicates the public interest and/or provides a public benefit.

A. Miller argues that imposing an injury requirement “lacks any statutory basis,” but the requirement is based in the Ohio Constitution.

Miller dispenses with the Ohio Constitution, arguing that whether a lawsuit can be brought is “a policy decision to be made by the General Assembly, not the courts.” Appellant’s Br. at 25–26. But again, R.C. 733.59 is silent as to whether it abrogated common-law standing requirements and merely instructs taxpayers on how to remedy a law director’s failure to meet certain statutory duties. This Court has previously refused to read “*statutory silence as clearly expressing an*

intention to abrogate the common-law requirements for standing.” ProgressOhio.org, 2014-Ohio-2382, at ¶ 22 (emphasis added).

As explained above, the standing and justiciability requirements of R.C. 733.59 remain. The General Assembly cannot force Ohio courts to issue advisory opinions, and courts cannot hear a case if it does not present an actual controversy, and an actual controversy requires an injury. *State ex rel. Davis v. Pub. Emples. Retirement Bd.*, 2008-Ohio-6254, ¶ 43; *State ex rel. White v. Kilbane Koch*, 2002-Ohio-4848, ¶ 18 (reiterating the Supreme Court of Ohio’s “well-settled precedent that we will not indulge in advisory opinions”). *State ex rel. Davis v. Pub. Emples. Retirement Bd.*, 2008-Ohio-6254, ¶ 43; *In re Application for Corr. Of Birth Rec. of Adelaide*, 2024-Ohio-5393, ¶ 101 (separate opinion of Deters, J.).

This Court has already determined that a plaintiff who attempts to invalidate a local ordinance “merely upon the ground that [it is] unauthorized and invalid” is not seeking to enforce a public right and fails to meet the requirements of taxpayer standing. *State ex rel. Teamsters Local Union No., 132 Ohio St. 3d at ¶¶ 14-16*. This is because “[a]lthough a [local government’s] failure to comply with a statute would certainly not benefit the public, allowing constant judicial intervention into government affairs for matters that do not involve a clear public right would also not benefit the public.” *Id.* at ¶ 17.

B. This case does not concern the abuse of the City’s corporate power.

Miller argues that, when a taxpayer brings a lawsuit seeking to prevent the abuse of a municipal corporation’s powers, the General Assembly has decided that the taxpayer is vindicating the public interest. Appellant’s Br. at 25–26. But Miller’s lawsuit does not seek to prevent the abuse of a municipal corporation’s powers; it seeks only to prevent a municipal corporation’s legislature from exercising a power allegedly given to the municipal corporation’s executive. Put

differently, Miller does not argue that the City does not have the power to grant variances. Instead, he admits that the city manager can grant variances and instead argues simply that the Council cannot grant them. *Id.* at 28 (“Contending that the granting of variances is an administrative or executive function, and, in granting such variances and in adopting the *Notwithstanding Ordinance*, the Council assumed and exercised a non-legislative power not granted to it by the *City Charter*, Mr. Miller commenced this statutory municipal taxpayer lawsuit so as to restrain the Council and its members to exercising only those powers the people of the City granted to them by the constitution of the City, *i.e.*, the *City Charter*.”). Miller improperly conflates the division of a municipality’s powers with the abuse of a municipality’s powers. *Id.* at 29 (arguing that “to seek to constrain a municipal body or official to exercising power consistent with a municipal charter (as Mr. Miller has done herein) most certainly should be determined to be vindicating the public interest and/or providing a public benefit”).

Elyria Gas & Water, a case heavily relied upon by Miller, demonstrates this principle. There, a state law required that municipal resolutions “shall be fully and distinctly read on three different days unless three-fourths of the members elected dispense with the rule.” *Elyria Gas & Water*, 57 Ohio St. at 378. The council passed a resolution declaring the necessity of the sale and issuance of bonds, but “it was not read on three different days, nor was the rule dispensed with[.]” *Id.* This was an “abuse of corporate powers,” bringing it within the purview of the taxpayer lawsuit statute, but only because the council had failed to act in compliance with the state law requiring three different readings. *Id.* at 384 (“The proceedings of the council of the city of Elyria . . . being unauthorized by reason of the failure of the council to act within its powers, and in compliance with the statute regulating such proceedings, the proposed use of the fund so to be raised would be illegal, and, therefore, a misapplication of it, as well as an abuse of corporate powers[.]”).

In *State ex rel. Norwood v. Hamilton Cnty. Bd. of Elections*, 148 Ohio St.3d 176 (2016), another case relied upon by Miller, this Court distinguished between administrative functions of ordinances and legislative functions of ordinances. *Norwood* at 179. But it performed that analysis because “[a]dministrative actions are not subject to initiative.” *Id.*, quoting *N. Main St. Coalition*, 2005-Ohio-5009, ¶ 34. The *Norwood* court did not hold that an entire municipality abuses its corporate powers any time a legislative body arguably exercises an administrative power. So even if the allegation of an abuse of corporate power suffices to be considered the vindication of the public interest, there has been no allegation of corporate power abuse here.

Here, Miller has not alleged that the City failed to comply with any state law governing a municipal corporation’s powers. Instead, he simply alleges that the City exercised a power properly granted to it; that power was just allegedly exercised by the legislature, rather than the city manager. Appellant’s Br. at 28. Miller cannot establish that this was an abuse of corporate powers.²

IV. CONCLUSION

For the reasons above, this Court should affirm the decision of the First District Court of Appeals that Miller lacks standing in this case.

Respectfully submitted,

EMILY SMART WOERNER (0089349)
CITY SOLICITOR

² If Miller wanted to challenge or appeal the Dunlap Ordinance that he incorrectly argues is an administrative act rather than a legislative act, he should have filed an administrative appeal. The proper method of challenging an administrative act is to file an administrative appeal under R.C. 2506. *Driscoll v. Austintown Associates*, 42 Ohio St.2d 263, 328 N.E.2d 395, (1975), syllabus at ¶ 4. A party may not file a declaratory judgment or injunction action until all administrative remedies have been exhausted. *Clagg v. Baycliffs Corp.*, 82 Ohio St.3d 277, 281, 1998 Ohio 414, 695 N.E.2d 728 (1998), citing *Haught v. Dayton*, 34 Ohio St.2d 32, 35-36, 295 N.E.2d 404 (1973).

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been filed electronically and served upon all parties as indicated this 29th day of July 2025.

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