Case No. 2024-1687

Supreme Court of the State 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.

City of Cincinnati ex rel. Miller v. City of Cincinnati, et al.
Hamilton County Court of Appeals, First Appellate District
Case No. C-23-0683

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REPLY BRIEF

1. Appellees and their *amici* ignore the starting and stopping point for statutory interpretation: the plain and unambiguous language of R.C. 733.59.

Appellees and their *amici* completely ignore "a familiar place: statutory interpretation." *Look Ahead Am. v. Stark Cty. Bd. of Elec.*, 175 Ohio St. 3d 454, 244 N.E.3d 1108, 2024-Ohio-2691 ¶18. But, as is well-established, the "paramount concern in examining a statute is the legislature's intent in enacting the statute" and, that to discern that intent, this Court "first consider[s] the statutory language, reading all words and phrases in context and in accordance with the rules of grammar and common usage." *Gabbard v. Madison Local Sch. Dist. Bd. of Ed,* 165 Ohio St. 3d 390, 179 N.E.3d 1169, 2021-Ohio-2067 ¶13. "When a statute is unambiguous, [this Court] need go no further to ascertain the legislature's intent; [it] appl[ies] the statute as written." *Johnson v. Montgomery*, 151 Ohio St. 3d 75, 86 N.E.3d 279, 2017-Ohio-7445 ¶15. And, R.C. 733.59 is clear and unambiguous as to the conditions precedent a taxpayer must satisfy before being afforded statutory standing to pursue a statutory municipal taxpayer lawsuit.

Through their failure to address the actual language of R.C. 733.59, though, Appellees and their *amici* essentially admit *sub silentio* that R.C. 733.59 is clear and unambiguous, and that such language cannot support their positions and arguments. Instead, they seek to have this Court ignore its limited role in statutory interpretation and impose some judicial gloss onto the language of R.C. 733.59 so as to drive a certain result. *But see State v. Gonzales*, 150 Ohio St. 3d 276, 81 N.E.3d 419, 2017-Ohio-777 ¶13 ("[i]n our limited role of statutory interpretation, we must refrain from inserting words to achieve a particular result"). "The role of this Court is to apply the statute as it is written – even if [it] think[s] some other approach might 'accord[ ] with good policy.'" *Johnson*, 2017-Ohio-7445 ¶15 (quoting *Burrage v. United States*, 571 U.S. 204, 218 (2014) (quoting *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398 (1984))); *accord Ohio*

Neighborhood Fin., Inc. v. Scott, 139 Ohio St. 3d 536, 13 N.E.3d 1115, 2014-Ohio-2440 ¶23 ("[w]hen statutory language is unambiguous, we will apply it as written, without resort to additional rules of statutory interpretation or considerations of public policy"). "Arguments for narrowing the application of the statute are more properly addressed to the legislature. [This Court's] review starts and stops with the unambiguous language of the statute." *Johnson*, 2017-Ohio-7445 ¶15; *accord Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 469 (1989) (Kennedy, J., concurring in judgment)("[t]here is a ready starting point, which ought to serve also as a sufficient stopping point, for this kind of analysis: the plain language of the statute").

Thus, this Court must reject the effort of Appellees and their *amici* to have this Court ignore or give short shrift to the plain and unambiguous language of R.C. 733.59. The language used by the General Assembly since first enacting the statutory municipal taxpayer provisions in 1860 is plain and unambiguous, clearly setting forth the conditions precedent necessary for any taxpayer to bring an action thereunder. No gloss or nuances can or should be placed on the language therein so as to impose an extra-statutory condition before one may proceed thereunder.

2. Statutory standing is a well-established principle utilized by the General Assembly in numerous contexts; overturning the principle would sow chaos to numerus remedial statutes where statutory standing exists.

Appellees and *amici* call upon this Court to ignore, or even overrule, the precedent of this Court concerning statutory standing, *i.e.*, *Middletown v. Ferguson*, 25 Ohio St. 3d 71, 495 N.E.2d 380 (1986). But the principle of statutory standing, as distinct from common law standing and the requisite personal injury requirement, is well-established and now exists in numerous contexts, not just in the statutory municipal taxpayer lawsuits provisions. *See, e.g., Shumaker v. Hamilton Chevrolet, Inc.*, 184 Ohio App.3d 326, 920 N.E.2d 1023, 2009-Ohio-5263 ¶17 (4th Dist.)("the [Consumer Sales Practices Act] gives consumers standing to enforce its provisions even when they

have not suffered actual injury from a violation"); *Burdge v. Kerasotes Showplace Theatres, LLC*, 2006-Ohio-4560 ¶55 (12th Dist.)("actual injury is not a necessary prerequisite to recovery under the CSPA"); *State ex rel. Mason v. State Emp. Rel. Bd.*, 133 Ohio App. 3d 213, 217, 727 N.E.2d 181 (1999)("we conclude that the Ohio Legislature conferred standing on 'any person' to seek enforcement of the Sunshine Law under R.C. 121.22(I)(1)"); *Doran v. Northmont Bd. of Ed*., 153 Ohio App.3d 499, 794 N.E.2d 760, 2003-Ohio-4084 ¶20 (1st Dist.)("Doran has standing pursuant to [R.C. 121.22] itself, which provides that 'any person may bring an action to enforce this section.…' We do not believe that anything further is required"); *Voss v. Quicken Loans, LLC*, 2024-Ohio-12 ¶31 (1st Dist.)("R.C. 5301.36 confers standing to mortgagors and owners of 'real property to which the mortgage pertains'" to an award statutory damages when release of mortgage is not timely filed even when no injury incurred); R.C. 2711.09 ("any party to [an] arbitration may apply to the court of common pleas for an order confirming the award").[1]

In *Middletown*, after the municipal corporation had entered into contracts concerning a road-widening project, the citizens of the municipality adopted an initiative ordinance repealing "any and all further legislation" concerning the road-widening project. Nonetheless, the

[1] In the *Municipalities & OMAA Amici Brief, at 14-15*, *amici* essentially call upon this Court to overrule *Middletown* and the entire principle of statutory standing, though without addressing the impact such a ruling will have in all contexts. Such an argument is oblivious to the fact that, over the course of decades, the General Assembly has enacted numerous remedial statutes which afford individuals statutory standing without an individualized injury. Certainly, to overrule *Middletown* and the entire principle of statutory standing would frustrate the intent of the General Assembly across a wide spectrum and throw into chaos numerous enactments by the General Assembly. Such an effort by *amici* must be rejected. *See Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 797 N.E.2d 1256, 2003-Ohio-5849 ¶58 ("[i]f overruling a precedent would cause chaos, it should be upheld even if wrongly decided"). Additionally, in making this argument, *amici* fail to appreciate that, should the Court overrule *Middletown* and the entire principle of statutory standing, the common law standing requirement would then be imposed upon municipalities and the attorney general whenever they undertake certain enforcement actions in court, *e.g.*, a statutory nuisance action, a building code violation, *etc*. There is not one standard for access to the courts for citizens and a completely different standard for the government.

municipality completed the project soon thereafter and the city commission enacted ordinances providing for the issuance of bonds to pay for the construction costs. In light of the initiative ordinance and in order to establish its authority to issue and the validity of such bonds, the City of Middletown brought a bond validation action pursuant to then-existing R.C. 133.71 (now at R.C. 133.70).

In *Middletown*, before addressing the merits, this Court directly addressed a challenge to the standing of the City of Middletown to bring the action, including that it lacked any "personal stake" in the controversy to challenge the legitimacy of the initiative ordinance. This Court declared that such a contention "overlooked the fact that standing may also be conferred by statute." *Id.* at 75. This Court then explained that "[s]tanding does not flow from the common-law 'personal stake' doctrine alone…. [S]tanding may also be conferred by a specific statutory grant of authority." *Id.* Without "specific statute authorizing invocation of the judicial process," then "the question of standing depends on whether the party has alleged … a 'personal stake in the outcome of the controversy'." *Id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 731-732 (1972)). But because R.C.133.71(B) authorized judicial review of the validity of the bonds, this Court held "that the city has standing in this case pursuant to a special statutory grant of authority." *Id.* at 76.[2]

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[2] R.C. 133.71(B), now codified at R.C. 133.70(B)(1), *see* 143 *Ohio Laws* 3412, 3521 (1989), provided that "[a]n issuer [(defined as 'any person issuing fractionalized interests in public obligations, an obligor, and, in the case of public obligations, the public')], at any time prior to its issuance or entering into of securities, may file a complaint for validation and thereby commence an action for the purpose of obtaining an adjudication of its authority to issue or enter into and the validity of, and security for and source of payment of, the securities, and of the validity of all proceedings taken and proposed to be taken in connection therewith." Based upon this language, this Court found in *Ferguson* that it was "clear that R.C. 133.71(B) authorizes judicial review, at the behest of the city, of the validity of all proceedings taken in connection with the bonds it proposes to issue and the city's authority to do so" and, "[w]e therefore hold that the city has standing in this case pursuant to a special statutory grant of authority. *Middletown*, 25 Ohio St. 3d at 76.

Thus, consistent with the holding of this Court in *Middletown*, two separate and distinct bases for standing have repeatedly been recognized: (i) standing premised upon the common-law personal stake requirement; and (ii) standing premised upon a grant of statutory standing.[3] *Voss*, 2024-Ohio-12 ¶¶27-28 ("[i]n Ohio, a party can establish standing in two ways"); *see, e.g., ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 13 N.E.3d 1101, 2014-Ohio-2382 ¶1 (Appellants "lack the direct injury required for common-law standing. Appellants similarly fail to allege a cognizable basis for statutory standing"); *Cool v. Frenchko*, 200 N.E.3d 562, 2022-Ohio-3747 ¶29 (10th Dist.)("[s]tatutory standing is 'the statutory grant of authority to sue.' Common-law standing principles do not apply when standing is authorized by statute" (internal citation omitted)); *Campbell v. Donald A. Campbell 2001 Trust*, 2021-Ohio-1731 ¶42 (8th Dist.)(""[i]n Ohio, the only other way to have standing to sue [other than satisfying the injury requirement for common law standing] is pursuant to an explicit statute or what is described as 'statutory standing'"); *City of Cincinnati v. Twang, LLC*, 2021-Ohio-4387 ¶14 (1st Dist.)("[t]his case involves statutory standing, not common-law standing"). And the authority or standing of Mr. Miller, as a municipal taxpayer, to bring this lawsuit "on behalf of" the City of Cincinnati is also a matter of statutory standing as expressly provided to him in R.C. 733.59.

3. As in numerous other situations where statutory standing has been found, there is no requirement that the General Assembly utilize talismanic language of "standing".

[3] In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 715 N.E.2d 1062, 1999-Ohio-123, this Court recognized a third basis for standing: "when the issues sought to be litigated are of great importance and interest to the public." *Id.* ¶33. However, in *State ex rel. Martens v. Findlay Mun. Ct.*, 178 Ohio St. 3d 533, 262 N.E.3d 304, 2024-Ohio-5667, this Court overruled *Sheward* and, in particular, its public-rights doctrine. *Id.* ¶23. However, in *Martens,* this Court still recognized the availability of statutory standing independent of the common law requirements for standing. *Id.* ¶24.

In an effort to avoid having this case be a matter of statutory standing, the City of Cincinnati posits that, in granting the authority to a municipal taxpayer to sue under R.C. 733.59, the General Assembly did not clearly express an intention to abrogate the common law standing requirements. *See City's Brief, at 6-9.* The City of Cincinnati essentially argues that, absent the General Assembly expressly utilizing the talismanic language of "standing" in its statutory enactment, courts should summarily conclude that there was no intent to abrogate the common law. *But see Wildcat Drilling, L.L.C. v. Discovery Oil & Gas, L.L.C.*, 164 Ohio St. 3d 480, 173 N.E.3d 1156, 2020-Ohio-6821 ¶15 ("no talismanic or magical language is required in order to abrogate the common law through a contract"). Such an argument by the City fails to appreciate that this Court has never required such a talismanic declaration by the General Assembly before legislation is determined to have abrogated the common law.[4]

"When a statute provides for judicial review, 'the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.'" *Ohioans for Concealed Carry, Inc v. City of Columbus*, 164 Ohio St. 3d 291, 172 N.E.3d 935, 2020-Ohio-6724 ¶23 (quoting *Middletown*, 25 Ohio St.3d at 75-76 (quoting *Sierra Club*, 405 U.S. at 732)). Thus, as noted above, the statute at issue in *Middletown*, the Consumer Sales Practices Act, the Open Meetings Act, *etc.*, have all been found to afford statutory standing without the

[4] For a statute, such as the statutory municipal taxpayer lawsuit provisions, which has been on the books for over 150 years, *see Appellant's Brief, at 13-14 & 14 n.5*, to argue that the General Assembly should have utilized the word "standing" borders on the absurd. "There was no doctrine of standing prior to the middle of the twentieth century. The word 'standing' made scattered appearances, but it was unattached to any analytical framework…." John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002). Thus, despite the argument of the City of Cincinnati, there would be no reason for the General Assembly to include such language. Regardless, though, such talismanic or magical language has never been required for courts to find the existence of statutory standing within an enactment of the General Assembly, including in the numerous provisions identified above where statutory standing has been found. *See Reply Brief, supra, at 2-4.*

General Assembly jumping through the hoop of expressly declaring or mentioning "standing". And the language in R.C. 733.59 is even more clear that, upon certain conditions precedent being met, "the taxpayer may institute suit in his own name, on behalf of the municipal corporation." No additional conditions – such as being personally injured or aggrieved is required. *Cf.* R.C. 135.351(B)(for a statutory claim premised upon destruction of a record, "[a]ny person *who is aggrieved* by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a record … may commence…." (emphasis added)).

The City of Cincinnati attempts to find solace for its argument from this Court's decision in *ProgressOhio.org, Inc. v. JobsOhio,* 139 Ohio St.3d 520, 13 N.E.3d 1101, 2014-Ohio-2382, going so far as to assert that language from the JobsOhio Act at issue in that case "is equivalent to" the language of R.C. 733.59. *See City's Brief, at 7*. But even a cursory comparison of the language from the JobsOhio Act versus R.C. 733.59 would readily show a clear distinction between the two.

In *ProgressOhio.org*, the plaintiffs maintained that they possessed statutory standing because 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 this section." *Id.* ¶20 (quoting R.C. 187.09(B)). As is apparent on the face of it, such provision said nothing about *who* could bring such an action or any conditions precedent before such an action could be brought. Thus, this Court properly characterized that provision as "unambiguously provid[ing] that…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." *Id.* ¶22. Stated otherwise, R.C. 187.09(B) declared *where* and *when* any constitutional challenge had to be

brought, but it made no reference whatsoever as to *who* could bring or was authorized to bring such a challenge.

Unlike the statute in *ProgressOhio.org*, R.C. 733.59 says nothing about where or when any municipal taxpayer lawsuit has to be brought. Instead, R.C. 733.59 directly provides that "the taxpayer may institute suit in his own name, on behalf of the municipal corporation" and may do so upon the satisfaction of certain conditions precedent. As noted in *Appellant's Brief, at 6*, when a taxpayer proceeds under R.C. 733.59, "the taxpayer[] stand[s] in the shoes of [the] municipal corporation." *City of Shaker Heights ex rel. Friends of Horseshoe Lake, Inc. v. City of Shaker Heights*, 2024-Ohio-3007 ¶23 (8th Dist.). And, as such, the taxpayer is proceeding in a derivative capacity on behalf of the municipality to vindicate the harm or injury against the municipal corporation as expressly authorized under R.C. 733.59.

4. As a statutory municipal taxpayer lawsuit is a derivative action authorized by statute, the harm or injury being vindicated is that suffered by the municipal corporation when, *inter alia*, its officials abuse the corporate power by assuming a power not granted to them.

The City of Cincinnati also wrongfully attempts to impose standards for shareholder derivative lawsuits under the Civil Rules onto statutory municipal taxpayer lawsuits. *See City's Brief, at 9-10.* But such an argument shows a fundamental misunderstanding of the nature of derivative lawsuits, *see* Black's Dictionary (1990), at 443 ("derivative" means "[a]nything obtained or deduced from another"), and ignores that, under R.C. 733.59, statutory municipal taxpayer lawsuits are actually brought "on behalf of the municipal corporation," not on behalf of the individual taxpayer.

"A 'taxpayer derivative action' … is an action brought by a taxpayer on behalf of a local governmental unit to enforce a cause of action belonging to the local governmental unit." *Scachitti v. UBS Fin. Servs.*, 215 Ill. 2d 484, 494, 831 N.E.2d 544 (2005). "The plaintiff taxpayer alleges

that defendants harmed the [government] as an entity, and he seeks to recover solely on behalf of the [government]. Thus, plaintiff brings [the] action derivatively." *Feen v. Ray*, 109 Ill. 2d 339, 344-45, 487 N.E.2d 619 (1985). And, thus, in such a derivative action, the taxpayer "does not claim direct injury to himself. Where a taxpayer sets judicial machinery in motion in a derivative action, the direct injury to be remedied is not personal to the taxpayer. Rather, the right of action is that of the governmental entity." *Id.* at 345; *accord Lyons v. Ryan*, 201 Ill. 2d 529, 535, 780 N.E.2d 1098 (2002)("[t]he claimed injury [in a taxpayer derivative action] is not personal to the taxpayers, but rather impacts the governmental entity on whose behalf the action is brought").[5] And this is why, in statutory municipal taxpayer lawsuits, "the City is the real party in interest, attempting to enforce its right," *Wade*, 18 F. Supp. 3d at 901, and "[t]he taxpayer's rights or claims are no greater than the rights or interests of the municipality"), *Cincinnati ex rel. Ritter v. Cincinnati Reds, LLC*, 150 Ohio App.3d 728, 2002-Ohio- 7078 ¶20 (1st Dist.).

Accordingly, in terms of standing, such derivative actions brought under the statutory municipal taxpayer lawsuit provision are similar to actions brought under the False Claims Act (the "FCA"), 31 U.S.C. § 3729 *et seq*. Under the FCA, a private person (the "relator") may bring a *qui tam* civil action "in the name of the Government," 31 U.S.C. § 3730(b)(1), against any person who, inter alia, "knowingly presents [to the Government] a false or fraudulent claim for payment

[5] In this case, the cause of action belonging to the City of Cincinnati is one for injunctive relief under R.C. 733.56 due to the abuse of corporate powers by members of the Cincinnati City Council, regardless of whether commenced by the city solicitor under R.C. 733.56 or by a taxpayer under R.C. 733.59. *Municipalities & OMAA Amici Brief, at 20*, actually admit that when a city solicitor brings an action under R.C. 733.56, the requisite injury is premised upon "the municipality's injury-in-fact. But when a taxpayer proceeds under R.C. 733.59, he or she is bringing the exact same claim, *i.e.*, one premised upon those expressly set forth in R.C. 733.56 to R.C. 733.58 that the city solicitor could have brought in the first instance. Yet, Appellees and their *amici* appear to argue that a distinctly different injury is required when the taxpayer brings the precisely same action as the city solicitor could bring under R.C. 733.56. But such an argument is wholly contrary to the whole structure of the statutory municipal taxpayer lawsuit provisions.

or approval." *Id.* § 3729(a).[6] In *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Supreme Court directly addressed the Article III standing of a relator in a *qui tam* action even though the relator did not suffer a personal injury, ultimately concluding that "the United States' injury in fact suffices to confer standing" on the relator. *Id.* at 774. Similarly, in the context of statutory municipal taxpayer lawsuits, the injury suffered by the municipal corporation wherein its officials abused corporate powers by assuming a power not granted to them constitutes an injury sufficient to afford a taxpayer standing to pursue an action under R.C. 733.56, provided the specific statutory conditions precedent in R.C. 733.59 are satisfied.[7]

5. Conflicting decision of this Court over the 150-plus years which the statutory municipal taxpayer lawsuits have been on the books militate a return to the plain and unambiguous language of R.C. 733.59.

Appellees and their *amici* repeat a chorus that *stare decisis,* not the plain and unambiguous language of R.C. 733.59, should dictate the decision in this appeal. However, this Court has repeatedly recognized the importance of making a correct pronouncement of the law such that,

[6] In *Municipalities & OMAA Amici Brief, at 21*, *amici* attempt to minimize the similarities of the FCA to the statutory municipal taxpayer statute, suggesting that claims under the FCA can only be brought by "informers" not by any person. *Municipalities & OMAA Amici Brief, at 21* (arguing "R.C. 733.59 seems to allow any taxpayer – informer or not – to initiate a lawsuit"). But the FCA does not limit the class of possible plaintiffs to insiders or informants as "*any* person may bring a qui tam suit in the Government's name." *United States v. Sanofi-Aventis U.S. LLC* (*In re Plavix Mktg*.), 974 F.3d 228, 233 (2d Cir. 2020)(citing emphasis in original and citing 31 U.S.C. § 3730(b)(1)); *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1089 (11th Cir. 2018)(same). The bottom line is a relator under the FCA need not suffer personal injury in order to bring a *qui tam* action on behalf of the Government; the equivalence to the statutory municipal taxpayer lawsuit provisions is self-evident.

[7] Under the FCA, the relator is not required to make a written demand upon the Government before bringing suit. Instead, the FCA requires a relator to deliver a copy of the complaint, and any supporting evidence, to the Government, which then has 60 days to intervene in the action. 31 U.S.C §§ 3730(b)(2), (4). If the Government elects to intervene, it then assumes primary responsibility for prosecuting the action. *Id.* § 3730(c)(1). If the Government declines to intervene within the 60-day period, the relator has the exclusive right to pursue the action. *Id.* § 3730(b)(4).

even when a prior decision runs counter to the plain language of a statute, it has readily overruled such precedent and applied the plain language so as to implement the more important and paramount principle of effectuating the actual intent of the General Assembly. *See, e.g., State ex rel. Dillon v. Indus. Comm'n of Ohio*, 176 Ohio St. 3d 10, 246 N.E.3d 413, 2024-Ohio-744 ¶17 ("this court's reasoning in *Russell* runs counter to the plain language of R.C. 4123.511(K) and R.C. 4123.56(A). Because *Russell* was wrongly decided, we overrule it and its progeny today. By applying the plain language of R.C. 4123.511(K)…"); *Shroades v. Rental Homes*, 68 Ohio St. 2d 20, 26, 427 N.E.2d 774 (1981)("[w]hile respecting the doctrine of *stare decisis*, it is more important to recognize the need to effectuate the intent of the General Assembly in enacting R. C. Chapter 5321 and for Ohio to join the overwhelming majority of states which provide much needed rights to tenants"). "It does no violence to the legal doctrine of *stare decisis* to right that which is clearly wrong. It serves no valid public purpose to allow incorrect opinions to remain in the body of our law." *State ex rel. Board of County Comm'rs v. Zupancic*, 62 Ohio St. 3d 297, 300, 581 N.E.2d 1086 (1991)(quoting *Scott v. News-Herald*, 25 Ohio St.3d 243, 254, 496 N.E.2d 699 (1986)(Holmes, J., concurring)).

Furthermore, precedents of this Court over the 150-plus years of the statutory municipal taxpayer lawsuit provisions have not been consistent as to whether satisfaction of the conditions precedent explicitly set forth in R.C. 733.59 is sufficient in order for a municipal taxpayer to pursue an action "on behalf of the municipal corporation" or whether extra-statutory requirements are also imposed. As developed and discussed fully in *Appellant's Brief, at 13-19*, in the decades and even century following adoption of the statutory municipal taxpayer provisions in 1860, decisions of this court repeatedly addressed and held that the proper person to bring such an action was one who satisfied the conditions precedent in the statute. But when this Court started to impose the

extra-statutory condition that the taxpayer proceeding under R.C. 733.59 also had to be seeking to vindicate the public interest or to provide a public benefit, not only did this Court not engage in any statutory analysis, but it ignored *stare decisis* in making no mention whatsoever of the century-plus precedents of this Court which held otherwise.

The City of Cincinnati attempts to distinguish these earlier precedents issued over the course of a century-plus by either claiming such cases did not involve standing or by reading more into the language of this Court's actual opinion or its analysis than is actually there. *See City's Brief, at 11-14.* Repeatedly, the City attempts to manufacture a personal injury to the individual taxpayer in such cases even though, in repeatedly addressing challenges to whether the plaintiffs in those cases could even bring the action, *i.e.*, had standing, this Court did not address such alleged injury as going to its analysis or resolution on that question. Simply stated, this Court simply considered the plain and unambiguous requirements of the statute and whether the plaintiff-taxpayer satisfied the condition precedent therein.

For example, the City claims the only issue in *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St. 374, 49 N.E. 335 (1898), was whether the taxpayer had to wait until the bond fund was actually raised before instituting suit. *City's Brief, at 12*. But the City ignores that this Court expressly addressed the contention "that the plaintiff cannot maintain the action," 57 Ohio St. at 382, *i.e.*, standing to bring the action, and ultimately concluded the plaintiff could bring the action under the statute alone, not under the common law. *Id.* at 384 ("we have not considered the question whether the plaintiff, as a taxpayer, independent of the statute, might not maintain the action, for we think it was authorized by the statute to bring the suit"). This Court did not consider the common law because the action of the taxpayer satisfied the conditions precedent in the statute, *i.e.*, the action "was authorized by the statute." *See Id.* at 375-76 ("before commencing the suit, requested the

city solicitor to bring an action for the same purpose, which he refused to do; and the action below was brought by the [taxpayer] in behalf of the city"). Nothing more was required.

Similarly, in addressing *Butler v. Karb,* 96 Ohio St. 472, 117 N.E. 95 (1917), the City ignores the actual analysis of this Court on the standing question, *i.e.*, that "the plaintiff is not a proper party to make such complaint," *id.* at 485. Characterizing such a contention as being "unsound," this Court's analysis in *Butler* was clear as to why the taxpayer could bring the action (with modification for the current statutory provisions)::

> The solicitor could maintain the action under authority of the provisions of [R.C. 733.56].… If upon the request of a taxpayer the city solicitor refuses to institute the action, the taxpayer may do so by virtue of the provisions of [R.C. 733.59]. He then represents the public just as would the solicitor had he exercised the power conferred upon him and brought the suit. These sections are remedial in their character and are therefore to be liberally construed and effectively applied in order to safeguard the rights of the municipality, the obvious purpose of their enactment.

Id. at 485-86. Despite the effort of the City, this Court said nothing about the taxpayer suffering any personal injury as part of its analysis as to why the taxpayer could maintain the action; the taxpayer in *Butler* could maintain the action because he satisfied the statutory conditions precedent and nothing more.[8]

With respect to *Parks v. Cleveland Ry. Co.*, 124 Ohio St. 79, 177 N.E. 28 (1931), the City of Cincinnati continues its effort to insert additional matters to the Court's actual analysis in considering the challenge to "the right of a taxpayer to bring this suit under" the statute. *Id.* at 85. It was immaterial to this Court's resolution of that issue as to whether taxpayers suffered pecuniary harm. Instead, this Court simply concluded that, regardless of financial impact or harm, "the

[8] Appellees and their *amici* also conveniently ignore the pronouncement of this Court in *Butler* that the municipal taxpayer lawsuit provisions "are remedial in their character and are therefore to be liberally construed and effectively applied in order to safeguard the rights of the municipality, the obvious purpose of their enactment." Id. at 486.

statute was intended to cover the execution or performance of *ultra vires* contracts by municipal officers, and to prevent usurpation by public bodies or agents of powers not granted, the exercise of which may imperil the public interest. The statute, being remedial in nature, should be construed liberally." *Id.* at 86. Accordingly, and for that reason alone, the taxpayer could bring the challenge to the abuse of corporate powers consistent with the statutory authority granted to him.

The City apparently concedes that in *State ex rel. Scott v. Masterson*, 173 Ohio St. 402, 183 N.E.2d 376 (1962), the taxpayers bringing the action did not need to demonstrate a personal harm or injury. In fact, the City acknowledges that a statutory municipal taxpayer lawsuit could be brought premised upon nothing more than the conditions precedent in R.C. 733.59 and that the only interest (not harm or injury) the taxpayer needed was a "sufficient interest in the execution of the laws to maintain [the] action." *Id*. at 404.[9]

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[9] OTRCL and the OML posit that such an interest is not sufficient to allow a taxpayer to challenge governmental action, notwithstanding the clear and unambiguous language of R.C. 733.56 *et seq*. In the *OML Amicus Brief*, at 3-4, it declares "[o]ver a century ago, this Court determined that 'taxpayers cannot contest official acts 'merely upon the ground that they are unauthorized and invalid.'" And OTRCL similarly claims such principle is a "well-established rule". *OTRCL Brief, at 6-7.* The characterizations by the OML and OTRCL are completely wrong.

The asserted basis for such principal being "over a century" old and a well-established rule is based upon language from *Pierce v. Hagans*, 79 Ohio St. 9, 86 N.E. 519 (1908). But this Court did not embrace such a proposition in *Pierce.* That upon which the OML and OTRCH attempt to find support in *Pierce* is offered only in *dicta* and then only in a general discussion of the spectrum of various legal views on the nature and scope of taxpayer lawsuits. In *Pierce,* the Supreme Court mentioned that one such view (but not the only view) was that "taxpayers cannot contest municipal ordinances or acts merely upon the ground that they are unauthorized and invalid." *Id.* at 22. Significantly, though, this Court did not adopt or ratify that proposition – it simple recognized that as one of many legal propositions on a spectrum.

Instead, in the very next sentence in *Pierce,* this Court actually acknowledged that, in contrast, "the greater weight of authority… 'is that if such action [of a municipality or its officials] be illegal or unauthorized[,] taxpayers may sue to restrain it without showing any special injury different from that sustained by other taxpayers.'" *Id.* at 22 (quoting 38 Cyc. at 1732 -1738). And most significantly, it was this later proposition upon which this Court expressly declared "afford[ed] support" for its actual holding in *Pierce.* And, thus, *Pierce* supports Appellant's positions and, contrary to the representations to the Court by OML and OTRCH, the proposition it seeks to advance is not a "well-established principle"; quite the contrary.

And the City continues its effort to avoid the century-plus of precedent supporting statutory standing being afforded to a taxpayer who satisfies the conditions precedent in R.C. 733.59 by continuing its mischaracterization of precedent and the Court's actual analysis therein. With respect to *Porter v. Oberlin*, 1 Ohio St. 2d 143, 205 N.E.2d 363 (1965), the City wrongfully attempts to suggest the case has nothing with respect to the right or ability of a taxpayer to bring the action, *see City's Brief, at 13*, even though this Court expressly declared it "will first consider whether plaintiff has a right to maintain this action." *Id.* at 145. And, premised upon an extensive review of the statutory municipal taxpayer lawsuit provisions, this Court concluded the taxpayer therein "[had] a right to maintain [the] action." *Id.* at 146. The City conveniently ignores this analysis and conclusion.

There are clearly two lines of cases from this Court addressing the requirements by which a taxpayer may bring a statutory municipal taxpayer lawsuit. Earlier cases, covering over a hundred years, concluded that, upon satisfaction of the conditions precedent in the statute, a taxpayer could bring the type actions provided for in the statutes. Concededly, recent cases have imposed the extra-statutory requirement that the taxpayer must also be vindicating the public interest or providing a public benefit. Precedent supports both conflicting positions; however, the plain and unambiguous language of the statute only supports the former.

"The principal basic purposes of the doctrine of *stare decisis* are to provide equal treatment for all and certainty as to what the law is. Those basic purposes require that, where there are two irreconcilable lines of decisions and a court determines to follow one of them, it should affirmatively reject all that is inconsistent with what is being followed." *State v. Morello*, 169 Ohio St. 213, 158 N.E.2d 525(1959)(Taft, J., concurring). That is essentially where the statutory municipal taxpayer lawsuit stands – two distinct lines of cases from this Court as to the standards

a taxpayer must satisfy in order to bring an action under R.C. 733.59. Either the plain and unambiguous language of the statute controls or an extra-statutory requirement is imposed.

A final comment in considering the impact or importance of *stare decisis.* When consideration is given that "[t]he doctrine of stare decisis is designed to provide continuity and predictability in our legal system" so as to provide "a clear rule of law by which the citizenry can organize their affairs," *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 797 N.E.2d 1256, 2003-Ohio-5849 ¶43, the nature of the issue in this appeal is not one wherein the public and municipalities have organized their affairs in reliance thereupon and, thus, the importance of *stare decisis* is not as strong. Major decisions and alteration of governmental operations have not occurred because this Court has recently imposed the extra-statutory requirement that a taxpayer must be vindicating the public interest or providing a public benefit in addition to satisfying the conditions precedent in R.C. 733.59. *Queare*, would the City of Cincinnati or any municipality have conducted their affairs differently had this Court not imposed the extra-statutory requirement. The answer is clear; municipal operations would be no different (other than, perhaps, municipal officials ensuring that they operate within the confines of the law). Thus, despite the near-exclusive importance which Appellees and their *amici* place on *stare decisis*, there is nothing militating deference to their effort to continue the imposition of the extra-statutory requirement before a taxpayer may bring a statutory municipal taxpayer lawsuit while while ignoring the plain and unambiguous language of R.C. 733.59.

6. The entirety of the claim is not moot and well-established exceptions to the mootness doctrine further support consideration of this appeal.

In an effort to avoid an adverse decision in this appeal, OTRCH claims that, in light of its continued progress of undertaking construction on the *Property*, as well an overall change to the zoning code in the City of Cincinnati, the claim in this case has become moot. *See OTRCH's Brief,*

at 10-16. Contrary to the indication of OTRCH, the challenge was not limited or isolated to the *Notwithstanding Ordinance* concerning only the *Property.* The core underlying issue in this case involved a direct challenge as to whether the Cincinnati City Council and its members abuse the corporate power by exercising and continuing to exercise a power not granted to them under the City's constitution, *i.e.*, the *Cincinnati City Charter. See Complaint* (T.d.1)(seeing, *inter alia*, injunctive relief prohibiting "the individual members of the Cincinnati City Council from engaging in the abuse of corporate and, in particular, from granting any legislative variances … to zoning or building codes or other provisions of law"). "An action is only moot when it would be impossible to provide meaningful relief even in a ruling in favor of the party seeking relief. However, an action will not be moot if an actual controversy still exists between adverse litigants." *State ex rel. Cordray v. Basinger*, 2010-Ohio-4870 ¶80 (7th Dist.) As a viable and live controversy capable of adjudication still exists amongst parties with adverse interests, this case is not moot.

Even if *arguendo* all claims are technically moot, this Court has acknowledged two distinct exceptions by which it can continued to exercise jurisdiction over an appeal: (i) if the case involves a matter of public or great general interest; or (ii) if the issues are capable of repetition, yet evading review. *In re Appeal of Suspension of Huffer from Circleville High School*, 47 Ohio St. 3d 12, 14, 546 N.E.2d 1308 (1989).

With respect to considering a technically moot case when it involves a matter of public or great general interest, this Court in *State v. Cupp*, 156 Ohio St.3d 207, 124 N.E.3d 811, 2018-Ohio-5211, addressed scenarios when that standard came into play. Initially in *Cupp*, this Court discussed the application of the principle in *Franchise Developers, Inc. v. Cincinnati*, 30 Ohio St.3d 28, 31, 30 Ohio B. 33, 505 N.E.2d 966 (1987). *Franchise Developers* involved a challenge to the development guidelines of the City of Cincinnati. When the case became "technically moot"

because ownership of the underlying property had been acquired by the City then transferred to a new owner, the City still had an interest in the determination of the validity of its development guidelines and this Court concluded the exception to mootness applied. And in *Cupp* itself, this Court also found the exception applicable because the State still had "an interest in" resolution of the issue.

In this case, involving a purely legal question, there is tremendous public and great general interest for definitive resolution of whether a municipal taxpayer seeking to bring a statutory municipal taxpayer lawsuit must satisfy only the conditions precedent in R.C. 733.59 or whether an additional extra-statutory requirement created by judicial fiat must also be satisfied. This appeal has resulted in 29 distinct *amici* offering their voices on the issue, including a significant number of municipalities and municipal-related organizations which have declared their "great interest" on Ohio's municipal-taxpayer-standing jurisprudence. *Municipalities & OMAA Amici Brief, at 1*. And, more noteworthy, as acknowledged by the Ohio Municipal League, "[t]he result of this case will impact every city and village in Ohio whether they are statutory or charter." *OML Amicus Brief, at 3*. Thus, this appeal does not involve an isolated or fact-specific case but, instead, is one that certainly involves a matter of public or great general interest throughout the entire State of Ohio such that, pursuant to precedent, this Court can continue to exercise jurisdiction even if *arguendo* the case is technically moot.

Additionally, this case is capable of repetition, yet evading review. An issue is capable of repetition yet evading review if "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *M.R. v. Niesen*, 167 Ohio St. 3d 404, 193 N.E.3d 548, 2022-Ohio-1130 ¶11 (quoting *United States v. Sanchez-Gomez*, 584 U.S.

381, 391 (2018)). As the legislative variance process at issue generally involves zoning or building codes, the ability for the judicial process to resolve them in a timely and definitive manner is lacking (as the attempt of OTRCH to moot this case through its actions demonstrates). If the Court accepts the principle argued by OTRCH that construction has progress sufficiently so as to moot this case, *see OTRCH Brief, at 10-11*, that is the natural result of cases involving zoning and building code – matters that are at the heart of what the Cincinnati City Council has granted legislative variances.

As for the second requirement, repetition is reasonably likely to occur as the granting of legislative variances by the Cincinnati City Council through notwithstanding has occurred repeatedly and has become par for the course in the City though oblivious to any constraints imposed by the city's constitution, *i.e.*, the Cincinnati City Charter. *See OTRCH Brief, at 3* (declaring "City Council has enacted hundreds of notwithstanding ordinances" and providing record support thereof). Thus, it is reasonable that the Cincinnati City Council will continue to do that which it has already done "hundreds" of times and grant special exemptions from the requirements of the zoning or building codes.

However, for the second requirement to apply, "[i]t is not enough for an issue to be capable of repetition between *some* parties; the issue must be capable of repetition between the 'same' parties." *M.R.*, 2022-Ohio-1130 ¶12. But in statutory municipal taxpayer lawsuits, the issue most certainly will involve the same parties, *i.e.*, the City of Cincinnati and the members of its city council. Because in actions under R.C. 733.59, "the City is the real party in interest, attempting to enforce its rights," *City of Cleveland ex rel. Wade v. City of Cleveland*, 18 F. Supp. 3d 897, 901 (N.D. Ohio 2014), the complaining party is not the individual taxpayer but, instead, is the municipal corporation itself. As noted above, the taxpayer[] stand[s] in the shoes of [the]

municipal corporation," *City of Shaker Heights ex rel. Friends of Horseshoe Lake, Inc. v. City of Shaker Heights*, 2024-Ohio-3007 ¶23 (8th Dist.), and the claim is actually that of the municipal corporation, not the taxpayer. Thus, in light of the historical of members of the Cincinnati City Council assuming a power not granted to them so as to grant legislative variances to the zoning and building codes, it is reasonable to expect that the City of Cincinnati will again be seeking to restrain its officials from exercising a power not granted to them.

The appeal is not moot as viable and live claims remain and, even if *arguendo* it is moot, well-established exceptions justify this Court continuing to exercise jurisdiction over this appeal.

Conclusion

"The need for taxpayers' suits arises from the absence of alternative means of correcting illegal practices of government officials which would otherwise be irreparable." Notes and Comments, *Taxpayers' Suits: A Survey and Summary*, 69 Yale L.J. 895, 910 (1960). Through enactment of the statutory municipal taxpayer lawsuit provisions, the General Assembly provided a specific statutory ability for municipal taxpayers to hold municipal officials accountable and set forth plain and unambiguous conditions precedent. To continually narrow a remedial statute through imposition of extra-statutory requirements would defeat the intent of the General Assembly and force taxpayers to sit passively and allow illegal actions by municipal official to continue unabated and ad infinitum. Accordingly, the judgment of the First District should be REVERSED and the case REMANDED for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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