In the Supreme Court of Ohio

CITY OF CINCINNATI *ex rel.* MILLER,	:	Case No. 2024-1687
	:	
Relator-Appellant,	:	On Appeal from the
	:	First District Court of Appeals
vs.	:	Hamilton County
	:	
CITY OF CINCINNATI, *et al.*,	:	Court of Appeals
	:	Case No. C-230683
Respondents-Appellees.	:	

BRIEF OF *AMICI CURIAE* OHIO MUNICIPALITIES AND THE OHIO MUNICIPAL ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEES

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STATEMENT OF *AMICI CURIAE* INTEREST

Amici Ohio Municipalities and the Ohio Municipal Attorneys Association join to urge this Court to affirm the decision of the First District Court of Appeals in *Cincinnati ex rel. Miller v. Cincinnati*, 2024-Ohio-4805 (1st Dist.), which holds firm to this Court's longstanding precedent regarding municipal-taxpayer standing. Relator-Appellant Mr. Mark Miller seeks to uproot this Court's settled jurisprudence, which has recognized a public-right requirement for a municipal-taxpayer to have standing under R.C. 733.59 and resulted in a consistent and dependable way to interpret questions on this subject, and replace it with a rule that will overwhelm local governments and inundate the courts with taxpayer lawsuits challenging the lawful actions of elected local government officials, and their unelected deputies, who are charged with advancing the public good and accountable through the political process. *Amici* have a great interest in preserving Ohio's municipal-taxpayer-standing jurisprudence or, if it is to be modified, seeing that any new rule adheres to the limitations placed on plaintiff-taxpayers and the courts by the Ohio Constitution.

Amicus the Ohio Municipal Attorneys Association ("OMAA") is an Ohio non-profit corporation incorporated in 1953 by city and village attorneys who saw the need for a statewide attorneys association to serve the interests of Ohio municipal government. Currently, the OMAA represents a majority of Ohio's cities and villages. The OMAA is closely aligned with the Ohio Municipal League. On a national basis, the OMAA is affiliated with the National League of Cities, and the International Municipal Lawyers Association. The Executive Director of the OMAA is a registered lobbyist and works with the Ohio legislature on matters of concern to municipalities. The OMAA has been accredited by the Supreme Court of Ohio as a sponsor for Continuing Legal Education Programs for municipal attorneys.

Amici Ohio Municipalities are cities and villages with home rule authority under Article XVIII of the Ohio Constitution. Like the City of Cincinnati, *Amici* Ohio Municipalities also receive and respond to demands from their taxpayers, including demands regarding the functions of and decisions made by their respective branches of local government. In addition, like Cincinnati, *Amici* Ohio Municipalities must defend their respective municipal corporations when a taxpayer demand results in litigation. Thus, *Amici* Ohio Municipalities have a direct interest in this Court's conclusion on the propositions of law presented in this case.

INTRODUCTION

In 1966, this Court interpreted the word "taxpayer" in R.C. 733.59 to mean "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." (Emphasis added.) *State ex rel. Nimon v. Springdale*, 6 Ohio St.2d 1 (1966), paragraph two of the syllabus. This Court reaffirmed its definition just a few years later. *See State ex rel. White v. Cleveland*, 34 Ohio St.2d 37, 40 (1973). And from there, it consistently looked to this case law for purposes of taxpayer statutory standing. *See, e.g.*, *State ex rel. Caspar v. Dayton*, 53 Ohio St.3d 16, 20 (1990); *State ex rel. Cater v. N. Olmsted*, 69 Ohio St.3d 315, 322-323 (1994); *State ex rel. Fisher v. Cleveland*, 2006-Ohio-1827, ¶ 10-12; *State ex rel. Teamsters Local Union No. 436 v. Bd. of Cty. Commrs.*, 2012-Ohio-1861, ¶ 10-17 (reviewing R.C. 309.12); *Ohioans for Concealed Carry, Inc. v. Columbus*, 2020-Ohio-6724, ¶ 23-26. Thus, it is established precedent in Ohio that a municipal taxpayer has statutory standing to bring an action under R.C. 733.59 only " 'when the right under review in the action is one benefiting the public.' " *Fisher* at ¶ 10, citing *White* at paragraph one of the syllabus; *Caspar* at 20.

Mr. Miller now suggest this Court should undo that nearly 60-year-old line of cases affirming the "public-right requirement." *Cincinnati ex rel. Miller v. Cincinnati*, 2024-Ohio-4805, ¶ 22 (1st Dist.). But he fails to even mention, let alone discuss, the implication of stare decisis. *See generally* Relator-Appellant's Merit Brief at 19-24 (hereinafter "Appellant's Br."). That alone should sound the alarm for this Court and guide it to stay the course. And for good reason: the public-right requirement is consistent with the very foundation for standing doctrine.

But even if this Court were to conclude that stare decisis does not control, and that its *Nimon-White* line of cases deserve to be revisited, it should nonetheless affirm. This case presents a valuable opportunity for this Court to clarify its "statutory standing" jurisprudence, in light of the Ohio Constitution and recent decisions of the United States Supreme Court interpreting and construing the United States Constitution and federal statutory law. Specifically, this case offers this Court the chance to recognize that, in a public-rights claim such as is raised by Mr. Miller under R.C. 733.59, the Ohio Constitution requires him to show he was injured in fact and present that to the common pleas court. Because he did not do so, which the First District also recognized, *see* 2024-Ohio-4805, at ¶ 25-27 (1st Dist.), the appellate court was nonetheless correct to vacate the judgment of the trial court and remand to dismiss the case for lack of standing. This Court should thus affirm.

STATEMENT OF THE CASE AND FACTS

Amici Ohio Municipalities and the OMAA adopt, in its entirety, and incorporate by reference here the statement of the case and facts contained within the Brief of Respondents-Appellees the City of Cincinnati, Jan-Michelle Lemon Kearney, Victoria Parks, Jeffrey Cramerding, Reggie Harris, Mark Jeffreys, Scott Johnson, Liz Keating, Greg Landsman, and Meeka Owens.

ARGUMENT

Amici focus their brief on Mr. Miller's first proposition of law:

> **Proposition of Law No. 1:** Under the municipal statutory 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.

In this proposition, Mr. Miller argues the text of R.C. 733.59 but loses sight of this Court's longstanding precedents interpreting it. He also neglects the fact that the General Assembly has yet to substantively change the statute in light of this Court's interpretation of the term "taxpayer," used consistently throughout its case law. That is, Mr. Miller's arguments fail a straightforward application of stare decisis. *See State v. Williams*, 2024-Ohio-1433.

This Court could stop there and, for the reasons advanced by the City of Cincinnati as to Mr. Miller's second proposition of law, affirm the First District. But to the extent stare decisis does not control, this Court can revisit its statutory-standing jurisprudence to recognize that the Ohio Constitution requires that a plaintiff suing in a common pleas court to vindicate a public right must bring with them an injury in fact.

I. The bedrock legal principle of stare decisis commands the result in this case.

" 'Stare decisis is a cornerstone of our legal system.' " *Williams* at ¶ 17, quoting *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 518 (1989). This first principle " 'compels a court to recognize and follow an established legal decision in subsequent cases in which the same question of law is at issue.' " *Id.*, quoting *State v. Henderson*, 2020-Ohio-4784, ¶ 28. And "[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.

a. *This Court has long recognized, as a matter of statutory interpretation, a public right prerequisite for taxpayers to have standing to sue under Ohio's taxpayer-lawsuit provisions, and the General Assembly has yet to substantively change those provisions as a result.*

Decades ago, this Court interpreted R.C. 733.59 to limit the universe of municipal taxpayers with standing to bring such an action to those who seek to vindicate a public right. *See White*, 34 Ohio St.2d at 40, quoting *Nimon*, 6 Ohio St.2d at paragraph two of the syllabus (" '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.' "). With that fact Mr. Miller appears to agree. *See* Appellant's Br. at 20-24.

This Court's recent decision in *Williams* is thus instructive here. In that case, this Court applied stare decisis to reaffirm its earlier precedent grounded in statutory interpretation. *See* 2024-Ohio-1433, at ¶ 14, citing *State v. Burns*, 2022-Ohio-4606. In *Burns*, this Court interpreted the statutes setting forth the procedure to bind over a matter from juvenile court to adult court to provide that "a juvenile may be convicted in adult court of charges that were not presented to the juvenile court but were returned by the grand jury if the charges were '*rooted in* the acts that were the subject of the juvenile complaint but were not specifically named in the individual acts transferred.' " (Emphasis added.) *Williams* at ¶ 14, quoting *Burns* at ¶ 13.

The appellee in *Williams* sought *Burns*'s demise, *id.* at ¶ 16, but failed to present this Court with "a compelling reason" to set aside the bedrock principle of stare decisis to do so, *id.* at ¶ 18. The fact that this Court's "rooted in" gloss was outside the strict statutory text did not change the calculus. *Id.* at ¶ 18-19. Rather, the statutes setting forth the bindover procedure supported it. *Id.* at ¶ 19. Further, this Court looked to the actions taken by the Ohio legislature in light of its decision in *Burns*. *Id.* at ¶ 20. While the General Assembly had amended certain statutes related to the bindover procedure after *Burns*, the legislature left untouched the specific statutory language at issue. *Id.*, citing R.C. 2151.23(H). Stare decisis therefore "demand[ed]" that this Court apply its earlier precedent to the subsequent case before it. *Id.* at ¶ 21.

So too here. For two reasons, stare decisis demands that this Court apply its earlier decisions in *Nimon* and *White* and their progeny. *First*, a "public right" focus is supported by the text of Ohio's municipal-taxpayer-lawsuit provisions. R.C. 733.59 does not stand on its own but rather is bound textually to R.C. 733.56 to 733.58. R.C. 733.56 to 733.58 set forth actions advancing public rights. *See Nimon*, 6 Ohio St.2d at 5-6. In fact, the "rights" a relator has under R.C. 733.59 are merely "derived from the right of the municipal corporation" and thus "the public," which is "the real party in interest." (Internal footnotes and accompanying text omitted.) *Id.* at 5.

Second, as Mr. Miller acknowledges in his brief, the General Assembly has yet to "substantively" amend the statute during its 150-year history, let alone since this Court decided *Nimon*, *White*, and their more recent progeny. *See* Appellant's Br. at 14, fn. 5 (concluding in part that "the statutory municipal taxpayer lawsuit provisions have been unchanged substantively since enacted over 150 years ago"). While the General Assembly amended the statute in 1977, as Mr. Miller admits, it made only "minor or grammatical" changes. *Id.*, citing Am.Sub.H.B. No. 219, 137 Ohio Laws 2091, 2105-2106 (1977). It did not, however, change the language of the statute

in a way that would counter this Court's earlier case law interpreting it. *Id.* Thus, in sum, as in *Williams* stare decisis demands adherence to these earlier precedents and that they be applied here. And for the reasons provided by the City of Cincinnati, and as the First District recognized, *Amici* agree that Mr. Miller lacks standing to bring his taxpayer suit under this established precedent.

One final note is worth mentioning in anticipation of an argument Mr. Miller might attempt to make in reply. This Court's recent decision to abrogate the "public-right" exception for purposes of traditional or common-law standing should have no bearing on the outcome here as it relates to the application of stare decisis. *State ex rel. Martens v. Findlay Mun. Court*, Slip Opinion No. 2024-Ohio-5667. At bottom, *Martens* was not a statutory-taxpayer-standing case. *Id.* at ¶ 24-25. Rather, the relator in *Martens* merely raised a "vague claim that he [was] entitled to 'taxpayer standing.' " *Id.* at ¶ 24. Thus, while this Court reviewed the municipal-taxpayer-lawsuit provisions in *Martens*, it had no occasion to address its earlier case law on the issue. *Id.* at ¶ 24-25.

b. *Requiring a taxpayer to advance a "public right" to have standing to sue under Ohio's municipal taxpayer lawsuit provisions places the proper limits on the cases that come before Ohio common pleas courts.*

While Ohio is among the majority of States in that it recognizes taxpayer standing as a general matter, the State is in the apparent minority for its more cautious—or, stated differently, less "permissive"—approach to the issue. Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 Fordham L.Rev. 1263, 1277-1278 (2013). As at least one scholar puts it, Ohio is among a handful of "definitive *anti*-taxpayer standing states." (Emphasis added.) *Id.* at 1278.

And for good reason. At bottom, without a public-right requirement in place for taxpayer actions, Ohio's common pleas courts will be inundated with taxpayer lawsuits challenging lawful

actions taken by duly-elected local government officials, who are charged with advancing the public interest and otherwise accountable to their constituents through the political process. As this Court recognized, "allowing constant judicial intervention into government affairs for matters that do not involve a clear public right would also not benefit the public," *Teamsters*, 2012-Ohio-1861, ¶ 17, the very entity the municipal-taxpayer-lawsuit provisions are designed to serve, *see, e.g.*, R.C. 733.56 to .58.

In addition, the reasons promoting a robust standing doctrine as a general matter also support limiting taxpayer actions in this manner. Generally speaking, "standing requirements . . . improve judicial decision making by requiring litigants to be adverse parties who have a stake in the case and who will be likely to present their side effectively." Urquhart, 81 Fordham L.Rev. at 1269, fn. 38, citing *Baker v. Carr*, 369 U.S. 186, 204 (1962). And a robust standing doctrine "help[s] ensure that the parties most affected by a controversy can litigate it." *Id.*, citing Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 Harv.L.Rev. 297, 311 (1979). Moreover, it helps "prevent advisory opinions by courts that might not appreciate the real-world consequences of the case at issue." *Id.*, citing Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv.L.Rev. 1002, 1006 (1924). And it helps to "increase judicial efficiency by 'filtering out' disputes that come before a court in a suboptimal form." *Id.*, citing Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 Clev.St.L.Rev. 531, 533-534 (2003). Last, but certainly not least, "standing requirements could advance constitutional separation of powers principles by ensuring that federal courts only engage in policymaking in cases involving actual litigants." *Id.*, citing Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L.Rev. 881, 894 (1983).

Amici focus on just two of these justifications here—the separation of powers and guarding against issuing advisory opinions. Consider first the separation of powers doctrine, which in Ohio " 'is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.' " *State ex rel. Johnson v. Ohio State Senate*, 2022-Ohio-1912, ¶ 7, quoting *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 159 (1986). The late-Justice Antonin Scalia perhaps summed up best the connection between the separation of powers and standing when he stated, "[T]he judicial doctrine of standing is a crucial and inseparable element of [the principle of the separation of powers], whose disregard will inevitably produce . . . an overjudicialization of the processes of self-governance." Scalia, 17 Suffolk U.L.Rev. at 881, citing Donald L. Horowitz, *The Courts and Social Policy* 4-5 (1977).

A public-right requirement advances this goal. Again, taxpayer lawsuits under R.C. 733.59 seek to vindicate public rights—that is, "rights that involve duties owed 'to the whole community, considered as a community, in its social aggregate capacity.' " *Spokeo, Inc. v. Robins*, 578 U.S. 330, 345 (2016) (Thomas, J., concurring.), quoting 4 William Blackstone, *Commentaries* *5 (hereinafter "Blackstone"). Historically, "[c]ommon-law courts more readily entertained suits from private plaintiffs who alleged a violation of their own rights" but less so suits from "private plaintiffs who asserted claims vindicating public rights." *Id.* at 343 (Thomas, J., concurring.) (discussing the injury-in-fact requirement). These "limitations persist in modern standing doctrine" because they "preserve separation of powers by preventing the Judiciary's entanglement in disputes that are primarily political in nature." *Id.* at 344.

Now consider the guardrails preventing advisory opinions. Under Article IV, Section 4(B) of the Ohio Constitution, the "original jurisdiction" of a common pleas court extends to "all

justiciable matters . . . as may be provided by law." " '[J]usticiable matters' are limited to ' "actual controversies between parties legitimately affected by specific facts." ' " *In re Application for Correction of Birth Record of Adelaide*, 2024-Ohio-5393, ¶ 11 (Fischer, J., for affirming the court of appeals' judgment), quoting *State ex rel. Barclays Bank PLC v. Court of Common Pleas*, 74 Ohio St.3d 536, 542 (1996), quoting *Fortner v. Thomas*, 22 Ohio St.2d 13, 14 (1970). Without such a requirement, a decision by the common pleas court would merely be advisory, contrary to the "settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies." *Fortner* at 14.

A public-right requirement for purpose of taxpayer standing puts the actual controversy between the *affected* parties before the common pleas court, as the Ohio Constitution requires. "Actual controversies are presented only when the plaintiff sues an adverse party"; that is, "a party from whose adverse conduct . . . the plaintiff properly claims the protection of the law." *Barclays Bank* at 542.

In a taxpayer lawsuit, the municipal corporation (or, more to the core, "the public"), not the taxpayer him or herself, is the "real party in interest." *Nimon*, 6 Ohio St.2d at 5; *Martens*, 2024-Ohio-5667, ¶ 24. As this Court put it in *Nimon* long ago, an action under R.C. 733.59 "is analogous to the equitable doctrine that, where the officers or directors of a corporation will not discharge their duty, the corporation is ordinarily the proper party to redress the wrong." *Nimon* at 5, citing *Pierce v. Hagans*, 79 Ohio St. 9 (1908). And a taxpayer in this scenario is more akin to "the shareholders of the corporation," who steps in "when the directors *are parties to the wrong*, or will not bring the action." (Emphasis in original.) *Id.* Thus, stated differently, a taxpayer's rights

in the action are merely "derived from the right of the municipal corporation." (Internal footnotes omitted.) *Id.* at 5-6.

And what is owed to the people is the "right to the performance of a *public* duty." (Emphasis added.) *Id.* That duty is not owed to the taxpayer individually, but to the public-at-large. *Id.* Thus, by imposing the public-right requirement on a taxpayer plaintiff, this Court puts the proper interests and parties squarely before the common pleas court. Without it, the common pleas court would have to "declare principles or rules of law which cannot affect the matter at issue in the case before it," *Travis v. Pub. Util. Comm.*, 123 Ohio St. 355, 359 (1931), which the Ohio Constitution forbids it to do.

II. If this Court concludes that stare decisis does not control and that Ohio's municipal-taxpayer-lawsuit provisions require a fresh look, it should nonetheless affirm because Mr. Miller failed to establish that he was injured-in-fact, a jurisdictional requirement for suits in Ohio's common pleas courts.

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. So may this Court now conclude with respect to its statutory standing jurisprudence. That is, it can recognize that "[a] plaintiff seeking to vindicate a public right embodied in a [state] statute . . . must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population." *Spokeo*, 578 U.S. at 348 (Thomas, J., concurring.), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). Stated differently, this Court can acknowledge that an injury-in-fact is a jurisdictional requirement, imposed on the common pleas courts by the Ohio Constitution, for a plaintiff to have standing to sue to vindicate a public right, including one set forth by statute.

a. ***While not compelled to do so, this Court has often looked to the United States Supreme Court's standing jurisprudence arising under the United States Constitution to resolve questions of standing in Ohio.***

"The constraints of Article III do not apply to state courts . . . ." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). But as Ohio's lower courts and scholars have recognized, "[w]hile not bound by the United States Supreme Court's interpretation of federal case-or-controversy jurisprudence, 'Ohio courts have generally chosen to voluntarily follow justiciability doctrines developed by federal courts.' " *Waldman v. Pitcher*, 2016-Ohio-5909, ¶ 22 (1st Dist.), quoting Solimine, 51 Clev.St.L.Rev. at 555. This includes the Court's standing jurisprudence. *See Moore v. Middletown*, 2012-Ohio-3897, ¶ 22, citing *Lujan*, 504 U.S. at 560-561.

And that makes sense, based on the respective text of the Ohio and United States Constitutions. *See State v. Maddox*, 2022-Ohio-764, ¶ 38 (DeWine, J., dissenting.), citing U.S. Const., art. III, § 2; *Fortner*, 22 Ohio St.2d at 14 (recognizing that "[a]lthough the language of our Constitution does not mirror the 'cases' and 'controversies' language of the United States Constitution, . . . our Constitution is generally understood to impose similar constraints . . . ."). Although using different language to get there, at least with respect to Ohio's common pleas courts and the federal trial courts, the two constitutions have the same general effect of making "justiciability," and thus standing, a jurisdictional prerequisite. For example, Article III recognizes that federal courts possess the "judicial Power of the United States." U.S. Const., art. III, § 1. And while Article III "does not attempt to define those terms," the Court has recognized that "[t]o be sure" that the judicial power "limits the jurisdiction of federal courts to 'Cases' and 'Controversies[.]' " *Lujan* at 560. *See* U.S. Const., art. III, § 2. And a boundary that "set[s] apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III . . . is the doctrine of standing." (Citation omitted.) *Lujan* at 560. Stated differently, "the core component

of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Id.*, citing *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Similar language is in Ohio's Constitution. Under Article IV, Section 1, "[t]he judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof." Ohio Const., art. IV, § 1. And, again, under Article IV, Section 4(B), "the courts of common pleas and divisions thereof . . . have such original jurisdiction over all justiciable matters . . . as may be provided by law." *Id.* at § 4(B). "A matter is justiciable only if the complaining party has standing to sue." *ProgressOhio.org*, 2014-Ohio-2382, at ¶ 11, citing *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 2012-Ohio-5017, ¶ 41. Thus, in sum, the Ohio Constitution "expressly requires standing for cases filed in common pleas courts," *id.*, citing art. IV, § 4(B), as the Federal Constitution does for purposes of federal courts. In short, "Article IV requires justiciability, and justiciability requires standing." *Id.*

Thus, like it is federally under Article III, in Ohio standing is a jurisdictional restriction placed on common pleas courts by the Ohio Constitution. *See Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 37 (1976), citing *Flast v. Cohen*, 392 U.S. 83 (1968) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. . . . The concept of standing is part of this limitation."); *Schwartzwald* at ¶ 22, citing *State ex rel. Dallman v. Court of Common Pleas*, 35 Ohio St.2d 176, 179 (1973) (recognizing that "standing is a 'jurisdictional requirement' " under Ohio law). *See also* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky.J. Equine, Agric., & Nat. Resources L. 349, 386 (2015) ("In Ohio, standing is a jurisdictional limitation based on Article IV, Section 4(B) of the Ohio Constitution, which provides Ohio courts with jurisdiction 'over all justiciable matters.' "). And this Court has also largely settled on the

same elements needed to establish common-law standing. As this Court has stated, "[t]he test for Article III standing, like the test for common-law standing in Ohio, requires an injury in fact, causation, and redressability." *State ex rel. Walgate v. Kasich*, 2016-Ohio-1176, ¶ 23, citing *Amador Cty. v. Salazar*, 640 F.3d 373, 378 (D.C.Cir. 2011), citing *Lujan*, 504 U.S. at 560. *See also Moore*, 2012-Ohio-3897, at ¶ 22 (pointing to *Lujan* for the general requirements to establish standing in Ohio). This Court has also fleshed these requirements out as a matter of a plaintiff setting forth his or her " 'direct, personal stake' in the outcome of the case." *Walgate* at ¶ 18, quoting *ProgressOhio.org*, 2014-Ohio-2382, at ¶ 1. So too has the United States Supreme Court. *See Gill v. Whitford*, 585 U.S. 48, 67 (2018).

Where this Court and the United States Supreme Court have diverged, however, is on the concept of "statutory standing." This Court has held that, in Ohio's common pleas courts, standing to sue can be "authorized by common law" or "conferred by statute." *ProgressOhio.org* at ¶ 17, citing *Middletown v. Ferguson*, 25 Ohio St.3d 71, 75 (1986). That is, "[s]tanding does not flow from the common-law 'personal stake' doctrine alone" but rather "may also be conferred by a specific statutory grant of authority." *Middletown* at 75.

But to recognize this principle, this Court looked to a decision of the United States Supreme Court. *Id.*, citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972). More recent decisions of the United States Supreme Court have, however, called into question—if not altogether abrogated—this principle from that federal case. *See, e.g.*, *Lujan*; *Raines v. Byrd*, 521 U.S. 811 (1997); *Spokeo*, 578 U.S. at 330; *Thole v. U.S. Bank N.A.*, 590 U.S. 538 (2020); *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). No better evidence of this is in the Court's 2016 decision in *Spokeo* and its 2021 decision in *TransUnion LLC*. Therefore, as one Ohio appellate court plainly put it in the wake of *Spokeo*, "the *Middletown* court's reliance on the *Sierra Club* decision for this

proposition of law ultimately has proven to be misplaced . . . . Thus, the continued viability in Ohio of 'statutory standing' as an exception to Ohio's common-law standing requirements is questionable." *Smith v. Ohio State Univ.*, 2017-Ohio-8836, ¶ 13, fn. 1 (10th Dist.).

b. *The United States Supreme Court now recognizes that an injury-in-fact is a requirement imposed by Article III of the United States Constitution that must be met for a plaintiff to have standing, regardless of any act of Congress, and this Court can now do the same under Article IV, Section 4(B) of the Ohio Constitution.*

In *Spokeo*, the Court recognized that an injury-in-fact is a requirement to have standing to sue in federal court for a public-rights claim. 578 U.S. at 339, quoting *Raines* at 820, fn. 3 and citing *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event . . . may Congress abrogate the Art. III minima"). That is, Congress " 'cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.' " *Id.*, quoting *Raines* at 820, fn. 3 and citing *Summers* at 497; *Gladstone* at 100 ("In no event . . . may Congress abrogate the Art. III minima"). To the contrary, "Article III standing *requires* a concrete injury even in the context of a statutory violation." (Emphasis added.) *Id.* at 341. Thus, "[a] statute that creates a public right plus a citizen-suit cause of action is insufficient by itself to establish standing." *TransUnion LLC* at 452-453 (2021) (Thomas, J., dissenting), citing *Lujan* at 576. A few years later, in *TransUnion LLC*, the Court took one more step and extended its rationale in *Spokeo* to private claims arising under a federal statute. *See id.* at 446-449 (Thomas, J., dissenting) (recognizing the expansion of *Spokeo*). Thus, "the requirement of injury in fact" remains "a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* at 497.

In sum, a plaintiff accessing a federal court to vindicate a public right arising under a federal statute must establish the elements that constitute "the 'irreducible constitutional

minimum' of standing." *Spokeo* at 338, quoting *Lujan*, 504 U.S. at 560. That is, he or she "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.*, citing among others *Lujan* at 560-561. *See also Moore*, 2012-Ohio-3897, at ¶ 22, citing *Lujan* at 560-561 ("To succeed in establishing standing, plaintiffs must show that they suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief."). This Court can now recognize the same as a matter of Ohio law. *See, e.g., Case v. Wilmington Trust, N.A.*, 703 S.W.3d 274, 281-282, fn.6 (Tenn. 2024) (following federal standing jurisprudence to recognize that Tennessee law also requires an injury in fact to have standing to sue on a public-rights claim).

Doing so here would also dispose of the case. Mr. Miller raised a public-rights claim under Ohio's municipal-taxpayer-lawsuit provisions but failed to allege an injury in fact. As has been stated, this Court's case law bears out that R.C. 733.59 sets forth a public-rights claim. *See Fisher*, 2006-Ohio-1827, at ¶ 12, quoting *Caspar*, 53 Ohio St.3d at 20 ("As established in *White* and discussed in *Caspar*, for a taxpayer to maintain an action under R.C. 733.59, the 'aim must be to enforce a public right, regardless of any personal or private motive or advantage.' ").

Further, Mr. Miller has not established he was injured in fact. "To establish injury in fact, a plaintiff need show he suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo*, 578 U.S. at 339, quoting *Lujan* at 560. "A 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Id.* at 340, quoting *Black's Law Dictionary* 506 (10th Ed. 2014). And "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.' " *Id.*, quoting *Lujan* at 560, fn.1.

Mr. Miller failed to establish these core injury components in his complaint. "Because standing to sue is required to invoke the jurisdiction of the common pleas court, 'standing is to be determined as of the commencement of suit.' " *Schwartzwald*, 2012-Ohio-5017,at ¶ 24, quoting *Lujan*, 504 U.S. at 570-571. Here, in his complaint Mr. Miller alleged, in sum, that he had standing to sue because his written demands to the Cincinnati City Solicitor were refused. *See* Relator's Verified Compl. at ¶ 63-68 (hereinafter "Compl."). That is, he claimed the City Solicitor should have brought, but did not bring, an action under R.C. 733.56. *Id.* And the reason the City Solicitor should have brought that action, he alleged, was because the "notwithstanding" ordinance process provided through Section 111-05 of the Cincinnati Municipal Code ("C.M.C.") is unlawful as an improper exercise of authority of the Cincinnati City Council as defined in the Cincinnati City Charter. *Id.* at ¶ 42-62, 69-75. Mr. Miller also singled out a particular notwithstanding ordinance. *Id.* at ¶ 18-41.

At best, Mr. Miller's allegations constitute either a violation of a "procedural right . . . in the proper administration of the laws," *Summers*, 555 U.S. at 496-497, or an "an injury in law," *TransUnion LLC*, 594 U.S. at 427, neither of which are sufficient. In *TransUnion LLC*, the Court drew a line between injuries in law and concrete injuries. *Id.* at 442. Plaintiffs whose credit reports were disseminated to other parties by their credit reporting agency, which had allegedly failed to follow federal law in creating them, were concretely injured. *Id.* However, plaintiffs whose error-ridden credit reports were not disseminated were not injured. *Id.* And in *Summers*, the Court concluded that an environmental protection group lacked standing to sue a federal agency to prevent it from enforcing regulations the group alleged were unlawful by exempting certain agency projects from the notice, comment, and appeal procedure that larger projects were required to overcome. *See* 555 U.S. at 490. Neither the group nor any of its members presented evidence that

they suffered actual or threatened injury through enforcement of the regulations. *Id.* at 493-497. And the lost ability to comment on agency actions for certain projects was insufficient in its own right. *Id.* at 496-497. Rather, the Court concluded that it would "exceed" the limitations set by the Constitution on federal courts " 'if, at the behest of Congress and in the absence of any showing of concrete injury," federal courts "entertain[ed] citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws." *Id.* at 497, quoting *Lujan* at 580-581 (Kennedy, J., concurring in part and concurring in judgment).

So too here. Mr. Miller did not allege he was actually injured in any way by the particular notwithstanding ordinance he raised, C.M.C. 111-05 generally, or the refusal of the City Solicitor to bring an action on his demand. That is, any injury he did allege was merely " 'procedural' " in nature or an "injury in law," neither of which are "concrete." *See generally TransUnion LLC*; *Summers*. "No concrete harm, no standing." *TransUnion LLC* at 417.

While this Court could stop there, Mr. Miller's alleged injury was also " 'a general interest common to all members of the public.' " *Spokeo*, 578 U.S. at 346 (Thomas, J., concurring), quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (per curiam). That is, he did not allege any injury "particular to himself." (Citations omitted.) *Id.* In sum, then, Mr. Miller failed to establish an injury in fact. That is, he failed to establish the constitutional, jurisdictional prerequisite for standing to sue in the common pleas court on this public rights claim.

A few final points are worth mentioning, particularly in light of possible arguments Mr. Miller might make in reply. *First*, reading or recognizing an injury-in-fact requirement for purposes of statutory-municipal-taxpayer standing is consistent with the relevant text of the Ohio Constitution, which again provides that "[t]he courts of common pleas . . . shall have such original jurisdiction over all justiciable matters . . . as may be provided by law." Ohio Const., art. IV,

§ 4(B). *Amici* anticipate Mr. Miller will suggest this "provided by law" language should be read to textually authorize statutory standing. However, this Court has recognized that this latter clause goes to a common pleas court's *subject-matter jurisdiction*, which is different in character from whether a particular plaintiff has *standing* to sue. *See Bank of Am., N.A. v. Kuchta*, 2014-Ohio-4275, ¶ 20-23. But even if the phrase does go to standing, the language does not circumvent the injury requirement. The text still requires that a matter be "justiciable." Ohio Const., art. IV, § 4(B). And the common pleas court has jurisdiction "over *all*" such matters. (Emphasis added.) *Id.* Thus, the provided-by-law phrase recognizes that the General Assembly may open the common pleas courtroom door to plaintiffs who meet the constitutional test for standing but are otherwise stopped short from entering or remaining for *prudential* reasons. That is, the General Assembly may "grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). But that is different from what a legislature cannot do, which is "erase . . . [the] standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820, fn. 3.

Second, recognizing an injury-in-fact requirement for purposes of municipal taxpayer standing is also consistent with this Court's common-law taxpayer precedents and the text of R.C. 733.59. These precedents recognize that, at common law, a taxpayer must show what amounts to an injury in fact to bring a suit. At common law, " 'a taxpayer lack[ed] legal capacity to institute a taxpayer action unless he ha[d] some special interest in the public funds at issue.' " *Martens*, 2024-Ohio-5667, at ¶ 24, quoting *State ex rel. Dann v. Taft*, 2006-Ohio-2947, ¶ 13, citing *State ex rel. Masterson v. Ohio State Racing Comm.*, 162 Ohio St. 366, 368 (1954), at paragraph one of the syllabus. And courts are not to read "a statute as abrogating the common law unless the statutory

language clearly expresses or imports that intention." *ProgressOhio.org*, 2014-Ohio-2382, at ¶ 22, citing *Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 67 Ohio St.3d 302, 304 (1993). R.C. 733.59 does not clearly express an intent by the General Assembly to do away with this "special-interest" injury requirement.

Third, recognizing an injury-in-fact requirement does not mean that the Ohio legislature has no role to play. For example, a "concrete" harm may be either "tangible" or "intangible." *Spokeo*, 578 U.S. at 340. "In determining whether an intangible harm constitutes injury in fact, both history and the judgment" of the respective legislative body "play important roles." *Id.* Thus, a legislature "may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.' " *Id.* at 341, quoting *Lujan*, 504 U.S. at 578. Arguably, that is what the General Assembly has done in R.C. 733.59. But this "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* Rather, "standing requires a concrete injury even in the context of a statutory violation." *Id.*

Fourth, recognizing an injury-in-fact requirement does not create a double standard between a city law director or village solicitor and a municipal taxpayer for purpose of establishing standing. A city law director or village solicitor must assert an injury-in-fact—in this instance, the municipality's injury-in-fact—to bring an action under, for example, R.C. 733.56. Again, under this provision, a city law director or village solicitor has the "responsibility" to vindicate an injury to the public. *Nimon*, 6 Ohio St.2d at paragraph one of the syllabus. And the injury in fact that must be alleged is the "public right to the performance of a public duty by an officer of a municipal corporation." *Id.*

Fifth, R.C. 733.59 is not an example of a *qui tam* action. These actions could be considered a "well-established exception," *Spokeo*, 578 U.S. at 345, fn.* (Thomas, J., concurring.), to the general rule otherwise barring a private plaintiff from bringing "a claim for the violation of public rights" unless the plaintiff "allege[d] that the violation caused them 'some extraordinary damage, beyond the rest of the [community],' " (Alteration in original.) *id.* at 345, quoting 3 Blackstone *220. Thus, a *qui tam* could allow "private plaintiffs to sue in the government's name for the violation of a public right." *Spokeo* at 345, fn.*, citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773-774 (2000).

R.C. 733.59 lacks the fundamental characteristics of a *qui tam* action, however. A *qui tam* action is in essence an "informer statute." *See Vermont Agency* at 774-777. That is, historically, such an action "allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves." *Id.* at 775. *See also* Evan Caminker, Comment, *The Constitutionality of* Qui Tam *Actions*, 99 Yale L.J. 341, 341-342, fn.3 (1989) (discussing the historical nature of *qui tam* action as "informer" statutes and listing and discussing specific early-American *qui tam* informer statutes). R.C. 733.59 is no such statute. For example, compare it to the federal False Claims Act, 31 U.S.C. 3729-3733 (hereinafter the "FCA"). Under the FCA, the "informer" must be an individual able to disclose to the government "material evidence and information" in his or her "possess[ion]." *See* 31 U.S.C. 3730(b)(2). R.C. 733.59 carries no such requirement. Rather, it applies to "*any* taxpayer of the municipal corporation." R.C. 733.59 (Emphasis added.). And while that taxpayer must make a "written request" to the city law director or village solicitor, there is no requirement that that request be supported by *any* evidence or information—let alone "material" evidence or information—in the taxpayer's possession. Rather, R.C. 733.59 seems to allow *any* taxpayer—informer or not—to

initiate a lawsuit. If that was not all, R.C. 733.59 does not offer a "bounty" for the information the taxpayer hands over to the government. Under the FCA, for example, "[t]he relator receives a share of any proceeds from the action . . . plus attorney's fees and costs." *Vermont Agency* at 779-770, quoting 31 U.S.C. 3730(d)(1)-(2). No such bounty provision appears in R.C. 733.59.

Sixth, requiring an injury in fact for purposes of municipal taxpayer standing even more directly advances the goals of maintaining the separation of powers and preventing the issuance of advisory opinions. Regarding the separation of powers, "[b]y properly contenting itself with the decision of actual cases or controversies at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J 1219, 1229 (1993). "Far from an assault on the other branches, this is an insistence that they are supreme within their respective spheres, protected from intrusion—however welcome or invited—of the judiciary." *Id.* at 1229-1230. And, with respect to advisory opinions, requiring an injury in fact protects against what would be " 'perhaps a more egregious and problematic abuse' " by Ohio courts, which is to " 'to issue opinions in cases in which there has been no injury, resulting in advisory opinions, which long-standing Ohio law prohibits' " Ohio courts from issuing. *Martens*, 2024-Ohio-5667, at ¶ 19, quoting *State ex rel. Food & Water Watch v. State*, 2018-Ohio-555, at ¶ 29, citing *Fortner*, 22 Ohio St.2d at 14.

Seventh, recognizing an injury-in-fact requirement will seemingly bring Ohio into accord with a number of other states on the issue. At least one scholar acknowledged in 2015 that "Ohio recognizes taxpayer standing pursuant to statute, but adds an unexpected judicial requirement that the plaintiff be seeking to vindicate an interest that is not unique to the plaintiff—the opposite, [sic] of the special injury requirement common in other states that allow taxpayer standing."

Sassman, 8 Ky.J. Equine, Agric., & Nat. Resources L. at 387, fn. 275, citing *Teamsters*, 2012-Ohio-1861, 969 N.E.2d 224, 228.

* * *

Mr. Miller seeks a rule from this Court that would allow an uninjured taxpayer to bring a lawsuit against a municipal corporation merely by complying with the literal text of R.C. 733.59. Appellant's Br. at 10. That is, in essence he seeks to have this Court resurrect the *Sheward* " 'ghoul' " it finally laid to rest in *Martens*, but by relocating it into this Court's statutory-standing jurisprudence. *Martens*, 2024-Ohio-5667, at ¶ 23, quoting *Lamb's Chapel v. Ctr. Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment).

This Court should reject the invitation. Like acts of the political branches of the state government, acts of the political branches of local governments are presumed constitutional and must be proven unconstitutional beyond a reasonable doubt. *See Arnold v. Cleveland*, 67 Ohio St.3d 35, 38 (1993). If all that is required for a taxpayer to bring a suit challenging that authority is adherence to the statutory text, uninjured taxpayers will have a path to directly interfere with the lawful decisions of the legislative and executive branches of a municipality. *Martens* at ¶ 19. And that places Ohio's common pleas courts in the possible role of judicial policy-making. *Id.*

But the problem for Mr. Miller—and the saving grace here—is that the Ohio Constitution places the limit on cases that come before Ohio's common pleas courts. The Ohio Constitution requires that a matter be "justiciable." Ohio Const., art. IV, § 4(B). That is, it requires that a taxpayer have standing, which this Court can now recognize requires an injury in fact even for purposes of a public-rights claim initiated by a taxpayer under R.C. 733.59. Thus, to the extent stare decisis should not otherwise command the result here, this Court can let the *Sheward* ghoul

rest comfortably in peace by recognizing that an injury in fact is a requirement Mr. Miller had to—but did not—establish to bring his taxpayer claim into the common pleas court below.

CONCLUSION

For the foregoing reasons, and those advanced by Respondents-Appellees, this Court should affirm the First District's decision to vacate the judgment of the trial court and remand to the trial court for the purpose of dismissing Relator-Appellant's complaint for a lack of standing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Amici Curiae Ohio Municipalities and the Ohio Municipal Attorneys Association in Support of Appellees was served this 29th day of July, 2025, by email on the following:

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