IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI *ex rel.* MARK MILLER, Relator-Appellant, vs. CITY OF CINCINNATI, *et al.*, Respondents-Appellees, and OVER-THE-RHINE COMMUNITY HOUSING, Intervening Respondent-Appellee.	Case No. 2024-1687 On Appeal from the First District Court of Appeals, Hamilton County Court of Appeals Case No. C-23-0683

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF RELATOR-APPELLANT

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae, The Buckeye Institute, was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policy solutions, and promoting those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3). The Buckeye Institute files and joins amicus briefs that are consistent with its mission. Regarding this case, The Buckeye Institute advocates for following the Ohio Constitution and the rule of law.

STATEMENT OF THE CASE

The Buckeye Institute adopts by reference the Statement of the Facts and Case set forth in Relator-Appellant's Memorandum in Support of Jurisdiction.

ARGUMENT AND LAW

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

"All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary . . . ." Ohio Const., art. I, § 2. When the people elect government officials, they "have a clear right to expect from [those

official's] fidelity, zeal, and unremitting diligence in the promotion of the public good." Salmon P. Chase, *Message of the Governor of Ohio to the Fifty-Fourth General Assembly at the Session Commencing January 2, 1860*, at 1 (1860), available at https://ohiomemory.org/digital/collection/addresses/id/980/rec/2. These fundamental principles of constitutional law place the people in control of the government.

Ohio's statutory framework permitting taxpayer actions upholds this principle by allowing citizens to intervene when they feel it is necessary to prevent abuses of corporate power that the government refuses to address. However, courts have limited this power of the people by imposing judicially created requirements that do not have a basis in the text of the taxpayer action statutes. This Court should reject these unwarranted requirements and restore power to the people.

I. Ohio's statutory grant of taxpayer standing is uniquely broad compared to other states.

In Ohio, the legal representative of a municipality (the village solicitor or the city law director) must

> apply, in the name of the municipal corporation, to a court of competent jurisdiction for an order of injunction *to restrain* the misapplication of funds of the municipal corporation, *the abuse of its corporate powers*, or the execution or performance of any contract made in behalf of the municipal corporation *in contravention of the laws or ordinance governing it*, or which was procured by fraud or corruption.

(Emphasis added.) R.C. 733.56. The legal representative is also required to seek forfeiture or specific performance "[w]hen an obligation or contract made on behalf of

a municipal corporation, granting a right or easement or creating a public duty, is being evaded or violated," R.C. 733.57, and to seek a writ of mandamus to compel performance when "an officer or board of a municipal corporation fails to perform any duty expressly enjoined by law or ordinance," R.C. 733.58. R.C. 733.56–733.58 each require the municipality's legal representative to file a legal action when the municipality is exceeding its authority or violating the law. "In such a proceeding he represents the public." *Butler v. Karb*, 96 Ohio St. 472, 486 (1917).

If the legal representative of the municipality "fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation." R.C. 733.59. "He then represents the public just as would the [city] solicitor had he exercised the power conferred upon him and brought the suit." *Butler* at 486.

Like Ohio, most states allow taxpayer lawsuits. Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 Fordham L. Rev. 1263, 1277 (2012). Also like Ohio, some states enable these lawsuits through statute, *see, e.g.,* Ariz. Rev. Stat. Ann. § 35-213 (statutorily establishing the procedure for taxpayer lawsuits); N.Y. State Fin. Law § 123-b (McKinney) (same), while others authorize them through constitutional provisions or state common law, *see* Urquhart at 1275.

Ohio stands out, however, due to the broad scope of its statutory command. Unlike other state legislatures that confine the states' statutory provisions to illegal

expenditures or injuries to government property, the Ohio General Assembly has granted Ohio courts jurisdiction over taxpayer actions where the claim is "to restrain . . . the abuse of [the municipality's] corporate powers." R.C. 733.56. This Court has recognized this broad grant of authority:

> [T]he legislative intent is not to be narrowed to the mere matter of waste or unlawful diversion, but that the 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* . . . .

(Emphasis added.) *Parks v. Cleveland Ry. Co.*, 124 Ohio St. 79, 86 (1931) (analyzing substantially similar provision under the prior General Code).

The grant of such broad authority by the General Assembly is significant. If it desired to limit Ohio's taxpayer actions to align with the statutes of other states, it could have done so. But it has consistently chosen not to.

II. Taxpayer actions were first statutorily recognized in Ohio shortly after the ratification of the 1851 Constitution.

This Court recently acknowledged that statutory taxpayer actions have existed in the state for over 150 years. *State ex rel. Martens v. Findlay Mun. Ct.*, 2024-Ohio-5667, ¶ 24. The precursor to the current statutory authority recognized that it was "the duty of the city solicitor to apply to a court of competent jurisdiction for an order to restrain . . . the abuse of its corporate powers . . . ." Act of Mar. 3, 1860, Section 13, 57 Ohio Laws 16, 18. *See also* R.C. 733.56 ("The village solicitor or city director of law shall apply, in the name of the municipal corporation, to a court of competent

jurisdiction for an order of injunction to restrain . . . the abuse of its corporate powers."). Much like today, *see* R.C. 733.59, the 1860 act authorized a taxpayer "to institute an action in his own name on behalf of the city" if the city officials failed, upon request, to seek an order restraining the unlawful action, Act of Mar. 3, 1860, Section 13, 57 Ohio Laws 16, 18. As this Court has recognized, "In such cases, the standing requirement is satisfied because the municipal corporation or the state is the actual party in interest and the General Assembly has explicitly given the taxpayer authority to sue on the government's behalf." *State ex rel. Martens* at ¶ 24.

The taxpayer action established in 1860 emerged during a crucial period in Ohio's history. Less than a decade earlier, the people of Ohio ratified a new constitution that significantly restructured the state's government. One key reason for convening the 1851 convention was a widespread perception that the government was failing to act in the people's interest. Ohio and many other states "were emerging from crises of public debt and corruption." *ProgressOhio.org, Inc. v. JobsOhio*, 2014-Ohio-2382, ¶ 49 (Pfeifer, J., dissenting). Some advocates for the convention "argued for limitations on the legislature's ability to incur public debt, which had exceeded $20 million by 1849 . . . ." Barbara A. Terzian, *Ohio's Constitutions: An Historical Perspective*, 51 Clev. St. L. Rev. 357, 370 (2004). "The climate of the times was agitation and anger over the imposition of tax burdens on the citizens for the benefit of private corporations and for the public losses incurred when subsidized corporations failed." *C.I.V.I.C. Grp. v. Warren*, 88 Ohio St.3d 37, 40 (2000). The 1851 Constitution sought to fix some of these problems.

The need for public oversight of government actions, however, persisted after the 1851 constitutional convention. In his 1856 State of the State Address, Governor William Medill decried the lack of transparency by government officials. *See* William Medill, *Annual Message of the Governor of Ohio to the Fifty Second General-Assembly* (1856), available at https://ohiomemory.org/digital/collection/p267401coll32/id/5726. Governor Medill suggested that

> a law be passed requiring every public officer, compensated by fees, to keep an accurate account of his receipts and expenditures, and transmit the same to the appropriate department, at the seat of government, with the view that a general synopsis of such accounts be published once a year for the information of the people of the State.

Id. at 7. He noted that "[t]hese local offices are generally lucrative," and that "[e]very financial transaction should he subjected to the most rigid accountability, and all misapplications of the public money be severely punished." *Id.*

Similarly, in his 1860 inaugural address, Governor William Dennison recommended the implementation of "stringent laws against public officers who embezzle the public's money." *See Governor Dennison's Inaugural*, The Clermont Courier (Jan. 19, 1860), available at *https://ohiomemory.org/digital/collection/p16007coll105/id/4020/rec/22*. Dennison emphasized that "[l]aws cannot be too explicit in defining and enforcing a proper accountability of all persons acting in a public capacity." William Dennison, *Inaugural Address of William Dennison, Governor of Ohio: Delivered Before the*

Senate and House of Representatives, Jan. 9, 1860, at 8 (1860), available at https://www.google.com/books/edition/Inaugural_Address_of_William_Dennison_Go/hE9wuiEhzrQC?hl=en&gbpv=0. Dennison argued that public officials "should be prohibited from tampering with the public funds in any way, and restricted in their use, to the demands of his official duties." *Id.* He urged the General Assembly to "[l]eave no pretext for an abuse of [the official's] trust." *Id.* Concluding on the topic, Dennison noted that the "sacredness of private and public property is the life of republican forms of government, and one of the very highest duties of the legislator, is to surround it *with all the necessary safeguards of law*." (Emphasis added.) *Id.*

Two months after Dennison's call to arms on government waste, the 1860 taxpayer action statute became law. *See* Act of Mar. 3, 1860, Section 13, 57 Ohio Laws 16, 18.

The 1860 taxpayer action statute and its successors helped address the public debt and corruption issues that led to the 1851 constitutional convention. Since its inception, the core of the statute has remained unchanged. *Compare* Act of Mar. 3, 1860, Section 13, 57 Ohio Laws 16, 18 (establishing taxpayer actions for cities of the first class having a population exceeding eighty thousand inhabitants) *with*

- An Act To provide for the Organization and Government of Municipal Corporations, 66 Ohio Laws 149, 175 (expanding the municipal corporations covered);
- An Act To amend an act entitled an act to provide for the organization and government of municipal corporations, 67 Ohio Laws 68, 72 (clarifying that

a taxpayer suit may not be brought until a request to the city solicitor has been made in writing);

- An Act To amend, revise, and consolidate the statutes relating to municipal corporations, 75 Ohio Laws 161, 218–219 (consolidating the statutes relating to municipal corporations);
- An Act To amend section 1777 of the revised statutes of Ohio, 81 Ohio Laws 188, 189 (expanding when a city solicitor must file suit);
- An Act To amend section 4314 of the General Code, relating to a solicitor in a municipality, 101 Ohio Laws 216, 216–217 (incorporating the taxpayer statute in the General Code); and
- R.C. 733.56–733.59.

The modern-day equivalents of the 1860 taxpayer statute continue to safeguard against similar future crises of public debt and corruption.

III. The jurisdiction of Ohio courts is defined by the Ohio Constitution, followed by the General Assembly. Courts cannot eschew such jurisdiction by imposing requirements not in the text.

The Ohio Constitution is a unique "document of independent force." *Arnold v. Cleveland*, 67 Ohio St.3d 35, 42 (1993). "[T]here are differences between the Ohio and Federal Constitutions that necessarily impact the interpretive process." R. Patrick DeWine, *Ohio Constitutional Interpretation*, 86 Ohio St. L.J. (forthcoming 2025) (manuscript at 2). This is particularly crucial in how Article IV of the Ohio Constitution delineates the courts' jurisdiction. *See generally Case v. Wilmington Tr., N.A.*, 703 S.W.3d 274, 286 (Tenn. 2024) (noting that most state courts "have found that their state constitutions place separate parameters on standing doctrine than

does the United States Constitution" and citing sources); *see also Firearm Owners Against Crime v. Papenfuse*, 669 Pa. 250, 273 (2021) (noting that Pennsylvania's doctrine of standing is "a prudential, judicially-created tool," in contrast to the federal constitutional doctrine).

Like the Federal Article III, the Ohio Constitution vests the "judicial power of the state . . . in a supreme court," and other inferior courts. Ohio Const., art. IV, § 1. Unlike the Federal Constitution, "Article IV, Section 4(B) of the Ohio Constitution states that common pleas courts have 'such original jurisdiction over all justiciable matters * * * as may be provided by law,'" *Highland Tavern, L.L.C. v. DeWine*, 2023-Ohio-2577, ¶ 22, and common pleas judges possess "such power and jurisdiction, at chambers, or otherwise, as may be directed by law," Ohio Const., art. IV, § 18. *See also* R.C. 2305.01 (vesting common pleas courts with original jurisdiction "in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts").

This Court has interpreted Article IV to mean that the subject matter jurisdiction of common pleas courts "is defined *entirely by statute*." (Emphasis sic.) *Highland Tavern, L.L.C.* at ¶ 22, quoting *Ohio High School Athletic Assn. v. Ruehlman*, 2019-Ohio-2845, ¶ 7. *See also State ex rel. Atty. Gen. v. Harmon*, 31 Ohio St. 250, 258 (1877) ("The jurisdiction of the courts and justices, except in a few specified cases, is required to be such as may be prescribed by law."). The Court has also "recognized that standing is a 'jurisdictional requirement,'" noting that "'[i]t is an elementary concept of law that a party lacks standing *to invoke the jurisdiction* of the court unless he has,

in an individual or *representative capacity*, some real interest in the subject matter of the action.'" (Second emphasis added.) *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 2012-Ohio-5017, ¶ 22, quoting *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179 (1973). Because "[a] matter is justiciable only if the complaining party has standing to sue," *Preterm-Cleveland, Inc. v. Kasich*, 2018-Ohio-441, ¶ 20, quoting *ProgressOhio.org, Inc.*, 2014-Ohio-2382, at ¶ 11, and common pleas courts have "such original jurisdiction over all justiciable matters . . . as may be provided by law," Ohio Const., art. IV, § 4(B), the General Assembly may confer standing by statute, *e.g., City of Middletown v. Ferguson*, 25 Ohio St.3d 71, 75–76 (1986).

The Ohio Constitution's delegation of the power to the General Assembly to decide the jurisdiction of the courts makes sense.

> The power of allotting to the different departments of government their appropriate functions is a legislative power; and in so far as the distribution has not been made in the constitution, the power to make it is vested in the general assembly, as the depository of the legislative power of the state.

Harmon, 31 Ohio St. at 258.

Allotting this power to the General Assembly is not only constitutionally mandated but also ensures predictability and uniformity across the state. When the legislature grants "any particular power upon a court, [the legislature] virtually declares that it considers it a power which may be most appropriately exercised under

the modes and forms of judicial proceedings." *Id.* at 259–60, quoting *In re Cooper*, 22 N.Y. 67 (1860).

IV. The Court has overstepped its authority by imposing additional standing requirements on R.C. 733.59.

The text of R.C. 733.56–733.58 set forth explicit elements for a cause of action to restrain the misapplication of funds, the abuse of municipal corporate powers, the performance of an illegal contract, and other specified actions. Yet, the courts have judicially imposed additional elements, but only if certain persons bring the case. If the village solicitor or city director of law institutes an action for an injunction, specific performance, or mandamus under R.C. 733.56–733.58, he or she would not be required to meet these judicially imposed restraints. If the village solicitor or city director of law declines to institute an action at a taxpayer's request, the General Assembly places the taxpayer into the shoes of the solicitor or director of law. *See* R.C. 733.59. The court should—as the General Assembly intended—treat the taxpayer exactly the same as the solicitor or director of law. Instead, courts have required taxpayers to prove—in addition—that they are enforcing a "public right" to have standing. *See, e.g., State ex rel. Phillips Supply Co. v. Cincinnati*, 2012-Ohio-6096, ¶ 17 (1st Dist.) ("To have standing to pursue a taxpayer claim under R.C. 733.59, a party must not only satisfy the statutory requirements . . . but he must also demonstrate that he is enforcing 'a right of action on behalf of and for the benefit of the public.'").

"[D]etermining whether a statute confers standing is an exercise in statutory interpretation." *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430

S.C. 200, 210 (S.C.2020). *Accord Ohioans for Concealed Carry, Inc. v. Columbus*, 2020-Ohio-6724, ¶ 23 ("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.'"), quoting *City of Middletown*, 25 Ohio St.3d at 75–76. For taxpayer actions, the General Assembly's grant of jurisdiction to common pleas courts and the standing to invoke that jurisdiction are clear. The common pleas courts have general jurisdiction "in all civil cases." *See* R.C. 2305.01. The General Assembly imposed a duty on, and granted a cause of action to the village solicitor or city director of law to "apply, in the name of the municipal corporation, to a court of competent jurisdiction for an order of injunction to restrain . . . the abuse of [the municipalities'] corporate powers . . . ." R.C. 733.56. "If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any [such] application . . . *the taxpayer may institute suit in his own name, on behalf of the municipal corporation*." (Emphasis added.) R.C. 733.59.

Despite this clear language, courts have required that "taxpayer actions under R.C. 733.59 must be filed to 'enforce a public right . . . .'" *Cincinnati ex rel. Miller v. Cincinnati*, 2024-Ohio-4805, ¶ 21 (1st Dist.), quoting *State ex rel. Fisher v. City of Cleveland*, 2006-Ohio-1827, ¶ 12. Furthermore, this Court has ruled that "taxpayers cannot contest official acts 'merely upon the ground that they are unauthorized and invalid.'" *State ex rel. Teamsters Loc. Union 436 v. Cuyahoga Cty. Bd. of Commrs.*, 2012-Ohio-1861, ¶ 16, quoting *Pierce v. Hagans*, 79 Ohio St. 9, 22 (1908).

The "unexpected judicial requirement that the plaintiff [must] be seeking to vindicate an interest that is not unique to the plaintiff—[is] the opposite of the special injury requirement common in other states that allow taxpayer standing." Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky. J. Equine, Agric. & Nat. Res. L. 349, 387 (2015), citing *State ex rel. Teamsters Loc. Union 436*, 2012-Ohio-1861, at ¶ 12. The public interest requirement also contradicts the reasoning of this Court in a recent similar case. *Compare State ex rel. Teamsters Loc. Union 436* at ¶ 12 (imposing a public interest requirement for statutory taxpayer standing), quoting *State ex rel. Ohio Acad. of Trial Laws. v. Sheward*, 86 Ohio St.3d 451, 471 (1999) *with State ex rel. Martens*, 2024-Ohio-5667 (overruling *Sheward*'s non-statutory public-right/public-interest standing).

Beyond contradicting the statutory text, restraining taxpayers from challenging unauthorized and invalid acts contradicts this Court's earlier interpretations of taxpayer action statutes. In *Elyria Gas & Water Co. v. City of Elyria*, 57 Ohio St. 374, 383 (1898), this Court found that "where the proceedings of a municipal corporation are unauthorized and void, either from the want of power or from its unlawful exercise, . . . a suit to enjoin them may . . . be properly brought under the [predecessor] statute." The *Elyria* Court concluded that "the abuse of corporate powers, within the purview of the statute, includes an unauthorized or unlawful exercise of the powers possessed by the corporation, as well as the assumption of powers not conferred." *Id.* at 384.

The Court's recent judicially imposed requirements have "turned into an increasingly serious obstacle to [the General Assembly's] efforts to create new rights and to give people causes of action to vindicate those rights," *see* C. R. Sunstein, *Injury In Fact, Transformed*, 2021 Sup. Ct. Rev. 349, 374 (2021). Such judicially imposed limitations on jurisdiction contradict the express statutory grant of jurisdiction and standing, contradict the purpose of taxpayer actions, and unconstitutionally intrude on the General Assembly's province to determine the courts' jurisdiction, who may invoke it, and how they may do so.

CONCLUSION

For the above reasons, the Court should reverse the lower court's decision and reject the atextual requirements placed on taxpayer actions.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above Amicus Curiae Brief of The Buckeye Institute in Support of Relator-Appellant was served via e-mail on this 9th day of June 2025, on the following counsel:

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