SUPREME COURT OF OHIO

STATE EX REL. OHIO ATTORNEY GENERAL, Appellant, v. ROBERT BURNS, Appellee.	CASE NO. 2020-1078 *On Appeal from the Montgomery County Court of Appeals, Second Appellate District, No. 28496*

MERIT BRIEF OF *AMICI CURIAE* BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS, OHIO ASSOCIATION FOR SCHOOL BUSINESS OFFICIALS, AND OHIO SCHOOL BOARDS ASSOCIATION IN SUPPPORT OF APPELLEE'S POSITION

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I. STATEMENT OF FACTS

A. Case-Specific Statement of Facts

The *Amici Curiae* adopt the case-specific Statement of Facts set forth in Appellee's Merit Brief.

B. Statement of Interest of *Amici Curiae*

The Buckeye Association of School Administrators (BASA) is a statewide organization representing over 95 percent of school district superintendents in Ohio. BASA is a nonprofit 501(c)(6) corporation dedicated to assisting its members to more effectively serve the needs of school administrators and their school districts. BASA provides extensive informational support, advocacy, and professional development in an effort to support its professional practice.

Founded in 1936, the Ohio Association of School Business Officials (OASBO) is a not-for-profit statewide professional association serving the continuing education and legislative advocacy needs of public school district treasurer/CFOs, business managers, transportation directors, food and nutrition supervisors, and administrative support staff. OASBO also offers school districts group savings programs.

The Ohio School Boards Association (OSBA) is a nonprofit 501(c)(4) corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter. Nearly 100 percent of the 711 boards representing the city, municipal, local, exempted village, and career technical school districts and educational service centers throughout the State of Ohio are OSBA members. OSBA's activities include extensive informational support, advocacy and consulting, such as board development and training, legal information, labor relations representation, and policy service and analysis.

These organizations enhance Ohio's public school districts by helping shape a legislative and regulatory environment conducive to student learning. It is vital to the governing bodies of public school districts and their administrators that legal regulations impacting the daily operations of school districts are as clear as possible. When courts stray from established law or apply established rules incorrectly, they create uncertainty for school boards and their employees. That uncertainty is damaging for Ohio public schools; for the employees who administer, teach, and serve in those schools; and, ultimately, for the children who attend those schools.

II. LAW AND ARGUMENT

The Second Appellate District properly articulated the standard for when liability attaches to public officials related to the loss or misuse of public money: "a public official is strictly liable for the loss of public funds over which the official exercises control." App. Op. ¶15. This rule is well-established in Ohio law, and creates the proper structure within which public officials can operate. By way of background, Ohio public schools, established under Chapter 33 of the Ohio Revised Code, are led by a board of education, which is deemed the body politic and corporate, and which governs the school district. R.C. 3313.17; R.C. 3313.47. The board of education is tasked with appointing a treasurer, who is the chief fiscal officer for the school district. R.C. 3313.22. The legislature has specifically mandated that treasurers are "responsible for the financial affairs of the district." R.C. 3313.31. Likewise, the Board is required to appoint a superintendent who is the "executive officer for the board" and is statutorily tasked with responsibilities related to pupils and teachers, among other things. R.C. 3319.01. Below the level of the superintendent and treasurer are a range of other administrators, whose titles vary from district to district, and who are responsible for different operational aspects of the school district.

As public officials, certain school district employees are bound by R.C. 9.39, which states that "[a]ll public officials are liable for all public money received or collected by them or by their subordinates under color of office." Prior precedent has been clear about when liability for the loss or misuse of public money would attach to a public official under R.C. 9.39. It attaches when that official has "control" of the funds. There is no Ohio case law in which a public official has been held liable for funds over which he or she had no control. Instead, strict liability under R.C. 9.39 has been imposed only for those who are responsible, under the law, to exert such control over public money. In the case of a public school district, that responsibility rightfully lies with the treasurer. Comparably, for a community school, the official responsible to exert control over public money is the fiscal officer.

Yet inexplicably, the Attorney General is straying from this longstanding rule, and attempting to radically expand the parameters under which an official can be held liable for public money. Overturning the Second Appellate Court's decision would: (A) create absurd and unintended consequences for public officials statewide who do not control public money; (B) impose strict liability for public money upon public officials not acting under color of office; and (C) result in uncertainty for school districts and other public employers concerning liability for losses of public money.

The *Amici* will address each issue in turn.

A. Overturning the Second Appellate District's decision would create absurd and unintended consequences for public officials statewide who do not control public money.

Strict liability for loss or misuse of public funds has never attached to public officials who do not exercise control over those funds. The Ohio General Assembly confirmed this in 2019 through the manner in which it revised the strict liability statute for public school district treasurers.

As part of Ohio House Bill 491, enacted by the 132nd General Assembly, R.C. 3313.25 was amended to no longer hold school district treasurers strictly liable for a loss of public funds. Instead, R.C. 3313.25 maintains liability only when the loss results from the treasurer's negligence or other wrongful act. 2019 Am.Sub.H.B. No. 491. The Fiscal Note and Local Impact Statement prepared by the Ohio Legislative Service Commission explains the state of the law before the amendment and the impetus behind the change:

> **Liability for loss of public funds**
>
> Under current law, public officials are strictly and individually liable for the loss or misuse of public money *under their control,* regardless of blame. Like most public officials in Ohio, school district and educational service center (ESC) treasurers must obtain a bond conditioned on the treasurer's faithful performance of all official duties. The bond protects the school district or ESC, not the treasurer, against a loss in the event of misuse of public money.
>
> The bill provides an exception to the general rule of strict liability for loss of public funds for a treasurer of a school district or ESC in the performance of official duties generally and to the treasurer's reliance on the accuracy of various nonfinancial information or data. Thus, a treasurer will not be held liable unless the funds are lost as a result of the treasurer's own negligence or other wrongful act.

Ohio Legislative Service Commission, *Fiscal Note and Local Impact Statement*[1] *to Am.Sub.H.B. 491*, at 2-3, https://www.legislature.ohio.gov/download?key=10781&format=pdf (accessed Mar. 15, 2021) (Emphasis added).

The General Assembly understood that strict liability attaches under R.C. 9.39 for school district treasurers related to the loss or misuse of public funds *under their control*. Because the General Assembly saw this as an issue and expressly sought to take steps to provide some relief to such public officials, it revised R.C. 3313.25, the statute related to bonds for school district treasurers, *because treasurers are the public officials affected by the strict liability requirement under R.C. 9.39.*[2] Treasurers have public funds under their control and, thus, needed the reprieve that the General Assembly sought to provide for blameless loss of public funds. The Fiscal Note and Local Impact Statement references the bond requirement, which both school district treasurers and community school fiscal officers have, showing the intrinsic link between these roles and potential liability for the loss of funds they are managing. R.C. 3313.25; R.C. 3314.011. The entire backdrop of this change in House Bill 491 is that school district treasurers are the ones with control over public funds, the ones who are bonded,[3] and, likewise, the ones that could be held liable for the loss or misuse of funds, therefore justifying why the General Assembly singled treasurers out for this amelioration.

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[1] This Court has utilized the Fiscal Note & Local Impact Statement prepared by the Ohio Legislative Service Commission to further identify and understand the goals of the General Assembly in drafting legislation. *See State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, ¶17.

[2] The General Assembly previously has used the same approach of revising the statute that is specific to a particular class of public officials who were subject to strict liability, rather than revising R.C. 9.39 (*See, e.g.,* R.C. 131.18 (statute addressing the release and discharge of county, municipal corporation, township or school district treasurer, public library fiscal officer, clerk of courts or judge from liability in certain situations)).

[3] Besides school district treasurers, the only other school district employee statutorily required to be bonded is the business manager. R.C. 3319.05.

The General Assembly clearly knows how to identify administrators by role for purposes of making changes to liability for such positions. Yet it did not find it necessary to remove the strict liability requirement as applied to school districts under R.C. 9.39, by way of R.C. 3313.25, from any position but a treasurer. It defies logic, and belies the legislature's purpose, to now say that other administrators who do not control public funds remain strictly liable for loss/misuse of those funds, but treasurers (those who actually control the public funds) are only liable in negligence. The legislature deemed it necessary to revise R.C 3313.25 to remove blameless loss for treasurers. The Attorney General should not be permitted to now try casting a wider net to find others to hold strictly liable.

Extending strict liability to other administrators would also contradict the specific guidance that the Attorney General's Office has given to local governmental officials as recently as 2018. At the 2018 conference, the Attorney General's Office gave a presentation titled "2018 Local Government Officials Conference Collections Enforcement Findings for Recovery." The presentation[4] was directed to local government officials and was an opportunity for such officials to obtain both legal and practical information directly from the source about how the Attorney General's Office enforces Findings for Recovery.[5] In the section titled "Joint and Several Liability," the Attorney General states:

The AOS [Auditor of State] frequently issues findings jointly and severally against

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[4] This Court has found it appropriate to look to the content of a course PowerPoint to determine what information had been shared to attendees of that course. See *In re Judicial Campaign Complaint Against Falter*, 158 Ohio St.3d 1458, 1461, 2020-Ohio-1413.

[5] "'Finding for recovery' means a determination issued by the auditor of state, contained in a report the auditor of state gives to the attorney general pursuant to section 117.28 of the Revised Code, that public money has been illegally expended, public money has been collected but not been accounted for, public money is due but has not been collected, or public property has been converted or misappropriated." R.C. 9.24(H)(3). It is the legal mechanism through which the state recovers public money that has been lost or misused.

– Person who received the money (primary)

– Surety

– Public official(s) who approved payment (secondary)

Local Government Officials Conference (2018), *Collections Enforcement Findings for Recovery*, at 5, https://ohioauditor.gov/trainings/lgoc/2018/Finding%20for%20Recovery.pdf (accessed Mar. 15, 2021).

This is the Attorney General's practical explanation to local government officials of how the Auditor of State interprets and applies the liability outlined in R.C. 9.39 for public officials who "receive[] or collect[]" public money. As the state official ultimately responsible for enforcing findings for recovery (R.C. 117.28), the Attorney General's training communicates the Auditor's standards to the very people who may be affected—local government officials. The Attorney General's office has publicly stated that the Auditor of State deems a "person who received the money" and "public official(s) who approved payment" as those potentially liable under R.C. 9.39. This is logical and valuable guidance that shows that the Auditor of State's perspective is that liability for lost/misused public funds attaches only to the specific official who exerted control over those funds (those who receive the money and those who approve payments). To overturn the Second Appellate District's decision would render the Attorney General's 2018 guidance incorrect and would unintentionally impose strict liability for the loss of public money on officials with no fiscal control. Based on the guidance provided by the Attorney General to local government officials, even the Auditor of State and Attorney General did not previously believe officials with no fiscal control to be strictly liable under R.C. 9.39. This is the type of day-to-day guidance – direct from the Attorney General's office – that public school officials and other government officials rely upon, and should be able to rely upon. To now repudiate this guidance,

in addition to the well-established court precedent that informed public officials may have reviewed when performing their jobs, would certainly cause upheaval and uncertainty. It would also lead to the absurd result of employees with no control over public money being held strictly liable, at the sole discretion of the Attorney General.

B. Overturning the Second Appellate District's decision would impose strict liability for public money upon public officials not acting under color of office.

The first sentence of R.C. 9.39 is compound, with numerous terms and phrases. In order to understand the sentence, it is necessary to look to R.C. 117.01, the Auditor of State definitions provision, for additional guidance. Three specific terms within R.C. 9.39 are further defined in R.C. 117.01: "All *public officials* are liable for all *public money* received or collected by them or by their subordinates under *color of office*." (Emphasis added). Of those italicized terms, it is undisputed that Robert Burns, as a community school director, was a public official and that public money was involved. What is entirely in dispute, yet left unanalyzed by the Attorney General, is whether, as a community school director, Burns did anything under "color of office" related to the receipt or collection of public money.

Pursuant to R.C. 117.01(A), "color of office" means "actually, purportedly, or allegedly done under any law, ordinance, resolution, order, or other pretension to official right, power, or authority." This Court made it clear that, in determining liability under R.C. 9.39, one must look to the facts of the situation to determine whether the specific official's responsibilities included receipt or collection of public money (or whether he or she supervised employees tasked with such receipt or collection) under color of office. *Cordray v. Int'l Preparatory School*, 128 Ohio St.3d 50, 2010-Ohio-6136, ¶29. Specifically, what is the character of the official's role and what is the official tasked to do by way of his or her role as an employee of the public entity? In *Cordray*, this Court directed the lower court to engage in a detailed analysis of whether the community

school administrator had the responsibility to, and did, act under the law with official right, power, or authority related to the receipt or collection of public money. *Id*.

On remand, the Court of Common Pleas did just that – it looked to whether "that representative's *responsibilities* include 'the receipt or collection' of such funds." *AG v. Int'l Preparatory School,* Cuyahoga Co. C.P. No. 05 575404, 2012 Ohio Misc. LEXIS 247 (Feb. 10, 2012), ¶17 (Emphasis added). In order to set the framework for analyzing the administrator's role within the community school, the Common Pleas court first had to define the key components of R.C. 9.39. It did so in a manner similar to the courts and the attorneys in this case by looking to the definitions of "received" and "collected":

> "Receipt" is commonly understood as the act of receiving, and it is commonly understood that to "receive" is to "take in or hold," *Websters II New Riverside University Dictionary* (1988), 981. "Collection" is commonly understood as the "collecting of money," "to receive payment," and to "deposit" funds, *Websters II New College Dictionary* (1986), p. 220; *Websters II New Riverside University Dictionary* (1988), 281; *Random House College Dictionary* (2001), p. 261.

Id. at ¶18.

In that specific case, the administrator supervised bank accounts used "as receptors" of payments received by the state, and "controlled" such accounts, making her "involved with funds that are 'received or collected' within the meaning of R.C. 9.39." *Id.* at ¶19. The court went on to use the term "control" a second time in defining the administrator's role, noting that she also had control over the bank accounts used for the receipt and collection of public funds, such as to implicate liability under R.C. 9.39. *Id.* at ¶20. As this Court dictated, the Common Pleas court

engaged in an analysis of the character of the position held by the administrator, regarding the receipt and control of public funds, to determine whether liability attached.

Here, the Attorney General's Office seeks to attach liability to a community school director *without engaging in such an analysis at all*, and specifically without determining whether the public money it claims the director received or collected was done so under color of office. This is a crucial component of R.C. 9.39 and one that this Court must require the Attorney General to sufficiently analyze. It is telling that the Attorney General's Merit Brief before this Court cites to *Cordray* but fails entirely to cite to the case on remand in which the specific analysis requested by this Court took place. To allow strict liability to attach to this community school director or another like administrator, without such an analysis, is a slippery slope that would open the floodgates of liability. It is also entirely inconsistent with this Court's prior precedent and the language of the statute.

Instead, the Court must require the Attorney General, before attempting to hold a public school administrator such as the one in this instance strictly liable under R.C. 9.39, to establish that the administrator's specific job responsibilities included not just the receipt or collection of public funds (which the facts section of Appellee's Merit Brief clearly shows not to be the case) but also that he had the specific authority and responsibility for such receipt or collection. What the Appellant ignores is that this community school director was not given the responsibility for fiscal oversight of the school. The community school had engaged another person to fulfill that role. Even if the director had any tangential role related to the finances of the school, he was not receiving or collecting the money under color of office. Holding such an official strictly liable for the loss of funds controlled by someone else is inconsistent with all required components of R.C. 9.39 and with this Court's directive to the lower court in *Cordray*.

If this Court were to permit the Attorney General, before attempting to collect lost money from a public official, to entirely skip over the analysis into whether the official was tasked, under color of office, with receipt or collection of that public money, the impact to Ohio public school officials would be far-reaching. Many school employees come into contact, in some glancing way, with public funds. Principals approve budgets for their buildings, athletic directors sign off on a variety of costs associated with extracurricular activities, food service supervisors provide information on expenditures required for meals. Under the Attorney General's overreaching application of R.C. 9.39, what these employees do in their job may be viewed as part of the process of "receipt" of public money and thus strict liability would attach to any loss of those funds. Yet they are not tasked under the law with receiving public money. If a true analysis were done to determine if these public officials actually engaged in such receipt or collection under color of office, it would be clear that they could not be held strictly liable for a later loss. The Attorney General cannot be permitted to skip this step.

Imposing strict liability for the loss of public funds on public officials with control over the funds makes sense because those officials voluntarily took on specific duties related to the funds under color of office. Strict liability over public funds will not come as a surprise to them because their job is the safekeeping and control of funds. But if the Attorney General's contention in this case were to be upheld, public employees across Ohio will be in a state of confusion, wondering whether they also could be held liable for public fund losses related to money they did not actually control. The Second Appellate District created the proper standard by relying on the well-established common-law principle, and specifically articulating that "a public official is strictly liable for the loss of public funds over which the official exercises control." App. Op. ¶15. As discussed more fully in the next section, instead of contemplating the potentially unbounded

expansion being proposed by the Attorney General's office, with no basis in law or prior practice, public officials and employees serving entities such as Ohio public schools need clarity regarding how liability attaches under R.C. 9.39. That clear standard is the one set forth in the Second Appellate District decision.

C. Overturning the Second Appellate District's decision will result in uncertainty for school districts and other public employers concerning liability for losses of public money.

First and foremost, it is crucial to distinguish the arguments made in this brief from any attempt to lessen the oversight responsibilities of any public officials related to public money. There are, and should be, requirements with teeth that ensure that public money can only be expended when authorized by law and is managed appropriately by those in charge of it. This Court deftly elucidated the public policy argument, and repudiated those who would call situations in which strict liability attaches harsh:

> Although, as this court stated in *Herbert,* applying strict liability seems harsh, id., it is necessary from a public-policy standpoint:
>
> "`[I]t would be distinctly against public policy not to require a public officer to account for and disburse according to law moneys that have come into his hands by virtue of his being such public officer; that it would open the door very wide for the accomplishment of the grossest frauds if public officials were permitted to present as the defense, when called on to disburse the money according to law, that it had been (performed) or destroyed by some deputy, or other subordinate, connected with the public office.'"

Cordray, 128 Ohio St.3d 50, ¶ 15-16 (citing *State v. Herbert*, 49 Ohio St.2d 88, 96-97, 358 N.E.2d 1090 (1976), quoting *Seward v. Natl. Surety Co*., 120 Ohio St. 47, 50, 165 N.E. 537 (1929)).

The Court is correct that it is necessary from a public policy standpoint for a public official who has public money "come into his hands" under color of his office to be held liable for loss of that money, subject to blameless loss statutes for some, including school treasurers under R.C. 3313.25. But this case is not about an official who had public money "in his hands" under color of his office and lost or misused it. The director in this matter had no such control under color of his office over the misappropriated funds. Another administrator did have such control, and he has been held accountable.

It is reasonable, and essential, that the public official in control of public funds is liable for such money – managing and controlling that money is what those officials are tasked with under color of office. The legislature has set up public schools in a logical and practical manner. Specifically, there is a distinct and time-tested statutory scheme for school finance. R.C. 3313.31 identifies the treasurer as the chief fiscal officer of the school district, and states that the treasurer "shall be responsible for the financial affairs of the district." Likewise, R.C. 3314.011 requires that community schools designate a "fiscal officer." Proper financial management of public schools is so essential that the legislature has designated these roles under the law, and individuals in these positions are expressly tasked with controlling the fiscal responsibilities of the school (again, under color of office). The General Assembly also found it necessary to require that both school district treasurers and community school fiscal officers be bonded, further solidifying that the treasurers and fiscal officers are the ones with official duties, and accompanying liability, related to public money.[6] R.C. 3313.25; R.C. 3314.011. The Attorney General is attempting to

[6] As referenced above, the only other school district employee required to be bonded is the business manager. O.R.C. 3319.05. This further shows that the General Assembly believes that a discrete number of school employees are responsible for public funds and, therefore, in need of a bond. The General Assembly could have required a bond for any other school district employee if it had

upend the process by averring, with no basis in law or fact, that other administrators have the appropriate degree of fiscal responsibilities for strict liability to attach. Yet the legislature's intent to bestow such responsibilities on specifically named school administrators (treasurers and fiscal officers) is clear.

Further, unlike treasurers, many other administrators within a school district began as teachers and moved into administrative roles, all in the name of serving the instructional and social-emotional needs of district students. Many such administrators do not have specific experience with the complicated world of public finance. In fact, school treasurers are required to have a license separate and apart from other administrative licenses. R.C. 3301.074. They, along with treasurers and fiscal officers for most other governmental agencies in the state, are required annually to complete six hours of comprehensive education and instruction in finance, investments, cash management, ethics, and other topics deemed appropriate by the Treasurer of State. R.C. 135.22. To say that all of those administrators who do not hold a specific license or receive training to perform the duties of treasurer – those with a complete focus on the educational and other needs of students – must also now be responsible for fiscal management and ensuring that the money controlled by the treasurer and his or her department is properly handled is unjustified. The effect of overturning the Second Appellate District's decision, and adopting the Attorney General's position, would be to deter educators from wanting to take on administrative roles within the school district. Experienced teachers and principals would not want to serve in administrative roles in the district if they could be held strictly liable for the loss of the district's funds in the hands of other district staff, when they have no control over those funds. *It is*

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foreseen that employees other than treasurers or business managers could have been in a position to damage a public agency through the loss of public funds. Yet it did not.

unfeasible for all administrators to be in control of the fiscal operations of the district. It is even worse to hold them strictly liable for losses of funds when, in fact, they exert no such control.

Finally, and most concerning to Ohio public schools, is that the Attorney General and Ohio Auditor of State are now taking the stance in this case that potentially any school district employee who has anything to do with the receipt of money, yet who has no actual control over that money after it is received by the district, could be held strictly liable. If this Court permits the rule to be expanded as articulated by the Attorney General in this case, the list of school employees who could find themselves strictly liable for any loss of public money that they do not control expands dramatically. The Attorney General believes that all it takes is passive "receipt" of money. This could potentially include approval of budgets, expenditure reports, or even grant applications. If this becomes the rule of law, a grants manager who is tasked with finding donors and bringing in money could be strictly liable for any loss of the money once it is received. A high school principal who is responsible for approving the budget for the high school could be strictly liable for any loss of the money within the budget, even when the principal has no actual control over those funds. Overturning the Second Appellate District's decision would not only allow strict liability for the loss of funds to attach to a community school director, or to the superintendent of a public school, but to a great number of other individuals who may come in contact with public funds but have no corresponding control over such funds or responsibility under color of their office related to those funds. Such employees are not bonded, they cannot write checks related to those funds, and they cannot forward the funds or otherwise access them in any way. The requirement that strict liability attaches only to officials with public money under their control prevents this illogical result, and allows for clarity and predictability for school district officials and other public officials when they commit to a job in the public sector.

III. CONCLUSION

For the reasons set forth herein, *Amici Curiae* request this Court affirm the Second Appellate District's decision.

Respectfully submitted

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CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served this 15th day of March, 2021, via electronic and/or regular mail, upon:

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