

**In The
Supreme Court Of Ohio**

State ex rel. JAMES PALM, et al.	:	
	:	
<i>Relators,</i>	:	Case No. 2021-0960
	:	
v.	:	Original Action in Mandamus
	:	
	:	
JEFF McCLAIN, et al.	:	
	:	
<i>Respondents.</i>	:	

**MOTION TO DISMISS OF RESPONDENT
TREASURER ROBERT SPRAGUE**

Now comes Respondent Ohio Treasurer Robert Sprague and moves this Court to dismiss Relators' Complaint pursuant to Civ.R. 12(B)(1) and 12(B)(6). Relators lack standing to bring their claims and have failed to state a claim upon which relief can be granted. A memorandum in support of Respondent's motion is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

INTRODUCTION

Relators bring this original action in mandamus against the Ohio Tax Commissioner Jeff McClain and the Ohio Treasurer Robert Sprague primarily to compel them to “jointly adopt policies and procedures” for the processing of tax payments from individual taxpayers. They allege this is required by R.C. 5703.058. They claim that the Tax Commissioner’s and the Treasurer’s failure to comply with R.C. 5703.058 led to Relators being taxed twice on their personal income.

Relators’ claims against Treasurer Sprague must be dismissed for several reasons. First, Relators lack standing with respect to the Treasurer. They cannot establish that the Treasurer’s actions are “fairly traceable” to their alleged tax-related injuries, nor would any of the relief they seek from the Treasurer redress these asserted injuries. Second, Relators have not exhausted the administrative remedies available to them. The “failure to exhaust available administrative remedies bars the issuance of a writ of mandamus.” *State ex rel. Bailey v. Indus. Comm’n. of Ohio*, 62 Ohio St. 3d 191, 192-93, 580 N.E.2d 1081 (1991). Here, Relators have not alleged that they availed themselves of the administrative remedies available to them: a petition for reassessment of the challenged taxes or an appeal to the Board of Tax Appeals. Instead, they confuse the issue and contend that they do not need to attempt administrative remedies because they would not “prevail” in such administrative avenues. But whether Relators would *prevail* (which at this point is unknown) is not the same as whether the administrative remedies are *available*. Relators’ failure to exhaust (or even attempt) available administrative remedies is fatal to their mandamus action.

Even if Relators could overcome this deficiency (which they cannot), their mandamus claims against the Treasurer fail on their face. Relators have not shown a clear legal right to

their requested relief from the Treasurer because they misread state law. R.C. 5703.058 pertains only to policies and procedures for payments received from *state* entities—not individual taxpayers. Additionally, the Treasurer has no clear legal duty to provide the requested mandamus relief because no statute gives the Treasurer authority over employer-paid tax withholdings on individual state income tax returns. That is a tax issue over which the Treasurer has no control. The Treasurer’s main statutory duty is to safekeep the state treasury. Tax payments clearly represent one of the types of funds required to be kept in the state treasury in the offices of the Treasurer or in state depositories. The Treasurer’s role is to facilitate deposit of the actual payments received by the State of Ohio’s various agencies in the appropriate state depository bank accounts. But, the Treasurer plays no role in determining the tax amount for any taxpayer, the processing of tax returns, or the collection or maintenance of information pertaining to individual taxpayers. Thus, the Treasurer should not have been named as a respondent here at all.

Finally, Relators cannot establish the lack of an adequate remedy in the ordinary course of the law. Relators had adequate legal remedies by way of (1) petitioning for reassessment; (2) appealing the final assessment to the Board of Tax Appeals; and (3) appealing any adverse judgment of the Board of Tax Appeals to this Court or a lower court of appeals. Relators chose not to use these available legal remedies but that choice does entitle them to mandamus relief.

For all of these reasons, Relators’ Complaint against the Treasurer should be dismissed.

STATEMENT OF FACTS

Relators James Palm and Sara Pearson are Ohio taxpayers residing in northeast Ohio. Compl. at ¶ 10-11. They allege that Respondents Ohio Tax Commissioner Jeff McClain and

the Ohio Treasurer Robert Sprague are jointly failing to comply with R.C. 5703.058, a statute that pertains to the processing of tax payments. *Id.* at ¶ 12-13, 22. They claim that Respondents’ failure “to adopt and issue policies and procedures in conformity with R.C. 5703.058” is leading to duplicate collection of personal income taxes from taxpayers who do not possess a W-2 form from their employers when filing their taxes. *Id.* at ¶ 22-24. Relators also allege that the Tax Commissioner is failing to notify taxpayers of any credit account balance for which a refund is due, pursuant to R.C. 5703.77. *Id.* at ¶ 24.

Relators Palm and Pearson are two taxpayers who were unable to obtain a copy of their W-2 forms from their respective employers and thus could not file state income taxes for certain years. *See id.* at ¶ 25-55. Relator Palm did not file tax returns for 2016, 2017, or 2018. *Id.* at ¶ 25. In 2020, he attempted to become compliant for those tax years, but he could not obtain the necessary W-2 information from his employers. *Id.* The company he worked for in 2017 was no longer in business. *Id.* at ¶ 26. Palm was able to obtain wage and income statements from the IRS for tax years 2016-2018, but these statements only listed amounts withheld by his employers for federal taxes—not the amounts withheld by his employers for state taxes. *Id.* at ¶ 28-29. Palm believes his employers withheld state taxes. *Id.* at ¶ 30. He contacted the Ohio Department of Taxation to determine the amount of state taxes withheld, but the Department allegedly informed him that it does not keep such withholding and payment information. *Id.* at ¶ 31. Palm says the Department instructed him to report that zero dollars had been withheld by his employer. *Id.* at ¶ 32.

Palm filed his Ohio tax returns for 2016 through 2018 in December 2020, and listed “unknown” for the amount withheld by his employer for state taxes on those returns. *Id.* at ¶ 33. The Department of Taxation processed Palm’s returns and allegedly gave Palm “zero

credit” for the amount withheld and paid to the State of Ohio by his employers. *Id.* at ¶ 35. For the 2016 tax year, the Department sent a notice indicating that Palm had a balance due of \$49.12. *Id.* at ¶ 36; Ex. G. For the 2018 tax year, the Department sent a notice for a balance due of \$253.11. *See* Ex. H. Although he does not allege that he actually paid any taxes in 2016-2018, Palm believes that he does not owe these past-due taxes, and believes that he is instead owed a refund. Compl. at ¶ 37, 39.

Relator Pearson did not file tax returns for 2017, 2018, or 2019. *Id.* at ¶ 43. In 2020, she attempted to become compliant for those tax years, but she too could not obtain the necessary W-2 information. *Id.* at ¶ 49. Pearson was able to obtain wage and income statements from the IRS for tax years 2017-2019, but these statements only listed amounts withheld by her employers for federal taxes—the statements do not list the amounts withheld by her employers for state taxes. *Id.* at ¶ 50. Pearson believes the employers withheld state taxes. *Id.* at ¶ 48.

Pearson filed her Ohio tax returns for 2017 through 2019 in December 2020, and listed “unknown” for the amount withheld by her employer for state tax on those returns. *Id.* at ¶ 51. The Department of Taxation processed Pearson’s returns and allegedly indicated that zero taxes were withheld and paid to the State of Ohio by her employers. *Id.* at ¶ 52. Like Palm, Pearson does not allege that she actually paid taxes—she believes that taxes were paid to the State during these tax years and believes that she is owed a refund. *Id.* at ¶ 53.

Relators Palm and Pearson now seek a writ of mandamus “directing Respondents Commissioner McClain and Treasurer Sprague to ‘jointly adopt policies and procedures for the processing of payment of taxes . . . such that payments are deposited in or credited to the appropriate account or fund within thirty days after receipt,’ as required by R.C. 5703.058, and to timely notify taxpayers of any credit account balance for which a refund is due, as required

by R.C. 5703.77.” Compl. at 16. Relators also seek “proper adjustments to the amount of state tax owed” and any refunds to be issued to Relator Palm and Relator Pearson accordingly. *Id.* at 16-17. In addition, Relators ask “[t]hat the policies and procedures adopted by Commissioner McClain and Treasurer Sprague include the availability of account transcripts that list the amount of state withholding paid by the employer to the State of Ohio on the employee’s behalf, such that individual taxpayers can avail themselves of legal avenues by the Ohio Board of Tax Appeals and/or legal avenues under R.C. Chapter 2723.” *Id.* at 17.

Respondent Treasurer Robert Sprague is an elected state official. The Office of the Treasurer of the State of Ohio is established pursuant to Article III of the Ohio Constitution. The Treasurer’s powers and duties are principally set forth in Chapter 113 of the Revised Code. Specifically, the Treasurer is charged with the safekeeping of the state treasury, and is the custodian of certain funds outside the state treasury. *See, e.g.*, R.C. 113.05; R.C. 113.051.

STANDARD OF REVIEW

A court can dismiss a mandamus action under Civ.R. 12(B)(1) when it lacks subject-matter jurisdiction. *Avco Fin. Servs. Loan, Inc. v. Hale*, 36 Ohio App. 3d 65, 67, 520 N.E.2d 1378 (10th Dist.1987); *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9.

A motion to dismiss for failure to state a claim upon which a court may grant relief challenges the sufficiency of the complaint itself. *Volbers-Klarich v. Middletown Mgt. Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11-12. A court must consider and accept all non-conclusory factual allegations of the complaint as true and afford all reasonable inferences in the non-moving party’s favor. *Id.* However, “unsupported conclusions are not considered admitted and are not sufficient to withstand a motion to dismiss.” (Citations

omitted.) *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994). Further, courts are not required to accept unsupported legal conclusions as true when reviewing Civ.R. 12(B)(6) motions to dismiss. *See Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193, 532 N.E.2d 753 (1988). Dismissal under Civ.R. 12(B)(6) is warranted if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *O’Brien v. Univ. of Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975).

ARGUMENT

I. Relators Lack Standing with Respect to the Treasurer.

“It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue.” *State ex rel. Walgate v. Kasich*, 147 Ohio St.3d 1, 2016-Ohio-1176, 59 N.E.3d 1240, ¶ 18, quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469, 1999-Ohio-123, 715 N.E.2d 1062. “Traditional standing principles require litigants to show, at a minimum, that they have 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.” *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 101, ¶ 7. An injury sufficient to confer standing must be “concrete and not simply abstract or suspected.” *State ex rel. Food & Water Watch v. State*, 153 Ohio St.3d 1, 2018-Ohio-555, 100 N.E.3d 391, ¶ 20, quoting *Ohio Contractors Ass’n v. Bicking*, 71 Ohio St. 3d 318, 320, 643 N.E.2d 1088 (1994).

Here, Relators do not (and cannot) establish an injury that is fairly traceable to conduct of the Treasurer. Relators allege that “[t]he State of Ohio . . . processes the employee’s tax return as if the employee had paid no state income taxes . . . , giving the taxpayer no credit for

funds received from the employer on the employee's behalf[.]” Compl. at ¶ 5. But, as discussed in detail below, the *Treasurer* does not “process[] the employee’s tax return.” *Id.* In fact, the Treasurer has no role in administering employer-paid tax withholdings. The Treasurer’s role is to facilitate deposit of the actual payments received by the State of Ohio’s various agencies in the appropriate state depository bank accounts. Additionally, the Treasurer plays no role in determining the tax amount for any taxpayer, the processing of tax returns, or the collection or maintenance of information pertaining to individual taxpayers. *See infra* Section III.A-B. Thus, as a matter of law, Relators cannot demonstrate an injury that is “fairly traceable” to the Treasurer.

Relators also cannot demonstrate redressability. That is because the relief Relators request from the Treasurer would not redress their alleged injuries. Relators request (1) policies and procedures jointly adopted by the Tax Commissioner and the Treasurer, pursuant to R.C. 5703.058; (2) timely notification to taxpayers of any “credit account balance for which a refund is due,” pursuant to R.C. 5703.77; (3) that Relators’ personal income tax accounts be credited with the money allegedly withheld by their employers, and that any refunds owed be issued to Relators; and (4) “[t]hat the policies and procedures adopted by Commissioner McClain and Treasurer Sprague include the availability of account transcripts that list the amount of state withholding paid by the employer[.]” Compl. at 16-17.

None of this relief is available from the Treasurer. The “policies and procedures” that R.C. 5703.058 requires are not policies and procedures for processing the returns of taxpayers (whether individual or corporate). R.C. 5703.058 merely requires the adoption of policies and procedures that supplement R.C. 113.08, and R.C. 113.08 contemplates only deposits made by

state entities or agents thereof. As a matter of law, R.C. 5703.058 does not provide Relators with the relief they seek. *See infra* Section III.A-B.

Similarly, R.C. 5703.77 does not impose any duty on the Treasurer at all (or even reference the Treasurer), and so Relators cannot obtain relief from the Treasurer under this statute. The Treasurer has no statutory authority to credit Relators' personal income tax accounts with the money allegedly withheld by their employers, nor any authority over administering refunds to individual taxpayers.

Accordingly, Relators lack standing with respect to the Treasurer and their complaint against him must be dismissed.

II. Mandamus Relief Must Be Denied Because Relators Have Not Exhausted Their Administrative Remedies.

A. Relators' failure to challenge their tax assessments through the statutorily provided administrative process precludes this mandamus action.

Mandamus relief must be denied here. "[I]t [is] necessary to exhaust administrative remedies before asserting the extraordinary remedy of mandamus." *Burt Realty Corp. v. Columbus*, 21 Ohio St. 2d 265, 268, 257 N.E.2d 355 (1970), citing *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 412, 96 N.E.2d 414 (1951); *State ex rel. Foreman v. City Council of Bellefontaine*, 1 Ohio St. 2d 132, 132, 205 N.E.2d 398 (1965).

Revised Code Chapter 5747 provides Relators with administrative avenues they needed to exhaust before seeking the extraordinary writ of mandamus. Relators' mandamus action concerns personal income taxes and an alleged failure to credit employer-paid tax withholdings. Compl. at ¶ 2. Both failed to timely file tax returns for various years. *Id.* at ¶ 25, 43. Under R.C. 5747.13(A), which concerns income taxes, "[i]f any taxpayer fails to file a return . . . the taxpayer is personally liable for the amount of the tax," and "the tax commissioner may make an assessment against any person liable for any deficiency[.]" This tax assessment begins an

administrative process through which a taxpayer can challenge the tax liability asserted against him or her. The Tax Commissioner “shall give the party assessed written notice of the assessment,” and “[w]ith the notice, the commissioner shall provide instructions on how to petition for reassessment and request a hearing on the petition.” R.C. 5747.13(A). The taxpayer then has 60 days to file with the Tax Commissioner a “written petition for reassessment.” R.C. 5747.13(B).

It bears noting that in every instance, the cited sections speak to how the Tax Commissioner and the taxpayer will interrelate. The Revised Code sets forth no specific role or authority for the Treasurer with respect to the information; thus, the Treasurer as a matter of law has no legal role or responsibility beyond facilitating the deposit of payments to the state designated depositories. *See generally* R.C. 113.05, 113.08, 113.09.

This statutorily provided administrative process—that is, a taxpayer’s ability to petition for reassessment—is the first step in determining whether a taxpayer has overpaid. If, upon the Tax Commissioner’s final determination of a petition for reassessment, the Tax Commissioner finds and corrects an error in the initial assessment showing that the taxpayer overpaid, “there shall be issued to the [taxpayer] . . . a refund in the amount of the overpayment,” along with “interest on that amount.” R.C. 5747.13(F).

Relators do not allege that they followed this statutory process and filed petitions for reassessment with the Tax Commissioner, despite having 60 days in which to do so. R.C. 5747.13(B). But as a matter of law, even if they did, the fact that this administrative remedy was available to Relators (even if they chose not to pursue it) forecloses their claims. Their “failure to exhaust [their] available administrative remedies bars the issuance of a writ of mandamus.” *State ex rel. Bailey*, 62 Ohio St. 3d at 192-93.

B. Relators' failure to appeal to the Board of Tax Appeals from any adverse final determination precludes this mandamus action.

Moreover, if Relators had followed the R.C. 5747 process, they could have appealed an adverse final determination to the Board of Tax Appeals. “[A]ppeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, [or] reassessments[] . . . may be taken to the board of tax appeals by the taxpayer[.]” R.C. 5717.02; *see, e.g., Turner Constr. Co. v. Lindley*, 61 Ohio St. 2d 124, 126, 399 N.E.2d 1231, 1233 (1980).

If Relators had been unsuccessful before the Board of Tax Appeals, they could have then appealed to this Court or a lower court of appeals, having exhausted their administrative remedies. “The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals . . . shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situated or in which the taxpayer resides.” R.C. 5717.04.

However, Relators have not appealed to the Board of Tax Appeals. *See* Compl. at ¶ 59. They seek the extraordinary remedy of mandamus even though they have not (1) petitioned for reassessment before the Tax Commissioner, or (2) appealed to the Board of Tax Appeals. Relators ask this Court to consider whether the processing of their tax returns violates state law by failing to take account of employer-paid tax withholdings. *See, e.g.,* Compl. at ¶ 61-62. But Relators’ “failure to exhaust [their] available administrative remedies precludes [this Court] from reaching this question.” *State ex rel. Bailey*, 62 Ohio St. 3d at 192; *see also State ex rel. Schindel v. Rowe*, 25 Ohio St. 2d 47, 48, 266 N.E.2d 569, 570 (1971) (“Relator made no application for a variance before filing this action. Because he did not exhaust the administrative remedies available to him, mandamus is not available.”); *cf. State ex rel. Foreman v. City Council of Bellefontaine*, 1 Ohio St. 2d 132, 132, 205 N.E.2d 398, 399 (1965)

(holding that “[t]he exhaustion of administrative remedies is a condition precedent which must be fulfilled before one may resort to the courts to compel the issuance of a permit for a nonconforming use”).

Based on the allegations in the Complaint, not only have Relators failed to exhaust all administrative remedies, they have failed to even attempt any. Relators’ mandamus action is therefore improper and should be dismissed.

C. Relators’ contentions do not establish, by clear and convincing evidence, that these administrative remedies are unavailable.

Relators have two responses, both unavailing. First, Relators emphasize the opportunity they see themselves as providing to this Court to grant sweeping relief by addressing an alleged “systemic failure” to properly credit employer-paid tax withholdings. Compl. ¶ 2; *see also id.* ¶ 76. But taxpayers can hardly allege a “systemic failure” entitling them to mandamus relief when they have not even used statutorily provided avenues for challenging individual tax assessments. The two Relators here have not exhausted—or even attempted to exhaust—their available administrative remedies. *See* Compl. at ¶ 59. And nowhere in their Complaint do Relators allege that other taxpayers have used these statutorily provided remedies and still failed to achieve resolution of their tax issues. *See, e.g.,* Compl. ¶ 72. Relators cannot make an end run around this Court’s case law. Under this Court’s clear holdings, “it [is] necessary to exhaust administrative remedies before asserting the extraordinary remedy of mandamus.” *Burt Realty Corp.*, 21 Ohio St. 2d at 268. And “mandamus will not issue when an individual has a plain and adequate remedy in the ordinary course of law.” *State ex rel. Hodge*, 131 Ohio St. 3d 357, at ¶ 6.

Second, Relators contend that these available administrative remedies do not count as adequate legal remedies because Relators do not think they could “prevail.” Compl. ¶ 67; *see*

also id. at ¶ 59. But Relators confuse *success* with *availability*. “[T]he *availability* of an appeal is an adequate remedy sufficient to preclude a writ.” (Emphasis added.) *State ex rel. Peoples v. Johnson*, 2017-Ohio-9140, ¶ 11, 152 Ohio St. 3d 418, 420, 97 N.E.3d 426, 428, quoting *State ex rel. Luoma v. Russo*, 141 Ohio St.3d 53, 2014-Ohio-4532, 21 N.E.3d 305, ¶ 8. “And the fact that a prior appeal was unsuccessful or even wrongly decided does not mean that it was not an *adequate* remedy.” *State ex rel. Peoples v. Johnson*, 2017-Ohio-9140, ¶ 11, 152 Ohio St. 3d 418, 420, 97 N.E.3d 426, 428, citing *State ex rel. Walker v. State*, 142 Ohio St.3d 365, 2015-Ohio-1481, 30 N.E.3d 947, ¶ 14; *State ex rel. Barr v. Pittman*, 127 Ohio St.3d 32, 2010-Ohio-4989, 936 N.E.2d 43, ¶ 1.

Thus, Relators miss the mark when they speculate that taxpayers “cannot *prevail* through the Board of Tax Appeals because neither the taxpayer nor the Tax Commissioner/State of Ohio have information on the amount withheld and forwarded by their employer[.]” (Emphasis added.) Compl. at ¶ 67. First, Relators’ speculation is simply that—speculation, and it is premature. Second, even if Relators’ speculation later proved to be correct, an “unsuccessful” administrative appeal “does not mean that it was not an *adequate* remedy.” *State ex rel. Peoples*, 152 Ohio St. 3d 418, at ¶ 11. Again, Relators confuse success with adequacy. Whether Relators (or other hypothetical taxpayers) would “meet their burden of proof” in a petition for reassessment or administrative appeal is a down-the-line merits question—not a reason why they are entitled to short-circuit the legal remedies the General Assembly has provided. Compl. at ¶ 71.

Thus, Relators’ mandamus action must be dismissed for failure to exhaust administrative remedies.

III. Relators Cannot Establish the Requirements for a Writ of Mandamus.

In any event, a cause of action for mandamus against the Treasurer does not lie here because Relators cannot establish the three requirements for mandamus. “To be entitled to a writ of mandamus, a party must establish, by clear and convincing evidence, (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law.” *State ex rel. Luonuansuu v. King*, 2020-Ohio-4286, 161 Ohio St. 3d 178, 161 N.E.3d 619, ¶ 15, citing *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6, 13.

A. Relators lack a clear legal right to the requested relief from the Treasurer.

1. Relators’ reading of R.C. 5703.058 is contrary to the plain language of the statute.

Relators have not shown, by clear and convincing evidence, a clear legal right to the relief sought. Indeed, their mandamus claim is based on a flawed reading of the statute. Relators claim that R.C. 5703.058 requires the Tax Commissioner and the Treasurer to jointly adopt policies and procedures for processing tax payments from individual taxpayers, see, e.g., Compl. at ¶ 21, but R.C. 5703.058 does no such thing. Rather, the plain language indicates that that section provides for the adoption of policies and procedures intended to supplement R.C. 113.08, a provision relating to specific procedures for payments to the Treasurer received from *state* entities.

R.C. 5703.058 does not provide for the adoption of policies and procedures related to processing of the returns of taxpayers, whether they are individuals or corporations. Instead, it specifically states that “the tax commissioner and the treasurer of state shall consult and jointly adopt policies and procedures for the processing of payments of taxes *administered* by the tax commissioner” (Emphasis added.) R.C. 5703.058. Even more importantly, R.C.

5703.058 states the essential reason for this law, *to wit*, to ensure that “such payments are deposited in or credited to the appropriate account or fund within thirty days after receipt of the commissioner or treasurer.” *Id.* But what neither R.C. 5703.058 nor any other section of the Ohio Revised Code does, is extend the ministerial duties of the Treasurer. The processes and procedures for the determination, levying, and processing of income taxes is vested with the Tax Commissioner. The Treasurer’s role is limited to keeping the state treasury and facilitating deposit of funds to state designated depositories.

When it comes to the processing of tax payments, the Treasurer acts as the safekeeper of the state treasury, where tax payments are deposited. That is, the duty of the Treasurer is to ensure the deposit of employer withholding tax, state income tax, and other types of tax payments into the appropriate state-held bank accounts. By statute, the authority of the Treasurer over tax payments ends with the processing of the payment, i.e., when the monies are deposited into the appropriate state-held bank account. *See generally* R.C. 113.05, 113.08, 113.09.

R.C. 5703.058 does not extend the authority of the Treasurer. Instead, R.C. 5703.058 merely requires the adoption of policies and procedures that supplement R.C. 113.08:

Before January 1, 2008, the tax commissioner and the treasurer of state shall consult and jointly adopt policies and procedures for the processing of payments of taxes administered by the tax commissioner such that payments are deposited in or credited to the appropriate account or fund within thirty days after receipt by the commissioner or treasurer. The policies and procedures shall apply to all such payments received on or after January 1, 2008. *The policies and procedures are supplemental to rules adopted by the treasurer of state under section 113.08 of the Revised Code.*

(Emphasis added.) R.C. 5703.058. R.C. 113.08 contemplates only deposits made by state entities or agents thereof. R.C. 113.08 provides, in pertinent part:

[E]very state officer, employee, and agent shall, at the times and in the manner prescribed by rule of the treasurer of state, pay to the treasurer of state all money,

checks, and drafts received for the state, or for the use of the officer, employee, or agent, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise. The rules shall include procedures for dealing with checks not accepted for deposit by a financial institution and procedures for making deposits into the custodial funds of the treasurer of state. The payer shall specify the amount being paid, the fund to which the amount is to be credited, and any other information required by the treasurer of state. The treasurer of state shall file and preserve the record of payment.

(Emphasis added.) Said differently, R.C. 113.08 governs the relationship between the Treasurer and every state officer—including the Tax Commissioner—who deposits money into the state treasury. In directing the Treasurer and the Tax Commissioner to “jointly adopt policies and procedures” under R.C. 5703.058, the General Assembly expressly limited the scope for adoption of such policies related to tax payments by referencing R.C. 113.08. And, the policies and procedures that were adopted—see Relators’ Exhibit C—address the handling of tax payments at the state account/fund level as contemplated by R.C. Chapter 113.

The plain language of R.C. 5703.058 itself confirms that the Treasurer’s role here is merely ministerial. R.C. 5703.058 refers only to “the processing of payments of taxes *administered by the tax commissioner.*” (Emphasis added.) Notably absent from this language is any reference to taxes administered by the *Treasurer*. R.C. 5703.058 simply confirms that this is a tax case, and Relators have no clear legal right to relief from the Treasurer. Relators’ contention that R.C. 5703.058 requires the Treasurer to “credit[] [individual] taxpayer accounts,” Compl. at ¶ 21, is contrary to the plain language of the statute and an unsupported legal conclusion that this Court is not required to accept as true. *See Mitchell*, 40 Ohio St.3d at 193.

Accordingly, Relators have no clear legal right to mandamus relief from the Treasurer.

2. Relators’ do not establish by clear and convincing evidence that they are entitled to mandamus relief in the form of tax refunds.

In addition to the above flaws in their statutory argument, Relators also have a facts and proof problem. “The facts and proof submitted to establish [mandamus] criteria must be ‘plain, clear, and convincing before a court is justified in using the strong arm of the law by way of granting the writ.’” *State ex rel. New Riegel Local School Dist. Bd. of Edn. v. Ohio School Facilities Comm.*, 3d Dist. Seneca No. 13-16-22, 2017-Ohio-875, ¶ 21, quoting *State ex rel. Pressley v. Indus. Commission*, 11 Ohio St.2d 141, 161, 228 N.E.2d 631, 647 (1967).

Clear and convincing evidence is “that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.”

State ex rel. Husted v. Brunner, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, ¶ 18, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

Here, the Relators do not meet the “clear and convincing evidence” standard of proof. They ask that their accounts “be properly credited for the money withheld by [their] respective employers and paid to the State of Ohio,” and any refunds be issued accordingly. *See* Compl. at 17. But their evidence of entitlement to multi-year tax refunds are self-serving affidavits and IRS tax and wage statements that contain no detail as to how much income tax was or was not remitted to the State of Ohio. The amounts allegedly paid to the State are admittedly “unknown.” *See* Compl. at ¶ 33, 52. Because Relators have not established plainly and clearly that some amount was paid to the State via their withholding, they have not proved entitlement to the tax refunds they request.

Accordingly, Relators cannot establish a clear legal right to the requested relief *from the Treasurer*.

Finally, because Relators have not yet exhausted their available administrative remedies, they have not established a clear legal right to the requested relief *from anyone*. See *State ex rel. Dynamic Indus. v. City of Cincinnati*, 2016-Ohio-7663, 147 Ohio St. 3d 422, 66 N.E.3d 734, ¶ 12 (“[Relator] has not exhausted its administrative remedies Therefore, the city has no clear legal duty to grant the requested relief and [Relator] has no clear legal right to that relief.”).

B. Relators cannot establish that the Treasurer has violated any “clear legal duty.”

Relators have not shown that the Treasurer has a clear legal duty to provide them with their requested relief. Indeed, as explained above, the Treasurer is obligated under R.C. 5703.058 only to jointly adopt policies and procedures intended to supplement R.C. 113.08. The Treasurer has no obligation to jointly adopt policies and procedures relating to individual taxpayer accounts or liabilities. Thus, the Treasurer should be dismissed from this case.

Relators’ citation to R.C. 5703.77 further underscores that the Treasurer has no clear legal duty to provide the requested relief either. In addition to R.C. 5703.058, Relators rely on R.C. 5703.77. See, e.g., Compl. at 16. Crucially, R.C. 5703.77 does not once even reference the Treasurer. The statute is entitled “[a]uthoriz[ation] of Commissioner to either apply an overpayment to future tax liabilities or issue a refund.” And the statute makes clear that a “[t]ax or fee” means “a tax or fee *administered by the tax commissioner*.” (Emphasis added.) R.C. 5703.77(A)(2). Accordingly, the statute provides that, with regard to taxpayer refunds, “*the tax commissioner* shall review the taxpayer’s accounts for the tax or fee and notify the taxpayer of any credit account balance for which *the commissioner* is required to issue a refund[.]”

(Emphases added.) R.C. 5703.77(B). Again, the statute nowhere references the Treasurer. *See also* R.C. 5703.77(D) (“[T]he tax commissioner shall withhold from that refund the amount of any of the taxpayer’s tax debt . . .”).

The Treasurer has no legal duty—let alone a *clear* legal duty—to provide Relators with their requested relief. The Treasurer is improperly named as a respondent here and should be dismissed from the case.

C. Relators had adequate legal remedies through the administrative process and therefore may not seek mandamus.

As discussed above, Relators had adequate legal remedies by way of (1) petitioning for reassessment; (2) appealing the final assessment to the Board of Tax Appeals; and (3) appealing any adverse judgment of the Board of Tax Appeals to this Court or a lower court of appeals. “It is well settled that mandamus will not issue when an individual has a plain and adequate remedy in the ordinary course of law.” *State ex rel. Hodge v. Ryan*, 131 Ohio St. 3d 357, 2012-Ohio-999, 965 N.E.2d 280, ¶ 6; *see also State ex rel. Steele v. McClelland*, 154 Ohio St.3d 574, 2018-Ohio-4011, 116 N.E.3d 1267, ¶ 9; R.C. 2731.05. “Administrative remedies are plain and adequate remedies that preclude mandamus.” *State ex rel. Hodge*, 131 Ohio St. 3d 357, at ¶ 6.

Relators have not established that these legal remedies are unavailable or inadequate. *See supra* Section I.C. Nor do they allege that they have attempted these legal remedies—which the General Assembly has provided to them by statute. *See, e.g.,* Compl. at ¶ 59. Thus, Relators have not “establish[ed], by clear and convincing evidence. . . the lack of an adequate remedy in the ordinary course of the law.” *State ex rel. Luoniansuu*, 161 Ohio St. 3d 178, ¶ 15. For this additional reason, Relators’ mandamus action must be dismissed.

CONCLUSION

For the foregoing reasons, Relators' Complaint against the Treasurer should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed and a true and accurate copy was served on May 24, 2022, by electronic mail upon the following:

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