

**IN THE
SUPREME COURT OF OHIO**

**State of Ohio, ex rel. William D. Mason,
Cuyahoga County Prosecuting Attorney**
The Justice Center, Courts Tower
1200 Ontario St., Ninth Floor
Cleveland, Ohio 44113

Case No. 12-1128

Relator,

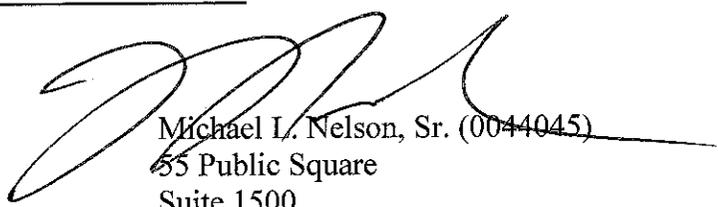
vs.

**Nancy Margaret Russo,
Judge, Cuyahoga County Court
of Common Pleas**
The Justice Center, Courts Tower
1200 Ontario St., Courtroom 18C
Cleveland, Ohio 44113

Respondent.

On Writ of Prohibition

**BRIEF OF *AMICUS CURIAE* NOVA'S INTERNET SWEEPSTAKES CAFÉ IN
SUPPORT OF RESPONDENT**



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INTRODUCTION

Now comes Nova's Internet Sweepstakes Café ("Nova's" or amicus), as Amicus Curiae, and files this memorandum in support of Respondent Judge Nancy Margaret Russo's ("Respondent") Motion to Dismiss and in opposition to the Relator, William D. Mason ("Relator") as pled in his Petition and Complaint for Writ of Prohibition and Immediate Alternative Writ.

INTEREST OF AMICUS CURIAE

Nova's Internet Sweepstakes Café ("Nova's" or amicus) is an Ohio Corporation employing four people, three full-time and one part-time. Nova's sells computer time - including internet access, word processing, and media player functions - as well as facsimile and photocopying services. Nova's also uses sweepstakes software to promote its sale of computer time. On May 30, 2012, amicus received a cease and desist letter signed by Relator informing amicus of Relator's position that "'Internet Sweepstakes Cafés' are gambling establishments" prohibited by Ohio Rev. Code 2915.02(A)(2) (Petition Ex 1.) The letter maintained that "[a]ny individual that continues to operate an Internet Sweepstakes Café will have their facts presented to a Grand Jury for criminal prosecution and forfeiture."

Nova's maintains that Ohio Rev. Code 2721.03 grants the Cuyahoga County Court of Common Pleas unambiguous jurisdiction to construe Ohio Rev. Code § 2915.01 *et seq.* in light of House Bill 386, which was signed by Governor Kasich on June 11, 2012. The Court also has the authority to determine the validity of § 2915.01 *et seq.* under the Ohio Constitution as applied to "sweepstakes establishments," as that term is defined by House Bill 386 which explicitly authorizes Nova's to offer its sweepstakes promotion. The County Prosecutor's threat to seek an indictment against anyone operating an internet sweepstakes

café profoundly affects Nova’s business, which has been duly licensed and taxed in the amount of \$22,640 annually by the city of Brook Park pursuant to Brook Park Ordinance No. 9657-2010. As a small business threatened with criminal prosecution for activities that have been expressly permitted by a duly enacted law, amicus has a substantial interest in the affirmation of its entitlement to rely on the judicial branch to vindicate rights that have been expressly granted to it by the General Assembly.

These questions represent matters of ultimate importance to the amicus and similarly situated café owners who have invested in their communities by providing jobs, engaging in commerce with other lawful businesses, and paying taxes and license fees to municipalities such as The City of Brook Park pursuant to local ordinances specifically authorizing them to operate.

SUMMARY OF THE ARGUMENT

To succeed in his petition for writ of prohibition, Relator must prove that (1) Respondent is exercising or is about to exercise judicial power, (2) the exercise of power is unauthorized by law, and (3) Relator possesses no other adequate remedy of law. *State ex rel. Westlake v. Corrigan*, 112 Ohio St.3d 463, 2007 Ohio 375, 860 N.E.2d 1017, ¶ 12. While no party disputes that the Respondent has exercised judicial power, Relator has not proven, and indeed cannot prove, that Respondent lacks the jurisdiction to hear the matter.

Respondent has jurisdiction under the Ohio Declaratory Judgment Act, Ohio Rev. Code § 2721 *et seq.* which grants trial courts jurisdiction to determine any question of “construction or validity” of a statute and to further issue a “declaration of rights, status, or other legal relations under [the statute].” Ohio Rev. Code § 2721.03. The enactment of House Bill 386, which unambiguously provides that “sweepstakes establishments” in

operation at the time of its enactment may continue to operate, also recognizes the Court's authority to issue court orders to qualified "sweepstakes establishments" permitting them to resume operation. To the extent that Ohio Rev. Code § 2915.02 (the "Statute") could have ever been construed as prohibiting internet cafés from offering sweepstakes promotions, any such construction of the Statute has been necessarily repealed by House Bill 386.

Relator perversely argues that the doctrine of separation of powers renders courts powerless to address acts of the executive branch that are clearly ultra vires under the General Assembly's laws or the Constitutions of the United States and the State of Ohio. Such a conclusion is not, and indeed cannot be, supported by Ohio law.

Relator's conduct in refusing to revoke his threat that "[a]nyone operating an Internet Sweepstakes Café will have their facts presented to a Grand Jury for criminal prosecution and forfeiture" even after the enactment of H.B. 386, (Petition, Ex. 1), itself offends the separation of powers doctrine. Relator is insisting upon a policy that gives no effect to, and in fact contravenes, a duly enacted command of the General Assembly.

Prosecutorial discretion is not limitless. Although this Court has not precisely delineated its limits, it has acknowledged their existence in no uncertain terms. *State ex rel. Murr*, 34 Ohio St. 3d 46, 516 N.E.2d 234 (1987). The United States Supreme Court similarly held that a prosecutor's discretion was not "unfettered," and that even "selectivity in the enforcement of criminal laws" was subject to "constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 124-25 (1979). Neither the Relator nor any amicus have cited a case holding that prosecutorial discretion extends to a decision to enforce a statute that is void, or to prosecution of a statute under a construction that the General Assembly has effectively repealed, and no such authority exists

If it were otherwise it would mean that one could not mandamus a state officer to perform a clearly mandatory duty or one could not enjoin him from committing a patent and outrageously illegal act. A private citizen in such case would be helpless from unlawful, oppressive and outrageous conduct of a state official.

Am. Life & Accident Ins. Co. v. Jones, 152 Ohio St. 287, 299, 89 N.E.2d 301 (1949) (holding that a declaratory judgment action against the head of an administrative board of the State was proper). As Relator cannot show that the Respondent lacks jurisdiction to consider the construction, validity, and construction of the Statute, Respondent's Motion to Dismiss should be granted.

ARGUMENT

I. THE RESPONDENT HAS JURISDICTION TO DETERMINE QUESTIONS OF THE VALIDITY AND CONSTRUCTION OF OHIO REV. CODE § 2915 UNDER THE OHIO DECLARATORY JUDGMENT ACT.

"The validity, construction and **application** of criminal statutes and ordinances are appropriate subjects for a declaratory judgment action." *Peltz v. South Euclid*, 11 Ohio St. 2d 128, 228 N.E.2d 320, paragraph 1 of the syllabus (1967) (emphasis added); *see also Pack v. Cleveland*, 1 Ohio St. 3d 129, 131, 438 N.E.2d 434 (Ohio 1982) (holding that one "affected by" or "materially interested" in a criminal statute may challenge the validity of the law and that a justiciable cause may be shown by the relationship of the parties concerned with the application of the law).

In *Peltz*, a candidate for the State Senate, brought an action for declaratory and injunctive relief against the City of South Euclid in the Cuyahoga County Court of Common Pleas under Ohio Rev. Code § 2721.02. *Peltz*, 11 Ohio St. 2d at 128. The Declaratory Plaintiff challenged Ordinance No. 18-63, which was enacted to eliminate "any sign which would be visible to passing traffic announcing, advocating, promoting or otherwise

commenting upon a political candidate or a political subject or issue,” excepting bumper stickers. *Id.* The Court of Common Pleas held that the candidate lacked standing to challenge the constitutionality of the statute, because the election for the state Senate seat had already been held. *Id.* The Supreme Court of Ohio reversed, holding that the record established the existence of a ripe controversy because the ordinance would nevertheless impact his “constitutional right as a citizen, resident, and property owner to erect signs for other candidates and issues in the future.” *Id.* at 131. The Supreme Court held that the ordinance “violates Section 11, Article I of the Constitution of the state of Ohio, as well as the First and Fourteenth Amendments to the Constitution of the United States,” and further held that, “South Euclid is permanently enjoined from enforcing the ordinance to the extent of its constitutional infirmity.” *Id.* at 134.

Peltz illustrates that declaratory plaintiffs need not violate the law in order to establish the existence of a sufficient controversy triggering the Respondent’s jurisdiction under Ohio Rev. Code 2721.03. *Id.* at 131. Rather, the Respondent’s jurisdiction is proper whenever a controversy exists “between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Id.* (quoting *Evers v. Dwyer*, 358 U.S. 202, 203 (1958)); see also *Devon, Inc. v. State of Ohio, Bureau of Motor Vehicles*, 31 Ohio App.3d 130, 508 N.E.2d 984 (1st Dist.1986) (holding that a party who seeks to determine the construction or validity of a statute has a legal remedy through a declaratory judgment action).

In the instant case, it is clear that Relator and the Declaratory Plaintiffs below are “parties having adverse legal interests.” Relator contends that the Declaratory Plaintiffs

operate businesses that are *per se* unlawful, even in light of the enactment of House Bill 386, which provides that:

All sweepstakes establishments conducting a sweepstakes through the use of a sweepstakes terminal device, whether or not licensed by a local entity, in existence and operating before [June 11, 2012] may continue to operate at only their current locations after [June 11, 2012].

(Ex. B, House Bill 386 § 12(B).)

It is equally clear that Relator's actions in informing the Declaratory Plaintiffs below of his intention to seek an indictment against them if they continue to operate their business creates a controversy of "sufficient immediacy and reality" to confer jurisdiction under the Declaratory Judgment Act. Just as in *Peltz*, where it was undisputed that the municipality intended to enforce an ordinance against the declaratory plaintiff, here it is undisputed that Relator intends to seek the prosecution of "[a]nyone operating an Internet Sweepstakes Café." (Petition, Ex. 1.) See *State ex rel. Greater Cleveland Rapid Transit Auth. v. Griffin*, 62 Ohio App.3d 516, 519, 576 N.E.2d 825 (8th Dist.1991) (holding that county prosecutor had created a clear justiciable controversy by threatening prosecution).

Indeed, the enactment of House Bill 386 necessarily presents an immediate question of the proper construction and application of Ohio Rev. Code § 2915 *et seq.* Absent a judicial determination of the proper construction of Ohio Rev. Code § 2915 *et seq.* in light of the enactment of House Bill 386, the construction of § 2915 advanced by Relator cannot provide "fair notice and sufficient definition and guidance to enable [café owners] to conform [their] conduct to the law." *Siegel v. Lifecenter Organ Donor Network*, 2011 Ohio 6031, ¶ 33 (Ohio Ct. App., Hamilton County Nov. 23, 2011) (evaluating statute under standard for unconstitutional vagueness in declaratory judgment action).

A. The Enactment of House Bill 386 Presents a Ripe Controversy Concerning the Proper Construction of Ohio Rev. Code § 2915 *et seq.*

Under settled Ohio Law, if a newly enacted piece of legislation is clearly in conflict with existing legislation, effect must be given to the later act. *Goff v. Gates*, 87 Ohio St. 142, 149, 100 N.E. 329 (1912).

It is also a well-known rule of construction that where a statute purports to revise the whole subject-matter of a former act and thereby evidences the fact that it is intended as a substitute for the former, although it contains no express words to that effect, **it operates as a repeal of the former law.**

Id. (emphasis added). House Bill 386 clearly provides that internet sweepstakes cafés in operation at the time of the Bill’s enactment, as well as those that have closed due to the threat of criminal prosecution, may remain open provided they comply with certain regulatory limitations imposed by the Bill. House Bill 386 also provides that the Attorney General or the appropriate county prosecuting attorney “may bring an action for injunction against a person that conducts a sweepstakes through the use of a sweepstakes terminal device that has not conducted such sweepstakes before the effective date of this section.” (*Id.*, § 12(C)(3)).) Tellingly, the Relator’s authority under House Bill 386 is **limited** to the authority to bring an action for injunction—not criminal charges—and only then against a person conducting sweepstakes that had not conducted such sweepstakes before the effective date of the Act.

In asserting the “prosecutorial discretion” to prosecute sweepstakes operators that were expressly allowed to operate, Relator is claiming primacy over another co-equal branch of the government, the state legislature. It is the role of the legislature to provide the executive branch of government with laws that “plainly demarcate” the issue. *Batchelder*, 442 U.S. at 126. The executive may not make such a demarcation itself in the guise of

enforcing the law. *Id.* To do so would allow the executive to **make the law** in violation of the separation of powers doctrine.

As such, Relator's threat to prosecute sweepstakes establishments notwithstanding the passage of House Bill 386 presents a significant question concerning the proper construction of Ohio Rev. Code § 2915.02. Nova's asserts that any construction of the statute that would impose criminal liability on it for offering a sweepstakes promotion was necessarily repealed by the enactment of House Bill 386. Relator disagrees. This is precisely the type of dispute concerning construction of a statute that the Court is expressly authorized by the Ohio Declaratory Judgment Act to resolve.

Relator's cease and desist letters sent to sweepstakes establishments make clear that he is not merely reserving the right to bring charges based upon an independent investigation of particular sweepstakes café operators. Rather, Relator expressly states the intention to seek an indictment against "[a]nyone operating an Internet Sweepstakes Café." (Petition, Ex. 1.) Consequently, Relator's references to cases purporting to hold that a declaratory judgment action is inappropriate when "a party seeks to **pre-adjudicate** whether conduct is criminal," are simply inapposite. (*See* Petition at ¶ 36) (emphasis added). Unlike the declaratory plaintiffs in *Quality Care Transport v. OWFS*, 2nd Dist. Case Nos. 2009-CA-113, 2009-CA-121, 2010 Ohio 4763, the Declaratory Plaintiffs here are not seeking declarations as to whether their past conduct violated the law. Rather, like the declaratory plaintiff in *Peltz*, the Declaratory Plaintiffs seek a determination of the proper construction of § 2915.02 in light of the enactment of House Bill 386 and a declaration of their rights to continue to operate, which House Bill 386 expressly contemplates courts will issue. To the extent that Relator appears to suggest that jurisdiction under the declaratory judgment act is

limited to facial challenges of a statute, (Petition at ¶ 37), such a view is contrary to the clear statement of this Court that the **application** of a criminal statute is an appropriate subject of a declaratory judgment action. *Peltz*, 11 Ohio St. 2d 128, paragraph 1 of the syllabus.

Relator's argument that such a determination represents an unconstitutional encroachment upon his prosecutorial discretion is misplaced. House Bill 386 unequivocally grants the executive branch **no discretion** to prosecute grandfathered sweepstakes establishments because it explicitly authorizes such establishments to operate. Whether the enactment of House Bill 386 repeals Ohio Rev. Code 2915 with respect to the operation of sweepstakes establishments, or whether it simply compels a reading of Ohio Rev. Code 2915 that does not extend to conduct authorized by House Bill 386, it is indisputable that House Bill 386 precludes the prosecution of grandfathered internet sweepstakes café owners under Ohio Rev. Code § 2915.02. The law is clear that no executive officer possesses the discretion to act outside the bounds of his authority, and no case cited by Relator holds otherwise.¹

The infirmity of Relator's argument is apparent when one considers that House Bill 386 clearly delineates Relator's authority to proceed against sweepstakes establishments. Relator merely has the right to seek an injunction against those sweepstakes establishments that are covered by the moratorium called for in House Bill 386. In previous decisions

¹ Amicus Ohio Prosecuting Attorneys Association appears to operate under the same misconception, citing *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197 for the proposition that the decision to prosecute is "discretionary and not normally subject to judicial review." *Mootispaw*, however, was an action seeking a writ of mandamus to compel a prosecutor to prosecute an alleged offender for collusion. The prosecutor's authority to initiate prosecutions under the statute was never challenged. In the instant case, the Declaratory Plaintiffs contend that prosecutions of sweepstakes establishments are not authorized by Ohio law.

denying petitions for writs of prohibition, this Court has noted the distinction between an executive official's discretionary powers and unlawful acts that are not consigned to the discretion of the officer. In *State ex rel. Celebrezze v. Court of Common Pleas*, 60 Ohio St. 2d 188, 398 N.E.2d 777 (1979), this Court declined to grant a writ of prohibition against a Court's order granting a temporary restraining order restraining the Secretary of State from dismissing a member of the board of elections and a contempt order for violation of the TRO while the trial court considered whether the dismissal violated the State's Sunshine Statute. *Id.* at 189. Noting that it had not granted writs of prohibition to affirm "extraordinary powers" in the executive branch, this Court found that the respondent in that case possessed the jurisdiction to determine the legality of the Secretary's action. *Id.* Similarly, the Respondent here clearly possesses the jurisdiction to determine the legality of the Relator's extraordinary threat to prosecute internet café owners in defiance of the newly enacted provisions of House Bill 386.

B. The Respondent Has Jurisdiction to Determine Whether the State's Construction of Ohio Rev. Code § 2915 Is Valid Under The United States and Ohio Constitutions.

Nova's also alleges that the Relator's construction of § 2915.02 as applying to all internet café operators offering sweepstakes promotions violates Art. I, § 2; Art. I, § 11; Art. I, § 16; and Art. II, § 26 of the Ohio Constitution. Relator's statement that "[n]o plaintiff in this case has sought a declaration that Ohio's antigambling statutes are unconstitutional or otherwise void," is patently untrue. (*See* Petition ¶ 37.)

Nova's has alleged that Relator's construction of the Statute also violates those provisions of the Ohio Constitution guaranteeing due process, equal protection, free speech, and equal operation of the law. This Court has held that declaratory judgment actions—and actions for prohibitory injunctions—are the appropriate vehicles for challenging the constitutionality of a statute. *See, e.g., State ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629, 635, 1999 Ohio 130, 716 N.E.2d 704 (“[C]onstitutional challenges to legislation are normally considered in an action originating in a court of common pleas.”).

C. The Respondent Possesses the Authority to Issue a Temporary Restraining Order as a Power Ancillary to Its Jurisdiction to Determine the Proper Construction and Validity of the Statute.

“[A] court has authority to make **any judicial order** which, from the nature of the case, may be necessary to the effective exercise of its jurisdiction.” *State ex rel. Ellis v. Board of Deputy State Sup’rs*, 70 Ohio St. 341, 349, 71 N.E. 717 (1904) (emphasis added). As the Respondent clearly possesses the jurisdiction to determine the construction, validity, and application of § 2915.02 and House Bill 386, she also clearly possesses the authority to make preliminary orders that are ancillary to that jurisdiction.

Contrary to the State's contention, the factual findings in the Respondent's order do not make “premature determinations” concerning the lawfulness of the Declaratory Plaintiffs' actions because a TRO is an interlocutory order. Relator is free to dispute such factual findings anew as the case progresses and the ultimate issue of the legality of the Declaratory Plaintiffs business in light of the enactment of House Bill 386 is still before the Respondent just as the Ohio Declaratory Judgment Act dictates it should be.

The purpose of a temporary restraining order or preliminary injunction is to “prevent designated parties from exercising their claimed rights pending a determination of the merits”

and to “preserve the status quo ante.” *Black v. Hall*, 2010 Ohio 4677, ¶ 8 (Ohio Ct. App., Cuyahoga County Sept. 30, 2010); *Beasley v. City of E. Cleveland*, 20 Ohio App. 3d 370, 374, 486 N.E.2d 859 (Ohio Ct. App., Cuyahoga County 1984); *Gessler v. Madigan*, 41 Ohio App. 2d 76, 79, 322 N.E.2d 127 (Ohio Ct. App., Auglaize County 1974). “The status quo to be preserved by a preliminary injunction is the last actual, peaceable, uncontested status which preceded the pending controversy.” *Black*, 2010 Ohio 4677 (quoting *Edgewater Constr. Co. v. Percy Wilson Mortg. & Finance Corp.*, 44 Ill. App. 3d 220, 228 (Ill. App. Ct. 1st Dist. 1976)).

While Relator asserts there is a general rule that a trial court lacks the authority to enjoin the enforcement of a criminal statute, *see, e.g., Troy Amusement Co. v. Attenweiler*, 137 Ohio St. 460, 465, 30 N.E.2d 799 (1940), Relator can cite to no case applying such a rule to the issuance of temporary or ancillary interlocutory orders necessary to maintain the status quo ante during the pendency of the underlying declaratory judgment proceeding. *See, Celebrezze*, 60 Ohio St. 2d at 190 (holding that action for writ of prohibition could not be used to challenge the issuance of a temporary restraining order when Respondent possessed jurisdiction to hear the underlying action).

II. THE RESPONDENT HAS THE AUTHORITY TO ENJOIN THE ENFORCEMENT OF AN UNCONSTITUTIONAL CONSTRUCTION OF A CRIMINAL STATUTE.

As discussed *supra*, Respondent’s jurisdiction under the Declaratory Judgment Act derives from her authority to determine the construction, validity, and application of statutes, including the right to issue relief concerning the constitutionality of statutes. Relator however, contends a Court in equity may not interfere with criminal prosecutions and in support cites the following summary from the Court of Appeals for Montgomery County:

A court of equity “will not interfere by injunction to prevent the enforcement of criminal statutes at the instance of an alleged law violator.” *Troy Amusement Co. v. Attenweiler*, 137 Ohio St. 460, 465 (1940), citing 1 High on Injunctions, 4th ed. 85, section 68; *Olds v. Klotz*, 131 Ohio St. 447, 452 (1936). The proper forum for such a case is the criminal courts.

Ensley v. City of Dayton, Case No. 14487, 1995 Ohio App. LEXIS 3366 (Ohio Ct. App., Montgomery County Aug. 16, 1995). (See Petition at ¶37.) However, both *Troy Amusement Co. v. Attenweiler* and *Olds v. Klotz*, cited by the court in *Ensley v. City of Dayton*, establish that such a command is simply inapplicable where an unconstitutional statute would impair private property rights.

In *Olds*, the Ohio Supreme Court found that an ordinance restricting the hours of operation of grocery stores had “no substantial relation to public health, safety, morals or general welfare, and [was] in contravention of the due process clause of the Fourteenth Amendment of the United States Constitution and the due course of law clause of Article I, Section 16 of the Constitution of Ohio.” *Olds*, 131 Ohio St. at 452. After finding the ordinance unconstitutional, the Court found that while “as a general rule” an injunction will not lie against the enforcement of an unconstitutional ordinance, “where the enforcement of a clearly unconstitutional law or ordinance will infringe property rights and work an irreparable injury to one’s business equity will give proper relief by injunction.” *Id.*

In the instant case, Nova’s pled that Relator’s prosecution of its business would infringe on its property rights, work an irreparable injury to its business, and violate its rights under the Ohio Constitution. For these reasons, *Olds*, by affirming the common pleas court’s authority to enjoin the enforcement of unconstitutional statutes affirms the Respondent’s jurisdiction to hear challenges to the Statute’s constitutionality.

In *Anderson v. Brown*, 13 Ohio St. 2d 53, 233 N.E.2d 584 (1968), the Supreme Court of Ohio reversed a ruling of the Court of Appeals finding an injunction improper in an action challenging the validity of a municipal ordinance that the Declaratory Plaintiff contended conflicted with state law. Noting that that the ordinance in question specified that each day of noncompliance results in a separate offense under the ordinance, the Ohio Supreme Court wrote:

The fact that the constitutional issues raised in this case could also be raised as a defense in the criminal action does not necessarily mean that such a defense is an adequate remedy. Where each day of noncompliance results in a separate offense, a defendant under this ordinance is faced with a set of undesirable choices. He may stop his violations by closing down his trailer park, thereby incurring business losses; he may continue to violate the ordinance, thereby risking further prosecution and additional fines; or he may comply by obtaining a permit, thereby submitting for at least a year to the very ordinance which he believes to be invalid. If he chooses the last-mentioned course of action he takes the risk that, compliance once obtained, prosecution of the criminal action against him might be stopped in order to avoid testing the constitutionality of a questionable ordinance. The clearer the unconstitutionality of such an ordinance, the greater would be the likelihood of cessation of prosecution upon compliance.

Anderson, 13 Ohio St. 2d at 56. The policy concerns articulated by the Court are equally applicable to the café operators. As in *Anderson*, café owners are presented with a set of “undesirable choices.” *Id.* If the cease and desist letters are to be taken truthfully, café owners may either risk the certainty that the prosecutor will go before a Grand Jury or “incur[] business losses” by shutting down their businesses, “tak[ing] the risk that compliance, once obtained, prosecution of [a] criminal action against [them] might be stopped in order avoid testing the constitutionality of a questionable [construction of the statute].” *Id.*

Tellingly, neither *Troy Amusement Co.* nor *Ensley* were raised through a writ of prohibition. Rather, they are simply appeals of a court's final injunctive order. "It is well-settled that prohibition does not function as a substitute for an appeal." *State ex rel. Celebrezze*, 60 Ohio St. 2d at 190. Indeed, this Court has explicitly affirmed the **jurisdiction** of common pleas courts to enter injunctions restraining further action by the executive. In *Garono v. State*, 37 Ohio St. 3d 171, 524 N.E.2d 496 (1988), this Court affirmed in part a lower court's injunction enjoining the police from further "seizing, confiscating, or impounding" video poker machines. While this Court noted that a court should exercise "great caution" when enjoining the executive branch from enforcing the law, *id.* at 173, it found that the issuance of the injunction was proper when the State could not show that the machines were intended to be used to violate the gambling laws. *Id.* at 175. In other words, the Supreme Court approved of a trial court evaluating the merits of the executive branch's construction of a criminal statute, just as Nova's asked the Court to do here. This Court's decision in *Garono* clearly illustrates that whatever principles may caution against the imposition of injunctive relief against the executive's law enforcement powers, such principles are **not jurisdictional**. "Jurisdiction does not relate to the rights of the parties, but to the power of the court." *Executors of Long's Estate v. State*, 21 Ohio App. 412, 415, 153 N.E. 225 (1st Dist. 1926). As Relator can show no jurisdictional basis for relief, his petition for a writ of prohibition must therefore be denied.

III. THE RESPONDENT'S ORDER IS NOT, IN ANY CASE, INTERFERING WITH A CRIMINAL INVESTIGATION.

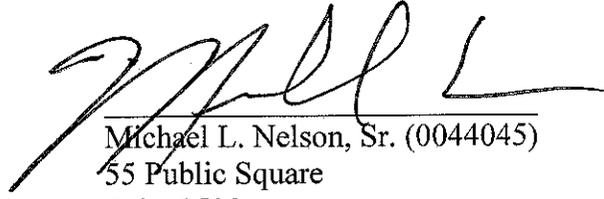
Nova's is not named in the May 30th indictment, and is not involved in any pending criminal prosecution. *Compare Peltz*, 11 Ohio St. 2d at 128 (declaratory plaintiff not yet charged under ordinance); *Ensley*, 1995 Ohio App. LEXIS 3366 at *5 (declaratory plaintiff

charged in criminal complaint). None of the parties named in the indictment are parties in the underlying action. Relator has conceded in the action below that the alleged criminality of “internet sweepstakes cafés” are not dependent on any one software system. (*See* Petition Ex. 8 (“Defense agrees that there is no discernible difference between VS2 and non-VS2 software for purposes of internet sweepstakes cafés.”).) Indeed Respondent noted that the May 30th indictment contains no charge related to the operation of the software used by amicus. (Petition at ¶ 19.) Consequently, her Order, or any other Orders she may issue in the lawsuit filed by Nova’s, does not interfere in any way with Relator’s criminal prosecution against other persons not party to this civil suit. In any case, Relator has presented no credible evidence that Respondent’s exercise of her jurisdiction in the underlying action will interfere in any way with the State’s prosecutorial discretion.

CONCLUSION

The Relator is the one who has no authority here, not Respondent. This fundamental fact cannot be changed by Relator’s repeated misguided invocations of prosecutorial discretion. The General Assembly simply left Relator no legitimate discretion over this subject. For the aforesaid reasons stated herein, the Respondent’s Motion to Dismiss should be granted and the Relator’s petition for a writ of prohibition should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MLN', is written over a horizontal line.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing pleading was served by both regular U.S.

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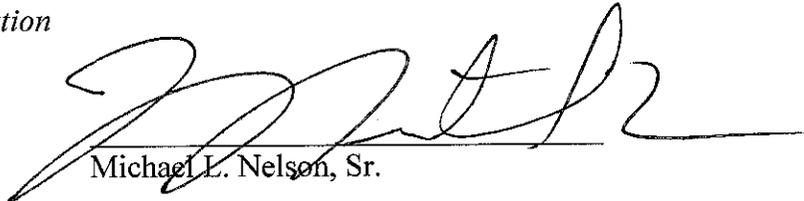
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