

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, ex rel.)
William D. Mason, Cuyahoga)
County Prosecuting Attorney,)
Relator,)
vs.)
Nancy Margaret Russo, Judge,)
Cuyahoga County Court of)
Common Pleas,)
Respondent.)

Case No. 2012-1128
Original Action in Prohibition

RELATOR'S MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS

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INTRODUCTION

This is an original action in prohibition in which Relator William D. Mason, Cuyahoga County Prosecuting Attorney ("Relator") seeks to prevent Respondent the Honorable Nancy Margaret Russo ("Respondent") from conducting judicial proceedings that are not authorized by law. In particular, Respondent is currently presiding over a civil action that was brought and/or joined by at least twenty-three (23) so-called Internet Café operators who have sought to enjoin Relator from threatening criminal prosecution unless illegal gambling activities cease and from enforcing the provisions of Ohio Revised Code Chapter 2915 against them.

In her July 26, 2012 Motion to Dismiss, Respondent takes the position that she has jurisdiction to decide, by declaratory judgment, whether certain conduct violates valid Ohio criminal statutes. As more fully explained hereafter, Relator submits that Respondent has no jurisdiction in declaratory judgment to pre-adjudicate guilt or innocence under a valid criminal statute. Beyond that, the practical implications from Respondent's continued conduct of these proceedings are truly astonishing. Does an Ohio judge have jurisdiction in declaratory judgment to decide whether a person selling a new formulation of bath salts or synthetic marijuana would be violating Ohio's criminal drug laws? Does an Ohio judge have jurisdiction in declaratory judgment to decide whether a person who has devised a new form of assisted suicide would be committing murder? Does an Ohio judge have jurisdiction in declaratory judgment to decide whether a person could invoke the castle-doctrine to shoot a trespasser on their curtilage? Does an Ohio judge

have jurisdiction in declaratory judgment to decide whether a public official could receive gifts from a subordinate or business associate without implicating Ohio's bribery statute? If the answer to these questions is no, then there is nothing special about Ohio's criminal gambling statutes that would justify Respondent's extraordinary actions in the case at bar.

Relator respectfully submits that in entertaining the underlying civil action and issuing declaratory and injunctive relief to prevent Relator from enforcing valid Ohio gambling laws, Respondent has acted in excess of her jurisdiction by interfering unlawfully with Relator's ability and duty to enforce the law, supplanting Relator's prosecutorial discretion and compromising pending criminal prosecutions and investigations. Because Relator's Petition and Complaint for Writ of Prohibition ("Petition") states good grounds for relief in prohibition, Relator respectfully urges this Court to deny Respondent's motion to dismiss and, unless a peremptory writ of prohibition is issued, grant an alternative writ of prohibition to permit the presentation of evidence and the submission of merit briefs.

STATEMENT OF THE FACTS

The facts in brief are that on May 30, 2012, a Cuyahoga County grand jury indicted ten (10) individuals and seven (7) companies for conducting illegal gambling activities by means of an intricate internet gambling system known as VS2. See Petition at para. 5. The indictment alleged that those defendants used the artifice of operating an Internet Sweepstakes Café to conceal their gambling activities. *Id.* Internet Sweepstakes Cafés are retail establishments often located

in shopping centers or strip malls that operate computerized gambling devices. See Petition at para. 6. For a price, usually \$20.00, a customer is provided with gambling “credits” and is able to log onto a computer terminal that is programmed to simulate a video slot machine. *Id.* In order to create the illusion that such activity is not illegal gambling, retail vendors purport to sell customers “Internet time” or “long-distance pre-paid phone cards,” and the money used to purchase such items is loaded into the video game as gambling credits or tokens. *Id.* Depending on the customer’s luck at playing the video slot machines, the player can win more credits or tokens that can be redeemed for cash prizes or more gambling time. *Id.* The VS2 criminal case is *not* assigned to Respondent; it was randomly assigned to another Judge on the Cuyahoga County Court of Common Pleas.

On the same day that the grand jury indictment was returned, Relator sent letters addressed to various establishments in Cuyahoga County directing them to cease and desist from operating on their premises Internet Sweepstakes gaming systems that violated Ohio gambling laws. See Petition at paras. 9-10.

On June 4, 2012, plaintiff J&C Marketing, LLC filed a Verified Complaint for Declaratory Judgment, Temporary Restraining Order, and Preliminary and Permanent Injunctive Relief against Relator. See Petition at para. 11. That case was assigned to Respondent. *Id.* Shortly thereafter, approximately twenty-two (22) or more plaintiffs beat a fast and furious path to the courthouse door – not so much to have other judges randomly assigned to decide their cases but rather to intervene as plaintiffs so that their case would be decided by Respondent. See Petition at

para.26. And although Respondent initially was steadfast in declaring that no Sweepstakes café using the VS2 gaming system would be permitted to intervene, she subsequently capitulated and allowed their intervention as well. See Petition at para. 19.

On June 13, 2012, Respondent issued the first in what would be a steady stream of temporary restraining orders, authorizing the plaintiffs' businesses to re-open and declaring that that "the businesses/plaintiffs are sweepstakes establishments operating pursuant to Ohio law; that the business activity is not gambling and is not prohibited by Ohio law; that the individual localities have made a determination that the businesses are lawful enterprises and issued permits and/or licenses to these plaintiffs; *** [and that the plaintiffs] are not operating in violation of Ohio law (based upon the pleadings and argument) and that the legislature has specifically permitted the business of sweepstakes enterprises." See Petition at paras. 16-17 and State's Exhibit 5. Respondent then authorized the parties to seek discovery from the Relator concerning matters that were in varying stages of undercover criminal investigations, going so far as to permit the parties to depose Relator once if not more, though somewhere less than twenty (20) times. See Petition at para. 20.

Respondent's conduct of these proceedings and the rulings issued therein have fundamentally compromised the Relator's ability to prosecute pending criminal cases and enforce Ohio's gambling laws as they may relate to future criminal prosecutions. Contrary to Respondent's assertions, the fact that Relator

has not yet sought criminal charges against the plaintiffs below is immaterial. Until now, Relator has elected to proceed against the owners and wholesale distributors of the VS2 gaming system and has declined to prosecute the retail operators of the VS2 gaming system and equivalent systems. Relator has expressed his intent to bring criminal prosecutions against the plaintiffs should the gambling operations continue. (State's Exhibit 1, attached to Relator's Petition).

And while the VS2 civil plaintiffs have used Respondent's orders as a shield against criminal prosecution, the VS2 criminal defendants have begun using Respondent's various orders as a sword against the pending indictments. In a July 13, 2012 motion filed after the commencement of this original action that was accordingly unavailable then but will be submitted as evidence here if an alternative writ is granted, attorneys for the defendants – indeed, the same attorneys that Respondent allowed to argue on behalf of the VS2 plaintiffs' bids for intervention – explicitly and heavily relied on Respondent's orders to attack the criminal prosecution:

Pursuant to H.B. 386, this Court^[1] recently granted temporary restraining orders requested by a number of Internet café businesses – some of which use the VS2 System – that were shut down by law enforcement before H.B. 386 was enacted. Ex 4, Journal Entry, *AMA Ventures Inc. v. Mason*, Case No. CV-12-785188 (Ohio Ct. Common Pleas, Cuyahoga County June 25, 2012) (Russo, J.); Ex. 5, Journal Entry, *J&C Marketing LLC v. Mason*, Case No. CV-12-784234 (Ohio Ct. Common Pleas, Cuyahoga County June 14, 2012) (Russo, J.). The Court found that these cafés “are sweepstakes establishments operating pursuant to Ohio law” and determined that their sweepstakes promotions are “not gambling.” *Id.* The Court ruled that

¹As noted previously, Respondent does not preside over the criminal case, which is pending before a different judge of the Court of Common Pleas.

the cafés could resume operating because, through H.B. 386, the “Legislature has specifically permitted the business of sweepstakes enterprises.” *Id.* The Court explained that H.B. 386 seeks to preserve the state of affairs that existed prior to the recent series of cease-and-desist letters sent to sweepstakes cafés in Cuyahoga County. *See id.* (finding that “the balance of harm requires the issuance of the said cease and desist letters”).

Because the cafés in *J&C Marketing* and *AMA Ventures* were “operating prior to the enactment of H.B. 386,” they were “grandfathered in pursuant to that legislation” and therefore could reopen. *Id.* It bears repeating that some of these cafés use the VS2 Sweepstakes System. Ex. 4, Journal Entry, *AMA Ventures*. Just as these cafés are “grandfathered in” pursuant to H.B. 386, *id.*, so is the VS2 Sweepstakes System that uses the cafés to conduct their sweepstakes. By alleging that the VS2 Sweepstakes System involves gambling, therefore, the Indictment directly conflicts with H.B. 386.

Significantly, the Court observed that the County “agrees there is no discernible difference between the VS2 and non VS2 software for purposes of Internet sweepstakes cafes.” *Id.* The Court made this observation after a State prosecutor conceded that the “difference” between the VS2 software and the non-VS2 software is like “Coke/Pepsi.” Whereas the State has indicted Defendants based on its incorrect belief that the VS2 Sweepstakes System involves gambling, the State has *not* brought criminal charges against the manufacturers of the indistinguishable software used by many Internet café business in Cuyahoga County.

* * *

Therefore, if the State cannot establish probable cause that the defendants have engaged in gambling – and, as will be established, they cannot possibly meet that standard – then the other charges necessarily fail.⁵

⁵ Moreover, as this Court has noted, the public interest is served by allowing the cafés to continue operating because State and local governments have implicitly and expressly authorized the sweepstakes cafés: “the public interest is best served by the granting of the TRO as the business have received licenses/permits from local governments,” “are not operating in violation of Ohio law,” and the Legislature has specifically permitted the business of sweepstakes enterprises.” Ex. 4,

Journal Entry, *AMA Ventures*; Ex. 5, Journal Entry, *J&C Marketing*. Furthermore, sweepstakes cafés only make income, and thus only pay taxes to the State when they are in operation. The governments long-standing permitting of, and open acceptance of tax revenue from the cafés, is incongruous with a subsequent prosecution of their business model, which is not in the public's interest.

As indicated, a copy of such filings will be submitted if an alternative writ is granted.

Because of the incalculable effect Respondent's conduct of proceedings is having and may have on future criminal prosecutions, to say nothing of the unprecedented nature of this interference with the Prosecuting Attorney's ability and duty to enforce Ohio's criminal laws, Relator commenced this original action in prohibition against Respondent on July 3, 2012, requesting peremptory and alternative writs of prohibition. On July 6, 2012, the Ohio Attorney General requested leave to file as an amicus curiae in support of Relator's request for relief in prohibition. On July 24, 2012, the Ohio Prosecuting Attorneys Association likewise moved for leave to file as an amicus curiae in support of Relator's request for relief in prohibition.

On July 26, 2012, Respondent moved for dismissal of this case. On July 27, 2012, fifteen (15) café operators move for leave to file as an amicus curiae in support of Respondent's motion to dismiss. Another café operator sought similar leave on July 30, 2012.

Relator respectfully submits this memorandum in opposition to Respondent's motion to dismiss.

ARGUMENT

I. Relator's Petition States Good Grounds for Relief in Prohibition Because Respondent's Conduct of the Underlying Proceedings Has Exceeded Her Lawful Jurisdiction.

Relief in prohibition is available to restrain a court from acting in excess of its lawful jurisdiction. In this case, Respondent has exceeded her lawful jurisdiction by her conduct of these proceedings. While the dubious basis on which the plaintiffs have induced Respondent to exercise jurisdiction will be explored more fully in Section II of this memorandum, the troubling manner in which Respondent has in fact conducted these proceedings – and its calamitous implications on the very ability to enforce Ohio criminal laws – demonstrate the urgent need to grant relief in prohibition in this case. For the reasons that follow, Relator respectfully submits that the facts alleged in the Petition provide proper grounds to issue a writ of prohibition in this case.

To obtain a writ of prohibition, the relator must show that (1) the court against whom the writ is sought is exercising or about to exercise judicial power; (2) the exercise of that power is unauthorized by law; and (3) denial of the writ will result in injury for which no other adequate remedy exists in the ordinary course of the law. *See State ex rel. Cleveland Elec. Illum. Co. v. Cuyahoga Cty. Court of Common Pleas*, 88 Ohio St.3d 447, 449, 727 N.E.2d 900 (2000). If a lower court patently and unambiguously lacks jurisdiction to proceed in a cause, prohibition will not only prevent any future unauthorized exercise of jurisdiction but will also correct the results of prior jurisdictionally unauthorized actions. *See State ex rel. Engelhart v. Russo*, 131 Ohio St.3d 137, 2012-Ohio-47, 961 N.E.2d 1118, ¶ 14. “In

cases of patent and unambiguous lack of jurisdiction, the requirement of lack of an adequate remedy at law need not be proven because the availability of alternate remedies like appeal would be immaterial.” *State ex rel. Cleveland v. Sutula*, 127 Ohio St.3d 131, 2010-Ohio-5039, 937 N.E.2d 88, ¶ 25.

In the matter at hand, there is no dispute that respondent was exercising and was going to continue to exercise judicial power in the underlying case. The fundamental issue this case presents is whether that exercise of judicial power was unauthorized by law. For the reasons that follow, relator’s Verified Complaint pleads facts showing that respondent’s exercise of judicial power in this case was unauthorized by law.

A court’s exercise of judicial power is unauthorized by law and thus amenable to relief in prohibition if the court has no jurisdiction of the cause it is attempting to adjudicate *or* if the court acts in excess of or beyond its jurisdiction. See *State ex rel. Ellis v. McCabe*, 138 Ohio St. 417, 35 N.E.2d 571 (1941), syllabus at paragraph three; *Shafer v. Common Pleas Court of Franklin Cty.*, 137 Ohio St. 429, 30 N.E.2d 811 (1940), syllabus at paragraph one; *State ex rel. Carmody v. Justice*, 114 Ohio St. 94, 97, 150 N.E. 430 (1926); *State ex rel. Kriss v. Richards*, 102 Ohio St. 455, 458, 132 N.E. 23 (1921); *State ex rel. Garrison v. Brough*, 94 Ohio St. 115, 113 N.E. 683 (1916), syllabus at paragraph two. As one Ohio treatise states,

The province of the writ of prohibition is not necessarily confined to cases where the subordinate court or other tribunal is absolutely devoid of jurisdiction but, rather, is extended to cases where such tribunal, although rightfully entertaining jurisdiction of the subject matter in controversy, proposes or is attempting to exceed its legitimate powers.

67 Ohio Jurisprudence 3d, Mandamus, Procedendo, and Prohibition, Section 189, at 659 (2009).

In *State ex rel. Burtzloff v. Vickery*, 121 Ohio St. 49, 166 N.E. 894 (1929), the Supreme Court of Ohio observed:

This court was given original jurisdiction by the constitutional amendment of 1912 in prohibition, but the Constitution does not define the nature of the writ, neither has the Legislature ever defined it. We must therefore look to the principles of the common law. The writ of prohibition has been defined in general terms as an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior tribunal commanding it to cease abusing or usurping judicial functions. Its legitimate scope and purpose is to keep inferior courts within the limits of their own jurisdiction and to prevent them from encroaching upon the jurisdiction of other tribunals.

Id. at 50, 166 N.E. 894.

“In other words, the purpose of a writ of prohibition is to restrain inferior courts and tribunals from exceeding their jurisdiction.” *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 73, 701 N.E.2d 1002 (1998). So even if a court has general jurisdiction to hear a particular matter, a writ of prohibition may still issue if the court exceeds its authority through judicial proceedings and rulings that improperly usurp power and result in injury for which there is no adequate remedy at law. *See, e.g., State ex rel. Lambdin v. Brenton*, 21 Ohio St.2d 21, 254 N.E.2d 681 (1970) (writ issued to prohibit enforcement of trial court order commanding plaintiff to produce privileged medical records even though plaintiff did not waive the privilege).

Judicial proceedings that encroach improperly upon executive law enforcement police powers are prime examples of proceedings in which relief in prohibition should issue.

For instance, in *State ex rel. Ray v. Burns*, 174 Ohio St. 543, 191 N.E.2d 153 (1963), criminal charges were filed against two individuals for allegedly violating a municipality's "Sunday Closing" ordinance. After the defendants entered not guilty pleas, the trial court issued orders granting each defendant's request for permission to remain open on Sunday until the cases were tried and ordering "that police surveillance of the place of business and issuance of warrants for alleged violations of the Sunday law be discontinued until this case is tried on its merits and guilt or innocence of the defendant is determined by this court ***." *Id.* The city's law director and police prosecutor sought a writ of prohibition to restrain the trial court "from exercising judicial functions beyond those conferred upon him by law, namely, enjoining the police officers of the city of Euclid from performing their sworn duties of enforcing the Sunday Closing Law, in attempting to enjoin the enforcement of Section 741.01 of the Codified Ordinances of the City of Euclid, and permitting *** [the accused persons] to operate their business in violation of Section 741.01." *Id.* The court of appeals found that the trial court's authority and jurisdiction extended only to the allegations of facts set forth in the affidavits charging the Sunday Closing Law violations and that the trial court's orders "were without authority or jurisdiction and are void," permanently prohibiting the trial court "from enjoining

the police officers from enforcing the Sunday Closing Law.” *Id.* at 544, 191 N.E.2d 153.

Affirming that judgment, the Supreme Court of Ohio’s *per curiam* opinion succinctly said the following:

The respondent, judge of the Euclid Municipal Court, was without jurisdiction to make the entries in question restraining the police officers of the city of Euclid from enforcing the Sunday Closing Law. It was an exercise of a judicial function beyond those conferred upon him by law, and the entries are a nullity.

A writ of prohibition may be employed to prevent an inferior court from usurping jurisdiction with which it has not been invested by law.

The judgment of the Court of Appeals is affirmed.

State ex rel. Ray v. Burns, 174 Ohio St. at 544, 191 N.E.2d 153.

Similarly recognizing that a writ of prohibition may issue where a court exceeds its jurisdiction by the exercise of judicial power that interferes with executive authority, the court in *State ex rel. Gilligan v. Hoddinott*, 36 Ohio St.2d 127, 304 N.E.2d 382 (1973), held that the writ would issue “to prevent a court from interfering with the Governor in the exercise of his discretionary powers as chief executive, absent a clear showing of abuse of that discretion; that interference being such a usurpation of power that it exceeds the court’s jurisdiction.” *Id.*, syllabus at paragraph three. In that case, Ohio Inns filed a declaratory judgment action in common pleas court against the Ohio Department of Natural Resources (ODNR) over alleged contract defaults in its operation and management of certain state park lodging and restaurant facilities, including those at Burr Oak State Park. The trial court enjoined ODNR and anyone acting in concert from interfering with Ohio Inns’

operations. Because of a then-pending labor dispute at Burr Oak between Ohio Inns and a union seeking to represent its employees that “was marked by some degree of violence and unlawfulness,” the local sheriff, a local judge, and ODNR inspectors urged the Governor to close the park to avoid further danger to life and property. *Id.* at 129, 304 N.E.2d 382. Accepting the recommendation, the Governor issued an executive order closing Burr Oak to the public just over one week after Ohio Inns obtained its injunction barring ODNR and others from interfering with Ohio Inns’ operations. Following the commencement of contempt proceedings against the Governor, the Governor filed an original action in prohibition in the Supreme Court of Ohio.

Acknowledging that the trial court, as a court of general jurisdiction, had the power to issue the injunction and enforce its lawful orders by contempt proceedings, the question the Ohio Supreme Court had to determine was “whether the Court of Common Pleas, through its preliminary injunction, had the authority and the jurisdiction to interfere with the Governor in the performance of executive acts which were dependent upon his judgment or discretion.” *State ex rel. Gilligan v. Hoddinott*, 36 Ohio St.2d at 131, 304 N.E.2d 382. Because the Governor had evidence reasonably establishing that an inflammatory situation existed warranting his executive action, the Ohio Supreme Court, finding no abuse of discretion, held that the trial court exceeded its jurisdiction by initiating contempt proceedings against the Governor. *Id.* at 131-132, 304 N.E.2d 382. The court declared that absent a clear showing that an executive act dependent upon judgment or discretion

was an abuse of that discretion, “the judicial branch of government must refrain from interfering in that exercise.” *Id.* at 132, 304 N.E.2d 382.

Considering such judicial interference in light of the separation of powers among our three coordinate branches of government, a concurring opinion added:

The judicial branch does not have the power or authority to control or to infringe upon the executive power of the Governor within the area of authority allotted to him by the Constitution to exercise his judgment and discretion. *** The Court of Common Pleas usurped its jurisdiction in seeking to interfere with the exercise of the supreme executive power of the Governor of Ohio, granted by the Ohio Constitution. Prohibition is the appropriate and necessary remedy, under the factual situation here, to stop such invasion of executive authority.

State ex rel. Gilligan v. Hoddinott, 36 Ohio St.2d at 133-134, 304 N.E.2d 382
(Corrigan, J., concurring).

In the matter at hand, the primary object of the plaintiffs below has been to enjoin Relator from threatening to prosecute them for gambling law violations and indeed to enjoin Relator from enforcing Ohio’s gambling laws against them. In the initial June 4, 2012 motion for a Temporary Restraining Order that Respondent granted (and that began the intervenors’ rush to the courthouse), the plaintiffs asked for two things. The motion sought to

- a. Enjoin [Relator’s] May 30, 2012, cease and desist letter to Plaintiff’s internet sweepstakes cafés located in Brook Park and Parma Heights, Ohio; and
- b. Enjoin Relator from enforcement of Ohio Revised Code §2915 *et seq.* against Plaintiff’s internet sweepstakes operations in Brook Park and Parma Heights, Ohio.

(A copy of the J&C Marketing, LLC’s June 4, 2012, Motion for Temporary Restraining Order was attached to Relator’s complaint as State’s Exhibit 3,

emphasis added). In response, on June 13, 2012, Respondent simply journalized the fact that “the court grants the TRO.” None of Respondent’s subsequent orders have clarified that she has not granted what the plaintiffs sought: an injunction against criminal prosecution for violation of Ohio’s gambling laws.

What is more, Respondent’s orders granting a succession of the plaintiffs’ requests for temporary restraining orders have affirmatively and uniformly declared that “the businesses/plaintiffs are sweepstakes establishments operating pursuant to Ohio law; that the business activity is not gambling and is not prohibited by Ohio law; that the individual localities have made a determination that the businesses are lawful enterprises and issued permits and/or licenses to these plaintiffs; *** [and that the plaintiffs] are not operating in violation of Ohio law (based upon the pleadings and argument) and that the legislature has specifically permitted the business of sweepstakes enterprises.” See Relator’s Petition at para. 16 and State’s Exhibit 5. While the Relator will return to these premature legal declarations when discussing the supposed “declaratory judgment” aspect of this case in Section II of this memorandum, their significance here is that they erect a virtual shield that effectively precludes Relator from enforcing Ohio’s gambling laws through criminal investigations and prosecutions. And where Respondent at one time maintained that she would entertain in the civil case only claims by plaintiffs who were not using the VS2 gaming system that was the subject of a pending criminal prosecution, she eventually abandoned that self-imposed distinction by allowing plaintiffs using the VS2 gaming system to obtain comparable

declarations that their conduct is illegal that will only eviscerate the pending criminal prosecutions.

These findings exceed the scope of Respondent's authority. If effective, they operate not only to preclude Relator from prosecuting the individuals who received the May 30 cease and desist letter but also to resolve the substantive issue of guilt in the 17 criminal cases already under indictment in another courtroom and any other cases Relator may choose to bring in the future against owners or operators of Internet Sweepstakes Cafes under § 2915 et seq. Respondent has created a legal shield preventing Relator from fulfilling his duty to exercise his good faith discretion over whether to pursue criminal charges in an entire field of criminal law.

"[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). The judiciary is precluded from interfering in the exercise of this discretion in all but the most limited of circumstances:

"A court of equity will not interfere with an executive officer charged with the duty of protecting the public from violations of penal statutes and prosecuting the violators thereof, so long as such officer acts reasonably and in good faith within the executive discretion conferred on him by his office. Neither will a court of equity interfere in criminal prosecutions pending or contemplated unless, with other necessary conditions, violations of property rights are clearly [threatened]."

Clifton Springs Distilling Co. v. Brown (1909), 8 Ohio N.P. (N.S.) 105, 19 Ohio Dec. 661, 1909 WL 751.

Indeed, injunctions that to restrain the enforcement of Ohio's gambling laws go against long-standing Ohio law. In *Troy Amusement Co. v. Attenweiler*, 137 Ohio St. 460, 30 N.E.2d 799 (1940), the Supreme Court of Ohio declared the following as Ohio syllabus law:

Injunction will not lie to restrain criminal prosecution under a constitutional and valid statute making it an offense to carry on a lottery or scheme of chance where the person seeking the injunction has a full, adequate and complete remedy in the defense he may make to the charge of violating the statute.

In that case, a theatre owner sought to enjoin the authorities from interfering with the operation of "bank night." The lower courts refused to issue an injunction and the Supreme Court of Ohio affirmed, with an opinion that has particular resonance here:

It is a general rule that a court of equity will not interfere by injunction to prevent the enforcement of criminal statutes at the instance of an alleged law violator. 1 High on Injunctions, 4th Ed., 85, § 68. The legitimate place for the trial of criminal cases is in the courts established for that purpose and courts of equity will not oust the proper forum by drawing to themselves litigation which will prevent criminal courts from exercising their jurisdiction. So long as the defense which may be made in impending criminal prosecution is adequate to protect the rights of the accused, equitable relief by injunction is not available to him.

This principle has found especial application in actions to enjoin prosecution for violation of penal laws prohibiting lotteries and schemes of chance. *Meadville Park Theatre Corp. v. Mook*, 337 Pa. 21, 10 A.2d 437; *Harvie v. Heise, Sheriff*, 150 S.C. 277, 148 S.E. 66; *Barkley, Dist. Atty. v. Conklin*, Tex.Civ.App., 101 S.W.2d 405; *Earheart v. Young, Sheriff*, 174 Tenn. 198, 124 S.W.2d 693;

Wellston Kennel Club v. Castlen, Pros. Atty., 331 Mo. 798, 55 S.W.2d 288. In each of the cases cited injunction was denied.

In this jurisdiction an exception to the general rule is recognized in those cases in which public authorities or private persons seek to enforce unconstitutional and invalid legislation whereby vested property rights will be interfered with to the extent of causing irreparable injury for which there is no adequate remedy at law. *Olds v. Klotz*, 131 Ohio St. 447, 3 N.E.2d 371.

The plaintiff makes no claim that the statutes forbidding lotteries and schemes of chance are unconstitutional and void; nor do the facts pleaded show that vested property rights would be unlawfully interfered with.

What is the rule with respect to enjoining prosecution under a valid statute on the ground that the litigation is instituted for the sole purpose of harassing and vexing a person?

By token of what has been previously stated property rights will be protected by injunction against vexatious litigation arising from prosecutions under an invalid criminal statute. If injunction lies against one prosecution, a fortiori, like remedy will lie against repeated prosecutions. But where the criminal statute is valid, injunction will not lie against prosecutions merely on the ground that they are vexatious. A multiplicity of prosecutions does not of itself warrant interference in equity, nor does the threat of repeated prosecutions. *Sullivan v. San Francisco Gas & Electric Co.*, 148 Cal. 368, 83 P.156. 3 L.R.A., N.S., 401, 7 Ann. Cas. 574; *City of Douglas v. South Georgia Grocery Co.*, 178 Ga. 657, 174 S.E. 127. Moreover insolvency of a party instigating prosecution will never warrant the interposition of equity to restrain the administration of criminal justice. But insolvency may be of makeweight importance when other elements coupled with such financial inability justify relief as against harassing prosecutions under a void law. See 28 American Jurisprudence 255, § 58, and Walsh on Equity 318, § 63.

As long as the criminal statutes under which the prosecutions are instituted, are enforceable, the protection of personal rights lies in the guaranties surrounding the defense of an accused person and in his action at law for damages for wrongful prosecution, arrest or imprisonment. *Sullivan v. San Francisco Gas & Electric Co.*, *supra*. See, also, 14 A.L.R., annotation, pages 296 and 300. Even an innocent

person thus finds protection in the normal processes of the courts, without the intervention of chancery. At any rate the allegations of the petition herein do not show harassment which warrants the granting of an injunction. It does not even appear from the pleading that a single criminal prosecution has been carried to a conclusion on the merits.

The guilt or innocence of the plaintiff, its officers and agents, in connection with the operation of 'bank night' cannot be determined in this action. The plaintiff and those acting in its behalf must await a test in the criminal courts since the facts alleged in the petition do not warrant chancery in stepping in to prevent the administration of criminal justice in the ordinary and usual way.

Solely for the reason that the remedy by injunction will not lie, this court holds that the Court of Appeals did not err in sustaining the demurrer, dissolving the restraining order and dismissing the petition.

Troy Amusement, 137 Ohio St. at 465-467, 30 N.E.2d 799.²

More recently in *Garono v. State*, 37 Ohio St.3d 171, 524 N.E.2d 496 (1988), the Supreme Court of Ohio reversed the issuance of an injunction against the seizure, impoundment, or confiscation of certain gambling devices, observing:

² Respondent's discussion of the *Troy Amusement* case cites only to the earlier court of appeals opinion, see Motion to Dismiss at pp. 10-11, yet nothing in the subsequent opinion by the Ohio Supreme Court supports Respondent's suggestion that injunctions preventing the enforcement of valid criminal laws depend on whether there is "an ongoing criminal proceeding relating to the plaintiff." The Amici Curiae who filed their brief in support of Respondent's motion to dismiss further attempt to distinguish *Troy Amusement* on the grounds that it was decided in 1940, 13 years before the Declaratory Judgment Act was codified under Chapter 2721. of the Ohio Revised Code. See Amici Curiae Memorandum at p. 6. That contention is historically wrong, however, because Ohio has had a declaratory judgment act since 1933. See *Renee v. Sanders*, 160 Ohio St. 279, 283, 116 N.E.2d 420 (1953) ("Effective October 10, 1933, the so-called Declaratory Judgments Act became effective and it was incorporated in the General Code as Sections 12102-1 to 12102-16, inclusive.")

A court should exercise great caution regarding the granting of an injunction which would interfere with another branch of government and especially with the ability of the executive branch to enforce the law. An injunction would be proper where the police are unwarranted in going beyond their authority or duty, but an injunction cannot be used to make crime profitable, easy, and uninterrupted. Unless the police seek to enforce an unconstitutional or void law, we will not inhibit their efforts to enforce the law.

Id. at 173, 524 N.E.2d 496 (citations and internal punctuation omitted).

Consistent with *Troy Amusement*, the *Garono* court declared:

Although appellee in the case *sub judice* has not been arrested, his property rights are likewise adequately protected through the criminal process. If appellee has not violated the gambling laws, he may raise this defense to clear himself and to recover his property. To approve the injunction granted by the trial court would prevent the police from ever being able to seize, impound, or confiscate appellee's poker machines in the future if they were used in an unlawful manner. This would, in effect, give appellee a license to violate the law without fear of reprisal. For these reasons, we find that the injunction is improper in that it is too broad and thereby interferes with law enforcement.

Id. at 174, 524 N.E.2d 496.

Despite this binding legal precedent, however, Respondent has already issued at least preliminary declaratory and injunctive relief that interferes fundamentally with the Relator's ability and indeed duty to enforce Ohio's laws against gambling. Respondent has issued declaratory relief in the form of Temporary Restraining Orders that enjoin Relator from ordering the cessation of Sweepstakes Café operations that constitute gambling. It is uncontested that Relator's decision to charge 17 defendants and to send the May 30 cease and desist letter was made under a good faith belief that there was probable cause to support criminal charges under R.C. 2915 et seq. Respondent has nullified Relator's ability to bring these

charges by finding, without hearing any testimony or considering any evidence, that the business activity of the various plaintiffs, including but not limited to those plaintiffs using the VS2 gaming system, “is not gambling and is not prohibited by Ohio law.”

Respondent’s TRO provides a new and unprecedented avenue for any person in Ohio to prospectively shield himself from the bringing of criminal charges under a valid and uncontested statute. If a trial court has jurisdiction to find an affirmative absence of criminal conduct in a civil case, any person would then be able to bring a civil action declaring his intent to engage in activity, obtain a favorable ruling from the trial court, and rely upon that ruling to preclude the prosecutor from bringing charges later on. And if that were not enough, the plaintiffs in Respondent’s case are using it as a means to obtain “civil discovery” from law enforcement authorities concerning ongoing criminal investigations that are plainly designed to have law enforcement tip its hand – surely a gambler’s dream scenario. This ripple effect was born out in this case, as Respondent granted at least 23 motions to intervene filed on behalf of owners of Internet Sweepstakes Cafes across Cuyahoga County.

Even though Respondent has general jurisdiction to issue declaratory relief, the orders Respondent entered were in excess of that jurisdiction. Respondent has not only concluded that the plaintiffs were not violating Ohio law, she has also concluded that the entire VS2 gaming enterprise – including conduct that is the basis of several ongoing criminal cases – was not illegal at all. This order will

irreparably harm Relator's ability to bring any future prosecutions relating to Internet Sweepstakes Cafes under R.C. 2915 et seq. There was no basis for such a broad order that interfered with Relator's ability to make a good faith determination of probable cause unique to every prospective defendant involved in the VS2 system. "The duty of the prosecuting attorney is to *exercise his discretion* in determining, on a case-by-case basis, whether to prosecute particular individuals for alleged criminal offenses." *Pengov v. White*, 146 Ohio App.3d 402, 406, 2001-Ohio-1668, 766 N.E.2d 228 (9th Dist.) (emphasis in original). Respondent's use of a broadsword to exculpate anyone involved in the conduct at issue obliterates Relator's case-by-case discretion and is unjustifiable under the confines of her jurisdiction.

Perhaps most troubling, Respondent's conduct of the proceedings below has caused her to go beyond her judicial responsibilities by acting as a "super grand jury," deciding for herself whether or not the plaintiffs' conduct – whatever it may really be – violates Ohio's gambling laws. With all due respect, it is for the Prosecuting Attorney, in the exercise of sound discretion, to determine whether to initiate a criminal prosecution. It is for the grand jury to determine whether there is probable cause to believe that an offense has been committed. And it is for the trier of fact, hearing all relevant evidence bearing on the question, to determine whether certain conduct constitutes the crime of gambling. It is not for the Respondent to usurp such responsibilities, regardless of her conscious intent.

James Madison famously wrote: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself.” The Federalist (1788), No. 51. Respondent has regrettably exceeded her lawful jurisdiction in this case by entertaining an action the very basis of which is to prevent the enforcement of Ohio’s gambling laws. Relator respectfully submits that these facts provide proper grounds for relief in prohibition in this case and accordingly requests that this Court deny Respondent’s motion to dismiss.

II. Couching the Underlying Action as Being One for Declaratory Judgment Does Not Invest Respondent with the Jurisdiction to Conduct These Improper Proceedings.

Although the plaintiffs ostensibly sought to invoke Respondent’s jurisdiction by pleading their cases as being actions for declaratory judgment, it is readily apparent – not only from the filings below but also from the filings here from the Respondent and amici – that the plaintiffs do not truly seek any declaration as to the construction or validity of any law but rather seek a determination of whether their conduct violates the law. And to the extent that the Common Pleas Court has original jurisdiction “over all justiciable matters” pursuant to Article IV, Section 4(B) of the Ohio Constitution, the absence of such a justiciable controversy here makes Respondent’s exercise of jurisdiction here that much more suspect.

For purposes of this discussion, it should be noted that the elements necessary to establish gambling under Ohio law are (1) payment of a *price* (2) for a *chance* (3) to gain a *prize*. *Westerhaus Co. v. City of Cincinnati*, 165 Ohio St. 327,

135 N.E.2d 318 (1956), syllabus at paragraph five (emphasis sic). *See also Stillmaker v. Dept. of Liquor Control*, 18 Ohio St.2d 200, 249 N.E.2d 61 (1969), syllabus at paragraph one. The plaintiffs say that because their customers supposedly pay money not to gamble but rather to be able to use the internet or place long-distance telephone calls, the plaintiffs' conduct does not constitute gambling in violation of Ohio law. In the plaintiffs' view, so long as they structure the transaction to make it look like there is no *consideration*, i.e., no payment of a *price* to play games of chance for a prize, then their conduct cannot constitute illegal gambling under Ohio law.

Seeking creative ways to avoid the application of gambling laws is nothing new. In *FCC Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954), the United States Supreme Court acknowledged the difficulty in enforcing gambling laws, noting:

Law enforcement officers, federal and state, have been plagued with as many types of lotteries as the seemingly inexhaustible ingenuity of their promoters could devise in their efforts to circumvent the law. When their schemes reached the courts, the decision, of necessity, usually turned on whether the scheme, on its own peculiar facts, constituted a lottery. So varied have been the techniques used by promoters to conceal the joint factors of prize, chance, and consideration, and so clever have they been in applying these techniques to feigned as well as legitimate business activities, that it has often been difficult to apply the decision of one case to the facts of another.

Id. at 293, 74 S.Ct. 593, 98 L.Ed. 699.

The plaintiffs here maintain that so long as their patrons buy something – *anything* but gambling credits – then they surely are not paying money to gamble. Indeed, the plaintiffs say that by making the representation that there is “no purchase necessary” for customers to play the games of chance – though with far

fewer “credits” than paying customers receive – they are insulated from being charged with illegal gambling activities.

This Court previously rejected a comparable ruse in *Kroger Co. v. Cook*, 24 Ohio St.2d 170, 265 N.E.2d 780 (1970), where the court held:

The operation on liquor permit premises of a sales promotional game which involves the payment of a price by a majority of the participants who purchase merchandise, for a chance to win a prize by all participants, including a minority who make no purchases and participate free, constitutes the conducting of gaming or a scheme or chance on permit premises within the prohibition of Regulations 53, Section II, of the Liquor Control Commission.

Id., syllabus at paragraph two.

Other courts have more recently seen through the same ruse as perpetrated by operators of Internet Sweepstakes Cafés such as those operated by the plaintiffs below. *See U.S. v. Davis*, 5th Cir. No. 11-40265, 2012 WL 3104677 (Aug. 1, 2012) (evidence sufficient to show that sale of Internet time at defendants’ cafés was an attempt to legitimize an illegal lottery); *State v. Vento*, N.M.App. No. 30,469, 2012 WL 3101655 (Jul. 26, 2012) (evidence sufficient to show that sweepstakes constituted commercial gambling, though conviction reversed for erroneous jury instruction); *Moore v. Mississippi Gaming Comm.*, 64 So.2d 537 (Miss.App. 2011) (evidence sufficient to show customers were purchasing prepaid telephone cards to play computer games rather than to make telephone calls); *F.A.C.E. Trading, Inc. v. Carter*, 821 N.E.2d 38 (Ind.App. 2005) (distinguishing promotion of primary business with chance to win business-related prize from promotion of non-primary business-related and incidental activity for chance to win prize unrelated to primary

business activity); *Midwestern Enterprises, Inc. v. Stenehjem*, 625 N.W.2d 234, 240 (N.D. 2001) (limited free play still constituted illegal lottery because “[p]eople were not paying their dollars for phone cards but rather, were paying their dollars for a chance to win up to \$500 in cash.”).

Nevertheless, there is no disputing that R.C. 2721.02(A) authorizes courts of record to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. R.C. 2721.03, on which the plaintiffs ostensibly relied below, permits any person whose rights, status, or other legal relations are affected by a constitutional provision, statute, or other law to “have determined any question of construction or validity arising under” the constitutional provision, statute, or other law and “obtain a declaration of rights, status, or other legal relations under it.” In essence, a declaratory judgment action may enable parties with an actual ripened controversy to eliminate uncertainty regarding their legal rights and obligations, but it cannot be used merely to obtain an advisory opinion that is contingent on the happening of hypothetical future events. *See Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶¶ 8-9.

In her Motion to Dismiss, Respondent argues that she was within her jurisdiction to grant declaratory judgment and a TRO in favor of the plaintiffs because Relator had threatened them with prosecution. The mere threat of prosecution, according to Respondent, is sufficient to create a justiciable controversy that would give plaintiffs standing to request a TRO. But Respondent’s jurisdiction was not invoked to determine “any question of construction or validity arising

under” a constitutional provision, statute, or other law or to “obtain a declaration of rights, status, or other legal relations under it.” The plaintiffs do not claim that the conduct in which they are engaged would be in violation of a law that they want to challenge or have construed. To the contrary, the plaintiffs insist that their conduct does not violate the law.

In any case, the constitutionality, validity, or even construction of the law itself is not at issue in this case and is not affected by any of Respondent’s various orders. Nor has Respondent acted to interpret any affirmative right, legal status, or relation of any of the plaintiffs. Respondent instead has made only a factual finding that the specific conduct of these plaintiffs is not prohibited under Ohio law. In short, Respondent is pursuing this course not to decide any issue of law but rather to decide whether the plaintiffs’ conduct constitutes gambling in violation of Ohio’s criminal code.

Truth be told, the plaintiffs are not seeking an interpretation of R.C. 2915 et seq. from Respondent, they are seeking a legal finding of fact that they may use as a shield against future prosecution. The plaintiffs are asking for this finding so that they may remove their conduct beyond the realm of Relator’s inherent prosecutorial discretion to seek charges in the future. This is beyond the jurisdiction of the trial court, and indeed Ohio courts have refused to permit civil declaratory judgment actions to be used as a means to pre-adjudicate whether conduct is criminal. See *Quality Care Transport v. OWFS*, 2d Dist. No. Nos. 2009 CA 113, 2009 CA 121, 2010-Ohio-4763, ¶ 24 (affirming trial court’s refusal to declare whether plaintiff had

violated state Medicaid regulation); *State ex rel. Becker v. Schwart*, 5th Dist. No. 06 CA 4, 2006-Ohio-6389, ¶ 12 (“Assuming, arguendo, appellant seeks to pre-adjudicate a particular element of a potential criminal charge via a declaratory judgment * * *, we would be unwilling to approve such a maneuver * * *.”); *R.A.S. Entertainment, Inc. v. City of Cleveland*, 130 Ohio App.3d 125, 719 N.E.2d 641 (8th Dist. 1998) (refusing to declare whether live exotic dance performances would be constitutionally protected expression).

In *Cancun Cyber Café and Business Center, Inc. v. City of North Little Rock*, 2012 Ark. 154, 2012 WL 1223791, the Arkansas Supreme Court upheld the dismissal of an internet café’s action for declaratory and injunctive relief for lack of justiciability, noting that unlike the situation in which a party is engaged in conduct that would be illegal under a law the party seeks to contest or have construed, the internet café maintained that its conduct was legal and not subject to prosecution for being in violation of the law. *Id.* at * 4. “It is apparent to us that, in its request for declaratory relief, Cancun was seeking an advisory opinion rather than the resolution of an actual controversy.” *Id.*

For their part, Respondent and her amici cite to several cases holding that the threat of criminal prosecution is sufficient to confer standing to seek a declaratory judgment and for a court to issue a TRO. As discussed below, those cases are fundamentally inapposite here.

In *Peltz v. City of South Euclid*, 11 Ohio St.2d 128, 228 N.E.2d 320 (1967), the court held that where a municipal ordinance imposing criminal penalties upon a

contemplated act – in that case, posting political signs on public or private property – would be enforced against a person if he proceeds with that act, that person had standing to test the validity, construction and application of the ordinance by an action for declaratory judgment and it was unnecessary to demonstrate the existence of an actual controversy for such person to incur a violation of the ordinance. But that case is inapposite here for several reasons. First, the issue here is not whether the plaintiffs have *standing* but rather whether declaratory relief is appropriate. Second, unlike the plaintiff in *Peltz* who sought to test the validity, construction, and application of the municipal ordinance by engaging in the very conduct that the ordinance proscribed, the plaintiffs here do not raise any issue as to the applicable law and instead insist that their conduct does not *violate* the law. Third and perhaps most fundamentally, *Peltz* fits within the exception recognized previously in *Troy Amusement* inasmuch as the plaintiff in *Peltz* challenged the validity or construction of the law that was the basis for the threatened prosecution – namely, whether the ordinance forbidding political signs on public or private property violated the First Amendment. It plainly did. The plaintiffs in the instant case have not challenged either the validity or construction of any Ohio law, so any reliance on *Peltz* is fundamentally misplaced.

Similarly in *Pack v. City of Cleveland*, 1 Ohio St.3d 129, 438 N.E.2d 434 (1982), plaintiffs had standing to pursue declaratory relief where they challenged the constitutionality of a statutory exemption of certain movie projectionists from an obscenity statute. *Id.* at 130, 438 N.E.2d 434. The plaintiffs in the instant case

have made no such challenge and the Respondent has no occasion to render declaratory relief regarding the statute absent such a challenge.

Respondent relies upon *State ex rel. Greater Cleveland Rapid Transit Auth. v. Griffin*, 62 Ohio App.3d 516, 576 N.E.2d 825 (8th Dist. 1991), for the proposition that the threat of prosecution against a potential future action by a civil plaintiff may give rise to declaratory relief. But unlike Respondent's order, the declaratory relief sought in *Griffin* was within the confines of R.C. 2721.03 because the plaintiffs there sought to determine the authority of a local government agency to indemnify its own members under its bylaws. The claim thus properly arose under R.C. 2721.03 because the plaintiff's sought to determine their "rights, status, or other legal relations" under a state-created entity. If the prosecution's interpretation of the statute creating the agency in *Griffin* was correct, the nature of the plaintiff's employment was fundamentally different from what they had previously believed it to be. *Id.* at 519, 576 N.E.2d 825. Indeed, the prosecutor's letter to the plaintiffs in *Griffin* makes clear that the case turned on an issue of law:

"The Regional Transit Authority is a creature of statute, and as such, its powers and duties are strictly defined and limited by statute. Payment of attorney fees on behalf of employees accused of criminal violations beyond the scope of their official duties, is not among the powers and duties set forth in the statute governing the board's actions, and is improper. An expenditure of public monies for such a purpose is an improper expenditure and will be investigated and treated accordingly. Board approval of a misapplication of public funds can result in personal liability to the individual board members approving said expenditure."

Griffin, 62 Ohio App.3d at 518, 576 N.E.2d 825. The validity of that interpretation and its effect on a pre-existing legal entitlement justified the issuance of a declaratory judgment – not the mere threat of prosecution.

This in inapposite to the case at hand, where the plaintiffs have no pre-existing right to engage in Internet Sweepstakes gaming and where the conduct they seek leave to engage in is not based upon any relation to a state-created entity. The only interest of the plaintiffs in the present case is a forward-looking determination of whether their specific conduct is illegal. This is not an attack on the validity of R.C. 2915 et seq. and it does not relate to any party's legal rights, status, or obligations under it. The only interpretation of R.C. 2721.03 that would allow such an expansion of the bases for declaratory relief would be to hold that the mere possibility of being subjected to criminal sanction so affects a person's "rights, status, or other legal relations" under a statute – even before they are charged under that statute – that the trial court has jurisdiction to enjoin its application. In other words, a person would have an enforceable "right" to engage in any conduct not proscribed by statute and to have that right used as an offensive weapon by a trial court to block a prosecutor's decision to indict. Such an interpretation would give the trial court the authority to enter declaratory injunctions against any prosecution, pending or in the future, over any person in the state under any criminal statute based solely on a belief in the plaintiff's guilt or innocence.

Respondent argues that her issuance of the TRO does not interfere with prosecutorial discretion because the plaintiffs in the instant case have not been

charged, and nothing in her order prevents Relator from charging them later on. The extent of Respondent's interference, however, exists independent to, and regardless of, whether charges in a specific case have been presented to the Grand Jury. See *Clifton Springs Distilling Co. v. Brown* (1909), 8 Ohio N.P. (N.S.) 105, 19 Ohio Dec. 661, 1909 WL 751 ("Neither will a court of equity interfere in criminal prosecutions *pending or contemplated* * * *") (emphasis added). Respondent's overbroad order creates a chilling effect on all prosecutions under the statute, whether they have been brought by the date of this pleading or not. This is evident from the number of plaintiffs that sought leave to intervene in the pending litigation in front of Respondent immediately after the issuance of the TRO.

The extent of Respondent's interference is also proven by the pleadings filed in the various criminal cases brought against Internet Sweepstakes Café owners/retailers since Respondent's June 25 order. These defendants have attempted to use Respondent's order as an affirmative weapon by which to demand dismissal of their cases or to otherwise block any efforts by Relator to prosecute. As indicated previously in the Statement of Facts, VS2 defendants are already relying on Respondent's orders to demand the release of his lawfully-seized bank accounts and to argue that his indictment was defective:

"Pursuant to H.B. 386, this Court recently granted temporary restraining orders requested by a number of Internet café businesses – some of which use the VS2 Sweepstakes System – that were shut down by law enforcement before H.B. 386 was enacted. Ex. 4, Journal Entry, *AMA Ventures Inc. v. Mason*, Case No. CV-12-785188 (Ohio Ct. Common Pleas, Cuyahoga County June 25, 2012) (Russo, J.); Ex. 5, Journal Entry, *J&C Marketing LLC v. Mason*, Case No. CV-12-784234 (Ohio Ct. Common Pleas, Cuyahoga County June 14, 2012 (Russo, J.).

The Court found that these cafes “are sweepstakes establishments operating pursuant to Ohio law” and determined that their sweepstakes promotions are “not gambling.” *Id.* The Court ruled that the cafes could resume operating because, through H.B. 386, the “Legislature has specifically permitted the business of sweepstakes enterprises.” *Id.* * * * By alleging that the VS2 Sweepstakes System involves gambling, therefore, the Indictment directly conflicts with H.B. 386.”

Respondent’s TRO has become a sledgehammer by which the named defendants are now trying to bludgeon Relator into dismissing each case. Respondent was patently and unambiguously without jurisdiction to issue such an order.

Nor does the recent passage of Am.Sub.H.B. No. 386 give the plaintiffs or Respondent any cover to maintain the declaratory judgment action. Neither Respondent nor her amici contend that the action below involves any challenge to the validity of that Act or requires any construction or interpretation of the Act.

Contrary to the plaintiffs’ contentions and the Respondent’s orders that the plaintiffs were “sweepstakes establishments operating pursuant to Ohio law,” Section 12(A)(1) of that Act defines “sweepstakes” as “any game, contest, advertising scheme or plan, or other promotion *** in which consideration is **not** required for a person to enter to win or to become eligible to receive any prize, the determination of which is based upon chance.” (Emphasis added.) Because the plaintiffs require that gamers pay to play before they may play games of chance for prizes, the plaintiffs would not qualify as “sweepstakes” under Am.Sub.H.B. No. 386.

And although Am.Sub.H.B. No. 386 imposed a moratorium on new sweepstakes operations from the effective date of the Act until June 30, 2013 so that

such operations could be studied further, the General Assembly was clearly wary of the legality of such operations, finding in Section 12(C) reads as follows:

(C) The General Assembly finds the following:

(1) The state has experienced a proliferation of retail businesses that utilize a sweepstakes to facilitate sales. These establishments utilize computer terminals or stand alone machines, which currently are not consistently and uniformly regulated statewide and have created a window of opportunity for rogue operators to open in cities across the state.

(2) Judges across the state have issued conflicting rulings regarding the legality of these sweepstakes establishments.

(3) The General Assembly has determined that a moratorium on new retail sweepstakes establishments is needed while legislation is being considered.

At any rate, there can be no serious contention that Respondent's jurisdiction was invoked to determine "any question of construction or validity arising under" any law or to "obtain a declaration of rights, status, or other legal relations under" the law. See R.C. 2721.03. Because there was no ripened justiciable controversy warranting the declaratory relief sought, Respondent's exercise of jurisdiction under these circumstances was beyond that which is authorized by Ohio law. Because Relator's Petition alleges facts that provide good grounds for relief in prohibition, Respondent's motion to dismiss should be denied.

III. Relator Lacks Any Adequate Remedy At Law.

Where Respondent patently and unambiguously lacks jurisdiction, Relator does not need to demonstrate the lack of an adequate remedy in the ordinary course of the law. *State ex rel Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 15. In this case, however, Relator lacks any adequate remedy in the ordinary course where Respondent's order will create a chilling effect on both the existing criminal cases and those that may be brought in the future, and subjects Relator to unjustifiably onerous discovery requests in the ongoing civil cases.

Respondent has impermissibly obstructed the exercise of Relator's prosecutorial discretion. Respondent's finding that "the businesses/plaintiffs are operating pursuant to Ohio law; that the business activity is not gambling and is not prohibited by Ohio law" cuts the legs off any criminal prosecution – pending or contemplated – that seeks to enforce Relator's good faith determination that there is probable cause to support a finding of a violation under R.C. 2915 et seq. The defendants against whom Relator has already brought charges have already used Respondent's orders as legal precedent for the ultimate issue in each criminal case. Now that other courts have been presented with Respondent's rulings as precedent on the ultimate issue, Relator faces the risk that each pending prosecution may be dismissed. This irreparably harms Relator's ability to bring any further charges based on good faith exercise of his discretion or to effectively prosecute the cases already indicted.

Respondent's order also deprives Relator of an adequate remedy on a second ground by subjecting him to onerous discovery requests in the ongoing civil cases. Although those actions are presently stayed in front of Respondent, the State's discovery obligation remains ongoing. Respondent's issuance of the TRO by its nature will subject the State to improper discovery into prosecutorial discretion and threatens to disclose confidential law enforcement investigations, grand jury matters, and protected work product.

Respondent argues that Relator's ability to appeal a discovery request leaves him with an adequate remedy. This remedy is insufficient, however, because it will still require the disclosure of privileged information in discovery. Once privileged information is ordered to be revealed, the party who must provide the information will not have a meaningful remedy if required to wait to appeal the ruling until the final judgment of all claims. "The proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage." *Gibson-Myers & Associates, Inc. v. Pearce*, 9th Dist. No. 19358, 1999 WL 980562, *2 (Oct. 27, 1999). Respondent's order leaves unprotected vast amounts of privileged information bearing on internal decision-making in the prosecutor's office and the manner in which determinations to prosecute are made, and which will directly impact a pending criminal case. The use of Respondent's civil case to attack the pending criminal indictment is even further evidence that the harm does not exist in the vacuum of her civil docket, and an appellate remedy from the civil case is illusory when the harm is done to the criminal case.

Respondent's continued conduct of this case leaves Relator without any adequate legal remedy. There is no ordinary legal remedy available to correct Respondent's improper usurpation of power. The only proper remedy available is the extraordinary remedy of prohibition to restrain Respondent's unauthorized exercise of judicial powers. The facts alleged in Relator's Petition provide proper grounds for issuance of the writ in this case.

CONCLUSION

Relator respectfully requests that this Court deny Respondent's motion to dismiss and, unless a peremptory writ of prohibition is issued, grant an alternative writ of prohibition that permits the presentation of evidence and the submission of merit briefs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing Relator's Memorandum in Opposition to Respondent's Motion to Dismiss was served this 6th day of August 2012 by regular U.S. Mail, postage prepaid, upon:

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