ORIGINAL

IN THE SUPREME COURT OF OHIO

PROGRESSOHIO.ORG, INC., et al . Appellants,	)	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 11AP 1136
v.	)	
JOBSOHIO, et al. Appellees.	)	CASE NO. 12-1272

MERIT BRIEF OF AMICUS CURIAE OHIO ROUNDTABLE IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST

Amicus curiae The American Policy Roundtable dba Ohio Roundtable ("Ohio Roundtable") is an Ohio-based public policy organization. It was founded in 1980 and is an Ohio nonprofit corporation. A guiding principle of its public policy pursuits has been adherence to the rule of constitutional law. Ohio Roundtable, and its staff and thousands of Ohio citizen volunteers, have worked for the proper application of the rule of law in Ohio through numerous activities. Ohio Roundtable has a network of supporters in excess of 10,000 Ohio citizens, businesses, churches and civic organizations who subscribe to and participate in regular briefings and communications regarding Ohio Roundtable activities. It has actively opposed the expansion of legalized gambling in Ohio, including multiple previous efforts to amend the Ohio Constitution to authorize casino gambling and legislative efforts to expand the Ohio Lottery.

Ohio Roundtable is a party in a case involving issues similar to those presented in this case, *State ex rel. Walgate v. Kasich,* 2013-Ohio-946 (Ohio App. 10 Dist.). The *Walgate* case involves claims arising from enforcement of public duties under of the lottery and casino provisions of the Ohio Constitution. The Tenth District Court of Appeals affirmed judgment dismissing the claims of plaintiffs, including Ohio Roundtable, for lack of standing on March 14, 2013.

STATEMENT OF CASE AND FACTS

This case is on appeal from a complaint for declaratory, injunctive and general relief challenging the constitutionality of R.C. Chapter 187 (also referred to as the JobsOhio Act) and R.C. Chapter 4313, which create a private corporation in violation of Article XIII of the Ohio Constitution and saddle the state with massive debt to fund it.

Prior to the passage of R.C. Chapter 4313, appellants challenged R.C. Chapter 187 in its entirety by bringing an action in this Court pursuant to R.C. Chapter 187.09, which required that this Court accept original jurisdiction of any action challenging the constitutionality of the JobsOhio Act within 90 days of its effective date. This Court struck down that portion of the bill as a violation of separation of powers. *ProgressOhio.org v. Kasich,* 129 Ohio St.3d 449, 2011-Ohio-4101. Subsequent to appellants' challenge before this Court, unconstitutional sections of the legislation were altered in Ohio's biennial budget, H.B. 153.

The governor has filed the papers to create the private JobsOhio Corporation and has named a board of directors. JobsOhio is receiving funding from the state and is operating and expending funds. JobsOhio is preparing to issue over a billion dollars of bonds to fund itself – all backed by liens on state assets.

After this Court dismissed the first case, appellants filed a complaint for declaratory, injunctive and general relief in the Franklin County Court of Common Pleas. Appellees challenged the appellants' right to bring this suit on grounds that they lacked standing. The case was dismissed based upon lack of standing and that decision was affirmed by the 10th District Court of Appeals.

ARGUMENT

Appellants' Proposition of Law: Plaintiffs have standing to bring this action.

A. Standing Generally

"Standing determines 'whether a litigant is entitled to have a court determine the merits of the issues presented' " *Moore v. Middleton*, 133 Ohio St.3d 55, 2012-Ohio-387, ¶20, 975 N.E.2d 977, quoting *State ex rel. Teamsters Local Union No. 436 v. Cuyahoga County Board of Commissioners*, 132 Ohio St.3d 47, 2012-Ohio-1861, ¶10, 969 N.E.2d 224. Whether a party has established standing to bring an action before the court is a question of law, which is reviewed de novo on appeal. Id. at ¶20.

Standing may be determined by principles of common law. *Middletown v. Ferguson*, 25 Ohio St.3d 21, 25, 25 OBR 125, 495 N.E.2d 380. It also may be conferred by a specific statutory grant of authority. Id. at 25; *Moore,* 133 Ohio St.3d 55, 2012-Ohio-387, ¶48, 975 N.E.2d 977.

This Court's "cases make clear that [it is] generous in considering whether a party has standing." Given that the present case was dismissed for failure to state a claim for lack of standing the Court must indulge all reasonable inferences from the complaint in appellants' favor. *Moore,* ¶¶4, 39 FN1. Such dismissals can be granted only where "it appears beyond doubt from the complaint that plaintiff can prove no set of facts entitling him to recovery". *O'Brien v. University Community Tenants Union*, 42 Ohio St. 242, syllabus, 327 N.E.2d 753 (1975). "It is well settled that standing does not depend on the merits of the plaintiff's contention that particular conduct is illegal or unconstitutional. Rather, standing turns on the nature and source of the claim asserted by the plaintiffs." *Moore,* ¶23, citing *Warth v. Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

Appellants' complaint in the present case seeks declaratory, injunctive and general relief. However, a party is not limited to the relief claimed in pleadings. *Raimonde v. VanVlerah,* 42 Ohio St.2d 21, 26, 325 N.E.2d 544; Civ.R. 54(c). "Where the allegations of a petition are sufficient to warrant the general relief sought, the form of the prayer is immaterial, and where the prayer is for general relief the court will shape its judgment according to the equity of the case and grant any relief warranted by the allegations of the petition." *State ex rel. Blackwell v. Bachrach,* 166 Ohio St. 301, 143 N.E.2d 127, paragraph two of the syllabus. In *State ex rel. Masters v. Beamer,* 109 Ohio St. 133, 150-151, 141 N.E. 851 (1923), this Court applied this principle to grant a writ of mandamus to a board of education enforcing a duty to provide high school branches within 4 miles of plaintiffs' residence even though their complaint in common pleas court only requested transportation to the nearest high school. As a result of this principle, appellants' complaint is not subject to dismissal, unless it is beyond doubt from the complaint that they can prove no set of facts entitling them to declaratory, injunctive or mandamus relief, and establishing standing to seek such relief.

Moreover, the declaratory relief claim asserted in the complaint raises the issue of mandamus since the right to mandamus relief has been codified. R.C. 2731.02. To the extent that appellants have a right to mandamus relief, that right may be the subject of declaratory relief.

B. Statutory Standing

As discussed above, standing may be conferred by a specific statutory grant of authority. To confer standing, a statute must "entitle[ ] a litigant to have a court determine the merits of the issue presented." *Moore,* ¶20.

Mandamus relief has been available in Ohio throughout its history, pursuant to both common law and statute. Prior to 1953, G.C. 12284 statutorily authorized this Court, the court of appeals and the court of common pleas to issue writs of mandamus. In 1953 the Ohio legislature enacted R.C. 2731.02, which modified G.C. 12284 by adding language that "Such writ may issue on the information of the party beneficially interested." This language entitles litigants, who are beneficially interested, to have a court determine claims for mandamus relief. Accordingly, it is a statutory grant of standing to beneficially interested parties to seek mandamus relief.

It is well settled under Ohio law that "[a] person's status as a taxpayer is generally sufficient to establish a beneficial interest when the object is to compel performance of a duty for the benefit of the public." *State ex rel. Spencer v. East Liverpool Planning Commission,* 80 Ohio St.3d 297, 299, 685 N.E.2d 1251 (1997). In *Spencer* the Court held that "[r]esidents are normally taxpayers", "[t]herefore, Spencer's allegation in his complaint that he is a resident of East Liverpool conferred sufficient standing on him to bring the mandamus action". Id. at 299. In the present case, appellants have alleged that they are citizens and taxpayers of Ohio and therefore have sufficient standing to seek mandamus relief pursuant to R.C. 2731.02.

In 1933, the Ohio legislature statutorily authorized declaratory relief actions. R.C. 2721.02 currently "broadly authorizes plaintiffs to bring actions for a declaration of 'rights, status, and other legal relations whether or not further relief is or could be claimed." *Moore,* ¶45. R.C. 2721.03 broadly authorizes "any person whose rights, status, or other legal relations are affected by a constitutional provision" or "statute" to "obtain a declaration of rights, status, or other legal relations under it." This Court observed in *Moore* that "we do not necessarily agree

that [R.C. Chapter 2721] does not confer standing. Indeed, standing can be created by legislation." *Moore,* ¶48. Indeed, to the extent that R.C. Chapter 2721 entitles a litigant to have a court determine the merits of the issues presented, it confers standing.

R.C. 2721.03 limits the authority to seek declaratory relief under that statute to a person whose rights are affected. R.C. 2731.02 provides appellants a right to mandamus relief to the extent that they are beneficially interested in such relief. To the extent, appellants have a right to mandamus relief, R.C. Chapter 2721 confers standing on them to seek a declaration of that right.

The distinction between statutory and common law standing with respect to mandamus, injunctive and declaratory relief has recently emerged as a significant issue by reason of the case of *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999) and its progeny. *Sheward* has been interpreted as imposing a strict 'rare and extraordinary' limitation on common law standing for public duty/taxpayer actions despite the fact that both the majority and minority opinions clearly approved voluminous precedent to the contrary, an issue which will be addressed below. *Sheward*, however, did not address the implications of statutory standing, which unlike common law standing, is not subject to modification by the courts. This Court did address the distinction between common law and statutory standing in *Willoughby Hills v. C.C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 591 N.E.2d 1203 (1992). In *Bar's Sahara* this Court explained that under common law, only an aggrieved party had standing to appeal administrative determinations. Id. at 26. However, since the Ohio legislature had enacted R.C. Chapter 2506, which generally allowed appeals from administrative determinations, such appeals by political subdivisions were statutorily authorized regardless of whether they were directly affected.

The broad authority conferring standing in R.C. Chapter 2506 is analogous to the broad authorization provided by the mandamus and declaratory relief statutes. Ohio law is clear that any limits on common law standing may be modified by broad statutory conferrals of standing.

C. Common Law Standing

Even if there was no statutory standing, appellants have common law standing in the present case under the traditional public duty/taxpayer case law of this Court. Appellants have standing to pursue claims enforcing constitutional public duties regarding formation of corporations and state involvement in and extension of credit to private corporations on the basis of their status as taxpayers or citizens in accordance with Ohio's traditional public duty/taxpayer case law. The lower courts, however, determined that appellants had no standing under the traditional public duty/taxpayer case law as a result of their view that the case of *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999) limits all public right standing to rare and extraordinary cases.

The *Sheward* case can't reasonably be interpreted to preclude traditional public duty/taxpayer standing, given that such standing was affirmed by both the majority and minority, as well as the case's syllabus. The 'rare and extraordinary' dicta was applicable to the *Sheward* court's extension of public right standing, to a duty to preserve judicial power and similar public duties, particularly in the context of an original mandamus claim where there is an alternative legal remedy.

The *Sheward* syllabus was essentially a restatement of the syllabus of *Brissel v. State ex rel. McCammon,* 87 Ohio St. 154, 100 N.E. 348 (1912), which provides at paragraph four:

> "In a proceeding in mandamus, where the relief sought is the enforcement of a public duty by a public officer or board, it is sufficient to sustain the right of the relator to maintain the suit that he show that he is a citizen and as such interested in the execution of the laws."

The *Brissel* court enforced a public duty by county commissioners to appropriate money or collect taxes necessary to pay their proportionate share of a public hospital. The *Sheward* court at paragraph one of its syllabus, essentially restated the *Brissel* syllabus as follows:

> "Where the object of an action in mandamus and/or prohibition is to procure the enforcement or protection of a public right, the relator need not show any legal or special individual interest in the result, it being sufficient that the relator is an Ohio citizen and, as such, interested in the execution of the laws of this state."

The *Sheward* majority explained that public right standing was "...fully conceived in Ohio as a means to vindicate the general public interest". *Sheward,* 86 Ohio St.3d at 473. The *Sheward* court particularly noted *State ex rel. Nimon v. Springdale* (1966), 6 Ohio St.2d 1, 4, 215 N.E.2d 592 (1966) which "listed a long line of cases in support of the citizen/taxpayer – mandamus action", including the *Brissel* case. Id. at 473.

The *Sheward* dissent by Chief Justice Moyer also affirmed the traditional public duty/taxpayer case law in Ohio, while objecting to its extension to a public duty to preserve judicial power:

> "While it is true that the trial courts of this state have a clear legal duty to recognize and enforce only those statues that are constitutional, that duty is not imposed by the challenged statutes created by Am.Sub.H.B. No. 350. ***This distinguishes the case at bar from Zupancic, and from the traditional "public duty/taxpayer" case in Ohio.*** The majority notes that the public-right doctrine (defined by the majority as permitting an individual to obtain a writ of mandamus to enforce a public right without the showing of a personal interest in the subject matter) dates from the last century as an exception to the personal-injury

> requirement of standing. However, the extension of that doctrine so as to equate public duty with enforcement of the doctrine of separation of powers, or with preservation of judicial power within the judiciary, is not a long-standing legal principle. The majority has indeed created a new theory of standing, and one not justified by *Zupancic.* Id. at 522. (Emphasis added.)

Chief Justice Moyer was particularly concerned about the effect that enforcement of a public duty to preserve judicial power would have in the context of this Court's original jurisdiction in mandamus:

> "The majority states that '[i]t is necessary to consider whether Am.Sub.H.B. No. 350 is unconstitutional in order to determine whether [respondent judges] have a clear legal duty to follow prior law.' ***If this reasoning justifies exercise of original jurisdiction in mandamus in this case, then a mandamus action naming trial court judges respondents is available to entertain a constitutional challenge to any statute, because trial court judges are always under a duty to enforce only valid, constitutional laws.*** The majority appears ready to accept this premise, as it baldly states that 'in Ohio mandamus is a proper proceeding in which to question the constitutionality of legislative enactments.' ***But in its willingness to do so, the majority is sounding a death knell for the doctrine that mandamus may not be used where a declaratory judgment action offers an adequate remedy to challenge the constitutionality of a statute, initially in the trial courts, followed by appellate review.***" Id. at 521-22. (Emphasis added.)

The effect of extending the public right doctrine to a mandamus action to enforce a public duty to preserve judicial power, would potentially allow all constitutional challenges to statutes to proceed directly to this Court.

It was in this context that the majority limited the effect of its ruling to the rare and extraordinary case. Otherwise, the logic of its holding could have overwhelmed this Court's docket. However, there was nothing in the logic of the majority or minority opinions, which

would justify limiting traditional public duty/taxpayer cases to those that are rare and extraordinary.

The extension of a rare and extraordinary limit to all public duty/taxpayer cases is particularly pernicious where it is extended to declaratory relief and injunction claims as well as mandamus claims, as the lower courts did in this case. It is one thing to limit public right mandamus actions to those that are rare and extraordinary. Such a doctrine would not eliminate declaratory or injunction actions for similar relief. However, where, as in this case, the rare and extraordinary limit is applied to declaratory and injunctive as well as mandamus relief, the effect is to shut the courthouse doors to most public duty/taxpayer cases in their entirety.[1]

The 'rare and extraordinary' limit discussed in *Sheward* is dicta. The syllabus of Supreme Court decisions states the points of law decided in a case. *State v. Wilson*, 58 Ohio St.2d 52, 59, 388 N.E.2d 745 (1979). "[W]here the justice assigned to write the opinion discusses matters or expresses his opinion on questions not in the syllabus, the language is merely the personal opinion of the writer or "merely obiter dicta." Id. at 60. This principle has long been the law of Ohio. *State ex rel. Donahey v. Edmondson*, 89 Ohio St. 93, 107-108 (1913). While dicta may be considered for its persuasive effect, it needs to be considered in its context. The context of this limit is that it applies to the extension of the public right doctrine to a public duty to preserve judicial power in a mandamus claim. It is not law, and it does not necessarily logically apply outside of this context. This is eminently clear, with respect to

[1] There is a closely related doctrine regarding when mandamus relief may be available, if injunctive or declaratory relief is also available. This doctrine turns on the question of whether injunctive or declaratory relief constitutes an adequate legal remedy. This question is not directly relevant to the issues in this appeal, and therefore will not be addressed.

traditional public duty/taxpayer mandamus cases, since such cases were approved by both the majority and minority opinions in the *Sheward* case.

The traditional public duty/taxpayer cases include a long line of cases conferring standing on taxpayer to seek the type of mandamus, declaratory and injunctive relief sought by appellants in the present case. Appellants seek an order requiring compliance with constitutional duties regarding corporate formation and state investment in, and extension of credit to, private corporations. In *State ex rel. Ryan v. City Council of Gahanna,* 9 Ohio St.3d 126, 459 N.E.2d 208 (1984), a taxpayer sought a writ of mandamus "compelling respondents to comply with the provisions of Sections 6 and 13 of Article VIII of the Ohio Constitution", which forbade municipal and private joint ventures and precluded the use of tax money for payment of industrial development bonds. Id. at 131. This Court concluded that an urban development project planned by Gahanna violated these provisions and granted the requested writ. In *State ex rel. Ohio Motorists Association,* 8 Ohio App.3d 123, 456 N.E.2d 567 (1982), the court granted a writ of mandamus compelling compliance with statewide standards governing the placement of traffic control devices. In that case the court held that a non-profit corporation and an individual had standing as citizens to seek such relief because they were beneficially interested in having the traffic laws of Ohio uniformly executed. Id. at 128.

This Court has also historically granted injunctive relief to citizens or taxpayers seeking to require political subdivisions to comply with constitutional duties. The *Gahanna* court relied in part on *Alter v. Cincinnati,* 56 Ohio St. 47, 46 N.E. 69 (1897) in which a taxpayer obtained an injunction precluding Cincinnati from becoming a part owner of a waterworks in violation of

Section 6, Article VIII of the Ohio Constitution. In *Taylor v. The Commissioners of Ross County,* 23 Ohio St. 22 (1872), this Court upheld injunctive relief sought by a taxpayer precluding a county from using public funds for railroad projects to be turned over to railroad companies because this violated Section 6, Article VIII of the Ohio Constitution. In *Village of Brewster v. Hill,* 128 Ohio St. 343, 190 N.E. 266 (1934), an injunction precluding an electric light plant project was upheld at the behest of a taxpayer for the same reason. More recently, this Court reversed the denial of an injunctive relief sought by citizens against a city's financial involvement in a real estate project which violated Section 6, Article VIII. *C.I.V.C. Group v. City of Warren,* 88 Ohio St.3d 37, 723 N.E.2d 106 (2000). While Section 6, Article VIII applies to municipalities, Ohio case law makes clear that the meaning given this section by the courts is equally applicable to the state under Section 4, Article VIII of the Ohio Constitution, which is at issue in this case. *State ex rel. Eichenberger v. Neff,* 42 Ohio App.2d 69, 75, 330 N.E.2d 454 (1974).

The above cases demonstrate that this Court has long recognized public duty/taxpayer standing to seek mandamus and injunctive relief requiring compliance with the type of constitutional duties at issue in this case. Moreover these and other decisions of this Court make clear that statutory grants of standing are not necessary because public duty/taxpayer standing "exists independent of any statute authorizing invocation of the judicial process". *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St.3d 451, 473, 715 N.E.2d 1062 (1999) citing *State ex rel. Nimon v. Springdale,* 6 Ohio St.2d 1, 4-5, 215 N.E.2d 592 (1966).

As noted by this Court in *Sheward,* the federal judicial system requires a showing of injury to establish standing to enforce a public duty or right. *Sheward,* 86 Ohio St.3rd at 470. However, this requirement derives from the federal constitution and is not binding on this Court, which is "free to dispense with the requirement for injury where the public interest so demands." Id. at 470. In an unusual response to dissenting opinion, the *Sheward* court went on to explain that this Court "will entertain a public action" " 'under circumstances where the public injury by its refusal will be serious' " *Sheward,* 86 Ohio St.3d at 503, citing *State ex rel. Trauger*, 66 Ohio St. 612, 616, 64 N.E. 558 (1902), quoting *Ayers v. Board of State Auditors,* 42 Mich. 422, 429, 4 N.W. 274 (1880). The *Trauger* case is the basis for the much vaunted rule limiting public duty/taxpayer standing to 'rare and extraordinary' cases.

Trauger, however, does not refer to serious public injury as a criterion for standing, but as a criterion for determining whether to grant relief in mandamus, which involves a discretionary writ. *Trauger* was quoting a Michigan case, *Ayers,* which explained that mandamus relief "is not usually allowed unless under circumstances when the public injury by its refusal will be serious. * * * But we find no reason to consider the matter as one lying outside of judicial discretion, ***which is always involved in mandamus cases***, concerning the relief, as well as other questions" *Trauger*, 66 Ohio St. at 616, quoting *Ayers,* 42 Mich. at 429. (Emphasis added). As discussed above, "standing does not depend on the merits of the plaintiff's [claims]" *Moore,* ¶23. Whether the public injury is sufficiently serious to merit the granting of a discretionary writ of mandamus goes to the merits of the claim, not the issue of whether plaintiffs' have a sufficient interest to justify standing.

As previously discussed, *Sheward's* standing reasoning was only dicta not a rule of law. The rule of law set forth in the syllabus made no mention of a 'rare and extraordinary' limit. Moreover, the language of 'rare and extraordinary' is not helpful in setting a limiting principle. The term 'extraordinary' in the context of mandamus, adds nothing since all writs of mandamus are extraordinary writs by definition. The term 'rare' tells us nothing other than such cases are not often encountered. It is not helpful in describing the type of case which justifies allowing public duty/taxpayer standing.

Sheward's additional dicta that public actions are limited to cases of such magnitude and scope that they implicate the public right to preservation of judicial power is also not helpful in setting a limiting principle. As pointed out by Justice Moyer, in the *Sheward* dissenting opinion, all unconstitutional statutes arguably involve the judiciary's duty to enforce only valid, constitutional laws and hence would implicate a public right to preservation of judicial power. Such a principle would not necessarily limit public actions, it would logically expand them, by justifying original jurisdiction in mandamus naming trial judges respondents in any case involving a constitutional challenge to a statute. *Sheward,* 86 Ohio St.3d at 522.

Any criterion of seriousness discussed in *Sheward* and *Trauger* must be placed in the context of other pertinent decisions by this Court. The present case involves violations of constitutional duties, a circumstance which this Court has treated very seriously:

> "If the members of a legislative body can ignore, with impunity, the mandates of a constitution or a city charter, then it is certain that the faith of the people in constitutional government will be undermined and eventually eroded completely." *State ex rel. Carter v. North Olmstead,* 69 Ohio St.3d 315, 323, 631 N.E.2d 1048

(1994), quoting *Cleveland ex rel. Neelon v. Locher,* 25 Ohio St. 49, 52, 266 N.E.3d 831 (1971).

Moreover, the above described case law allowing mandamus, declaratory and injunctive relief to taxpayers for violation of similar constitutional duties, indicates this Court's view of the seriousness of such violations. The circumstances of the present case are far more serious than the cited cases, and would therefore easily meet any applicable criterion of seriousness.

CONCLUSION

This Court has recently cautioned judges "to remember, standing is not a technical rule intended to keep aggrieved parties out of court. 'Rather, it is a practical concept designed to insure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented.' " *Moore,* ¶47.

The 'hot controversy' factor is undisputed, and the 'nonjusticiable' factor should not be, given this Court's clear precedent that taxpayers are beneficially interested parties entitled, by statutory and common law, to enforce a public duty because of their interest in the execution of the laws of this state. The 'rare and extraordinary' limit applied in this case does not serve either of the legitimate purposes of the doctrine of standing. It is being wielded as a "technical rule intended to keep aggrieved parties out of court" and should not be allowed to stand.

Accordingly, amicus curiae Ohio Roundtable requests this Court to reverse the appellate court's decision and remand this case for further proceedings in accordance with law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Amicus Curiae Ohio Roundtable in Support of Appellants was sent by ordinary U.S. mail to the following on this 16th day of April, 2013:

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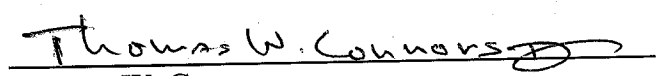

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