

IN THE SUPREME COURT OF OHIO

STATE EX REL.	:	
ROBERT L. WALGATE, JR., ET AL.	:	
	:	Case No. 2013-0656
Plaintiffs-Appellants,	:	
	:	On Appeal from the Franklin County Court of
v.	:	Appeals, Tenth Appellate District
	:	
OHIO GOVERNOR JOHN R. KASICH,	:	Court of Appeals Case No. 12-AP-548
ET AL.,	:	
	:	
Defendants-Appellees.	:	

RESPONSE OF STATE DEFENDANTS-APPELLEES IN OPPOSITION TO APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

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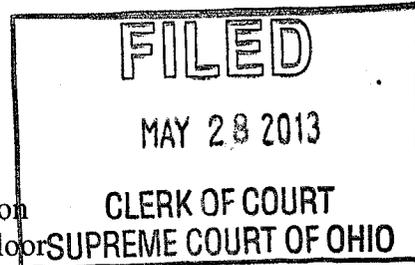
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INTRODUCTION

This case does not warrant discretionary review, because the Tenth District's decision rests on well-settled Ohio precedent on the issue of standing. Standing is the bulwark that prevents Ohio courts from issuing advisory opinions at the behest of litigants who seek to use the judicial system rather than the political process to air their grievances. The Court has repeatedly held that plaintiffs may not sue to challenge the constitutionality of Ohio law absent a direct and concrete injury that differs in manner or degree from that suffered by the general public. *Cuyahoga Cty. Bd. of Commrs. v. State of Ohio*, 112 Ohio St.3d 59, 2006-Ohio-6499, ¶ 22; *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123. Here, thirteen plaintiffs challenge statutes governing the operation of video lottery terminals ("VLTs") and casinos in the State of Ohio. Both lower courts dismissed Plaintiffs-Appellants' Complaint for lack of standing. For several reasons, the decision below does not warrant review.

First, this case does not implicate any substantial constitutional question, as Plaintiffs' Complaint was dismissed as a result of pleading deficiencies. The appeals court determined on the face of the pleadings that each of the Plaintiffs failed to allege any direct and particularized injury resulting from the VLT and casino laws. Any alleged injuries were, at best, speculative and hypothetical. Notwithstanding Plaintiffs' novel theories to the contrary, this case presents a poor vehicle for revisiting decades of established precedent on standing.

Second, review is not warranted here by any question of great public importance. Plaintiffs insist that the case warrants review, and even justifies standing, because, they say, gambling is "controversial," but controversy does not render a case appropriate for judicial review under traditional notions of standing or under the "public right" exception articulated in *Sheward*. Public action standing arises "only" in "rare and extraordinary case[s]." *Sheward*, 86

Ohio St. 3d at 503-04. The Tenth District properly concluded that the legislation challenged here does not rise to the same magnitude and scope as the issues presented in *Sheward*.

For these reasons, the Court should decline to review this case. In the alternative, to the extent that the public-right standing issue here might be affected by the Court's review of *ProgressOhio v. JobsOhio*, No. 2012-1272, the State Defendants respectfully request that the Court not grant unneeded review now, but at most hold this case until *ProgressOhio* is decided.

STATEMENT OF THE CASE AND FACTS

A. Plaintiffs sued to challenge statutes that they dislike.

On October 21, 2011, Plaintiffs sued in Franklin County Common Pleas Court challenging the constitutionality of various statutes governing VLTs and casinos. Plaintiffs sought declaratory and injunctive relief and a writ of mandamus against Defendants Ohio Governor John R. Kasich, the Ohio Casino Control Commission, the Ohio Lottery Commission, and Ohio Tax Commissioner Joseph W. Testa ("State Defendants"). The trial court allowed seven entities operating casinos and racetracks in Ohio to intervene as defendants.

Plaintiffs allege that various aspects of the VLT laws violate Article XV, Section 6 of the Ohio Constitution governing state-operated lotteries and Article VIII, Section 4 of the Ohio Constitution, which bars the State from joint ownership in a private enterprise. Am. Compl., Counts 1-7, 9, 10. Plaintiffs also argue that the VLT law was enacted in violation of the One-Subject Rule and the Three-Readings Rule of the Ohio Constitution. *Id.*, Counts 6, 7.

Plaintiffs' remaining claims address casinos. Plaintiffs allege that certain provisions enacted in Am. Sub. H.B. 277 (2009) violate Article XV, Section 6(C) by exempting casino operators from the commercial activity tax ("CAT") and simultaneously imposing other taxes upon casino operators that, in Plaintiffs' view, the operators should not pay. *Id.*, Counts 11, 12, 14, 15. Plaintiffs also say that the Cleveland casino violates the constitutional one-facility limit

and that R.C. 3772.27(B) violates Article XV, Section 6(C) by allowing all four casinos to spend the required \$250,000,000 over a period of three years. *Id.*, Counts 13, 16. Finally, Plaintiffs claim that Ohio law grants a monopoly to gaming companies in violation of the Fourteenth Amendment to the United States Constitution. *Id.*, Count 17.

The thirteen Plaintiffs here include (1) a public advocacy group opposed to the expansion of legalized gambling (the American Policy Roundtable, “Roundtable”), (2) a corporation, Agnew Sign & Lighting, Inc., and (3) eleven individual Ohio residents. Roundtable alleges that it is a nonprofit corporation that actively opposes the expansion of legalized gambling in Ohio. Three of the individuals, Robert Walgate, David Zanotti, and Laura Adams, allege that, as Roundtable officers or supporters, they are involved in opposing legalized gambling. Walgate further alleges that he suffers from a gambling addiction. His mother, Plaintiff Sandra Walgate, alleges that she has suffered the secondary effects of her son’s gambling addiction. Five Plaintiffs (Paula Bolyard, Jeffrey and Michelle Malek, and Thomas and Donna Adams) assert they are the parents of public school students, and a sixth (Sandra Walgate) says she is a public school teacher. Plaintiff Linda Agnew claims she owns a corporate-Plaintiff that pays the CAT. Two plaintiffs were added in the First Amended Complaint. Joe Abraham asserts that he is a citizen, resident, and taxpayer of the State of Ohio and a resident of Cleveland and the Cleveland Public School District. Plaintiff Frederick Kinsey alleges that he would operate a casino but for the terms of the Ohio Constitution.

B. The trial court dismissed for lack of standing, and the appeals court affirmed.

The trial court granted the State Defendants’ Rule 12(B) Motions to Dismiss, concluding that Plaintiffs lacked standing. See Order of December 9, 2011.

The Tenth District affirmed, holding that Plaintiffs lacked standing under any one of five asserted theories. App. Op. ¶ 14. First, the court found that none of the individual plaintiffs

suffered or were threatened with any direct and concrete injury resulting from the negative effects of gambling. *Id.* ¶ 16. For example, Plaintiff Robert Walgate did not allege that the challenged laws caused his gambling addiction, and thus did not cause his and his mother’s purported injuries relating to his addiction; nor would the relief requested redress such injury. *Id.* Any future injury related to the increased availability of gambling “is purely speculative and hypothetical and, thus, does not constitute actual or concrete injury.” *Id.* Next, Zanotti and Abraham could not base standing on claims that their communities would suffer negative social effects from increased gambling, as such harm was “abstract and speculative,” and was not even alleged in the complaint, but only in briefing. *Id.* ¶ 17.

Second, the court rejected Agnew’s and Agnew Lighting’s claim of “special fund” taxpayer standing. *Id.* ¶¶ 18-20. The claim that Agnew Lighting was taxed differently from others “fails to allege damage distinct from the damages suffered by the general public and fails to allege a special interest in a special fund.” *Id.* ¶ 20.

Third, the court held that the public school teacher and parents of public school students lacked standing. *Id.* ¶¶ 21-22. Those Plaintiffs claimed that the challenged laws improperly redirect general funds from public education and replace the reduction with projected VLT proceeds. *Id.* ¶ 21. The court held that this was “purely speculative” and “at most, alleges an injury that *could* occur *if* there is a deficit in funds and the funds are not adequately replenished and *if* their particular schools and districts are affected.” *Id.* ¶ 23 (emphasis in original).

Fourth, the appeals court affirmed that Plaintiff Kinsey failed to allege any actual injury in the form of an equal protection deprivation. *Id.* ¶¶ 24-27. The complaint alleges merely in “general and conclusory fashion” that but for the provisions of the Ohio Constitution limiting gambling to four locations, owned by two gaming companies, Kinsey would run his own casino.

Id. ¶ 27. But without an allegation that he was “ready and able” to do so, Kinsey’s alleged injury was “hypothetical and speculative, and therefore, insufficient to confer standing.” (*Id.*).

Fifth, the Tenth District held that plaintiffs lacked standing under *Sheward*’s public right exception. *Id.* ¶¶ 30-32. The court found that the laws challenged here are “not of the same magnitude as” those in *Sheward*, “which concerned separation of powers and the ability of the Ohio legislature to re-enact legislation expressly prohibited by the judiciary.” *Id.* ¶ 32.

Finally, the appeals court also found that the trial court did not err in dismissing Plaintiffs’ Complaint without allowing an opportunity to file an amended complaint to plead additional facts. *Id.* ¶¶ 34, 35. Plaintiffs never sought to file a second amended complaint nor otherwise explained how an amendment would cure the deficiencies in their complaint. *Id.* ¶ 35.

**THIS CASE DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION
AND IS NOT OF PUBLIC AND GREAT GENERAL INTEREST**

In dismissing the case for lack of standing, the courts below followed uncontroverted Ohio law and found that Plaintiffs’ Complaint failed to plead the requisite elements of standing: injury-in-fact, causation, and redressability. Plaintiffs argue that the Tenth District’s decision has great constitutional and public import because it leaves provisions of the Ohio Constitution unenforceable. Jur. Mem. 3. However, the Tenth District’s decision does not foreclose possible future constitutional challenges; rather, it leaves the question open for another day for litigants with a direct, concrete, and personal stake in the outcome. Not every appeal challenging a lower court’s no-standing decision merits review in this Court. The Tenth District’s analysis needs no adjustment or clarification. No further action in this Court is needed.

This appeal also does not involve a matter of public or great general interest that warrants review or the application of the public right exception to standing. This appeal is about standing, not the underlying constitutional issues. And the Tenth District’s standing analysis accords with

this Court's standing cases and needs no additional consideration. While VLTs and casinos may have attracted public *attention*, they do not have the same widespread public *impact* as *Sheward* or other public right actions heard by this Court. The statutory scheme at issue in *Sheward* affected every tort claim filed in Ohio. The statute challenged in *AFL-CIO* affected every injured worker anywhere in Ohio who wanted to participate in the workers' compensation system. *State ex rel. Ohio AFL-CIO v. Ohio BWC*, 97 Ohio St.3d 504, 2002-Ohio-6717, at ¶ 12. Plaintiffs have made no showing that the issues presented in their appeal rise to the same level of importance. Plaintiffs' arguments, if accepted as a measuring stick for justiciability, would eliminate the jurisdictional prerequisite of standing altogether and would open the floodgates of the courthouse to any case that garners an indeterminate amount of public scrutiny.

Moreover, Plaintiffs' procedural objections raise routine matters of trial procedure and do not warrant jurisdiction. The Courts below handled the procedural objections under settled law, so nothing here presents an opportunity to write new law. Simply put, this is not a case where the courts below "refused" Plaintiffs a chance to amend the complaint or deprived them of their day in court. See Jur. Mem. 4. Rather, this lawsuit was dismissed as the result of pleading deficiencies and Plaintiffs' own failure to comply with the rules of civil procedure.

Nor is jurisdiction warranted merely because the Court has accepted jurisdiction in *ProgressOhio.org v. JobsOhio*, No. 2012-1272. While plaintiffs in both cases claim public right standing, most parts of the two cases diverge sharply: The *ProgressOhio* plaintiffs claim legislator standing and statutory standing under the JobsOhio Act and Declaratory Judgment Act, while Plaintiffs here claim special-fund taxpayer standing, standing resulting from the negative effects of gambling, and standing of parents and teachers to challenge school funding.

But even if there were an overlapping issue of public right standing, it would at most

justify a hold on this case for *ProgressOhio*, and not an outright grant here. A grant would waste court and party resources, merely for a one-issue potential overlap. The Court should, at most, hold this case, and even so, should hold only on Plaintiffs' First Proposition of Law in this case regarding public right standing, and not the routine factbound remainder of this case. Further, once *ProgressOhio* is decided, the Court would not need to grant review or even remand the case, if the Court holds, as it should, that the *Sheward* exception will not be expanded to cover the *ProgressOhio* plaintiffs or other plaintiffs such as those here. In that case, the Court can simply deny review in this case at that time. Finally, even if the Court uses the *ProgressOhio* case to expand the *Sheward* exception and create a new, broader standard for public right standing, the Court should not grant full review of this case, but should vacate and remand this appeal back to the Tenth District to review whether these Plaintiffs have standing under whatever newer standard might be established in *ProgressOhio*. However, under the Court's current requirements for traditional and public right standing, review is not warranted here.

ARGUMENT

State Defendants-Appellees' Proposition of Law No. 1

Plaintiffs lack standing to challenge the constitutionality of statutes in the absence of any allegations of a concrete, particularized injury different in character from that sustained by the public generally.

An Ohio court cannot consider the merits of a legal claim until the person seeking relief establishes standing to sue. *Sheward*, 86 Ohio St.3d 451, 469. And because the original jurisdiction of common pleas courts is limited to "justiciable matters," standing is a jurisdictional prerequisite. *See Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, ¶¶ 20-22 (citing Article IV, Section 4(B) of the Ohio Constitution).

Ohio law is clear: Private litigants may not sue to challenge the constitutionality of Ohio law absent a direct and concrete injury that is different in manner or degree from that suffered by

the public in general. *Cuyahoga Cty. Bd. of Commrs.*, 112 Ohio St.3d 59, 2006-Ohio-6499, ¶ 22; *Sheward*, 86 Ohio St.3d 451, 469, 470. See also *State ex rel. Masterson v. Ohio State Racing Comm.*, 162 Ohio St. 366, 367 (1954) (“[P]rivate citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally.”). Plaintiffs must satisfy three elements for standing to attack a statute’s constitutionality: (1) an injury-in-fact: “that he or she has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general,” (2) causation: “that the law in question has caused the injury,” and (3) redressability: “that the relief requested will redress the injury.” *Sheward*, 86 Ohio St. 3d at 469-470 (citations omitted). Moreover, the injury must be “actual” and “concrete,” “not simply abstract or suspected.” *Ohio Contractors Assn. v. Bicking*, 71 Ohio St. 3d 318, 320.

The Tenth District applied these well-settled principles in rejecting standing here.

A. The Tenth District properly held that Plaintiffs failed to establish standing based on the purported negative effects of gambling.

First, the appeals court properly concluded that Plaintiffs failed to establish an injury-in-fact, causation, and redressability premised on the alleged negative effects of gambling. Plaintiff Robert Walgate alleges that he is a recovering addicted gambler and that his “addiction in the past caused great distress and hardship” to himself and his family, including his mother Plaintiff Sandra Walgate. Am. Compl. ¶¶ 1, 4. The court correctly found that “the complaint does not allege that the laws in question have caused the injury or that the relief requested will redress such injury.” App. Op. ¶ 16 (citing *Sheward* at 469-70). Even if the complaint is construed broadly to allege (and it does not) that the increased availability of gambling authorized by the challenged laws *may* cause injury to Robert Walgate and his family in the future, “such injury is purely speculative and hypothetical, and thus, does not constitute actual or concrete injury to

justify a finding of standing.” App. Op. ¶ 16; *Tiemann v. Univ. of Cincinnati*, 127 Ohio App. 3d 312, 325 (10th Dist. 1998) (“A bare allegation that plaintiff fears some injury will or may occur is insufficient to confer standing.”).

The Tenth District also properly concluded that Plaintiffs Zanotti and Abraham lacked standing based on their contention that they will suffer the negative social effects of increased gambling in their communities. App. Op. ¶ 17. The appeals court found this alleged harm to be “abstract and speculative” and not contained in the Complaint. *Id.* Indeed, the only factual allegation in the Complaint pertaining to Zanotti and Abraham is that they live in Strongsville and Cleveland, respectively, both within Cuyahoga County. Am. Compl. ¶¶ 3, 9.

Plaintiffs raise both procedural and substantive objections, both without merit. The first—that the appeals court should have considered affidavits attesting to the negative effects of gambling—is addressed below. The other objection is that the appeals court should have applied federal cases where plaintiffs who alleged harm from the negative effects of gambling in their communities had standing. See Jur. Mem. 10-11. Plaintiffs’ reliance on these cases is misplaced, as the plaintiffs in those cases, unlike Plaintiffs here, established *all three* prongs of standing. See *Patchak v. Salazar*, 632 F.3d 702, 703-704 (D.C. Cir. 2011) (finding that quantified allegations of increased crime and pollution “constituted an injury-in-fact fairly *traceable* to the Secretary’s . . . decision” and that “the court could *redress*” that injury “with an injunction that would in effect prevent the Band from conducting gaming on the property”) (emphasis added), *aff’d*, *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S. Ct. 2199 (2012); see also *Amador County v. Salazar*, 640 F.3d 373, 378 (D.C. Cir. 2011) (finding “direct causal connection” between harm and challenged official action and redressability where court order would prevent all gambling in county).

In contrast, even if Plaintiffs Zanotti and Abraham alleged a sufficiently concrete injury-in-fact resulting from increased casino gaming (and they have not), they cannot establish redressability. The casino-related claims address only the manner in which the casinos are taxed (Counts 11, 12, 14), and the construction of multiple casino facilities in Cleveland without an additional initial investment (Count 13). Even if the Court were to order the casinos to pay additional taxes and fees, the granting of such relief would not force the casinos to shut down. Though such relief might impose an economic impediment for casinos, it would not provide the *complete* redress required to satisfy standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992) (finding no redressability and thus no standing where it is “entirely conjectural” whether the requested relief would cease or alter the challenged activity). Zanotti and Abraham therefore lack standing because they cannot establish injury-in-fact or redressability. And because none of the individual plaintiffs who are members of Roundtable (both Walgates, Adams, Zanotti, and Abraham) suffered any redressable harm, the Tenth District also properly determined that Roundtable lacked associational standing. App. Op. ¶ 28. See also *Bicking*, 71 Ohio St. 3d at 320 (association lacked standing where no members suffered “actual injury”).

B. Plaintiffs lack standing based on their status as parents of public school students.

The Tenth District also properly held that Plaintiffs Bolyard, the Maleks, and the Adamases lack standing to challenge the manner in which the VLT legislation will purportedly affect public education funding.¹ These Plaintiffs allege that, as parents of public school students, they have a judicially cognizable interest in school district funds. But parents of public school students do not automatically have standing to challenge school-funding laws. As in any case seeking to enjoin an official act, plaintiffs must “allege and prove damage *to themselves*

¹ Plaintiffs have apparently abandoned any claim based on Sandra Walgate’s status as a public school teacher. See Am. Compl. ¶ 4; Jur. Mem. 11.

different in character from that sustained by the public generally.” *State ex rel. Masterson*, 162 Ohio St. at 368 (emphasis added). In the absence of such allegations here, the Tenth District properly held that Plaintiffs lack standing as parents to challenge the VLT legislation.

Plaintiffs do not even allege an actual deficiency in school funding resulting from the challenged VLT provisions. Indeed, the presence of an actual injury depends on several hypothetical contingencies. The Complaint “at most alleges an injury that *could* occur *if* there is a deficit in funds *and* the funds are not adequately replenished and *if* their particular schools and districts are affected.” App. Op. ¶ 23 (emphasis in original). Plaintiffs here fail to allege a particularized and direct injury traceable to the challenged funding mechanism. Likewise, in *Okanongan Sch. Dist. #105 v. Superintendent of Public Instruction for State of Washington*, 291 F.3d 1161, 1166-67 (9th Cir. 2002), a case cited by Plaintiffs, the Court found that parents *lacked* standing for failure to show that educational deficiencies were caused by the district’s funding practices or would be redressed by court order. *Cf. Powell v. Ridge*, 189 F.3d 387, 403 (3rd Cir. 1999) (parents alleged sufficient, redressable injury under Title VI by quantifying per-child funding deficiency in districts with high proportions of non-white students) (cited in Jur Mem 11).

The appeals court properly concluded that the Plaintiffs’ allegations of injury are “purely speculative” and no different from the type of harm that could be asserted by the general public.

C. Plaintiffs lack taxpayer standing.

Plaintiffs also assert without further explanation that they have standing as “contributors to special funds for schools. . . to pursue claims of unconstitutional diversion of. . . casino tax proceeds from education or school funds.” Jur. Mem. 11. This apparently refers to Agnew’s and her company’s claims related to the casinos’ CAT liability. The Tenth District correctly held that Agnew Sign & Lighting (ASL) and Linda Agnew lacked standing to assert such claims.

ASL and Agnew's payment of the CAT does not in itself confer taxpayer standing to challenge the manner in which the CAT is assessed on other entities. A "taxpayer can not [sic] bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy." *Masterson*, 162 Ohio St. at 368. ASL and Agnew argued below that because monies from the CAT are allocated to the Ohio School District Tangible Tax Replacement Fund and the Ohio Local Government Tangible Property Tax Replacement Fund, they have an interest in a special fund to satisfy *Masterson*. But they do not challenge the administration of a special fund or assert any harm to their rights in such funds. They merely argue that casinos will be taxed differently from other commercial entities in Ohio. The Tenth District rightly concluded that they failed to plead a distinct injury or "special interest" different from any other taxpayer.

State Defendants-Appellees' Proposition of Law No. 2

This is not the "rare and extraordinary case" that triggers public-right standing.

Plaintiffs also do not have standing under *Sheward's* public right exception or under any of Plaintiffs' novel theories. The Court explained that "[t]he public-right doctrine is, indeed, an exception to the personal-injury requirement of standing." *Sheward*, 86 Ohio St. 3d at 503. However, "[n]ot all alleged illegalities or irregularities are thought to be of that high order of concern" to qualify for public right standing. *Id.* The Court "expressed quite clearly" that it "will entertain a public action only 'in the rare and extraordinary case' where the challenged statute operates, 'directly and broadly, to divest the courts of judicial power.'" *Id.* at 504. After *Sheward*, the Court has repeatedly held that public right standing is reserved for "rare and extraordinary" cases. This lawsuit does not qualify for that designation.

Sheward was a "rare and extraordinary case" because the challenged legislation involved sweeping structural changes to civil tort law across over one hundred sections of the Revised

Code and “operated to directly and broadly divest the courts of judicial power” in that the General Assembly overruled the Ohio Supreme Court by re-enacting provisions the Court previously deemed unconstitutional. *Id.* at 457-459. Since *Sheward*, the Court has applied public right standing in only one case. In *State ex rel. Ohio AFL-CIO v. Ohio BWC*, 97 Ohio St.3d 504, 2002-Ohio-6716, the Court found public right standing because the legislation requiring mandatory drug testing “affects every injured worker who seeks to participate in the workers’ compensation system” and thus “affects virtually everyone who works in Ohio.” *Id.* at ¶ 12. Otherwise, the Court has declined to apply the *Sheward* exception. See *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, ¶ 47 (challenge to disbursement of unclaimed funds not “rare and extraordinary” case); *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶ 51 (*Sheward* exception is “narrow” and does not apply if case “presents only a general and abstract question concerning the constitutionality of a legislative act”).

The Tenth District correctly held that this challenge does not fall within *Sheward*’s public right exception and does not warrant a departure from common law standing requirements. App. Op. ¶ 32. Plaintiffs do not challenge the conclusion that their case does not rise to the level of *Sheward*. Rather, they challenge the appeals court’s description of *Sheward*’s scope—taken from this Court’s post-*Sheward* cases—by arguing that the “rare and extraordinary” limit is “dicta” and not a criterion for public right standing. Jur. Mem. 7-8. However, after *Sheward*, the Court “expressed quite clearly. . . that this court will entertain a public action only ‘in the rare and extraordinary case’” *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Ohio Bureau of Workers Compensation*, 108 Ohio St. 3d 432, 2006-Ohio-1327, ¶ 49; see also *State ex rel. Ohio AFL-CIO*, 2002-Ohio-6716, ¶ 12 (“The granting of writs of

mandamus and prohibition to determine the constitutionality of statutes will ‘remain extraordinary’ and ‘limited to exceptional circumstances. . .’”).

Finally, Plaintiffs cite older mandamus cases involving enforcement of a specific public duty. Jur. Mem. 7-8; *see, e.g., State ex rel. Trauger v. Nash*, 66 Ohio St. 612 (1902) (granting writ of mandamus filed by citizen to compel Governor to fill a vacancy in the office of lieutenant governor). But original action cases are distinct. Plaintiffs sued in a common pleas court, so they must establish standing as a jurisdictional prerequisite under Article IV, Section 4(B) of the Ohio Constitution. *See Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, ¶¶ 3, 20 (“standing is required to invoke the jurisdiction of the common pleas court” under Article IV, § 4(B)).

State Defendants-Appellees’ Proposition of Law No. 3

Dismissal for lack of standing is proper, without requiring allowance to amend a complaint, when plaintiffs never sought to amend and offered no particularized facts, by affidavits or otherwise, showing a redressable injury-in-fact.

In their Fourth and final proposition of law, Plaintiffs assert two procedural errors. Neither argument has merit. First, Plaintiffs argue that the trial court should have allowed them to amend their complaint before dismissing. But Plaintiffs never sought leave to do so, never proposed a Second Amended Complaint, nor otherwise spelled out the facts that would cure their standing problem. At most, Plaintiffs referred in passing, in their opposition to the motions to dismiss, to the idea of amendment. However, a reference in an unrelated brief does not constitute a motion for leave to amend under Civ. Rule 15(A). *See White v. Roch*, 9th Dist. C.A. No. 22239, 2005-Ohio-1127, ¶ 8 (trial court properly denied leave to amend where plaintiff failed to file Civ. R. 15(A) motion before complaint was dismissed); *accord Moore v. Rickenbacker*, 10th Dist. 00AP-1259, 2001 Ohio App. LEXIS 1973 (May 3, 2001). The trial court had no duty to *sua sponte* order Plaintiffs to file an amended complaint before granting Defendants’ motions to dismiss. *Moore, supra*, at * 5.

Plaintiffs also argue that the courts below improperly dismissed the complaint without considering affidavits submitted with their memorandum in opposition to the Motion to Dismiss of Governor Kasich. However, those affidavits did not assert particularized facts showing a redressable injury-in-fact or otherwise cure the standing defects in their Complaint. One affidavit, offered by a non-party witness testifying as to the behavioral patterns of compulsive gamblers, does not allege any direct injury-in-fact to the plaintiffs themselves resulting from the challenged laws. See Aff. of Valerie C. Lorenz, Ph.D. (Ex. A of Plaintiffs' Mem. Contra Mot. To Dismiss of Def. Kasich). The other affidavit, from Plaintiff Zanotti, opines that VLTs and casinos will increase public corruption and result in increased costs to all Ohio taxpayers. Zanotti Aff. ¶¶ 3-4 (*Id.*, Ex. B). These conclusory allegations fail to set forth a concrete, particularized injury different from a purported harm suffered by the general public. Thus, even with the submission of their affidavits, dismissal was proper.

CONCLUSION

The Court should decline jurisdiction over this appeal.

Respectfully submitted,

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I certify that a copy of the foregoing Response of State Defendants-Appellees in Opposition to Appellants' Memorandum in Support of Jurisdiction was served by regular U.S. mail this 28th day of May, 2013 upon the following:

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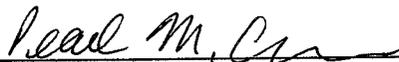
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