

ORIGINAL

IN THE OHIO SUPREME COURT

BANK OF AMERICA, N.A.	*	CASE NO. 2013-0304
Plaintiff/Appellant	*	On Appeal from the Medina County Court of Appeals, Ninth Appellate District
-vs-	*	
GEORGE M. KUCHTA, et al.	*	Court of Appeals Case No. 12CA0025-M
Defendant/Appellees.	*	

**MEMORANDUM OF AMICI CURIAE JOSEPH AND LORI LAPIERRE
IN SUPPORT OF MOTION FOR RECONSIDERATION**

Andrew M. Engel (0047371)
 KENDO, ALEXANDER, COOPER & ENGEL, LLP
 7925 Paragon Road
 Centerville, OH 45459
 (937) 433-4090
 Fax: (937) 433-1510
 aengel@kacelawllp.com

Scott A. King (0037582)
 Terry W. Posey (0084284)
 THOMPSON HINE LLP
 Austin Landing I
 10050 Innovation Drive
 Suite 400
 Dayton, Ohio, 45342-4934

and

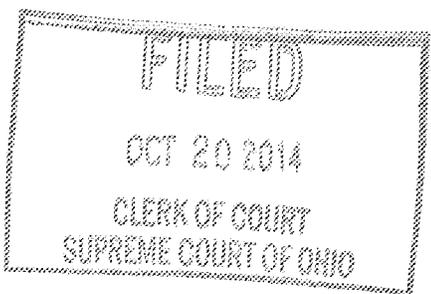
Attorneys for Appellant

Brian Flick (0081605)
 MILLS, MILLS, FIELY & LUCAS, LLC
 503 South Front Street, Ste. 240
 Columbus, Ohio 43215
 614.754.7076
 614-767-5229 fax
 bflick@mmflaw.com

Marc E. Dann (0039425)
 Grace M. Doberdruk (085547)
 Daniel M. Solar (0085632)
 James R. Douglass (0022085)
 THE DANN LAW FIRM CO., LPA
 4600 Prospect Avenue
 Cleveland, Ohio 44103
 Telephone: (216)373-0539
 Fax: (216)373-0536
 mdann@dannlaw.com
 grace@dannlaw.com
 firedcoach@aol.com

Attorneys for Amici Curiae Joseph and Lori LaPierre

Attorneys for Appellees



Amici Curiae Joseph and Lori LaPierre support the Motion For Reconsideration of George and Bridget Kuchta. They believe that the Court should reconsider its decision to consider that arguments of the parties on issues that were not addressed in the briefing.

The holding in this case delved into an issue that the parties did not really brief – the nature of subject-matter jurisdiction and the role standing plays in it. In its brief, Bank of New York concentrated on whether the principles of res judicata can be applied to subject-matter jurisdiction. “These principles do not change because the issue is one affecting subject matter jurisdiction . . .” *Brief of Appellant, Bank of New York, N.A.* p. 5. In fact, throughout its brief, Bank of America time and again argues that res judicata can apply to subject-matter jurisdiction and cites copious authority for that premise. Similarly, neither the Kuchtas nor the amici curiae addressed whether standing is a part of subject-matter jurisdiction. All of the parties proceeded in their arguments under the assumption that standing was a component of subject-matter jurisdiction. That assumption was perfectly reasonable in light of *Schwartzwald*.

The result is that the Court issued its decision without the benefit of the parties’ input on the precise issue the Court addressed. Because of the way it viewed the issues in the case, the Court did not delve into the primary issue briefed by the parties – the conditions under which res judicata can apply to the issue of subject-matter jurisdiction. Ultimately, the Court did not need to address the issue the parties thought was being litigated because it viewed the case completely differently than the parties did. It was like watching a running back cross the goal line only to have the official raise his fist in the air and yell, “You’re out!”

As argued below, the Court’s decision in this case departs from long-held precedent

and alters the constitutional power of Ohio's common pleas courts. The decision is important on many levels and casts into doubt much existing precedent. For instance, the decision:

1. Seemingly modifies syllabus paragraph 1 of *Morrison v. Steiner*, which defines "subject-matter jurisdiction."
2. Seemingly overrules the holding of *Barclays Bank*, which held that justiciability is part of a common pleas court's subject-matter jurisdiction.
3. Seemingly adopts the plurality position contained in *State, ex rel. Tubbs-Jones v. Suster* that standing does not impact subject-matter jurisdiction.
4. Holds that a court's jurisdiction can be exercised even if that jurisdiction is never invoked.

For these reasons, the Court should consider the parties arguments on the issues the Court decided.

Moreover, the Court should reconsider the decision because the answer the Court gave to the certified question does not really match the question itself. The result is sure to be much more litigation regarding exactly how the decision should be applied by lower courts.

A. The Court's Definition of Subject-Matter Jurisdiction

In its decision, the Court correctly identified the source of a common pleas court's statutory jurisdiction as R.C. 2305.01. But the Court equates this grant of basic statutory jurisdiction as being coextensive with subject-matter jurisdiction. Notably, however, R.C. 2305.01 does not use the term "subject-matter jurisdiction." Rather, it states, "the court of

common pleas has original jurisdiction in all civil cases . . .” Similarly, Art. IV, Sec. 4(B) grants common pleas courts “original jurisdiction over all justiciable matters . . . as provided by law.” Neither grant refers to “subject-matter jurisdiction.”

The majority cites to *Saxton v. Seiberling*, 48 Ohio St. 554 (1891) for the proposition that Ohio’s common pleas courts are courts of general jurisdiction, “with subject-matter jurisdiction that extends to “all matters at law and in equity that are not denied to it.” *Kuchta* at 20. But in *Saxton*, Justice Minshall did not use the term “subject-matter.” The full quote from the decision reads:

The court of common pleas is a court of general jurisdiction. It embraces all matters at law and in equity that are not denied to it.

Saxton, pp. 558-59. In fact, the reference to jurisdiction - without the qualifier “subject-matter” - is ubiquitous in this Court’s decisions discussing the judicial power of Ohio courts.

Further, the majority glosses over a critical qualifier contained in *Saxton* – “not denied to it.” In 1891, Ohio’s constitution did not deny jurisdiction to a common pleas court. But that changed more than 70 years later with the passage of the Modern Courts Amendment. That amendment specifically denied common pleas courts jurisdiction over non-justiciable matters. Indeed, one could read Art. IV, Sec. 4(B) to define the “class of cases” over which a common pleas court has original constitutional jurisdiction – justiciable matters.

The majority goes on to rely on *Robinson v. Williams*, 57 N.E. 55, 62 Ohio St. 401 (1900) and *Winemiller v. Laughlin*, 38 N.E. 111, 51 Ohio St. 421 (1894) for the proposition that foreclosure cases are within the subject-matter jurisdiction of a common pleas court. But again, neither decision uses the term “subject-matter.” *Robinson*, p. 408 (“But, general as they are, they do not preclude the common pleas, in proper cases, from exercising any of

its power as a court of general jurisdiction at law and in equity . . ."); *Winemiller* (implicitly acknowledges that a common pleas court has jurisdiction over foreclosure actions). The LaPierres do not contest that a common pleas court has statutory jurisdiction over foreclosure cases. They contend, however, that statutory jurisdiction is but one part of subject-matter jurisdiction.

B. The Court Modified The Holding Of *Morrison v. Steiner*

The majority stated: "Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases." *Kuchta* at ¶19 (citing *Morrison v. Steiner*, 32 Ohio St.2d 86, 87, 290 N.E.2d 841 (1972)). But that definition of subject-matter jurisdiction is not found in *Morrison*. At no time did the Court tie subject-matter jurisdiction to "a particular class of cases." Rather, the first syllabus paragraph of that case reads:

Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits; venue connotes the locality where the suit should be heard.

Id. syll. 1 (emphasis added). And the same pronouncement is found in the body of the opinion:

Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits, . . . Subject-matter jurisdiction defines the competency of a court to render a valid judgment in a particular action.

Id. p. 87; see also, *Cheap Escape Co., Inc. v. Haddox, LLC*, 900 N.E.2d 601, 120 Ohio St.3d 493, 2008-Ohio-6323, ¶6 (2008); *In re J.J.*, 855 N.E.2d 851, 111 Ohio St.3d 205, 2006-Ohio-5484, ¶11 ("Subject-matter jurisdiction "connotes the power to hear and decide a case upon its merits." *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, 87, 61 O.O.2d 335, 290 N.E.2d 841.").

Instead of speaking of a "class of cases," this Court has directly and repeatedly welded subject-matter jurisdiction to "a case" and "a particular action." This Court has for over 150 years even defined the more generic term "jurisdiction" in the same manner.

"Jurisdiction" means "[t]he power to hear and determine *a cause* * * *." *Scott v. Bank One Trust Co., N.A.*, 577 N.E.2d 1077, 62 Ohio St.3d 39 (1991)(emphasis added)(quoting *Sheldon's Lessee v. Newton*, 3 Ohio St. 494, 499 (1854)).

The definition provided in *Morrison* discusses the power of a court to decide the merits of a case. Reaching the merits – rendering judgment on claims asserted by a plaintiff – is also tied to this Court’s jurisprudence on standing. Prior to reaching the merits, the plaintiff’s standing must be established. *Clifton v. Blanchester*, 126 Ohio St.3d 1597, 2010-Ohio-4928, ¶15 (“It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue.”) (quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469, 715 N.E.2d 1062); see also, *Moore v. Middletown*, 975 N.E.2d 977, 133 Ohio St.3d 55, 2012-Ohio-3897, ¶21 (2012). In the absence of a plaintiff with standing, a court lacks the power to reach the merits of a case.

The only conclusion one can reach when reading *Kuchta* in light of *Morrison* and its progeny is that the Court intended to alter *Morrison*’s definition of “subject-matter jurisdiction,” to recast it in terms of “a particular class of cases,” instead of a particular case. Yet, the Court offered no explanation for the change, no reason for abandoning a definition announced more than forty years ago.

By changing the definition of “subject-matter jurisdiction,” the Court is overruling, or at least modifying, the first syllabus paragraph of *Morrison*. In *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 100 Ohio St.3d 216, 2003-Ohio-5849 (2003), Justice O’Connor wrote that:

Stare decisis is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system. It is only with great solemnity and with the

assurance that the newly chosen course for the law is a significant improvement over the current course that we should depart from precedent.

Id. ¶1. The opinion went on to say:

The doctrine of stare decisis is designed to provide continuity and predictability in our legal system. We adhere to stare decisis as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs. *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 4-5, 539 N.E.2d 103. Those affected by the law come to rely upon its consistency. *Helvering v. Hallock* (1940), 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604. Accordingly, stare decisis is long revered. See, e.g., 1 Blackstone, Commentaries on the Laws of England (1765) 70 ("precedents and rules must be followed, unless flatly absurd or unjust * * *).

Id. ¶43. With those cautioning principles firmly in mind, the Court adopted the standard under which existing precedent is cast aside.

A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Id. syll ¶1.

In this case, the Court changed the time-honored definition of "subject-matter jurisdiction" without explanation. No longer does the term relate to the power to decide a particular case. Now it relates only to the class of cases a court may hear. And the distinction is not an ancillary to the resolution of this case. As the Court noted, whether standing relates to subject-matter jurisdiction is critical to determining whether a judgment is void, instead of merely voidable. *Kuchta* ¶17. And that determination is critical for application of the principles of res judicata. As the Court recently held, if a judgment is void, it is always subject to collateral attack. *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-

1052, ¶46 (2014). Such a drastic change of the law should not be done as an afterthought, but should be declared plainly.

C. The Court's Decision In This Case Directly Conflicts With Barclays Bank.

"This Court has said several times that "[p]rohibition tests and determines "solely and only" the subject matter jurisdiction of the inferior tribunal." *State ex rel. Eaton Corp. v. Lancaster*, 534 N.E.2d 46, 40 Ohio St.3d 404, 409 (1988)(citing *State, ex rel. Staton, v. Common Pleas Court*, 5 Ohio St.2d 17, 21, 34 O.O.2d 10, 13, 213 N.E.2d 164,167 (1965). Such a writ is issued specifically to prevent a lower court from exercising judicial power that it does not possess.

In *State, ex rel. Adams, v. Gusweiler* (1972), 30 Ohio St.2d 326, 59 O.O.2d 387, 285 N.E.2d 22, this Court adopted the general rule regarding prohibition:

"If an inferior court is without jurisdiction whatsoever to act, the availability or adequacy of a remedy of appeal to prevent the resulting injustice is immaterial to the exercise of supervisory jurisdiction by a superior court to prevent usurpation of jurisdiction by the inferior court. * * * "

Id. at p. 329. Prohibition will issue only when the lack of jurisdiction is "patent and unambiguous." *Department of Administrative Services, Office of Collective Bargaining v. State Employment Relations Bd.*, 562 N.E.2d 125, 54 Ohio St.3d 48, 51 (1990)(citing *State, ex rel. Safeco Ins. Co. of America, v. Kornowski*, 40 Ohio St.2d 20, , 317 N.E.2d 920 (1974).

It stands to reason that if prohibition addresses the exercise of subject-matter jurisdiction, then the Court's decisions in prohibition cases would be instructive on the definition of "subject-matter jurisdiction" and the types of considerations incorporated into the term.

In *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas*, 660 N.E.2d 458, 74 Ohio St.3d 536, 1996-Ohio-286 (1996), this Court granted a writ of prohibition

against a common pleas court that was going to exercise jurisdiction in a case that was not justiciable. Barclays Bank PLC was the named defendant in the common pleas case and sought a writ of prohibition because it was not a proper defendant in the case. Barclays argued that because it was not the proper defendant, the common pleas court was not presented with a justiciable matter and, therefore, lacked jurisdiction under Art. IV, Sec. 4(B) of Ohio's Constitution. This Court observed:

The Constitution of Ohio sets forth the basic limitations on the jurisdiction of the common pleas courts. Section 4(B), Article IV of the Ohio Constitution vests the common pleas courts with "such original jurisdiction over all justiciable matters * * * as may be provided by law." This court, in interpreting Section 4(B), Article IV, has declared the following:

"It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and render judgments which can be carried into effect." *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 36, 257 N.E.2d 371, 372. Actual controversies are presented only when the plaintiff sues an adverse party. This means not merely a party in sharp and acrimonious disagreement with the plaintiff, but a party from whose adverse conduct or adverse property interest the plaintiff properly claims the protection of the law. Thus, we hold that the presence of a disagreement, however sharp and acrimonious it may be, is insufficient to create an actual controversy if the parties to the action do not have adverse legal interests. Cf. *Diamond v. Charles* (1986), 476 U.S. 54, 62, 106 S.Ct. 1697, 1703, 90 L.Ed.2d 48, 57.

Id. p. 452.

This Court found that, because Barclays was not a proper defendant in the case, it and the plaintiffs did not possess adverse legal interests. As a result, the common pleas court was not presented with a justiciable matter and lacked subject-matter jurisdiction to proceed. In fact, the Court's syllabus stated:

An action to enjoin payment under a letter of credit or a confirmation of a letter of credit must include the beneficiary as a party in order to present an actual controversy within the common pleas court's subject matter jurisdiction.

Id. syll. ¶2.

In *Barclays Bank*, this Court expressly held that the lack of a justiciable matter deprived a common pleas court of subject-matter jurisdiction. In *ProgressOhio.org* and *Schwartzwald* this Court directly held that standing is an absolute requirement for justiciability. But in this case the Court has held that standing and justiciability do not really impact a common pleas court's subject-matter jurisdiction. These decisions cannot be reconciled. If the Court has decided to change the jurisdictional landscape in the state, it should provide litigants and lower courts with some guidance as to exactly where the new horizon sits.

D. The Court's Reliance on *State ex rel. Tubbs-Jones v. Suster* Is Misplaced

To find support for severing the constitutional requirement of justiciability from subject-matter jurisdiction, the Court cited to *Suster* for the proposition that “a particular party's standing or lack thereof, does not affect the subject-matter jurisdiction of the court in which the party is attempting to obtain relief.” *Kuchta*, ¶ 23 (citing to *State ex rel. Tubbs-Jones v. Suster*, 701 N.E.2d 1002, 84 Ohio St.3d 70, 77 1998-Ohio-275 (1998)). This reliance on *Suster* is odd because in *Schwartzwald* the Court refused to follow the very part of *Suster* it now cites to, reasoning:

However, four justices declined to join that portion of the opinion, and therefore it is not a holding of this court. See Ohio Constitution, Article IV, Section 2(A) (“A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment”).

Schwartzwald ¶ 29. Thus, because the portion of *Suster* to which the Court cites was supported by a mere plurality, it offers no support for the proposition. If the Court is now adopting that portion of *Suster*, it should restate the proposition directly and not by implication.

E. Pratts v. Hurley Does Not Control This Case.

The majority relied heavily on *Pratts v. Hurley*, 806 N.E.2d 992, 102 Ohio St.3d 81, 2004-Ohio-1980 (2004) and concluded that standing goes not to subject-matter jurisdiction but rather to the issue of a court's exercise of jurisdiction in a particular case. *Id.* ¶15. But the Court's framing of the issue was odd: "There is a distinction between a court that *lacks subject-matter jurisdiction over a case* and a court that *improperly exercises that subject-matter jurisdiction once conferred upon.*" *Id.* (emphasis added). It did not refer to jurisdiction over a class of cases. Instead, it considered exercise of jurisdiction conferred.

As the dissent noted, *Pratts* did not involve a case in which the trial court lacked a grant of constitutional jurisdiction. A capital case is justiciable: the State of Ohio is the only party who may prosecute criminal charges, and the defendant is the accused. The legal interests of the two parties were very real; the common pleas court was not being asked to adjudicate a speculative dispute. And, the common pleas court has basic statutory jurisdiction under R.C. 2931.03. Thus, in *Pratts*, the common pleas court possessed both the constitutional and statutory jurisdiction to hear the case before it. Further, this Court noted that the case had been properly commenced, i.e. its jurisdiction had been invoked. Thus, as the dissent argues, *Pratts* actually supports the notion that standing goes to subject-matter jurisdiction.

The issues presented in *Pratts* were different from those presented in this case and it should not have been the sole precedent to which the Court looked in issuing its decision.

F. Constitutional Delegation Of Power Is Paramount

Many of Ohio's trial courts are created by statute and their jurisdiction is defined by statute. *State ex rel. DeWine v. Court of Claims of Ohio*, 130 Ohio St.3d 244, 2011-Ohio-5283. (2011) (Court of Claims is created by statute and has only those powers conferred by statute.) *State ex rel. Johnson v. Perry Cty. Court*, 25 Ohio St.3d 53, 54, (1986) (county courts are created by statute and their jurisdiction is set by statute); *Truman v. Walton*, 59 Ohio St. 517, 525, 53 N.E. 57 (1899)(mayor's court is created by statute and has only that jurisdiction conferred by statute); *Cheap Escape Co., Inc. v. Haddox, L.L.C.*, 120 Ohio St.3d 493, 2008-Ohio-6323, 900 N.E.2d 601, ¶ 7 (being created by statute, municipal court's subject-matter jurisdiction is also created by statute). The power of the General Assembly to do create those courts is found in the Constitution. Art. IV, Sec 1 of the Constitution and provides:

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, *and such other courts inferior to the Supreme Court as may from time to time be established by law.*

Id. (emphasis added).

But unlike statutory courts, Ohio's common pleas courts were created by the people. And their judicial power is initially conferred by the Constitution itself. This Court has often reaffirmed the source all governmental power in Ohio.

" " [T]he people possessing all governmental power, adopted constitutions, completely distributing it to appropriate departments." *Hale v. State* (1896), 55 Ohio St. 210, 214, 45 N.E. 199, 200. They vested the legislative power of the state in the General Assembly (Section 1, Article II, Ohio Constitution), the executive power in the Governor (Section 5, Article III, Ohio Constitution), and the judicial power in the courts (Section 1, Article IV, Ohio Constitution).' " *Norwood* at ¶ 115, quoting *State ex rel. Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 462, 715 N.E.2d 1062.

State v. Bodyke, 933 N.E.2d 753, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶23. And so the people did in 1968 when they adopted the Modern Courts Amendment to Ohio's Constitution.

In passing the amendment, Ohio's citizens decided to limit the power of common pleas courts. They decided that only justiciable matters be heard, that only those matters that are capable of resolution within our adversarial system be considered. And but for that one exception, that one restriction, they bestowed to the legislative branch the dispensation of judicial authority to Ohio's trial courts.

And until the Court's decision in this case, the constitutional grant of a common pleas court's power was considered the most fundamental grant of jurisdiction.

" ' It is a well-established principle of constitutional law that when the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution.' " *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶ 3, quoting *Smith v. State*, 289 N.C. 303, 328, 222 S.E.2d 412 (1976).

State v. Noling, 992 N.E.2d 1095, 136 Ohio St.3d 163, 2013-Ohio-1764 (Ohio 2013). In *Noling*, the Court held that the legislature's attempt to expand the Court's jurisdictional power was unconstitutional because "neither statute nor rule of court can expand our jurisdiction." *Id.* at ¶4 (quoting *Scott v. Bank One Trust Co., N.A.* (1991), 62 Ohio St.3d 39, 41); see also *Brock v. Neimeyer*, 130 Ohio St.3d 80, 2011-Ohio-4704, ¶1 (affirming dismissal of complaint which did not invoke either the Court of Appeals's original or appellate jurisdiction as defined by Section 3(B)(1) and (2), Article IV, of the Ohio Constitution). Although in this case the Court is not addressing an attempt by the legislature to expand the power of a court beyond its constitutional authority, the Court is interpreting R.C. 2305.01 in a manner that effectively reaches the same result. It elevates

the General Assembly's exercise of legislative power under Art. IV, Sec. 4(B) above that the judicial authority granted by that provision itself. It is interpreting a statute that conveys judicial power as being of greater importance than the constitutional grant of judicial power itself. The Kuchtas respectfully submit that no statutory grant of jurisdiction can supplant the constitutional requirement of a justiciable matter found in Art. IV, Sec. 4(B). This Court recently embraced this very reasoning.

In *ProgressOhio.org v. JobsOhio*, this Court considered the relationship of standing to the requirement of justiciability. Justice French succinctly explained:

Nor could we. The Ohio Constitution expressly requires standing for cases filed in common pleas courts. Article IV, Section 4(B) provides that the courts of common pleas "shall have such original jurisdiction over all justiciable matters" (Emphasis added.) A matter is justiciable only if the complaining party has standing to sue. *Fed Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 41 ("It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy"). Indeed, for a cause to be justiciable, it must present issues that have a "direct and immediate" impact on the plaintiffs. *Burger Brewing Co. v. Liquor Control Comm., Dept. of Liquor Control*, 34 Ohio St.2d 93, 97-98, 296 N.E.2d 261 (1973). Thus, if a common pleas court proceeds in an action in which the plaintiff lacks standing, the court violates Article IV of the Ohio Constitution. Article IV requires justiciability, and justiciability requires standing. These constitutional requirements cannot be bent to accommodate Sheward.

ProgressOhio.org, Inc. v. JobsOhio, 139 Ohio St.3d 520, 2014-Ohio-2382, ¶¶10-11.

Instead of couching justiciability in terms of subject-matter jurisdiction, the Court carefully considered it in terms of constitutional power. If standing is lacking, any judgment by the Court other than dismissal is an unconstitutional exercise of power. Yet, in this case, the Court has carved out an exception, a loophole through which a common pleas court may ignore the constitution and do that which the citizens of the state declared they cannot do. The only rational reading of the majority's decision is that a branch of Ohio's

government is not necessarily bound by the constitution which created it. Ohio's constitution is no longer the repository of all governmental power.

In fact, by holding that constitutional jurisdiction is of secondary importance to statutory jurisdiction, the Court creates an avenue through which parties can obtain advisory opinions. Because standing must now be raised by a party prior to judgment, it is possible for litigants to bring cases before a judge for decision even if the plaintiff lacks standing. Unless the judge herself notices the lack of standing, she is powerless to remedy the issue after judgment is rendered. This potential destroys the long-held sanctity of our adversarial system.

In *Fortner v. Thomas*, the Court outlined the prohibition against advisory opinions.

It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.

Fortner v. Thomas, 22 Ohio St. 2d 13, 14 (1970). The Modern Courts Amendment ensured that Ohio's common pleas courts would not wander into the realm of advisory opinions by specifically restricting jurisdiction to those matters that are justiciable.

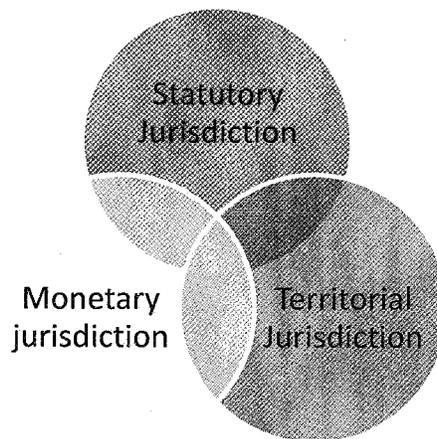
G. The Many Faces Of Subject-Matter Jurisdiction

In *Cheap Escape Co., Inc. v. Haddox, LLC*, 900 N.E.2d 601, 120 Ohio St.3d 493, 2008-Ohio-6323 (2008), the Court grappled with the many types of jurisdiction required for a municipal court to exercise judicial power. The Court noted the difference between common pleas courts and municipal courts and then looked at the language that grants municipal courts judicial power:

Unlike courts of common pleas, which are created by the Ohio Constitution and have statewide subject-matter jurisdiction, see Section 4(A) and (B), Article IV, Ohio Constitution, municipal courts are statutorily created, R.C. 1901.01, and their subject-matter jurisdiction is set by statute. R.C. 1901.18(A) provides the applicable law in this regard: " Except as otherwise provided in this division or section 1901.181 of the Revised Code, subject to the monetary jurisdiction of municipal courts as set forth in section 1901.17 of the Revised Code, a municipal court has original jurisdiction within its territory in all of the following actions or proceedings * * *." The list of enumerated actions includes breach-of-contract cases, which is the cause of action here. *Id.* at (A)(3).

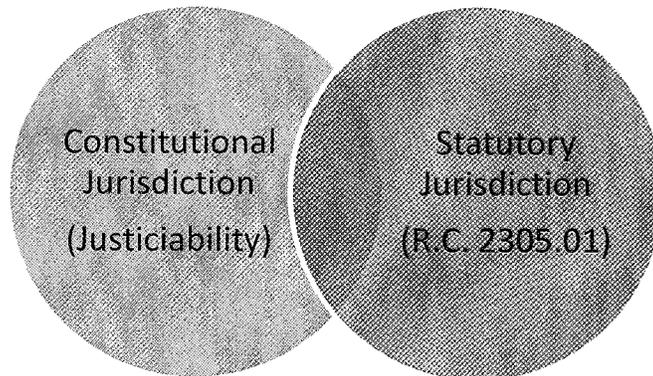
Id. ¶7. It even lamented that "jurisdiction is a vague term, " ' a word of many, too many, meanings.' " *Id.* ¶5.

Yet, the Court was able to define the sources of, and restrictions on, the subject-matter jurisdiction of a municipal court. It acknowledged that the subject-matter jurisdiction of a municipal court has several components: the general statutory grant of jurisdiction, as well as the limiting components of a monetary limit and the territorial requirement. Thus, the subject-matter jurisdiction of a municipal court can be represented as follows:



The subject-matter jurisdiction of municipal courts is found in the center, the area at which the three component jurisdictions overlap. If any one component part is missing, the court lacks subject-matter jurisdiction. In *Cheap Escape*, the Court held that the case before the municipal court lacked the required territorial nexus required by statute, and thus, the municipal court lacked subject-matter jurisdiction over the case before it. *Id.* ¶22.

The jurisdiction of common pleas courts is simpler to represent. It has but two components: the constitutional grant and the statutory grant. It can be represented as follows:



A common pleas court’s realm of authority is the area in which the two component grants of power overlap – justiciable matters over which the General Assembly has granted jurisdiction. The language of Art.IV, Sec. 4(B) contemplates both a legislative grant of, and a constitutional limit on, a common pleas court’s subject-matter jurisdiction.

H. Basic Statutory Jurisdiction

This confusion becomes clear when one looks at the concept of “basic statutory jurisdiction.” The Court has long held that the mere grant of “basic statutory jurisdiction” is

not sufficient to vest judicial power in a common pleas court if another provision of law restricts the exercise of that power.

In *State ex rel. Sanquily v. Court of Common Pleas of Lucas County*, 573 N.E.2d 606, 60 Ohio St.3d 78 (Ohio 1991), this Court considered whether a common pleas court's "basic statutory jurisdiction" was a sufficient grant of power, by itself, to prevent the Court from issuing a writ of prohibition. The Court differentiated between the general grant of jurisdiction found in R.C. 2305.01, and limitations on that general grant found in other sections of the Revised Code.

Indeed, we held just last term that where "a statute 'patently and unambiguously' prevents" a common pleas court "from exercising the general original jurisdiction bestowed on common pleas courts by R.C. 2305.01," the common pleas court "is 'total[ly] and complete[ly]' * * * without any jurisdiction 'whatsoever' * * *."

Id. at p. 80. The Court did not take the narrow view of jurisdiction taken by the majority in this case. Instead, it acknowledged that a restriction on the general grant of jurisdiction can deprive a common pleas court of the power to decide the merits of a case. *Id.*; *See also, State ex rel. Kaylor v. Bruening*, 684 N.E.2d 1228, 80 Ohio St.3d 142, 146, 1997-Ohio-350 (Ohio 1997) ("while Judge Bruening and the domestic relations court possessed basic statutory jurisdiction to grant visitation to a natural parent in a divorce, dissolution, legal separation, or child support proceeding, R.C. 3107.15(A)(1) patently and unambiguously divested them of jurisdiction to proceed on the biological mother's motions relating to visitation following the adoption decree terminating the natural mother's parental rights.); *Rosen v. Celebrezze*, 117 Ohio St.3d 241, 2008-Ohio-853, 883 N.E.2d 420, ¶ 46 ("the mere fact that the Ohio court has basic statutory jurisdiction to determine custody matters in legal-

separation and divorce cases * * * does not preclude a more specific statute * * * from patently and unambiguously divesting the court of such jurisdiction"); *State ex rel. Cleveland v. Sutula*, 126 Ohio St.3d 131, 2010-Ohio-5039, ¶23. (Ohio 2010) ("the common pleas court's basic statutory jurisdiction over actions for declaratory judgment, specific performance, injunction, and damages does not vest that court with jurisdiction over the union's R.C. Chapter 4117-related claims.").

If a common pleas court's general grant of statutory jurisdiction can be restricted by another statute, how can a constitutional restriction be insufficient to deny a court the power to decide the merits of a case? The General Assembly derives all of its power from Ohio's Constitution. In fact, all branches of Ohio's government derive their power from the Constitution as adopted by the citizens of the state. Surely the people who created a court through a duly adopted constitution can also restrict the power of that court. If not, then the people are no longer the source of governmental power. *See Piqua Branch of the State Bank of Ohio v. Knoup*, 6 Ohio St. 342, 356 (1856)("The object of a written constitution is to enumerate, and distinctly describe, the power delegated by the people to the government, so that they may not be left matters of doubt or conjecture."). If not, the sovereignty of the people is no longer secure.

I. Invocation: A chicken and egg analysis

As this Court stated in *Schwartzwald*, standing is required in order for a plaintiff to invoke the jurisdiction of a common pleas court. That statement echoes the law of Ohio as announced numerous times by this Court - standing is required before a court may proceed to and decide the merits of the matter. Yet, in this case, the Court significantly alters that premise.

It is unclear how a common pleas court can exercise a power if that power is never invoked. The concept is akin to starting a fire without being able to light the match. In order to drive a car down the road, you first have to start the engine. But in this case the Court has taken a common pleas court's jurisdiction and hooked it up to an unseen, undefined jurisdictional tow truck.

This Court has held on numerous occasions that standing is an absolute prerequisite to a court's consideration the merits of a case. Standing to prosecute a claim is a threshold question, one which "embodies general concerns about how courts should function in a democratic system of government." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469. "The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented." *Ohio Contractors Assn. v. Bicking*, 71 Ohio.St.3d 318, 320, 1994-Ohio-183, *see also, Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 2007-Ohio-5024, 115 Ohio St.3d 375, ¶27. This Court has stated that standing is often used to deny litigants access to the courts. *State ex rel. Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St.2d 457, 459 (1976). This is why standing is a preliminary inquiry which must be made before a court may proceed to the merits of a case. *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, ¶9; *see also State ex rel. Merrill v. Ohio Dept. Natural Resources*, 130 Ohio St. 3d 30, 2011-Ohio-4612, ¶27.

The Court's decision in this case changes the nature of standing from one of requirement to one of preference. No longer is a trial court denied the power to decide a case brought by a plaintiff without standing. The Court's decision radically rewrites the jurisprudence of the state and reshapes the litigation landscape. And it does so at the

expense of the power of the people's right to grant and define the power bestowed on the government.

I. The Court's Handling Of The Certified Question Is Confusing

The question certified by the Ninth District Court of Appeals and accepted by this Court is:

When a defendant fails to appeal from a trial court's judgment in a foreclosure action, can a lack of standing be raised as part of a motion for relief from judgment?

The issue as stated is broad. It does not limit itself to motions under Civ.R. 60(B)(3), or even R. 60(B) in general. Yet it is also narrow in that addresses only foreclosure cases.

In answering the question, the Court stated:

An allegation that a plaintiff fraudulently claimed to have standing may not be asserted as a ground for vacating the judgment under Civ.R. 60(B)(3).

Kuchta, syll ¶1. And in the conclusion, the majority restated the answer as follows:

[W]e answer the certified question in the negative and hold that lack of standing cannot support a Civ.R. 60(B)(3) motion for relief from judgment, even if a plaintiff's assertion of standing was patently false.

Kuchta, ¶25. The answer provided by the Court did not fairly meet the question before it. Therefore, the Court should at least clarify the bounds of its decision.

The broad question before the Court was not limited to motions filed under Civ.R. 60(B)(3). It was more general and included all motions for relief from judgment, regardless of the basis. The Court did not address whether the issue of standing could support a

motion under any other sections of Civ.R. 60(B). For instance, Civ. R. 60(B)(2) encompasses relief sought because of newly discovered evidence. What if a defendant finds proof of a lack of standing after the time for appeal has run? Perhaps, for example, he learns by accident that another bank was in actual possession of the note and an unrecorded mortgage assignment when suit was filed by the plaintiff. Further, Civ. R. 60(B)(4) is a seldom invoked provision that permits relief from judgment if post-judgment circumstances warrant eliminating future application of the judgment. Again, maybe an entity other than the plaintiff now claims to be able to enforce the note against the defendant. Under those circumstances, should the original judgment still stand? And 60(B)(5) is the “catch-all” provision. Because standing does go to the invocation of the common pleas court’s jurisdiction, might that provision be a legitimate basis for seeking relief?

The Court’s holding is even confusing as to motion brought under Civ. R. 60(B)(3). The holding indicates that standing may never be the basis for relief under 60(B)(3). Yet, in the body of the opinion, the Court noted that “[t]he Kuchtas have not alleged that Bank of America committed intrinsic fraud, such as attaching a materially false affidavit to its motion for summary judgment.” *Kuchta*, ¶14. Does the Court intend that 60(B)(3) is still available to a defendant if a plaintiff introduces a false affidavit to support its assertion of standing? The holding seems to state otherwise.

Finally, the certified question was limited to the context of foreclosure cases. Yet the Court’s analysis is not unique to foreclosure cases at all. The concept of standing applies to all civil cases and the rule announced this case was not limited to a particular type of civil action.

The Court's holding, when compared to the question before it, leaves many questions unanswered. The Court answered the broad certified question in the negative, but its holding is much more limited. Clarification of the Court's decision would greatly aid both litigants and lower courts in the application of the rule announced.

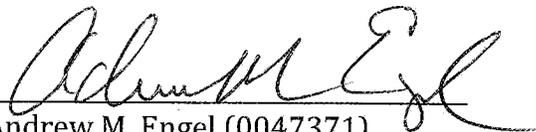
CONCLUSION

The Court's decision has disturbed many long-held principles. The holding is at odds with prior announcements of this Court on issues that are central to this Court's decision. In this, the LaPierre's do not complain about inconsistencies in dicta.

In this decision, the Court modified a syllabus of *Morrison*; failed to consider its holding in *Barclays* that constitutional justiciability is a part of a common pleas court's subject-matter jurisdiction; relied on a case which it recently held was of no precedential value; and relegated the will of the people to a secondary consideration regarding the exercise of governmental power. And in doing so, the Court issued a decision that did not fairly meet the question it set out to answer.

For these reasons, the LaPierres ask that the Court reconsider its decision in this case.

Respectfully submitted,



Andrew M. Engel (0047371)

KENDO, ALEXANDER, COOPER & ENGEL LLP

7925 Paragon Road

Centerville, OH 45459

(937) 433-4090

Fax: (937) 433-1510

aengel@kacelawllp.com

for 

Brian D. Flick (0081605)
MILLS, MILLS, FIELY & LUCAS, LLC
503 South Front Street, Ste. 240
Columbus, Ohio 43215
614.754.7076
614-767-5229 fax
bflick@mmflaw.com

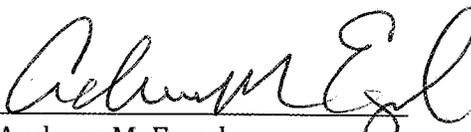
Attorneys for Amici Curiae Joseph and Lori
LaPierre

CERTIFICATE OF SERVICE

I certify that the foregoing was served via ordinary mail this 20th day of October 2014 upon the following:

Scott A. King, Esq.
Terry W. Posey, Esq.
THOMPSON HINE LLP
Austin Landing I
10050 Innovation Drive
Suite 400
Dayton, Ohio, 45342-4934

Marc E. Dann, Esq.
Grace M. Doberdruk, Esq.
Daniel M. Solar, Esq.
DANN, DOBERDRUK & HARSHMAN
4600 Prospect Avenue
Cleveland, Ohio 44103



Andrew M. Engel