

IN THE
SUPREME COURT OF OHIO

STATE EX REL.
ROBERT L. WALGATE, JR., et al.,

Plaintiffs-Appellants,

v.

JOHN R. KASICH, et al.,

Defendants-Appellees.

: Case No. 13-0656
:
:
:
: On Appeal from the Franklin County
: Court of Appeals, Tenth Appellate
: District, Case No. 12-AP-548
:
:
:
:

BRIEF OF APPELLANTS ROBERT L. WALGATE, JR., DAVID P. ZANOTTI, THE
AMERICAN POLICY ROUNDTABLE dba OHIO ROUNDTABLE, SANDRA L.
WALGATE, AGNEW SIGN & LIGHTING, INC., LINDA AGNEW, PAULA BOLYARD,
JEFFREY MALEK, MICHELLE WATKIN-MALEK, THOMAS W. ADAMS, DONNA J.
ADAMS, JOE ABRAHAM, AND FREDERICK KINSEY

THOMAS W. CONNORS (0007226)

**Counsel of Record*

JAMES M. WHERLEY (0082169)

Black, McCuskey, Souers & Arbaugh

220 Market Avenue South

Suite 1000

Canton, Ohio 44702

Counsel for Plaintiffs-Appellants

Robert L. Walgate, Jr., David P. Zanotti,

The American Policy Roundtable dba

Ohio Roundtable, Sandra L. Walgate,

Agnew Sign & Lighting, Inc., Linda

Agnew, Paula Bolyard, Jeffrey Malek,

Michelle Watkin-Malek, Thomas W.

Adams, Donna J. Adams, Joe Abraham,

and Frederick Kinsey

MICHAEL DEWINE (0009181)

Attorney General of Ohio

ERIC E. MURPHY(0083284)

State Solicitor

**Counsel of Record*

MICHAEL J. HENDERSHOT

(0081842)

Chief Deputy Solicitor

STEPHEN P.

CARNEY(0063460)

Deputy Solicitor

Appeals Section

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

Counsel for State Defendants-

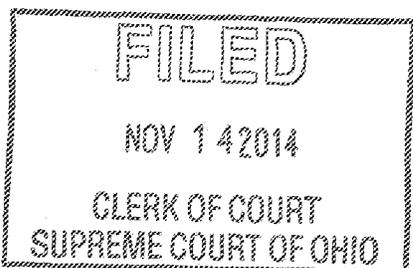
Appellees, Ohio Governor John

R. Kasich, Ohio Casino Control

Commission, Ohio Lottery

Commission, and Ohio Tax

Commissioner Joseph W. Testa



MATTHEW L. FORNSHELL
(0062101)

**Counsel of Record*

ALBERT G. LIN (0076888)
KATHERINE G. MANGHILLIS
(0077307)
Ice Miller, LLP
250 West Street
Columbus, OH 43215

*Attorneys for Intervening-Defendants-
Appellees Raceway Park, Inc.,
HLC/PDC Holdings, LLC, Central Ohio
Gaming Ventures, LLC and Toledo
Gaming Ventures, LLC*

ALAN H. ABES (0062423)

**Counsel of Record*

JOCELYN C. DEMARS (0086688)
Dinsmore & Shohl LLP
255 E. 5th Street, Suite 1900
Cincinnati, Ohio 45202

*Attorneys for Intervening-Defendant-
Appellee, Thistledown Racetrack, LLC*

Christopher S. Williams (0043911)

**Counsel of Record*

JAMES F. LANG (0059668)
MATTHEW M. MENDOZA (0068231)
Calfee, Halter & Griswold LLP
The Calfee Bldg
1405 East Sixth Street
Cleveland, OH 44114-1607

*Attorneys for Intervening-Defendants-
Appellees, Rock Ohio Caesars LLC,
Rock Ohio Caesars Cleveland LLC and
Rock Ohio Caesars Cincinnati LLC*

CHARLES R. SAXBE (0021952)

**Counsel of Record*

JAMES D. ABRAMS (0075968)
IRV BERLINER (0033150)
JASON H. BEEHLER (0085337)
Taft Stettinius & Hollister LLP
65 E State St., Suite 1000
Columbus, OH 43215

*Attorneys for Intervening-Defenda.
Appellees Northfield Park Associa.
LLC, Lebanon Trotting Club, Inc.,
MTR Gaming Group, Inc., and PN
(Ohio), LLC*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE AND FACTS.....	1
ARGUMENT	11
A. <u>Proposition of Law No. II</u> : Parties whose interests are adversely affected by the negative effects of unconstitutional gambling have standing to pursue claims of violations of the lottery and casino provisions of the Ohio Constitution.....	11
1. Standing generally.....	12
2. Statutory standing.....	14
a. Statutory mandamus standing.....	14
b. Statutory declaratory relief standing.....	18
3. Common law standing.....	19
4. Appellants have standing based on harm from the negative effects of unconstitutional gambling.....	23
a. Judicially cognizable interest; injury-in-fact.....	23
b. Zone of interest.....	24
c. Concrete and particularized.....	26
d. Actual or imminent as opposed to hypothetical or speculative.....	29
e. Redressability.....	30
B. <u>Proposition of Law No. III</u> : Parents of public school students and contributors to special funds for schools have standing to pursue claims of unconstitutional diversion of lottery proceeds and casino tax proceeds from education or school funds.....	32

C. <u>Proposition of Law No. IV</u> : In order for a court to dismiss a complaint for failure to state a claim for lack of standing (Civ. R. 12(b)(6)), it must appear beyond doubt from the complaint and standing affidavits that the plaintiff can prove no set of facts entitling him to relief. In the event of such dismissal, a court must allow an opportunity to amend the complaint	35
D. This court has original jurisdiction as necessary to a complete determination of this cause with respect to the issue of appellants' citizen standing to seek mandamus relief.....	38
1. Original jurisdiction on review.....	38
2. Appellants' citizen standing to seek mandamus relief.....	41
3. Federal standing law which precludes citizen mandamus standing is not applicable in the present case.....	48
CONCLUSION	49
CERTIFICATE OF SERVICE	50
APPENDIX	<u>Appx. Page</u>
Decision of the Franklin County Court of Appeals dated March 14, 2013.....	1
Judgment Entry of the Franklin County Court of Appeals dated March 15, 2013	15

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Amador County, Cal. v. Salazar</i> , 640 F.3d 373 (D.C. Cir. 2011).....	23, 25, 26, 31
<i>Arlington Heights v. Metropolitan Housing Development</i> , 429 U.S. 252, 97 S. Ct. 555, 50 L.Ed.2d 450 (1977).....	14
<i>Association of Data Processing Service Organizations, Inc. v. Camp</i> , 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed. 2d 184 (1970).....	22
<i>Bennett v. Spear</i> , 520 U.S. 154, 117 S. Ct. 1154 (1997)	20
<i>Blank v. Preventative Health Programs</i> , 504 F.Supp 416 (D.C. Ga. 1980).....	38
<i>Board of Education v. Walter</i> , 58 Ohio St. 2d 368, 390 N.E. 2d 813 (1979).....	32, 33
<i>Brissel v. State ex rel. McCannon</i> , 87 Ohio St. 154, 100 N.E. 348 (1912).....	17, 44
<i>Brown v. Columbus City Schools Board of Education</i> , 10th Dist. Franklin No. 08AP-1067, 2009-Ohio-3230.....	33, 34
<i>Clarke v. Securities Industry Ass'n.</i> , 479 U.S. 388, 107 S. Ct. 750, 93 L.Ed.2d 757 (1987).....	24
<i>Cleveland ex rel. Neelon v. Locher</i> , 25 Ohio St. 49, 266 N.E.3d 831 (1971).....	48
<i>Conn v. Gabbert</i> , 526 U.S. 286 (1999)	37
<i>Craigmiles v. Giles</i> , 312 F.3d 220 (6th Cir. 2002)	37
<i>Data Processing Svc. Orgs. v. Camp</i> , 397 U.S. 150, 90 S. Ct. 827, 25 L.Ed.2d 184 (1970).....	19
<i>DeRolph v. State of Ohio</i> , 78 Ohio St.3d 193, 677 N.E.2d 733 (1992).....	33

<i>Flast v. Cohen</i> , 392 U.S. 83 (1968).....	13
<i>County Chamber of Commerce, Inc. v. Pataki</i> , 275 A.D. 2d 145, 712 N.Y.S. 2d 687 (2000).....	24
<i>Jordan v. Cuyahoga Metro. Hous. Auth.</i> , 161 Ohio App.3d 216, 2005-Ohio-2443, 829 N.E.2d 1237 (8th Dist.).....	38
<i>Kentucky Restaurant Concepts, Inc. v. City of Louisville</i> , 209 F. Supp.2d 672 (W.D. Ky. 2002).....	37
<i>Lac Vieux Desert Board of Lake Superior Indians v. Michigan Gaming Control Board</i> , 172 F.3d 397 (6th Cir. 1999).....	36
<i>Leppla v. Sprint Com, Inc.</i> , 156 Ohio App. 3d 498, 2004-Ohio-1039, 806 N.E.2d 1019 (2d Dist.).....	19
<i>Linkous v. Mayfield</i> , 4th Dist. Scioto App. No. CA 1894, 1991 WL 100358 (June 4, 1991).....	11, 28
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992).....	13, 29, 37, 49
<i>Marbury v. Madison</i> . 5 U.S. 137 (1803).....	42, 49
<i>Massachusetts v. EPA</i> , 549 U.S. 497, 127 S.Ct. 1438, 167 L. Ed. 2d 248 (2007).....	14, 21, 27, 30, 31, 32
<i>Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak</i> , 132 S. Ct. 2199, 183 L. Ed 2d 211, 567 U.S. ____ (2012).....	24
<i>Middletown v. Ferguson</i> , 25 Ohio St.3d 71, 495 N.E.2d 380 (1986).....	12
<i>Moore v. Middletown</i> , 133 Ohio St.3d 55, 2012-Ohio-387, 975 N.E.2d 977.....	12, 13, 14, 18, 46
<i>O'Brien v. University Community Tenants Union</i> , 42 Ohio St.2d 242, 327 N.E.2d 753 (1975).....	13, 26, 37
<i>Office of Communication of United Church of Christ v. FCC</i> , 123 U.S.App.D.C. 328, 359 F.2d 994.....	22

<i>Ohio Contractors Assn. v. Bicking</i> , 71 Ohio St. 3d 318, 643 N.E.2d 1088 (1994)	11, 28
<i>Parker v. District of Columbia</i> , 478 F.3d 370 (D.C. Cir. 2007)	18, 23
<i>Patchak v. Salazar</i> , 632 F.3d 702 (D.C. 2011)	23
<i>Progress Ohio.org, Inc. v. JobsOhio</i> , 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101	18
<i>Racing Guild of Ohio v. Ohio State Racing Comm.</i> , 28 Ohio St.3d 317, 503 N.E.2d 1025 (1986)	35
<i>Seventh Urban, Inc. v. University Circle Property Development, Inc.</i> , 67 Ohio St. 2d 19, 423 N.E.2d 1070 (1981)	15
<i>Sierra Club v. Morton</i> , 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)	22
<i>Special Grand Jury 89-2</i> 450 F.3d 1159 (10th Cir. 2006)	21
<i>Spitzer v. Stillings</i> 109 Ohio St. 297, 142 N.E. 365 (1924)	15
<i>State ex rel. Allied Wheel Products, Inc. v. Industrial Commission</i> , 161 Ohio St. 561, 120 N.E.2d 421 (1954)	40
<i>State ex rel. Blackwell v. Bacharach</i> , 166 Ohio St. 301, 143 N.E. 2d 127 (1957)	45
<i>State ex rel. Carter v. North Olmstead</i> , 69 Ohio St.3d 315, 631 N.E.2d 1048 (1994)	48
<i>State ex rel. Dann v. Taft</i> , 110 Ohio St. 3d 252, 2006-Ohio-3677, 853 N.E. 2d 263	35
<i>State ex rel. Dayton Newspapers v. Phillips</i> , 46 Ohio St.2d 457, 351 N.E.2d 127 (1976)	19
<i>State ex rel. Gregg v. Tanzey</i> , 49 Ohio St. 656, 32 N.E. 750 (1892)	44

<i>State ex rel. Hanson v. Guernsey County Bd. of Commissioners,</i> 65 Ohio St.3d 545, 605 N.E.2d 378 (1992)	38
<i>State ex rel. Hodges v. Taft,</i> 64 Ohio St.3d 1, 591 N.E.2d 1186 (1992)	17, 45
<i>State ex rel. Libby-Owens-Ford Glass Co. v. Industrial Commission,</i> 162 Ohio St. 302, 123 N.E.2d 23 (1954)	41
<i>State ex rel. Newell v. Brown,</i> 162 Ohio St. 147, 122 N.E.2d 105 (1954)	16, 44
<i>State ex rel. Nimon v. Village of Springdale,</i> 6 Ohio St.2d 1, 215 N.E.2d 592 (1966)	45
<i>State ex rel. Ohio Academy of Trial Lawyers v. Sheward,</i> 86 Ohio St.3d 451, 715 N.E.2d 1062 (1999)	12
<i>State ex rel. Ohio Roundtable v. Taft,</i> 10th Dist. Franklin App. No. 02AP-911, 2003-Ohio-3340	4
<i>State ex rel. Pressley v. Industrial Commission,</i> 11 Ohio St.2d 141, 228 N.E.2d 631 (1967)	17, 39
<i>State ex rel. Scott v. Masterson,</i> 173 Ohio St. 402, 183 N.E.2d 376 (1962)	45
<i>State ex rel. Spencer v. East Liverpool Commission,</i> 80 Ohio St. 3d 297, 685 N.E.2d 1251 (1997)	17, 45
<i>State ex rel. Teamsters Local Union No. 436 v. Cuyahoga County Board of Commissioners,</i> 132 Ohio St.3d 47, 2012-Ohio-1861, 969 N.E.2d 224	12
<i>State ex rel. Trauger v. Nash,</i> 66 Ohio St. 612, 64 N.E. 558 (1902)	44, 46
<i>State ex rel. v. Henderson,</i> 38 Ohio St. 644 (1883).....	16, 43, 44
<i>State ex rel. Werden v. Williams, Clerk</i> 26 Ohio St. 170 (1875).....	40
<i>State of Ohio v. Hughes,</i> 41 Ohio St. 2d 208, 324 N.E.2d 731 (1975)	15

<i>State of Ohio v. Steffen</i> , 70 Ohio St.3d 399, 639 N.E.2d 67 (1994)	39
<i>State v. Brown</i> , 38 Ohio St. 344 (1882).....	44, 47
<i>State, ex rel. v. Tanzey</i> , 49 Ohio St. 656, 32 N.E. 750 (1892)	17
<i>Taylor v. Academy Iron & Metal Co.</i> , 36 Ohio St.3d 149, 522 N.E.2d 464 (1988)	20
<i>The People ex rel. Ayres v. Board of State Auditors</i> , 42 Mich. 422, 4 N.W. 274 (1880).....	46
<i>Warth v. Seldin</i> , 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).....	11, 13, 18, 23, 26, 28
<i>Watt v. Energy Action Educational Foundation</i> , 454 U.S. 151, 102 S. Ct. 205, 70 L. Ed.2d 309 (1981).....	14
<i>Willoughby Hills v. C.C. Bar's Sahara, Inc.</i> , 64 Ohio St.3d 24, 591 N.E.2d 1203 (1992)	12

Statutes

Civ. R. 12(b)(6).....	35
O.A.C. 3770:2-1, <i>et seq.</i>	3
O.A.C. 3770:2-3-01.....	3
O.A.C. 3770:2-3-08(A).....	4
R.C. 2731.02.....	16
R.C. 3770.03.....	2
R.C. 3770.21.....	2, 3
R.C. 3772.01	7
R.C. 3772.27	8, 9
R.C. 3772.34	7

R.C. 5751.0(F)(2)(hh)	7
R.C. 5751.01, <i>et seq.</i>	7
R.C. 5753.01	7
R.C. Chapter 2915.....	6
R.C. Chapter 3769.....	3
R.C. Chapter 3770.....	6
Ohio Constitution, Art. I, Sec. 2	49
Ohio Constitution, Art. I, Sec. 20	43, 53
Ohio Constitution, Art. II, Sec. 15(C).....	5, 6
Ohio Constitution, Art. II, Sec. 15(D)	5
Ohio Constitution, Art. IV, Sec. 1	19
Ohio Constitution, Art. IV, Sec. 2	40
Ohio Constitution, Art. IV, Sec. 2 (B)(1)(f)	38
Ohio Constitution, Art. IV, Sec. 2(B)(3)	39
Ohio Constitution, Art. XV, Sec. 6.....	<i>passim</i>
Ohio Constitution, Art. VIII, Sec. 4.....	4, 5
U.S. Constitution, Art. III, Sec. 2.....	19

Other Authorities

Wright & Miller, <i>Federal Practice and Procedure</i> 217, Sec. 1350 (1990).....	38
-----------------------------------------------------------------------------------	----

STATEMENT OF THE CASE AND FACTS

This case arises from a series of executive and legislative actions expanding gambling in Ohio in 2009 and 2011. In 2009, Ohio's legislature authorized the Ohio Lottery Commission to implement and operate slot machines described as video lottery terminals ("VLTs") as a form of lottery. Shortly thereafter, Ohio's governor announced that the resulting proceeds would replace educational funds being diverted to social services. The Lottery Commission issued regulations authorizing the VLTs. No further action was taken on the VLTs until June 17, 2011, when Ohio's governor entered a memorandum of understanding (the "MOU") with two gaming companies.

The MOU provided that the Lottery Commission would promulgate rules paying 66.5% of the proceeds of the VLTs to its operators, which are certain race tracks, most of which were owned by the two gaming companies. The MOU also promised legislation relating to casino gaming, authorized by constitutional amendment in 2009. The promised legislation, among other things, reduced the commercial activity tax on casino proceeds required by the 2009 constitutional amendment in exchange for payments of over \$200 million.

Appellants filed an amended complaint on January 5, 2012 with the Franklin County Common Pleas Court alleging violations of duties under the Ohio Constitution's lottery and casino provisions. Art. XV, Sec. 6, Ohio Constitution. The lottery provision violations included, among others, conducting gambling which did not constitute a lottery, failing to devote the net proceeds of this gambling/lottery to educational purposes, and failure by the state to conduct the gambling/lottery operations in their entirety. The casino provision violations included, among others, failure to collect commercial activity taxes on all casino gaming proceeds, and failure to enforce requirements relating to initial facility investment and limits on the number of facilities

The complaint also alleged a federal fourteenth amendment violation arising out of creation of a monopoly by limiting casino gaming to locations owned by a few gaming companies, and by requiring license fees of \$250 million, which were far in excess of regulatory costs.

The common pleas court dismissed the complaint for lack of standing on the grounds that the issues were not sufficiently significant and that the effects on appellants' interests were speculative, and the court of appeals upheld the dismissal on the same basis. This Court accepted jurisdiction, but later dismissed Proposition of Law No. I as improvidently allowed. This cause remains pending on Propositions of Law Nos. II, III and IV.

A. Violations of the Ohio Constitution's Lottery Provisions

Art. XV, Sec. 6 of the Ohio Constitution, enacted in 1851, provides that:

Except as otherwise provided in this section, lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.

The General Assembly may authorize an agency of the state to conduct lotteries, to sell rights to participate therein, and to award prizes by chance to participants, provided that the entire net proceeds of any such lottery are paid into a fund of the state treasury that shall consist solely of such proceeds and shall be used solely for the support of elementary, secondary, vocational, and special education programs as determined in appropriations made by the General Assembly.

On July 13, 2009, the 128th Ohio General Assembly authorized the operation of slot machines as a form of lottery by passing Am. Sub. H. B. No. 1 ("H.B. 1"), which was signed into law by Ohio's governor on July 17, 2009. H.B. 1 was an appropriations bill which among other changes of law, amended R.C. 3770.03 and added a new section, R.C. 3770.21, allowing the Lottery Commission to operate slot machines described as conducting video lottery terminal games ("VLTs").

On July 13, 2009, Ohio's governor issued a directive to the Lottery Commission entitled "Implementing Video Lottery Terminals," which commanded the Lottery Commission to develop administrative rules governing the VLTs' implementation and operation. The directive declared, that "The Implementation of Video Lottery Terminals is an Important Part of Ohio's Balanced Budget Plan." On August 17, 2009, the Lottery Commission approved the administrative rules concerning video lottery gaming. O.A.C. 3770:2-1, *et seq.* The rules restrict application for "video lottery license[s]" to those who are also "permit holder[s]," *i.e.* persons who had been issued permits under R.C. Chapter 3769 to conduct horse racing. O.A.C. 3770:2-3-01.

VLTs, as defined in R.C. 3770.21(A), were neither contemplated nor included in the definition of "lottery" as used in Art. XV, Sec. 6 of the Ohio Constitution. The operation of such devices exceeds the Constitution's authorization to conduct a lottery. Because the General Assembly did not and does not have the authority to authorize a state agency to operate anything other than a "lottery," the above described statutes and rules are unconstitutional.

Under Art. XV, Sec. 6 of the Ohio Constitution, lotteries must be conducted solely and in their entirety by an agency of the State of Ohio authorized by the General Assembly to conduct lotteries. Under H.B. 1, and related administrative rules, VLT games will be conducted by racetrack permit-holders and not the Lottery Commission. VLT games under H.B. 1 will not be conducted solely or in their entirety by the Lottery Commission in violation of Art. XV, Sec. 6 of the Ohio Constitution.

Under Art. XV, Sec. 6 of the Ohio Constitution, the entire net proceeds of lotteries authorized pursuant to that section must be used solely for the support of elementary, secondary, vocational, and special educational programs in Ohio. "Net Proceeds" are "gross revenue less

expenses.” *State ex rel. Ohio Roundtable v. Taft*, 10th Dist. Franklin App. No. 02AP-911, 2003-Ohio-3340. The June 17, 2011 MOU, described above, provides that the Lottery Commission will promulgate rules specifying that the commission for licensed VLT sales agents shall be no more than 66.5%. Subsequently a change to O.A.C. 3770:2-3-08(A) has gone into effect providing that commissions paid to video lottery agents shall be 66.5%. This is an arbitrarily selected figure that bears no relation to the actual expenses of VLT games and will not result in such net proceeds being applied as required by Art. XV, Sec. 6.

H.B. 1 lowered the State’s funding for public education in the Education Foundation Aid by more than \$900,000,000 and replaced those education dollars with more than \$900,000,000 proceeds projected to be generated by the Lottery Commission through the VLT games. The admitted purpose of the VLT games was to free up funds in the state budget for social services. Art. XV, Sec. 6 of the Ohio Constitution mandates that all of the proceeds generated by the Ohio Lottery *must* be used to support elementary, secondary, vocational and special education in Ohio, *not* social services.

The redirection of more than \$900,000,000 in general revenue funds from education and replacement of these dollars with VLT game revenues, as encompassed in the governor’s July 13, 2009 directive and H.B. 1, violates Article XV, Sec. 6 of the Ohio Constitution. The Lottery Commission has or will use VLT game revenues to redirect general revenue funds from education to non-education programs. The above-described exchange of funds appropriated for education programs with anticipated proceeds from VLT games, indirectly uses the proceeds from the lottery to fund non-education programs in violation of Art. XV, Sec. 6 of the Ohio Constitution.

Article VIII, Sec. 4 of the Ohio Constitution prohibits the State of Ohio from financial involvement with private enterprise and prohibits the State of Ohio from becoming “a joint owner * * * in any company or association in this state * * * formed for any purpose whatsoever.” The Lottery Commission, in joint association with the private owners of seven pari-mutuel racing facilities in Ohio, will operate and maintain VLTs/slot machines for the purpose of generating revenue from the users of those VLTs/slot machines, which revenues shall be shared and distributed between the Lottery Commission and the private racetrack owners.

The Lottery Commission’s rule allows net proceeds of VLT games, required under Art. XV, Sec. 6 to be used to fund education, to be provided to the racetracks and thereby provides for the use of state money in private enterprise. The private owners of the racetracks and the Lottery Commission, jointly, will provide oversight, maintenance, and management of the VLTs/slot machines and the locations where they will be operated. No other private joint enterprises, businesses, entities or individuals will be allowed to operate VLTs/slot machines in the State. By virtue of the shared revenue arrangement between the Lottery Commission and the seven private racetrack owners, which constitutes the use of State money in private enterprise, the financial advantage provided by the State in preventing competition, the joint and shared management of the maintenance, management, supervision, and operation of VLT games, the Lottery Commission’s actions violate Article VIII, Sec. 4 of the Ohio Constitution.

Art. II, Sec. 15(D) of the Ohio Constitution provides that no bill of the General Assembly shall contain more than one subject. H.B. 1 enacts numerous changes to the Ohio Revised Code which do not have a common purpose or relationship to the provisions regarding VLT games. The provisions of H.B. 1, including but not limited to, the VLT provisions, violate the single subject provision contained in Art. II, Sec. 15(D) of the Ohio Constitution.

Art. II, Sec. 15(C) of the Ohio Constitution requires that “every bill shall be considered by each House on three different days * * *.” H.B. 1 was substantially rewritten and amended by the Conference Report, first released and introduced in the Conference Committee on July 13, 2009, and passed by the legislature on that same day, to insert provisions concerning separate non-appropriation subjects, such as changes to R.C. Chapter 3770 and the scope and applicability of R.C. Chapter 2915. Since these provisions were not included in the versions of H.B. 1 initially approved by the Ohio House and Ohio Senate, it effectively became a new bill and did not have required consideration by each house on three different days, as required in Art. II, Sec. 15(C) of the Ohio Constitution, thereby rendering H.B. 1 or, in the alternative, the new provisions added by the Conference Report into H.B. 1, unconstitutional.

B. Violation of the Ohio Constitution’s Casino Gaming Provisions.

Art. XV, Sec. 6(C) of the Ohio constitution, enacted in 2009, provides that:

(2) A thirty-three percent tax shall be levied and collected by the state on all gross casino revenue received by each casino operator of these four casino facilities. In addition, casino operators, their operations, their owners, and their property shall be subject to all customary non-discriminatory fees, taxes, and other charges that are applied to, levied against, or otherwise imposed generally upon other Ohio businesses, their gross or net revenues, their operations, their owners, and their property. Except as otherwise provided in §6(C), no other casino gaming-related state or local fees, taxes, or other charges (however measured, calculated, or otherwise derived) may be, directly or indirectly, applied to, levied against, or otherwise imposed upon gross casino revenue, casino operators, their operations, their owners, or their property.

(4)* * * Said commission shall require each initial licensed casino operator of each of the four casino facilities to pay an upfront license fee of fifty million dollars (\$50,000,000) per casino facility for

the benefit of the state, for a total of two hundred million dollars (\$200,000,000).

R.C. 5751.01 *et seq.* (2009) (the commercial activity tax or “CAT tax”) was a customary non-discriminatory tax imposed generally upon Ohio businesses’ gross receipts. The June 17, 2011 MOU described above provided, among other things, that the State of Ohio would seek to amend R.C. 5751.01, *et seq.* to exclude certain receipts of casino operators from the application of the CAT tax in exchange for additional payments from casino operators beyond those required by Art. XV, Sec. 6(C).

On June 28, 2011, the 129th Ohio General Assembly passed Am. Sub. H.B. No. 277 (“H.B. 277”), which was signed into law by appellee Kasich on July 15, 2011. H.B. 277 amended R.C. 5751.01(F)(2)(hh) to exclude certain amounts from gross receipts subject to the CAT tax as follows:

(hh) In the case of amounts collected by a licensed casino operator from casino gaming, amounts in excess of the casino operator’s gross casino revenue. In this division, “casino operator” and “casino gaming” have the meanings defined in § 3772.01 of the Revised Code, and “gross casino revenue” has the meaning defined in § 5753.01 of the Revised Code.

H.B. 277 also added R.C. 3772.34 which provides as follows:

There is hereby created in the state treasury the casino operator settlement fund. The fund shall receive any money paid to the state by the operators of casino facilities in excess of any licenses or fees provided by this chapter or by §6(C) of Article XV, Ohio Constitution, and in excess of any taxes as provided by Title LVII of the Revised Code. * * *

Under H.B. 277, and pursuant to the MOU, gross casino revenues, casino operators, their operations, their owners and their property (collectively “casino operators”) will not be subject to

all customary non-discriminatory taxes imposed generally upon Ohio businesses in violation of Art. XV, Sec. 6. Under H.B. 277, and pursuant to the MOU, casino gaming-related fees, taxes or other charges, in addition to those described in Art. XV, Sec. 6(C), will be applied to casino operators in violation of Art. XV, Sec. 6.

Art. XV, Sec. 6(C) of the Ohio Constitution provides in pertinent part that:

(9) * * * "Casino facility" means all or any part of any one or more of the following properties (together with all improvements situated thereon) in Cleveland, Cincinnati, Toledo, and Franklin County. . ."

Art. XV, Sec. 6(C) provides in pertinent part that:

(5) Each initial licensed casino operator or each of the four casino facilities shall make an initial investment of at least two hundred fifty million dollars (\$250,000,000) for the development of each casino facility * * *.

(8) Notwithstanding any provision of the Constitution, statutes of Ohio, or a local charter and ordinance, only one casino facility shall be operated in each of the cities of Cleveland, Cincinnati, and Toledo, and in Franklin County.

H.B. 277 amends R.C. 3772.27 to add the following:

(C) A licensed casino operator may open a casino facility in phases and may have gaming areas in one or more buildings, facilities, rooms, or areas that together constitute a single casino facility within the boundaries of one or more of the properties described in §6(C)(9) of Article XV, Ohio Constitution, and, if located on more than one of those properties, is connected by one or more of the following:

- (1) Property owned by the casino operator or any of its affiliates;
- (2) Property leased by the casino operator or any of its affiliates;

- (3) Access over property under the right of the casino operator or any of its affiliates, whether it be by skyways, walkways, roadways, easements, or rights of way;
- (4) Nongaming amenities.

R.C. 3772.27 (B), which was passed by the 128th Ohio General Assembly in Am.

Sub. H.B. No. 519 and signed into law by Ohio's governor on June 10, 2010, provides:

(B) If a casino operator has made an initial investment of at least one hundred twenty-five million dollars at the time a license is issued, the casino operator shall spend the remainder of the minimum two-hundred-fifty-million-dollar total required initial investment within thirty-six months after the issuance of that license.

The MOU provides "that ROC's [Rock Ohio Caesars LLC] Cleveland project Phase I and Phase II are to be considered a single casino and the Phases may be operated concurrently." Phase I involves the opening and operation of a casino facility without an initial investment of \$250,000,000. Under H.B. 277, and pursuant to the MOU, more than one casino facility will be authorized to operate in Cleveland in violation of Art. XV, Sec. 6 (C)(8). Under H.B. 277 and H.B. 519, and pursuant to the MOU, each initial licensed casino operator of each of the four authorized casino facilities will be authorized to make an initial investment of less than \$250,000,000 for the development of each casino facility in violation of Art. XV, Sec. 6 (C)(5).

Amendment XIV of the United States Constitution provides that:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Art. XV, Sec. 6(C) of the Ohio Constitution, H.B. 1, H.B. 519 and H. B. 277 grant a monopoly to the gaming companies signing the MOU, on casino gaming and related activity in the property parcels identified therein. The identified properties are owned or controlled by the gaming companies signing the MOU, thereby precluding others from engaging in legal casino gaming, which includes table game wagering and slot machines. The grant of such monopoly violates Amendment XIV of the United States Constitution.

C. Standing

Appellants consist of 13 litigants: The American Policy Roundtable dba Ohio Roundtable, Robert L. Walgate, Jr., David P. Zanotti, Sandra L. Walgate, Agnew Sign & Lighting, Inc., Linda Agnew, Paula Bolyard, Jeffrey Malek, Michelle Watkin-Malek, Thomas W. Adams, Donna J. Adams, Joe Abraham and Frederick Kinsey.

Founded in 1980 as a public policy organization, Roundtable is an Ohio non-profit corporation. Roundtable is actively opposed to the expansion of legalized gambling in Ohio. Walgate Jr. and Zanotti are officers of Roundtable. Additionally, Walgate Jr. is a recovering addicted gambler whose addiction “in the past caused great distress and hardship to his family” and adversely affected his ability to pursue college and hold employment. Agnew owns ASL that pays the CAT tax, which in turn is allocated, in part, to the school district tangible tax replacement fund and the Ohio local government tangible property tax replacement fund. Bolyard, the Maleks, and the Adams are parents of public school students. Walgate is a public school teacher and the mother of a recovering gambling addict. Walgate and her family have suffered great emotional and financial stress because of her son’s gambling addiction. Kinsey is being denied the right to exercise the trade or business of casino gambling. Roundtable and ASL are Ohio corporations, and all other appellants are Ohio citizens, residents, and taxpayers.

Kinsey is being deprived of the right to exercise the trade or business of casino gaming, which includes table game wagering, in Ohio, by Art. XV, Sec. 6(C) of the Ohio Constitution. He would engage in casino gaming in Ohio but for the provisions of Art. XV, Sec. 6(C) which grant a special and exclusive privilege to engage in casino gaming in Ohio to two gaming corporations.

Appellants have alleged the negative effects of gambling in the amended complaint and in standing affidavits authorized by *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). See *Linkous v. Mayfield*, 4th Dist. Scioto App. No. CA 1894, 1991 WL 100358, *4 (June 4, 1991). Memorandum Contra Kasich Motion to Dismiss, Exhibits A and B; Amended Complaint, ¶¶ 1, 2, 3, 4 and 9. Roundtable alleges that its officer and supporter have suffered the effects of gambling addiction, and has therefore established organizational standing under *Ohio Contractors Assn. v. Bicking*, 71 Ohio St. 3d 318, 320, 643 N.E.2d 1088 (1994). Abraham and Zanotti allege that as citizens of Cleveland and Cuyahoga County, they will be negatively affected by the opening of a casino in their community.

Dr. Valerie C. Lorenz in her standing affidavit details the negative consequences to compulsive and pathological gamblers and the heightened addictive effects of slot machines, such as VLTs. Lorenz Affidavit, ¶¶ 4, 5, Memorandum Contra Kasich Motion to Dismiss, Exhibit A. Zanotti's standing affidavit details the negative social effects that his community will be subjected to by increased gambling. Zanotti affidavit, ¶¶ 1 – 5, Memorandum Contra Kasich Motion to Dismiss, Exhibit B.

ARGUMENT

- A. Proposition of Law No. II: Parties whose interests are adversely affected by the negative effects of unconstitutional gambling have standing to pursue claims of violations of the lottery and casino provisions of the Ohio Constitution.**

1. Standing generally

“Standing determines ‘whether a litigant is entitled to have a court determine the merits of the issues presented’ ”. *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-387, 975 N.E.2d 977, ¶ 20, quoting *State ex rel. Teamsters Local Union No. 436 v. Cuyahoga County Board of Commissioners*, 132 Ohio St.3d 47, 2012-Ohio-1861, 969 N.E.2d 224, ¶ 10. Whether a party has established standing to bring an action before a 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 71, 75, 495 N.E.2d 380 (1986). It also may be conferred by a specific statutory grant of authority. *Id.* at 75; *Moore* at ¶ 48. The distinction between statutory and common law standing with respect to mandamus 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 ‘rare and extraordinary’ limitation on common law standing for mandamus actions. *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 *Willoughby Hills* 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 common law standing principles may be modified by statutory conferrals of standing.

In assessing standing, the court must accept, as true, all material allegations of the complaint construed in favor of the complaining party. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Such allegations may also be supplied by amended pleadings or affidavits. *Id.* at 501. Moreover, "[a]t the pleading stage, general factual allegations of injury resulting from the defendants' conduct may suffice, for in a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992).

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, fn. 1. 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.2d 242, 327 N.E.2d 753 (1975), syllabus.

"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*, 133 Ohio St.3d at ¶ 23, citing *Warth*, 422 U.S. at 500. Review of standing evaluates whether the allegations assure the "concrete adverseness which sharpens the presentation of issues." *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

Such review does not reach the issue of whether plaintiff's claim is ultimately determined to assert a legal violation.

The inquiry into plaintiffs standing does not require that all plaintiffs have standing. When standing has been established for one plaintiff to assert a claim, the courts make it clear that it is not necessary to consider the standing of other plaintiffs regarding such claim. *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. 1438, 1453, 167 L. Ed. 2d 248 (2007); *Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252, 264, 97 S. Ct. 555, 50 L.Ed.2d 450 (1977); *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160, 102 S. Ct. 205, 70 L. Ed.2d 309 (1981).

2. Statutory standing

a. Statutory mandamus standing

As discussed above, standing may be conferred by a specific statutory grant of authority. A statute confers standing, when it provides that "a litigant is entitled to have a court determine the merits of the issue presented." *Moore*, ¶ 20.

R.C. 2731.02, enacted in 1953, provides with respect to mandamus that [s]uch writ may issue on the information of the party beneficially interested. This language constitutes a statutory grant of standing because it provides that a beneficially interested party is entitled to seek mandamus relief. This same language is contained in G.C. 12887, enacted in 1910, in R.S. 6744, enacted in 1879, and in Section 5704 of the Code of Civil Procedure, adopted in 1853. This language is derived from the Ohio Constitution of 1851, which first conferred this Court with jurisdiction in mandamus and provided in the Bill of Rights in Art. I, Sec. 2 that "All political power is inherent in the people. Government is instituted for their equal protection and benefit."

The standing granted to beneficially interested parties by statute to seek mandamus relief is derived from the legislature's constitutional authority to define common pleas jurisdiction and therefore may not be modified by this Court. Art. IV, Sec. 4(B) of the Ohio Constitution provides that, "[t]he courts of common pleas...shall have such original jurisdiction over all justiciable matters...as may be provided by law. This Court has observed that, "[I]t is clear, therefore, that the power to define the jurisdiction of the courts of common pleas rests in the General Assembly." *Seventh Urban, Inc. v. University Circle Property Development, Inc.*, 67 Ohio St. 2d 19, 22, 423 N.E.2d 1070 (1981). This Court has recognized that it does not have authority to limit the jurisdiction granted by the Legislature to lower courts. *State of Ohio v. Hughes*, 41 Ohio St. 2d 208, 211, 324 N.E.2d 731 (1975).

The term "beneficially interested" has been defined by this Court on numerous occasions, prior to the Legislature using this term when recodifying the mandamus standing provision in R.S. 6744, G.C. 12887 and R.C. 2731.02. As a result, the Legislature is presumed to have used this term in the sense defined by this Court:

"Where a statute is construed by a court of last resort having jurisdiction, and such statute is thereafter amended in certain particulars, but remains unchanged so far as the same has been construed and defined by the court, it will be presumed that the Legislature was familiar with such interpretation at the time of such amendment, and that such interpretation was intended to be adopted by such amendment as a part of the law, unless express provision is made for a different construction."

Spitzer v. Stillings, 109 Ohio St. 297, 142 N.E. 365 (1924),
syllabus

This Court throughout its history, has broadly defined the term 'beneficial interest' to include the interest a citizen has in enforcement of the laws, the interest an elector has in the conduct of elections, as well as more particular interests a party may have. The broad concept

that a citizen has a beneficial interest in enforcement of the laws, includes the more particular beneficial interest that appellants have in enforcing laws designed to protect them from specific circumstances such as the negative effects of gambling. The laws limiting gambling are designed to protect those such as appellants, who are personally vulnerable to or who live in communities adversely affected by, the negative effects of gambling. This Court's broad definition of beneficial interest as including a citizen's interest in enforcing the laws, has been adopted by the Legislature in its recodification of the mandamus standing provision, and therefore is now a legislative grant of jurisdiction, which may not be modified by this Court.

A distinction regarding the definition of beneficial interest has been drawn by this Court between circumstances where enforcement of a public duty is sought to protect a purely private right, and circumstances where such enforcement is sought to protect a public right. *State ex rel. v. Henderson*, 38 Ohio St. 644, 648-649 (1883) (“[W]here the relief is sought merely for the protection of private rights, the relator must show some personal or special interest in the subject matter...[W]here the question is one of public right...the relator need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and, as such, interested in the execution of the laws.”) That distinction is not pertinent in the present case, because appellants are seeking to protect both public and private rights, and are therefore not merely seeking to protect private rights.

The long history of the definition of the phrase ‘beneficially interested’ for purposes of mandamus claims was summarized by this Court in *State ex rel. Newell v. Brown*, 162 Ohio St. 147, 150-151, 122 N.E.2d 105 (1954):

Where a public right, as distinguished from a purely private right, is involved, a citizen need not show any special interest therein, but he may maintain a proper action predicated on his citizenship relation to such public right. This doctrine has been steadily

adhered to by this court over the years. *State v. Brown*, 38 Ohio St., 344, *State, ex rel. v. Henderson*, 38 Ohio St., 644, 649; *State, ex rel., v. Tanzey*, 49 Ohio St., 656, 32 N.E., 750; *State, ex rel. Trauger, v. Nash. Governor*, 66 Ohio St., 612, 64 N. E., 558 and *Brissel et. al., Comms. v. State, ex rel. McCammon*, 87 Ohio St., 154, 100 N. E., 348.

The more recent history of this definition was described in *State ex rel. Spencer v. East Liverpool Commission*, 80 Ohio St. 3d 297, 299, 685 N.E.2d 1251 (1997):

A person must be beneficially interested in the case in order to bring a mandamus action. *State ex rel. Russell v. Ehrnfelt* (1993), 67 Ohio St.3d 132, 133, 616 N.E.2d 237; R.C. 2731.02. 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. Hodges v. Taft* (1992), 64 Ohio St.3d 1, 4, 591 N.E.2d 1186, 1189; *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 40 O.O.2d 141, 228 N.E.2d 631, paragraph nine of the syllabus.

This definition was most recently approved and applied in *Sheward*, 86 Ohio St.2d at paragraph one of the syllabus:

"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 significance of the above-described case law is not to show citizen standing, an issue which this court has declined to review, but to establish the definition of beneficial interest which has been incorporated into the mandamus standing provision adopted by the General Assembly. If the definition is broad enough to include a citizen's general interest in the enforcement of laws, it certainly includes appellants' more specific interest in enforcing laws designed to protect them from the negative effects of gambling.

b. Statutory declaratory relief standing

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*, 133 Ohio St.3d 55 at ¶ 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. 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.

Statutory declaratory relief standing is “available when there is a real, justiciable controversy and relief is necessary ‘to preserve the rights of the parties’ ”. *Progress Ohio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 19. However, standing “does not depend on the merits of the plaintiff’s contention that particular conduct is illegal or unconstitutional”. *Moore*, ¶ 23, citing *Warth*, 422 U.S. 4 at 500. This means that standing analysis does not evaluate the existence of the legal rights asserted. *Parker v. District of Columbia*, 478 F.3d 370, 378 (D.C. Cir. 2007) (“[W]e do not ... evaluate the existence *vel non* of appellants’ Second Amendment claim as a standing question.”) Accordingly, analysis of standing to seek declaratory relief does not require a determination of whether appellants have the legal rights claimed, since that is an issue to be determined on the merits.

Standing to seek declaratory relief turns mainly on whether there is a justiciable controversy. The criteria for determining what is a justiciable controversy is essentially the same as the criteria for determining common law standing, as described below, and therefore will

not be analyzed separately. However, there is a significant distinction, in that Ohio's declaratory relief statute requires that it be liberally construed. R.C. 2721.13.

3. Common law standing

Appellants also have common law standing in the present case. In determining the requirements for common law standing under Ohio law, Ohio courts generally follow federal decisions on standing. *Leppla v. Sprintcom, Inc.*, 156 Ohio App. 3d 498, 2004-Ohio-1039, 806 N.E.2d 1019, ¶ 31 (2d Dist.). In *State ex rel. Dayton Newspapers v. Phillips*, 46 Ohio St.2d 457, 351 N.E.2d 127 (1976), this Court embraced the requirements for standing set forth in *Data Processing Svc. Orgs. v. Camp*, 397 U.S. 150, 90 S. Ct. 827, 25 L.Ed.2d 184 (1970). Nonetheless, this Court has made clear that federal decisions in the area of standing are not binding upon it because federal standing is governed in part by Art. III, Sec. 2, of the United States Constitution (the case and controversy requirement), which is not binding upon the states. *Sheward*, 86 Ohio St.3d at 470.

The basis for standing analysis under Ohio law is found in Art. IV, Sec. 1, of the Ohio Constitution which provides that “[T]he judicial power of the state is vested in a supreme court, court of appeals, courts of common pleas and divisions thereof...” Common law standing analysis is a means by which Ohio courts determine the extent of the judicial power delegated to them by the people of the State of Ohio. This Court has exercised that authority by adopting federal standing law, but it is not bound by such law.

The *Data Processing* case broke the question of standing in to two components. The first component is based on the "case or controversy" requirement of the federal constitution and requires an injury-in-fact, economic or otherwise, by the invasion of a judicially cognizable interest. The second component requires that ‘the interest sought to be protected by the

complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Dayton Newspapers*, 46 Ohio St.2d at 459 (1976). This Court, following federal case law, describes these components as "constitutional and prudential considerations." *Taylor v. Academy Iron & Metal Co.*, 36 Ohio St.3d 149, 152, 522 N.E.2d 464 (1988). The United States Supreme Court explained in *Bennett v. Spear*, 520 U.S. 154, 162, 117 S. Ct. 1154 (1997), that the constitutional component was an "irreducible constitutional limit" based on the federal constitution and that the prudential component was a "judicially self-imposed limit." With respect to Ohio law, however, the federal constitutional limit is not binding, and its adoption is therefore a "judicially self-imposed limit" or a prudential consideration.

The constitutional limitation requires: "(1) that the plaintiff has suffered an 'injury-in-fact' – an invasion of a judicially cognizable interest which is (a) concrete and particularized, and (b) actual or immanent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third-party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be readdressed by a favorable decision." *Id.* at 167. The prudential limitation includes the requirement that a plaintiffs' grievance fall within the zone of interests described in the *Data Processing* case. *Id.* at 162.

As discussed above, injury-in-fact involves a judicially cognizable interest. The use of the phrase "judicially cognizable interest" in defining injury-in-fact is intended to "emphasize that an interest can support standing even if it is not protected by law * * * so long as it is the sort of interest that courts think to be of sufficient moment to justify judicial intervention." *In re:*

Special Grand Jury 89-2, 450 F.3d 1159, 1172 (10th Cir. 2006). As a result, " * * * once an interest has been identified as a 'judicially cognizable interest' in one case, it is such an interest in other cases as well * * *." *Id.* at 1172.

The determination of what constitutes a 'judicially cognizable interest' must be grounded in the purpose of standing analysis, which is to ensure the proper adversarial presentation of a case. *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. at 1453, 167 L.Ed. 248. As explained by the *Massachusetts* court:

"The gist of the question of standing" is whether petitioners have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). As Justice KENNEDY explained in his *Lujan* concurrence:

"While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," 504 U.S. at 501, 112 S. Ct. 2100 (internal quotation marks omitted).

The United States Supreme Court has repeatedly emphasized that the fact that harm is wide-shared does not preclude standing:

That these climate-change risks are "widely shared" does not minimize Massachusetts' interest in the outcome of this litigation. See *Federal Election Comm'n v. Akins*, 524 U.S. 11.24, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998)) "[W]here a harm is concrete, though widely shared, the Court has found "injury in fact").

Id. at 1457.

“[T]he fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

Sierra Club v. Morton, 405 U.S. 727, 734, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972).

The type of interest that may be deemed a judicially cognizable interest was defined broadly by the *Data Processing* court:

That interest, at times, may reflect ‘aesthetic, conservational, and recreational’ as well as economic values. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 616; *Office of Communication of United Church of Christ v. FCC*, 123 U.S.App.D.C. 328, 334-340, 359 F.2d 994, 1000-1006. A person or a family may have a spiritual stake in the First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause. *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844. We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury in which petitioners rely here.

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 154, 90 S.Ct. 827, 25 L.Ed. 2d 184 (1970).

In *Sierra Club v. Morton*, 405 U.S. at 738, fn. 13, the Court also recognized a broad range of judicially cognizable interests:

See, e.g., *Environmental Defense Fund, Inc. v. Hardin*, 138 U.S.App.D.C. 391, 395, 428 F.2d 1093, 1097 (interest in health affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); *Office of Communication of United Church of Christ v. FCC*, 123 U.S.App.D.C. 328, 339, 359 F.2d 994, 1005 (interest of television viewers in the programming of a local station licensed by the FCC); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608, 615-616 (interests in aesthetics, recreation, and orderly community planning affected by FPC licensing of a hydroelectric project); *Reade v. Ewing*, 205 F.2d 630, 631-632 (interest of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration); *Crowther v. Seaborg*, 312 F.Supp. 1205, 1212 (interest in health and safety of persons residing near the site of a proposed atomic blast).

The federal courts have emphasized that a judicially cognizable interest is not the same as a legal right. This principle was explained in *Parker v. District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007):

The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim. See *Warth v. Seldin*, 422 U.S. 490, 501-02, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (assuming factual allegations and legal theory of complaint for purposes of standing analysis).

In the present case, appellants are not required to show that they have legal rights under the lottery and casino provisions of the Ohio Constitution to establish standing. They need only show that they have a cognizable interest which has been adversely affected, thereby ensuring an adversarial presentation of the subject case.

4. Appellants have standing based on harm from the negative effects of unconstitutional gambling.

a. Judicially cognizable interest; injury-in-fact

Numerous courts have held that harm from the negative effects of gambling can constitute the invasion of a judicially cognizable interest, an injury-in-fact for, purposes of standing. In *Amador County, Cal. v. Salazar*, 640 F.3d 373, 378 (D.C. Cir. 2011), the court held that allegations "that the planned gaming would increase the county's infrastructure costs and impact the character of the community *** are more than sufficient to establish 'concrete and particularized' harm." In *Patchak v. Salazar*, 632 F.3d 702, 704 (D.C. 2011), the court held that "in terms of Article III standing, the impact of the Bands' [casino] facility on Patchak's way of

life constituted an injury-in-fact * * *."¹ In *County Chamber of Commerce, Inc. v. Pataki*, 275 A.D. 2d 145, 155-156, 712 N.Y.S. 2d 687 (2000), the court held that a non-profit corporation and an unincorporated association representing organizations and citizens opposed to casino gambling who alleged harm from the expansion of casino gambling had alleged sufficient harm to establish standing.

In *State ex rel. Ohio Roundtable v. Taft*, 119 Ohio Misc.2d 49, 2002-Ohio-3669, ¶ 47, the court addressed some of the same allegations being made in the present case in the context of determining standing to pursue a claim challenging the constitutionality of an expansion of lottery operations. The court held that allegations that expanded lotteries were operating outside of constitutional limits and would adversely affect gambling addicts and their families, alleged sufficient injuries for purposes of standing. The court reasoned that “* * * under the Ohio Constitution, the gambling addict cannot be subjected to the temptation to participate in any legal lottery that does not fall within the strict confines of the exception to the general ban on lotteries.” *Id.* at ¶ 47.

Appellants Robert Walgate, Sandra Walgate, Abraham, Zanotti and Roundtable have standing under this theory because they, their communities or its members are adversely affected by unconstitutional gambling.

b. Zone of interest

The prudential limitation represented by the zone-of-interests test "is not meant to be especially demanding," *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388, 399, 107 S. Ct. 750,

¹ On appeal of the Patchak case to the United States Supreme Court, it was uncontested that Article III standing existed where plaintiff alleged that "...he lived in close proximity to the Bradley property and that a casino there would destroy the life style he has enjoyed by causing increased traffic, increased crime, decreased property values, an irreversible damage in the rural character of the area, and other aesthetic, social economic, and environmental problems. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 183 L. Ed 2d 211, 567 U.S. ____ (2012).

93 L.Ed.2d 757 (1987); *Amador County*, 640 F.3d at 379; *Patchak*, 632 F.3d at 705. The interest that plaintiff seeks to protect need only be "arguably within the zone of interests to be protected." *Dayton Newspapers, Inc.*, 46 Ohio St.2d at 459. Whether a plaintiff's interest is arguably protected by a constitutional or statutory enactment is not determined by the overall purpose of the enactment generally, but by the particular provision at issue. *Bennett*, 520 U.S. at 176; *Clark*, 479 U.S. at 400-401. The "breadth of the zone of interests varies according to the provisions of law at issue." *Bennett*, 520 U.S. at 163.

In *Bennett*, for example, the United States Supreme Court observed that although the overall purpose of the Endangered Species Act was species preservation, one of its provisions requiring use of "the best scientific and commercial data" arguably sought to avoid "needless economic dislocation." *Id.* at 176. Accordingly, *Bennett* held that a party adversely affected by determinations under the ESA which caused economic dislocation was within the zone of interests to be protected by the ESA provision at issue.

In *Patchak*, plaintiff challenged a decision by the Secretary of the Interior, under the Indian Reorganization Act (the "IRA") which paved the way for a casino facility under the Indian Gaming Regulatory Act (the "IGRA"). The *Patchak* court reasoned that the IRA placed limits on the Secretary's authority to make the challenged decision. *Patchak*, 632 F.3d at 705-706. Accordingly the *Patchak* court concluded:

"When that limitation blocks Indian gaming, as *Patchak* claims it should have in this case, the interests of those in the surrounding community—or at least those who would suffer from living near a gambling operation—are arguably protected. And because of their interests, they are proper parties to enforce the IRA's restrictions."

Patchak, 632 F.3d at 706.

In *Amador County*, the Secretary of the Interior approved a compact which allowed for casino gambling under the IGRA. *Amador County*, 640 F.3d at 377. Plaintiffs claimed that the Secretary's approval of the compact was unauthorized under the IGRA. The *Amador County* court reasoned that because the IGRA limited the Secretary's actions which allowed gambling, "[t]hose in the surrounding community who are impacted by gambling fell within the IGRA's zone of interest. Accordingly, the County, whose alleged injury flows from its proximity to the gambling operation, is 'arguably protected' and is thus a proper party to enforce the limitations the IGRA imposes on the Secretary." *Amador County*, 640 F.3d at 379.

c. Concrete and particularized

The appellate court determined that appellants' alleged harm from the negative effects of gambling was "purely speculative and hypothetical" or "abstract and speculative". Court of Appeals Opinion, ¶¶ 16-17. The appellate court also determined that the allegations of harm were not "contained within the complaint" and ignored the standing affidavits. *Id.* at ¶ 17. These determinations were made in the context of a Civ. R. 12(B)(6) proceeding which allows dismissal "only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover". *O'Brien*, 42 Ohio St. 2d 242 at syllabus.

Federal standing law, which has been adopted by this Court for purposes of common law standing, is clear that affidavits containing allegations of fact supportive of standing are to be considered by a court in determining standing. *Warth*, 422 U.S. at 501. The appellate court was fully advised of the affidavits. Appellants' Court of Appeals Brief, p. 20. The standing affidavits of Dr. Valerie Lorenz and David Zanotti detail the negative personal and social effects of gambling and should have been considered by the appellate court.

The case of *Massachusetts v. EPA*, 549 U.S. 497, 127 S.Ct. at 1456-58 illustrates the appropriate use and importance of standing affidavits in determining standing. In *Massachusetts*, the United States Supreme Court determined standing to challenge the EPA decision to not regulate vehicle emissions of carbon dioxide, based on the negative effects of global warming. The plaintiff submitted uncontested affidavits regarding those negative effects, which the court treated as true for purposes of evaluating standing. The affidavits asserted, among other things, that global warming was caused by carbon dioxide emissions and that global warming would cause a precipitous rise in sea levels that would erode Massachusetts's shoreline by the end of the century, reduction of snow in the mountains, increase in spread of disease, and increase in the ferocity of hurricanes. None of this was considered abstract for purposes of standing analysis, because, as the court repeatedly emphasized, the affidavits were uncontested.

The affidavits of Lorenz, in the present case, were also uncontested. These affidavits detail the negative effects of gambling, just like the *Massachusetts* affidavits detailed the negative effects of global warming. Just as in the *Massachusetts* case, the appellate court was bound to deem these detailed effects as true, for purposes of standing analysis. Under these circumstances, there is no basis or justification for the appellate court to determine that the negative effects of gambling are merely abstract.

The *Lujan* court explained with respect to the concrete and particularized standard that “[b]y particularized, we mean that the injury must affect the plaintiff in a personal and individual way.” *Lujan*, 504 U.S. at 561, fn. 1.

As detailed by the court in *State ex rel. Ohio Roundtable v. Taft*, 119 Ohio Misc.2d 49, 2002-Ohio-3669, ¶¶ 20-28, the negative effects of gambling on which the partial constitutional ban of lotteries and partial statutory ban of casino gambling is based include:

1. The vulnerability of compulsive or pathological gamblers;
2. The suffering of the compulsive gambler's family and friends;
3. The increased cost to charitable and public social service agencies to deal with the affects of excessive gambling, which displaced their use for other beneficial purposes;
4. The association with an increase of racketeering and organized crime;
5. Increase of the opportunities and motives for the corruption of public officials.

Appellants have alleged the negative effects of gambling in the amended complaint and in standing affidavits authorized by *Warth*, 422 U.S. at 501. See *Linkous v. Mayfield*, 4th Dist. Scioto No. CA 1894, 1991 WL 100358, *4. Memorandum Contra Kasich Motion to Dismiss, Exhibits A and B; Amended Complaint, ¶¶ 1, 2, 3, 4 and 9. Robert Walgate and Sandra Walgate allege that he is a recovering addicted gambler and that she and her family have suffered great distress as a result of this addiction. Roundtable alleges that its officer and supporter have suffered the effects of gambling addiction, and has therefore established organizational standing under *Ohio Contractors Assn.*, 71 Ohio St. 3d at 320. Abraham and Zanotti allege that they are citizens of Cleveland and of Cuyahoga County, respectively and will therefore be negatively affected by the opening of a casino in their community.

Dr. Valerie C. Lorenz in her standing affidavit details the negative consequences to compulsive and pathological gamblers and the heightened addictive effects of slot machines, such as VLTs. Lorenz Affidavit, ¶¶ 4, 5, Memorandum Contra Kasich Motion to Dismiss, Exhibit A. Zanotti's standing affidavit details the negative social effects that his community will be subjected to by increased gambling. Zanotti affidavit, ¶¶ 1 – 5, Memorandum Contra Kasich Motion to Dismiss, Exhibit B.

These allegations easily meet the concrete and particularized standard by showing an effect on appellants in a personal and individual way. This is particularly so given the U.S. Supreme Court's clear directive that "[a]t the pleading stage, general factual allegations of injury resulting from the defendants' conduct may suffice, for in a motion to dismiss, we presume[e] that general allegations embrace these specific facts that are necessary to support the claim". *Lujan*, 504 U.S. at 561. In any event, it cannot be reasonably maintained that it appears beyond doubt from the amended complaint and standing affidavits that appellants can prove no set of facts supporting standing on this theory.

d. Actual or imminent as opposed to hypothetical or speculative

The appellate court's conclusion that appellants' allegations fail to show standing because they are hypothetical and speculative is also not justified, for reasons similar to those described above. The *Lujan* court explained the conjectural standard as requiring alleged harm to be "actual or imminent, not 'conjectural' or 'hypothetical'". *Lujan*, 504 U.S. at 560. This element requires a showing that the alleged harm is actual or imminent. In order to demonstrate that, it is necessary to be clear about the harm alleged.

Appellants are alleging that their interests are being invaded by being subjected to the negative effects of unconstitutional gambling. One of those negative effects is the increased temptation presented by unconstitutional gambling to those who are vulnerable to gambling addiction. Limiting this negative effect is one of the purposes behind the limitations placed on lotteries and casino gambling. As explained by the court in *State ex rel. Ohio Roundtable v. Taft*, 119 Ohio Misc.2d 49, 2002-Ohio-3669 at ¶ 47, "Walgate and his family are being subjected to the added danger of a state-run lottery that does not fall within the strict confines of the exception to the general ban on lotteries in the Ohio Constitution". This reasoning applies not

only to the lottery exception, but also the casino gambling provision, which is a limited exception to Ohio's statutory ban on casino gambling.

The harm in this circumstance is the increased danger, presented by the unconstitutional lottery and casino gambling activity alleged in this case. The increased danger of the negative individual effects of unconstitutional gambling detailed in the standing affidavits, precludes a determination that appellants can prove no set of facts supporting the element that such danger is actual or imminent.

With respect to the community effects of unconstitutional gambling, they are amply supported by the details of the standing affidavits. Such negative effects have been well established, and preclude any determination that it is beyond doubt that appellants can prove no set of facts supporting this element of standing.

The negative personal and social effects of gambling are as actual or imminent as the negative effects of global warming addressed in the *Massachusetts* case. In *Massachusetts*, the court considered allegations that the sea levels would rise precipitously by the end of this century to be sufficiently actual or imminent to establish standing. One factor is that the affidavits were uncontested. Another factor, is that the purpose of standing analysis is to assure sufficient adverse presentation for the court and not to conclusively establish the negative effects of man-made global warming or the negative effects of gambling.

e. Redressability

The trial court also determined that there was no standing under the negative effects of standing theory because such negative effects could not be redressed. Trial Court Judgment, pp. 14-15. The trial court reasoned that social harm from gambling would still exist if

unconstitutional gambling was stopped, because constitutional gambling could still be allowed to proceed.

However, the element of redressability only requires that the harm arising from the alleged injury be redressed. The alleged injury in this case is the negative effects of unconstitutional gambling, not the negative effects of constitutional gambling. The negative effects of unconstitutional gambling could certainly be redressed by stopping the unconstitutional gambling.

As reasoned by the court in *State ex rel. Ohio Roundtable v. Taft*, 119 Ohio Misc.2d 49, 2002-Ohio-3669 at ¶ 47, the appellants are “being subject to the added danger” of a lottery that is not authorized by the Ohio Constitution. Injury from that added danger can be redressed by enforcing the constitutional ban on the gambling that causes the added danger.

This reasoning was also reflected in the *Amador County* case, which held that because the subject gambling may only proceed by reason of defendants’ constitutional violations, there is a direct causal connection between such violations and plaintiffs’ harm. *Amador County*, 640 F.3d at 378. The injury from the constitutional violations was held to be redressable because if plaintiffs succeed on the merits the subject gambling would not proceed. *Amador County*, 640 F.3d at 378.

Moreover, in *Massachusetts*, the court found that it was not necessary to establish that the relief being sought would reverse global warming, as long as it could be shown that global warming could be slowed down or reduced. *Massachusetts*, 549 U.S. 497, 127 S. Ct. at 1458. Nor was it necessary to show that the risk of serious harm was not remote, so long as the relief sought would reduce such risk. *Id.* at 1458. As explained by the *Massachusetts* court:

“The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners

received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA's denial of the rulemaking petition." *Id.* at 1458.

As in the *Massachusetts* case, the relief sought by appellants would reduce the risk of harm to them, which is sufficient to support standing.

B. Proposition of Law No. III: Parents of public school students and contributors to special funds for schools have standing to pursue claims of unconstitutional diversion of lottery proceeds and casino tax proceeds from education or school funds.

The appellate court determined that those appellants who are parents of public school students or a public school teacher lacked standing to assert claims relating to unconstitutional diversion of lottery and casino proceeds from funds dedicated to educational use. The appellate court based its ruling on the conclusion that appellants "...fail to allege [they]...will suffer a direct and concrete injury that is different from that suffered by the public in general". Court of Appeals Decision, ¶ 21.

This Court has allowed standing on a number of occasions for parents of public school children to seek declaratory relief regarding claims of constitutional violations relating to school funding. In *Board of Education v. Walter*, 58 Ohio St. 2d 368, 384, 390 N.E. 2d 813 (1979), this Court allowed standing for a claim for declaration of rights under Art. VI, Sec. 2 of the Ohio Constitution brought by parents of public school children, among others. Art. VI, Sec. 2 provides that "[t]he General Assembly shall make provisions, by taxation, or otherwise, as ... will secure a thorough and efficient system of common schools throughout the state..." This Court allowed standing with the following explanation:

We find that the issue concerning legislation passed by the General Assembly pursuant to Section 2 of Article VI of the Ohio Constitution presents a justiciable controversy. In so finding, we find the decisions of the courts in New York, New Jersey and Washington helpful. In *Robinson v. Cahill* (1975), 69 N.J. 133,

351 A.2d 713; *Board of Education, Levittown Union Free School District v. Nyquist* (1978), 94 Misc.2d 466, 408 N.Y.S. 606; and *Seattle School District No. 1 v. State* (1978), 90 Wash.2d 476, 585 P.2d 71, the courts had no difficulties concerning their authority to review the constitutionality of similar legislation.

Id. at 384-385.

Each of the cases cited by the *Walter* court involved requests for declaratory relief regarding constitutional provisions involving school funding brought by parents of public school children.

A similar result was obtained in *DeRolph v. State of Ohio*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1992) which involved claims by, among others, next friends of public school children, for a declaration of rights under Art. VI, Sec. 2 of the Ohio Constitution regarding school funding. In *DeRolph*, Chief Justice Moyer stated in dissent that “[w]e do not maintain that this court is without jurisdiction over this case”. *Id.* at 783. Chief Justice Moyer took issue with whether the issue presented was a political issue appropriate for judicial resolution, but not with the jurisdiction of the court over the parties and the subject matter.

The 10th District Court of Appeals, in *Brown v. Columbus City Schools Board of Education*, 10th Dist. Franklin No. 08AP-1067, 2009-Ohio-3230, ¶ 7, also supported standing for parents of students attending public schools to assert claims relating to an unconstitutional handling of school funds:

"Appellants have not suffered and are not threatened with any direct and concrete injury in a manner or degree different from that suffered by the public in general. Appellants alleged only that they were taxpayers in the city of Columbus. ***Appellants do not allege they are students in the Columbus City Schools system or are parents of students in the school system.***"

Brown, 2005-Ohio-3230 at ¶ 13. (Emphasis added.)

The appellate court in this case acknowledged that by referencing parents, *Brown* “pointed to groups that could potentially assert direct and actual harm” but then inexplicably concluded that appellants failed to allege that their “interests are being threatened in a way that is distinct from the general public”. Court of Appeals Decision, ¶¶ 22-23. This reasoning is not logical because *Brown* was clearly indicating that parents of Columbus City schools’ students had an interest distinct from the general public in the school funding issue it was addressing.

Moreover, in *State ex rel. Ohio Roundtable* 119 Ohio Misc.2d 49, 2002-Ohio-3369 at ¶ 46, the court held, that the parent of a public school child being deprived of the constitutionally guaranteed benefit that all lottery proceeds would be used to support public education, had standing. The same allegation is being made by parents of public school children in the subject case in connection with the VLT claims. A similar claim is being made in connection with the casino claims, in that parents are alleging deprivation of the constitutionally guaranteed benefit that CAT taxes would be applied and proceeds would be used to support public education.

It bears noting that the appellate court incorrectly minimized the school funding at issue, by characterizing it as only involving a claim of redirection and substitution of funds. However, appellants are additionally claiming that net proceeds of lotteries were being distributed to gambling corporations instead of education programs as required by Art. XV, Sec. 6. Appellants are also claiming that CAT taxes which are supposed to be allocated to school district special funds are not being collected in violation of Art. XV, Sec. 6(C).

The appellate court also rejected appellant ASL’s standing based on its interest in a special fund, on the grounds that the complaint does not allege a special interest in, or challenge the administration of, a special fund. However, ASL does allege payment of the CAT tax which as a matter of law is allocated in part to the school district tangible tax replacement fund. The

collection of this tax is part of the administration of this fund. Appellants are alleging a violation of a constitutional requirement to collect this tax. A similar circumstance supported standing in *Racing Guild of Ohio v. Ohio State Racing Comm.*, 28 Ohio St.3d 317, 503 N.E.2d 1025 (1986):

There is no question that the clerks are contributors to the relevant special fund. Nor is there any question that the allegedly illegal actions of the commission resulted in insufficient contributions into that same special fund. This alone is enough to satisfy the *Masterson* requirement of a special interest in the relevant fund.

In *State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 2006-Ohio-3677, 853 N.E. 2d 263, standing to assert a claim regarding management of the Ohio Workers' Compensation Fund was granted to a person who contributed into the fund:

Longstanding Ohio law does recognize that a taxpayer with a "special interest" in particular public funds has standing to seek equitable relief in a court of equity to remedy a wrong committed by public officers in the management of those funds. *Id.*; *Racing Guild of Ohio, Local 304, Serv. Emps. Internatl. Union, AFL-CIO v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d. Dann arguably has a "special interest" in the management of the Workers' Compensation Fund because he had paid into that fund as an employer.

Appellants Paula Bolyard, Jeffrey Malek, Michelle Watkins-Malek, Thomas and Donna Adams and Sandra Walgate have standing under this theory by reason of their status as public school student parents or teacher.

C. Proposition of Law No. IV: In order for a court to dismiss a complaint for failure to state a claim for lack of standing (Civ. R. 12(b)(6)), it must appear beyond doubt from the complaint and standing affidavits that the plaintiff can prove no set of facts entitling him to relief. In the event of such dismissal, a court must allow an opportunity to amend the complaint.

Appellant Kinsey alleges a violation of the Equal Protection clause and the Privileges and Immunities clause of the Fourteenth Amendment of the U.S. Constitution on the grounds that

Art. XV, Sec. 6 of the Ohio Constitution grants a monopoly to two or three gaming companies to engage in casino gaming in Ohio. Amended Complaint ¶¶ 10, 119-121. The monopoly is accomplished by Art. XV, Sec. 6(C)(9) limiting casino gaming to specified parcels of land owned or controlled by two or three gaming companies.

The trial court held that appellant Kinsey lacked standing because he failed to allege that he was “ready and able” to engage in the business of casino gambling in Ohio. Court of Appeals Decision, ¶ 22. Kinsey did allege that he “would engage in casino gaming in Ohio but for the provisions of Art. XV, Sec. 6(C) which grant a special and exclusive privilege to engage in casino gaming in Ohio to two gaming corporations. Amended Complaint, ¶ 10. Casino gaming is defined by Art. XV, Sec. 6(C)(9) as “any type of slot machine or table game wagering”. Engaging in any type of table game wagering is not quite as daunting as the characterization of ‘operate a casino’ would suggest.

Establishing standing for an equal protection claim does not require showing that the claimant attempted to secure a casino license and lost. The standard for showing such standing has been explained as follows:

“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit...”

Lac Vieux Desert Board of Lake Superior Indians v. Michigan Gaming Control Board, 172 F.3d 397, 404 (6th Cir. 1999).

Kinsey’s allegation contemplates that he would engage in casino gaming as authorized by Art. XV, Sec. 6(C)(1) and (6), which includes applying for a license, but does not include those

provisions which violate the Fourteenth Amendment of the U.S. Constitution. Amended Complaint ¶¶ 118-121. The Fourteenth Amendment is violated by laws “...protecting a discrete interest group from economic competition...” *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002). The provisions of Art. XV, Sec. 6(C)(1) and (9) limiting casino gaming to property owned by a few gaming companies is such a law. The Fourteenth Amendment is also violated by laws which violate a “...due process right to choose one’s field of private employment...” *Conn v. Gabbert*, 526 U.S. 286, 292 (1999). License fees required to be paid before engaging in constitutionally protected activity are unconstitutional to the extent that they are not reasonably incident to the administration of the licensing law. *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F. Supp.2d 672, 692 (W.D. Ky. 2002). The license fees and expenditure requirements of a \$50 million upfront license fee and a \$250 million initial investment for each casino facility are violations of this principle of law. Ohio Constitution, Art. XV, Sec. 6(C)(4) and (5).

Kinsey is ready and able to engage in casino gaming, which by constitutional definition includes licensing, absent these unconstitutional requirements. Kinsey’s allegation is sufficient for purposes of standing at the pleading stage given the presumption “...that general allegations embrace those facts that are necessary to support the claim.” *Lujan*, 504 U.S. at 561. The trial court may dismiss Kinsey’s claim for lack of standing “only if appears beyond a doubt that the plaintiff can prove no set of facts...” supporting standing. *O’Brien*, 42 Ohio St. 2d at syllabus.

Kinsey’s injury arises from the barrier that casino gaming is only allowed by Art. XV, Sec. 6 on property owned or controlled by two or three gaming companies. Appellees have not shown beyond doubt that appellant Kinsey can prove no set of facts supporting standing.

It is well settled that when a motion for failure to state a claim is sustained, leave to amend the pleading should be granted unless the court determines that allegations or other statements of facts consistent with the challenged pleading could not possibly cure the defect. *Jordan v. Cuyahoga Metro. Hous. Auth.*, 161 Ohio App.3d 216, 2005-Ohio-2443, 829 N.E.2d 1237, ¶ 12 (8th Dist.).

Appellants had previously raised the issue to the trial court that as a general rule “if a complaint is defective [with respect to jurisdictional allegations], the court will grant leave to have it amended to cure the jurisdictional defect.” Memorandum Contra Kasich Motion to Dismiss, p. 4; 5A Wright & Miller, Federal Practice and Procedure 217, §1350 (1990) citing *Blank v. Preventative Health Programs*, 504 F.Supp 416, 422 (D.C. Ga. 1980). In *Blank* the court cited this rule and allowed opportunity to amend after announcing its order of dismissal but, before entering final judgment. Nonetheless the trial court in the present case dismissed the amended complaint and entered final judgment which precluded the filing of subsequent motions for reconsideration. See *State ex rel. Hanson v. Guernsey County Bd. of Commissioners*, 65 Ohio St.3d 545, 547, 605 N.E.2d 378 (1992). The trial court’s entry of final judgment precluded the filing of a motion for leave to amend in violation of this general rule.

The appellate court upheld the trial court’s ruling because no motion for leave to amend was filed, prior to the final judgment. However, appellants did not believe that an amended complaint was necessary, until the court dismissed the case and entered final judgment. At that point no further motions were available under the civil rules because final judgment was entered.

D. This court has original jurisdiction as necessary to a complete determination of this cause with respect to the issue of appellants’ citizen standing to seek mandamus relief

1. Original jurisdiction on review

In the event that this Court does not allow standing as argued above, the circumstances in this case would invoke this Court's original jurisdiction under Art. IV, Sec. 2 (B)(1)(f) of the Ohio Constitution, because resolution of the issue of citizen standing to assert a mandamus claim is necessary for a complete determination of the cause before this Court. While this Court has declined to review this issue, it still has original jurisdiction "[i]n any cause on review as may be necessary to its complete determination" under Art. IV, Sec. 2 (B)(1)(f). This Court has "interpreted this provision to authorize judgments in this court that are necessary to achieve closure and complete relief in actions pending before this court". *State of Ohio v. Steffen*, 70 Ohio St.3d 399, 407, 639 N.E.2d 67 (1994).

The appellate court has denied appellants' standing as citizens to maintain a mandamus claim in the common pleas court by reason of the *Sheward* case's 'rare and extraordinary' limit. By declining review, this Court leaves that ruling in place in the 10th District Court of Appeals, where most such claims would need to be brought, thereby effectively blocking such claims in common pleas court in Ohio. However, this ruling will not bring closure to appellants' citizen standing mandamus claim, because appellants can file it in this Court pursuant to its original jurisdiction in mandamus. In that event, this Court will be precluded from applying *Sheward's* 'rare and extraordinary' limit to its original jurisdiction in mandamus by Art. IV, Sec. 2(B)(3) of the Ohio Constitution which provides that:

No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

This Court made clear in *State ex rel. Pressley v. Industrial Commission*, 11 Ohio St.2d 141, 145, 228 N.E.2d 631 (1967), that the term 'rule' in Art. IV, Sec. 2(B)(3) meant rule of decision:

From the decision announced in *State ex rel. Werden v. Williams, Clerk* (1875), 26 Ohio St. 170, until the pronouncement of the law in *State ex rel. City of Toledo v. Lynch, Aud.* (1913), 87 Ohio St. 444, 101 N.E. 352, this court adhered to a rule that mandamus must be filed in the District Court, and that an action in mandamus could not be filed originally in this court without the court's permission, for the reason that 'it can more speedily and conveniently be heard in the District Court.' *State, ex rel. Werden v. Williams, Clerk, supra.*

State, ex rel. City of Toledo v. Lynch, Aud., supra, held that the last sentence of Section 2 of Article IV of the Ohio Constitution, proposed by the 1912 Constitutional Convention and adopted by the Ohio electorate, effective January 1, 1913, which provides that 'no law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court,' made the rule of *State ex rel. Werden v. Williams, Clerk, supra*, constitutionally invalid.

The rule of *Sheward*, placing a 'rare and extraordinary' limit on this Court's original jurisdiction in mandamus is constitutionally invalid. It is also constitutionally invalid to apply the 'rare and extraordinary' limit to the common pleas court's original jurisdiction in mandamus granted by the General Assembly, pursuant to its constitutional authority.

The *Pressley* court lays out the back and forth between the people of the State of Ohio and this Court over its original jurisdiction in mandamus. Such jurisdiction was first granted to this Court in 1851, upon adoption of the proposal of the 1851 Ohio Constitutional Convention. This Court subsequently ruled in *Werden* in 1875 that original mandamus claims may only be filed in this Court with this Court's permission. The 1912 Ohio Constitutional Convention responded with the provision that no rule or statute may limit this Court's original jurisdiction. In *State ex rel. Allied Wheel Products, Inc. v. Industrial Commission*, 161 Ohio St. 561, 577, 120 N.E.2d 421 (1954), this Court once again ruled that this Court must exercise discrimination in determining whether an original mandamus action may be filed in this Court. This Court quickly

reversed that ruling in *State ex rel. Libby-Owens-Ford Glass Co. v. Industrial Commission*, 162 Ohio St. 302, 305 123 N.E.2d 23 (1954), citing the last sentence of Art. IV, Sec. 2.

The *Pressley* court rejected a similar effort to limit this Court's original jurisdiction in mandamus. The argument was made that statutory mandamus was an adequate remedy in the ordinary course of law which precluded original mandamus claims in this Court. The *Pressley* court held that the last sentence of Art. IV, Sec. 2, now Art. IV, Sec. 2(B)(3), barred any limitation on this Court's original jurisdiction, by statute or court ruling. *Pressley* at 147-148.

The *Pressley* court went on to explain that this Court has no authority to exercise discretion when a properly stated cause of action in mandamus is filed in this Court. *Id.* at paragraph two of the syllabus. In such event, this Court is required to exercise its original jurisdiction in mandamus. *Id.* at paragraph two of the syllabus.

The exercise of this Court's original jurisdiction is not discretionary when it is properly invoked. This principle is not only applicable to this Court's original jurisdiction in mandamus, but also to this Court's original jurisdiction in any cause on review when it is necessary for complete determination of that cause. In the present case, the cause on review includes appellants' cause of action in mandamus. This cause will not be completely determined if standing to maintain it in common pleas court is denied, because it can then be filed in this Court. Accordingly, exercise of this Court's original jurisdiction would be necessary for complete determination of this cause, and because it is properly invoked, it would not be discretionary.

2. Appellants' citizen standing to seek mandamus relief

Citizen standing to seek mandamus relief is not only one of the most well-settled principles of Ohio case law, it is a fundamental element of the structure of the Ohio Constitution.

Standing, the entitlement to seek relief in court, is ultimately a question of the scope of judicial power, as defined by the rights and remedies provided by, or through, the constitution. Most of these rights and remedies are defined by the common law or statute, pursuant to the judicial and legislative powers delegated by means of the constitution. However, certain rights and remedies were deemed so fundamental that they were specified by the people of Ohio in its constitution. Among these remedies was mandamus, for which this Court was granted original jurisdiction in the Ohio Constitution in 1851. Mandamus was defined most notably by the United States Supreme Court in *Marbury v. Madison*. 5 U.S. 137, 167 (1803), quoting Blackstone, as:

“A command issuing in the king’s name from the court of king’s bench, and directed to any person, corporation, or inferior court of judicature within the king’s dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king’s bench has previously determined, or at least supposes, to be consonant to right and justice.”

The *Marbury* court described when a writ of mandamus may issue, quoting Lord Mansfield:

“This writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.”

The *Marbury* court, however, while concluding that mandamus was appropriate on the facts before it, declined to issue a writ because the U.S. Constitution had not granted it jurisdiction in mandamus. The framers of the Ohio Constitution of 1851, with this precedent in background, avoided this result by ensuring that this Court would have jurisdiction in mandamus.

While mandamus was adopted in the United States from English common law, there were very basic differences. The sovereign in whose name a command was being issued, was not the

king, it was the people. Moreover, the principles of justice and good government which the remedy of mandamus was to serve were set forth in a constitution.

One of the principles of good government set forth in the Ohio Constitution at the same time original jurisdiction in mandamus was granted to this Court, was the ban on lotteries at issue in this case. This ban was set in place to curb abuses by Ohio government entities in using lotteries to fund public purposes. By this ban, the people of Ohio specifically limited the legislative power being delegated to the General Assembly. Moreover, the people specified as part of the Bill of Rights that "...all powers, not herein delegated, remain with the people". Art. I, Sec. 20, Ohio Constitution. Accordingly, when the General Assembly violates the ban on lotteries, it encroaches on the undelegated powers retained by the people, in violation of a right granted to the people by Art. I, Sec. 20.

Mandamus is the means by which a violation of the rights of the people is remedied. That is reflected by the fact that mandamus claims are brought *ex relatione*, which means 'upon being related' or more loosely 'on behalf of', the State of Ohio. Where enforcement of a public duty is sought, in furtherance of a public right, the real party in interest is the people at large. *State ex rel. v. Henderson*, 38 Ohio St. 644, 648 (1883). The reference to the State of Ohio in mandamus proceedings is a reference to the people of the State of Ohio. Mandamus is the remedy the people have granted to themselves in the Ohio Constitution, to protect the principles of good government, which they have defined in the Constitution.

The people, of course, are an abstract entity. They cannot bring a claim, unless someone brings it on their behalf. It has long been a principle of Ohio law, that a writ of mandamus "may issue on the information of the party beneficially interested". Report of the Commissioners on Practice and Procedure and the Code of Civil Procedure adopted in 1853, at Section 570;

Pressley, 11 Ohio St.2d at 167-168. The concept of beneficial interest was based on the core principle first established by the 1851 Ohio Constitution: “All political power is inherent in the people. Government is instituted for their equal protection and benefit.” Art. I, Sec. 2, Ohio Constitution. The principles of government are a benefit granted by the people to themselves. The people, which are made up of all citizens of the State of Ohio, have a beneficial interest in the constitutional principles of government.

As a result, this Court has repeatedly held throughout Ohio history, that a citizen has a beneficial interest in the enforcement of the laws. *State v. Brown*, 38 Ohio St. 344, 346-347 (1882) (“The relator, as a citizen of Clermont County, is interested in having the proper number of courts and judges to administer justice therein...”); *State ex rel. v. Henderson*, 38 Ohio St. 644, 648-649 (1883) (If a citizen “has ... the right to insist, as against the city that Route 20 shall be constructed and established, then the writ properly lies upon his relation.”); *State ex rel. Gregg v. Tanzey*, 49 Ohio St. 656, 662, 32 N.E. 750 (1892) (“[A]n elector has [a] beneficial interest in an election”); *State ex rel. Trauger v. Nash*, 66 Ohio St. 612, 64 N.E. 558 (1902), paragraph one of the syllabus (“...[A] private citizen may be the relator in a mandamus proceeding to enforce the performance of a public duty affecting himself as a citizen and the citizens of the state at large.”); *Brissel v. State ex rel. McCannon*, 87 Ohio St. 154, 100 N.E. 348 (1912), paragraph four of the syllabus (A relator may maintain a mandamus proceeding to enforce a public duty if “he show[s] that he is a citizen and as such interested in the execution of the laws.”); *State ex rel. Newell v. Brown*, 162 Ohio St. 147, 150-151, 122 N.E.2d 105 (1954). (“Where a public right ... is involved, a citizen ... may maintain a proper action [in mandamus] predicated on his citizenship relation to such public right.”)

This principle has also been applied repeatedly in more recent history. *State ex rel. Nimon v. Village of Springdale* 6 Ohio St.2d 1, 4, 215 N.E.2d 592 (1966) (“[W]here ... the object of the mandamus is ... the enforcement of public duty ... it is sufficient that [the relator] is interested as a citizen ... in having the laws executed ...”); *State ex rel. Blackwell v. Bacharach*, 166 Ohio St. 301, 143 N.E. 2d 127 (1957), paragraph one of the syllabus (“An action in mandamus ... may be maintained by the relator, when he shows that he is a citizen and as such is interested in the execution of the laws.”); *State ex rel. Scott v. Masterson*, 173 Ohio St. 402, 404, 183 N.E.2d 376 (1962) (“[T]he relators as taxpayers and electors have sufficient interest in the execution of the laws to maintain this action.”); *Pressley*, 11 Ohio St.2d at paragraph nine of the syllabus (“Mandamus will lie to permit a private individual to compel a public officer to perform an official act ... where the relator has an interest, such as that of a taxpayer ... “); *State ex rel. Hodges v. Taft*, 64 Ohio St.3d 1, 4, 591 N.E.2d 1186 (1992) (The status of taxpayer is sufficient to show a beneficial interest for purposes of filing a petition for writ of mandamus”); *State ex rel. Spencer v East Liverpool Planning Commission*, 80 Ohio St.3d 297, 299, 685 N.E. 2d 1251 (1997) (“A person’s status as taxpayer is generally sufficient to establish a beneficial interest” for purposes of bringing a mandamus action.”); *Sheward*, 86 Ohio St.3d 4 at paragraph one of the syllabus. (A relator has an interest sufficient to bring a mandamus action to enforce a public right if “the relator is an Ohio citizen and, as such, interested in the execution of the laws of this state”.)

All of these cases are now being treated as dead letters because the *Sheward* court, in dicta, described a ‘rare and extraordinary’ limit on mandamus actions. The only justification provided for this limit was the following:

Thus this court will entertain a public action “ ‘under circumstances where the public injury by its refusal will be

serious' ". *State ex rel. Trauger, supra*, 66 Ohio St. at 616, 64 N.E. at 559, quoting *Ayres, supra*, 42 Mich. at 429, 4 N.W. at 279.

Id. at 503.

The *Trauger* case is the basis for the much vaunted rule limiting citizen standing mandamus actions 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, *Ayres*, 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 *The People ex rel. Ayres v. Board of State Auditors*, 42 Mich. 422, 429, 4 N.W. 274 (1880) (Emphasis added). As discussed above, "standing does not depend on the merits of the plaintiff's [claims]" *Moore*, 133 Ohio St. 3d at ¶ 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.

This is why, a criterion of seriousness, is not mentioned as an element of standing in Ohio's voluminous citizen standing mandamus case law, or even in *Sheward's* syllabus. It is justified, depending on the circumstances, as a factor in the exercise of discretion in determining on the merits whether to grant a writ of mandamus. The *Sheward* court found it a particularly noteworthy factor when it granted a writ to enforce a public duty to preserve judicial power and the dissent pointed out the effect on this Court's docket. It cannot be justified as a rule of the law on standing, which effectively eliminates the citizen standing mandamus action in Ohio.

Trauger is also instructive because it illustrates that the level of seriousness, which would justify exercising discretion in granting mandamus relief, is significantly less than the phrase ‘rare and extraordinary’ might suggest. *Trauger* involved a statute requiring the governor to fill a vacancy in the office of lieutenant governor. *Ayres*, the case quoted by *Trauger* regarding the factor of serious public injury, involved a statutory duty to advertise for proposals to publish supreme court reports. Moreover, *Trauger* cited two Ohio cases as the basis for its rule allowing citizen standing. *State v. Brown*, 38 Ohio St. 344 (1882) involved a writ compelling a sheriff to provide notice for election of a common pleas judge. *State v. Tanzey*, 49 Ohio St. 656, 32 N.E. 750 (1892) involved a writ compelling transmission of voting tally sheets.

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 citizen standing to bring mandamus actions.

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 his dissenting opinion in *Sheward*, 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).

In summary, *Sheward*'s 'rare and extraordinary' limit on mandamus jurisdiction is not only unconstitutional under Art. IV, Sec. 2(B)(1)(f), it violates the basic principles of standing analysis, by evaluating the merits of a claim in determining standing.

Trauger, however, would be controlling precedent in the present case. Just as in *Trauger*, the attorney general in this case has failed to enforce the performance of public duties affecting appellants as citizens and the citizens of the state at large. The *Trauger* court held that “a writ of mandamus may be directed to the governor, or any other officer, . . . to compel the performance of clear legal and mandatory duties . . .” *Trauger*, 66 Ohio St. at 617. *Trauger*, has not been overruled, and clearly allows appellants as citizens, to seek the mandamus relief requested in this case.

3. Federal standing law which precludes citizen mandamus standing is not applicable in the present case

The United States Supreme Court has “consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen’s

interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.” *Lujan* 504 U.S. at 573-574.

This is the source of the Ohio case law which has adopted this principle for purposes of standing analysis in a number of cases. This principle is grounded in provisions of the U.S. Constitution which are contrary to provisions of the Ohio Constitution and Ohio statutes allowing citizen standing to bring mandamus actions.

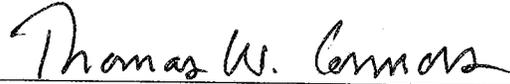
The U.S. Constitution limits the judicial power to “cases and controversies”, while the Ohio Constitution has no such limit. Instead, the Ohio Constitution grants the people rights and remedies regarding enforcement of government duties. It specifies that government is instituted for the benefit of the people. Art. I, Sec. 2, Ohio Constitution. It specifies as a right of the people, that all powers not delegated remain with them. Art. I, Sec. 20, Ohio Constitution.

It also granted a remedy through this Court, in mandamus, which was then defined by existing precedent, as available to parties beneficially interested, “to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.” *Marbury*, 5 U.S. at 166. The Ohio Constitution makes clear that the people, the citizens of this state, have a beneficial interest in the laws forming their government and that mandamus is the remedy of last resort to protect such interest.

This is why this Court has historically upheld citizen standing to bring mandamus actions. In contrast, federal standing analysis is based on a different constitutional structure and is not relevant to citizen mandamus standing as contemplated by the Ohio Constitution.

CONCLUSION

For the above reasons, appellants request this Court to reverse the appellate court's decision and remand this case to the trial court for further proceedings.



Thomas W. Connors, Esq. (0007226)

**Counsel of Record*

James M. Wherley, Esq. (0082169)

Black, McCuskey, Souers &
Arbaugh

220 Market Avenue South

Suite 1000

Canton, Ohio 44702

Counsel for Plaintiffs-Appellants

Robert L. Walgate, Jr., David P.

Zanotti, The American Policy

Roundtable dba Ohio Roundtable,

Sandra L. Walgate, Agnew Sign &

Lighting, Inc., Linda Agnew, Paula

Bolyard, Jeffrey Malek, Michelle

Watkin-Malek, Thomas W. Adams,

Donna J. Adams, Joe Abraham, and

Frederick Kinsey

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular U.S. mail this 14th day of November, 2014 upon the following:

Michael DeWine, Esq. (0009181)

Attorney General of Ohio

Eric E. Murphy, Esq. (0083284)

State Solicitor

**Counsel of Record*

Michael J. Hendershot, Esq. (0081842)

Chief Deputy Solicitor

Stephen P. Carney, Esq. (0063460)

Deputy Solicitor

Appeals Section

30 East Broad Street, 17th Floor

Matthew L. Fornshell, Esq. (0062101)

**Counsel of Record*

Albert G. Lin, Esq. (0076888)

Katherine G. Manghillis, ESQ. (0077307)

Ice Miller, LLP

250 West Street

Columbus, OH 43215

Attorneys for Intervening-Defendants-

Appellees Raceway Park, Inc.,

HLC/PDC Holdings, LLC; Central Ohio

Columbus, Ohio 43215

*Counsel for State Defendants-Appellees
Ohio Governor John R. Kasich, Ohio
Casino Control Commission, Ohio Lottery
Commission, and Ohio Tax Commissioner
Joseph W. Testa*

Alan H. Abes, Esq. (0062423)

**Counsel of Record*

Jocelyn C. DeMars (0086688)

Dinsmore & Shohl LLP

255 E. 5th Street, Suite 1900

Cincinnati, Ohio 45202

*Attorneys for Intervening-Defendant-Appellee
Thistledown Racetrack, LLC*

Christopher S. Williams, Esq. (0043911)

**Counsel of Record*

James F. Lang, Esq. (0059668)

Matthew M. Mendoza, Esq. (0068231)

Calfee, Halter & Griswold LLP

The Calfee Bldg

1405 East Sixth Street

Cleveland, OH 44114-1607

*Attorneys for Intervening-Defendants-Appellees
Rock Ohio Caesars LLC, Rock Ohio Caesars
Cleveland LLC and Rock Ohio Caesars Cincinnati
LLC*

*Gaming Ventures, LLC and Toledo Gaming
Ventures, LLC*

Charles R. Saxbe, Esq. (0021952)

**Counsel of Record*

James D. Abrams, Esq. (0075968)

Irv Berliner, Esq. (0033150)

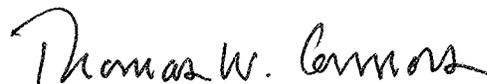
Jason H. Beehler, Esq. (0085337)

Taft Stettinius & Hollister LLP

65 E State St., Suite 1000

Columbus, OH 43215

*Attorneys for Intervening-Defendants-
Appellees Northfield Park Associates, LLC
Lebanon Trotting Club, Inc., MTR Gaming
Group, Inc., and PNK (Ohio), LLC*



Thomas W. Connors

Attorney for Plaintiffs-Appellants

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel. Robert L. Walgate, Jr. et al., :

Relators-Appellants, :

v. :

John R. Kasich et al., :

Respondents-Appellees. :

No. 12AP-548
(C.P.C. No. 11CVH-10-13126)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 14, 2013

Black, McCuskey, Souers & Arbaugh, Thomas W. Connors, and James M. Wherley, Jr., for appellants.

Michael DeWine, Attorney General, Aaron D. Epstein, Pearl M. Chin, Peter M. Thomas, Michael A. Rzymek, Brian P. Mooney, Julie E. Brigner, and Ryan P. O'Rourke, for state appellees.

Ice Miller, LLP, Matthew Fornshell, Albert Lin, and Ross R. Fulton, for appellees Central Ohio Gaming Ventures, LLC, and Toledo Gaming Ventures, LLC.

Calfee, Halter & Griswold LLP, Christopher S. Williams, James F. Lang, and Matthew M. Mendoza, for appellees Rock Ohio Caesars LLC, Rock Ohio Caesars Cleveland LLC, and Rock Ohio Caesars Cincinnati LLC.

APPEAL from the Franklin County Court of Common Pleas.

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Mar 14 12:49 PM-12AP000548

No. 12AP-548

2

SADLER, J.

{¶ 1} Relators-appellants appeal from the judgment of the Franklin County Court of Common Pleas granting the motions to dismiss filed by respondents-appellees for lack of standing. For the reasons that follow, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} Appellants consist of 13 litigants, The American Policy Roundtable dba Ohio Roundtable ("Roundtable"), Robert L. Walgate, Jr., ("Walgate Jr."), David P. Zanotti ("Zanotti"), Sandra L. Walgate ("Walgate"), Agnew Sign & Lighting, Inc. ("ASL"), Linda Agnew ("Agnew"), Paula Bolyard ("Bolyard"), Jeffrey Malek, Michelle Watkin-Malek ("the Maleks"), Thomas W. Adams, Donna J. Adams ("the Adams"), Joe Abraham ("Abraham"), and Frederick Kinsey ("Kinsey"). Though litigation originated with the filing of an initial complaint on October 21, 2011, currently at issue before us is the amended complaint ("complaint") filed on January 5, 2012.

{¶ 3} Seeking declaratory relief, injunctive relief, and a writ of mandamus, the complaint named the following 21 appellees, the State Lottery Commission, Lottery Commission Interim Director Dennis Berg, Lottery Commission Members Ershkine E. Cade, Allan C. Krulak, Patrick McDonald, Clarence E. Mingo, II, William Morgan, Amy Sabbath, Elizabeth D. Vaci, Michael G. Verich (collectively referred to as "Lottery Commission"), the Casino Control Commission, Casino Commission Chairman Jo Ann Davidson, Casino Commission Executive Director Matt Schuler, Casino Commission Vice Chairman June E. Taylor, Casino Commission Members Martin R. Hoke, Ranjan Manoranjan, Peter R. Silverman, John S. Steinhauer, McKinley E. Brown (collectively referred to as the "Casino Commission"), Ohio Governor John R. Kasich, and Ohio Tax Commissioner Joseph W. Testa.

{¶ 4} The complaint challenges legislation recently enacted and amended, primarily by Am.Sub.H.B. No. 1 ("H.B. 1") signed into law on July 17, 2009 and Am.Sub.H.B. No. 277 ("H.B. 277") signed into law on July 15, 2011, as it pertains to casinos and video lottery terminal games ("VLTs"). Specifically, appellants assert the amendments made to R.C. Chapters 3770, 3772, 5751, and 5753, and the administrative rules implemented thereunder violate Article XV, Section 6, Article VIII, Section 4, Article IV, Section 2, and Article II, Section 15 of the Ohio Constitution.

(¶ 5) Ohio Constitution, Article XV, Section 6, provides in relevant part:

Except as otherwise provided in this section, lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.

(A) The General Assembly may authorize an agency of the state to conduct lotteries, to sell rights to participate therein, and to award prizes by chance to participants, provided that the entire net proceeds of any such lottery are paid into a fund of the state treasury that shall consist solely of such proceeds and shall be used solely for the support of elementary, secondary, vocational, and special education programs as determined in appropriations made by the General Assembly.

(C)(2) A thirty-three percent tax shall be levied and collected by the state on all gross casino revenue received by each casino operator of these four casino facilities. In addition, casino operators, their operations, their owners, and their property shall be subject to all customary non-discriminatory fees, taxes, and other charges that are applied to, levied against, or otherwise imposed generally upon other Ohio businesses, their gross or net revenues, their operations, their owners, and their property. Except as otherwise provided in section 6(C), no other casino gaming-related state or local fees, taxes, or other charges (however measured, calculated, or otherwise derived) may be, directly or indirectly, applied to, levied against, or otherwise imposed upon gross casino revenue, casino operators, their operations, their owners, or their property.

(4) * * * Said commission shall require each initial licensed casino operator of each of the four casino facilities to pay an upfront license fee of fifty million dollars (\$ 50,000,000) per casino facility for the benefit of the state, for a total of two hundred million dollars (\$ 200,000,000).

(5) Each initial licensed casino operator of each of the four casino facilities shall make an initial investment of at least two hundred fifty million dollars (\$ 250,000,000) for the development of each casino facility for a total minimum

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Mar 14 12:49 PM-12AP000548

investment of one billion dollars (\$ 1,000,000,000) statewide. A casino operator: (a) may not hold a majority interest in more than two of the four licenses allocated to the casino facilities at any one time: and (b) may not hold a majority interest in more than two of the four casino facilities at any one time.

(8) Notwithstanding any provision of the Constitution, statutes of Ohio, or a local charter and ordinance, only one casino facility shall be operated in each of the cities of Cleveland, Cincinnati, and Toledo, and in Franklin County.

(9) For purposes of this section 6(C), the following definitions shall be applied:

"Casino facility" means all or any part of any one or more of the following properties (together with all improvements situated thereon) in Cleveland, Cincinnati, Toledo, and Franklin County:

"Gross casino revenue" means the total amount of money exchanged for the purchase of chips, tokens, tickets, electronic cards, or similar objects by casino patrons, less winnings paid to wagerers.

{¶ 6} Ohio Constitution, Article VIII, Section 4 provides, "[t]he credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever." Ohio Constitution, Article IV, Section 2 sets forth the cases in which the Supreme Court of Ohio has original jurisdiction. Ohio Constitution, Article II, Section 15 provides, in relevant part, "(C) Every bill shall be considered by each house on three different days, unless two-thirds of the members elected to the house in which it is pending suspend this requirement. (D) No bill shall contain more than one subject, which shall be clearly expressed in its title."

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Mar 14 12:49 PM-12AP000548

{¶ 7} In the first five counts of the complaint, appellants allege VLTs, their conduction by third-parties, the manner in which the state plans to use their net proceeds, and the state becoming a joint owner in a private venture are constitutionally prohibited. In counts six and seven, appellants contend H.B. 1 violates the "single subject rule" and the "three day rule" in contravention of the Ohio Constitution. Count eight alleges H.B. 1 unconstitutionally expands the jurisdiction of the Supreme Court of Ohio. Counts eleven and twelve allege casino operators are both unconstitutionally exempted from certain taxes and required to pay taxes they should not. Count thirteen asserts casinos are or were not required to post initial investments as required by the Constitution. Counts nine, ten, fourteen, fifteen, and sixteen seek mandamus relief, and the final count of the complaint alleges Ohio's gambling laws unconstitutionally create a monopoly.

{¶ 8} Motions to dismiss were filed by Governor Kasich, Tax Commissioner Testa, the Casino Commission, and the Lottery Commission. Additionally, seven entities were granted leave to intervene as party appellees. In the motions to dismiss, appellees argued appellants lacked standing, appellants' complaint failed to state a claim, and appellants' claims were not ripe for judicial review. By decision and entry rendered on May 30, 2012, the trial court agreed with appellees' contention that each appellant lacked standing and consequently granted appellees' motions to dismiss.

II. ASSIGNMENTS OF ERROR

{¶ 9} This appeal followed, and appellants bring the following two assignments of error for our review:

[I.] The trial court erred in dismissing appellants' claims for lack of standing.

[II.] The trial court erred in dismissing appellants' claims for lack of standing without allowing the filing of an amended complaint pleading additional facts in support of standing.

III. STANDARD OF REVIEW

{¶ 10} In order to sue, a plaintiff must have standing to bring the suit. As recently stated by this court, "[t]he question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented. Standing is a threshold test that, if satisfied, permits the court to go on to decide whether the plaintiff has a good cause of

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Mar 14 12:49 PM-12AP000548

action, and whether the relief sought can or should be granted to plaintiff.' " *League of United Latin Am. Citizens v. Ohio Governor*, 10th Dist. No. 10AP-639, 2012-Ohio-947, ¶ 20, quoting *Tiemann v. Univ. of Cincinnati*, 127 Ohio App.3d 312, 325 (10th Dist.1998), citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975). See also *Ohio Contrs. Assn. v. Bicking*, 71 Ohio St.3d 318, 320 (1994) (standing is whether a litigant is entitled to have the court determine the merits of the issues raised).

{¶ 11} Under the doctrine of standing, a litigant must have a personal stake in the matter he or she wishes to litigate. *Tiemann* at 325. Standing requires a litigant to have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult * * * questions." *Id.*, quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962). In order to have standing, a plaintiff must demonstrate some injury caused by the defendant that has a remedy in law or equity. *Id.* The injury is not required to be large or economic, but it must be palpable. *Id.* Furthermore, the injury cannot be merely speculative, and it must also be an injury to the plaintiff himself or to a class. *Id.* "An injury that is borne by the population in general, and which does not affect the plaintiff in particular, is not sufficient to confer standing." *League of United Latin Am. Citizens* at ¶ 21, citing *Tiemann* at 325, citing *Allen v. Wright*, 468 U.S. 737 (1984). See also *State ex rel. Masterson v. Ohio State Racing Comm.*, 162 Ohio St. 366, 368 (1954) ("private 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"). (Citation omitted.)

{¶ 12} Dismissal for lack of standing is a dismissal pursuant to Civ.R. 12(B)(6). *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶ 4. "A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint." *Volbers-Klarich v. Middletown Mgt.*, 125 Ohio St.3d 494, 2010-Ohio-2057, ¶ 11. In order to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. In addressing a Civ.R. 12(B)(6) motion, a trial court may consider only the statements and facts contained in the pleadings and may not

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Mar 14 12:49 PM-12AP000548

No. 12AP-548

7

consider or rely on evidence outside the complaint. *Brown* at ¶ 5, citing *Estate of Sherman v. Millhon*, 104 Ohio App.3d 614, 617 (10th Dist.1995). For purposes of appellate review, a question involving standing is typically a question of law, and, as such, it is to be reviewed de novo. *Ohio Concrete Constr. Assn. v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-905, 2009-Ohio-2400, ¶ 9.

IV. DISCUSSION

{¶ 13} Founded in 1980 as a public policy organization, Roundtable is an Ohio non-profit corporation. The complaint asserts Roundtable is actively opposed to the expansion of legalized gambling in Ohio. Walgate Jr. and Zanotti are officers of Roundtable. Additionally, according to the complaint, Walgate Jr. is a recovering addicted gambler whose addiction "in the past caused great distress and hardship to his family" and adversely affected his ability to pursue college and hold employment. (Complaint, 2.) The complaint also alleges Agnew owns ASL that pays the commercial activity tax ("CAT tax"), which in turn is allocated, in part, to the school district tangible tax replacement fund and the Ohio local government tangible property tax replacement fund. It also alleged that Bolyard, the Maleks, and the Adams are parents of public school students. Further, it is alleged that Walgate is a public school teacher and the mother of a recovering gambling addict. The complaint asserts Walgate and her family "have suffered" great emotional and financial stress because of her son's gambling addiction. With respect to Kinsey, the complaint alleges he is being denied the right to exercise the trade or business of casino gambling. With the exception of Roundtable, all appellants allege they are Ohio citizens, residents, and taxpayers.

{¶ 14} It is appellants' position the trial court erred in concluding each appellant lacks standing. According to appellants, standing has been established under five theories, to wit: (1) gambling's negative effects constitute injury in fact, (2) taxpayer standing based on the adverse effect to special funds, (3) standing due to adverse effects by diversion of funds from schools and local governments, (4) standing under traditional public duty laws, and (5) standing based on Kinsey's alleged "denial of equal treatment" resulting from the laws limitation of casino gambling to certain entities.

{¶ 15} "[I]n the vast majority of cases brought by a private litigant, the question of standing depends upon whether the party has alleged such a personal stake in the

outcome of the controversy, as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." (Citations and internal quotations omitted.) *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469 (1999); *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 178-79 (1973), citing *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). An association has standing to bring a lawsuit on behalf of its members when: " '(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' " *League of United Latin Am. Citizens* at ¶ 19, quoting *Tiemann* at 324. In order to have standing to attack the constitutionality of a legislative enactment, the private litigant must generally show 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, that the law in question has caused the injury, and that the relief requested will redress the injury. *Willoughby Hills v. C.C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 27 (1992); *Palazzi v. Estate of Gardner*, 32 Ohio St.3d 169 (1987), syllabus; *Anderson v. Brown*, 13 Ohio St.2d 53 (1968), paragraph one of the syllabus.

{¶ 16} In the present matter, we conclude none of appellants have private standing because they have not suffered or are not threatened with any direct and concrete injury in a manner or degree different from that suffered by the public in general. Walgate Jr. and Walgate allege that, due to Walgate Jr.'s gambling addiction, they and their family have suffered in the past. However, the complaint does not allege that the laws in question have caused the injury or that the relief requested will redress such injury. *Sheward* at 469-70. To the extent the complaint can be interpreted as an allegation that increasing the availability of gambling in Ohio *may* cause them injury, such injury is purely speculative and hypothetical and, thus, does not constitute actual or concrete injury to justify a finding of standing. *Wurdlow v. Turvy*, 10th Dist. No. 12AP-25, 2012-Ohio-4378, ¶ 15, citing *Tiemann* at 325 (a bare allegation that a plaintiff fears some injury will or may occur is insufficient to confer standing).

{¶ 17} Similarly, Zanotti and Abraham fail to allege the injury required to confer standing. Other than a general allegation of "irreparable harm," the complaint contains no allegation of injury with respect to either Zanotti or Abraham. In the brief, Zanotti and Abraham contend they will suffer negative social effects due to their communities being subjected to increased gambling. Not only is this alleged harm abstract and speculative, but, also, such allegation is not contained within the complaint. See Civ.R. 12(B)(6); *Brown*.

{¶ 18} Agnew is the owner of ASL that pays the CAT tax from which certain casino revenues are excluded. Because monies from the CAT tax are partially allocated to the school district tangible tax replacement fund and the Ohio local government tangible property tax replacement fund, Agnew and ASL argue they have standing as taxpayers with a special interest in a special fund similar to the taxpayers with standing in *Racing Guild of Ohio v. Ohio State Racing Comm.*, 28 Ohio St.3d 317 (1986), and *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 2006-Ohio-3677.

{¶ 19} In *Dann*, a mandamus action was filed seeking records from the Governor's office regarding the administration of the Workers' Compensation Fund. In addressing whether Dann had standing, the Supreme Court of Ohio discussed that, as an employer, Dann had contributed to the fund and, therefore, arguably had a special interest in the management of the fund to confer standing. *Dann* recognizes a narrow exception to the well-established premise that a taxpayer lacks legal capacity to institute a taxpayer action unless the taxpayer has some "special interest" in the fund at issue. *Gildner v. Accenture*, 10th Dist. No. 09AP-167, 2009-Ohio-5335, ¶ 19, appeal not allowed, 124 Ohio St.3d 1446, 2010-Ohio-188.

{¶ 20} Here, the complaint does not allege any special interest in a special fund, nor does it challenge the administration of a special fund. Rather, the complaint challenges the fact that some Ohio industries are being taxed differently than others. Such an allegation is not sufficient to confer standing under *Racing Guild* or *Dann*, as it fails to allege damage distinct from the damages suffered by the general public and fails to allege a special interest in a special fund. *Gildner; Masterson*. Accordingly, Agnew and ASL lack standing.

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Mar 14 12:49 PM-12AP000548

{¶ 21} Appellants Bolyard, the Maleks, and the Adams assert they have standing because they are the parents of public school students, and Walgate asserts she has standing because she is a public school teacher. According to appellants, because the challenged legislation redirects general funds from public education and replaces the reduction with proceeds projected to be generated by the Lottery Commission, such is unconstitutional. After review of the complaint, we find the complaint fails to allege these five appellants will suffer a direct and concrete injury that is different from that suffered by the public in general. *Brown* at ¶ 7. In *Brown*, taxpayers and school district residents claimed Ohio's school funding system was unconstitutional. In affirming the trial court's judgment that the plaintiffs lacked standing, this court noted the plaintiffs did not allege they were students or parents of students in the school system. *Id.* at ¶ 13. According to appellants, this statement alone confers standing upon Bolyard, Walgate, the Maleks, and the Adams. We disagree.

{¶ 22} In challenging the constitutionality of school funding, the plaintiffs in *Brown* asserted the Columbus City School District's allocation of funds caused a per-pupil disparity within the district. Hence, it appears that in *Brown* the complaint alleged there were, at least potentially, individuals actually and directly being harmed by the per-pupil disparity in funding; however, those persons were not parties to the litigation. When read in context, the decision did not go so far as to hold that those particular students and their parents did have standing, but, rather, pointed to groups that could potentially assert direct and actual harm.

{¶ 23} The complaint presented before us is unlike the one presented in *Brown*. The complaint fails to allege any direct and concrete injury 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. Not only is this allegation purely speculative, but it also fails to allege appellants' interests are being threatened in a way that is distinct from the general public.

{¶ 24} With respect to Kinsey, he asserts he has standing due to his alleged violation of his right to equal protection and to exercise a trade or business in legalized casino gambling. The complaint states only that Kinsey "would engage in casino gaming in Ohio" but for the state's grant of such privilege to two gaming corporations.

(Complaint, 4.) In support of his position that he has standing, Kinsey relies on *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. The Michigan Gaming Control Bd.*, 172 F.3d 397 (6th Cir.1999). Appellees, also relying on *Lac Vieux*, assert Kinsey does not have standing.

{¶ 25} In *Lac Vieux*, the plaintiff asserted statutes and ordinances that provided a preference in the development of casino gambling to particular parties was unconstitutional. The federal district court concluded the plaintiff lacked standing, but that judgment was reversed by the Sixth Circuit Court of Appeals. The court reviewed the three elements of standing, specifically, (1) that injury be concrete, particularized, actual or imminent, (2) that there be a causal connection between the injury and the conduct complained of, and (3) that it is likely, as opposed to speculative, that injury will be redressed by a favorable decision. *Id.* at 403. Quoting *Associated Gen. Contrs. of Am. v. Jacksonville*, 508 U.S. 656 (1993), the court stated:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit. ... In the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract.

Lac Vieux at 404.

{¶ 26} The court then stated the standing issue presented hinged on whether the plaintiff "has sufficiently alleged that it is able and ready to bid for a casino license." Because the complaint in *Lac Vieux* alleged the plaintiff had "arranged for the development of major casino resort development" and at all times relevant "has been ready and has had the ability to submit the requisite information for a casino development proposal" in accordance with the applicable laws, the court concluded the plaintiff sufficiently showed it could have submitted a timely proposal and was still ready to do so should the preference be struck down. *Id.*

{¶ 27} In contrast, the complaint before us does not allege Kinsey is "ready and able" to engage in the business of casino gambling in Ohio. Instead, the complaint alleges only in a general and conclusory fashion that, but for casino gambling being limited to two gaming corporations, Kinsey would operate a business of casino gambling in Ohio. Thus, the trial court correctly concluded Kinsey's alleged injury was hypothetical and speculative and, therefore, insufficient to confer standing.

{¶ 28} As previously indicated, an association has standing on behalf of its members when " (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *League of United Latin Am. Citizens* at ¶ 19, quoting *Tiemann* at 324. The Supreme Court of Ohio has emphasized that "to have standing, the association must establish that its members have suffered actual injury." *State ex rel. Am. Subcontrs. Assn. v. Ohio State Univ.*, 129 Ohio St.3d 111, 2011-Ohio-2881, ¶ 12, quoting *Bicking* at 320. "At least one of the members of the association must be actually injured." *Id.*, citing *Warth* at 511; *Ohio Licensed Beverage Assn. v. Ohio Dept. of Health*, 10th Dist. No. 07AP-490, 2007-Ohio-7147, ¶ 21. "[T]he injury must be concrete and not simply abstract or suspected." *Bicking* at 320.

{¶ 29} Appellant Roundtable has not met its burden with respect to standing. As has been discussed, the complaint does not allege Roundtable's members have suffered actual injury that is concrete and not simply abstract or suspected. *Id.* Consequently, we conclude Roundtable lacks standing as well.

{¶ 30} Appellants also assert they have standing, pursuant to the "public right" exception provided in *Sheward*, which provides that, when issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to the named parties. *Id.* at 471. In *Sheward*, several organizations and individual taxpayers and citizens filed an original action in prohibition and mandamus in the Supreme Court of Ohio against several Ohio common pleas court judges, challenging the constitutionality of tort reform legislation in Am.Sub.H.B No. 350. According to the relators in *Sheward*, the legislation re-enacted legislation the Supreme Court had already found in prior decisions to be unconstitutional.

The respondents argued the relators had no standing to bring an action as taxpayers because they were not enforcing a public right and because they failed to demonstrate pecuniary harm different from that suffered by the general taxpaying public. Though the Supreme Court concluded the relators bringing the action lacked the usual personal stake requirement for standing, the court found the issues presented were of such a high order of public concern that it was justifiable to allow the action as a public right action. *Id.* at 474. As summarized by this court in *Brown*, the Supreme Court indicated it "would entertain a public-right action under circumstances when, by its refusal, the public injury will be serious." *Id.* at ¶ 8. The Supreme Court made clear that "it was not suggesting that citizens have standing to challenge the constitutionality of every legislative enactment that allegedly violates the doctrine of separation of powers or exceeds legislative authority." *Id.* Rather, "[t]he court emphasized it will entertain a public-right action only in the rare and extraordinary case where the challenged statute operates directly and broadly to divest the courts of judicial power." *Id.* Additionally, "[t]he court refused to entertain a public-right action to review the constitutionality of a legislative enactment unless it is of a magnitude and scope comparable to that of Am.Sub.H.B. No. 350." *Id.*

{¶ 31} Recently, relying on *Brown*, this court found the plaintiffs did not have public right standing in *ProgressOhio.org, Inc. v. JobsOhio*, 10th Dist. No. 11AP-1136, 2012-Ohio-2655, in which the plaintiffs raised a constitutional challenge to the JobsOhio Act enacted and amended through H.B. 1 and No. 153 of the 129th General Assembly. On appeal, the plaintiffs argued they had public right standing because the complaint concerned a matter of great public interest and importance. This court rejected the plaintiffs' position and concluded that, unlike the statutory scheme in *Sheward* that affected every tort claim filed in Ohio, the JobsOhio Act was not the "assault on the power of the judicial branch that concerned the Supreme Court of Ohio in *Sheward*." *Id.* at ¶ 32.

{¶ 32} Similar to *Brown* and *JobsOhio*, the matter before us does not fall within the public right exception explained in *Sheward*. The legislation challenged here is not of the same magnitude as that presented in *Sheward*, which concerned separation of powers and the ability of the Ohio legislature to re-enact legislation expressly prohibited by the judiciary. *Brown* at ¶ 14.

{¶ 33} For all the foregoing reasons, we conclude each appellant lacks standing to pursue this matter and, accordingly, overrule appellants' first assignment of error.

{¶ 34} In their second assignment of error, appellants contend the trial court erred in dismissing their complaint without allowing them an opportunity to file a second amended complaint in order to plead additional facts.

{¶ 35} Initially, we note the record does not contain a motion or any other request by appellants asking that the trial court grant them permission to file a second amended complaint. Moreover, the record contains no indication that appellants provided any grounds for why leave should be granted, no explanation regarding new matters appellants wished to include in an amended pleading, nor an explanation of how an amendment would cure the deficiencies in their complaint. *Richard v. WJW TV-8*, 8th Dist. No. 84541, 2005-Ohio-1170, ¶ 24; *Riverview Health Inst., LLC v. Kral*, 2d Dist. No. 24931, 2012-Ohio-3502, ¶ 26.

{¶ 36} Accordingly, appellants' second assignment of error is overruled.

V. CONCLUSION

{¶ 37} Having overruled both of appellants' assignments of error, the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK and CONNOR, JJ., concur.

Franklin County Ohio Court of Appeals Clerk of Courts- 2013 Mar 14 12:49 PM-12AP000548

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State ex rel. Robert L. Walgate, Jr. et al.,	:	
Relators-Appellants,	:	
v.	:	No. 12AP-548
John R. Kasich et al.,	:	(C.P.C. No. 11CVH-10-13126)
Respondents-Appellees.	:	(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 14, 2013, appellants' assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellants.

SADLER, TYACK, and CONNOR, JJ.

/S/ JUDGE _____

Franklin County Ohio Court of Appeals Clerk of Courts-2013 Mar 15 12:29 PM-12AP000548

Franklin County Ohio Court of Appeals Clerk of Courts-2013 Mar 15 12:29 PM-12AP000548

Tenth District Court of Appeals

Date: 03-15-2013
Case Title: ROBERT L WALGATE JR -VS- OHIO STATE GOVERNOR JOHN R KASICH
Case Number: 12AP000548
Type: JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge Lisa L. Sadler

Electronically signed on 2013-Mar-15 page 2 of 2

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0656

State ex rel. Robert L. Walgate, Jr., et al.,

Appellants,

v.

Ohio State Governor, John R. Kasich, et al.,

Appellees.

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals Case No. 12-AP-548

NOTICE OF APPEAL OF APPELLANTS ROBERT L. WALGATE, JR., DAVID P. ZANOTTI, THE AMERICAN POLICY ROUNDTABLE dba OHIO ROUNDTABLE, SANDRA L. WALGATE, AGNEW SIGN & LIGHTING, INC., LINDA AGNEW, PAULA BOLYARD, JEFFREY MALEK, MICHELLE WATKIN-MALEK, THOMAS W. ADAMS, DONNA J. ADAMS, JOE ABRAHAM, AND FREDERICK KINSEY

THOMAS W. CONNORS (0007226) (Counsel of Record) JAMES M. WHERLEY, JR. (0082169) BLACK, McCUSKEY, SOUERS & ARBAUGH 220 Market Avenue South, Suite 1000 Canton, OH 44702 (330) 456-8341 Attorneys for Appellants

AARON D. EPSTEIN (0063286) PEARL M. CHIN (0078810) ASSISTANT ATTORNEYS GENERAL 30 East Broad Street, 16th Floor Columbus, OH 43215 Attorneys for Appellee Ohio Governor John R. Kasich

RECEIVED APR 26 2013 CLERK OF COURT SUPREME COURT OF OHIO

FILED APR 26 2013 CLERK OF COURT SUPREME COURT OF OHIO

PETER M. THOMAS (0040887), SECTION CHIEF

SUSAN A. CHOE (0067032), PRINCIPAL ASST. ATTY. GENERAL

MICHAEL A. RZYMEK (0040826), PRINCIPAL ASST.

ATTY. GENERAL

CHARITABLE LAW SECTION, GAMBLING UNIT

150 East Gay Street, 23rd Floor

Columbus, Ohio 43215-3428

Attorneys for Appellees Ohio Casino Control Commission and the Commissioners of the Ohio Casino Control Commission

BRIAN P. MOONEY (0066018)

PRINCIPAL ASST. ATTY. GENERAL

615 West Superior Avenue, 11th Floor

Cleveland, Ohio 44113

Attorneys for Appellees Ohio Lottery Commission and Commissioners of the Ohio Lottery Commission

ALAN H. ABES, ESQ. (0062423)

JOCELYN C. DeMARS (0086688)

DINSMORE & SHOHL, LLP

255 E. 5th Street, Suite 1900

Cincinnati, Ohio 45202

Attorneys for Intervening-Appellee Thistledown Racetrack, LLC

CHARLES R. SAXBE, ESQ. (0021952)

JAMES D. ABRAMS, ESQ. (0075968)

IRV BERLINER, ESQ. (0033150)

JASON H. BEEHLER, ESQ. (0085337)

TAFT STETTINIUS & HOLLISTER, LLP

65 E State St., Suite 1000

Columbus, OH 43215

Attorneys for Intervening-Appellees Northfield Park Associates, LLC, Lebanon Trotting Club, Inc., MTR Gaming Group, Inc., and PNK (Ohio), LLC

JULIE E. BRIGNER (0066367)

RYAN P. O'ROURKE (0082651)

ASSISTANT ATTORNEYS GENERAL

30 E. Broad Street, 25th Floor

Columbus, OH 43215

Attorneys for Appellee

Joseph W. Testa, Tax Commissioner of Ohio

MATTHEW L. FORNSHELL, ESQ.

(0062101)

ALBERT G. LIN, ESQ. (0076888)

KATHERINE G. MANGHILLIS,

ESQ. (0077307)

SCHOTTENSTEIN, ZOY & DUNN

250 West Street

Columbus, OH 43215

Attorneys for Intervening-Appellees

Raceway Park, Inc., HLC/PDC

Holdings, LLC; Central Ohio

Gaming Ventures, LLC and Toledo

Gaming Ventures, LLC

CHRISTOPHER S. WILLIAMS,

ESQ. (0043911)

JAMES F. LANG, ESQ. (0059668)

MATTHEW M. MENDOZA, ESQ.

(0068231)

CALFEE, HALTER & GRISWOLD,

LLP

The Calfee Bldg

1405 East Sixth Street

Cleveland, OH 44114-1607

Attorneys for Intervening-Appellees

Rock Ohio Caesars LLC, Rock Ohio

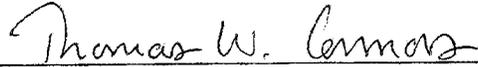
Caesars Cleveland LLC and Rock

Ohio Caesars Cincinnati LLC

Appellants Robert L. Walgate, Jr., David P. Zanotti, The American Policy Roundtable dba Ohio Roundtable, Sandra L. Walgate, Agnew Sign & Lighting, Inc., Linda Agnew, Paula Bolyard, Jeffrey Malek, Michelle Watkin-Malek, Thomas W. Adams, Donna J. Adams, Joe Abraham, and Frederick Kinsey hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals case No. 12-AP-548 on March 14, 2013.

This case raises a substantial constitutional question and is one of public and great general interest.

Respectfully submitted,



Thomas W. Connors (0007226)
James M. Wherley, Jr. (0082169)
Black, McCuskey, Souers & Arbaugh
220 Market Ave., S.
Suite 1000
Canton, OH 44702
Telephone: 330-456-8341
Fax: 330-456-5756

Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by regular U.S. mail this 25th day of April, 2013 upon the following:

Pearl M. Chin (0078810)
Aaron D. Epstein
Assistant Attorneys General
30 E. Broad Street, 16th Floor
Columbus, OH 43215
*Attorneys for Appellee
Ohio Governor John R. Kasich*

Peter M. Thomas, Section Chief (0040887)
Susan A. Choe, Principal Asst. Atty. General
(0067032)
Michael A. Rzymek, Principal Asst. Atty. General
(0040826)
Charitable Law Section, Gambling Unit
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215-3428
*Attorneys for Appellees, Ohio Casino Control
Commission and the Commissioners of the Ohio
Casino Control Commission*

Alan H. Abes, Esq. (0062423)
Jocelyn C. DeMars (0086688)
Dinsmore & Shohl LLP
255 E. 5th Street, Suite 1900
Cincinnati, Ohio 45202
*Attorneys for Intervening-Appellee
Thistledown Racetrack, LLC*

Christopher S. Williams, Esq. (0043911)
James F. Lang, Esq. (0059668)
Matthew M. Mendoza, Esq.
Calfee, Halter & Griswold LLP
The Calfee Bldg
1405 East Sixth Street
Cleveland, OH 44114-1607
*Attorneys for Intervening-Appellees
Rock Ohio Caesars LLC, Rock Ohio Caesars
Cleveland LLC and Rock Ohio Caesars Cincinnati
LLC*

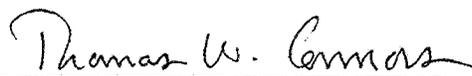
Julie E. Brigner (0066367)
Ryan P. O'Rourke
Assistant Attorneys General
30 E. Broad Street, 25th Floor
Columbus, OH 43215
*Attorneys for Appellee
Joseph W. Testa, Tax Commissioner of Ohio*

Brian P. Mooney (0066018)
Principal Assistant Attorney General
615 West Superior Avenue, 11th Floor
Cleveland, Ohio 44113
*Attorneys for Appellees, Ohio Lottery
Commission and Commissioners of the Ohio
Lottery Commission*

Matthew L. Fornshell, Esq. (0062101)
Albert G. Lin, Esq. (0076888)
Katherine G. Manghillis, Esq. (0077307)
Schottenstein, Zox & Dunn
250 West Street
Columbus, OH 43215
*Attorneys for Intervening Appellees
Raceway Park, Inc., HLC/PDC Holdings,
LLC; Central Ohio Gaming Ventures, LLC
and Toledo Gaming Ventures, LLC*

Charles R. Saxbe, Esq. (0021952)
James D. Abrams, Esq. (0075968)
Irv Berliner, Esq. (0033150)
Jason H. Beehler, Esq. (0085337)
Taft Stettinius & Hollister LLP
65 E State St., Suite 1000
Columbus, OH 43215
*Attorneys for Intervening-Appellees
Northfield Park Associates, LLC, Lebanon
Trotting Club, Inc., MTR Gaming Group,
Inc., and PNK (Ohio), LLC*

Michael DeWine, Ohio Attorney General
(0009181)
30 E Broad Street, 14th Floor
Columbus, Ohio 43215



Thomas W. Connors
Thomas W. Connors
Attorney for Appellants