

IN THE
SUPREME COURT OF OHIO

STATE EX REL.	:	Case No. 13-0656
ROBERT L. WALGATE, JR., et al.,	:	
	:	
Plaintiffs-Appellants,	:	On Appeal from the Franklin County
v.	:	Court of Appeals, Tenth Appellate
	:	District, Case No. 12-AP-548
JOHN R. KASICH, et al.,	:	
	:	
Defendants-Appellees.	:	
	:	

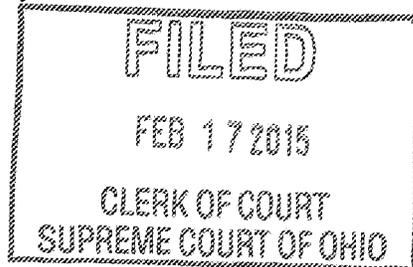
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ARGUMENT

A. Introduction

In order to properly consider the propositions of law in this case, it is first necessary to address the following issues: 1) which justiciability doctrine is applicable; 2) what is the standard for establishing the criteria for standing; 3) the difference between the federal and Ohio constitutional and statutory provisions relevant to standing; and 4) the procedural posture in which standing is being determined.

1. **The Applicable Justiciability Doctrine is Standing not the Political Question Doctrine.**

Justiciability is a broad concept which covers a number of distinct doctrines, including but not limited to standing, and which is aptly described as follows:

As a general matter, “the justiciability doctrines govern *what* matters are susceptible to determination in federal court, *who* can invoke federal judicial power, and *when* federal court action is timely.” Standing usually refers to the second issue, that is, the characteristics a person or another juridical entity must possess to bring a suit. The political question doctrine usually refers to the first issue, that even in a suit where a plaintiff has standing, federal courts should not resolve such questions.

Solimine, *Recalibrating Justiciability in Ohio Courts*, 51
Cleveland State Law Review 533 (2004)

Appellees extensively argue the applicability of the political question doctrine, which Chief Justice Moyer defined as follows:

The fact that this lawsuit implicates other branches of government, or has political overtones, does not automatically invoke the political questions doctrine. A political question is one that requires policy choices and value judgments that have been expressly delegated to, and are more appropriately made by, the legislative branch of government.

DeRolph v. State of Ohio, 78 Ohio St. 2d 193, 267 (1979).

The question in the present case involves constitutional provisions which grant the people a beneficial interest in the laws of our government, original jurisdiction in mandamus to this Court to enforce that interest and through the Legislature original jurisdiction in mandamus to the common pleas courts to enforce that interest. The Ohio Constitution and the Legislature have expressly delegated the authority and responsibility to the courts to address the requests for mandamus relief made in this case. The courts are not being asked to assume undelegated authority or improperly interfere with the delegated authority of another branch. They are being asked to perform duties imposed on them by the Ohio Constitution and the Legislature.

Appellees' argument that granting standing in this case would interfere with the political or democratic process could not be further off the mark. State-Appellees' Br. ("Appellees Br.") at 1, 14-16. It is the political or democratic process which produced the constitutional and statutory provisions which delegate authority to the courts to address the claims in this case. A failure to exercise jurisdiction would be a disrespect for, and interference with, the political and democratic process, not vice versa.

It is standing doctrine, not the political question doctrine, which is at issue in the present case. This distinction is vitally important to bringing focus and coherence to this case. Ohio's common law standing doctrine is derived from the 'cases and controversies' provision of the federal constitution which confines:

"the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."

Massachusetts v. EPA, 549 U.S. 497, 516, citing *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

The *Massachusetts* court emphasized that:

“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.”

Id. at 517, citing *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The common law standing issue in this case is whether the parties are sufficiently adverse. That is all. Not the abstract issues of the political question doctrine.

2. The Standard for Establishing the Criteria for Standing.

This Court has adopted the federal criteria for standing. *State ex rel. Dayton Newspapers v. Phillips*, 46 Ohio St. 2d 457 (1976); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451 (1999). The federal criteria for standing require:

"(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."

Bennett v. Spear, 520 U.S. 154, 162 (1992) (Emphasis added.)

The core criterion for standing is the invasion of a judicially cognizable interest, which is also described as an injury-in-fact. This concept is the source of much confusion. Injury connotes something like a broken arm, or an addict’s relapse into gambling, but that is not the extent of what is contemplated by this concept. It contemplates the invasion of any kind of interest the judiciary considers worthy of protection. It does not have to be a legally protected interest, as indicated by the *Bennett* court’s substitution of the phrase ‘judicially cognizable’ for

'legally protected'. It includes a wide range of interests as described in appellants' merit brief. The extent of these interests is not certain, as the federal courts have not drawn a clear line defining which interests are protectable. Appellants' Br. at 22.

Some guidance is provided by the federal courts 'prudential' criterion for standing, called the zone-of-interests test. Whatever interest is deemed judicially cognizable must fall within the zone of interests of the laws which are the subject of the claims before the Court. Protection of such interests does not have to be the objective of the given laws, as long as the interests would arguably be protected by said laws. *Bennett*, 520 U.S. at 163. The zone-of-interests test is "not meant to be especially demanding". *Clark v. Security Industry Ass'n.*, 479 U.S. 388, 399 (1987).

The type of interest which is judicially cognizable may be defined by common law. "[O]nce an interest has been identified as a 'judicially cognizable interest' in one case, it is such an interest in other cases as well..." Special Grand Jury 89-2, 450 F.3d 1159, 1172 (10th Cir. 2006). Such interests may also be defined by the Legislature:

"Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Lujan*, 504 U.S., at 580, 112 S.Ct. 2130 (KENNEDY, J., concurring in part and concurring in judgment). "In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Ibid.*

Massachusetts v. EPA, 549 U.S. 497, 516 (2007), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

The scope of the invasion of interest or injury necessary to show sufficient adversity has recently been clarified in the *Massachusetts* case. The *Massachusetts* court emphasized that it was only necessary to show a "risk of harm" in order to meet the "actual" or immanent" criterion, and "reduc[tion] [of] that risk" to meet the redressability criterion. *Id.* at 521. The

particularized injury requirement was met regardless of how many others were injured, as long as the party bringing the suit was also injured. *Id.* at 517.

Appellees argue that the *Massachusetts* court expressed that states are “entitled to a special solicitude in [the Court’s] standing analyses”. *Id.* at 520. However, the principle that risk of harm and reduction of risk demonstrate sufficient adversity to justify standing was not the product of solicitude:

It is clear that petitioners’ submissions as they pertain to Massachusetts have *satisfied the most demanding standards of the adversarial process*. EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both “actual” and “imminent.” *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation marks omitted). There is, moreover, a “substantial likelihood that the judicial relief requested” will prompt EPA to take steps to reduce that risk. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

Id. at 521. (Emphasis added.)

The general applicability of this principle is demonstrated by its application in other cases:

And so a judgment in the plaintiff’s favor in the present lawsuit would eliminate a probable injury from the landfill. No more is necessary to establish standing. *Massachusetts v. EPA*, 549 U.S. 497, 525-26 and n. 23, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007); *Clinton v. City of New York*, 524 U.S. 417, 432-33, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998); *Village of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) (“even a small probability of injury is sufficient to create a case or controversy – to take a suit out of the category of the hypothetical – provided of course that the relief sought would, if granted, reduce the probability,” quoted approvingly in *Massachusetts v. EPA*, *supra*, 549 U.S. at 525 n. 23, 127 S.Ct. 1438)

American Bottom Conservancy v. U.S. Army Corps., 650 F.3d 652, 658 (7th Cir. 2011)

3. The Difference Between the Federal and Ohio Constitutional and Statutory Provisions Relevant to Standing.

As discussed, the federal criteria for standing adopted by this Court is based on the U.S. Constitution's 'cases and controversies' provision. Mandamus standing in Ohio is based on the Ohio Constitution's provisions designating the people as beneficiaries of the laws on which the government is based and granting original mandamus to this court to enforce public duties arising from such laws. It is also based on the mandamus statute granting standing to beneficially interested parties.

The connection between the constitution and the mandamus statute is more direct than most statutes. Article XIV, §§ 1 and 2 of the 1851 Constitution, now repealed, directed the Legislature to appoint three commissioners to prepare the Code of Civil Procedure, which was enacted in 1853. Section 5704 of the Code provided that writs of mandamus may issue on the information of beneficially interested parties. The concept of beneficially interested parties was adopted from the constitutional principle that the people are the beneficiaries of the laws constituting the government. This concept has been recognized throughout Ohio's history by the thirteen Ohio Supreme Court cases discussed in Appellants' Brief, at 44-45, which allow standing based on a citizen's interest in the execution of Ohio's laws.

It is therefore beyond cavil that an Ohio citizen's interest in the execution of Ohio's laws is a judicially cognizable interest. While this court has declined to review the issue of citizen mandamus standing, it has not reversed the cases holding that a citizen has an interest in the execution of Ohio's laws. Accordingly, under Ohio law, this interest is judicially cognizable and its invasion is an injury-in-fact caused by a failure to execute the laws, and redressable by a writ of mandamus requiring such execution.

As a result, the issue of the constitutional validity of Sheward's 'rare and extraordinary' limitation must be addressed to assess the extent of this interest. Appellees do not dispute that the criterion of seriousness on which the 'rare and extraordinary' limitation is based, is actually an element of mandamus to be determined on the merits, and therefore, not an element of standing analysis. Appellees also do not dispute that this Court does not have authority to limit the legislative grant of standing provided by the mandamus statute. What appellees do argue is that the mandamus statute's grant of standing is merely a restatement of the Art. IV, § 4(B) limitation of common pleas jurisdiction to justiciable matters. Appellees' Br. at 35. However, this Court's thirteen decisions recognizing mandamus standing based on a citizen's beneficial interest in enforcing the laws demonstrate that the statutory "beneficially interested" language is a specific grant of standing. Appellants' Br. at 44-45.

4. The Procedural Posture in Which Standing is Being Determined.

When standing is determined in the context of a Civ. R. 12(B)(6) motion to dismiss, all the facts in the complaint and supporting affidavits are presumed true and all reasonable inferences must be made in the non-movant's favor. *City of Cincinnati v. Beretta USA Corp.*, 95 Ohio St. 3d 416, 418 (2002). In addition, because a party is not required to prove his or her case in the complaint, "as long as there is a set of facts, consistent with the complaint which would allow the plaintiff to recover, the complaint may not be dismissed. *York v. Ohio State Highway Patrol*, 60 Ohio St. 3d 143, 145 (1991). Consistent with this, federal standing practice requires a presumption that "general factual allegations embrace those specific facts necessary to support the claim" for purposes of a motion to dismiss for failure to state a claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

B. 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. Statutory mandamus standing.

Appellees argue that the reference to beneficially interested parties in the mandamus statute is merely a general requirement that a party have standing. Appellees equate it to the constitutional provision limiting common pleas court jurisdiction to justiciable matters. However, this constitutional provision is a general description of the jurisdiction of the common pleas court. The ‘beneficially interested’ language is a specific grant of standing because it defines which litigants are entitled to have a court determine the merits of the issues presented.

Appellees also contend that the standing language of the declaratory relief statute is equivalent to the mandamus statute’s standing provision. However, the declaratory relief statute authorizes relief to persons whose rights are affected and limits relief to circumstances where the controversy will be resolved. This criteria is equivalent to the general justiciability requirement. The beneficial interest language in the mandamus statute has a different meaning. That phrase has historically been defined by this Court as including citizens interested in the execution of Ohio’s laws. Moreover, this phrase and this Court’s interpretation of it are grounded in the constitutional provision that the government is instituted for the people’s benefit. Furthermore, the Legislature has embraced this Court’s definition, by reenacting the mandamus statute numerous times.

The beneficial interest phrase first appeared in the mandamus section of the 1853 Code of Civil Procedure. (It was not referenced in the preceding mandamus statute enacted in 1831.) The 1853 Code was enacted pursuant to the 1851 Ohio Constitution which first set forth the provision granting the people a beneficial interest in the laws establishing the government. It is

clearly a grant of standing because it describes which parties are entitled to seek mandamus relief. It is well settled that those parties include citizens interested in the execution of the laws.

Appellees also argue that the theory of standing based on the beneficially interested statutory language is waived. This Court's test for waiver of issues on appeal has been established as follows:

“Issues not raised in the lower court and not there tried and which are completely inconsistent with and contrary to the theory upon which appellants proceeded below cannot be raised for the first time on appeal.

Republic Steel Corp. v. Board of Revision of Cuyahoga County,
175 Ohio St. 179, syllabus (1963).

In *State ex rel. Jones v. Hendon*, 66 Ohio St.3d 115, 118, fn.2, (1993), this Court applied this principle in considering a constitutional argument not specifically raised in the court of appeals because it was not completely inconsistent with the lower court argument.

Appellants raised the issue of this Court's longstanding case law granting standing based on a citizens beneficial interest in the execution of the laws, in the court of appeals. Aplt. Ct. App. Brief at 24-25. This case law was derived from the statutory beneficial interest language. Appellants are clearly not raising issues which are completely inconsistent with and contrary to the theories raised below.

2. Common law standing.

Appellees misconceive the judicially cognizable interest at issue in this case regarding the negative effects of gambling. Appellees describe the distinction between constitutional and unconstitutional gambling as puzzling. However, this distinction has been well framed by Ohio's published case law as follows:

The injury alleged here is that 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. The Walgates have alleged a sufficient injury.

Ohio Roundtable v. Taft, 119 Ohio Misc.2d 49, 2002-Ohio-3669, ¶47.

The judicially cognizable interest in this case is appellants' interest in being protected from the negative effects of unauthorized gambling. This interest is invaded by all of the violations of the lottery and casino provisions in this case. All of these violations involve gambling which is not authorized by the constitution. The limitations in the lottery and casino provisions were adopted to protect against the negative personal and social effects of gambling.

Those appellants who have a gambling addiction or who live in the communities in which the unauthorized gambling is being conducted, have a more specific interest which is being invaded. Moreover, under Ohio law, all appellants, as citizens, have a judicially recognized interest in the enforcement of the laws, which is also being invaded by these violations.

It bears emphasis that the whole point of assessing appellants' interests, is to determine whether they will be sufficiently adverse to appellees to ensure that this litigation will be conducted in an adversary context. That is the whole purpose of standing analysis, not establishing damages or controlling access to the courts. It is from this perspective, then, that the type of interest sufficient to justify standing should be determined. The relevant consideration is whether the interest is of such a nature that its invasion would justify an adversary posture.

Appellees' misconceptions regarding judicially cognizable interests, obviate much of their analysis of the issues of causation and redressability. It is clear that the invasion of appellants' interest in protection from the negative effects of unconstitutional gambling, is caused by the unconstitutional gambling. It is equally clear that such an injury may be redressed

by stopping the unconstitutional gambling. A similar analysis may be made regarding appellants' interest as citizens in enforcement of the laws. It is completely irrelevant to this analysis that there is legal gambling, since that is not the source of the injury being claimed.

Appellees also fail to apply the proper standard in assessing causation and redressability. The Massachusetts standard only requires a showing of risk of harm and that steps can be taken to reduce that risk. The Massachusetts court further noted that for standing purposes, it was only necessary to show that the challenged actions 'contributed' to the harm. *Id.* at 523. A sufficient showing of such causation was made in the Massachusetts case by undisputed affidavits testifying to a causal connection between manmade greenhouse gas emissions and global warming. Such evidence was deemed to establish that a failure to regulate contributed to the harms caused by global warming.

Similarly, the undisputed affidavits in the present case testify to a causal connection between expansion of gambling and increased gambling addiction and resulting harms (Lorenz Aff., ¶¶ 2-6, Appellees' Br., Appx. 36-37) and increased public costs in addressing such harms (Zanotti Aff., ¶2, Appellees' Br., Appx. 40). At a minimum, these affidavits demonstrate that appellees actions in allowing unconstitutional gambling contribute to harm to appellants and are thus sufficient to meet the Massachusetts' standard.

In any event, given the present procedural posture, the allegations in the complaint and affidavit must be deemed true. All reasonable inferences must be made in appellants' favor and general allegations must be deemed to embrace the specific facts necessary to support the claim of standing. Indeed, unless it is "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations", the present case may not be dismissed. *Hishon v. King & Spalding*, 467 U.S. 69, 74 (1984). The allegations in the complaint and affidavits

regarding the negative personal and social effects of gambling preclude dismissal under these standards.

The case law clearly supports this conclusion. In *Patchak v. Salazar*, 632 F.3d 702, 704 (D.C. Cir. 2011), allegations that a casino would adversely impact Patchak's way of life and cause other aesthetic, social and economic problems was deemed sufficient. In *Amador County, Cal. v. Salazar*, 640 F.3d 373, 378 (D.C. Cir. 2011), allegations that casino gambling would increase the county's infrastructure costs and impact the character of the community were deemed sufficient. It is clearly not beyond doubt that there are no facts appellants could establish which would meet these standards.

C. 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.

Appellants' standing as parents of public school children to bring the subject school funding claims is clearly established under Ohio law by *Board of Education v. Walter*, 58 Ohio St. 2d 368 (1979) and *DeRolph v. State of Ohio*, 78 Ohio St.3d 193 (1992). *Walter* involved a claim by parents of public school children and others for a declaration of rights regarding Ohio constitutional provisions relating to school funding. *Walter* specifically held that "[w]e find that the issue . . . presents a justiciable controversy" *Id.* at 384. Appellees argue that *Walter* was addressing the political question doctrine not standing. Appellees' Br. at 40. It is true that *Walter* rejected the argument that the political question doctrine rendered the claims nonjusticiable. But it is also true that the concept of justiciability includes other doctrines such as standing or ripeness, which were necessarily addressed by *Walter's* finding of justiciability. *Walter* supported its holding by citing three cases from other states allowing standing to parents

of public school children to seek declaratory relief regarding constitutional provisions involving school funding. *Id.* at 384-385.

Appellees also argue that *DeRolph* did not address standing. However, Chief Justice Moyer specifically stated in the dissent to that decision that “[w]e do not maintain that this court is without jurisdiction over this cause.” *DeRolph* at 265. Chief Justice Moyer’s position was that the political question doctrine precluded this court from addressing the school funding claims in *DeRolph*. The political question doctrine is not implicated by the present case.

Appellees further contention that *DeRolph* was subject to dismissal on the grounds of standing, but that the argument was waived, is not plausible. *DeRolph* was before this Court on numerous occasions despite Chief Justice Moyer’s objections. Moreover, this Court has specifically held that objections based on standing are not waived because they are jurisdictional in nature. *New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218 (1987). Chief Justice Moyer would surely have raised this point if he thought it was available.

Appellees offer no adequate justification for overturning these well-settled precedents. Appellees cite some out-of-state precedent, but such cases are not binding on this Court, which has already held to the contrary.

With respect to special fund standing, appellees argue the facts. They claim that the pertinent appellants have not contributed to a special fund i.e. the School District Tangible Tax Replacement Fund. However, factual disputes must be resolved in appellants favor in Civ.R. 12(B)(6) motion proceedings. Appellees also argue that any depletion of the School District Tax Replacement Fund must be offset by transfers from the General Revenue Fund pursuant to R.C. 5751.22(D). However, Article II, Section 22, of the Ohio Constitution precludes appropriations for a period longer than two years. Moreover, the Legislature is not obligated to make

appropriations. *Board of Treasurers of the Tobacco Use Prevention and Control Foundation v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, ¶42. As explained in the *Tobacco Foundation* case, "...each General Assembly [has the right] to evaluate independently the budgetary priorities of the state." *Id.*, ¶17. Moreover, state funds in which "...no protected third-party interests were created, [are] subject to the legislature's plenary power over state money." *Id.*, ¶34.

Racing Guild of Ohio v. Ohio State Racing Commission, 28 Ohio St.3d 317, 322 (1986) reasoned that contributors to a fund will face an inevitable increase if those managing the fund fail to enforce required payments into the fund. This Court concluded that this potential placed in jeopardy the contributor's property rights in income that "might go to" such an increase, thereby meeting the special fund standing test of *State ex rel. Masterson v. State Racing Commission*, 162 Ohio St. 366 (1954). The same claim is being made by the contributors to the School District Tangible Tax Replacement Fund.

Appellees' argument that *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 2000-Ohio-3672 does not support standing for an individual owner of a corporation is not well taken. Dann was allowed standing for contributions to the Workers' Compensation Fund, made by his limited liability company. Articles of Organization for Law Offices of Marc Dann, LLC, <http://www2.sos.state.oh.us/reports/rwservlet?imgc&Din=200503102670> (accessed February 15, 2015) In any event, the corporation is an appellant and would have standing based on its contributions.

D. 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.

Appellees argue that appellant Kinsey lacks standing because his claim is not redressable. However, “[t]he” ‘injury-in-fact’ in an equal protection claim 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 equal protection claim is redressable by striking down the unconstitutional barriers.

Appellees also argue that Kinsey’s allegation that he “would engage in casino gaming in Ohio but for the provisions of Art. XV, § 6(C)...” does not establish that he is “ready and able” to do so. However, the presumption that “general factual allegations embrace those specific facts necessary to support the claim” renders Kinsey’s allegation sufficient for purposes of a Civ.R. 12(B)(6) motion to dismiss. *Lujan*, 504 U.S. at 561. Bear in mind that casino gaming includes table game wagering, which is well within reach, absent the unconstitutional barriers of a \$50 million license fee and a required \$250 million investment.

In any event, any such flaw in the complaint, could be readily cured by an amendment, if the trial court had not barred amendments by issuing a final judgment. Appellees say that that’s too bad because appellants were on notice of flaws in the complaint by reason of the motion to dismiss and failed to amend before the trial court ruled on it. However, appellants were also on notice of published case law that allowed standing under three different theories relevant to the gambling/lottery issues in this case: 1) parents of public student standing; 2) negative effects of gambling standing; and 3) public action standing. *Ohio Roundtable v. Taft*, 119 Ohio Misc.2d 49, 2002-Ohio-3669, ¶¶46-48. Furthermore, appellants were on notice of published Ohio case law requiring allowance of leave to amend upon dismissal for failure to state a claim unless defects are incurable. *Jordan v. Cuyahoga Metro. Hous. Auth.*, 161 Ohio App. 3d 216, 2005-Ohio-2443, ¶12 (8th Dist.). Appellants had reason to believe that they had standing under Ohio

case law, and therefore needed no amendment, until the trial court slammed the courthouse doors shut in violation of the *Jordan* case.

E. 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.

Appellees do not dispute appellants' preliminary contention that this Court's original jurisdiction would be invoked if this Court upholds dismissal of appellants' mandamus claims under review, but left appellants with available claims on the same subject matter under this Court's original jurisdiction in mandamus. However, appellees dispute that this Court would have original jurisdiction in mandamus over the subject claims, arguing that Sheward's 'rare and extraordinary' limit is constitutionally valid.

Appellees' comment that this Court's denial of jurisdiction on the citizen mandamus standing issue resolves the issue for purposes of review, is off point. The comment is true, but it does not change the fact that a complete determination of appellants' mandamus claims will not be had, if they may later be filed in this Court under its original jurisdiction in mandamus.

Appellees' comments that appellants do not request any relief or seek an advisory opinion fails to appreciate appellants' point. This Court's original jurisdiction is invoked in cases on review where necessary for a complete determination of the cause on review and its exercise is not discretionary where it is properly invoked. In the present case, appellants' cause of action in mandamus would not be completely determined if appellants can re-file it later with this Court. Therefore this Court would presently have original jurisdiction under the complete determination clause. The request for relief is inherent in the type of jurisdiction invoked, which is "as may be necessary to [the cause's] complete determination" i.e. the Court would then determine the mandamus claims.

Appellees' contention that Art. IV, § 2(B)(3) does not prohibit additional limits on original actions, has been rejected by this Court. In *Libby-Owens-Ford Glass Co. v. Ind. Comm.*, 162 Ohio St. 302, 306-307 (1954), this Court held that its original jurisdiction in mandamus "is the common-law jurisdiction that was exercised in Ohio at the time of the adoption of the constitutional provision in 1851", which "cannot be enlarged or abridged..." as a result of Art. IV, § 2, which is now Art. IV., § 2(B)(3).

The cases cited by appellants as allowing additional limits on this Court's original jurisdiction are distinguishable from the present case. *State ex rel. Flanagan v. Lucas*, 139 Ohio St.3d 559, 2014-Ohio-2588 dismissed a *quo warranto* claim for lack of standing since the relator was not entitled to the office at issue. The *quo warranto* statute enacted in 1838, required that the relator be entitled to the office at issue. Swan's Statutes of the State of Ohio, p. 787. Accordingly, Flanagan was merely recognizing the jurisdictional limits exercised at the time of the grant of original *quo warranto* jurisdiction to this Court, it was not adding any limit. Justice O'Donnell's dissent in *State ex rel. Cleveland Right to Life v. State of Ohio Controlling Bd.*, 138 Ohio St.3d 57, 2013-Ohio-5632, ¶¶ 40, 41, regarding the political question doctrine is also distinguishable. The political question doctrine precludes judicial review of issues which were exclusively delegated to another branch of government. In the present case, however, the constitution has specifically delegated authority to this Court to address mandamus claims.

Appellees argue that the criteria of *Westfield Insurance v. Galatis*, 100 Ohio St. 3d 216, 228 (2003), such as workability and lack of undue hardship, must be met before determining that the *Sheward* 'rare and extraordinary' limitation is constitutionally invalid. But this would contradict *State ex rel. Toledo v. Lynch*, 87 Ohio St. 444, 449 (1913) which struck down the essentially same limitation on mandamus jurisdiction, pursuant to Art. IV. § 2, reasoning that:

The duty of subordination to the law rests nowhere more impressively than upon a tribunal which is not otherwise subordinate. The adjudications of a court of last resort must so enforce and so obey the provisions of fundamental law as to make popular government possible. *To make it practicable is the duty of the electors.* (Emphasis added.)

Finally, appellees argue the merits of appellants' mandamus claims, stating that they are disguised declaratory relief claims because they seek prohibitory relief. This argument is unavailable because consideration of the merits is improper in the context of standing analysis. Moreover, this Court has mandated performance of constitutional duties on numerous occasions, despite the fact that such orders could also potentially be characterized as preventing unconstitutional activities. *State ex rel. Cater v. North Olmsted*, 69 Ohio St.3d 315, 323 (1994); *Cleveland ex rel. Neeland v. Locher*, 25 Ohio St. 49, 52 (1971). Similarly, appellees argue on the merits that the mandamus claims should be dismissed because appellants have alternative declaratory relief. This takes some chutzpah given that they are also arguing that there is no standing for the declaratory relief claims. Furthermore, mandamus claims can be asserted with declaratory relief claims, when necessary for complete relief.

From a broader perspective, the results sought by appellees would lead this Court into the anomalous position of encouraging the filing of mandamus claims under this Court's original jurisdiction. By declining review of the appellate court's dismissal of appellants' mandamus claims in the common pleas court, pursuant to *Sheward*, this Court has substantially blocked such claims. At the same time, appellees have been unable to defend the basis for *Sheward's* 'rare and extraordinary' limit. They do not dispute that the cases cited in support of this limit are referring to the discretionary nature of mandamus relief, i.e. the merits not standing. Nor do they dispute that these cases allowed mandamus relief under circumstances far less serious than the 'rare and extraordinary' limit suggests. *Sheward's* limit cannot withstand scrutiny, and the only

way to obtain that scrutiny now, is under this Court's original jurisdiction in mandamus (if not this Court's complete determination jurisdiction).

Sheward is a case at war with itself. Its dicta, the 'rare and extraordinary' limit, has swallowed its syllabus, standing based on a citizen's interest in the execution of the laws. That syllabus and the constitutional and statutory provisions on which it is based have been nullified. *Sheward's* dicta is a complete disregard of not just one, but two constitutional conventions. Not only did Ohio's constitution direct this Court to exercise original jurisdiction in mandamus, it later reiterated this by barring this Court from limiting this jurisdiction. *Sheward's* 'rare and extraordinary' limit strikes at the core of Ohio's constitutional structure. The Constitution of 1851 was the result of circumstances similar to those in this case: government influenced by gambling interests and corporate cronyism. The result was the lottery ban, limitations on government and corporate joint ventures and mandamus jurisdiction to enforce these public duties, all issues in this case.

This Court's efforts to make mandamus jurisdiction discretionary was blocked by the constitutional amendments of 1912, which reduced this Court's docket by making review jurisdiction discretionary while barring limits on mandamus jurisdiction. In applying the 1912 amendments over objections, this Court noted that "it is a sufficient answer that it is ordained. There can be no equivalent to a constitutional provision" *City of Akron v. Roth*, 88 Ohio St. 456, 465 (1913). This is all the justification that is needed to reject *Sheward's* 'rare and extraordinary' limitation.

CONCLUSION

Given that a citizen's interest in the execution of the laws is a judicially cognizable interest under Ohio law, injury-in-fact standing exists for both the declaratory and mandamus

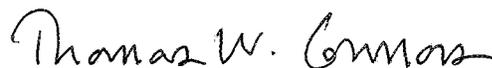
relief claims. Appellants' interest in protection from the negative personal and social effects of gambling, diversion of school funds, special fund management and equal treatment are also well established judicially cognizable interests which support standing in this case. In any event, standing based on a citizen's beneficial interest is granted by the mandamus statute which is directly based on Ohio's constitution and repeatedly upheld by this Court.

Appellees inveigh against using judicial process to make policy, and appellants share this sentiment. Appellees seek to uphold the policy determinations of the 2009 constitutional amendment as well as those of the 1851, 1912, 1973 and 1987 constitutional amendments, not argue the merits of such policies. Appellees are invoking a remedy granted to them by these constitutional provisions, and long recognized by this Court. Democracy is not being impeded, it is being advanced.

Intervening Appellees make a thinly veiled and extra-legal appeal regarding the amounts of money generated for government by gambling. This of course is a policy argument, not a legal argument, but it is also very revealing about how the gambling interests operate. One could respond that 35 to 60% of this money is derived from exploitation of the vulnerable, but that too is a policy argument. *Why Casinos Matter*, Institute for American Values (2013) 37-40. What is most striking is how brazen they are, nakedly appealing to this Court, to determine the vitally important constitutional issues in this case, not on the basis of the law, but on the basis of money to be exchanged. When all is said and done, the only remedy that is being sought in this case is execution of the laws. There is no legitimate interest that would be offended by such a result.

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.

Respectfully submitted,



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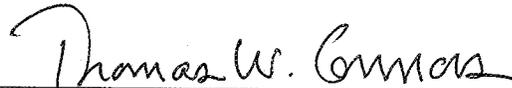
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