THE SUPREME COURT OF OHIO

State ex rel. CITIZENS FOR COMMUNITY VALUES, INC., et al.	:	
Relators,	:	Case No. 2020-0175
v.	:	Original Action in Mandamus
GOVERNOR MIKE DEWINE, et al.	:	
Respondents.	:	

MOTION TO DISMISS OF RESPONDENTS

Now comes Respondents, Governor Mike DeWine, Ohio Department of Education, State Board of Education, and Ohio Superintendent of Public Instruction Paola DeMaria, and move this Court to dismiss Relators' complaint for lack of subject matter jurisdiction under Civ. R. 12(b)(1), lack of standing, and failure to state a claim under Civ. R. 12(b)(6). A memorandum in support of the Respondents' motion is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Educational Choice Scholarship Program ("EdChoice Scholarship Program") is one of Ohio's avenues for giving eligible families financial Scholarships to enroll their children in chartered nonpublic schools rather than the public school districts in which they reside. On January 31, 2020, the General Assembly passed 2020 Am. Sub. S.B. No. 120, Section 3 ("S.B. 120"), which appropriated ten million dollars to help fund EdChoice Scholarships and set back the Scholarship application start date by sixty days. Although S.B. 120's effect on the EdChoice Scholarship Program was limited to these two provisions, Relators believe that S.B. 120 is just the first step in a grand plan to "materially reduce the number of children entitled to EdChoice Scholarships under the law." Compl. at 5.

In an effort to thwart what they *fear* the General Assembly will do with the EdChoice Scholarship Program in the *future*, Relators bring this mandamus action asking this Court to, in effect, declare that S.B. 120 is not yet enacted because it is subject to referendum, to direct the Ohio Department of Education to accept EdChoice Scholarship applications, and to enjoin Respondents from taking action that would reduce the number of individuals eligible for EdChoice Scholarships. *Id.* at 16. Relators cannot demonstrate that they are entitled to relief for several fatal reasons.

First, Relators cannot establish standing to bring this mandamus action. They merely put forth what future deleterious effects they *might* suffer *if* the EdChoice Scholarship Program were to be reduced or eliminated. Certain Relators only claim speculative, unparticularized injuries to their respective (personal) abilities to plan and budget for the upcoming school year. And, the associational Relator, Citizens for Community Values, Inc., fails to identify any members that have been injured by the passage of S.B. 120. Relators also cannot show that their alleged

injuries are fairly traceable to S.B. 120 or that the relief they request will redress their injuries. Finally, Relators have failed to allege facts demonstrating that they have standing pursuant to the public rights doctrine. Accordingly, Relators fail under all possible standing frameworks.

Second, this case is not a mandamus action. Relators are, in essence, asking this Court to grant declaratory and injunctive relief by enjoining S.B. 120 and the Respondents from taking certain actions. This Court lacks original jurisdiction to grant Relators' requested relief, and therefore, their Complaint should be dismissed.

Finally, assuming that Relators possess standing and this Court enjoys original jurisdiction over this action, which they do not, Relators still fail to assert a claim for which relief can be granted. Relators cannot show that they have a clear legal right to injunctions against S.B. 120 or that they are entitled to EdChoice Scholarships. Additionally, Relators cannot show that Respondents owe a clear legal duty or that they lack an adequate remedy at law. Indeed, a declaratory injunction action is available to Relators to seek relief and, as such, their mandamus action must fail. Lastly, Relators have offered no facts showing that Governor DeWine committed acts or omissions which caused their alleged injuries and so, Relators' claims against Governor DeWine must fail as well. For all of these reasons, Relators' Complaint must be dismissed.

II. BACKGROUND

A. The Relators.

Relators include a group of nineteen parents of school aged children ("Family Relators") who claim to reside within the boundaries of a public school that was placed on the EdChoice designated list for the 2020-2021 school year. *See* Compl. None of the Family Relators claim to have been denied an EdChoice Scholarship, nor do they claim that they applied to and were rejected by a chartered nonpublic school due to the passage of S.B. 120. In fact, fourteen of the

Family Relators have their children already enrolled in and are attending private schools and/or chartered nonpublic schools of their choice. Compl. at ¶¶ 4, 5, 10, 11, 12, 13, 14, 15, 16, 17, 19. Their claims are simply that *if* they are denied an EdChoice Scholarship in the future then their personal financial situations *may be* negatively impacted. *Id.* Some also claim that they have already spent money or incurred debts in reliance on receiving an EdChoice Scholarship in the future and so, *if* the Scholarship falls through, they will not be able to make good on those personal financial obligations. Compl. ¶¶ 10, 11, 12. Others are just worried about what their personal financial forecast *will be if* they are denied an EdChoice Scholarship. Compl. ¶¶ 4, 5, 13, 14, 15, 16, 17. Finally, five of the Family Relators do not have children in chartered nonpublic schools currently. In those cases, the families claim that they intend to enroll their children in chartered nonpublic schools, although they do not claim that they have actually submitted any applications for enrollment. Compl. ¶¶ 6, 7, 8, 9, 18. Instead, these families simply fear that, *if* they apply for an EdChoice Scholarship and are denied, then they *will not* be able to afford to send their children to a chartered nonpublic school. *Id.*

Two of the Relators are private schools ("School Relators") who accept EdChoice Scholarships. Comp. ¶¶ 2, 3. They claim that the 2020-2021 EdChoice designated school list has "led to an increase in families expressing interest in sending their children" to these schools. *Id.* The schools claim that the "60-Day freeze" of the application period impacted their ability to budget and plan for the upcoming school year. *Id*. Like the Family Relators, the School Relators do not allege that they have lost EdChoice monies to which they were entitled or that their enrollment has been actually impacted due to Respondents' conduct or by the passage of S.B. 120. *Id.*

The associational Relator, Citizens for Community Values (CCV) aka the "Ohio Christian Education Network" claims to be a "coalition of schools and community members." Compl. ¶ 1. Some of CCV's member schools "participate in the EdChoice Scholarship program and educate Ohio's children who deem those schools best for them." *Id.* None of the Relators claim to be CCV members.

B. The EdChoice Scholarship Program.

The Educational Choice Scholarship Program ("EdChoice Scholarship Program"), as regulated by R.C. Chapter 3310 and Ohio Adm.Code Chapter 3301-11, enables the Ohio Department of Education ("ODE") to award up to 60,000 eligible students with educational scholarships to attend chartered nonpublic schools. *See* R.C. 3310.02(A)(2). That being said, the amount of scholarships can be increased if at least 90% of the total available scholarships are awarded. R.C. 3310.02(A)(2). Every year, ODE evaluates the academic performance of each Ohio public school district, and each school building within each district, and then assigns letter grades based on each school's achievement on previously determined performance criteria. *See* R.C. 3302.03. Students who reside within the boundaries of public schools that do not meet performance goals are eligible for EdChoice Scholarships, which they can use for tuition to attend chartered nonpublic schools if they prove themselves otherwise eligible. *See* R.C. 3310.03. An EdChoice Scholarship is $4,650 for grades K-8 and $6,000 for grades 9-12. *See* R.C. 3310.09.

Eligibility for an EdChoice Scholarship is not automatic, nor is it easily determined. The process for obtaining a Scholarship award is multi-tiered and involves several layers of review by the chartered nonpublic school, the student's home public school district, and finally ODE. Initially, a student who resides within the boundaries of an EdChoice-designated public school building, is attending or is assigned to attend an EdChoice-designated building and who intends

to obtain an EdChoice Scholarship must apply to and be accepted for enrollment in an EdChoice-approved chartered nonpublic school. Ohio Adm.Code 3301-11-05(A) and 3301-11-11.

Admission into chartered nonpublic schools is oftentimes based on competitive, merit-based criteria. No chartered nonpublic school is required to accept a student who possesses an EdChoice Scholarship. *See* R.C. 3310.17(B). However, once a student is accepted for enrollment, the participating chartered nonpublic school must accept the EdChoice Scholarship as full tuition if the family's income is at or below two hundred percent of the federal poverty level. *See* R.C. 3310.13; Compl. at ¶ 23. Otherwise, a parent must satisfy any difference between the chartered nonpublic school's tuition rates and the amount of the EdChoice Scholarship. *Id.* Once a student receives an EdChoice Scholarship, he or she may continue to receive EdChoice Scholarships so long as the student maintains compliance with the eligibility requirements, including, but not limited to, continued residency in the residential district where the scholarship was awarded. *See* R.C. 3310.03(F).

Every year, ODE releases a list of EdChoice-approved chartered nonpublic schools that is accessible to students through ODE's website. Ohio Adm.Code 3301-11-03 and 3301-11-11(A). *See also* www.education.ohio.gov/edchoice. If a student is accepted into an EdChoice-approved chartered nonpublic school, then the student must submit his or her application for the EdChoice Scholarship through the nonpublic school to his or her home public school district for review. *See* Ohio Adm.Code 3301-11-06 and 3301-11-12. The application must include all "information and documentation" showing proof of: (1) the student's identity; (2) the identity of the student's parents or guardians; (3) the student's residential address, district of residence, and other eligibility criteria set forth in R.C. 3310.03; (4) that the accepting chartered nonpublic school is EdChoice approved; and (5) family income affecting the amount of the potential award. Ohio

Adm.Code 33-1-05(A)(1)-(5) and (E). The student's home public school district must review the Scholarship application and, within thirty days of receipt of the application, must identify any errors in eligibility that would affect the Scholarship awards and payments. Ohio Adm.Code 3301-11-06. ODE will award a Scholarship only after all errors have been successfully resolved. ODE will notify a successful applicant of his or her Scholarship award via mail within thirty days of the award determination. Ohio Adm.Code 3301-11-07(A).

ODE awards Scholarships "not later than the thirtieth day of June prior to the first day of July of the school year for which a Scholarship is sought." R.C. 3310.16(A). EdChoice Scholarship families do not receive Scholarship money directly. Instead, Scholarship payments are made in periodic, partial payments and are sent directly to the chartered nonpublic schools via "warrant of the auditor and made payable in the name of the parent or legal custodian of the student….and the chartered nonpublic school in which the student is enrolled." R.C. 3310.08(C)(1); Ohio Adm.Code 3301-11-10.

C. 2020 Am. Sub. S. B. No. 120.

With respect to applying for an EdChoice Scholarship, R.C. 3310.16 (A) provides that a "priority application period shall open on the first day of February prior to the first day of July of the school year for which a Scholarship is sought and run not less than seventy-five days." On January 31, 2020, the General Assembly passed 2020 Am. Sub. S.B. No. 120, Section 3 ("S.B. 120") which amends parts of R.C. 3310.16 as follows:

> Of the foregoing appropriation item 200550, Foundation Funding, up to $10,000,000 in fiscal year 202l shall be used to pay Scholarships awarded as follows. Notwithstanding anything in the Revised Code to the contrary, for applications for the 2020-2021 school year, the Department of Education shall accept, process, and award performance-based Educational Choice Scholarships under section 3310.03 of the Revised Code as follows. ***An application period for students who are eligible for the first time for the 2020-2021 school year shall open April 1, 2020, and run not less than sixty days*** or to the extent funds

> appropriated by the General Assembly under Section 265.10 of H.B. 166 of the 133rd General Assembly and this section remain available. The Department shall award Scholarships in the order that it receives applications and shall continue to award Scholarships to the extent the funds appropriated by the General Assembly under Section 265.10 of H.B. 166 of the 133rd General Assembly and this section remain available. ***An application period for students who were eligible for Scholarships for the 2019-2020 school year, regardless of whether the students received Scholarships for that school year, and remain eligible for the 2020-2021 school year shall open April 1, 2020, and run not less than sixty days.*** These Scholarships shall be funded and paid in accordance with section 3310.08 of the Revised Code.

2020 Am. Sub. S.B. No. 120, Section 3, 13-14 ("S.B. 120") (emphasis added). In short, S.B. 120 made an appropriation of ten million dollars to help fund the 2020-2021 EdChoice Scholarship Program and it moved back the priority application period from February 1, 2020 to April 1, 2020, but only for the 2020-2021 school year. *Id.* Despite S.B. 120's 60-day delay in opening the application period, public school districts must still process EdChoice Scholarship applications within 30 days of receipt (Ohio Adm.Code 3301-11-06) and ODE must still award EdChoice Scholarship by June 30, 2020 (R.C. 3310.16(A)). Also, S.B. 120 *did not* alter or modify the eligibility criteria for EdChoice Scholarships. Said differently, the *only* thing that S.B. 120 did was move one deadline - the priority application deadline. It left untouched all pre-existing deadlines, eligibility and funding.

III. LAW AND ARGUMENT

A. Standard of Review

"A court can dismiss a mandamus action under Civ.R. 12(B)(1) when it lacks subject matter jurisdiction and under Civ. R. 12(B)(6) for failure to state a claim upon which relief can be granted." *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9. In order for a complaint to be dismissed, it must appear beyond doubt that the relator can prove no set of facts warranting the requested writ of mandamus. *Id.* Unsupported

conclusions, however, do not suffice. *State ex rel. Seikbert v. Wilkinson,* 69 Ohio St.3d 489, 490, 633 N.E. 2d 1128 (1994).

B. The Relators Lack Standing.

"'It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue.'" *State ex rel. Walgate v. Kasich*, 147 Ohio St.3d 1, 2016-Ohio-1176, 59 N.E.3d 1240, ¶ 18, quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St.3d 451, 469, 715 N.E.2d 1062 (1999). "The essence of the doctrine of standing is whether the party seeking relief has alleged 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.*, quoting *Racing Guild of Ohio, Local 304 v. Ohio State Racing Comm.,* 28 Ohio St.3d 317, 321 (1986); *ProgressOhio.org, Inc., v. JobsOhio,* 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 101, ¶ 1. Thus, courts must conduct a preliminary inquiry into whether a person seeking relief has standing to bring an action in the first place. *State ex rel. Cordray v. Marshall,* 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, ¶ 12.

Relators fail to allege that S.B. 120 causes them a direct and concrete injury sufficient to confer upon them standing to challenge it. In particular, Relators claim to have standing to bring this attack of S.B. 120 pursuant to Article IV, Sec. 4(B) of the Ohio Constitution and R.C. 2731.02. Compl. ¶ 21. "[S]tanding to attack the constitutionality of a legislative enactment exists only where a litigant 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." *Cuyahoga Cty. Bd. of Commrs. v. State of Ohio,* 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 300, ¶ 22; *see also Preterm-Cleveland, Inc. v. Kasich,* 153 Ohio St.3d 157, 2018-Ohio-441, 102 N.E.3d 461. Under

R.C. 2731.02, this Court may issue a writ "on the information of the party beneficially interested[]" in the writ. "The applicable test is whether [the] relators would be directly benefitted or injured by a judgment in the case." *State ex rel. Hills & Dales v. Plain Local Sch. Dist. Bd. of Educ.*, 2019-Ohio-5160, ¶ 9, quoting *State ex rel. Sinay v. Sodders,* 80 Ohio St.3d 224, 226, 685 N.E.2d 754 (1997); *see also State ex rel. Botkins v. Laws,* 69 Ohio St.3d 383, 387, 632 N.E.2d 897 (1994) ("[A] complaint for a writ of mandamus must set forth facts showing that the relator is a party beneficially interested in the requested act before a proper claim is established.").

For Relators to have standing, they must show a "direct, personal stake in the outcome of the case; ideological opposition to a program or legislative enactment is not enough." (internal quotations omitted) *Id.*, quoting *ProgressOhio.org, Inc. v. JobsOhio,* 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 101, ¶ 1. "Under traditional standing principles, a plaintiff must show, at a minimum, that he has suffered (1) an injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." (internal quotations omitted) *Id.*, quoting *ProgressOhio.org, Inc.* at ¶ 7.

1. Relators have alleged no direct and concrete injury.

Relators' Complaint is peppered with accusations that the General Assembly *intends* to "materially change who will receive EdChoice Scholarships," and they put forth several deleterious effects that they *might* suffer *if* such a future law were to be enacted. *See* Compl. at ¶¶ 4, 5, 10, 11, 12, 13, 14, 15, 16, 17, 19. Indeed, none of the Family Relators have been denied EdChoice Scholarships, nor do they claim that they applied to and were rejected by chartered nonpublic schools due to the enactment of S.B. 120. In fact, fourteen of the Family Relators have their children already enrolled in and are attending private schools and/or chartered nonpublic schools of their choice. *Id*. Their claims are simply that *if* they are denied EdChoice

Scholarships in the future then their personal financial situations *may be* negatively impacted. *Id.* Some also claim that they have already spent money or incurred debts for household items such as car repairs in reliance on receiving EdChoice Scholarships in the future and so, *if* the Scholarships fall through, then they will not be able to make good on those personal financial obligations. Compl. ¶¶ 10, 11, 12. Others are just worried about what their personal financial forecast *will be if* they are denied EdChoice Scholarships. Compl. ¶¶ 4, 5, 13, 14, 15, 16, 17. Finally, five of the Family Relators do not have children in chartered nonpublic schools currently. In those cases, the families claim that they intend to enroll their children in chartered nonpublic schools although they do not claim to have actually submitted any applications for enrollment. Compl. ¶¶ 6, 7, 8, 9, 18. Instead, these families simply fear that, *if* they are denied EdChoice Scholarships, then they *will not* be able to afford to send their children to chartered nonpublic schools. *Id.*

Once again, S.B. 120 does not reduce or eliminate anything, and the Relators do not allege otherwise. TheFamily Relators's fear that lawmakers may reduce or eliminate the EdChoice Scholarship Program sometime in the future, and that they may suffer some hypothetical financial distress as a result, is insufficient to confer standing here. "A bare allegation that plaintiff fears that some injury will or may occur is insufficient to confer standing." *Wurdlow v. Turvy*, 2012-Ohio-4378, 977 N.E.2d 708, ¶ 15 (10th Dist.), citing *Tiemann v. Univ. of Cincinnati*, 127 Ohio App.3d 312, 325, 712 N.E.2d 1258 (10th Dist. 1998). An injury sufficient to confer standing is "concrete and not simply abstract or suspected." *State ex rel. Food & Water Watch v. State*, 2018-Ohio-555, 100 N.E.3d 391, ¶ 20 (Ohio), quoting *Ohio Contrs. Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994). A party lacks standing to challenge a legislative enactment that "does not cause or threaten direct and concrete

injury to the party asserting the challenge." *Preterm-Cleveland, Inc.*, 153 Ohio St.3d 157, 2018-Ohio-441, 102 N.E.3d 461, at ¶ 27.

In *Preterm-Cleveland Inc.,* this Court dismissed a surgical facility's constitutional challenge to provisions in a 2013 budget bill for lack of standing because the facility failed to allege a direct or concrete injury. *Id.* at ¶ 31. There, the surgical facility provided abortion services and challenged three newly enacted provisions that regulated, restricted, or made criminal certain acts with respect to abortion activities. *Id.* at ¶ 4. The facility claimed that it possessed standing to challenge all three provisions because the provisions caused the facility "new administrative burdens, limit[ed] the number of hospitals with which it could have such an agreement, and plac[ed] its license at greater risk of loss or revocation than before." *Id.* at ¶ 22. The facility expressed fear of future harms including criminal and civil liability and reduced ability to continue to provide the same level of services. *Id.* at ¶ 22, 26. The Court found that the facility lacked standing because it failed to show that it "has suffered or is threatened with direct and concrete injury[,]" but rather, the facility "offered unsubstantiated, conclusory averments about those provisions…[A]nd it only speculates that it might be injured." *Id.* at ¶ 22. As to the facility's fear of future harm, this Court stated, "although [the facility] presented evidence that it altered its conduct due to its fear of criminal and civil liability pursuant to those provisions, it neither suffered nor is threatened with a direct and concrete injury because of them." *Id.* at ¶ 26.

So too here, the Family Relators' alleged injuries are nothing more than speculation about the future of the EdChoice Scholarship Program and how future laws may impact them moving forward. But they do not allege that by moving the priority application deadline, S.B. 120 itself

will actually cause them that harm. Therefore, they lack standing because they allege no direct, concrete injuries.

The School Relators fare no better in alleging a direct and concrete injury. *See* Comp. ¶¶ 2, 3. They claim that the 2020-2021 EdChoice-designated school list has "led to an increase in families expressing interest in sending their children" to these schools. *Id.* The schools claim that the "60-Day freeze" of the application period impacted their ability to budget and plan for the upcoming school year. *Id*. Like the Family Relators, the School Relators do not allege that they have lost EdChoice monies to which they are or were entitled or that their enrollment has been actually impacted due to the enactment of S.B. 120. *Id.* General, unspecific allegations of injury - like the Relators' here - do not establish standing. *See Walgate,* 147 Ohio St.3d 1, 2016-Ohio-1176, 59 N.E.3d 1240 at ¶ 26.

In *Walgate,* several individuals brought a declaratory judgment and mandamus action in common pleas court challenging the constitutionality of various gambling laws and claiming that gambling caused them emotional and financial distress and other hardships to their families. *Id.* The trial court granted the state's motion to dismiss for lack of standing. This Court ultimately affirmed the dismissal, ruling that the appellants "have not pled concrete harm or injury different in manner or degree from that suffered by the general public" and that "appellants offer no examples of any particularized harm beyond bare assertions that they and their families have suffered emotional and financial distress because of gambling issues. Such general, unspecific allegations fail to establish a direct, personal interest different from the concerns shared by the general public." *Id.*

The School Relators (and the Family Relators) similarly fail to offer any particularized harm that is different from any experienced by the general public due to the delay in the start of

the EdChoice Scholarship application process. Accordingly, they have failed to allege any particularized harm that they will suffer from the delayed deadline and have therefore failed to allege facts sufficient to establish their standing to challenge S.B. 120. *See also Preterm-Cleveland Inc.*, at ¶ 22 (mere speculation of injury without articulating particularized harm or risk of harm does not establish standing); *State ex rel. Am. Subcontractors Ass'n v. Ohio State Univ.*, 129 Ohio St.3d 111, 2011-Ohio-2881, 950 N.E.2d 535, ¶ 12, quoting *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994) (" '[T]he injury must be concrete and not simply abstract or suspected.' ").

2. None of the alleged injuries are fairly traceable to S.B. 120.

To be clear, S.B. 120 did not touch the EdChoice Scholarship eligibility provisions. It did not touch the deadlines for Ohio public school districts to complete their application review and it did not touch ODE's deadline of June 30, 2020 to notify families and schools of EdChoice Scholarship awards. S.B. 120 simply delayed the start of the application process by 60 days, and only for the 2020-2021 school year. EdChoice Scholarships will be awarded for the 2020-2021 school year at the same time (no later than June 30) as they always have been. *See* R.C. 3310.16. Regardless, School Relator, Genoa Christian Academy, still claims that it budgets in "mid-February based on the enrollment applications and trends" and the delay "affects what staff they will hire, whether they need to split classes, and what programming they can have for the following school year." Compl. at ¶ 2. School Relator, Monclova Christian Academy, claims that, due to the delayed start, it "will not know which families will be able to afford to attend next year, which creates incredible problems for the school as it attempts to budget, hire staff, and plan classes." Compl. at ¶ 3.

But, the School Relators do not claim that they cannot proceed with their own application process with prospective families, including making initial determinations as to eligibility and

financial status. Nor does S.B. 120 cause a delay in the receipt of EdChoice Scholarship funds. Therefore, Relators' claims as to their alleged inability to continue to plan and budget and any alleged delay in Scholarship awards are unfounded, and they are not a result of S.B. 120. *See Walgate* at ¶ 27 (finding the appellants' failed to establish a causal link between the state's actions and their general assertions that gambling laws caused financial and family distress).

3. The relief requested will not redress Relators' alleged injuries.

Relators request this Court: (1) to treat the "EdChoice Scholarship Section(s) of S.B. 120 as subject to referendum; (2) to direct the Governor to "set forth" that S.B. 120 will not be effective until May 1, 2020; (3) to direct ODE to accept and process EdChoice Scholarship applications; and (4) to direct Respondents to "not take any action" that would "impact the value or amount of EdChoice Scholarships available to the population identified on November 1, 2109." Compl. at 16. As more fully explained below, Relator's entire request for relief is a thinly-veiled (and improper) attempt to obtain an injunction from this Court. It should be rejected. But even if, for the sake of argument, this Court were to consider Relators' request for relief, the inescapable conclusion is that none of the requested relief will actually redress the Relators' alleged injuries. This complete lack of a connection between the harm alleged and the relief requested is fatal to Relators' standing.

Previously, in *State ex rel. Food & Water Watch,* 2018-Ohio-555, 100 N.E.3d, ¶ 32, this Court dismissed a mandamus action for lack of standing where individuals claimed that a state agency's failure to promulgate environmental regulations led to their alleged health problems and to one individual having to smell "hydrocarbon stenches" from a local industrial plant. There, the Court declined to order the state agency to pass the requested regulations because it found that the relator failed to establish a causal connection between their alleged injuries and

the state's lack of action and that the relator "has not demonstrated that the promulgation of rules…will likely redress her injury." *Id.* at ¶ 21.

As in *State ex rel. Food & Water Watch* in the Relator's demand to effectively enjoin S.B. 120 will not redress their alleged injuries. As stated above, S.B. 120 *does not* impact the amount of EdChoice Scholarships for the 2020-2021 school year or when they will ultimately be awarded. So, to the extent that Relators' claimed harm relates to the funding and award of EdChoice Scholarships, enjoining S.B. 120 cannot possibly redress that harm. That is, Relators will be in the exact same position even if this Court grants their writ.

In all likelihood, by the time this Court will be able to resolve this matter, the EdChoice Scholarship application process may be open or very near opening, and the Relators may proceed with their applications to determine if they are eligible (and this case will be moot). If they are eligible, they will receive their award as set forth by law. None of the requested relief will change that outcome. Finally, while Relators baldly claim that EdChoice Scholarships vested with "the population identified on November 1, 2109[,]" Relators have not alleged any facts sufficient to show any entitlement to an EdChoice Scholarship as of November 1, 2019. *See* Compl. at 5 and ¶¶ 29, 41. And, since S.B. 120 does not impact eligibility for an EdChoice Scholarship, and no Relator has been denied one, whether and/or when an entitlement to an EdChoice Scholarship vests is irrelevant. Accordingly, the Relators lack standing for this additional reason.

4. CCV lacks associational standing.

The association Relator, Citizens for Community Values (CCV) aka the "Ohio Christian Education Network" has failed to identify any member that has been harmed and, therefore, it lacks associational standing to bring this action. "An association has standing on behalf of its members when (a) its members would otherwise have standing to sue in their own right; (b) the

interests it seeks to protect are germane to the organization's purpose; and (c) neither the claims asserted nor the relief requested requires the participation of individual members in the lawsuit." *State ex rel. Am. Subcontractors Ass'n*, 129 Ohio St. 3d 111, 2011-Ohio-2881, 950 N.E. 2d 535, ¶ 12, quoting *Bicking*, 71 Ohio St. 3d 318, 320, 643 N.E. 2d 1088. This Court has emphasized that, "to have standing, the association must establish that its members have suffered actual injury." (internal citation omitted) *Id.* That is, at least one of the members of the association must be actually injured." *Id.*

CCV does not identify even one of its members in this action, let alone a member that alleges an injury. *See id.* Instead, CCV broadly claims to be a "coalition of schools and community members," and some of CCV's member schools "participate in the EdChoice Scholarship program and educate Ohio's children who deem those schools best for them." Compl. at ¶ 1; *see also* Aff. of Aaron Baer at ¶¶ 8 and 9. CCV purports to generally speak on behalf of "Ohio's children and families," "Ohio's public and private schools," and only through the "anecdotal knowledge" of its Executive Director Aaron Baer. *See* Aff. of Aaron Baer at ¶¶ 3, 6, 7, 15; *see also* Compl. at 4 through 6 and ¶¶ 30, 31, 32, 33, 35. CCV simply has not demonstrated any factors that would confer associational standing in this case. Indeed, CCV has shown only that it is ideologically opposed to S.B. 120, not that it has a direct, personal stake in the outcome of this matter. *See ProgressOhio.org, Inc.*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, at ¶ 1.

5. Relators cannot establish public right standing.

Finally, Relators cannot establish standing through the public right doctrine. The public right doctrine is an exception to the personal injury requirement of standing and provides that "when the 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 named

parties." *Id.* at ¶ 9, quoting *Sheward*, 86 Ohio St. 3d 451, 471, 715 N.E. 2d 1062. "To succeed in bringing a public-right case, a litigant must allege 'rare and extraordinary' issues that threaten serious public inquiry. Not all allegedly illegal or unconstitutional government actions rise to the level of importance." *Id.*, citing *Sheward* at 503-504. Public right standing is available only in mandamus actions "to procure the enforcement or protection of a public right." *Id.* at ¶ 10, citing *Sheward* at paragraph one of the syllabus.

While public school funding in general is always important, the process by which EdChoice Scholarships are awarded is not the "rare and extraordinary" issue contemplated in this narrow exception. Additionally, S.B. 120 does not impact a "public right" but deals specifically with a finite group of Ohioans that may be eligible for an EdChoice Scholarship. Accordingly, Relators fail to demonstrate that they have standing through the public right doctrine.

C. Relators Fail to Bring Their Mandamus Action in the Name of the State.

In addition to lacking standing, Relators fail to bring their mandamus action in the name of the State. R.C. 2731.04 provides, in part, "Application for the writ of mandamus must be by petition, *in the name of the state on relation of the person applying*, and verified by affidavit." (Emphasis added.). This Court has found that failure to bring a mandamus action in the name of the state is fatal and subject to dismissal. *See Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382, ¶ 34, citing *Gannon v. Gallagher*, 145 Ohio St. 170, 171, 60 N.E.2d 666 (1945). Of the twenty-two listed Relators in this case, only four (Citizens for Community Values, Inc., Genoa Christian Academy, Monclova Christian Academy, and Jen Becker) properly bring their action in the name of the state. This defect is fatal as to the other relators and, without amendment, this Court must dismiss those parties and their claims from this action. *See id.* at ¶ 36, citing *Litigaide, Inc. v. Lakewood Police Dept. Custodian of Records*, 75 Ohio St.3d 508, 664 N.E.2d 521 ("If, however, a respondent in a mandamus action raises this

R.C. 2731.04 defect and relators fail to seek leave to amend their complaint to comply with R.C. 2731.04, the mandamus action must be dismissed.").

D. This Court Lacks Subject Matter Jurisdiction Over Relators' Claims for Declaratory and Injunctive Relief.

Further, this Court lacks subject matter jurisdiction over Relators' claims because Relators seek a declaratory judgment with a prohibitory injunction. Although styled in mandamus, Relators actually seek a declaration that S.B. 120 is subject to referendum and, therefore, not effective until May 1, 2020, if ever. Thus, they seek an order effectively enjoining S.B. 120. As this Court does not possess original jurisdiction over declaratory judgment actions, this Court should dismiss Relators' claims.

This Court has established "that 'if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus.' " *State ex rel. Ohio Civil Serv. Employees Assn, Local 11 v. State Empl. Rels. Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.3d 688, ¶ 11 ("OCSEA"), quoting *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 634, 716 N.E.2d 704 (1999). "However, 'where declaratory judgment would not be a complete remedy unless coupled with extraordinary relief in the nature of a mandatory injunction, the availability of declaratory judgment does not preclude a writ of mandamus.'" (emphasis sic) *State ex rel. Gadell-Newton v. Husted*, 153 Ohio St.3d 225, 2018-Ohio-1854, 103 N.E.3d 809, ¶ 9, quoting *State ex rel. Arnett v. Winemiller*, 80 Ohio St.3d 255, 259, 685 N.E.2d 1219 (1997). "The difference between the two forms of relief is simple: 'a prohibitory injunction is used to prevent a future injury, but a mandatory injunction is used to remedy past injuries.'" *Id.* at ¶ 10, quoting *State ex rel. GMC v. Indus. Comm'n*, 117 Ohio St.3d 480, 2008-Ohio-1593, 884 N.E.2d 1075, ¶ 12.

Here, Relators' objective is to obtain declaratory and injunctive relief. Specifically, Relators ask this Court to find, in other words - declare, that S.B. 120 is subject to referendum and, therefore, not effective until at least 90 days after being filed by the Governor. In a declaratory judgment action, courts "declare rights, status, and other legal relations * * *." R.C. 2721.02. Declaring that S.B. 120 is subject to referendum fits squarely within that definition. It is of no consequence that they have not challenged the constitutionality of S.B. 120. *See id.* at ¶ 13 ("Actions for declaratory judgment may be predicated on constitutional *or* nonconstitutional grounds.").

Moreover, if Relators were able to prove that S.B. 120 is subject to referendum, which it is not, then all they would need is a prohibitory injunction for complete relief. If this Court were to accept Relators' position that S.B. 120 is subject to referendum, then it could not go into effect until at least May 1, 2020. However, if that were the case, then several aspects of S.B. 120 would be rendered meaningless. The relevant provisions of S.B. 120 only apply for the 2020-2021 school year. *See* 2020 Am. Sub. S.B. 120 ("Notwithstanding anything in the Revised Code to the contrary, for applications for the 2020-2021 school year * * *."). Therefore, there would not even be a need for a prohibitory injunction for these provisions; a declaratory judgment finding S.B. 120 is subject to referendum would provide complete relief itself. However, other provisions, namely the $10,000,000 in funding assistance, would still survive. As Relators seek to prevent that provision and others from ever going into effect, a prohibitory injunction enjoining S.B. 120 would, in fact, provide Relators with complete relief. Accordingly, Relators' action in mandamus is not proper.

Relators' reliance upon *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225, 631 N.E.2d 582 (1994) is misguided. In *Voinovich*, this Court considered three original mandamus

actions in which the constitutionality of 1993 Am. Sub. H.B. 107 was challenged. 69 Ohio St. 3d at 226-227. Ultimately, the Court struck down various portions of H.B. 107 as violating the single-subject rule and granted the relators' request for a writ of mandamus. *Id.* at 230. Thus, at first blush, it appears that *Voinovich* supports the notion that mandamus may lie to challenge an enactment such as S.B. 120. However, in 2006, this Court expressly rejected *Voinovich* as precedent establishing that an action in mandamus is an appropriate way to challenge the constitutionality of a law. *See State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Ohio Bureau of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335, ¶ 46 ("UAW"). In *UAW*, this Court found that "[i]n *Voinovich* * * *, we never expressly considered the general jurisdictional preclusion concerning mandamus actions that are actually disguised actions for declaratory judgment and prohibitory injunction * * *." The Court concluded, "Consequently, [*Voinovich*] lack[s] precedential effect." *Id.*, citing *Lewis v. Casey*, 518 U.S. 343, 352 (1996), fn. 2.

This case is also distinguishable from other cases where this Court found that mandamus was proper. In *OCSEA*, OCSEA was unsuccessful in their attempt to include certain employees into its group of bargaining units. *Id.* at ¶ 2. As a result, they filed six total petitions with the State Employment Relations Board ("SERB"). *Id.* While the petitions were pending, the General Assembly enacted H.B. 405, which, among other things, exempted those employees from the definition of "public employees." *Id.* at ¶¶ 3-4. At the State's request, SERB then dismissed the petitions. *Id.* at ¶ 4. OCSEA proceeded to file a petition for a writ of mandamus in the Tenth District Court of Appeals, which dismissed the case and held that OCSEA had actually requested a declaratory judgment. *Id.* at ¶ 6. On review, this Court overturned the decision and found that a writ of mandamus was the appropriate vehicle. *Id.* at ¶ 17. Although

OCSEA clearly sought to have H.B. 405 declared unconstitutional, because SERB had dismissed the petitions, a declaratory judgment would not have provided OCSEA with complete relief. *Id.* Rather, they also required a mandatory injunction compelling SERB to reinstate the petitions. *Id.*

In this case, none of the Respondents took any affirmative action that would require a mandatory injunction to undo any alleged harm suffered by Relators. Any supposed harm, such as the denial of a Scholarship due to some future change in the program requirements, has not happened yet. Therefore, mandamus is not the proper vehicle, and this Court does not have jurisdiction to consider Relators' claims. *See Gadell-Newton*, 153 Ohio St.3d 225, 2018-Ohio-1854, 103 N.E.3d 809, at ¶ 13 ("Gadell-Newton is attempting to prevent an injury that has not yet occurred but that she anticipates will occur. That is the function of a prohibitory injunction."). Accordingly, Relators' petition should be dismissed.

Finally, Relators request that ODE "immediately begin accepting, processing, and awarding EdChoice Scholarship applications from all eligible as of February 1, 2020" does not bring this action under the purview of mandamus. This Court has found time and again that " 'a writ of mandamus will not issue to compel the general observance of laws in the future.' " (internal quotation omitted) *UAW*, 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335, at ¶ 38, quoting *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 49, quoting *State ex rel. Kirk v. Burcham*, 82 Ohio St.3d 407, 409, 696 N.E.2d 582 (1998). In *UAW*, the Court held that an action in mandamus did not lie where UAW sought to compel the BWC to comply with this Court's holdings in other cases. *Id.* at ¶ 39.

Here, Relators, are seeking to compel ODE to follow the law as it existed prior to S.B. 120 by accepting, processing, and awarding EdChoice Scholarships. If February 1 is the

applicable start date, then ODE would be required by law to accept, process, and award Scholarships to those eligible, because that is what Ohio law required before S.B. 120. Thus, Relators' request is clearly an attempt to compel general observance of *prior* law by ODE and the other Respondents, which is not proper in mandamus. *See id.*

E. Relators Cannot Establish the Requirements for a Writ of Mandamus.

Assuming, arguendo, that this Court has jurisdiction and that Relators have standing, a cause of action for mandamus does not lie as Relators cannot establish the three requirements for mandamus. "To be entitled to a writ of mandamus, a party must establish, by clear and convincing evidence, (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law." *Id.* at ¶ 6, citing *State ex rel. Waters v. Spaeth*, 131 Ohio St.3d 55, 2012-Ohio-69, 960 N.E.2d 452, ¶ 6, 13. First, Relators do not have a clear legal right to apply for an EdChoice Scholarship as of February 1, 2020, nor do they have a right to the actual Scholarship. (cite for the proposition that no right to the Scholarship) Second, as the application window does not open until April 1, 2020, Respondents are under no clear legal duty to act. Finally, as stated previously, Relators have an adequate remedy at law in the form of a declaratory judgment and prohibitory injunction.

However, before the Court can address these prongs, it must first determine whether S.B. 120 is subject to referendum as the answer to that question proves dispositive of the other issues. Because S.B. 120 provides for appropriations for the current expenses of the state government and state institutions, it is not subject to referendum.

Article II, Section 1(D) of the Ohio Constitution provides, in part, "[l]aws providing for tax levies, *appropriations for the current expenses of the state government and state institutions*, and emergency laws necessary for the immediate preservation of the public peace, health or

safety, shall go into immediate effect." (Emphasis added.) These categories of laws are not subject to referendum. *Id.* All other laws are subject to the referendum process and cannot go into effect until at least 90 days after being filed by the Governor in the Secretary of State's Office. *See* Ohio Constitution, Article II, Section 1(C).

S.B. 120 is unequivocally an appropriations bill related to current expenses as it appropriates up to $10,000,000 from the General Revenue Fund, for fiscal year 2021, for first-time eligible students applying for EdChoice Scholarships for the 2020-2021 school year. Unlike other states that might operate on a yearly budget, Ohio functions using a biennial budget. Currently, Ohio is operating under the 2020-2021 budget, which was passed in 2019. *See* 2019 Am. Sub. H.B. No. 166 ("to make operating appropriations for the biennium beginning July 1, 2019, and ending June 30, 2021."). Further, S.B. 120's purpose is "to amend * * * H.B. 166 of the 133rd General Assembly * * *, and to make an appropriation." 2020 Am. Sub. S.B. No. 120. Accordingly, it is only logical to conclude that S.B. 120 is an appropriations bill related to current expenses, which exempts it from referendum. Therefore, S.B. 120 became effective immediately.

Voinovich is, once again, distinguishable from this case and should not be applied. One of things the *Voinovich* Court did was overrule the decision in *State ex rel. Riffe v. Brown*, 51 Ohio St.3d 149, 363 N.E.2d 876. In *Riffe*, this Court found that if a bill contained any appropriation for the current expenses of the state government, even if the rest of the bill was unrelated to appropriations, then the whole bill "takes effect immediately and is not subject to referendum." *Voinovich*, 69 Ohio St.3d 225, 236, 631 N.E.2d 582. In *Voinovich*, the Court was persuaded by Chief Justice O'Neill's dissent, which provides "'[a]ny section of a law which changes the permanent law of the state is subject to referendum under the powers reserved to the

people by Section 1 of Article II, even though the law also contains a section providing for an appropriation for the current expenses of the state government and state institutions under Section 1d, Article II, becomes immediately effective.'" *Id.*, quoting *Riffe* at 167 (C.J. O'Neill, dissenting). The Court proceeded to find that the nonappropriation provisions of H.B. 107 would be subject to referendum while those provisions that included an appropriation would become effective immediately. *Id.*

In this case, S.B. 120 does not *permanently* change the EdChoice Scholarship Program. S.B. 120 only applies to the 2020-2021 school year. *See* 2020 Am. Sub. S.B. 120 ("Notwithstanding anything in the Revised Code to the contrary, for applications for the 2020-2021 school year * * *."). As such, it is merely a temporary modification of the otherwise permanent, statutory framework. In other words, the laws can be read *in pari materia*. S.B. 120 does not include any language that repeals or otherwise provides for a permanent change to R.C. 3310.16 or the other aspects of the EdChoice Scholarship Program. Rather, for this upcoming school year, a temporary adjustment is being made. As the law currently stands, for the 2021-2022 school year, the current framework, including R.C. 3310.16 and the February 1 application window start date, will go back into effect.

As S.B. 120 is not subject to referendum, it is evident that Relators do not have a clear legal right to apply for EdChoice Scholarships at this time or retroactively to February 1, 2020. Under S.B. 120, the application window for EdChoice Scholarships does not open until April 1, 2020. Further, there is no clear right to the Scholarships as each student must first be determined to be eligible. Where no present injury or duty exists at the time a petition is filed, "[m]andamus will not lie to remedy the anticipated nonperformance of a duty." *Home Care Pharmacy, Inc. v. Creasy*, 67 Ohio St.2d 242, 343-344, 423 N.E.2d 482 (1981).

Similarly, Respondents do not have a clear legal duty to act here. First, once the application window is open, ODE admittedly has the duty to "accept, process, and award Scholarships * * *." R.C. 3310.16. For the 2020-2021 school year, the application window does not open until April 1, 2020. Second, there is no authority to suggest that the Governor has a duty to declare an alternate effective date of a particular law as Relators suggest. Finally, Relators fail to allege what duty, if any, the State Board of Education or the Superintendent of Public Instruction owe to ignore a validly enacted law. Accordingly, ODE and the other Respondents do not have a clear legal duty to do anything at this time and their request for a writ of mandamus must be rejected.

Finally, as previously stated, Relators have an adequate remedy in law in the form of a declaratory judgment and prohibitory injunction. This would provide them with complete relief if they were successful. Thus, even if this Court finds that mandamus was the proper avenue and that Relators have standing, Relators are nonetheless unable to establish the other requirements for a writ of mandamus.

F. Relators Fail to State a Claim Against Governor DeWine.

Relators allege no acts, omissions, or wrongdoing by Governor DeWine, and he should therefore be dismissed as a party to this action. The factual allegations of a complaint must be accepted as true when a court considers a motion to dismiss based on Civ.R. 12(B)(6). *Walgate*, 147 Ohio St.3d 1, 2016-Ohio-1176, 59 N.E.3d 1240, at ¶ 69 (Lanzinger, J., dissenting), citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). "But in the first instance, there must be factual allegations from which the court can make all reasonable inferences. If it is beyond doubt that [Relators] can prove no set of facts entitling [them] to relief, [their] claim must be dismissed. *Id.* citing *O'Brien v. Univ. Community Tenants Union, Inc.,* 42 Ohio St. 2d 242, 327 N.E. 2d 753 (1975).

Here, Relators point to one act by Governor DeWine - that he signed S.B. 120 after the General Assembly passed the bill. Compl. at 4. This act is within the Governor's scope of duties, and it simply is not an omission or wrongdoing such that Relators may bring this action against the Governor as a party. *See State ex rel. Timson v. Shoemaker*, 10th Dist. Franklin No. 02AP-1037, 2003-Ohio-4703, ¶ 17 (upheld dismissal of attorney as a party to an action when the attorney was named in the complaint only because she was the attorney in fact, and because she signed public official bonds on behalf of her principal).

IV. CONCLUSION

For the foregoing reasons, Relators' Complaint should be dismissed for failure to state a claim and because this Court lacks subject matter jurisdiction.

Respectfully submitted,

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I hereby certify that the foregoing was electronically filed and a true and accurate copy was served on February 27, 2020, by electronic mail upon the following:

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