

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case no. 2013-0945

appeal as of right in original action for extraordinary writs
from court of appeals, 12th appellate district

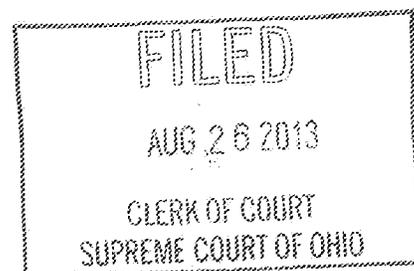
STATE OF OHIO ex rel. THE CINCINNATI ENQUIRER,

Appellee/Cross-Appellant,

-v-

HON. MICHAEL J. SAGE, et al.,

Appellant/Cross-Appellee.



Brief of amicus curiae Ohio Coalition for Open Government
supporting cross-appellant The Cincinnati Enquirer
in seeking reversal of the court of appeals' denial of writ of prohibition

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Preliminary Statement:
**Why this Court should reverse the court of appeals' decision
to uphold Judge Sage's protective order**

Judges cannot impose their opinions upon citizens' disagreements, however hotly contested, if those disagreements are not "justiciable matters" under Ohio's Constitution (Art.IV, § 4). A disagreement is not "justiciable" if the person invoking judicial power to resolve it does not need judicial relief to avert or redress an actual legal injury.¹

When Judge Michael Sage granted Prosecutor Michael Gmoser's motion to prevent public disclosure of the 911 recording at issue here, Gmoser did not need any judicial relief. He already was preventing public disclosure by steadfastly refusing to disclose the recording to the press, and he alone controlled who had access to it.

The answers to three obvious questions—that the court of appeals should have asked—expose the patent and unambiguous absence of justiciability.

Q. Did the press have the recording?

A. No.

¹ E.g., *Kincaid v. Erie Insur. Co.*, 128 Ohio St.3d 322, 323, 2010-Ohio-6036, 944 N.E.2d 207, 209, ¶ 9; *State ex rel. Elyria Foundry Co. v. Industrial Comm'n*, 82 Ohio St.3d 88, 89, 1998-Ohio-366, 694 N.E.2d 459, 460.

Q. Was anyone about to give the recording to the press?

A. No.

Q. Who was poised to publicize the recording?

A. No one.

The answers to all of those questions appeared on the face of Gmoser's motion and remained true when Judge Sage granted it three days later.

This was not a situation where Gmoser concluded that state law required him to release the recording to the press, so he sought Judge Sage's guidance to avoid jeopardizing the constitutional rights of accused murderer Michael Ray. To the contrary, Gmoser already had made up his mind. He was not going to release the recording because he had concluded firmly that the 911 recording was not a public record and that publicizing it would jeopardize Ray's Sixth Amendment right to an unbiased jury.

So by continuing his persistent refusal to disclose the recording, Gmoser could prevent exactly the public disclosure that he moved Judge Sage to order because only Gmoser and his client, the sheriff, had the recording.

Gmoser's motion for protective order identified only a contingent potential threat to his and Michael Ray's legal interests: the Cincinnati Enquirer and another

newspaper were threatening to sue under Ohio's Public Records Act to overturn Gmoser's refusal to release the recording. That suit, "if filed," Gmoser speculated, might result in a ruling for the newspapers.²

So, on the day that Michael Ray was indicted, Gmoser rushed his motion to Judge Sage, who was assigned to the just-filed Ray case. Gmoser urged Judge Sage to bar disclosure of the recording "by order of Court."³

Gmoser did not need any protective order. If the press sued, Gmoser could enjoy the benefits of judicial protection if he won that suit. Unless and until that happened, Gmoser could continue to prevent public disclosure by just saying "no."

Rushing his motion to Judge Sage was a tactic. Gmoser was trying to preempt this suit before it was filed. He wanted an order from a likely-sympathetic judge that would preclude some other court from ruling for the Enquirer when and if the Enquirer sued. Indeed, that is exactly how Gmoser tried to use Judge Sage's order when Gmoser moved to dismiss this action at its outset. (See mot. to dismiss filed in this action on July 30, 2012.)

² (Mot. for protective order at 3.)

³ (Mot. for protective order at 3.)

But regardless of *why* Gmoser rushed his motion to Judge Sage, the Ohio Constitution barred Judge Sage from granting it because Gmoser's motion was not justiciable as a matter of law. When a citizen asks to inspect a public office's record, his request does not impair any of the office's rights or legal interests. When the office denies the request, the office continues to keep the record and continues to enjoy full discretion to withhold it as the office claims the right to do. Only when the citizen sues to force the office to disclose the record does their disagreement ripen into a justiciable controversy that can support a court's jurisdiction.

This Court, therefore, should reverse the portion of the court of appeals' judgment that denied the Enquirer's request for a writ of barring Judge Sage from enforcing his order.

Amicus curiae, the Ohio Coalition for Open Government

The Ohio Coalition for Open Government is a nonprofit corporation whose members include Ohio newspapers, Ohio broadcasters, and other citizens who share a common interest in informing the public about, enforcing, and studying the laws of Ohio that obligate public offices to make their records available for public inspection and copying. The coalition was formed by the Ohio Newspaper Foundation, a nonprofit corporation controlled by most of Ohio's daily and weekly newspapers.

Aside from the coalition's general commitment to freedom of information, some coalition members have experienced situations like the one presented here. Some public offices have sued or threatened to sue some coalition members after the members said that they disagreed with offices' denials of the members' requests to inspect records. The public offices initiated or threatened those suits to get court rulings that the offices did not have to disclose the records that they already were refusing to disclose.

Citizens cannot enjoy their right to inspect government records if merely asking to see a record creates the untenable risk that they will have to defend litigation or concede that the office rightly denied the citizen's request.

Those members of the coalition contend, and the coalition itself contends, that when a public office initiates litigation to affirm its denial of a citizen's request to see the office's records, courts must end that litigation at the outset without resolving its merits. In those circumstances, the doctrines of ripeness and standing dictate that the litigation is not justiciable.

Amicus agrees with the Enquirer that the court of appeals correctly decided that Gmoser should have disclosed the 911 recording when the Enquirer asked for a copy, but offers no additional argument to support that ruling.

Statement of Facts

In addition to the facts described in the merits brief of appellee-cross appellant Cincinnati Enquirer, amicus presents the following facts from the record that are relevant to the particular focus of this brief, many of which are not mentioned in the opinion of the court of appeals below.

1. **Prosecutor Gmoser's motion for protective order.**

On June 22, 2012, a grand jury indicted Michael Ray for murdering his father, which began the prosecution in the Butler County Court of Common Pleas in *State of Ohio v. Michael Ray*, No. CR 2012 06 0941.⁴ As the Butler County Prosecutor, respondent Michael Gmoser prosecuted that case, which was assigned to respondent, Judge Michael Sage.

On the same day that the grand jury indicted Ray, Gmoser moved Judge Sage for a protective order.⁵ He asked Judge Sage "to prohibit public dissemination" of the 911 recording at issue in this appeal. (Mot. for protective order at 2.)

Gmoser said that relator Cincinnati Enquirer and another newspaper had asked the sheriff for a copy of the recording, and that Gmoser had rejected those

⁴ (*State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012, 2013 WL 2423214 at *2, 2013-Ohio-2270, ¶ 7 n.2.)

⁵ (*State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012, 2013 WL 2423214 at *2, 2013-Ohio-2270, ¶ 7 & n.2.)

requests on the sheriff's behalf. The recording, Gmoser advised, "has not been released." (Mot. for protective order at 2.)

Gmoser said that he and the sheriff had solid legal grounds for refusing to release the recording to the newspapers. He cited two provisions in Ohio's Public Records Act, R.C. 149.43, and his prosecutorial duty to avoid producing publicity that might bias Michael Ray's future jurors. (Mot. for protective order at 2-4.)

Gmoser did not file the recording with the court.⁶

He asked Judge Sage to bar public disclosure of the recording because the two requesting newspapers "have now threatened suit" under the Public Records Act if the recording "is not released." (Mot. for protective order at 2.)

That suit, "if filed," Gmoser argued, would decide whether the Public Records Act requires Gmoser to release the recording. (Mot. for prot. order at 2-3.)

Then he said: "Even if it is determined that the content of the third call is not exempt from the requirements of R.C. 149.43, the content should be protected from disclosure in this case by order of Court," emphasizing Michael Ray's fair-trial rights under the Sixth Amendment. (Mot. for prot. order at 3.)

⁶ (See *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012, 2013 WL 2423214 at *2, 2013-Ohio-2270, ¶ 8.)

Gmoser did not claim that neither he nor Ray could raise those Sixth Amendment rights fully in the “if filed” newspaper suit to block compelled release of the recording.

2. **Judge Sage’s protective order.**

Three days after Gmoser filed his motion, Judge Sage granted it from the bench after a hearing.⁷ Gmoser played the recording in chambers, but did not file it with the court, and offered no other evidence to support his motion.⁸

As journalized two days later, on June 27, 2012, Judge Sage’s order described the motion as “seeking to prohibit public dissemination” of the recording. (Prot. Order at 1.)

The order recited that Michael Ray’s attorney “orally joined” Gmoser’s motion to bar public disclosure of the recording. (Prot. Order at 1.)

The order concluded that “it is clear to this court that the Defendant’s right to a fair trial would be prejudiced by publicizing the subject recording” and that

⁷ (State ex rel. Cincinnati Enquirer v. Sage, 12th Dist. No. CA2012, 2013 WL 2423214 at *2, 2013-Ohio-2270, ¶ 8.)

⁸ (State ex rel. Cincinnati Enquirer v. Sage, 12th Dist. No. CA2012, 2013 WL 2423214 at *2, 2013-Ohio-2270, ¶ 8.)

Gmoser had satisfied his burden to persuade Judge Sage to prevent the recording “from being released.” (Prot. Order at 3.)

Judge Sage’s order did not explain why Gmoser needed to bar public release of the recording when Gmoser already exercised unfettered control over who had access to it and was staunchly refusing to disclose it publicly.

3. The Cincinnati Enquirer files this action while the prosecution of Michael Ray proceeds, and Judge Sage amends his protective order.

On June 28, 2012, the day after Judge Sage journalized his protective order, The Cincinnati Enquirer filed this action in the Court of Appeals for the Twelfth District, and filed an amended complaint in July.

Shortly after the Enquirer filed its amended complaint, and before the Enquirer had developed any evidence in discovery, respondents Gmoser and Judge Sage moved to dismiss this action on its merits. They relied on Judge Sage’s protective order, arguing that Judge Sage’s findings foreclosed the Enquirer’s ability to prevail on the merits as a matter of law. (Motion to dismiss at 3, 4, 5, filed July 30, 2012.)

About 2½ months later in mid-October, the court of appeals had not yet ruled on respondents' motion to dismiss the Enquirer's action, nor had the Enquirer filed its merits brief in this action. Ray's trial was to begin on October 15.⁹

On Thursday, October 11, a few days before Ray's trial, Judge Sage amended his protective order. The amended order recited that "the parties orally requested" that he amend his protective order to allow Gmoser to disclose the recording "immediately preceding its admission and publication to the jury in open court at the trial." The amended protective order granted that request. (Amended prot. order.)

Gmoser delivered a copy of the recording to the Enquirer on the following Monday, when a jury was empaneled in Ray's trial.¹⁰

The jury found Ray guilty three days later, on October 18. On that day, Gmoser and Judge Sage moved the court of appeals to dismiss this action as moot, and the Enquirer filed its merits brief in that court.¹¹

⁹ (See court of appeals docket in this action, CA2012-06-0122 and online docket in Butler County Court of Common Pleas docket in *State v. Ray*, No. CR 2012 06 0941.)

¹⁰ (See Butler County Court of Common Pleas docket in *State v. Ray*, No. CR 2012 06 0941 and docket of court of appeals in this action, CA2012-06-0122; *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012, 2013 WL 2423214 at *3, 2013- Ohio-2270, ¶ 12.)

The court of appeals decided the merits of this action on June 3, 2013—nearly eight months after Gmoser released the recording voluntarily at the start of Ray’s trial, and nearly one year after Gmoser asked Judge Sage to intervene because the Enquirer had “threatened suit.” That suit remains unresolved because Gmoser has chosen to appeal.

4. **The court of appeals’ analysis of Judge Sage’s protective order.**

Before evaluating Judge Sage’s protective order, the court of appeals rejected Gmoser’s arguments that the Public Records Act’s exemptions for trial preparation records and confidential law enforcement investigatory records applied to the recording. (*State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012, 2013 WL 2423214 at *5, 2013-Ohio-2270, ¶¶ 22, 23.)

But the Public Records Act has an exemption for “records the release of which is prohibited by state or federal law.” R.C. 149.43(A)(1)(v). The court of appeals said that Judge Sage’s protective order may have allowed Gmoser to withhold the recording under that exemption.¹²

...continued from previous page

¹¹ (See Butler County Court of Common Pleas docket in *State v. Ray*, No. CR 2012 06 0941 and docket of court of appeals in this action, CA2012-06-0122.)

¹² *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012, 2013 WL 2423214 at *8, 2013-Ohio-2270, ¶ 43.)

The court of appeals rejected the Enquirer's argument that Gmoser's motion was not justiciable. In doing so, the court observed that Criminal Rule 16 allows a prosecutor in discovery "to disclose evidence only to opposing counsel." *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012, 2013 WL 2423214 at *7, 2013-Ohio-2270, ¶¶ 38, 39; and see *12, ¶ 62 (Piper, J., concurring).

The court of appeals also ruled that Judge Sage had inherent authority to enter orders "restricting the litigants and their counsel from disclosing certain information relative to the litigation." *Sage*, 2013 WL 2423214 at *8, 2013-Ohio-2270, ¶ 40.)

And the court decided that Gmoser validly invoked Judge Sage's judicial authority to determine whether "information subject to the control of the court or the litigants and their counsel should be disclosed." *Sage*, 2013 WL 2423214 at *9, 2013-Ohio-2270, ¶ 46.

In making those rulings, the court of appeals did not say that any "litigants" or "counsel" who possessed the recording were going to disclose it. The court of

appeals found that Gmoser “remained steadfast” in his refusal to release the recording, which was “clear and unambiguous” and “in good faith.”¹³

Amicus Ohio Coalition for Open government urges this Court to rule that, on its face—patently and unambiguously—Gmoser’s motion for protective order was not justiciable as a matter of law. Through his unfettered control of the recording and his persistent denials of public access to it, Gmoser already was preventing the very public disclosure that he hurriedly moved Judge Sage to order. This Court should so rule and reverse the court of appeals’ judgment to the extent that the appellate court upheld Judge Sage’s jurisdiction to issue the protective order.

Argument of amicus

Proposition of law:

A citizen’s disagreement with a public office’s decision to deny a request to inspect that office’s records is not justiciable unless and until the requesting citizen sues to compel the office to disclose the records.

A. A court has no jurisdiction to resolve matters that are not ripe for judicial relief or where the litigant invoking judicial power already is achieving the relief that he is asking the court to provide.

Article IV, section 4 of Ohio’s Constitution limits the jurisdiction of common pleas courts to “justiciable matters.” A legal matter is not justiciable if it is not “ripe”

¹³ *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012, 2013 WL 2423214 at *9, *10, 2013-Ohio-2270, ¶s 45, 54.

for decision. State ex rel. Elyria Foundry Co. v. Industrial Comm'n, 82 Ohio St.3d 88, 89, 1998-Ohio-366, 694 N.E.2d 459, 460.

A matter is not ripe if it “rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” Texas v. United States, 523 U.S. 296, 300 (1998) (citations and quotation marks omitted).

Similarly, a matter is not justiciable if the litigant invoking judicial power has no legal injury for the court to remedy or redress, essential components of “standing.” E.g., Fed. Home Loan Mtge Corp. v. Schwartzwald, 134 Ohio St.3d 13, 17, 18, 2012-Ohio-5017, 979 N.E.2d 1214, 1218, 1219, 1223, ¶s 20-22, 24, 38; Kincaid v. Erie Insur. Co., 128 Ohio St.3d 322, 326, 2010-Ohio-6036, 944 N.E.2d 207, 211-212, ¶ 20.

So if the litigant already has achieved the relief that he is asking the court to order, the matter is not justiciable because the litigant has no standing. Woods v. Oak Hill Comm. Med. Ctr, Inc., 134 Ohio App.3d 261, 271, 730 N.E.2d 1037, 1044-1045 (1999).

Standing “is an indispensable element of justiciability that we may not compromise.” Woods, 134 Ohio App.3d at 271, 730 N.E.2d at 1044.

To establish standing, the litigant invoking judicial authority must show:

(1) an actual or threatened injury to the litigant’s legally-protected interest,

(2) the opponent has committed or is threatening to commit conduct that injures or jeopardizes the litigant's legal interest, and

(3) that the requested judicial relief is likely to redress the litigant's injury or threatened injury.

E.g., Moore v. City of Middleton, 133 Ohio St.3d 55, 60, 2012-Ohio-3897, 975 N.E.2d 977, 982, ¶ 22.

"These three factors—injury, causation, and redressability—constitute the irreducible constitutional minimum of standing," this Court has ruled. Moore, 133 Ohio St.3d at 60, 2012-Ohio-3897, 975 N.E.2d at 982, ¶ 22.

A litigant's standing must exist at the outset—when the litigant first invokes judicial power to resolve the problem that the litigant presents. The litigant cannot acquire standing later, while the matter is pending. Fed. Home Loan Mtge Corp., 134 Ohio St.3d at 18, 19, 22, 23, 2012-Ohio-5017, 979 N.E.2d at 1219, 1220, 1223, ¶s 24, 27, 28, 38, 41, 42; Kincaid, 128 Ohio St.3d at 326, 2010-Ohio-6036, 944 N.E.2d at 211-212, ¶s 19, 20.

Whether a matter is justiciable is a question of law, which this Court reviews *de novo*. Kincaid, 128 Ohio St.3d at 323, 2010-Ohio-6036, 944 N.E.2d at 209, ¶ 9; State ex rel. Elyria Foundry Co., 82 Ohio St.3d at 89, 1998-Ohio-366, 694 N.E.2d at 460.

B. Gmoser's motion for protective order was patently and unambiguously nonjusticiable, which deprived Judge Sage of the jurisdiction to grant it.

Gmoser presented Judge Sage with nothing justiciable when Gmoser asked for a protective order. Gmoser moved Judge Sage to bar public disclosure of a record that Gmoser already absolutely controlled; that Gmoser already was firmly refusing to disclose to the public; and that Gmoser was not going to file as a court record.¹⁴

Although Ray's counsel eventually would receive a copy of the recording in discovery, that was not a problem because Ray's counsel joined in Gmoser's motion.¹⁵ Also, Gmoser independently could constrain Ray's counsel by designating the recording in discovery as "counsel only" under Criminal Rule 16, as the court of appeals found.¹⁶

Obviously Gmoser did not need a protective order to bar *himself* or his opposing counsel from disclosing the recording. Although the court of appeals said that Judge Sage had jurisdiction to decide whether an otherwise public record

¹⁴ *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012, 2013 WL 2423214 at *2, *7, *10, 2013-Ohio-2270, ¶s 7, 37, 54.

¹⁵ Protective order at p. 1, ¶ 3.

¹⁶ *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012, 2013 WL 2423214 at *7, 2013-Ohio-2270, ¶ 38.

“ought to be sealed,” no one signaled any interest in filing it as a court record, so there was nothing to “seal.”¹⁷

Gmoser identified only one threat to the status quo: the Enquirer and another newspaper threatened to sue to overturn Gmoser’s “clear and unambiguous” denial of their requests.¹⁸ Therefore, Gmoser speculated, the newspapers might get court-ordered access to the recording before Judge Sage could empanel an unbiased jury for Ray’s trial.

But Gmoser’s fear of what might happen in an anticipated, but hypothetical newspaper lawsuit hardly presented an issue that was ripe for Judge Sage to adjudicate. Nor did it show that Gmoser needed Judge Sage’s order to avert injury to the legal interests that Gmoser asserted.

Because Gmoser exerted exclusive control over the recording and resolutely withheld it from the press, he already was preventing the public disclosure that he was asking Judge Sage to order. A citizen’s request to inspect a public office’s records impairs none of the office’s rights or legal interests. Nor does a threat to

¹⁷ *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012, 2013 WL 2423214 at *2, *7, *8, *10, 2013-Ohio-2270, ¶s 7, 37, 42, 54.

¹⁸ *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012, 2013 WL 2423214 at *9, 2013-Ohio-2270, ¶ 45; Mot. for protect. order at 2-3.

overturn a denied request because the office has no duty to reverse its decision merely because the citizen threatens to sue.

Here, if the newspapers chose not to sue, Gmoser could continue to withhold the recording until he introduced it as evidence in Ray's trial. And if the newspapers sued, as the Enquirer did here, Gmoser could present all of his evidence and arguments in that suit, which he did. Plus he could continue to withhold the recording unless and until the newspapers won a final judgment that no one could appeal.

This action's continuing pendency proves the utter fantasy in Gmoser's claimed need for a preemptive order from Judge Sage. Now, over 13 months after the Enquirer sued and nearly a year after Ray's trial ended, the Enquirer has yet to achieve a final judgment that Gmoser cannot appeal.

Gmoser's evidence before Judge Sage underscores why he would have suffered no prejudice in waiting to see if the newspapers sued. Gmoser's sole evidence before Judge Sage was the playing of the recording, which the judges below were just as capable of evaluating, as are the justices of this Court. *Sage*, 2013 WL 2423214 at *2, 2013-Ohio-2270, ¶ 8.

The California Supreme Court unanimously adopted the same justiciability analysis that the amicus urges this Court to adopt here. The City of Manhattan

Beach denied an attorney's request to see the city's records related to the hiring of a police officer. The attorney threatened to sue to enforce his request. But the city sued first, arguing that disclosing the requested records would violate the police officer's privacy. The city sought a declaratory ruling that the state open records law did not require release the requested records.

The requesting attorney moved to dismiss, arguing that the matter was not justiciable unless and until he asked a court to force the city to disclose the records. The lower courts disagreed, but the California Supreme Court reversed. The California Supreme Court called the city-initiated litigation "a waste of judicial resources" because the matter was not "ripe for adjudication."¹⁹ With reasoning similar to that urged in this brief, the Court said:

If the person requesting the records does not deem it worthwhile to bring a judicial proceeding to compel disclosure after a public agency has denied a request for disclosure, no litigation will occur and the records will not be disclosed.

....

If the petitioner chose not to file an action pursuant to section 6258, the city would not have been required to disclose the requested records.

¹⁹ *Filarsky v. Superior Court of Los Angeles*, 28 Cal.4th 419, 432, 49 P.3d 194, 201, 121 Cal. Rptr.2d 844, 852 (2002).

If the petitioner had filed an action seeking to compel disclosure..., the city could have raised all the contentions it successfully raised in its own declaratory relief action.

Filarsky v. Superior Court of Los Angeles, 28 Cal.4th 419, 432, 434, 49 P.3d 194, 200-201, 2002, 121 Cal. Rptr.2d 844, 852, 853 (2002) (“section 6258” is a provision of California’s open records law that allows requesters to sue to enforce their requests for public records; the “petitioner” before the California Supreme Court was the requesting attorney).

A unanimous Alabama Supreme Court reached a similar conclusion in an analogous situation. A newspaper’s editorials had accused a county agency of violating the state open meetings law by barring the press and the public from attending certain kinds of meetings. Instead of waiting to see if the newspaper sued, the agency sued for a court ruling that the sunshine law allowed the closed meetings. Deciding that “anticipation of future litigation” is insufficient to create a justiciable controversy, the Alabama Supreme Court upheld the trial court’s dismissal of the agency’s suit. Huntsville-Madison County Airport Auth. v. Huntsville Times, 564 So.2d 904, 905 (1990).

For essentially the same reasons, this Court should rule that Gmoser’s preemptive strike was nonjusticiable on its face, which unambiguously deprived Judge Sage of jurisdiction to grant it.

Conclusion

Prosecutor Gmoser's motion for protective order was grossly premature.

Gmoser's claimed need for Judge Sage to intervene rested on three contingent future events. The first was that the newspapers would sue to get the recording before Michael Ray went to trial. The second was that the newspapers would win such a suit before Michael Ray went to trial. The third was that the newspapers would win such a suit before Ray went to trial *and* that something would prevent Gmoser from appealing.

The first event was uncertain; the second and third were impossible.

Yet even if those impossible future events were certain to happen before Ray's trial started, they could not have made Gmoser's motion for protective order justiciable. Gmoser had no standing to ask Judge Sage to order "no-public-disclosure" of a record that Gmoser already and unwaveringly was refusing to disclose. The issue was not ripe when Judge Sage decided it. Although phrased as a command, the practical function of Judge Sage's protective order was that of an advisory opinion—merely validating Gmoser's ongoing choice not to release the recording— and thus violated Article IV, section 4 of Ohio's Constitution.

The court of appeals should have recognized that and ruled that Judge Sage had no jurisdiction to grant Gmoser's motion. This Court should reverse the court of appeals' denial of the Enquirer's request for a writ of prohibition.



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for Open Government

Certificate of Service

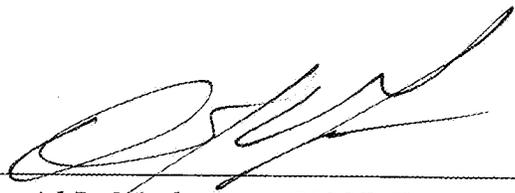
A copy of the foregoing Brief of amicus curiae Ohio Coalition for Open Government was served this 26th day of August, 2013, by regular First-Class U.S. mail, on the following:

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