IN THE SUPREME COURT OF THE STATE OF OREGON

MT & M GAMING, INC., a Washington corporation

Petitioner on Review,

v.

CITY OF PORTLAND, an Oregon municipal corporation,

Respondent on Review.

Brief of ACLU Foundation of Oregon, Inc., as *Amicus Curiae*

SC No. S063648
CA No. A154206
TC No. 121114443

Petition for Review of a Decision of the Court of Appeals
on Appeal from a Judgment of the Multnomah County Circuit Court,
by the Honorable Henry c. Breithaupt, Judge pro tempore

Decision Filed:	September 30, 2015
Author:	Egan, J.
Concurring:	Armstrong, P.J., and Nakamoto, J.

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I. INTRODUCTION

The court should review the Court of Appeals decision, which announces a new a requirement standing to seek an interpretation of law under the Uniform Declaratory Judgments Act (UDJA), ORS 28.010 to 28.160. It's not enough, the Court of Appeals said, for the plaintiff to be "economically harmed" by the government's interpretation of the law – it also has to be "subject to" the law. *MT & M Gaming, Inc. v. City of Portland*, 274 Or App 100, 106, ___ P3d ___ (September 30, 2015). That new standing requirement seems inconsistent with the text of the UDJA and this court's precedents, as explained below. But the bigger problem with the Court of Appeals decision is its practical effect: it shuts the courthouse door to some of the people most in need of getting in. The people most interested in obtaining a judicial interpretation of a law are, not surprisingly, those whom the law burdens financially. But they won't have standing to seek that relief, if they are not themselves engaged in the activity the law regulates, according to the Court of Appeals decision. To preserve access to justice, this court should agree to review this new and restrictive view of standing under the UDJA.

II. BACKGROUND

MT & M Gaming (MT & M), the petitioner on review, is a Washington corporation that operates a casino just north of Portland. In recent years, the city has issued permits to Portland businesses that offer poker and other games of chance to customers who pay a membership fee. MT & M thinks the new businesses have drawn patrons and, hence, revenue away from its casino. And, for present purposes, there is no dispute that they have. MT & M also thinks that the businesses don't fit the "social games" exception to the definition of "gambling" in ORS 167.117[1] and,

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[1] ORS 167.117 provides in part:

"(7) 'Gambling' means that a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under the control or influence of the person, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome. 'Gambling' does not include:

"* * * * *

"(c) Social games.

"* * * * *

"(21) 'Social games' means:

"* * * * *

"(b) * * * [A] game, other than a lottery, between players in a private business, private club or place of public accommodation where no house

therefore, that the businesses are engaged in unlawful gambling under ORS 167.127. So MT & M brought this action for a judicial declaration to that effect.

The trial court dismissed the case summarily, concluding that MT & M lacked standing to pursue this action because it "neither alleged nor made any showing that it is in the legal 'system' it challenges, nor even that it seeks to be and has been prevented from participating in that legal 'system.'" *MT & M Gaming*, 274 Or App at 102.

The Court of Appeals agreed. It held that MT & M lacked standing, even if it was harmed economically by the city's alleged misinterpretation of the gambling laws. The court explained that economic harm alone is not enough to confer standing. The UDJA, the court said, "requires something more." *Id.* at 100. More precisely, it requires that MT & M itself be "subject to" the law it wants the court to construe:

> "[E]ven if MT & M has shown that it has been economically affected by the city's grant of permits to poker clubs operating in Portland, it has failed to show that that economic effect has any relationship to its present legal interest. Indeed, it appears that MT &M, which has not alleged that it does business or owns property in Oregon, is not subject to the laws it asks the court to construe and, in fact, has no legal interests in the state. Consequently, even assuming that [plaintiff] was economically

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player, house bank or house odds exist and there is no house income from the operation of the social game."

> harmed, such harm alone is insufficient to confer standing under ORS 28.020."

274 Or App at 100.

The court did not explain what it meant by "not subject to." It appears, however, that the court meant MT & M is not *itself* operating poker clubs in Oregon that might fit the "social games" exception in ORS 167.117(21), as the city construes it.[2]

III. QUESTION PRESENTED

If a person is harmed economically by the government's interpretation of a law, but is not engaged in the activity that the law regulates, does the person have standing to bring an action for a judicial declaration of the law's intent?

IV. PROPOSED RULE

A person who is harmed economically by the government's interpretation of a law, but who is not engaged in the activity that the law regulates, nevertheless has has standing to bring an action for a judicial declaration of the law's intent.

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[2] As explained in the petition for review, petitioner thought about opening its own fee-based card room in Oregon. But was deterred by the Attorney General opinion that such operations constitute unlawful gambling, Pet for Rev 2-3, an opinion that the city, apparently, disputes.

V. REASONS FOR REVERSAL

The Court of Appeals decision is inconsistent with the relevant statutory language and with a decision by this court interpreting that language.

The UDJA provides that courts "have the power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." ORS 28.010. It then provides that any person whose "rights" are "affected" by a statute "may have determined any question of construction" under the statute or law – in other words, may have a court construe the statute. ORS 28.020.[3] The statute doesn't define "rights," but the plain and ordinary meaning of that term is broad enough to include the right of business to be free of harm from unlawful competition. *See Webster's Third New Int'l Dictionary* 1955 (unabridged ed 2002) ("**right * * * 2 :** something to which one has a just claim: as * * * the power or privilege to which one is

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[3] ORS 28.020 reads:

> "Any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

justly entitled (as upon principles of morality, religion, law, or custom)").[4] MT & M has the right, then, not to have to compete for customers with fee-based poker clubs that violate the gambling laws. And that right is "affected" by the city's conclusion that the clubs operate "social games" within the meaning of ORS 167.117(21). *See Webster's* at 35 ("**affect** * * * "to have a detrimental influence upon – used *esp.* in the phrase *affecting commerce*"). That should be sufficient under ORS 28.020 to let MT & M seek a judicial declaration that the city has misinterpreted that statute.

This court's decision in *League of Oregon Cities v. State*, 334 Or 645, 56 P3d 892 (2002), supports that conclusion. *League* involved Ballot Measure 7 (2000), a voter-approved initiative, that required local governments to compensate landowners for land-use regulations that affected the value of their property or else waive the regulations as to that property. The plaintiffs sought a judicial declaration that the measure was invalid because it had not been properly enacted. The defendants argued that none of the plaintiffs had standing to seek that relief, but this court ruled otherwise. In discussing the affect-rights requirement in ORS 28.020, the

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[4] This court assumes that "the legislature intended to give words of common usage their "plain, natural, and ordinary meaning." *State v. Clemente-Perez*, 357 Or 745, 756, 359 P3d 232 (2015). Dictionaries are authorities on the meanings of words, and the one this court favors is the one cited in the text.

court said that "a plaintiff must show some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law," and, in addition, must show that the injury or other impact is not "too speculative." 334 Or at 658. Two of the plaintiffs made that showing, the court said. One was a rancher who testified that Measure 7 would lead to increased development around his property, some of it incompatible with ranching. And that, he said, would "interfere with my ability to continue ranching and * * * would thus jeopardize a portion of my income." *Id.* at 660-61. The other plaintiff owned a home in Jacksonville that would decrease in value if, in response to the measure, the county waived regulations that prevented a neighbor from developing an aggregate mine on her property. *Id.* at 660.

To be sure, these two plaintiffs were landowners and, therefore, were subject to Measure 7 in the sense that they, too, could have sought compensation for or relief from the land-use regulations that affected their properties, if there were any. But that wasn't the basis of their claims, and that wasn't why this court said they had standing. The court focused on how the measure would harm them financially – "how Measure 7 would lead to increased development and how, specifically, that increased development would injure them," *id.* at 661 – not on whether they were themselves

subject to the measure they sought to invalidate. There is no reason to believe that the rancher would not have had standing to bring the action if he had rented his ranch rather than owned it.

The Court of Appeals decision is likewise at odds with this court's opinion in *Morgan v. Sisters Sch. Dist. No. 6*, 353 Or 189, 301 P3d 419 (2013). The plaintiff in *Morgan*, a taxpayer and voter, sought a judicial declaration that a school district lacked legal authority to enter into a particular form of financing arrangement without an election. The trial court dismissed the case on standing grounds, and this court affirmed. The court said that the "test" for standing to seek a declaration under the UDJA involved "three related but separate considerations": (1) "there must be some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law"; (2) "the injury must be real or probable, not hypothetical or speculative"; and (3) "the court's decision must have a practical effect on the rights that the plaintiff is seeking to vindicate." 353 Or at 195-97 (citations and internal quotation marks omitted). The court did not say that, in addition, the plaintiff must be "subject to" the law it wants the court to construe. That wasn't a fourth consideration.

This case seems to meet *Morgan*'s three-part test. MT & M is seeking to redress for an injury to its economic interests, not simply to satisfy some curiosity about the law. The injury is real, not speculative or hypothetical. (That much is all but conceded.) And the injury would be remedied if the court were to grant the relief requested – a declaration that MT & M's competitors are engaged in unlawful gambling.

In sum, there is no apparent support, in the statutory text or this court's precedents, for the news "subject to" requirement for standing under UDJA.

VI. REASONS FOR REVIEW

This case meets several of this court's criteria for review:

(1) It presents an issue of law that is important, *see* ORAP 9.07(1)(f), and recurring. *See* ORAP 9.07(2). Declaratory judgment actions are commonplace, as this court can tell from just looking at the advance sheets. In the past six months, this court and the one below have decided seven cases, including this one, that were brought under the UDJA to challenge government interpretations of the law. *See Couey v. Atkins*, 357 Or 460, 355 P3d 866 (2015); *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or

437, 353 P3d 581(2015); *Stewart Title Guaranty Co. v. DCBS*, 272 Or App 138, 354 P3d 744 (2015); *Doyle v. City of Medford*, 271 Or App 458, 351 P3d 768 (2015); *Bova v. City of Medford*, 271 Or App 452, 350 P3d 607 (2015); *Hicks v. Cent. Point Sch. Dist.*, 270 Or App 532, 348 P3d 307, *rev den*, 357 Or 743 (2015).

(2) The issues presented are state-law issues. *See* ORAP 9.07(4). And they are ones of first impression. *See* ORAP 9.07(5). As noted, no prior case has recognized a "subject to" requirement for actions brought under UDJA to challenge the government's interpretation of the law.

(3) The argument for standing is preserved. *See* ORAP 9.07(7).

(4) The Court of Appeals published an opinion. *See* ORAP 9.07(11).

(5) The Court of Appeals decision appears to be wrong, for reasons noted above, if not others. *See* ORAP 9.07(14).

(6) Finally, and perhaps most importantly, the Court of Appeals decision will preclude judicial resolution of a great many legal disputes.

People are often affected by government interpretations of laws that regulate activities they don't themselves engage in and thus are not themselves "subject to." The homeowners downwind of the farm are affected by the Department of Agriculture's interpretation of laws that regulate the application of pesticides. The commercial fishermen at the coast are affected by the Department of Forestry's interpretation of laws that regulate logging next to salmon-spawning grounds. Similarly, a casino operator in La Center is affected by Portland's decision to permit poker clubs within the casino's market despite Oregon's gambling laws. These aggrieved parties are not "subject to" the laws they think the government is misconstruing. So they can't seek relief in the courts, except perhaps through an action for damages, under the Court of Appeals decision.

VII. CONCLUSION

A declaratory judgment action can be an invaluable tool for resolving disputes about the law. It's efficient, effective, and relatively inexpensive. Unfortunately, fewer people will have access to that remedy under the Court of Appeals' interpretation of the standing requirements in the UDJA. This court should allow review to determine whether that ruling is itself a correct interpretation of law.

The court should allow review.

Respectfully submitted,

s/ Thomas M. Christ

Thomas M. Christ

For the ACLU Foundation of Oregon Inc.

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I certify that the word count of this brief, as described in ORAP 5.05(2)(a), is 2,409 words.

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s/ Thomas M. Christ

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Certificate of Filing and Service

I certify that I filed the attached Brief by electronic filing on December 4, 2015. I further certify that on the same date, I served a copy on the following lawyer(s) by the electronic service function of the eFiling system (for registered eFilers) and by first-class mail, with postage prepaid (for non-eFilers):

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