No. A23-1738

State of Minnesota
In Supreme Court

In the Matter of the Minnesota Racing Commission's Approval of Running Aces Casino, Hotel & Racetrack's Request to Amend its Plan of Operation,

Shakopee Mdewakanton Sioux Community,

***Appellant/Cross-Respondent*,**

vs.

Minnesota Racing Commission, and North Metro Harness Initiative, LLC, d/b/a Running Aces Casino, Hotel & Racetrack

***Respondents/Cross-Appellant*.**

REPLY BRIEF OF RESPONDENT AND CROSS-APPELLANT NORTH METRO HARNESS INITIATIVE, LLC, D/B/A RUNNING ACES CASINO, HOTEL & RACETRACK

[Counsel listed on following page]

KEITH ELLISON
Attorney General
State of Minnesota

Ryan Pesch (#0398743)
ryan.pesch@ag.state.mn.us
445 Minnesota Street, Suite 1400
St. Paul, MN 555101-2131
Phone: 651-296-3353

Attorneys for Respondent Minnesota Racing Commission

Erica A. Holzer (#0395234)
Evan A. Nelson (#0398639)
Carly J. Johnson (#0402704)
MASLON LLP
erica.holzer@maslon.com
evan.nelson@maslon.com
carly.johnson@maslon.com
225 South Sixth Street, Suite 2900
Minneapolis, MN 55402
(612) 672-8200

Attorneys for Respondent/Cross-Appellant North Metro Harness Initiative, LLC, d/b/a Running Aces Casino, Hotel & Racetrack

Joshua T. Peterson (#397319)
Allison J. Mitchell (#0402134)
Casey L. Matthiesen (#0402192)
FAEGRE DRINKER BIDDLE & REATH LLP
josh.peterson@faegredrinker.com
allison.mitchell@faegredrinker.com
casey.matthiesen@faegredrinker.com
2200 Wells Fargo Center
90 So. Seventh Street
Minneapolis, MN 55402
Phone: 612-766-7000

Attorneys for Appellant/Cross-Respondent Shakopee Mdewakanton Sioux Community

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

TABLE OF AUTHORITIES

ARGUMENT

I. THE COMMUNITY DOES NOT HAVE STANDING TO BRING A CERTIORARI CHALLENGE TO ITS COMPETITOR'S LICENSE

North Metro Harness, LLC, d/b/a Running Aces Casino, Hotel & Racetrack ("Running Aces") operates a card club pursuant to its license and approved plan of operation granted by the Minnesota Racing Commission (the "Commission"). *See* Minn. Stat. § 240.30, subd. 1. The Shakopee Mdewakanton Sioux Community (the "Community") also offers card playing at its casino. (*See* Br. of App./Cross-Resp. Shakopee Mdewakanton Sioux Community ("Comm.'s Opening Br.") at 4 (noting the Community's blackjack compact was approved in 1991).) The Community and Running Aces are competitors in Minnesota's regulated card-playing gambling industry.

The Community concedes it can only have standing for this challenge if it can allege it has suffered "injury in fact." (Reply Br. of App./Cross-Resp. Shakopee Mdewakanton Sioux Community ("Comm.'s Reply Br.") at 3.) While claiming there are "three reasons" for standing, the Community collects its entire argument for standing under the heading "The Community Has Suffered an Injury in Fact." (*Id.* at 2, 4-13.) In this context, the purported injury in fact is an "injury to a legally protected right, including a statutory grant of limited competition." (*Id.* at 3 (quotation omitted)); *see also Minn. Voters All. v. Hunt*, 10 N.W.3d 163, 167 (Minn. 2024) ("injury in fact" is "a concrete and particularized invasion of a legally protected interest" (citation omitted)). But there is no "statutory grant of limited competition" regarding card playing that would preclude the Commission from allowing Running Aces to offer Dealer Assist ETG tables with player stations. On the contrary, the legislature encourages card playing at race track licensees, including Running Aces, pursuant to the "intent of the

legislature that the proceeds of the card playing activities authorized by [Minn. Stat. ch. 240] be used to improve the horse racing industry by improving purses." Minn. Stat. § 240.135(c).

The Community's argument for standing is built on two faulty premises. First, the Community argues that the Commission has somehow conceded that the Community has standing because it consulted with the Commission pursuant to Minn. Stat. § 10.65. But this statute expressly disclaims that it confers any right for judicial review. Further, the Community does not argue that Minn. Stat. § 10.65 was a "legislative enactment granting standing," which is the standard for whether the Community has standing here. *Minn. Voters All.*, 10 N.W.3d at 167. And in any event, this Court, and not the Commission, determines whether the Community has standing. Second, the Community argues that Minnesota's card club statutes and criminal statutes, which the Community would have the Commission enforce in the Community's favor, confer standing. Those statutes do not confer standing. The card club statutes do not indicate a legislative preference to restrict card-playing competition in favor of the Community. On the contrary, the card club statutes were written to grant a restricted competition interest in favor of Running Aces and any other Minnesota horse racing track. And the criminal statutes do not confer standing for the very simple reason that the Community has no authority to enforce Minnesota's criminal code.

A. Standard of review—a modest bar is still a bar

The Community argues that the "[b]ar for [s]tanding to [a]ppeal an [a]gency [d]ecision is [m]odest." (Comm.'s Reply Br. at 3.) It may be true that a case describes standing for reviewing an agency determination as "a low hurdle." (*Id.* (quoting *In re Appeal of the Selection*

Process for the Position of Electrician, 647 N.W.2d 242, 247 (Minn. App. 2004)).) This argument, however, improperly diminishes the importance of standing.

Standing must always be established and for good reason. Standing is an "essential element of jurisdiction." *Minn. Voters All.*, 10 N.W.3d at 167 (quoting *Glaze v. State*, 909 N.W.2d 322, 325 (Minn. 2018)).

> Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court. If a plaintiff lacks standing to bring a suit, the attempt to do so fails. Standing is acquired in two ways: either the plaintiff has suffered some injury-in-fact or the plaintiff is the beneficiary of some legislative enactment granting standing. The goal of the standing requirement is to ensure that issues before the courts will be vigorously and adequately presented.

State by Humphrey v. Philip Morris Inc., 551 N.W.2d 490, 493 (Minn. 1996) (internal quotations and citations omitted.) Standing "gives some assurance that the issues will be fully and competently explored." *Metro. Sports Facilities Comm'n v. Cnty. of Hennepin*, 451 N.W.2d 319, 321 (Minn. 1990).

This is especially important here. The thrust of the Community's challenge is that Dealer Assist ETGs offered at Running Aces are prohibited gambling devices (they are not). But the agency tasked with making such determinations, the Minnesota Department of Public Safety, Alcohol and Gambling Enforcement Division (the "AGE"), is not a party here and was not the deciding agency below. Nor was AGE the deciding agency when Dealer Assist ETGs were first approved in 2017. (R.82.)[1] Notably, the AGE *was* involved in determining that Table Master was a prohibited gambling device in previous litigation. (R.107-18.) The

[1] Citations to the record on appeal are "R.xxx."

Community essentially wants to be a deputy of the AGE seeking a judicial determination that the Dealer Assist ETGs at Running Aces are illegal gambling devices. But the AGE has made no such determination and the Community does not have the authority to do so on its own.

The Community concedes that it must establish standing by sufficiently alleging it has suffered injury-in-fact. (Comm.'s Reply Br. at 3.) This is in important "hurdle" it must—but cannot—clear.

B. The fact that the Commission consulted with the Community on this issue does not confer standing for judicial review

The Commission consulted with the Community prior to approving Running Aces' floor plan. (R.289.) The Community argues that because a consultation occurred under Minn. Stat. § 10.65, it must mean that the Commission deemed that the Community has standing for a certiorari appeal. (*See* Comm. Reply Br. at 4-5.) The Community's argument is misguided.

As an initial matter, the Community appears to argue that standing is a factual determination, by claiming that the Commission's "actions and statements provide strong *evidence* that the Community has standing." (*Id.* at 5 (emphasis added).) Standing, of course, is a question of law reviewable *de novo* at any stage of the case. *Minn. Voters All.*, 10 N.W.3d at 167; *Glaze*, 909 N.W.2d at 325. The fact that the Community participated in the process does not confer standing. *See In re Pappas Senate Comm.*, 488 N.W.2d 795, 798 (Minn. 1992) ("[M]ere participation in agency proceedings does not confer standing to appeal.")

More to the point, Minn. Stat. § 10.65 *expressly disclaims* that it confers standing for this challenge.

> This section is not intended to, and does not, create any right to administrative or judicial review, or any other right, benefit, or responsibility, substantive or procedural, enforceable against the

> state of Minnesota, its agencies or instrumentalities, its officers or employees, or its subdivisions or any other persons.

Minn. Stat. § 10.65, subd. 4. This makes sense, as a consultation under this section does not require a voting quorum of the agency, does not result in a decision, and does not produce a record of decision. *See* Minn. Stat. § 10.65, subd. 2(2) ("Consultation is the proactive, affirmative process of identifying and seeking input from appropriate Tribal governments ...."), subd. 3(g) (formal consultation is not necessary); *see also generally* Minn. Stat. § 10.65 (listing no requirement for whom from an agency must attend the consultation). Judicial review on a writ of certiorari requires a decision and requires a record. *See Lancaster v. Dep't of Human Services*, 18 N.W.3d 80, 83 (Minn. 2025) (certiorari appeal of quasi-judicial decision requires a "binding decision regarding the disputed claim"), Minn. Stat. § 14.68 (the review is based on the record of decision).

Obviously, this certiorari challenge is a judicial review, as the Community seeks review of the Commission's quasi-judicial decision. (Comm.'s Opening Br. at 30 ("The Commission's approval of the 2023 Amended Plan of Operation is reviewed as a quasi-judicial decision.").) If the Community has a right to such review, it cannot come from a consultation under Minn. Stat. § 10.65, which produced neither a decision nor a record.

Further, Minn. Stat. § 10.65 expressly disclaims the creation of "any" right on the Community's behalf "enforceable against the state of Minnesota." Minn. Stat. § 10.65, subd. 4. While eliminating competition from Running Aces is obviously the goal of the Community's legal strategy, the Community has brought a certiorari challenge to *the Commission's decision*. But Minn. Stat. § 10.65 cannot be used *against the Commission*.

In sum, the fact that a consultation took place under Minn. Stat. § 10.65 does not—and cannot—confer standing.

The Community addresses this argument in a footnote, arguing that the statutory language only "pertains to the right of a tribe to appeal an agency's failure to consult." (Comm.'s Reply Br. at 4 n.1.) The Community misreads the statute. The statute clearly disclaims "*any* right to administrative or judicial review." Minn. Stat. § 10.65, subd. 4 (emphasis added). Because the statute does not create any right to judicial review, it cannot create standing. And because the statute does not create any right enforceable against the State or its agencies, it does not confer standing to bring a certiorari challenge to the Commission's decision.

C. The statutes at issue in this appeal are not a "legislative enactment granting standing" to the Community

1. The card club statutes do not confer standing

The Community argues that Minnesota has "by statute created a competition-restricted environment that allows tribal casinos to operate video games of chance commercially without interference from card clubs." (Comm.'s Reply Br. at 5.)[2] The approval at issue, however, was

[2] As noted in its opening brief, Running Aces does not concede that the Community may offer video games of chance at its casino, but that issue is not before this Court. *North Metro Harness Initiative LLC, v. Beattie, et al.*, No. 24-cv-01369 (PJS/LIB), Dkt. No. 85 (D. Minn. March 11, 2025), at 2 (dismissing without prejudice Running Aces' suit alleging "five tribal casinos in Minnesota ... are offering (or have offered) certain types of illegal gaming"); (Brief of Resp. and Cross-Appellant North Metro Harness Initiative, LLC, d/b/a Running Aces Casino, Hotel & Racetrack ("Running Aces Br.") at 20 n.7). That said, whatever rights the Community had to operate video games of chance are not at all impacted by the Commission's decision. The Community is not a licensee of the Commission. The Community does not require the Commission's approval for its casino operations, and the Commission has no authority to curtail nor approve the Community's gaming offerings.

issued under statutes allowing regulated card playing at Minnesota's racetracks. Minn. Stat. § 240.30, subd. 1. There is no legislative preference in favor of the Community for competition in the regulated industry of card gaming. As set forth in Running Aces' opening brief, Minnesota gambling laws were not enacted to grant Tribal casinos a monopoly on gambling, but instead reflect the State's interest in regulating the industry. (Running Aces Br. at 21-23.) Indeed, the card-playing statutes were enacted at a time when the Tribal casinos had a monopoly on card playing. (*Id.* at 23 n.10.) The legislature never intended for the Community to have a competitive advantage over Running Aces when it comes to card playing. Instead, the legislature wanted to advantage horse racetracks in Minnesota by allowing them to capture card club revenues to support the horse racing industry. Minn. Stat. § 240.135(c) ("It is the intent of the legislature that the proceeds of the card playing activities authorized by [Minn. Stat. ch. 240] be used to improve the horse racing industry by improving purses."); (*see also* Br. of Amicus Curiae Canterbury Park at 4-14).

The Community and Running Aces are competitors on equal footing to offer card-playing gambling. While, theoretically, if more people go to Running Aces for card playing,

fewer will go to the Community, there is no evidence that this is the case.[3] Even so, "economic injury [that] results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations." *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 5-6 (1968). To have standing, the Community "must show an injury or threat *to a particular right of [its] own*, as distinguished from the public's interest in the administration of the law." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940) (emphasis added). Thus, only when "the *particular statutory provision invoked* does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision." *Hardin*, 390 U.S. at 5-6 (emphasis added).

The Community is seeking compliance with card-room statutes of Minn. Stat. ch. 240. Specifically, the Community is seeking compliance with Minn. Stat. § 240.30, which allows for card playing at licensed facilities that submit plans of operation. (Comm.'s Reply Br. at 6); Minn. Stat. § 240.30; *see also* Minn. Stat. § 240.01, subds. 4-5 (defining card clubs and card playing). The Community also points to statutes passed in 2024, while this litigation was pending. (Comm.'s Reply Br. at 6.) This legislation merely clarifies that the Commission does

[3] There is nothing in the record to demonstrate that the Community has *actually* suffered loss of revenue or any other harm because Running Aces offers Dealer Assist ETGs. Given that Running Aces has offered Dealer Assist ETGs since 2017 (R.82), the Community has had ample opportunity to provide evidence, rather than mere speculation, of harm. The Community, meanwhile, seeks relief that would significantly harm the racetracks and the horse racing industry the Commission was created to protect. As noted in Canterbury Park Entertainment LLC's amicus brief, card club revenues increased by almost $30 million in 2018, the year after the introduction of Dealer Assist ETGs. (Br. of Amicus Curiae Canterbury Park at 11.) "For the past ten years, [Dealer Assist] ETGs have been in use and contributing to revenues at both Running Aces and Canterbury Park. If the revenue contributed by [Dealer Assist] ETGs were suddenly taken away, ... the loss would further exacerbate existing revenue concerns in the horse racing industry." (*Id.* at 11-12.)

not have "authority to approve or regulate ... video games of chance and other gambling devices, by means of ... the review and approval of a plan of operation or proposed or amended plan of operation" and racetracks may not offer "video games of chance[] or other gambling devices." Minn. Stat. §§ 240.071, .231.[4] Ultimately, the Community is seeking compliance with chapter 240, ignoring the fact that the Community is not a licensee under chapter 240. The statute does not evince a "legislative purpose to protect a competitive interest" in favor of the Community.

2. Criminal statutes do not confer standing

The Community attempts to avoid this conclusion by arguing its standing arises from criminal statutes regarding prohibited gambling devices, namely, Minn. Stat. §§ 609.755, 609.76, subd. 1(5). (Comm.'s Reply Br. at 6). Minn. Stat. § 609.755 makes it a misdemeanor to "except where authorized by statute, possesses a gambling device." Minn. Stat. § 609.76, subd. 1(5) makes it a gross misdemeanor to "provide[], in whole or any part thereof, any gambling device ...." The Community cannot "commence and maintain private prosecutions for alleged violations of [Minnesota's] criminal law." *State ex rel. Wild v. Otis*, 257 N.W.2d 361, 363 (Minn. 1977). It stands to reason that the Community cannot claim criminal statutes that it cannot enforce somehow grant it standing to challenge the Commission's decision. *See Perkins*, 310 U.S. at 125 (stating that to have standing, a person "must show an injury or threat to a

[4] These laws did not explicitly bar Dealer Assist ETGs, which have been at Running Aces since 2017. *See* Minn. Stat. §§ 240.071, .031. When the statutes were drafted, considered, and passed, not only was this litigation pending but Running Aces had been offering Dealer Assist ETGs since 2017. (R.82.) The statutes' silence as to Dealer Assist ETG indicates that the legislature does not disapprove of Dealer Assist ETGs.

particular right of their own, as distinguished from the public's interest in the administration of the law").[5]

D. The Community's unsubstantiated claims that Dealer Assist ETGs will harm the Community do not confer standing

The Community's final argument for standing is that "Running Aces', and Canterbury Park's, operation of [Dealer Assist ETGs] threatens the revenues received from the Community's gaming operations ...." (Comm.'s Reply Br. at 12.)[6] But Dealer Assist ETGs have been at Running Aces (and Canterbury Park) since 2017. (R.82; *see also* Br. of Amicus Curiae Canterbury Park at 11-12.) Despite this long-standing use, the Community offers no evidence of actual harm but instead relies on the specter of "the threat of economic loss to the Community from these games." (Comm.'s Reply Br. at 12-13.) In this context, the Community's goal is laid bare: it wants to eliminate all current and future competition. This is the "run-of-the-mill competitor case." (*Id.* at 13.) But under Minnesota law, the threat of increased competition is not injury in fact and cannot confer standing. *See Hardin*, 390 U.S. at 5-6.

[5] The point here is that the Community does not have standing to enforce Minnesota's criminal laws in Minnesota courts. This is not meant to impugn the Community's jurisdiction to enforce its own laws. *See State v. Thompson*, 929 N.W.2d 21, 30 (Minn. Ct. App. 2019) ("Indian tribes retain inherent authority to prosecute Indians for violations of the tribe's criminal code that are committed on the tribe's reservation.")

[6] The Community has made several transparent efforts to denigrate Running Aces because of its ownership. (Comm.'s Reply Br. at 12; Comm.'s Br. at 5 ("now controlled by a Connecticut-based, billion-dollar hedge fund—Running Aces' mission is maximize its return on investment.").) These slights are irrelevant and should be ignored.

CONCLUSION

For these reasons and those articulated in Running Aces' opening brief, the Community does not have standing for the certiorari challenge to Commission's approval of Running Aces' card club floor plan. The Court should dismiss this appeal.

Dated: May 7, 2025

MASLON LLP

By: */s/ Evan A. Nelson*
Erica A. Holzer (#0395234)
Evan A. Nelson (#0398639)
Carly J. Johnson (#0402704)
225 South Sixth Street, Suite 2900
Minneapolis, MN 55402
(612) 672-8200
erica.holzer@maslon.com
evan.nelson@maslon.com
carly.johnson@maslon.com

Attorneys for Respondent/Cross-Appellant North Metro Harness Initiative, LLC, d/b/a Running Aces Casino, Hotel & Racetrack

Certificate of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 3,037 words. This brief was prepared using Word for Microsoft 365.

Dated: May 7, 2025

MASLON LLP

By:*/s/ Evan A. Nelson*

Erica A. Holzer (#0395234)
Evan A. Nelson (#0398639)
Carly J. Johnson (#0402704)
225 South Sixth Street, Suite 2900
Minneapolis, MN 55402
(612) 672-8200
erica.holzer@maslon.com
evan.nelson@maslon.com
carly.johnson@maslon.com

Attorneys for Respondent/Cross-Appellant North Metro Harness Initiative, LLC, d/b/a Running Aces Casino, Hotel & Racetrack