IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

CIVIL DIVISION

STATE ex rel. ROBERT L. WALGATE Jr., et al.,	:	
Relators-Plaintiffs,	:	**Case No. 11 CVH-10-13126**
	:	**JUDGE TIMOTHY S. HORTON**
vs.	:	
JOHN R. KASICH, Governor, et al.,	:	
Respondents-Defendants.	:	

DECISION AND ENTRY

GRANTING DEFENDANTS' MOTIONS TO DISMISS FILED COLLECTIVELY ON DECEMBER 9, 2011

AND

HOLDING MOOT THE MOTIONS FOR JUDGMENT ON THE PLEADINGS FILED BY THE INTERVENING DEFENDANTS ON FEBRUARY 24, 28 AND 29, 2012

This matter is before the Court upon Respondents-Defendants' Motions to Dismiss, collectively filed on December 9, 2011. Defendants seek to dismiss pursuant to Ohio Civ. R. 12(B)(6).

On December 9, 2011, Respondents-Defendants' Ohio Casino Control Commission, Chairman Jo Ann Davidson, Vice Chairman June E. Taylor, Executive Director Matt Schuler, and Commissioners Martin R. Hoke, Ranjan Manoranjan, Peter R. Silverman, John S. Steinhauer, and McKinley E. Brown (collectively "Casino Control Commission") filed a Motion to Dismiss. On January 23, 2012, Relators-Plaintiffs Robert L. Walgate, Jr., The American Policy Roundtable dba Ohio Roundtable ("Ohio Roundtable"), David P. Zanotti, Sandra L. Walgate, Agnew Sign & Lighting, Inc., Linda Agnew, Paula Bolyard, Jeffrey Malek and Michelle Watkins-Malek, Thomas Donna Adams, Joe Abraham, and Frederick Kinsey (collectively

"Plaintiffs") filed a Memorandum Contra to Ohio Casino Control Commission's Motion to Dismiss. On February 9, 2012, the Ohio Casino Control Commission filed a Reply.

On December 9, 2011, Respondent-Defendant Ohio Governor John R. Kasich ("Governor Kasich") filed a Motion to Dismiss. On January 23, 2012, Plaintiffs filed a Memorandum Contra to Governor Kasich's Motion to Dismiss. On February 2, 2012, Governor Kasich filed a Reply.

On December 9, 2011, Respondents-Defendants Ohio Lottery Commission, Interim Director Dennis Berg, and Commissioners James Brady, Allan C. Krulak, Patrick McDonald, Clarence E. Mingo II, William Morgan, Amy Sabath, Elizabeth Vaci, Michael Verich, and Former Commissioner Erskine E. Cade (collectively "Lottery Commission") filed a Motion to Dismiss. On January 23, 2012, Plaintiffs filed a Memorandum Contra to the Lottery Commission's Motion to Dismiss. On February 10, 2012, the Lottery Commission filed a Reply.

On December 9, 2011, Respondents-Defendant Joseph W. Testa, the Ohio Tax Commissioner ("Tax Commissioner"), filed a Motion to Dismiss. On January 23, 2012, Plaintiffs filed a Memorandum Contra to the Tax Commissioner's Motion to Dismiss. On February 9, 2012, the Tax Commissioner filed a Reply.

Said Motions to Dismiss and responses are hereby considered submitted to the Court pursuant to Loc. R. 21.01. On April 5, 2012, the Court conducted an Oral Argument on the Motions to Dismiss and heard from representatives from Plaintiffs and the four Defendants who filed Motions to Dismiss. Upon review and consideration of the motions, responses and record, this Court hereby **GRANTS** the Motions to Dismiss for the reasons that follow. Having found that the Plaintiffs lack standing, the three pending Motions for Judgment on the Pleadings filed by Intervening Defendants Rock Ohio Caesars LLC, Rock Ohio Caesars Cleveland LLC, and Rock Ohio Caesars Cincinnati LLC (collectively "Rock Ohio"), Intervening Defendants Northfield Park Associates, LLC, Lebanon Trotting Club, Inc., MTR Gaming Group, Inc., and PNK (Ohio), LLC (collectively "Equine Intervenors"), and Intervening Defendant Thistledown Racktrack, LLC are deemed **MOOT**.

I. BACKGROUND

Plaintiffs consist of Ohio Roundtable and nineteen individuals, several of whom are members of or officers in Ohio Roundtable. Ohio Roundtable, a non-profit organization, has "actively opposed the expansion of legalized gambling in Ohio, including multiple previous efforts to amend the Ohio Constitution to authorize casino gambling and legislative efforts to expand the Ohio Lottery." (Amended Complaint ¶2.)

Plaintiffs commenced this action on October 21, 2011 against the Ohio Lottery Commission, the Ohio Casino Control Commission, the Governor of Ohio, the Ohio Tax Commissioner as well as several individual members and directors of the named Commissions (collectively "Defendants").[1] On, November 22, 2011, Plaintiffs' filed an amended complaint, titled "First Amended Complaint/Petition for Declaratory Judgment, Injunctive Relief and Writ of Mandamus" ("Amended Complaint"). Plaintiffs' claims against the Defendants arise from newly enacted amendments and sections to the Ohio Revised Code and the Ohio Constitution dealing with legalized gambling and casinos.

Article XV, Section 6 (A) of the Ohio Constitution provides that the General Assembly may authorize a state agency to conduct a lottery, "provided the entire net proceeds of any such lottery are paid into a fund of the state treasury that shall consist solely of such proceeds and shall be used solely for the support of [education]." The General Assembly, upon its authority within Section 6 of the Ohio Constitution, enacted R.C. Chapter 3770 to create the Ohio Lottery Commission to authorize, govern, and regulate a state lottery. R.C. 3770.03 authorizes the Ohio Lottery Commission to "promulgate rules under which a statewide lottery may be conducted."

In 2009 and in 2011, legislation was enacted that collectively amended a number of Ohio statutes and also enacted new sections of the Revised Code pertaining to the statewide lottery and the Lottery Commission's authority to promulgate rules for the lottery. On July 17, 2009,

[1] This case also includes Intervening Defendants (hereinafter collectively referred to as "Intervenors"). The Intervenors are a number of racing establishments and/or casinos with an interest in the use of VLTs and the constitutionality of casinos in Ohio. Throughout this Decision and Entry, when the Court refers to 'Defendants' it is not including the 'Intervenors.'

the Ohio governor signed into law Amended Substitute House Bill No. 1 ("H.B. 1"). Then, on July 15, 2011, Governor Kasich signed Substitute House Bill 277 ("H.B. 277") into law. Together, the legislation provides that video lottery terminals ("VLTs") are included within the definition of the statewide lottery. Specifically, H.B. 1 amended R.C. 3770.03 to specify that the "statewide lottery" includes, and "has included" since the original provision was enacted, video lottery terminals (VLTs). Also, H.B. 1 amended R.C. 3770.03 and enacted R.C. 3770.21 to authorize the installation and operation of VLTs at seven horse racing tracks across Ohio, under control of the Lottery Commission.

Article XV, § 6 of the Ohio Constitution also provides that casino gaming shall be authorized at four casino facilities at a designated location within the cities of Cincinnati, Cleveland, Columbus, and Toledo. Ohio Constitution, Article XV, Section 6(C)(1). A newly created Casino Control Commission shall be responsible for licensing and regulating the casino operators. The Commission shall require each licensed casino operator to pay an upfront license fee of fifty million dollars and make an initial investment of at least two hundred fifty million dollars. Ohio Constitution, Article XV, Section 6 (C)(4) and (5).

Article XV, Section 6 of the Ohio Constitution also provides that a 33 percent tax shall be levied on all gross casino revenue received by each casino operator, and that casino operators will be subject to all customary taxes and fees that are "otherwise imposed generally" upon Ohio businesses. Ohio Constitution, Article XV, Section 6(C)(2). In addition, no other casino gaming-related fees or tax, other than that described in the section, may be imposed upon the gross revenues of the casino.

Amended Substitute House Bill No. 519 ("H.B. 519") provides the implementation language for the constitutional provisions authorizing the four casino facilities. The Ohio governor signed H.B. 519 into law on June 10, 2010.

In addition to amending provisions of the Revised Code regarding VLTs, H.B. 277 also amended provisions pertaining to the casinos. H.B. 277 amended R.C. 5751.01 to exempt

licensed casinos from paying the commercial activity tax (CAT), a tax imposed generally upon Ohio businesses. H.B. 277 also amended R.C. 3772.27 to allow the casino facilities to be opened in phases.

A. Plaintiffs' Allegations

In their Amended Complaint, Plaintiffs assert seventeen claims and set forth eighteen separate paragraphs in the prayer for relief. The first ten counts challenge the legal framework in place governing the operation of video lottery terminals in the State of Ohio. The remaining counts challenge statutory and constitutional provisions relating to the operation of the four casinos.

1. Video Lottery Terminals

Plaintiffs allege that the amendments to the Revised Code and newly enacted sections provided for in H.B. 1 violate the Ohio Constitution.

In Count I, Plaintiffs allege that R.C. 3770.03, R.C. 3770.21, and Section 3(E) of H.B. 277 are unconstitutional because they exceed "the General Assembly's authority to authorize an agency of the [S]tate to conduct lotteries." (Amended Complaint ¶ 33), as VLTs were not contemplated nor included in the definition of "lottery" as used in the Constitution.

In Count II, Plaintiffs allege that H.B. 1 and related administrative rules are unconstitutional because VLT games will not be conducted solely by the Lottery Commission, rather racetrack permit-holders, in violation of the authority granted in Art. XV, Section 6 of the Constitution. In conjunction with Count II, Count IX seeks a writ of mandamus to compel Governor Kasich and the Lottery Commission to ensure that all lottery games, including VLTs, "are conducted solely and in their entirety by an agency of the State." (Amended Complaint, ¶72).

Count III alleges that because a 66.5 percent commission is paid to VLT agents, the entire net proceeds from VLT games will not be used to fund education as required by the Ohio Constitution. Plaintiffs allege in Count IV of the Amended Complaint that H.B. 1 circumvents

the constitutional requirement that the entire net proceeds of lotteries be used for education. According to Plaintiffs, Article XV, Section 6 of the Constitution prevents the General Assembly from using lottery proceeds to replace general revenue funds formerly allocated to education. In conjunction with Counts III and IV, Count X seeks a writ of mandamus to compel the Lottery Commission to "ensure that the full entire net proceeds of any lottery games are used for education programs in Ohio." (Amended Complaint, ¶75).

In Count V, Plaintiffs allege the involvement of the Lottery Commission with "seven pari-mutuel racing facilities in Ohio" (Amended Complaint, ¶ 55) violates Article VIII, Section 4 of the Constitution, which prohibits the State from becoming a joint owner in a private enterprise. In Count VIII, Plaintiffs allege H.B. 1 enactment of R.C. 3770.21(D) unconstitutionally expands the jurisdiction of the Ohio Supreme Court in violation of Article IV, Section 2(B)(1).

2. Casinos

Plaintiffs allege in Count XI and XII that H.B. 277 unconstitutionally exempts casino operators from state taxes they should be paying and imposes taxes upon the casino operators that they should not be paying. Count XI alleges that H.B. 277's amendment to R.C. 5751.01(F)(2), which excludes casino gaming amounts that are in excess of the casino operator's gross revenue from the CAT, violates Article XV, Section 6(C)(2) by not subjecting casinos to all taxes imposed generally upon Ohio businesses. Count XI also alleges that H.B. 277's enactment of R.C. 3772.34, which creates a fund to receive any money paid by operators of casino facilities in excess of licenses or fees provided for in Article XV, Section 6 of the Ohio Constitution, is unconstitutional. Count XII alleges that H.B. 277 unconstitutionally excludes "promotional gaming credits" from the 33 percent gross casino revenue tax imposed by Section 6(C) of Article XV of the Constitution. H.B. 277 clarified that gross casino revenue does not include promotional gaming credits, which are credits or discounts issued to patrons. In conjunction with Counts XI and XII, Counts XIV and XV seek writs of mandamus to ensure that the taxes described earlier are not imposed or excused.

In Count XIII, Plaintiffs allege they will be "irreparably harmed" because the opening of Cleveland in two phases violates the single casino facility mandate in Article XV, Section 6(C)(1) of the Constitution. H.B. 277 amended R.C. 3772.27, allowing a casino facility to open in phases and have multiple buildings. Plaintiffs also allege that R.C. 3772.27 and H.B. 277 unconstitutionally permit a casino to make an initial investment of less than two hundred fifty million dollars. R.C. 3772.27(B) provides that a casino operator has thirty-six months from the date their license was issued to spend the remainder of the two hundred fifty million dollar initial investment, if that casino operator had invested at least one hundred twenty-five million dollars prior to receiving the license. In conjunction with Count XIII, Count XVI seeks a writ of mandamus to compel the Casino Control Commission to ensure that the initial investment is paid and that only one casino facility is operated in Cleveland in compliance with the Ohio Constitution.

Finally, in Count XVII, Plaintiffs allege that Article XV, Section 6(C), H.B. 1, H.B. 277, and H.B. 519 in conjunction unconstitutionally grant a monopoly to the two gaming companies who signed a Memo of Understanding with Governor Kasich on June 17, 2011, violating the Fourteenth Amendment of the Ohio Constitution.

3. Procedural Allegations

Plaintiffs allege that H.B. 1 was passed in violation of two procedural restrictions in the Ohio Constitution. In Count VI, Plaintiffs allege H.B. 1 violates the "Single Subject Rule" of Article II, Section 15(D) of the Constitution, which provides that bills of the General Assembly shall not contain more than one subject. In Count VII, Plaintiffs allege that H.B. 1 violates the "Three Day Rule" of Article II, Section 15(C) of the Constitution, which requires that every bill shall be considered on three different days.

B. Standing to Bring Suit

Within the Plaintiffs' Amended Complaint, each of the individual Plaintiffs assert that he or she is "a citizen, resident, and taxpayer of the State of Ohio." Two Plaintiffs allege they are

actively involved in opposing legalized gambling as members of the Ohio Roundtable. (Amended Complaint, ¶¶1, 3.) Two Plaintiffs allege they either suffer from a gambling addiction or have been affected by such addiction through a family member. (Amended Complaint, ¶¶1, 4.) Three Plaintiffs assert they are parents of students attending public schools and another asserts she is a public school teacher. (Amended Complaint, ¶¶4, 6, 7, 8.) One Plaintiff claims she is the owner of a business that pays the CAT. (Amended Complaint, ¶5.) One Plaintiff alleges that he would operate a casino but for the restriction in the Ohio Constitution allocating such privilege to two particular gaming companies. (Amended Complaint, ¶10.)

C. Defendants' Motions to Dismiss

Defendants timely filed dispositive motions under Civ. R. 12B(6), asserting (1) Plaintiff lacks standing to bring this action and (2) Plaintiff has misread the Ohio Constitution and Revised Code, and has therefore, failed to state a claim upon which relief can be granted. All Defendants asserted that the Plaintiffs lack standing.

II. STANDARD OF REVIEW

"In considering a Civ.R. 12(B)(6) motion to dismiss, a trial court may not rely on allegations or evidence outside the complaint." *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 680 NE 2d 985 (1997). The trial court may review only the complaint and may dismiss the case "only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus.

The issue of standing may be properly raised by a Civ.R. 12(b)(6) motion for dismiss for failure to state a claim upon which relief can be granted. *See, Brown v. Columbus City Sch. Bd. Of Ed.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, syllabus. A challenge against a party for standing brings into issue that party's capacity to file an action. *Cramer v. Javid*, 10th Dist. No. 10AP-199, 2010-Ohio-5967. It is well settled that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue. *Ohio Contractors*

Assn. v. Bicking, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088. Standing is a legal concept that symbolizes a general concern about how courts should function within our system of jurisprudence. As the court explained in *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 NE 2d 371 (1970):

> It has been long and well established that it is the duty of every judicial tribunal to decide *actual controversies* between parties *legitimately affected* by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon *potential controversies*. The extension of this principle includes enactments of the General Assembly. (Emphasis added).

As standing is an indispensable part of any plaintiff's case, the Court will address this issue first.

The general rules of standing are well established: (1) a plaintiff must have suffered an injury in fact, (2) that injury must be causally related to the challenged action, and (3) "it must be likely that a favorable decision will redress the injury." *Javid, supra.*

According to the Tenth District Court of Appeals:

> An injury in fact is defined as "an invasion of a legally protected interest that is concrete and *particularized*, as well as actual or imminent, not hypothetical or conjectural." Bourke at ¶10, citing Lujan at 560, 112 S.Ct. at 2136. With respect to declaratory relief, a party lacks standing to sue unless the party is affected by or has a material interest in the contested subject matter of the suit. Murr v. Ebin (May 6, 1997), 10th Dist. No. 96APE10-1406. Where a plaintiff fails to allege that he has suffered an injury in fact, dismissal under Civ.R. 12(B)(6) is appropriate. See Brown. *Cramer v. Javid*, No. 10AP-199, 2010-Ohio-5967, ¶11. (Emphasis added).

A litigant has standing to challenge the constitutionality of legislative enactments, *only if*: (1) the litigant shows that they have suffered or are threatened with direct and concrete injury "in a manner of degree different from that suffered by the public in general," (2) that the law in question has caused the injury, and (3) that the relief requested will redress the injury. *Brown, 2009-Ohio-3230,* ¶¶ 7, 13; *see also, Kuhar v. Medina Cty. Bd. of Elections,*9th Dist. No. 06CA-0076, 2006-Ohio-5427, ¶9, (quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469-70).

IV. LAW AND ANALYSIS

A. Plaintiffs Do Not Have Standing as Citizens or Taxpayers

Generally, a private citizen does not have standing to challenge legislation by virtue of their status of taxpayers within the State of Ohio. *See State ex rel. Masterson v. Ohio State Racing Commission*, 162 Ohio St. 366, 123 N.E.2d 1 (1954); *Gildner v. Accenture, LLP*, 10th Dist. No. 09AP-167, 2009-Ohio-5335. All of the individual Plaintiffs (Robert L. Walgate, David P. Zanotti, Sandra L. Walgate, Linda Agnew, Paula Bolyard, Jeffrey Malek, Michelle Watkins-Malek, Thomas Adams, Donna Adams, Joe Abraham, and Frederick Kinsey) assert their standing is based, in part, upon the fact that they are citizens, residents, or taxpayers of the State of Ohio. This alone does not create standing to bring suit.

Instead, a taxpayer must have a distinct injury or an interest in the public fund at issue. According to the Ohio Supreme Court in *Masterson,* without express statutory authority, "a taxpayer lacks legal capacity to institute an action to enjoin the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy." Paragraph 1 of the syllabus. As stated earlier, the injury must be "in a manner or degree different from that suffered by the public in general." *Brown,* 2009-Ohio-3230, ¶¶ 7, 13. The individual Plaintiffs' assertions that they are taxpayers or citizens does not distinguish them from any other member of the general public in Ohio who also pays taxes or is a citizen of the State.

Plaintiffs, however, assert several individual Plaintiffs have standing based upon injuries distinct from the general public. Plaintiffs assert that Plaintiff Linda Agnew has standing by virtue of her ownership as a shareholder of an Ohio business, Agnew Sign & Lighting, Inc. (Agnew Inc.), which pays the CAT tax on its income. Ms. Agnew asserts she has been harmed because of the CAT exemption given to new casinos. Defendants assert that an 'owner' or shareholder has no specific right to advance the claims of a corporation. This court agrees.

Under Ohio law a corporation is a separate legal entity from its shareholders. Additionally, the mere fact that a corporation pays a tax does not vest standing to challenge that tax on a third party, in this case Ms. Agnew. "A litigant must assert its own rights, not the claims of third parties." *Ohio Apt. Ass'n v. Levin,* 127 Ohio St. 3d 76, 2010-Ohio-4414, 936 N.E.2d 919, ¶ 37. (recon. Denied, 2010-Ohio-5762).

Even so, Agnew Inc. has not been harmed by the CAT exemption given to casinos. In fact, Agnew Inc. never established how it would be legally harmed by said issue. The only statement in the Amended Complaint is a conclusion: "Relators-Plaintiffs will be irreparably harmed by said violation of Art. XV, §6 of the Ohio Constitution." (Amended Complaint, ¶ 85). The State has the ability to tax certain industries differently than others. A tax placed on one sector of the State's commerce does not create standing for other sectors not similarly taxed. Agnew Inc. does not operate or own a casino in the State of Ohio and is therefore not affected by the manner in which the CAT is applied. Assuming, *arguendo,* Agnew Inc. was a casino that was subject to the CAT, but not subject to the exemption, Agnew Inc. might be able to establish a recognizable harm. At best, Agnew Inc. is like all other segments of our economy that is not engaged in legal casino gambling. Additionally, Ms. Agnew did not assert any factual allegation as to how she would be harmed by the CAT exemption. As it is not appropriate for this Court to speculate, Ms. Agnew does not have standing.

Plaintiffs also assert that six individual Plaintiffs have standing to bring suit based on their status of parents of children enrolled in Ohio public schools or their employment as a teacher at an Ohio public school. Jeffrey Malek and Michelle Watkins-Malek are parents of a child enrolled in the Wadsworth City School District. Thomas Adams and Donna Adams are parents of four children enrolled in the Wadsworth City School District. Paula Bolyard is a parent of a child enrolled in the Green Local School District. Sandra Walgate is a teacher employed by the East Liverpool City School District.

Plaintiffs assert the parents of school children attending public schools have a clear interest in public school funding. Specifically, Plaintiffs argue they are directly harmed by the reduction of school funds dedicated for educational use caused by the CAT casino and VLT exemptions.

The Plaintiffs cannot show that, by virtue of their status as parents of children attending public schools or a teacher in an Ohio public school, they have suffered any injury distinct from the public in general, a requirement for taxpayer standing. *Brown, 2009-Ohio-3230,* ¶7. In *Brown,* taxpayers challenged the manner in which school district funds were allocated seeking declaratory and injunctive relief. The Tenth District Court of Appeals held that because appellant-taxpayer did not contribute into a special fund, their pecuniary interests were not affected differently than the general public.

The monies collected by the CAT are allocated by law into three funds: the School District Tangible Property Tax Replacement Fund, the Local Government Tangible Property Tax Replacement Fund, and the General Revenue Fund. R.C. 5751.20(B). Pursuant to R.C. 5751.22(D), any deficit in the School District Tangible Property Tax Replacement Fund for the fiscal years between 2006 and 2018, must be paid from the General Revenue Fund. As such, the question becomes whether Plaintiffs, as parents of public school children or teachers in public schools, are harmed separately from the general public when funds from the General Revenue Fund are reduced. The answer is an unequivocal no. If there is any harm by the reduction of monies in the General Revenue Fund by the CAT exemption, the harm is to all taxpayers in the State of Ohio. Taxpayers must differentiate their taxpayer status from that of the general public. Here, Plaintiffs cannot be distinguished from the general public.

B. Plaintiffs Have Not Suffered Concrete Injuries Different From Those of the General Public. As such, Plaintiffs Do Not Have Standing.

To have standing, there must be an *injury in fact*. It must be "concrete and particularized, as well as actual or imminent. *Cramer v. Javid*, 10th Dist. No. 10AP-199, 2010-Ohio-5967, ¶11. Plaintiffs cannot meet this standard.

Plaintiffs assert that David Zanotti and Joe Abraham have standing because their political subdivisions will be hosting the new casinos. Specifically, Plaintiffs argue Zanotti and Abraham have been injured "by the negative effects of unconstitutional gambling on their communities." Not only is this assertion hypothetical, it is also vague conjecture. Plaintiffs also assert that Sandra Walgate would be injured because of her son's gambling addiction. This argument rests upon an assumption and is also purely hypothetical.

Additionally, Plaintiffs assert Frederick Kinsey has standing because of his desire to be a casino operator in Ohio. Specifically, Kinsey asserts he would have engaged in casino gaming in Ohio but for the constitutional provision that grants the privilege to engage in casino gaming to two specific companies. Plaintiffs claim in the Amended Complaint that this constitutional provision creates a monopoly. Just as the claims of those above, Kinsey's deficient assertions are *hypothetical or conjectural.*

Prior to the current amendment to the Constitution, there was never a right to operate a casino in Ohio. The amendment was enacted by the citizens, exercising their right to vote. In doing so, the voters limited the number of casinos and operators in the state. If Mr. Kinsey had owned a casino prior to the enactment granting that privilege to two other companies, then he could have established harm. Additionally, Plaintiffs did not provide any facts in the Amended Complaint that show Kinsey attempted to secure a casino license and lost. The bare allegation is insufficient to create a harm or injury necessary to give the Plaintiff Kinsey standing. Granting Plaintiff standing based upon Kinsey's assertions would be like granting standing to a contractor who filed suit contesting the award of a publicly bid project when there was no allegation that

the plaintiff had ever bid the job. Kinsey's assertion of injury, just as those of the others listed above is *hypothetical or conjectural.*

C. Even if Plaintiffs Have Suffered Concrete Injuries Different From Those of the General Public, Plaintiffs Do Not Have Standing Because the Relief Requested Will Not Redress Their Injuries.

Even when a litigant can show that they have suffered or are threatened with a direct or concrete injury different from that suffered by the public, there is still the issue of redressability. The relief sought by the litigant must redress their injury. *Javid*, 10th Dist. No. 10AP-199, 2010-Ohio-5967.

Plaintiffs assert Robert Walgate and his mother, Sandra Walgate, have standing to pursue the claims because he is a recovering addicted gambler. Plaintiffs assert that any increase in legalized gambling due to the VLTs and the opening of the casinos would adversely affect him. Mrs. Walgate claims that she will be harmed due to her need to care for her adult child *should* in fact Mr. Walgate give in to his addiction.[2]

Even assuming *arguendo* the injuries of the Walgates are not of a *hypothetical or conjectural nature,* Plaintiffs fail to show how the relief sought within this matter will redress these asserted injuries. The Ohio Constitution was amended to allow four casinos to be built in Ohio. Irrespective of the outcome of this litigation, these four casinos will still be built and opened. Therefore, the social harm they allege would still exist.[3]

Mr. Walgate has also challenged the state's authority to legally authorize VLTs. If Plaintiff Walgate receives a favorable decision regarding his challenge on VLTs, there may conceivably be a reduced temptation to gamble. However, to hold that an addicted gambler's injury can be redressed by challenging the constitutionality of one aspect of legalized gambling

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[2] Mr. Walgate's claim is familiar to this Court, as it was also analyzed in Judge Hogan's 2002 opinion of *Ohio Roundtable v. Taft*, 2002-Ohio-3669. In *Taft*, the Walgates and Ohio Roundtable attempted to prevent Ohio from joining the Mega Millions lottery game. Judge Hogan found the Walgates had standing based upon these alleged injuries. However, *Taft* is not only non binding on this Court, it has since been distinguished in *Brinkman v. Miami University*, 12th Dist. No. CA2006, 2007-Ohio-437, ¶58, as a public action standing case. Public action standing has been narrowed since *Taft* and is further analyzed below.

[3] This is also true for Plaintiffs Zanotti and Abraham. Any secondary harm to their community because of gambling would not be redressed by this Court's ruling.

in Ohio, without removing all legalized gambling in the state would vastly expand the requirement of standing. Once decided, the Court would face a slippery slope until the notion of standing is unrecognizable: alcoholics having standing to sue over the issuing of new liquor permits; diabetics having standing to challenge new food regulations that increase sugar content; etc. Consequently, the Walgates simply lack standing to sue in this action.

D. Plaintiffs' Assertions Do Not Meet the Requirement for Public Action Standing.

When a litigant does not otherwise have standing to attack the constitutionality of a statute, the courts will allow the litigant to proceed when the party seeks to vindicate "public rights" affecting the general population of Ohio. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St. 3d 451, 471-73, 715 N.E.2d 1062 (1996).

> Where a public right, as distinguished from a purely private right, is involved, a citizen need not show any special interest therein, but he may maintain a proper action predicated on his citizenship relation to such public right. *Id.*

In *Sheward,* the Ohio Supreme Court allowed a lawyer's association, labor union, and an Ohio citizen to file an action against judges, challenging the constitutionality of a statute that contemplated tort reform and openly "challenged the judiciary's authority to interpret the Ohio Constitution to proceed under a public action standing." However, the Supreme Court expressly cautioned in *Sheward* that this public action exception to standing applies "only in rare and extraordinary cases where the challenged statute operates directly and broadly to divest the courts of judicial power. *Id* at 467-75. Other courts have followed suit, limiting *Sheward* to rare cases. *See State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.*, 97 Ohio St.3d 504, 780 N.E.2d 981, 2002-Ohio-6717 ("Granting of writs of mandamus and prohibition to determine the constitutionality of statutes will remain extraordinary and limited to exceptional circumstances that demand early resolution"); *see also, State ex. Rel. United Automobile, Aerospace & Agric. Implement Workers of America v. Ohio Bureau of Workers Comp.,* 108 Ohio St. 3d 432, 2006-Ohio-1327.844 N.E.2d 335.

Here, the Plaintiffs action cannot be compared to the magnitude and scope contemplated by *Sheward*, where the plaintiffs, as well as over 200 organizations and individuals filing *amicus briefs*, challenged the constitutionality of changes to civil tort law that revised over one hundred sections of the Revised Code and specifically overruled the Supreme Court by reenacting provisions the Court previously deemed unconstitutional. In light of the circumstances of *Sheward* and the cases that follow, and upon examination of the Amended Complaint, this Court cannot find a claim that justifies holding that the Plaintiffs' challenge falls into the public right exemption to the standing requirement. As such, there is no public right exception to standing in this case.

E. Plaintiff Ohio Roundtable Cannot Establish Organizational Standing

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 claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994), (quoting Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383, 394 (1977)). However, the association must also establish that its members have suffered actual injury that is concrete, not abstract. *Id at 320*, (quoting *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 40, 96 S.Ct. 1917, 48 L.ed.2d 450 (1976)). The determination of this issue rests on the first element of the *Bicking* test: do Plaintiff's members otherwise have standing to sue?

This Court has already held that the members of the Plaintiff Ohio Roundtable identified specifically in the Amended Complaint do not have standing. [4] Therefore, standing cannot be found to exist for Ohio Roundtable. More is needed and this Court finds their allegations lacking. Ohio Roundtable cannot meet the standard for organizational standing.

[4] Plaintiffs also asserted a 'zone of interest' test for the purpose of identifying standing. This Court has reviewed the cases relied upon by the Plaintiffs and those asserted by the Defendants. The Defendants asserted that the 'zone of interest' analysis is only valid in federal agency actions with no relevance to state court standing issues. This Court agrees.

V. CONCLUSION

The legal system we rely upon exists to try *actual* cases and controversies. It exists to give its citizens a voice when a wrong has occurred. However, it operates within certain boundaries and should not be used wantonly and/or for political or social gain.

Throughout their pleadings and oral arguments, Plaintiffs have offered little more than bare assertions of harm or injury. Given Plaintiffs' dearth of support, the Court questions Plaintiffs' real purpose in bringing these claims. Notwithstanding, the Court finds that Plaintiffs do not have standing and may not pursue with their claims.

Having decided that Plaintiffs do not have standing, the Court need not address the Defendants' motions asserting Plaintiffs have failed to state a claim upon which relief may be granted.

DECISION

Having found that the Plaintiffs do not have standing, nor do their claims fall into any of the known exceptions to standing, this Court **GRANTS** Respondents-Defendants Motions to Dismiss. Plaintiffs' Amended Complaint is **DISMISSED**.

Defendants-Intervenors' Motions for Judgment on the Pleadings' are **MOOT**.

Costs to Plaintiffs.

THIS IS A FINAL APPEALABLE ORDER.

IT IS SO ORDERED.

TIMOTHY S. HORTON, JUDGE

CC:

ALL PARTIES OF RECORD

Franklin County Court of Common Pleas

Date: 05-30-2012

Case Title: ROBERT L WALGATE JR -VS- OHIO STATE GOVERNOR JOHN R KASICH

Case Number: 11CV013126

Type: MOTION GRANTED

It Is So Ordered.

/s/ Judge Timothy S. Horton

Court Disposition

Case Number: 11CV013126

Case Style: ROBERT L WALGATE JR -VS- OHIO STATE GOVERNOR JOHN R KASICH

Case Terminated: 08 - Dismissal with/without prejudice

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 11CV0131262011-12-0999890000
   Document Title: 12-09-2011-MOTION TO DISMISS
   Disposition: MOTION GRANTED

2. Motion CMS Document Id: 11CV0131262011-12-0999970000
   Document Title: 12-09-2011-MOTION TO DISMISS
   Disposition: MOTION GRANTED

3. Motion CMS Document Id: 11CV0131262011-12-0999900000
   Document Title: 12-09-2011-MOTION TO DISMISS
   Disposition: MOTION GRANTED

4. Motion CMS Document Id: 11CV0131262011-12-0999980000
   Document Title: 12-09-2011-MOTION TO DISMISS
   Disposition: MOTION GRANTED