UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NORTHVILLE DOWNS, a Michigan Co-Partnership, OIL CAPITAL RACE VENTURE, INC. d/b/a MT. PLEASANT MEADOWS, and GREAT LAKES QUARTERHORSE ASSOCIATION, a Michigan non-profit corporation,

Plaintiffs,

v

THE HONORABLE JENNIFER GRANHOLM, the Governor of the State of Michigan, and MICHAEL COX, Esq., Michigan State Attorney General,

Defendants,

and

MGM GRAND DETROIT, LLC, a Delaware limited liability company,

Intervening Defendant.
_____/

Case No. 2:08-CV-11858-AC-RSW

Honorable Avern Cohn

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Phillip B. Maxwell (P24872)
Phillip B. Maxwell & Associates, PLLC
Co-counsel for Plaintiffs
20 Hudson Street
Oxford, MI 48371
(248) 969-1490

Edward Draugelis (P12947)
Draugelis & Ashton LLP
Co-counsel for Plaintiffs
380 N. Main Street
Clawson, MI 48017
(248) 588-7704 (D)

Donald S. McGehee (P37489)
Jessica Hodgson (P60103)
Melinda A. Leonard (P63638)
Assistant Attorneys General
Attorneys for Defendants
Alcohol & Gambling Enforcement Division
1500 Abbot Road, Suite 300
East Lansing, MI 48823
(517) 241-0210

Peter H. Ellsworth (P23657)
Jeffery V. Stuckey (P34648)
Phillip J. DeRosier (P55595)
Dickinson Wright PLLC
Attorneys for Intervening Defendant
215 South Washington Square, Suite 200
Lansing, MI 48933
(517) 371-1730
_____/

CONCISE STATEMENT OF ISSUES PRESENTED

I. Do Plaintiffs lack standing to sue Defendants, given that Plaintiffs have not suffered an "injury in fact" that was caused by Defendants and that can likely be redressed by a favorable decision?

II. Have Plaintiffs failed to state a plausible claim that Mich. Const. 1963 art. 4, § 41 violates the Equal Protection Clause where the provision does not contain a classification of persons and, in any event, the classification that exists is rationally related to the legitimate government purposes of controlling the expansion of gambling in Michigan and stimulating the economy of Detroit?

III. Have Plaintiffs failed to state a plausible claim that Mich. Const. 1963 art. 4, § 41 violates their First Amendment right to petition the Legislature for redress of grievances where the provision imposes no barrier at all between Plaintiffs and the Legislature?

IV. Have Plaintiffs failed to state a plausible claim that Mich. Const. 1963 art. 4, § 41 offends Due Process on the basis that it is overbroad and vague where the provision infringes on no protected speech, contains no prohibitions applicable to Plaintiffs, and sufficiently defines its scope?

V. Have Plaintiffs failed to state a plausible claim that Mich. Const. 1963 art. 4, § 41 violates the Commerce Clause where the law does not favor in-state interests over out-of-state interests and does not otherwise substantially burden interstate commerce?

VI. Is Plaintiffs' reliance on 42 U.S.C. § 1983 as a basis for relief misplaced where Plaintiffs cannot demonstrate a constitutional deprivation that has been caused by Defendants?

VII. Does this Court lack supplemental jurisdiction over Plaintiffs' state-law claims that are unrelated to Plaintiffs' federal law claims and, if not, should that jurisdiction be declined where the best course of action is to allow a Michigan state court to address the claims?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Bassett v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426 (6th Cir. 2008)

Borden's Farm Products Co. v. Baldwin, 293 U.S. 194; 55 S.Ct. 187; 79 L.Ed. 281 (1934)

Davis v. Federal Election Comm'n, ___ U.S.___; 128 S.Ct. 2759; 171 L.Ed.2d 737 (2008)

Dept of Revenue of Kentucky v. Davis, ___ U.S.___; 128 S.Ct. 1801; 170 L.Ed.2d 685 (2008)

Equality Foundation of Greater Cincinnati, Inc v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995)

Grinter v. Knight, 532 F.3d 567; 2008 U.S. App. LEXIS 12919 (6th Cir. 2008)

Helton v. Hunt, 330 F.3d 242 (4th Cir. 2003)

Mich. Const. 1963 art. 4, § 41

Pike v. Bruce Church, 397 U.S. 137; 90 S.Ct. 844; 25 L.Ed.2d 174 (1970)

Risser v. Thompson, 930 F.2d 549 (D. Wis. 1991)

Thurman v. DaimlerChrylser, Inc, 397 F.3d 352 (6th Cir. 2004)

U.S. v. Williams, ___ U.S.___; 128 S.Ct. 1830; 170 L.Ed.2d 650 (2008)

Vacco v. Quill, 521 U.S. 793; 117 S.Ct. 2293; 138 L.Ed.2d 834 (1997)

Virginia v. Hicks, 539 U.S. 113; 123 S.Ct. 2191; 156 L.Ed.2d 148 (2003)

28 U.S.C. § 1367

I. Introduction

This case represents a grievous attempt to eliminate a perceived hurdle to the growth of the horse-racing industry in Michigan (and, perhaps more precisely, the intertwined industry of wagering on the results of horse races). But not only is the hurdle nonexistent, the remedy sought would guarantee no benefit to the struggling industry; this suit is simply not the cure for Plaintiffs' ills.

The horse-racing industry once held a monopoly on legalized gambling in Michigan.[1] That monopoly has evaporated over time, and, especially in recent years, the industry has been faced with increased competition from a multitude of federally-regulated tribal casinos, the Michigan Lottery, and three casinos regulated by the Michigan Gaming Control Board (MGCB). Frustrated by this competition, Plaintiffs (a horsemen's association and two businesses that operate licensed race tracks in Michigan where pari-mutuel wagering is permitted)[2] filed the instant lawsuit attacking the validity of art. 4 § 41 of Michigan's Constitution. This constitutional provision permits the Legislature to authorize lotteries and, as most recently amended, imposes voter-approval requirements on the authorization of forms of gambling (with limited exceptions) and certain new state lottery games. Plaintiffs employ a shotgun approach in this action by alleging that Mich. Const. 1963, art. 4, § 41 commits a multitude of transgressions, including violations of the Equal Protection Clause, the First Amendment, the Due Process Clause, the Commerce Clause, 42 U.S.C. § 1983, and, finally, Michigan's Constitution and a state election statute.

---

[1] See *Rohan v. Detroit Racing Ass'n*, 314 Mich. 326, 334-335, 341; 22 N.W.2d 433 (1946) (discussing the legalization of betting on horse racing in Michigan and the then-existing lottery prohibition in Michigan's constitution); see also M.C.L. § 750.301 *et seq.*

[2] See M.C.L. § 431.301 *et seq.*, the Horse Racing Law of 1995.

Each count of Plaintiffs' First Amended Complaint stating federal claims suffers from legally fatal ills; consequently, all federal claims Plaintiffs have stated should be dismissed. As an initial matter, Plaintiffs' claims fail because this Court lacks jurisdiction over this matter since Plaintiffs lack standing to sue. Additionally, Plaintiffs' Equal Protection claim (Count III) lacks merit because Mich. Const. 1963, art. 4, § 41 does not contain classifications of persons (or businesses) subject to an Equal Protection analysis and, in any event, the provision easily survives rational basis scrutiny. Their First Amendment claim (Count I) fails because Mich. Const. 1963 art. 4, § 41 does not erect a barrier to legislative access; it merely formalizes a process by which gambling activities within its scope are authorized.

Dismissal of Plaintiffs' Due Process claim (Count IV) is merited as well because art. 4, § 41 is neither overbroad nor vague.[3] Additionally, Plaintiffs have failed to state a cognizable Commerce Clause claim (Count II) concerning this law, given that it does not distinguish between in-state and out-of-state entities or substantially burden interstate commerce. Similarly, Plaintiffs have failed to state a claim under 42 U.S.C. § 1983 given that no set of facts can establish a deprivation of constitutional rights.

Moreover, Plaintiffs' First Amended Complaint does not designate whether Plaintiffs are suing Defendants in their individual or official capacities. A review of that document reveals, however, that this is solely an official capacity suit against the Governor and Attorney General.[4] Plaintiffs do not seek money damages. Rather, they seek only prospective injunctive and declaratory relief against the individual defendants. But it is not at all clear what these officials

[3] As explained below, Plaintiffs' overbreadth claim actually is a First Amendment claim.

[4] See *United States ex rel. Diop v. Wayne County Community College Dist*, 242 F. Supp. 2d 497, 517 (E.D. Mich. 2003) (stating that without clear notification that the plaintiffs are suing the defendants in their individual capacities, courts assume that the plaintiffs are suing the defendants only in their official capacities); see also *Moore v. City of Harriman*, 272 F.3d 769, 771-772 (6th Cir. 2001).

could do individually to provide Plaintiffs a remedy, given that the approvals in the provision under attack rest in the hands of the State Legislature and electorate. Whether gambling is "to be or not to be" in Michigan is a question for the Legislature and voters of the State. Yet Plaintiffs claim to be offended by this very process—a process that puts decision-making in the hands of the people, striking at the very heart of democracy.

Finally, this Court should dismiss Plaintiffs' state-law claims arising out of the Michigan Constitution and Michigan's election law because Plaintiffs have failed to allege a proper basis for jurisdiction over these claims; in fact, given the unrelated nature of these claims to Plaintiffs' federal claims, the Court lacks subject matter jurisdiction over them. Even if the Court concludes that it possesses subject matter jurisdiction, the state-law issues should not first be considered by the federal court.

II. Background

This case involves several avenues through which laws are formed in Michigan; thus, a little background is beneficial. Michigan's Constitution provides four general methods of placing a proposal on the ballot for voter consideration: the statutory initiative, a power the people have reserved to themselves "to propose laws and to enact and reject laws";[5] the voter referendum, the power "to approve and reject laws enacted by the legislature";[6] the Legislative referendum, through which the Legislature may provide that certain bills passed will not become law unless approved by a majority of voters;[7] and the constitutional amendment process, whereby the Legislature or petitioning voters may propose an amendment.[8] Of these four, only the Legislative referendum is not relevant in this case.

[5] Mich. Const. 1963 art. 2, § 9.
[6] See *id.*
[7] Mich. Const. 1963 art. 4, § 34.
[8] Mich. Const. 1963 art. 12, §§1 and 2.

The specific constitutional provision under attack here is Mich. Const. 1963 art. 4, § 41. Before its amendment in 2004, art. 4, § 41 read: "The Legislature may authorize lotteries and permit the sale of lottery tickets in the manner provided by law." This version of art. 4, § 41 resulted from a legislatively proposed amendment to the long-existing lottery prohibition in the Michigan Constitution.[9] The amendment paved the way for the Legislature to establish the Michigan Lottery, which it accomplished by enacting the McCauley-Traxler-Law-Bowman-McNeely Lottery Act[10] in 1972. Around the same time, the Legislature authorized charitable gaming through enacting the Traxler-McCauley-Law-Bowman Bingo Act.[11]

Gaming at Native American casinos, which is also addressed in Mich. Const. 1963, art. 4, § 41, is governed by federal law, and its roots in Michigan trace back to the early 1980s.[12] Under the provisions of the Indian Gaming Regulatory Act (IGRA),[13] Native American tribes may negotiate compacts with states and receive authorization to conduct gambling activities.

In 1996, voters expanded the gambling authorized by Michigan law by approving Proposal E. This voter-initiated legislation[14] created the Michigan Gaming Control and Revenue Act (MGCRA) and legalized certain casino gambling in Detroit. The Legislature subsequently amended the voter-initiated legislation, establishing the MGCB and permitting the MGCB to license up to three casinos in any statutorily defined "city."[15] The MGCB has licensed and currently regulates the three casinos that operate in Detroit under the provisions of the MGCRA. The MGCRA does not apply to Native American casinos authorized under the IGRA, so the

---

[9] Before its amendment in 1972, Mich. Const. 1963 art. 4, § 41 stated: "The legislature shall not authorize any lottery nor permit the sale of lottery tickets." See also *Rohan*, 314 Mich. at 341.
[10] M.C.L. § 432.1 *et seq.*
[11] M.C.L. § 432.101 *et seq.*
[12] See "A History of Indian Gaming in Michigan" at http://house.mi.gov/hfa/gaming.asp (accessed on August 20, 2008).
[13] 25 U.S.C. § 2701 *et seq.*
[14] See Mich. Const. 1963 art. 2, § 9.
[15] M.C.L. § 432.206(3). "City" is defined in M.C.L. § 432.202(l).

MGCB does not have regulatory authority over those entities.[16] Because the MGCRA arose out of voter-initiated legislation, it is subject to a requirement that all amendments be passed by a super-majority three-fourths vote.[17]

For approximately eighteen months before the 2004 election, the Michigan Legislature engaged in debate concerning legislation that would have permitted additional forms of gambling at Michigan's horse racetracks, including gambling with video-lottery terminals similar to slot machines. Although each chamber of the Legislature passed bills toward this end, the "racino" legislation was never enacted, given that the two chambers never agreed on identical bills.[18]

In the 2004 election, the voters were asked through a petition-driven ballot proposal,[19] Proposal 04-01, to amend art. 4, § 41 by adding the following two sentences to its text:

> No law enacted after January 1, 2004, that authorizes any form of gambling shall be effective, nor after January 1, 2004, shall any new state lottery games utilizing table games or player operated mechanical or electronic devices be established, without the approval of a majority of electors voting in a statewide general election and a majority of electors voting in the township or city where the gambling will take place. This section shall not apply to gambling in up to three casinos in the City of Detroit or to Indian tribal gaming.

The voters approved that amendment, and art. 4, § 41 now reads:

> The Legislature may authorize lotteries and permit the sale of lottery tickets in the manner provided by law. No law enacted after January 1, 2004, that authorizes any form of gambling shall be effective, nor after January 1, 2004, shall any new state lottery games utilizing table games or player operated mechanical or electronic devices be established, without the approval of a majority of electors voting in a statewide general election and a majority of electors voting in the township or city where the gambling will take place. This section shall not apply to gambling in up to three casinos in the City of Detroit or to Indian tribal gaming.

Significantly, Plaintiffs' First Amended Complaint challenges the constitutionality of art. 4, § 41 in its entirety—not just the text most recently added.[20] Nevertheless, Plaintiffs complain

[16] See M.C.L. § 432.203(2)(d).
[17] Mich. Const. 1963, art. 2, § 9.
[18] See history of House Bills 4609-4611 from the 2003-2004 Legislature, attached as Exhibit 1.
[19] See Mich. Const. 1963 art. 12, § 2.

solely about the language in the 2004 addition to contend that the entire section is unconstitutional. Moreover, Plaintiffs rely on assertions concerning the funding of the ballot proposal more extensively than the language of the constitution itself as a basis for their conclusions of constitutional harm. Plaintiffs assert that the ballot proposal was funded almost entirely by owners of the MGCB-regulated and Native American tribal casinos, primarily MGM Grand Detroit, L.L.C., and the Saginaw Chippewa Tribe.[21] This statistical information is by no means outcome determinative or even relevant. But it is interesting to note what Plaintiffs neglect to mention: anti-gambling interest groups also encouraged voters to approve the amendment in an effort to curtail the expansion of gambling in Michigan.[22]

III. Standard of Review

Defendants request dismissal of Plaintiffs' First Amended Complaint under Fed. R. Civ. P. 12(c) because Plaintiffs have failed to state a valid claim for relief. Review under this rule[23] requires the Court to "accept [the plaintiff's] allegations as true, and draw all reasonable inferences in favor of the plaintiff."[24] This standard "'requires more than the bare assertions of legal conclusions.'"[25] "The complaint must include direct or indirect allegations ' respecting all the material elements to sustain a recovery under *some* viable legal theory."[26] Although

---

[20] See First Amended Complaint, paragraph 1, and page 11, Prayer for Relief.
[21] See First Amended Complaint, paragraph 15.
[22] See Exhibit 2, Bodipo-Memba, Alejandro, "Prop 1 Boils Down to Money; Questions and Answers on Issue," *Detroit Free Press*, October 27, 2004, p. 1B, characterizing proponents of Proposal 1 as "an unlikely combination of anti-gambling interests, Detroit casino owners and Indian tribe-owned casinos."
[23] The standard under this rule is nearly identical to the standard under Rule 12(b)(6). *Kottmyer v. Maas*, 436 F.3d 684, 689 (6th Cir. 2006).
[24] *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (internal quotations omitted).
[25] *In re Sofamor Danek Group, Inc*, 123 F.3d 394, 400 (6th Cir. 1997), quoting *Columbia Natrual Res, Inc v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995).
[26] *In re DeLorean Motor Co*, 991 F.2d 1236, 1240 (6th Cir. 1993).

"heightened fact pleading of specifics" is not required, the plaintiff must state "enough facts to state a claim to relief that is plausible on its face."[27]

IV. Argument

A. Lack of Subject Matter Jurisdiction

Dismissal of Plaintiffs' claims is warranted because the Court lacks subject matter jurisdiction over them. "Article III restricts federal courts to the resolution of cases and controversies."[28] Consequently, parties invoking federal jurisdiction must have "standing—the 'personal interest that must exist at the commencement of the litigation.'"[29] Standing is essential to establishing the case-or-controversy requirement of Article III.[30]

To establish standing, the Plaintiffs must demonstrate that: 1) they have suffered an "'injury in fact'" that is both "'concrete and particularized'" and "'actual or imminent'"; 2) there is a "'causal connection'" between the Plaintiffs' alleged injury and the conduct of the Defendants; and 3) Plaintiffs' injury "'likely'" will be "'redressed by a favorable decision.'"[31] Plaintiffs cannot satisfy these requirements; thus, they lack standing and the Court lacks subject matter jurisdiction.

First, Plaintiffs have not alleged facts showing that they have suffered an "actual or imminent" injury that is concrete and particularized. Although Plaintiffs generally allege that art. 4, § 41 prevents them from seeking legislative relief for their declining revenues, they assert no

---

[27] *Bassett, supra*.
[28] *Davis v. Federal Election Comm'n*, ___ U.S.____; 128 S.Ct. 2759, 2768; 171 L.Ed.2d 737 (2008), citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64; 117 S.Ct. 1055; 137 L.Ed.2d 170 (1997).
[29] *Davis*, 128 S.Ct. at 2768, quoting *Friends of Earth, Inc v. Laidlaw Environmental Services (TOC), Inc*, 528 U.S. 167, 189; 120 S.Ct. 693; 145 L.Ed.2d 610 (2000).
[30] *Davis*, 128 S.Ct. at 2768, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560; 112 S.Ct. 2130; 119 L.Ed.2d 351 (1992).
[31] *Citizens for Legislative Choice v. Sec of State*, 993 F. Supp. 1041, 1044 (E.D. Mich. 1998), quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560; 112 S.Ct. 2130, 2136; 119 L.Ed.2d 351 (1992).

facts showing that their efforts at having favorable legislation passed have actually been hampered. Notably, Plaintiffs have waited four long years to file this suit seeking to repair their alleged "injury," yet they cite no failed attempts at obtaining voter approval of laws authorizing gambling during that time period. Interestingly, Plaintiffs do not even allege that they have taken any unsuccessful action to propose that the voters modify or repeal the purportedly offensive provisions of art. 4, § 41. They cannot point to even one actual fact supporting that they have suffered a concrete and particularized injury.

Second, Plaintiffs also fail to show any causal connection between their alleged injury and Defendants' conduct. As will be further discussed in the context of Plaintiffs' claim under 42 U.S.C. § 1983, the only action of Defendants that Plaintiffs complain about is the "enforcement" of art. 4, § 41. Yet Plaintiffs have not alleged that Defendants actually have taken any actions to enforce art. 4, § 41. And, significantly, they have not alleged any actions Defendants have taken *against Plaintiffs*. Consequently, Plaintiffs have not provided any facts establishing that Defendants have caused their purported harm.

Finally, Plaintiffs cannot show that it is "likely" that their alleged injury will be "redressed by a favorable decision." Even if this Court declared the voter-approval requirements of art. 4, § 41 unconstitutional, Plaintiffs would be in the same situation they are in now. Currently, Plaintiffs may freely petition the Legislature for beneficial legislation. If that legislation authorizes gambling, the voter-approval requirements apply, but they do not stand between Plaintiffs and the Legislature. Consequently, removing those requirements would not alleviate Plaintiffs' alleged harm.

In light of the foregoing, Plaintiffs lack standing to sue, and their claims should be dismissed.

B. Equal Protection—Count III

Plaintiffs baldly assert in their First Amended Complaint that Mich. Const. 1963 art. 4, § 41 treats "similarly situated interests" differently "without justification" and that the provision therefore violates the Equal Protection Clause of the Fourteenth Amendment.[32] This claim should be dismissed because art. 4, § 41 contains no classification of persons (or businesses) and, even if it contained a classification subject to an Equal Protection analysis, there is a rational basis for the voter-approval requirement on laws authorizing gambling.

The Equal Protection Clause provides that no "State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[33] This provision "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly."[34] If a law that creates a classification does not "burden a fundamental right [or] target[] a suspect class" it will be upheld as long as it is rationally related to a legitimate government interest.[35] This remains true "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[36]

The threshold question, however, is whether art. 4, § 41 is subject to an Equal Protection analysis at all because it does not contain a classification of persons or businesses subject to constitutional protection.[37] "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by

---

[32] See First Amended Complaint at paragraph 24.
[33] U.S. Const. Amend. XIV, § 1.
[34] *Vacco v. Quill*, 521 U.S. 793, 799; 117 S.Ct. 2293; 138 L.Ed.2d 834 (1997), citing *Plyler v. Doe*, 457 U.S. 202, 216; 102 S.Ct. 2382; 72 L.Ed.2d 786 (1982).
[35] *Vacco*, 521 U.S. at 799; see also *Romer v. Evans*, 517 U.S. 620, 631; 116 S.Ct. 1620; 134 L.Ed.2d 855 (1996) (applying these principles to a state constitutional amendment).
[36] *Romer*, 517 U.S. at 632.
[37] See *McGowan v Maryland*, 366 U.S. 420, 427; 81 S.Ct. 1101; 6 L.Ed.2d 393 (1961) (stating that the "Equal Protection clause relates to equality between persons as such").

the law."[38] Plaintiffs allege that Mich. Const. 1963 art. 4, § 41 classifies gaming "interests" and "gaming licensees."[39] But no such classifications exist in the provision itself. At most, the provision classifies various laws or governmental decisions concerning gambling: laws concerning lotteries (sentence 1); laws authorizing a form of gambling (sentence 2); and new state lottery games (sentence 2), presumably authorized by the Commissioner of the Bureau of State Lottery.

The third sentence of the provision exempts from the entire section different categories of gambling, not different categories of people. It exempts "*gambling* in up to three casinos in the City of Detroit" and "Indian Tribal *gaming*." The latter exemption represents the obvious inapplicability of state law to gaming conducted by Native American tribes pursuant to the IGRA. And the first exemption represents a limitation on the number of casinos in which gambling may occur in Detroit before the voter-approval requirement would apply to laws authorizing gambling there.

Notably, the provision does not reference any particular casino or even provide a reference to the MGCRA. Consequently, the "three casinos" are not restricted to the three regulated by the MGCB. "Casino" must be taken at its plain meaning, not its meaning within a particular unmentioned provision of Michigan law. Moreover, although Detroit is the only location that currently qualifies as a "city" where casinos licensed by the MGCB may be located,[40] the possibility exists that other locations could qualify in the future and, if other legal

[38] *Personnel Administrtor of Massachusetts v. Feeney*, 442 U.S. 256, 271-272; 99 S.Ct. 2282; 60 L.Ed.2d 870 (1979).
[39] See First Amended Complaint at paragraph 24.
[40] M.C.L. § 432.202(l); M.C.L. § 432.206(3).

requirements were satisfied, the MGCB could license a casino in another location. This possibility demonstrates that "casino licensee" is not a classification under art. 4, § 41.[41]

In any event, the text of art. 4, § 41 does no more than address the mode of passing certain laws and authorizing certain lottery games. The funding behind the proposal sheds no light on the provision's meaning; the voters adopted it, and it would be inappropriate to view the meaning of the provision through the lens of whose dollars promoted it. Plaintiffs boldly assert that the "obvious rationale" behind Proposal 04-01 was the Michigan casino owners' desire to protect themselves from perceived economic competition that would result from any new forms of gambling being authorized at the horse-racing tracks. This alleged rationale is also analytically insignificant, given that individuals may lawfully lobby the legislature or voters to adopt laws in their favor.[42] Plaintiffs have not asserted that any of the groups that supported this constitutional amendment (either those presumably in favor of gambling or those opposed to it) did anything that was improper or otherwise illegal in promoting its adoption.

Even assuming that art. 4, § 41 contains a classification that is subject to an Equal Protection analysis, it is not unconstitutional. In Count III of the First Amended Complaint, Plaintiffs do not assert that any fundamental rights are infringed by art. 4, § 41,[43] and they do not assert that the provision targets any "suspect classification" (race, alienage, or national origin) or

[41] Plaintiffs contend that the only other gaming licensees in Michigan "of any consequence" are the horseracing licensees. One wonders whether the representatives of the many charitable organizations that have received gaming licenses from the Bureau of State Lottery would concur.
[42] See *Calif Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510-511; 92 S.Ct. 609; 30 L.Ed.2d 642 (1972).
[43] As explained below, Plaintiffs' claim in Count I that art 4, § 41 violates the First Amendment lacks merit. Consequently, to the extent that Plaintiffs' rest their Equal Protection claim on the infringement of First Amendment rights, that claim does not trigger heightened scrutiny for the Equal Protection analysis.

"quasi-suspect" class (i.e., gender or illegitmacy).[44] As a result, the "rational relationship" test plainly applies, and the constitutional validity of art. 4, § 41 is strongly presumed.[45] The State has a significant amount of discretion in creating classifications that are reasonably believed to be necessary.[46] Consequently, the classifications need only be rationally related to a legitimate governmental purpose.[47] Plaintiffs carry the heavy burden of showing that any of the classifications are arbitrary or unreasonable[48] and, even more daunting, the burden of eliminating every possible justification in support of the classification.[49]

Plaintiffs simply cannot sustain their burden. The augmented approval process for authorization of gambling activities within the scope of art. 4, § 41 is rationally related to the legitimate government interest of controlling the spread of gambling within the State. Michigan has a "paramount" interest in the health, safety, and welfare of its citizens and, in furtherance of that interest, has the ability to control the expansion of gambling.[50] Notably, however, art. 4, § 41 does not actually limit the expansion of gambling. Its applicability is even less intrusive. The provision merely places a check on the activities of other decision makers. Given that Plaintiffs have no constitutional right to engage in any form of gambling and Michigan's legislators or voters could outlaw gambling altogether, the mere addition of a layer of approval on certain

---

[44] *Equality Foundation of Greater Cincinnati, Inc v. City of Cincinnati*, 54 F.3d 261, 266 (6th Cir. 1995), vacated on other grounds, 116 S.Ct. 2519 (1996), citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432; 105 S.Ct. 3249; 87 L.Ed.2d 313 (1985); see also *Vacco*, 521 U.S. at 800.

[45] *Id.*

[46] *Borden's Farm Products Co v. Baldwin*, 293 U.S. 194, 209-210; 55 S.Ct. 187; 79 L.Ed. 281 (1934).

[47] *Borden's*, 293 U.S. at 210.

[48] *Borden's*, 293 U.S. at 209-210.

[49] *Federal Communications Comm'n v Beach Communications, Inc*, 508 U.S. 307, 315; 113 S.Ct. 2096; 124 L.Ed.2d 211 (1993).

[50] *Helton v. Hunt*, 330 F.3d, 242, 246-246 (4th Cir. 2003); *Rhode Island Chapter of Nat'l Women's Political Caucus, Inc v. Rhode Island Lottery Comm'n*, 609 F. Supp. 1403, 1413 (D. R.I. 1985).

gambling activities does not offend the Constitution. Interestingly, because the MGCRA was voter-initiated legislation, gambling in the three casinos currently regulated by the MGCB has already been subjected to state-wide and local government approval.[51] Moreover, the voter-initiated MGCRA is subject to a continuing heightened approval requirement—approval by a three-fourths majority vote.[52]

Yet another legitimate interest served by the exclusion of laws authorizing gambling in up to three casinos in the city of Detroit is the interest of generating revenue and industry in a struggling urban area. This economic stimulus was a driving force behind the passage of Proposal E, as was the interest in generating additional funds for Michigan's public school system.[53] Although the exemption in art. 4, § 41 is not limited in application to the casinos regulated by the MGCB, under present circumstances the exemption would encompass them. Permitting the Legislature to authorize additional forms of gambling in up to three casinos in Detroit without a voter-approval requirement furthers the legitimate interests that precipitated Proposal E.[54]

Mich. Const. 1963 art. 4, § 41 easily survives Plaintiffs' bare Equal Protection challenge. Even assuming that the provision contains a classification subject to an Equal Protection

---

[51] See M.C.L. § 432.202(l), limiting the definition of "city" to a subset of locations that "had a majority of voters who expressed approval of casino gaming in the city."

[52] Mich. Const. 1963 art. 2, § 9.

[53] See Exhibit 3, Gallagher, John, "A Gamble on Casinos Seems To Be Paying Off," *Detroit Free Press*, September 30, 2007, News, p. 1; see also "Overview of Casino Gaming in Michigan" http://www.state.mi.us/mgcb/overview.htm and Proposal E Ballot Language, http://www.michigan.gov/mgcb/0,1607,7-120-1382_1450-12939--,00.html (accessed on July 24, 2008).

[54] See *Dalton v. Pataki*, 5 N.Y.3d 243, 265-266; 835 N.E.2d 1180; 802 N.Y.S.2d 72 (2005) (stating that under rational basis review, "it would [be] rational for the Legislature to determine that certain racetrack communities were in greater need of the potential revenue that would be generated by the video lottery than others and, as a result, not require those areas to get prior local approval).

analysis, the constitutional provision is rationally related to the legitimate governmental purposes of controlling the expansion of gambling and providing economic aid to the city of Detroit.

C. First Amendment—Count I

In Count I of the First Amended Complaint, Plaintiffs assert that art. 4, § 41 violates their First Amendment right to petition for redress of grievances. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."[55] Plaintiffs have failed to state a valid First Amendment claim.[56] The sum of Plaintiffs' assertions supporting their claim is that art. 4, § 41 "erects a barrier to legislative access" (also referred to as "a barrier to legislative relief")[57] and therefore "violates the First Amendment right to petition the government for redress of grievances."[58]

Plaintiffs fail to allege any facts supporting their allegation that Mich. Const. 1963 art. 4, § 41 "erects a barrier to legislative access" or violates their "right to petition for redress of grievances." Indeed, no such facts exist. The voter-approval requirement on "law[s] *enacted* . . . that authorize[] any form of gambling" applies, by its terms, only *after* the Legislature has acted. Consequently, it places no barrier at all between Plaintiffs and the Legislature. Plaintiffs may continue to seek from the Legislature whatever they could seek before the amendment of art. 4, § 41. Plaintiffs simply mischaracterize art. 4, § 41. Rather than a barrier to access, the voter-

[55] U.S. Const. Amend. I.
[56] As an initial matter, Plaintiffs' First Amendment claim is deficient because it fails to rely on the Fourteenth Amendment to apply the First Amendment to the State, as opposed to the federal government. *Mills v. Alabama*, 384 U.S. 214, 218; 86 S.Ct. 1434; 16 L.Ed.2d 484 (1966); see also *Ball v. School Dist of Grand Rapids*, 641 F. Supp. 1, 3 (W.D. Mich. 1986) (stating that allegations concerning the Fourteenth Amendment were necessary to state a claim because it is "only through the fourteenth amendment that the . . . first amendment constrains the actions of the states . . . .").
[57] See First Amended Complaint, paragraph 13.
[58] See First Amended Complaint, paragraphs 19-20.

approval requirement more closely resembles the requirement that the Governor approve a law before it takes effect.[59] Like other checks and balances, it merely provides a procedure through which Michigan voters have the right to approve certain laws authorizing a form of gambling.

Piercing to the heart of Plaintiffs' claim, their description of the voter-approval requirement as a "barrier to legislative relief" is particularly telling. This moniker reveals that it is not actually *access* that Plaintiffs complain about—it's results. Of course, Plaintiffs have no right to legislation that furthers their economic goals. The Sixth Circuit Court of Appeals recognized this principle in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.[60] In that case, the Court concluded that a particular amendment to the City Charter did not impair the right to petition because those challenging the amendment still had access to the City Council, as well as other political venues, and still had the right to petition for repeal of the challenged amendment.[61] The Court noted that "the realization of [the group's] political agenda [was] not constitutionally guaranteed" and that "[t]hose who opposed [the amendment] simply lost one battle of an ongoing political dispute." [62]

Like the plaintiffs in *Equality Foundation*, Plaintiffs in the instant case have suffered no constitutional harm. Although Plaintiffs apparently perceive that the requirements of art. 4, § 41 will complicate their efforts to expand gambling in the horse-racing industry in Michigan, Plaintiffs still have the capability to petition the Legislature, and then the voters, for approval of laws approving forms of gambling. They also may petition the voters for the repeal of the voter-approval requirement through the same process by which it was added to art. 4, § 41.[63]

---

[59] Mich. Const. 1963 art 4, § 33.
[60] *Equality Foundation*, 54 F.3d at 269-270.
[61] *Equality Foundation*, 54 F.3d at 269.
[62] *Equality Foundation*, 54 F.3d at 269.
[63] See *Equality Foundation*, 54 F.3d at 269.

The First Amendment implications of a procedure for passing a law were also examined in *Risser v. Thompson*.[64] There, state senators asserted that that the requirement of a two-thirds majority vote to override a gubernatorial veto (specifically, a partial veto that permitted the governor to change words or digits in a legislatively approved bill) deprived the senators of their First Amendment right to vote.[65] Similarly, Plaintiffs here complain about a procedure that shifts the balance of power after the Legislature has acted—but to the voters, rather than the governor. But as noted in *Risser*, the federal Constitution does not require a specific balance of power within state government.[66] Consequently, Plaintiffs do not have a First Amendment right to a law-passing procedure that does not include a voter-approval requirement.[67]

Plaintiffs have not alleged any facts supporting their conclusion that art. 4, § 41 infringes on their right to petition for redress of grievances, nor could they. Thus, Count I of the First Amended Complaint fails to state a claim upon which relief can be granted.

D. Due Process—Count IV

Plaintiffs also fail to state a claim for violation of the Due Process Clause. The Due Process Clause of the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law."[68] Here, Plaintiffs present three different claims in this count of the First Amended Complaint, one of which is not properly characterized as a "due process" claim.

---

[64] 930 F.2d 549 (D. Wis. 1991).
[65] *Risser*, 930 F.2d at 553.
[66] *Risser*, 930 F.2d at 551-552.
[67] See *Risser*, 930 F.2d at 552 (discussing the injusticiability of the guarantee of a Republican form of government and stating, in any event, that "[a] modest shift in power among elected officials is not a denial of republican government or even a reduction in the amount of democracy").
[68] U.S. Const. Amend. XIV.

First, Plaintiffs reiterate their Equal Protection argument from Count III.[69] As demonstrated above, this claim lacks merit, and it fares no better under the heading of the Due Process Clause.

Next, Plaintiffs assert that art. 4, § 41 violates Due Process because it is both overbroad and vague.[70] As an initial note, the rhetorical questions Plaintiffs pose in this paragraph reveal that what Plaintiffs actually complain about is the difficulty that might ensue in construing the terms used in the recently added portion of that constitutional provision. As further discussed below, these concerns do not rise to the level of constitutional violation.[71] Difficulty in construing a law does not lead to a conclusion that it is impermissibly vague.

Turning to the first claim in paragraph 27, Plaintiffs have improperly characterized their overbreadth claim as a Due Process claim. The overbreadth doctrine arises out of the First Amendment, not the Due Process Clause.[72] Nevertheless, Plaintiffs have not properly stated a claim that art. 4, § 41 is constitutionally overbroad. Under this doctrine, "a statute is facially invalid if it prohibits a substantial amount of protected speech."[73] "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."[74] "The overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and

---

[69] See First Amended Complaint, paragraph 26.
[70] See First Amended Complaint, paragraph 27.
[71] See *Broadrick v. Oklahoma*, 413 U.S. 601, 607; 93 S.Ct. 2908; 37 L.Ed.2d 830 (1973) (stating that "[w]ords inevitably contain germs of uncertainty") and *United States Civil Service Commission v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 578-579; 93 S.Ct. 2880; 37 L.Ed.2d 798 (1973) (stating that although there may be "quibbles about the meaning" of certain words, "there are limitations in the English language with respect to being both specific and manageably brief").
[72] *US v. Williams*, ____U.S. ____; 128 S.Ct. 1830, 1838; 170 L.Ed.2d 650 (2008).
[73] *Williams*, 128 S.Ct. at 1838. The facial overbreadth challenge constitutes an exception to the standing requirements discussed above. *Leonardson v. City of East Lansing*, 896 F.2d 190, 195 (6th Cir. 1990).
[74] *Virginia v. Hicks*, 539 U.S. 113, 124; 123 S.Ct. 2191; 156 L.Ed.2d 148 (2003).

from actual fact,' that substantial overbreadth exists."[75] The expansive remedy of invalidating a facially overbroad law addresses the "concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions."[76] This extreme measure is to be employed "sparingly."[77]

Here, the most obvious indicator that the overbreadth doctrine does not apply is that the text of art. 4, § 41 prohibits no protected speech at all. In fact, Plaintiffs do not allege that art. 4, § 41 prohibits any protected speech. They merely assert in paragraph 28 that "the overbreadth of [art. 4, § 41] impinges on Plaintiffs' First Amendment Right to Petition for redress of grievances." As discussed above, however, art. 4, § 41 has no impact on Plaintiffs' right to petition. The recently added portion of this constitutional provision merely establishes a voter-approval requirement that must be followed under certain circumstances. And, significantly, Plaintiffs may still engage in whatever lobbying or persuasive efforts they could have engaged in to further their goals before the amendment of art. 4, § 41. No protected speech is restricted by this provision.

Plaintiffs' vagueness challenge also fails. Generally, a law is unconstitutionally vague if it does not provide a "person of ordinary intelligence fair notice of what is prohibited or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[78] "Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at

[75] *Hicks*, 539 U.S. at 122.
[76] *Hicks*, 539 U.S. at 119.
[77] *Leonardson*, 896 F.2d at 195 (6th Cir. 1990).
[78] *Williams*, 128 S.Ct. at 1845.

risk."[79] "'[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.'"[80]

Again, art. 4, § 41 does not prohibit or penalize any conduct. It merely establishes procedural requirements on the effectiveness of certain laws and the authorization of certain lottery games. Thus, the Due Process interest in giving citizens fair notice of proscribed conduct is not implicated here.[81] Moreover, the provisions of art. 4, § 41 are not impermissibly vague just because the courts may have to determine what certain terms mean.[82] The courts will be able to rely on the principles of statutory construction to determine the provision's scope.[83] Notably, certain provisions of art. 4, § 41 have already been construed by Michigan's Attorney General in Opinion 7190, issued March 15, 2006, through use of the rules of statutory construction applicable under Michigan law. Plaintiffs have failed to state a claim that art. 4, § 41 should be declared facially invalid on vagueness grounds, and any such properly stated claim would fail as a matter of law.

E. Commerce Clause—Count II

Plaintiffs also fail to state a claim for violation of the Commerce Clause. This constitutional provision provides that "Congress shall have power . . . [to] regulate Commerce . . . among the several states."[84] Given that Plaintiffs do not attack a law passed by Congress, it is

---

[79] *Maynard v. Cartwright*, 486 U.S. 356, 361; 108 S.Ct. 1853; 100 L.Ed.2d 372 (1988).
[80] *Williams*, 128 S.Ct. at 1845, quoting *Ward v Rock Against Racism*, 491 U.S. 781, 794; 109 S.Ct. 2746; 105 L.Ed.2d 661 (1989).
[81] See *Grayned v City of Rockford*, 408 U.S. 104, 108-109; 92 S.Ct. 2294; 33 L.Ed.2d 222 (1972) (describing the vagueness doctrine as helping individuals steer clear of prohibited conduct while also protecting the exercise of First Amendment freedoms by requiring clearly marked forbidden areas).
[82] See fn. 54 and 64 above.
[83] See *Grayned*, 408 U.S. at 110-111 (relying on State court construction and dictionary definitions of terms employed in the ordinance at issue in concluding that the provision was not impermissibly vague).
[84] U.S. Const. art. 1, §8, cl. 3.

apparent that their claim asserts a violation of the dormant Commerce Clause—the "negative implication" of the Commerce Clause that limits the power of the states to substantially burden interstate commerce.[85] In examining a dormant Commerce Clause challenge, the Court first asks "whether the challenged law discriminates against interstate commerce. . . . A discriminatory law is "virtually *per se* invalid[]" . . . and will survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives . . . ."[86] A law is discriminatory if it requires "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[87]

If a law does not facially discriminate but "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, . . . it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[88]

Plaintiffs have not asserted facts that support a dormant Commerce Clause violation, nor could they. Plaintiffs, all Michigan organizations,[89] first assert that they rely heavily on interstate commerce precipitating from pari-mutuel wagering on simulcast races that originate out of state.[90] The fact that Plaintiffs may engage in interstate commerce does not raise a Commerce Clause claim. Arguably, many, if not most, businesses do engage in interstate commerce, whether through obtaining products or services or selling their own products or services. Plaintiffs continue that art. 4, § 41 violates the Commerce Clause "because the

---

[85] *Dep't of Revenue of Kentucky v. Davis*, ___ U.S. ___; 128 S.Ct. 1801, 1808; 170 L.Ed.2d 685 (2008); see *Brown v. Hovatter*, 516 F. Supp. 2d 547, 560 (D. Md. 2007), citing *Cooley v. Bd. of Wardens*, 53 U.S. 299, 12 How. 299; 13 L.Ed. 996 (1852).
[86] *Dep't. of Revenue of Kentucky*, 128 S.Ct. at 1808 (citations omitted).
[87] *Oregon Waste Sys, Inc v. Dep't of Environmental Quality of Ore*, 511 U.S. 93, 99; 114 S.Ct. 1345; 128 L.Ed.2d 13 (1994).
[88] *Pike v. Bruce Church, Inc*, 397 U.S. 137, 142; 90 S.Ct. 844; 25 L.Ed.2d 174 (1970).
[89] See First Amended Complaint, paragraphs 3-5.
[90] See First Amended Complaint, paragraph 18.

disparate treatment of the racetrack interests effected by [art. 4, § 41] protects the interests of a discrete group, i.e. the casino interests[,] from economic competition."[91] This assertion, too, is insufficient to support a commerce clause claim. Although Plaintiffs assert disparate treatment, it is plain that art. 4, § 41 does not discriminate between in-state and out-of-state interests. It prescribes a method of passing certain gambling laws or authorizing certain lottery games without regard to who engages in or offers the gambling. If any location-based classification exists, it is based on locations within the State of Michigan. Such a classification is not a Commerce Clause concern.

Because art. 4, § 41 does not treat in-state and out-of-state commerce differently, it can only be challenged on Commerce Clause grounds under the *Pike* balancing test,[92] examining whether the law at issue substantially burdens interstate commerce. Although Plaintiffs contend that art. 4, § 41 burdens them in achieving the passage of favorable legislation, they do not contend that art. 4, § 41 burdens interstate commerce at all. But even if they did, whatever hypothetical burden one could claim art. 4, § 41 asserts on interstate commerce is certainly incidental to its legitimate purpose. Consequently, Plaintiffs' Commerce Clause claim fails and Count IV should be dismissed.

F. 42 U.S.C. § 1983—Count V

Plaintiffs also assert that Defendants' enforcement of art. 4, § 41 violates 42 U.S.C. § 1983.[93] This basis for relief, too, is fatally deficient, and Count V should be dismissed.

Persons deprived of the "rights, privileges or immunities" guaranteed under the Constitution have a private right of action under 42 U.S.C. § 1983 when someone operating

[91] See First Amended Complaint, paragraph 22.
[92] See *Pike*, 397 U.S. at 142.
[93] See First Amended Complaint, paragraph 30-31.

"under color of any statute, ordinance, regulation, custom, or usage" of a governmental entity causes the deprivation.[94] Plaintiffs' claim fails for multiple reasons.

First, "'[t]he violation of a federally protected right" is necessary for there to be liability . . . under § 1983."[95] As demonstrated throughout this brief, art. 4, § 41 does not deprive Plaintiffs of any constitutional rights. Consequently, there is nothing for this Court to enjoin or declare unconstitutional.

Second, the constitutional deprivations that Plaintiffs have asserted in this action have not been caused by the Attorney General or the Governor. For Plaintiffs' claim to have merit, "the deprivation must be committed by a person acting under color of law."[96] "The term, 'under color of law,' requires that the conduct, which allegedly caused the deprivation, be fairly attributable to the state."[97] Action is "fairly attributable" if the "deprivation . . . result[s] from the exercise of some right or privilege that has been created by the state, by a rule of conduct which has been imposed by the state, or by a person for whom the state is responsible" and "the defendant [is] a state actor."[98] Here, Plaintiffs claim deprivations that exist by virtue of the recent amendment of art. 4, § 41, not by virtue of any action of Defendants. Plaintiffs articulate this fact by asserting in support of their §1983 claim that their "continued business viability is threatened by their inability to seek legislative remedies for their declining revenue."[99] As previously explained, Plaintiffs may still freely seek such remedies. Indeed, Plaintiffs cite no action taken by Defendants to enforce the provisions of art. 4, § 41. Defendants' only action has been to defend against this suit. Moreover, Plaintiffs have suffered no injury at the hands of Defendants. It

---

[94] *Grinter v. Knight*, 532 F.3d 567; 2008 U.S. App. LEXIS 12919, *6, (6th Cir. 2008), quoting 42 U.S.C. § 1983.
[95] *Grinter, supra*, quoting *Schroder v. City of Fort Thomas*, 412 F.3d 724, 727 (6th Cir. 2005).
[96] *Grinter, supra*, citing *Street v. Corr Corp of Am*, 102 F.3d 810, 814 (6th Cir. 1996).
[97] *Knubbe v. Sparrow*, 808 F. Supp. 1295, 1301 (E.D. Mich. 1992).
[98] *Knubbe*, 808 F. Supp. at 1301.
[99] See First Amended Complaint, paragraph 32.

would be difficult to conceive of any circumstance at all where the requirements of art. 4, § 41 would be enforced *against Plaintiffs.* They are simply faced with a law they do not like. Because Plaintiffs have failed to state a cognizable § 1983 action, Count V should also be dismissed.

G. Violation of Michigan Statutory Law and Constitution—Count VI

In Count VI, Plaintiffs allege that art. 4, § 41 violates MCL 168.482(3) (part of the Michigan Election Law), Mich. Const. 1963 art. 12, § 2, and Mich. Const. 1963 art. 2, §4.[100] These claims arise solely out of state law. In the First Amended Complaint, Plaintiffs have asserted that this Court's jurisdiction is authorized under 28 U.S.C. §1331, which gives district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331 does not provide jurisdiction over these state-law claims, and Plaintiffs have cited no basis for this Court's jurisdiction over them. Defendants request that the Court dismiss these claims as well.

Despite Plaintiffs' failure to articulate a basis for this Court's jurisdiction over their state law claims, supplemental jurisdiction over state law claims under 28 U.S.C. § 1367 is sometimes available. Here, however, Defendants submit that it would be futile to permit Plaintiffs to amend their complaint to include this basis for jurisdiction because it does not apply here and, even if it did apply, jurisdiction should not be exercised. The relevant provisions of 28 U.S.C. § 1367 state:

> (a) Except as provided in subsections (b) and (c) . . . , in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. . . . .

[100] See First Amended Complaint, paragraphs 35-37.

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law, [or]

* * *

(3) the district court has dismissed all claims over which it has original jurisdiction . . . .

Supplemental jurisdiction does not exist here because Plaintiffs' state law claims are not "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." A claim is part of the same case or controversy if it "derive[s] from a common nucleus of operative facts."[101] Although Plaintiffs' state-law claims also concern art. 4, § 41, they merely constitute additional grounds for attacking its validity that are completely unrelated to the resolution of Plaintiffs' federal claims. Any facts related to the disposition of these claims, such as what language appeared on the petitions or the ballot relating to Proposal 04-01, pertain to no other claim in this case. Thus, Defendants assert that supplemental jurisdiction does not exist under 28 U.S.C. §1367(a).

If, however, the Court determines that supplemental jurisdiction does exist, Defendants request that, in its discretion, the Court decline to exercise it for the reasons stated in 28 U.S.C. §1367 (c)(1) and (c)(3). Here, the clearest basis for declining supplemental jurisdiction over Plaintiffs' state-law claims is that all of their federal claims lack merit and should be dismissed.[102] If the Court agrees and dismisses those claims, it should dismiss the state law claims as well: "'In the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered' will weigh against the exercise of supplemental

[101] *Harper v. AutoAlliance Intern, Inc,* 392 F.3d 195, 209 (6th Cir. 2004).
[102] See 28 U.S.C. §1367(c)(3).

jurisdiction."[103] Only if the interests of judicial economy and avoiding multiple lawsuits outweigh the concern over "needlessly deciding state law issues" should supplemental jurisdiction be exercised when all federal claims have been dismissed.[104] In fact, the Sixth Circuit has concluded that when the federal claims have been dismissed, declining supplemental jurisdiction is "the best course" of action.[105]

Supplemental jurisdiction should also be declined here because the resolution of Plaintiffs' claims concerns novel or complex areas of state law. "Federal courts lack competence to rule definitively on the meaning of state legislation."[106] Plaintiffs claim that (1) the petitions and ballot language for Proposal 04-01 violated Mich. Const. 1963 art. 10, §2 and MCL 168.482(3) because they did not identify certain constitutional provisions that Plaintiffs allege are "altered or abrogated" by art. 4, §41[107] and (2) these violations and the use of the initiative process by "big-money special interest groups" violate the "purity of elections" clause of Mich. Const. 1963 art. 10, §2.[108] Resolving these questions will require interpreting art. 4, § 41, resolving issues concerning its impact on the cited provisions of Michigan's Constitution, and examining whether the "purity of elections" clause extends to cover these alleged violations. Michigan's courts should have the first opportunity to address these questions.[109]

---

[103] *Edwards v. Widnall*, 17 F. Supp. 2d 1038, 1043 (D. Minn. 1998), quoting *Carnegie-Mellon University v. Cohill*, 484 U.S. 343; 108 S.Ct. 614; 98 L.Ed.2d 720 (1988).
[104] *Moon v. Harrison Piping Supply*, 465 F.3d 719, 728 (6th Cir. 2006).
[105] *Thurman v. DaimlerChrysler, Inc*, 397 F.3d 352, 359 (6th Cir. 2004).
[106] *Arizonans for Official English v. Ariz*, 520 U.S. 43, 48; 117 S.Ct. 1055; 137 L.Ed.2d 170 (1997).
[107] See First Amended Complaint, paragraphs 34-36.
[108] See First Amended Complaint, paragraph 37.
[109] *Reetz v. Bozanich*, 397 U.S. 82, 87; 90 S.Ct. 788; 25 L.Ed.2d 68 (1972).

These comity concerns are also reflected in the common-law abstention doctrines. For example, *Burford*[110] abstention, although not squarely applicable here, is appropriate in certain circumstances where "there are difficult questions of state law bearing on policy problems of substantial import whose importance transcends the result in the case then at bar" or the "exercise of federal review of the questions in a case and in similar cases would be disruptive to state efforts to establish a coherent policy with respect to a matter of substantial public concern."[111]

Plaintiffs ask this Court to invalidate a provision of the Michigan Constitution based on issues of state law. The provision under attack concerns a method put in place by the voters for approving laws authorizing gambling. How laws are passed is a matter of substantial public import, not to be taken lightly. Here, Michigan's voters have spoken on that issue, and Michigan's Courts should be given an opportunity to speak. Given the novelty of the interpretation of art. 4, § 41 and its impact on other provisions of Michigan's Constitution, it would be appropriate for this Court to decline jurisdiction on the state law issues.

V. Conclusion

Plaintiffs have brought this suit seeking relief from the Court when they should be seeking relief from the Legislature or the People. The recently added voter-approval requirement does not unfairly discriminate against Plaintiffs and does not unconstitutionally stand in the way of efforts toward achieving their goals. Defendants request that this Court recognize that

[110] *Burford v. Sun Oil Co*, 319 U.S. 315; 63 S.Ct. 1098; 87 L.Ed. 1424 (1943).
[111] *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361; 109 S.Ct. 2506; 105 L.Ed.2d 298 (1989), quoting *Colorado River Water Dist v. United States*, 424 U.S. 800; 96 S.Ct. 1236; 47 L.Ed.2d 483 (1976).

Plaintiffs lack standing to sue the Governor and Attorney General and that each of Plaintiffs' federal claims should be dismissed. Finally, Defendants request that the Court dismiss Plaintiffs' state-law claims because the Court lacks subject matter jurisdiction over them or, alternatively, its supplemental jurisdiction should not be exercised in this case.

Respectfully submitted,

Michael A. Cox
Attorney General

/s/ Donald S. McGehee
Donald S. McGehee (P37489)
Jessica Hodgson (P60103)
Melinda A. Leonard (P63638)
Assistant Attorneys General
Attorneys for Defendants
Alcohol & Gambling Enforcement Division
1500 Abbot Road, Suite 300
East Lansing, MI 48823
(517) 241-0210

Dated: August 21, 2008
aged/cases/gmbl/2008/nvd Brief in support of motion for jdg