

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL.
ROBERT L. WALGATE, JR., ET AL.

Plaintiffs-Appellants,

v.

JOHN R. KASICH, ET AL.,

Defendants-Appellees.

Ohio Supreme Court Case No. 13-0656

On Appeal from Franklin County Court of
Appeals, Tenth Appellate District,
Case No. 12-AP-548

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF INTERVENING
DEFENDANT-APPELLEES CENTRAL OHIO GAMING VENTURES, LLC AND
TOLEDO GAMING VENTURES, LLC**

Thomas W. Connors, Esq.
James M. Wherley, Jr., Esq.
Black, McCuskey, Souers & Arbaugh
220 Market Avenue South
Suite 1000
Canton, Ohio 44702

Attorneys for Plaintiffs-Appellants

Matthew Fornshell, Esq.
John Oberle, Esq.
Albert Lin, Esq.
Elizabeth E. Cary, Esq.
Ice Miller, LLP
250 West Street
Columbus, OH 43215
Tel: (614) 462-2700
Fax: (614) 462-5135
Matthew.Fornshell@icemiller.com
John.Oberle@icemiller.com
Albert.Lin@icemiller.com
Elizabeth.Cary@icemiller.com

*Attorneys for Intervening Defendant-
Appellees Central Ohio Gaming Ventures,
LLC and Toledo Gaming Ventures, LLC*

Mike DeWine, Esq.
Ohio Attorney General
30 E. Broad Street, 14th Floor
Columbus, OH 43215

Alexandra Schimmer, Esq.
Solicitor General
Michael Hendershot, Esq.
Chief Deputy Solicitor General
Appeals Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Pearl M. Chin, Esq.
Assistant Attorney General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

*Attorneys for Defendants-Appellees State of Ohio
and Governor John Kasich*

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SUPREME COURT OF OHIO

Christopher S. Williams, Esq.
James F. Lang, Esq.
Matthew M. Mendoza, Esq.
Calfee, Halter & Griswold LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114-1607

Attorneys for Intervening Defendant-Appellees Rock Ohio Caesars, LLC, Rock Ohio Caesars Cleveland, LLC and Rock Ohio Caesars Cincinnati, LLC

Alan H. Abes, Esq.
Jocelyn C. DeMars, Esq.
Dinsmore & Stohl LLP
255 East 5th Street, Suite 1900
Cincinnati, Ohio 45202
Attorneys for Intervening Defendant-Appellees Thistledown Racetrack, LLC

Charles R. Saxbe, Esq.
James D. Abrams, Esq.
Irv Berliner, Esq.
Jason H. Beehler, Esq.
Taft Stettinius & Hollister, LLP
65 E. State St., Suite 1000
Columbus, Ohio 43215
Attorneys for Intervening Defendant-Appellees Northfield Park Associates, LLC, Lebanon Trotting Club, Inc., MTR Gaming Group, Inc. and PNK (Ohio), LLC

Peter M. Thomas, Esq.
Michael A. Rzymek, Esq.
Assistant Attorneys General
Charitable Law Section, Gambling Unit
150 E. Gay Street, 23rd Floor
Columbus, Ohio 43215-3428

Attorneys for Defendants-Appellees the Ohio Casino Control Commission

Brian Mooney, Esq.
Assistant Attorney General
Charitable Law Section
615 W. Superior Avenue, 11th Floor
Cleveland, Ohio 44113

Attorney for Defendants-Appellees the Ohio Lottery Commission

Julie E. Brigner, Esq.
Ryan P. O'Rourke, Esq.
Assistant Attorneys General
Taxation Section
30 E. Broad Street, 25th Floor
Columbus, Ohio 43215

Attorneys for Defendants-Appellees Ohio Tax Commissioner Joseph W. Testa

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I. INTRODUCTION

In July of 2009, the Ohio General Assembly passed legislation which permitted the installation of Video Lottery Terminals (“VLTs”) in horse-racing tracks located throughout Ohio. Later that year, Ohio citizens passed a constitutional amendment which authorized four Las Vegas-style casinos in Cleveland, Columbus, Cincinnati, and Toledo. Since these enactments, Plaintiffs-Appellants¹ (among other litigants) have made multiple challenges to gambling statutes and regulations in an effort to slow down or halt the development of VLT facilities and casinos. This suit – which claims that the laws governing the operation, location, and taxation of VLT facilities and casinos are unconstitutional -- is simply the latest effort to interfere with Ohio’s gambling regulatory scheme. These efforts continue despite a multi-billion dollar investment in constructing casinos and VLT facilities, six of which are already open, employing thousands of citizens in new jobs in Ohio’s gambling industry.

In the courts below, Plaintiffs-Appellants’ claims failed because they did not adequately allege the most fundamental element of standing – injury-in-fact. In the alternative, Plaintiffs-Appellants argued that this is the “rare and extraordinary” case for which the public-right exception to standing is applicable. However, the lower courts disagreed and held that the public-right exception was not applicable in this case.

Even with this routine application of well-worn standing principles, Plaintiffs-Appellants now seek discretionary review before this Court. But under Ohio law, “a party to litigation has a right to **but one** appellate review” *Williamson v. Rubich*, 171 Ohio St. 253, 254 (1960) (emphasis added). In order to merit a **second, discretionary appeal** before the Supreme Court,

¹ Plaintiffs-Appellants are the American Policy Roundtable dba Ohio Roundtable (“Roundtable”), Robert L. Walgate, Jr., David B. Zanotti, Sandra L. Walgate, Agnew Sign & Lighting, Inc., Linda Agnew, Paula Bolyard, Jeffrey Malek, Michelle Watkin-Malek, Thomas W. Adams, Donna J. Adams, Joe Abraham and Frederick Kinsey.

an appellant must show that the case involves a “substantial constitutional question” or that the legal matters are of “public or great general interest.” *See* Ohio S. Ct. Prac. R. 7.02(C); *Williamson*, 171 Ohio St. at 254 (only “special circumstances” merit discretionary review).

But as recognized by the lower courts, this is not a novel or complicated legal matter. Instead, this case is a straightforward constitutional challenge to legislative enactments – because various special interest groups are opposed to gambling. Simply put, Plaintiffs-Appellants do not meet the demanding standard necessary for a second, discretionary appeal. Accordingly, Intervening Defendants-Appellees Central Ohio Gaming Ventures, LLC and Toledo Gaming Ventures, LLC (collectively, the “Casino Entities”) respectfully request this Court to deny jurisdiction, and dismiss this appeal.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Background On Gaming Statutes And The Allegations Of The Complaint.

On July 17, 2009, Ohio enacted Am.Sub.H.B. No.1 (“H.B. 1”), which authorized the Ohio Lottery to pass administrative rules that permitted the installation of VLTs in Ohio’s pari-mutuel horse-racing tracks. In November 2009, voters amended Article XV, § 6 of the Ohio Constitution, to permit four Las Vegas-style casinos to operate within the State. Subsequently, the General Assembly passed Am.Sub.H.B. No. 277 (“H.B. 277”), which implemented (among other things) regulations relating to the calculation of taxes and other payments to the State from VLTs and casinos.²

Plaintiffs-Appellants’ Amended Complaint seeks to challenge the constitutionality of these various statutes. In summary, these challenges are as follows:

² In addition to legislation, casinos and VLT facilities are governed by a substantial body of administrative rules issued by the Ohio Casino Control Commission, Ohio Lottery Commission, and the Ohio State Racing Commission. However, those administrative rules have not been challenged in the instant litigation.

VLT Challenges

- The Complaint alleges that VLTs do not fit within the definition of lottery (Claim One), will be conducted by third-parties (Claim Two), some VLT proceeds will not be used to support education (Claims Three & Four), and operation of VLTs violates the prohibition on the State's involvement with private enterprise (Claim Five). *See* Compl. at ¶¶ 21-55.
- The Complaint alleges that the bill which passed various VLT regulations violates the single subject rule (Claim Six), the three-day rule (Claim Seven), and improperly expands the jurisdiction of the Supreme Court (Claim Eight). *See id.* at ¶¶ 56-70.
- The Complaint seeks a writ of mandamus against the State actors to require that "all lottery games are conducted solely ... by an agency of the state" (Claim Nine), and that the "entire net proceeds from any lottery games are used for education programs" (Claim Ten). *See id.* at ¶¶ 71-76.

Casino Challenges

- The Complaint alleges that the Generally Assembly violated the constitution by specifically defining the calculation of the commercial activity tax ("CAT") for casinos (Claim Eleven), and exempting promotional gaming credits from the calculation (Claim Twelve). *See id.* at ¶¶ 77-93.
- The Complaint challenges the multi-stage construction and initial investment of the Cleveland Casino (Claim Thirteen). *See id.* at ¶¶ 94-104.
- The Complaint then seeks a writ of mandamus to prevent the implementation of the commercial activity tax ("CAT tax") (Claim Fourteen), exemption of gaming credits (Claim Fifteen), and the multi-stage construction and initial investment of the Cleveland Casino (Claim Sixteen). *See id.* at ¶¶ 105-117.
- Finally, the Complaint asserts a claim for "Grant of Monopoly," which purportedly violates the 14th Amendment of the U.S. Constitution (Claim Seventeen). *See id.* at ¶¶ 119-21.

B. Dismissal For Lack Of Standing.

In the trial court, the State moved to dismiss the Complaint for lack of standing which was joined by the Casino Entities and the other Intervening Defendants-Appellees. The trial court dismissed the Complaint solely on standing grounds. *See State ex. rel. Walgate v. Kasich*, Case No. 11 CVH-10-13126, slip op. at 17 (Franklin County C.P. Ct. May 30, 2012).

C. **Affirmance By The Tenth District Court of Appeals.**

On appeal, the Tenth District unanimously affirmed the trial court. The appellate court held that standing – injury-in-fact, causation, and redressability – is a jurisdictional precondition for any litigation. This is because the plaintiff must have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult questions.” *See State ex rel. Walgate v. Kasich*, 2013 Ohio 946, at ¶ 11 (10th Dist. Ct. App. 2013). At a minimum, there must be alleged a “palpable” injury to “the plaintiff himself.” *Id.* at ¶ 11. Importantly, “an injury that is borne by the population in general, and which does not affect the plaintiff in particular, is not sufficient to confer standing.” *Id.*

In analyzing the Complaint, the Tenth District held that “none of the [Plaintiffs-Appellants] have private standing because they have not suffered or are not threatened with any direct and concrete injury in a manner or degree different from that suffered by the public in general.” *Id.* at ¶ 16. Allegations that casinos and VLTs may lead to gambling addiction, or might cause “negative social effects” were too speculative to confer standing. *Id.* at ¶¶ 16-17.

Plaintiffs-Appellants also did not have standing to challenge the implementation of the CAT tax as it relates to casinos, or the amount of educational funding the State would receive from VLTs. Those alleged injuries were too speculative, and in any event, Plaintiffs-Appellants did not have any special status or interest in the CAT tax or VLT funding that would render their interest distinct from those suffered by the general public. *See id.* at ¶¶ 18-24.

Nor could Plaintiffs-Appellant establish standing based on purported harm from the Ohio Constitution granting a “monopoly” for casino gaming. No plaintiff presented specific allegations supporting that they had the capacity to fund, build, or operate a casino, and any injury was therefore “hypothetical and speculative.” *Id.* at ¶¶ 27-28.

The Tenth District also held that Plaintiffs-Appellants could not establish standing through the public-right exception announced in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451 (1999). *See id.* at ¶ 30. The appellate court emphasized that this exception is available only in “rare and extraordinary circumstances” and does not apply to routine cases that challenge the constitutionality of a legislative enactment. *See id.* Because the VLT and casino statutes did not address fundamental issues relating to the separation of powers, and did not materially affect the substantive rights of every citizen, the public-right exception was inapplicable.

Finally, the Tenth District held that Plaintiffs-Appellants could not challenge the trial court’s refusal to permit an amendment of the Complaint to cure these standing defects. Plaintiffs-Appellants had not moved to amend the complaint, and in any event, such amendment would not cure the deficiencies. *See id.* at ¶ 35.

The Tenth District therefore affirmed the trial court. *See id.* at ¶ 37. Plaintiffs-Appellants then sought discretionary review before this Supreme Court.

III. STATEMENT OPPOSING JURISDICTION

In their Memorandum in Support of Jurisdiction, Plaintiffs-Appellants argue that the Supreme Court should grant discretionary review for three reasons. **First**, the lower court opinions prevent those individually affected by VLTs and casinos from challenging the constitutionality of applicable statutes. **Second**, every Ohio citizen should have the right to challenge casino and VLT regulations – irrespective of whether they had an injury-in-fact -- given the inherent public interest involved. And **third**, the lower courts committed procedural errors by not permitting Plaintiffs-Appellants to amend their defective Complaint.

A. A Straight-Forward Application Of Standing Principles Does Not Merit Supreme Court Review.

First, application of the elements of standing is not a novel or complex legal question. Indeed, this Court has declined to accept cases that seek to overturn a dismissal for lack of standing. *See Brown v. Columbus City Schs. Bd. of Educ.*, Case No. 2009-1486, slip op. (Ohio Nov. 18, 2009) (declining to accept jurisdiction in a standing case); *Gildner v. Accenture*, Case No. 2009-2054, slip op. (Jan. 27, 2010) (same). These rulings acknowledge that the elements of standing have been routinely applied by trial and appellate courts throughout Ohio – every day, for many, many years. *See e.g. Masterson v. Ohio State Racing Commission*, 162 Ohio St. 366, 368 (1954) (analyzing principles of standing and holding that private citizens may not challenge a legislative enactment when there is no injury-in-fact different from the general public); *Liverpool, NY & Philadelphia Steamship Co. v. Comm'ers of Emigration*, 113 U.S. 33, 39 (1884) (challenge to legislative enactments cannot be hypothetical; court can only adjudicate the “precise facts” of the “legal rights of litigants in actual controversies”).

This case is no different. Accordingly, discretionary appeal is inappropriate, and this court should decline jurisdiction.

B. Application Of The Public-Right Exception Does Not Merit Supreme Court Review.

Second, review is not required to revisit the public-right exception to standing. As set forth in *Sheward*, the public-right exception permits a citizen without a particularized injury-in-fact to challenge the constitutionality of a legislative enactment. *See Sheward*, 86 Ohio St. 3d at 471-75. But this exception has only been applied in “rare and extraordinary circumstances” that raise fundamental issues affecting the nature of government, or materially affect every single citizen in Ohio. *See id.* at 471, 475. By contrast, the mere fact that a plaintiff challenges the constitutionality of a legislative enactment is insufficient to apply the “narrow” public right

exception. See *State ex rel. United Auto Aero. & Agric. Implement Workers of Am. v. OBWC*, 108 Ohio St. 3d 342, at ¶ 51 (2006).

Plaintiffs-Appellants argue that jurisdiction is appropriate in this case because this Court accepted jurisdiction in *ProgressOhio.org, Inc. v. JobsOhio*, Case No. 2012-1272 (Ohio Jan. 23, 2013). But *JobsOhio* presents starkly different factual circumstances. In *JobsOhio*, two legislators and various interest groups sought to challenge the privatization of a state agency. The legislators argued that they had standing for three reasons: (1) that the *JobsOhio* implementing legislation had a statutory grant of standing, and therefore, injury-in-fact was not necessary, see O.R.C. § 187.09; (2) that only legislators have the right to appropriate state funds, and therefore there was a cognizable injury-in-fact; and (3) that the public-right exception was applicable, because the privatized entity would fundamentally change the nature of Ohio government. See *JobsOhio*, Case No. 2012-1272, Mem. Supp. Jur. at 5-9 (filed July 27, 2012).

But none of these circumstances are at issue in this case. (1) There is no purported statutory grant of standing in the various VLT and casino statutes. Rather, the normal elements of standing – including injury-in-fact – must be applied before any constitutional challenge can proceed. (2) Nor is any officeholder with legislative authority challenging the VLT and casino statutes at issue here. Instead, this case is simply an attempt by various interest groups to prevent, slow down, or complicate legalized gambling in Ohio. (3) Finally, as explained in more detail below, this case does not raise the type of fundamental questions that necessitate application of the public-right exception.

C. Routine Procedural Decisions Do Not Merit Supreme Court Review.

Third, discretionary appeal is simply improper for the review of routine procedural decisions, such as whether to permit an amendment of a Complaint. Here, Plaintiffs-Appellants never filed a motion for leave to amend, and merely made a passing remark about amendment in

an opposition brief. *See State ex rel. Walgate*, 2013 Ohio 946, at ¶ 35. But this is not a substantive constitutional question or a matter of great public import, and is simply routine docket management within the discretion of the trial court. *See Univ. Hosps. Of Cleveland v. Lynch*, 96 Ohio St. 3d 118, 119 (2002) (trial court has discretion to deny amendment of complaint). Accordingly, discretionary appeal is inappropriate.

IV. CASINO ENTITIES' PROPOSITION OF LAW NO. 1: Plaintiffs-Appellants Lack Standing To Assert A Constitutional Challenge To Ohio's Gaming Laws And Regulations Absent An Injury-In-Fact.

In Ohio, it is well established that standing exists only where a litigant (a) has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, (b) that the law in question has caused the injury, and (c) that the relief requested will redress the injury. *See Cuyahoga County Bd. of Comm'rs. v. Ohio*, 112 Ohio St. 3d 59, ¶ 22 (1999). Standing requires "actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect . . . to refrain from giving opinions on abstract propositions ... or advise[ing] upon potential controversies." *Fortner v. Thomas*, 22 Ohio St. 2d 13, 14 (1970).

Plaintiffs-Appellants assert six theories of standing: (1) gambling addiction, (2) negative social effects, (3) school teacher/parent of public school students, (4) interested casino-operator, (5) taxpayer, and (6) associational standing. All of these theories fail.

Plaintiffs-Appellants first argue that Robert Walgate's status as a former **gambling addict** establishes standing. Plaintiffs-Appellants cite *Roundtable v. Taft*, 119 Ohio Misc. 2d 49, ¶¶ 47-48 (C.P.2002) for the proposition that an increased risk of addiction may support injury-in-fact. But Plaintiffs-Appellants do not allege that the purported VLT or casino regulations would cause additional injury, or that changing such regulations would redress the problem of gambling

addiction. *See State ex rel. Walgate*, 2013 Ohio 946, at ¶ 16; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992) (redressability insufficient where only small decrease in funding would not necessitate injury-in-fact). Here, Plaintiffs-Appellants have only challenged the addition of VLTs to Ohio's racetracks. Ohio already has lotteries, four constitutionally authorized casinos, horse racing, and charitable gaming -- which Plaintiffs-Appellants have not contested. Plaintiffs-Appellants fail to allege how preventing VLTs from being installed in an existing racetrack would redress any increased risk of gambling addiction.

Furthermore, the mere allegation that some injury – such as gambling addiction – might occur in the future is simply too speculative to support standing. *See Wurdlow v. Turvy*, 2012 Ohio 4378, at ¶ 15 (10th Dist. Ct. App. 2012) (“A bare allegation that plaintiff fears that some injury will or may occur is insufficient to confer standing.”); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (past exposure to illegal police choke-hold does not support injury-in-fact for future harm). Though Plaintiffs-Appellants assert that injury-in fact is “an invasion of a judicially cognizable interest,” *see* Pls.-Appls. Jur. Mem at 9, they ignore the requirement that such injury must be “(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Bennett v. Spear*, 520 U.S. 154, 162 (1997); *In re Special Grand Jury 89-2*, 450 F. 3d 1159, 1172 (2006).

Permitting standing based on some inchoate fear of future harm would eviscerate the requirement of injury-in-fact until it no longer exists. If gambling addicts have standing to challenge the addition of VLTs to existing facilities, then alcoholics can challenge the grant of new liquor licenses, and shopaholics can challenge zoning laws to redevelop empty lots into shopping malls.

Plaintiffs-Appellants next assert standing based on the **negative social effects** of gambling. Passing the fact that such injury is not alleged in the complaint, this is not a “direct and concrete injury in a manner or degree different from that suffered by the public in general.” See *Cuyahoga County Bd. Of Comm’rs*, 112 Ohio St. 3d 59, at ¶ 22. The cases cited by Plaintiffs-Appellants are distinguishable from the case at bar. In *Match-E-Be-Nash-She-Wish Ban of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2203 (2012), and *Amador County, Cal. v. Salazar*, 640 F. 3d 373, 378 (U.S. App. D.C. 2011), the purported negative social effects satisfied standing because there were no casinos or other places to gamble in the vicinity. But in this case, casinos and racetracks are in existence and operating in Ohio, as well as over 9,000 lottery retailers and thousands of charitable gaming locations. It is simply too speculative to assert that adding VLTs to an already existing gambling facility will increase any negative social effects.

Appellants argue that **teachers and parents of public school children** have a judicially cognizable interest, because the VLT regulation could somehow change or diminish future school funding. But again, the risk that some funding might be cut in the future is too speculative and too hypothetical to support injury-in-fact. See *State ex rel. Walgate*, 2013 Ohio 946, at ¶ 21.

Plaintiffs-Appellants next assert that they were barred from **conducting casino operations** because the Ohio Constitution granted a monopoly on casinos. But in cases where a person challenges a government set aside program, a party must “demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.” *Northeastern Fla. Chapt. of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Appellants do not dispute this requirement, nor do they contend that they

can meet this requirement. *See* Pls.-Appls. Jur. Mem., at 12. Without appropriate allegations that Plaintiffs-Appellants are able and ready to build a casino, this injury is merely speculative and is not distinct from the general public.

Nor do Plaintiffs-Appellants have standing to **challenge the CAT tax** as-applied to casinos based on their status as **taxpayers**. This Court has repeatedly held that taxpayers lack standing to challenge legislation, as they cannot allege an injury-in-fact that is distinct from the general public. *State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, at ¶ 9 (2006) (“Ohio law does not authorize a private Ohio citizen, acting individually and without official authority, to prosecute government officials suspected of misconduct based on the citizen's status as a taxpayer of general taxes.”); *State ex rel. Masterson v. Ohio State Racing Comm.*, 162 Ohio St. 366, 368, 123 N.E.2d 1 (1954). But where taxpayers contribute money to a particular, specialized fund, they have standing to challenge the management of that fund. *Dann*, 110 Ohio St. 3d 252, at ¶¶ 9-10; *Racing Guild of Ohio, Local 304, Serv. Employees Int’l. Union, AFL-CIO v. Ohio State Racing Comm.*, 28 Ohio St. 3d 317, syllabus at paragraph two (1986).

Here, the CAT tax is a generally applicable tax, and not a specific fund. *See* O.R.C. § 5751.02(A) (noting the CAT tax is a generally applicable tax levied “on each person . . . for the privilege of doing business in this state.”). Nor have Plaintiffs-Appellants alleged that they somehow contributed to a special fund. *See* Complaint ¶ 5. Accordingly, there is no injury-in-fact sufficient to support standing.

Ohio courts recognize **associational standing** when three circumstances are met:

(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); *Hunt v. Wash. State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977). To assert that its members have standing, the association must also establish that its members have suffered actual injury that is concrete, not abstract. *Bicking*, 71 Ohio St. 3d at 320. Based on the discussion above, Ohio Roundtable's members do not have standing; therefore, Ohio Roundtable also lacks standing.³

Accordingly, this Court should decline jurisdiction.

V. **CASINO ENTITIES' PROPOSITION OF LAW NO. 2: Plaintiffs-Appellants Claims Do Not Qualify For Public-Right Standing, Which Is Limited To "Rare And Extraordinary Cases," And Not Routine Challenges To Legislative Enactments.**

Nor does the public-right exception to standing apply to this case. Public right standing is limited to "rare and extraordinary cases" where there are "matters of great public interest and societal impact." *Sheward*, 86 Ohio St. 3d at 503-504. For example, in *Sheward*, the General Assembly had passed sweeping changes to tort law which "operated to directly and broadly divest the courts of judicial power" by reenacting provisions the Court previously deemed unconstitutional. *Id.* at 458-61. The majority stated:

the public action is conceived as an action to vindicate the general public interest. Not all alleged illegalities or irregularities are thought to be of that high order of concern. Thus, this court will entertain a public action under circumstances when the public injury by its refusal will be serious.

Id. at 503 (internal quotes and citations omitted).

Three years later, the Court permitted a public-right action challenging legislation imposing mandatory drug testing of injured workers. *See State ex rel. Ohio AFL-CIO v. OBWC*, 97 Ohio St. 3d 504, ¶¶ 11-12 (2002). Standing was appropriate because the law affected the

³ Plaintiffs-Appellants also spend much of their brief arguing the merits of payments to VLT operators and the distribution of the CAT tax. *See Pls.-Appls. Jur. Mem* at 11. The trial and appellate courts based their ruling entirely on Appellants' standing and did not reach the merits of their claims. Therefore, this Court's review is limited to the issue of Appellants' standing.

fundamental right to be free from unreasonable searches and had sweeping applicability to every worker who “seeks to participate in the workers' compensation system” and thus “virtually everyone who works in Ohio.” *Id.* at ¶ 12.

Just last year, this Court emphasized the importance of identifying an articulable right to confer public-right standing. *See State ex rel. Teamsters Local Union No. 436 v. Bd. of County Comm'rs*, 132 Ohio St. 3d 47, 2012-Ohio-1861, ¶¶ 12-17 (2012). There, this Court found that employees did not allege a public right had been violated when their public employer violated a statute by offering an early-retirement incentive program to all employees except them. *See id.* at ¶¶ 16-17. “Although a county's failure to comply with a statute would certainly not benefit the public, allowing constant judicial intervention into government affairs for matters that do not involve a clear public right would also not benefit the public.” *Id.* at ¶ 17.

Plaintiffs-Appellants argue the Court of Appeals strained *Sheward's* “rare and extraordinary” limit, “eviscerating Ohio’s traditional public duty/taxpayer case law.” Pls.-Applts. Jur. Mem., at 7. However, this Court has repeatedly re-emphasized the limit on public duty/taxpayer standing. *See State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St. 3d 261, at ¶ 47 (2005) (challenge to disbursement of unclaimed funds not “rare and extraordinary” enough to garner public-right standing); *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. OBWC*, 108 Ohio St. 3d 432, at ¶¶ 48-51 (2006) (challenge to revised worker’s compensation subrogation statute not “rare and extraordinary” enough to garner public-right standing; finding the *Sheward* exception is “narrow” and does not apply if a case “presents only a general and abstract question concerning the constitutionality of a legislative act”); *State ex rel. Kuhar v. Medina County Bd. of Elections*, 108 Ohio St. 3d 515, at ¶¶ 9-13

(2006) (constitutional challenge to legislation changing clerk of court to an elected position was not the “rare and extraordinary” case that broadly divests the judiciary of its power).

Simply put, this case does not raise questions about the fundamental checks and balances of Ohio government (*Sheward*), or materially affect the working conditions of every citizen in the State (*OBWC*). Rather, this case is simply a straightforward attempt by a special interest group to slow down or halt the expansion of VLTs and casinos in Ohio – even though such expansion has been enacted by the legislature (VLTs) and passed by the voters (casinos). Though such groups are permitted to lobby the legislature and influence public opinion, they may not use the court system for this political purpose absent a particularized injury-in-fact.

Accordingly, this Court should decline jurisdiction and dismiss this appeal.

VI. CASINO ENTITIES’ PROPOSITION OF LAW NO. 3: There Was No Procedural Error In Refusing To Permit Plaintiffs-Appellants To Amend Their Complaint To Cure Standing.

Finally, Plaintiffs-Appellants seek review of the trial court’s refusal to permit an amendment to the Complaint. However, as noted by the lower courts, Plaintiffs-Appellants never filed a motion for leave to amend, and this claim has been waived. *See State ex rel. Walgate*, 2013 Ohio 946, at ¶ 35; *White v. Roch*, 2005 Ohio 1127, at ¶ 8 (9th Dist. Ct. App. 2005) (affirming denial of leave to amend where party only made a “passing request for leave to amend” in an opposition brief); *Moore v. Rickenbacker*, 2001 Ohio App. LEXIS 1973, at *5 (10th Dist. Ct. App. May 3, 2001) (same).

Accordingly, this Court should decline jurisdiction.

VII. CONCLUSION

A discretionary appeal before the Ohio Supreme Court must involve a substantial constitutional question, or a matter of great public interest. But none of the standing issues adjudicated by the lower courts in this case involve novel or complex legal issues. Rather, this

litigation is a straightforward attempt by a special interest group to interfere with Ohio's VLT and casino regulatory scheme, because that group opposes gambling. Permitting a discretionary appeal in this case would allow any special interest group – absent a particularized injury-in-fact – to litigate its political disagreement in the Ohio Supreme Court.

For these reasons, Intervening Defendant-Appellees Central Ohio Gaming Ventures, LLC and Toledo Gaming Ventures, LLC respectfully request this Court to decline jurisdiction, and dismiss this appeal.

Respectfully submitted,

ICE MILLER, LLP



MATTHEW L. FORNSHELL (0062101)

JOHN H. OBERLE (0073248)

ALBERT G. LIN (0076888)

ELIZABETH E. CARY (0090241)

250 West Street

Columbus, Ohio 43215

Tel: (614) 462-2700

Fax: (614) 462-5135

Matt.Fornshell@icemiller.com

John.Oberle@icemiller.com

Albert.Lin@icemiller.com

Elizabeth.Cary@icemiller.com

*Attorneys for Intervening Defendant-Appellees Central
Ohio Gaming Ventures, LLC and Toledo Gaming Ventures,
LLC*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via regular mail on May 28, 2013.

Thomas W. Connors, Esq.
James M. Wherley, Jr., Esq.
McCusky, Souers & Arbaugh
220 Market Avenue South
Suite 1000
Canton, Ohio 44702

Attorneys for Plaintiffs-Appellants

Christopher S. Williams, Esq.
James F. Lang, Esq.
Matthew M. Mendoza, Esq.
Calfee, Halter & Griswold LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114-1607

Attorneys for Intervening Defendant-Appellees Rock Ohio Caesars, LLC, Rock Ohio Caesars Cleveland, LLC and Rock Ohio Caesars Cincinnati, LLC

Alan H. Abes, Esq.
Jocelyn C. DeMars, Esq.
Dinsmore & Stohl LLP
255 East 5th Street, Suite 1900
Cincinnati, Ohio 45202
Attorneys for Intervening Defendant-Appellees Thistledown Racetrack, LLC

Charles R. Saxbe, Esq.
James D. Abrams, Esq.
Irv Berliner, Esq.
Jason H. Beehler, Esq.
Taft Stettinius & Hollister, LLP
65 E. State St., Suite 1000
Columbus, Ohio 43215
Attorneys for Intervening Defendant-Appellees Northfield Park Associates, LLC, Lebanon Trotting Club, Inc., MTR Gaming Group, Inc. and PNK (Ohio), LLC

Mike DeWine, Esq.
Ohio Attorney General
30 E. Broad Street, 14th Floor
Columbus, OH 43215

Alexandra Schimmer, Esq.
Solicitor General
Michael Hendershot, Esq.
Chief Deputy Solicitor General
Appeals Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

Pearl M. Chin, Esq.
Assistant Attorney General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

Attorneys for Defendants-Appellees State of Ohio and Governor John Kasich

Peter M. Thomas, Esq.
Michael A. Rzymek, Esq.
Assistant Attorneys General
Charitable Law Section, Gambling Unit
150 E. Gay Street, 23rd Floor
Columbus, Ohio 43215-3428

Attorneys for Defendants-Appellees the Ohio Casino Control Commission

Brian Mooney, Esq.
Assistant Attorney General
Charitable Law Section
615 W. Superior Avenue, 11th Floor
Cleveland, Ohio 44113

Attorney for Defendants-Appellees the Ohio Lottery Commission

Julie E. Brigner, Esq.
Ryan P. O'Rourke, Esq.
Assistant Attorneys General
Taxation Section
30 E. Broad Street, 25th Floor
Columbus, Ohio 43215

*Attorneys for Defendants-Appellees
Ohio Tax Commissioner Joseph W. Testa*



*An Attorney For Intervening Defendant-Appellees Central
Ohio Gaming Ventures, LLC and Toledo Gaming Ventures,
LLC*