

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

**JOINT MOTION TO DISMISS APPEAL AS IMPROVIDENTLY ACCEPTED
IN LIGHT OF PROGRESSOHIO.ORG, INC. V. JOBSOHIO, 2014-OHIO-2382**

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 H. Oberle, Esq.
Albert Lin, 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

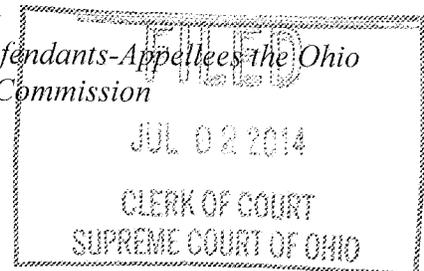
*Attorneys for Intervening Defendant-
Appellees Central Ohio Gaming Ventures,
LLC and Toledo Gaming Ventures, LLC*

Mike DeWine, Esq.
Ohio Attorney General
Michael Hendershot, Esq.
Chief Deputy Solicitor General
Stephen Carney, Esq.
Deputy Solicitor General
Appeals Section
Kristopher J. Armstrong
Constitutional Offices Section
30 East Broad Street, 17th 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*



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.
Dinsmore & Shohl 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.
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*

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*

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ANALYSIS.....	2
A. This Appeal Should Be Dismissed Because Under <i>JobsOhio</i> The Public Right Exception Is Not Applicable To The Facts Of The <i>Walgate</i> Appeal.....	2
B. This Appeal Should Be Dismissed Because The Remaining Issues Are Not Novel, Complicated, Or Important.	3
III. CONCLUSION.....	5

TABLE OF AUTHORITIES

Cases

<i>Brown v. Columbus City Schs. Bd. Of Educ.</i> , Case No. 2009-1486 slip op. (Ohio Nov. 18, 2009)	4
<i>Cuyahoga County Bd. Of Comm'rs v. Ohio</i> , 112 Ohio St. 3d 59 (1999)	4
<i>Gildner v. Accenture</i> , Case No. 2009-2054, slip op. (Ohio Jan. 27, 2010).....	4
<i>Northeastern Fla. Ch. Of Assoc. Gen. Contractors of Am. v. City of Jacksonville</i> , 508 U.S. 656 (1993).....	4
<i>Ohio Contractors Assn v. Bicking</i> , 71 Ohio St. 3d 318 (1994)	4
<i>ProgressOhio.org, Inc. v. JobsOhio</i> , Case No. 2012-1272, 2014-Ohio-2382 (Ohio July 10, 2014)	1
<i>State ex rel. Dann v. Taft</i> , 110 Ohio St. 3d 252 (2006)	4
<i>State ex rel. Walgate v. Kasich</i> , Case No. 2013-0656, slip op. (Ohio July 24, 2013)	1
<i>White v. Roch</i> , 2005 Ohio 1127 (9 th Dist. Ct. App. 2005)	5
<i>Wurdlow v. Turvy</i> , 2012 Ohio 4378 (10 th Dist. Ct. App. 2012)	4

Court Rules

Ohio S. Ct. Prac. R. 7.10.....	1
--------------------------------	---

I. INTRODUCTION

On July 24, 2013, this Court accepted an appeal from the Tenth District Court of Appeals which dismissed for lack of standing a variety of constitutional challenges to Ohio's statutes governing video lottery terminals ("VLTs") and casinos. *See State ex rel. Walgate v. Kasich*, Case No. 2013-0656, slip op. (Ohio July 24, 2013) ("*Walgate*"). The *Walgate* Appellants¹ asserted that this case required the application of the public-right exception to traditional standing. *See Walgate Appellants' Mem. Supp. Jur.* at 3 (filed April 26, 2013).

In seeking a discretionary appeal, the *Walgate* Appellants linked the outcome of their appeal to the Court's then-pending decision in *ProgressOhio.org, Inc. v. JobsOhio*, Case No. 2012-1272 (Ohio) ("*JobsOhio*"). Because both cases raised the same standing issues, the *Walgate* Appellants stated "it would be appropriate for [*Walgate*] to be accepted and resolved on the same basis as [*JobsOhio*]." *See Walgate Appellants' Mem. Supp. Jur.* at 4. This Court then accepted jurisdiction, and *sua sponte* stayed this appeal until resolution of *JobsOhio*.

On June 10, 2014, this Court affirmed the dismissal of the *JobsOhio* appeal, holding that the public right exception does not apply to cases originating in the court of common pleas. *See JobsOhio*, 2014-Ohio-2382, at ¶¶ 1, 9-13, 26 (Ohio July 10, 2014). The Court further limited the public right exception, stating that the mere allegation of an unconstitutional government action was insufficient to trump the requirements of traditional standing. *See id.*

Under Practice Rule 7.10, this Court may "*sua sponte* dismiss" a discretionary appeal that has "been improvidently accepted" and "summarily [] affirm" the decision of the lower court "on the basis of precedent." *See Ohio S. Ct. Prac. R. 7.10.* Because both *Walgate* and *JobsOhio*

¹ "Walgate Appellants" refers to Plaintiffs-Appellants Robert L. Walgate, Jr., David P. Zanotti, The American Policy Roundtable dba Ohio Roundtable, 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.

address substantially identical standing doctrines, and because *Walgate* presents no novel or important legal issues, the Joining Appellees² urge this Court to dismiss this appeal as improvidently accepted in light of the decision in *JobsOhio*, and summarily affirm the decision of the Tenth District Court of Appeals.

II. ANALYSIS

A. This Appeal Should Be Dismissed Because Under *JobsOhio* The Public Right Exception Is Not Applicable To The Facts Of The *Walgate* Appeal.

In their Memorandum in Support of Jurisdiction, the *Walgate* Appellants repeatedly note that the public right exception to standing is the primary basis for seeking a discretionary appeal before this Court. Claiming that their constitutional challenge to the VLT and casino statutes is of “great general significance,” the *Walgate* Appellants argue that they do not need to establish the traditional elements of standing. *See Walgate* Appellants Mem. Supp. Jur. 3-4. However, after *JobsOhio*, the public right exception cannot apply to the facts of *Walgate*, and the appeal should be summarily dismissed.

In *JobsOhio*, this Court held that the public right exception only applies in original actions in mandamus or prohibition filed in the Ohio Supreme Court. *See JobsOhio*, 2014-Ohio-2382, at ¶¶ 10-11. For actions initiated in the common pleas courts, however, the Ohio constitution requires litigants to comport with the traditional requirements of standing to present a justiciable controversy. *See id.* at ¶ 10. This includes, at a minimum, presenting allegations sufficient to support the three elements of standing: (1) injury-in-fact; (2) causation; and (3) redressability. *See id.* at ¶ 7.

² The “Joining Appellees” are Intervening Defendants-Appellees Central Ohio Gaming Ventures, LLC, Toledo Gaming Ventures, LLC, Rock Ohio Caesars LLC, Rock Ohio Caesars Cleveland LLC, and Rock Ohio Caesars Cincinnati LLC, Thistledown Racetrack, LLC, Northfield Park Associates, LLC, Lebanon Trotting Club, Inc., MTR Gaming Group, Inc. and PNK (Ohio), LLC.

Even if the public right exception applied in common pleas cases, this Court limited the exception to “rare and extraordinary issues that threaten serious public injury.” *Id.* at ¶ 9. But the mere allegation that there is a constitutional violation does not support an exception to traditional standing as such a litigant must present a justiciable injury-in-fact. *See id.*

Like *JobsOhio*, *Walgate* originated in the common pleas courts. For this reason alone, the public right exception is inapplicable. *See id.* at ¶ 26 (“The public right doctrine ... does not apply to actions brought in common pleas courts.”). Nor is *Walgate* a “rare and extraordinary case” that threatens “serious public injury.” *Id.* at ¶ 9. *Walgate* is a straightforward constitutional challenge by plaintiffs who disagree with the legislature’s policy decision to legalize and regulate certain types of gambling. But this is no different from *JobsOhio*. There, allegations that a legislative enactment relating to economic development was unconstitutional were insufficient to support the public right exception. *See id.* (“Not all allegedly illegal or unconstitutional government actions rise to this level of importance.”).

Given the similarities between the two cases, the *Walgate* Appellants understood that *JobsOhio* would resolve the standing issues in this case. *See Walgate* Appellant Mem. Supp. Jur. at 4 (stating that *Walgate* and *JobsOhio* should be “resolved on the same basis”). Like *JobsOhio*, the public right exception to standing cannot apply in *Walgate*, and this Court should dismiss this appeal, and summarily affirm the decisions of the lower courts.

B. This Appeal Should Be Dismissed Because The Remaining Issues Are Not Novel, Complicated, Or Important.

Absent the public right exception, this case presents no novel, complicated, or important legal issues appropriate for discretionary Supreme Court review.

As an initial matter, the *Walgate* Appellants seek review of the lower courts’ rulings that they lack traditional standing. But the three-part analysis of traditional standing is routinely

applied by trial and appellate courts throughout Ohio every day. Indeed, this Court has previously 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); *Gildner v. Accenture*, Case No. 2009-2054, slip op (Ohio Jan. 27, 2010).

Nor are the *Walgate* Appellants' allegations of injury-in-fact sufficient to support discretionary review. The *Walgate* Appellants assert six different theories of standing: (1) increased risk of gambling addiction; (2) negative social effects; (3) reduced educational funding for public schoolteachers or students; (4) purported casino-operators that cannot obtain a casino license; (5) taxpayer standing; and (6) associational standing. But prior precedent establishes that each of these theories fail. See *Wurdlow v. Turvy*, 2012 Ohio 4378, at ¶ 15 (10th Dist. Ct. App. 2012) (bare allegation of future harm too speculative to support injury in fact); *Cuyahoga County Bd. Of Comm'rs v. Ohio*, 112 Ohio St. 3d 59, at ¶ 22 (1999) (injury must be direct and concrete in a manner "different from that suffered by the public at large"); *Northeastern Fla. Ch. Of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (person challenging government set-aside must demonstrate ability to bid on contracts); *State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, at ¶ 9 (2006) (standing cannot be based upon "citizen's status as a taxpayer of general taxes"); *Ohio Contractors Assn v. Bicking*, 71 Ohio St. 3d 318, 320 (1994) (associational standing requires a showing that members have been actually injured); see generally Mem. Opp'n to Jur. of Defs.-Appellees Central Ohio Gaming Ventures, LLC and Toledo Gaming Ventures, LLC (filed May 26, 2013). Given this wealth of case law, the traditional standing arguments raised by the *Walgate* Appellants simply do not support additional review by the Ohio Supreme Court.

Finally, the *Walgate* Appellants argue that the trial court improperly denied them leave to amend their complaint to cure their deficient allegations. But this argument was waived because it was not raised in the prior appeal. See *White v. Roch*, 2005 Ohio 1127, at ¶ 8 (9th Dist. Ct. App. 2005). And in any event, whether a trial court chooses to exercise its discretion to permit an amendment to the complaint does not merit a discretionary appeal before this Court.

III. CONCLUSION

For these reasons, and the reasons set forth in the Joining Appellees' Memorandums in Opposition to Jurisdiction, the undersigned respectfully requests this Court to dismiss this appeal as improvidently accepted, and summarily affirm the decision of the lower courts.

Respectfully submitted,

CALFEE, HALTER & GRISWOLD LLP

*James F. Lang per email
authorization*

Christopher S. Williams (0043911)
James F. Lang (0059668)
Matthew M. Mendoza (0068231)
The Calfee Building
1405 East Sixth Street
Cleveland, OH 44114-1607
(216) 622-8200 (Phone)
(216) 241-0816 (Fax)
cwilliams@calfee.com
jlang@calfee.com
mmendoza@calfee.com

*Attorneys for Rock Ohio Caesars LLC, Rock
Ohio Caesars Cleveland LLC, and Rock Ohio
Caesars Cincinnati LLC*

DINSMORE & SHOHL LLP

*Alan H. Abes per email
authorization*

Alan H. Abes, Esq.
255 East 5th Street, Suite 1900
Cincinnati, Ohio 45202
Tel: 513-977-8149
Fax: 513-977-8141
alan.abes@dinsmore.com

*Attorneys for Intervening Defendant-Appellees
Thistledown Racetrack, LLC*

ICE MILLER, LLP

Albert Lin

Matthew L. Fornshell (0062101)
John H. Oberle (0073248)
Albert G. Lin (0076888)
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

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

TAFT STETTINIUS & HOLLISTER, LLP

*James D. Abrams per email
authorization*

Charles R. Saxbe, Esq.
James D. Abrams, Esq.
Irv Berliner, Esq.
65 E. State St., Suite 1000
Columbus, Ohio 43215
Tel: 614-334-6162
Fax: 614-221-2007
rsaxbe@taftlaw.com
jabrams@taftlaw.com
iberliner@taftlaw.com

*Attorneys for Intervening Defendant-Appellees
Northfield Park Associates, LLC, Lebanon
Trotting Club, Inc., MTR Gaming Group, Inc.
and PNK (Ohio), LLC*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via regular mail on July 2, 2014.

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

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*

Mike DeWine, Esq.
Ohio Attorney General
Michael Hendershot, Esq.
Chief Deputy Solicitor General
Stephen Carney, Esq.
Deputy Solicitor General
Appeals Section
30 East Broad Street, 17th 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*



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