

In the
Supreme Court of Ohio

STATE ex rel.	:	Case No. 2013-0656
ROBERT L. WALGATE, JR., et al.,	:	
Plaintiffs-Appellants,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
OHIO GOVERNOR JOHN R. KASICH,	:	
et al.,	:	Court of Appeals
Defendants-Appellees.	:	Case No. 12AP-548
	:	

MERIT BRIEF OF STATE DEFENDANTS-APPELLEES

THOMAS W. CONNORS* (0007226)

**Counsel of Record*

JAMES W. WHERLEY, JR. (0073932)

Black, McCusky, Souers & Arbaugh
220 Market Avenue South, Suite 1000
Canton, Ohio 44702-2116
tconnors@bmsa.com

Counsel for 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

MATTHEW FORNSHELL* (0062101)

**Counsel of Record*

ALBERT G. LIN (0076888)

ELIZABETH E. CARY (0090241)

JOHN OBERLE (0073248)

Ice Miller, LLP

250 West Street

Columbus, Ohio 43215

matthew.fornshell@icemiller.com

Counsel for Intervening Defendants-Appellees

Raceway Park, Inc., HLC/PDC Holdings,
LLC, Central Ohio Gaming Ventures, LLC,
and Toledo Gaming Ventures, LLC

MICHAEL DEWINE (0009181)

Ohio Attorney General

ERIC E. MURPHY* (0083284)

State Solicitor

**Counsel of Record*

MICHAEL J. HENDERSHOT (0081842)

Chief Deputy Solicitor

STEPHEN P. CARNEY (0063460)

MATTHEW R. CUSHING (0092674)

Deputy Solicitors

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980; 614-466-5087 fax

eric.murphy@ohioattorneygeneral.gov

Counsel for State Defendants-Appellees

Ohio Governor John R. Kasich, Ohio Casino

Control Commission, Ohio Lottery

Commission, and Ohio Tax Commissioner

Joseph W. Testa

CHRISTOPHER S. WILLIAMS* (0043911)

**Counsel of Record*

JAMES F. LANG (0059668)

MATTHEW M. MENDOZA (0068231)

ALEXANDER B. REICH (0084869)

LINDSEY E. SACHER (0087883)

Calfee, Halter & Griswold, LLP

The Calfee Building

1405 East Sixth Street

Cleveland, Ohio 44114-1607

cwilliams@calfee.com

Counsel for Intervening Defendants-Appellees

Rock Ohio Caesars LLC, Rock Ohio

Caesars Cleveland LLC, and Rock Ohio

Caesars Cincinnati LLC

ALAN H. ABES* (0062423)

**Counsel of Record*

JOCELYN C. DeMARS (0086688)

Dinsmore & Shohl, LLP

255 E. 5th Street, Suite 1900

Cincinnati, Ohio 45202

alan.abes@dinsmore.com

Counsel for Intervening Defendant-Appellee

Thistledown Racetrack, LLC

CHARLES R. SAXBE* (0021952)

**Counsel of Record*

JAMES D. ABRAMS (0075968)

IRV BERLINER (0033150)

CELIA M. KILGARD (0085207)

Taft Stettinius & Hollister, LLP

65 East State Street, Suite 1000

Columbus, Ohio 43215-4213

rsaxbe@taftlaw.com

Counsel for Intervening Defendants-Appellees

Northfield Park Associates, LLC, Lebanon

Trotting Club, Inc., MTR Gaming Group, Inc.,

and PNK (Ohio), LLC

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE AND FACTS.....	4
A. In 2009 and 2011, the General Assembly passed legislation regarding video lottery terminal games and casinos	4
B. Plaintiffs sued to undo the 2009 and 2011 legislation	5
1. Individual Plaintiffs	6
2. Corporate and organizational Plaintiffs	6
3. Plaintiffs’ claims.....	7
C. The lower courts dismissed Plaintiffs’ Amended Complaint because the Plaintiffs lacked standing.....	8
D. This Court narrowed Plaintiffs’ appeal after <i>ProgressOhio.org</i>	11
ARGUMENT	12
<u>State Defendant-Appellees’ Proposition of Law No. 1:</u>	
<i>Plaintiffs lack standing to challenge the constitutionality of statutes in the absence of any allegations of a concrete injury distinct from that sustained by the public generally.</i>	12
A. Plaintiffs cannot establish standing on account of gambling’s purported negative effects.....	17
1. The relief Plaintiffs request will not redress the purported harms of gambling. ...	18
2. The negative effects of the casino and VLT gambling challenged here are speculative and hypothetical, and are not causally related to the Acts.....	20
3. Roundtable cannot establish association standing	22
B. Plaintiffs cannot establish standing merely because they work at, or their children are enrolled in, public schools	23

1.	Standing rules have no special school-funding exception	23
2.	Sandra Walgate has waived the argument that she has standing as a teacher, and in any event her claim fails	25
3.	The harm Plaintiffs allege arising from the Acts’ replacement of education funds with VLT revenues is speculative and thus insufficient for standing	26
4.	Plaintiffs cannot assert third-party standing on behalf of the district	27
C.	Plaintiffs do not qualify for “special fund” taxpayer standing merely by paying the commercial-activity tax	28
D.	Plaintiff Kinsey cannot establish unequal-treatment standing.....	31
1.	Plaintiff Kinsey lacks standing because the relief he seeks would not redress the harm he alleges.....	31
2.	Kinsey lacks standing because he does not allege that he was “able and ready” to engage in casino gaming	32
E.	Plaintiffs’ arguments do not withstand scrutiny	34
1.	Because the alleged harms of gambling do not distinguish between legal and illegal gambling, Plaintiffs’ remedies would not alleviate their alleged harms.....	35
2.	Plaintiffs’ authorities regarding injury-in-fact are off base.	36
3.	Plaintiffs cite no appellate case supporting their theory that parents of schoolchildren have standing in this context.	40
4.	Plaintiffs cite no cases showing how they qualify for “special fund” taxpayer standing	42

State Defendant-Appellees’ Proposition of Law No. 2:

Dismissal for lack of standing is proper, without a further opportunity to amend a complaint, when plaintiffs never sought to amend and offered no facts, by affidavits or otherwise, showing a redressable injury-in-fact.

State Defendant-Appellees’ Proposition of Law No. 3:

This Court specifically rejected a proposition about public-rights standing in light of ProgressOhio.org. Plaintiffs’ arguments about that proposition are improper, and fail anyway.

CONCLUSION.....50

CERTIFICATE OF SERVICE

APPENDIX:

Decision and Entry, Franklin County Court of Common Pleas, May 30, 2012 Ex. 1

TABLE OF AUTHORITIES

Cases	Page(s)
<i>AAA Am. Constr., Inc. v. Alpha Graphic</i> , No. 84320, 2005-Ohio-2822 (8th Dist.).....	45
<i>Allen v. Wright</i> , 468 U.S. 737 (1984).....	15
<i>Already, LLC v. Nike, Inc.</i> , 133 S. Ct. 721 (2013).....	15
<i>Am. Soc. of Travel Agents, Inc. v. Blumenthal</i> , 566 F.2d 145 (D.C. Cir. 1977).....	15
<i>Amador Cnty v. Salazar</i> , 640 F.3d 373 (D.C. Cir. 2011).....	36, 37
<i>Ariz. Christian Sch. Tuition Org. v. Winn</i> , 131 S. Ct. 1436 (2011).....	16, 41
<i>ASARCO Inc. v. Kadish</i> , 490 U.S. 605 (1989).....	13
<i>Barnesville Educ. Ass’n v. Barnesville Exempted Vill. Sch. Dist. Bd. of Educ.</i> , No. 06 BE 32, 2007-Ohio-1109 (7th Dist.)	39
<i>Beztak Land Co. v. City of Detroit</i> , 298 F.3d 559 (6th Cir. 2002)	34
<i>Bd. of Education v. Walter</i> , 58 Ohio St. 2d 368 (1979)	40
<i>Brown v. Columbus City Schs. Bd. of Educ.</i> , No. 08AP-1067, 2009-Ohio-3230 (10th Dist.).....	29, 41
<i>Carroll v. Nakatani</i> , 342 F.3d 934 (9th Cir. 2003)	32, 33, 34
<i>Citizens Against Casino Gambling in Erie Cnty. v. Hogen</i> , No. 07-CV-0451S, 2008 WL 2746566 (W.D.N.Y. July 8, 2008)	22
<i>Clapper v. Amnesty Int’l, USA</i> , 133 S. Ct. 1138 (2013).....	1, 14, 26
<i>Clifton v. Blanchester</i> , 131 Ohio St. 3d 287, 2012-Ohio-780.....	1

<i>Cnty. of Rensselaer v. Regan</i> , 80 N.Y.2d 988 (1992)	37, 38
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006).....	15
<i>DeRolph v. Ohio</i> , 78 Ohio St. 3d 193 (1992)	40, 41
<i>Diva’s Inc. v. City of Bangor</i> , 411 F.3d 30 (1st Cir. 2005).....	29
<i>Dohme v. Eurand Am., Inc.</i> , 130 Ohio St. 3d 168, 2011-Ohio-4609.....	47
<i>Duncan v. State</i> , 102 A.3d 913 (N.H. 2014)	25
<i>Fed. Home Loan Mortg. Corp. v. Schwartzwald</i> , 134 Ohio St. 3d 13, 2012-Ohio-5017.....	12, 13, 32
<i>Fed. Way Sch. Dist. No. 210 v. State</i> , 219 P.3d 941 (Wash. 2009).....	24
<i>Gannon v. State</i> , 319 P.3d 1196 (Kan. 2014).....	25
<i>Helfrich v. City of Pataskala</i> , No. 02CA38, 2003-Ohio-847 (5th Dist.).....	45
<i>Hunt v. Wa. State Apple Adver. Comm’n</i> , 432 U.S. 333 (1977).....	14
<i>Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 of Pima Cnty., Ariz. v. Kirk</i> , 91 F.3d 1240 (9th Cir. 1996)	24, 25
<i>J.S. v. Attica Cent. Schs.</i> , 386 F.3d 107 (2d Cir. 2004).....	21
<i>Jackson v. United States</i> , 1993 WL 439821 (D.D.C. Oct. 20, 1993)	19
<i>Kowalski v. Tesmer</i> , 543 U.S. 125 (2004).....	27
<i>Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board</i> , 172 F.3d 397 (6th Cir. 1999)	33, 34

<i>Langley v. Dardenne</i> , 77 F.3d 479, 1996 WL 46781 (5th Cir. 1996) (Table)	20, 22
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996).....	16
<i>Lexmark Int’l, Inc. v. Static Control Components, Inc.</i> , 134 S. Ct. 1377 (2014).....	14, 22
<i>Los Angeles v. Lyons</i> , 461 U.S. 95 (1983).....	20, 21
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	<i>passim</i>
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007).....	38, 39, 40
<i>Meyer v. United Parcel Serv., Inc.</i> , 122 Ohio St. 3d 104, 2009-Ohio-2463.....	46
<i>Midwest Media Prop., LLC v. Symmes Twp., Oh.</i> , 503 F.3d 456 (6th Cir. 2007)	31
<i>Mitchell v. Lawson Milk Co.</i> , 40 Ohio St. 3d 190 (1988)	39
<i>Moore v. Rickenbacker</i> , No. 00AP-1259, 2001 WL 460901 (10th Dist. May 3, 2001)	45
<i>N. Canton v. Canton</i> , 114 Ohio St. 3d 253, 2007-Ohio-4005.....	27
<i>N.E. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville</i> , <i>Fla.</i> , 508 U.S. 656 (1993).....	32
<i>Ohio Contract Carriers Ass’n v. Pub. Utils. Comm’n</i> , 140 Ohio St. 160 (1942).....	26
<i>Ohio Contractors Ass’n v. Bicking</i> , 71 Ohio St. 3d 318 (1994)	13, 14, 22, 31
<i>Ohio Pyro, Inc. v. Ohio Dep’t of Commerce, Div. of State Fire Marshal</i> , 115 Ohio St. 3d 375, 2007-Ohio-5024.....	12, 13
<i>Patchak v. Salazar</i> , 632 F.3d 702 (D.C. Cir. 2011).....	36

<i>ProgressOhio.org, Inc. v. JobsOhio</i> , 139 Ohio St. 3d 520, 2014-Ohio-2382.....	<i>passim</i>
<i>Racing Guild of Ohio, Local 304, Serv. Emps. Int’l Union, AFL-CIO, CLC v. Ohio State Racing Comm’n</i> , 28 Ohio St. 3d 317 (1986)	42, 43
<i>Rumsfeld v. Forum for Academic and Institutional Rights, Inc.</i> , 547 U.S. 47 (2006).....	37
<i>Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki</i> , 100 N.Y.2d 801 (2003)	38
<i>Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki</i> , 275 A.D.2d 145 (N.Y. App. Div. 2000)	37
<i>Sault Ste. Marie Tribe of Chippewa Indians v. United States</i> , 288 F.3d 910 (6th Cir. 2002)	15
<i>Schulz v. State</i> , 731 N.E.2d 1041 (Ind. App. 2000)	20
<i>Sears v. Hull</i> , 961 P.2d 1013 (Ariz. 1998).....	20
<i>Settlers Bank v. Burton</i> , Nos. 12CA36, 12CA38, 2014-Ohio-335 (4th Dist.).....	27
<i>Sheaffer v. Westfield Ins. Co.</i> , 110 Ohio St. 3d, 2006-Ohio-4476.....	46
<i>Silver v. Pataki</i> , 274 A.D.2d 57 (N.Y. App. Div. 2000)	38
<i>Simon v. E. Ky. Welfare Rights Org.</i> , 426 U.S. 26 (1976).....	15
<i>State ex rel. Am. Subcontractors Assn., Inc. v. Ohio State Univ.</i> , 129 Ohio St. 3d 111, 2011-Ohio-2881.....	<i>passim</i>
<i>State ex rel. Cleveland Right to Life v. State of Ohio Controlling Bd.</i> , 138 Ohio St. 3d 57, 2013-Ohio-5632.....	48
<i>State ex rel. Dann v. Taft</i> , 110 Ohio St. 3d 252, 2006-Ohio-3677.....	28, 42, 43, 44

<i>State ex rel. E. Cleveland Fire Fighters' Ass'n, Local 500, Int'l Ass'n of Fire Fighters v. Jenkins,</i> 96 Ohio St. 3d 68, 2002-Ohio-3527	48
<i>State ex rel. Flanagan v. Lucas,</i> 139 Ohio St. 3d 559, 2014-Ohio-2588.....	48
<i>State ex rel. Grendell v. Davidson,</i> 86 Ohio St. 3d 629 (1999)	49, 50
<i>State ex rel. Hickman v. Capots,</i> 45 Ohio St. 3d 324 (1989)	39
<i>State ex rel. Jones v. Suster,</i> 84 Ohio St. 3d 70 (1998)	40, 42
<i>State ex rel. Leslie v. Ohio Hous. Fin. Agency,</i> 105 Ohio St. 3d 261, 2005-Ohio-1508.....	48
<i>State ex rel. LetOhioVote.org v. Brunner,</i> 123 Ohio St. 3d 322, 2009-Ohio-4900.....	15
<i>State ex rel. Linndale v. Teske,</i> 74 Ohio St. 3d 1415 (1995)	49, 50
<i>State ex rel. Masterson v. Ohio State Racing Comm'n,</i> 162 Ohio St. 366 (1954).....	<i>passim</i>
<i>State ex rel. N. Ohio Chapter of Associated Builders & Contractors., Inc. v. Barberton City Sch. Bd. of Educ.,</i> 188 Ohio App. 3d 395, 2010-Ohio-1826 (9th Dist.).....	28
<i>State ex rel. Ohio Academy of Trial Lawyers v. Sheward,</i> 86 Ohio St. 3d 451 (1999)	<i>passim</i>
<i>State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers' Comp.,</i> 97 Ohio St. 3d 504, 2002-Ohio-6717.....	47
<i>State ex rel. Ohio Roundtable v. Taft,</i> 119 Ohio Misc. 2d 49, 2002-Ohio-3669 (Franklin Cnty. C.P.).....	38, 42
<i>State ex rel. Ohio Roundtable v. Taft,</i> 2003-Ohio-3340 (10th Dist.)	42
<i>State ex rel. Stamps v. Montgomery Cnty. Automatic Data Processing Bd.,</i> 42 Ohio St. 3d 164 (1989)	49

<i>State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Bur. of Workers' Comp.</i> , 108 Ohio St. 3d 432, 2006-Ohio-1327 (2006).....	41, 48
<i>State ex rel. Walgate v. Kasich</i> , 989 N.E.2d 140, 2013-Ohio-946 (10th Dist.).....	9, 10, 11
<i>State ex rel. Walgate v. Kasich</i> , Case No. 11-CVH-10-13126 (Franklin Cnty. C.P. May 30, 2012)	<i>passim</i>
<i>State v. Warren</i> , 118 Ohio St. 3d 200, 2008-Ohio-2011.....	46
<i>Thomas v. Jackson Hewitt, Inc.</i> , 192 Ohio App. 3d 732, 2011-Ohio-618.....	39
<i>Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.</i> , 18 N.E.3d 505, 2014-Ohio-3741 (10th Dist.).....	<i>passim</i>
<i>United States v. Hays</i> , 515 U.S. 737 (1995).....	32
<i>United States v. Stoerr</i> , 695 F.3d 271 (3d Cir. 2012).....	41
<i>Util. Serv. Partners, Inc. v. Pub. Util. Comm'n</i> , 124 Ohio St. 3d 284, 2009-Ohio-6764.....	27, 29
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	13, 36
<i>Westfield Ins. Co. v. Galatis</i> , 100 Ohio St. 3d 216, 2003-Ohio-5849.....	49
<i>White v. Roch</i> , No. 22239, 2005-Ohio-1127 (9th Dist.).....	45
<i>Whitmore v. Arkansas</i> , 495 U.S. 149 (1990).....	21
<i>Willis v. Fordice</i> , 55 F.3d 633, 1995 WL 314414 (5th Cir. 1995) (Table)	20, 22
Statutes, Rules, and Constitutional Provisions	
NY State Finance Law § 123-b.....	37, 38
O.A.C. 3769-1-05	19

Ohio Const., art. IV, § 4(B)	12
Ohio Const., art. XII, § 5a.....	28
Ohio Const., art. XV, § 6	<i>passim</i>
R.C. 3770.03	4
R.C. 3770.21(A)(1).....	4, 19
R.C. 3772	4
R.C. 3772.27	5, 8
R.C. 3772.34	5
R.C. 4123.30	28
R.C. 5751.01(F)(2).....	5
R.C. 5751.02(A).....	28
R.C. 5751.20(B).....	7, 29
R.C. 5751.21(G).....	30, 43
R.C. 5751.22(D).....	30, 43
R.C. 5753.01(D).....	5
Other Authorities	
Richard H. Fallon, Jr. et al., <i>Hart and Wechsler’s The Federal Courts and the Federal System</i> (5th ed. 2009)	14
Veto Message of Gov. Kasich re: Am. Sub. H.B. 494 (Dec. 19, 2014)	16

INTRODUCTION

Gambling remains a divisive topic in Ohio. It has sparked heated political debate for decades, and in recent years has driven voters to pass amendments to the Ohio Constitution and the General Assembly to implement the popular will through legislation. The discourse over the scope of gambling in Ohio is by its very nature a political one, and accordingly has been channeled through the political process. Courts need not weigh in on every political issue of the day, and here the lower courts correctly concluded that these Plaintiffs' opposition to gambling in Ohio did not give them the kind of particularized interest in government action that permits interested bystanders to become litigants.

Plaintiffs are individuals and organizations who oppose the expansion of gambling in Ohio. Having lost at the polls, Plaintiffs now turn to the judiciary to further their cause. But the courts are the wrong forum. The justiciability principle of standing prevents the courts from deciding broad political questions at the behest of litigants whose only stake in the case is that they want an answer. Standing “ensure[s] that a dispute is presented in an adversary context” “capable of judicial resolution.” *Clifton v. Blanchester*, 131 Ohio St. 3d 287, 2012-Ohio-780 ¶ 15 (quotation marks omitted); *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 2014-Ohio-2382, ¶¶ 1, 19 (litigant’s “idealistic opposition” to government action does not make case justiciable). Standing “preserves the vitality of the adversarial process by assuring . . . that the parties before the court have an actual, as opposed to professed, stake in the outcome.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring). In doing so, it “prevent[s] the judicial process from being used to usurp the powers of the political branches” by litigants who want the courts to act as arbiters of mere political disagreement. *Clapper v. Amnesty Int’l, USA*, 133 S. Ct. 1138, 1146 (2013).

Plaintiffs have failed in both lower courts to show that they have standing. And Plaintiffs should find no more success here than they had below because this case involves a routine application of this Court's well-established standing precedent. In seventeen counts, Plaintiffs allege four types of harms arising from the legislation they challenge, but none is sufficient to bestow standing on any Plaintiff for any claim.

First, Plaintiffs do not allege that the gambling Acts they challenge cause them injury distinct from citizens generally. Their asserted harms therefore do not confer standing to challenge these Acts under the Constitution's Lottery or Casino Provisions, Single-Subject Rule, Three-Day Rule, the prohibition against public and private joint ownership of property, the constitutional limits on this Court's jurisdiction, or the limit on the number of gambling facilities in the State. Regardless of the substantive theory, Plaintiffs' concerns are speculative, and thus insufficient to demonstrate an injury-in-fact. Furthermore, Plaintiffs fail to demonstrate the requisite nexus between the legislation they challenge and the harms they allege, or how the relief they seek would redress those harms in a meaningful fashion.

Second, certain Plaintiffs' status as a teacher or parents of public school children do not give them standing to contest the statutes merely because they allege that some additional portion of casino revenues should be directed to schools. There is no "public education" exception to this Court's standing jurisprudence, and Plaintiffs cannot demonstrate the normal prerequisites of injury, causation, and redressability.

Third, one Plaintiff fails in claiming that it has standing because it pays the commercial-activity tax, while certain casino activity is exempt from that tax, because that allegation is shared by the business community generally. A member of an industry that pays a tax does not

have standing to sue merely because another industry is exempt from that tax given that the exemption does not affect the amount of tax that the member pays.

Fourth, Plaintiff Kinsey does not have standing to assert that the amendment to the Ohio Constitution that authorized casino gambling is itself unconstitutional because it limits the number and locations of gambling enterprises in the state, and thereby prevents him from engaging in casino gaming. Kinsey failed to demonstrate that he was “able and ready” to open a casino gaming operation if allowed to do so, and thus lacks standing to bring his claim.

Plaintiffs’ *fallback* position fares no better in asserting that the trial court should have given them another opportunity to amend their Complaint before dismissing. Plaintiffs already took advantage of one opportunity to amend after being put on notice of the standing defects in their Complaint by Defendants’ motion to dismiss, and Plaintiffs never asked the trial court for leave to file a second amended complaint thereafter. Nor have Plaintiffs ever described the facts that they could allege that would cure their standing deficiencies. Thus, the trial court did not err in failing to grant an unrequested amendment.

Finally, despite recognizing that the matter is not before the Court, Plaintiffs attempt to re-raise their previously dismissed first Proposition of Law and argue that this Court has jurisdiction under the “public right” theory of standing. This Court dismissed that Proposition as improvidently granted, and thus it is not the subject of this appeal. *See* 140 Ohio St. 3d 1412, 2014-Ohio-3785. Furthermore, this is not an original action in mandamus. Whatever *Sheward* says about those actions does not apply to a mandamus action in common pleas court. *See ProgressOhio.org*, 2014-Ohio-2382 ¶ 11. Finally, Plaintiffs are wrong: even if this Court could review the issue, Plaintiffs would lack “public right” standing because the legislation in this case

does not present the “rare and extraordinary” circumstances that are required under *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 467, 504 (1999).

The Tenth District properly found that the Plaintiffs lack standing, and dismissed their Complaint. The Tenth District’s decision should be affirmed.

COUNTERSTATEMENT OF THE CASE AND FACTS

Although this appeal concerns only Plaintiffs’ standing, understanding why the lower courts rightly dismissed the Complaint requires a closer look at some background.

A. In 2009 and 2011, the General Assembly passed legislation regarding video lottery terminal games and casinos

This case concerns Plaintiffs’ challenges to video lottery terminal games (“VLTs”) and casinos in Ohio. (VLTs are electronic games installed at horseracing tracks “that provide[] immediate prize determinations for participants.” R.C. 3770.21(A)(1)). Specifically, Plaintiffs challenge two acts: Am. Sub. H.B. 1, passed in July 2009 and Sub. H.B. 277, passed in July 2011 (together, the “Acts”). *See* Amended Complaint ¶¶ 24-26, 81-82, 88-90, 97-98, 103 (“Am. Compl.”) (Supp. S-1).

Together, the Acts implemented Article XV, Section 6 of the Ohio Constitution, and modified several rules and regulations concerning lotteries and casinos in Ohio. *See, e.g.*, R.C. 3770.03; 3772. House Bill 1 modified a subsection of the General Assembly’s lottery legislation, R.C. 3770.03, to clarify that the Commission’s authority had, since its inception, always included the authority to operate VLTs. *See* R.C. 3770.03(A). In addition to clarifying the scope of the Commission’s authority over VLTs, the Acts also implemented several of Article XV, Section 6’s provisions concerning casinos in Ohio. For example, Section 6 authorizes casino gaming at four facilities, one each in Cincinnati, Cleveland, Toledo, and greater Columbus. Oh. Const. art. XV, § 6(C)(1). It provides that each casino operator would be

required to pay a \$50 million license fee, and to invest at least \$250 million, in order to operate one of the four facilities authorized in Ohio, *id.* § 6(C)(4)-(5), and that the casinos would be subject to a 33% tax “on all gross casino revenue” in addition to “all customary non-discriminatory fees, taxes, and other charges that are . . . imposed generally upon other Ohio businesses,” *id.* at § 6(C)(2).

To implement these provisions of Section 6, the Acts amended portions of the Revised Code dealing with casinos. Among those changes are various definitions and clarifications to other statutes. First, H.B. 277 amended two definitional provision, R.C. 5751.01(F)(2) and 5753.01(D), to exclude (1) amounts above the casino’s “gross casino revenue” from Ohio’s generally applicable commercial-activity tax, and (2) “promotional gaming credits” from the 33% gross casino revenue tax required by Section 6. Second, H.B. 277 amended R.C. 3772.27 to allow the casinos to open in phases as long as they had invested at least 50% of the required \$250 million investment at the time they applied for a license. R.C. 3772.27(B)-(C). Third, H.B. 277 created R.C. 3772.34, which opened a “casino operator settlement fund” to receive all payments in excess of licenses, fees, or taxes made by the casinos to the State.

B. Plaintiffs sued to undo the 2009 and 2011 legislation

Plaintiffs sued in Franklin County Common Pleas Court challenging the constitutionality of various provisions of the Acts. Plaintiffs sought declaratory and injunctive relief, and writs of mandamus against Defendants Ohio Governor John R. Kasich, the Ohio Casino Control Commission, the Ohio Lottery Commission, and Ohio Tax Commissioner Joseph W. Testa (“Defendants”). One month *after* Defendants moved to dismiss Plaintiffs’ Complaint for lack of standing, Plaintiffs amended their Complaint to add additional Plaintiffs and allegations. The thirteen Plaintiffs in the First Amended Complaint include (1) a public advocacy group, Ohio

Roundtable, which opposes the expansion of gambling in Ohio (“Roundtable”), (2) an Ohio corporation, Agnew Sign & Lighting, Inc., and (3) eleven individual Ohio residents.

1. Individual Plaintiffs

Two of the individual Plaintiffs, Robert Walgate, Jr. and David Zanotti, are officers of Roundtable, and in that capacity have “actively opposed the legalized expansion of gambling in Ohio.” Am. Compl. ¶¶ 1, 3. Walgate, Jr. further alleges that he suffers from a gambling addiction, *id.* ¶ 1, which his mother, Plaintiff Sandra Walgate, alleges has caused her “great distress,” *id.* ¶ 4.

Five Plaintiffs (Paula Bolyard, Jeffrey and Michelle Malek, and Thomas and Donna Adams) assert they are the parents of public school students, and a sixth (Sandra Walgate) says she is a public school teacher. *Id.* ¶¶ 4, 6-8.

Plaintiff Linda Agnew claims she owns Plaintiff Agnew Sign & Lighting, Inc., an Ohio corporation that pays the commercial-activity tax. *Id.* ¶ 5.

Two plaintiffs, Joe Abraham and Frederick Kinsey, were added in the First Amended Complaint. Abraham asserts only that he is a citizen, resident, and taxpayer of the State of Ohio and a resident of Cleveland and the Cleveland Public School District; he does not assert any harms distinct from the general taxpayer. *Id.* ¶ 9. Unlike some of the other Plaintiffs, who seek to reduce gambling in Ohio, Kinsey alleges that he would open up a casino gaming operation but for Section 6(C)’s limitation on the number of casino gaming operations in the State. *Id.* ¶ 10.

2. Corporate and organizational Plaintiffs

Roundtable alleges that it is a nonprofit corporation that actively opposes the expansion of legalized gambling in Ohio. Roundtable contends that one of its non-party supporters, Laura Adams, “has suffered great distress . . . as a result of her father’s addiction to gambling.” *Id.* ¶ 2.

Agnew Sign & Lighting, Inc., is an Ohio corporation owned by Plaintiff Agnew. Like many businesses, it pays Ohio's commercial-activity tax, portions of which are allocated by statute to the School District Tangible Property Tax Replacement Fund and the Local Government Tangible Property Tax Replacement Fund (the "Funds"). R.C. 5751.20(B).

3. Plaintiffs' claims.

In their First Amended Complaint, Plaintiffs assert seventeen claims. Ten of Plaintiffs' claims concern those portions of the Acts relating to VLTs. Plaintiffs assert that aspects of the VLT laws violate Article XV, Section 6 of the Ohio Constitution governing state-operated lotteries and Article VIII, Section 4 of the Ohio Constitution, which bars the State from joint ownership in a private enterprise. Am. Compl. Counts 1-7, 9-10. Specifically, Plaintiffs claim three violations of Section 6: (1) VLTs are not a "lottery" as defined by Section 6, and thus the General Assembly exceeded their authority in passing the Acts, *id.* Count 1, (2) the VLTs will be installed at and maintained by privately owned racetracks, and thus will not be operated solely by the Ohio Lottery Commission, *id.* Count 2; and (3) the entire net proceeds of the VLTs will not be used to fund education, *id.* Counts 3-4. Plaintiffs also contend that the VLT laws were enacted in violation of the Joint Ownership Clause, the Single-Subject Rule, and the Three-Readings Rule of the Ohio Constitution, and unconstitutionally expanded the jurisdiction of the Ohio Supreme Court. *Id.* Counts 5-8. In Counts Nine and Ten, Plaintiffs seek writs of mandamus that VLTs be conducted solely by the Ohio Lottery Commission, *id.* Count 9, and that the entire net proceeds from VLTs be used for education, *id.* Count 10. (Counts 9 and 10 are thus the mandamus duplicates of Counts 2-4.)

Plaintiffs' remaining seven claims address those portions of the Acts relating to the casinos. Plaintiffs first allege that the Acts violate Section 6 by exempting casino operators from the commercial-activity tax and simultaneously imposing other taxes upon casino operators that,

in Plaintiffs' view, the operators should not pay. *Id.* Counts 11-12, 14-15. Plaintiffs also contend that the Cleveland casino violates the limit on the number of casino facilities authorized by Section 6, and that R.C. 3772.27(B) violates Section 6 by permitting the casinos to invest the required \$250 million in phases over a thirty-six month period. *Id.* Counts 13, 16. Finally, one Plaintiff asserts that Article XV, Section 6, in concert with the Acts, violates the Fourteenth Amendment by granting a monopoly to gaming companies. *Id.* Count 17. In Counts Fourteen through Sixteen, Plaintiffs seek writs of mandamus that (1) the casinos should be subject to the commercial-activity tax, but not other gaming-related fees, *id.* Count 14; (2) the 33% gross casino revenue tax should be applied to promotional gaming credits, *id.* Count 15; and (3) the Cleveland casino may only be operated with one facility, and all casinos must make their \$250 million investment in compliance with Section 6, *id.* Count 16. (Counts 14-16 are thus the mandamus duplicates of Counts 11-13.)

C. The lower courts dismissed Plaintiffs' Amended Complaint because the Plaintiffs lacked standing

Defendants challenged the Plaintiffs' standing and moved to dismiss the Complaint. In response, the thirteen Plaintiffs submitted only two affidavits: one from non-party Dr. Valerie Lorenz, and one from Plaintiff Zanotti. *See* Exs. A ("Lorenz Aff.") & B ("Zanotti Aff.") to Mem. Contra Kasich Mot. to Dismiss, *State ex rel. Walgate v. Kasich*, No. 11-CVH-10-13126 (Franklin Cnty. C.P.) (Supp S-35; S-39). Dr. Lorenz, a licensed clinical behavioral health counselor, averred only that (1) pathological gamblers cannot stop themselves from gambling, Lorenz Aff. ¶ 2, (2) the number of pathological gamblers has increased in recent years, *id.* ¶ 3, and (3) pathological gamblers and their families experience negative effects from gambling, including, among others, mental and physical health problems, *id.* ¶¶ 6-7. In his affidavit, Plaintiff Zanotti claims that the VLTs and casinos exceed constitutional limits, "and, as such,

will lead to an increase in problem and pathological gamblers,” who will in turn burden “the taxpayers, voters, citizens and families of Ohio.” *Zanotti Aff.* ¶ 2. He also avers that “[t]he large amounts of money involved with the planned VLT and casino activities will increase the opportunities and motives for the corruption of public officials and institutions,” and declares that “the citizens of Ohio have already been defrauded by” the Governor’s allegedly “corrupt practices,” *id.* ¶ 3, such as “the \$220 million payment agreed to by two gaming companies to the State of Ohio in exchange for favorable legislation that decreases ongoing [commercial-activity] tax revenues from those companies,” *id.* ¶ 5. *Zanotti* thus concludes that “[t]his extra-legal activity . . . defrauds” the government and its taxpayers. *Id.*

After argument, the trial court granted Defendants’ motion, finding that the Plaintiffs lacked standing to bring their claims. *See* Decision and Entry, *State ex rel. Walgate v. Kasich*, Case No. 11-CVH-10-13126 (Franklin Cnty. C.P. May 30, 2012). Plaintiffs appealed, assigning two errors: first, that the trial court erred in dismissing their claims for lack of standing; and second, that the trial court should have allowed Plaintiffs to file a second amended complaint pleading additional facts in support. *See State ex rel. Walgate v. Kasich*, 989 N.E.2d 140, 2013-Ohio-946 ¶ 9 (10th Dist.) (“App. Op.”).

Before the Tenth District, Plaintiffs asserted five theories that they alleged gave them standing. In a unanimous opinion, the Tenth District affirmed, holding that Plaintiffs lacked standing under any theory. *Id.* ¶ 37.

First, the court found that none of the individual Plaintiffs “suffered or [were] threatened with any direct and concrete injury” resulting from the negative effects of gambling, or that such injury was “in a manner or degree different from that suffered by the public in general.” *Id.* ¶ 16. For example, *Walgate Jr.* did not allege that the challenged laws caused his gambling addiction,

and thus did not cause his and his mother's purported injuries relating to his addiction; nor would the relief requested redress such injury. *Id.* The court found that any future injury related to the increased availability of gambling "[wa]s purely speculative and hypothetical" and thus insufficient. *Id.* Next, the court held that Plaintiffs Zanotti and Abraham did not allege any personal injury in the Complaint and could not base standing on claims that their communities would suffer negative social effects from increased gambling, as such harm was "abstract and speculative." *Id.* ¶ 17. Similarly, Plaintiff Roundtable lacked association standing on their members' behalf because it alleged only speculative injuries. *Id.* ¶¶ 28-29.

Second, the court rejected Plaintiffs Agnew and Agnew Sign & Lighting's claims of "special fund" taxpayer standing arising from Agnew Sign & Lighting's payment of the commercial-activity tax, funds which "are partially allocated to the school district tangible tax replacement fund and the Ohio local government tangible property tax replacement fund." *Id.* ¶¶ 18-20. Analyzing this Court's decisions, the Tenth District found that the claim that Agnew Sign & Lighting was taxed differently from other industries "fails to allege damage distinct from the damages suffered by the general public and fails to allege a special interest in a special fund" sufficient to grant "special fund" taxpayer standing. *Id.* ¶ 20.

Third, the court held that the public school teacher and parents of public school students lacked standing. *Id.* ¶¶ 21-22. Those Plaintiffs claimed that the Acts improperly "redirect[] general funds from public education and replace[] the reduction with" projected VLT proceeds. *Id.* ¶ 21. The Tenth District held that this was "purely speculative" and "at most, alleges an injury that *could* occur *if* there is a deficit in funds and the funds are not adequately replenished and *if* their particular schools and districts are affected." *Id.* ¶ 23. The court also found that the injury alleged, even if realized, was indistinct from that of the public. *Id.*

Fourth, the appeals court affirmed that Plaintiff Kinsey failed to allege any actual injury in the Complaint. *Id.* ¶¶ 24-27. It initially noted that the Complaint alleged merely in “general and conclusory fashion” that but for the provisions of the Ohio Constitution limiting gambling to four locations owned by two gaming companies, Kinsey would run his own casino. *Id.* ¶ 27. But without an allegation that he was “able and ready” to do so, Kinsey’s alleged injury was “hypothetical and speculative, and therefore, insufficient to confer standing.” *Id.*

The court also rejected Plaintiffs’ fifth and final theory of standing under the “public right” exception to traditional standing requirements, established in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451 (1999). *Id.* ¶¶ 30-32. The court found that the laws challenged here are “not of the same magnitude as” those in *Sheward*, “which concerned separation of powers and the ability of the Ohio legislature to re-enact legislation expressly prohibited by the judiciary.” *Id.* ¶ 32.

Turning to the question of amending the complaint, the Tenth District found that the trial court did not err in dismissing Plaintiffs’ Complaint without allowing an opportunity to file an amended complaint to plead additional facts. *Id.* ¶¶ 34, 35. The court noted that Plaintiffs had never sought to file a second amended complaint, nor otherwise explained how an amendment would cure the deficiencies in their complaint. *Id.* ¶ 35.

D. This Court narrowed Plaintiffs’ appeal after *ProgressOhio.org*

Plaintiffs appealed the Tenth District’s decision, and this Court granted review. After this Court decided *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St. 3d 520, 2014-Ohio-2382, it dismissed Plaintiffs’ first Proposition of Law but allowed Plaintiffs to proceed on Propositions of Law II-IV. *See* 136 Ohio St. 3d 1449, 2013-Ohio-3210 (accepting Propositions I-IV for review); 140 Ohio St. 3d 1412, 2014-Ohio-3785 (dismissing Proposition I). Plaintiffs’ Proposition of Law I appealed that portion of the Tenth District’s ruling that held that Plaintiffs could not

establish standing under this Court’s “public rights” exception in *Sheward*. See Pls.’ Mem. in Supp. of Jur. at 6 (Apr. 25, 2013) (Proposition I).

Thus, only three of Plaintiffs’ Propositions of Law are presently before this Court:

- (1) Parties whose interests are adversely affected by the negative effects of unconstitutional gambling have standing to pursue claims of violence of the lottery and casino provisions of the Ohio Constitution, *id.* at 8 (Proposition II);
- (2) Parents of public school students and contributors to special funds for schools have standing to pursue claims of unconstitutional diversion of lottery proceeds and casino tax proceeds from education or school funds, *id.* at 11 (Proposition III);
- (3) In order for a court to dismiss a complaint for failure to state a claim for lack of standing (Civ. R. 12(b)(6)), it must appear beyond doubt from the complaint and standing affidavits that the plaintiff can prove no set of facts entitling him to relief. In the event of such dismissal, a court must allow an opportunity to amend the complaint, *id.* at 12 (Proposition IV).

ARGUMENT

State Defendant-Appellees’ Proposition of Law No. 1:

Plaintiffs lack standing to challenge the constitutionality of statutes in the absence of any allegations of a concrete injury distinct from that sustained by the public generally.

The only issue decided in the trial court was that Plaintiffs lacked standing. See Decision and Entry, *State ex rel. Walgate v. Kasich*, Case No. 11-CVH-13126 (Franklin Cnty. C.P. May 30, 2012). That is because standing, a jurisdictional requirement in the common pleas courts, is a threshold inquiry to ensure that the parties are adverse and the plaintiff has been harmed in a concrete, redressable fashion. See Oh. Const. art. IV, § 4(B) (limiting jurisdiction of common pleas courts to “justiciable matters”); *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017 ¶ 24 (“[S]tanding to sue is required to invoke the jurisdiction of the common pleas court.”); *Ohio Pyro, Inc. v. Ohio Dep’t of Commerce, Div. of State Fire Marshal*, 115 Ohio St. 3d 375, 2007-Ohio-5024 ¶ 27 (“Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue.”); see also, *e.g.*,

Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) (standing “preserves the vitality of the adversarial process by assuring [] that the parties before the court have an actual, as opposed to professed, stake in the outcome”). As a constitutional requirement imposed by Section 4(B), standing is a mandatory inquiry for all cases before the court of common pleas. *Schwartzwald*, 2012-Ohio-5017 ¶¶ 22, 24; *ProgressOhio.org*, 2014-Ohio-2382 ¶ 11 (“if a common pleas court proceeds in an action in which the plaintiff lacks standing, the court violates Article IV of the Ohio Constitution”).

Plaintiffs must prove that they have standing as to each claim they raise. *See, e.g., Ohio Pyro*, 2007-Ohio-5024 ¶ 27 (“the person or entity seeking relief must establish standing to sue”); *Lujan*, 504 U.S. at 561 (the party bringing suit “bears the burden of establishing the[] elements” of standing); *Warth v. Seldin*, 422 U.S. 490, 518 (1975) (“It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.”). Meeting that burden of proof is not some lawyer’s trick: “[T]he doctrine of standing to sue is not a kind of gaming device that can be surmounted merely by aggregating the allegations of different kinds of plaintiffs, each of whom may have claims that are remote or speculative taken by themselves.” *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Kennedy, J., op.). Rather, each Plaintiff must demonstrate that he or she “ha[s] a direct, personal stake in the outcome of his or her case.” *ProgressOhio.org*, 2014-Ohio-2382 ¶ 1.

Plaintiffs must demonstrate three things to invoke the jurisdiction of the courts: (1) that they have suffered, or are threatened with suffering, a “direct and concrete injury in a manner or degree different from that suffered by the public in general,” (2) “that the law in question has caused the injury,” and (3) “that the relief requested will redress the injury.” *Sheward*, 86 Ohio St. 3d at 469-70 (citing, among others, *Ohio Contractors Ass’n v. Bicking*, 71 Ohio St. 3d 318,

320 (1994)); *see also, e.g., Lujan*, 504 U.S. at 560-61 (these elements comprise “the irreducible constitutional minimum of standing”). In the case of an organization or association, that group can establish standing to sue on behalf of its members only when ““(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”” *Bicking*, 71 Ohio St. 3d at 320 (quoting *Hunt v. Wa. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)). Thus, an organization will only have standing if it demonstrates that at least one of its members has actually been injured, that the challenged legislation caused the injury, and that the relief requested would redress that member’s harm. *Id.*

Mere “ideological opposition to a program or legislative enactment is not enough.” *ProgressOhio.org*, 2014 Ohio-2382 ¶ 1. Nor is an injury shared equally by the public generally sufficient, *State ex rel. Masterson v. Ohio State Racing Comm’n*, 162 Ohio St. 366, 368 (1954) (“[P]rivate citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally.”). Such generalized grievances are for the political branches. *See Clapper v. Amnesty Int’l, USA*, 133 S. Ct. 1138, 1146 (2013) (standing requirement “prevent[s] the judicial process from being used to usurp the powers of the political branches”); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014) (“generalized grievances” do not confer standing). Indeed, it is widely recognized that “by ensuring both that the judicial process is invoked only when necessary to resolve a concrete dispute and that generalized grievances widely shared by the public are vindicated through the political process,” standing serves an important separation

of powers function central to our democratic system of governance. Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 114-115 (5th ed. 2009).

The requirement that a lawsuit involve concrete harm applies equally to parties challenging how the law applies to *others*. See, e.g., *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42–43 (1976) (plaintiffs lacked standing to challenge an IRS ruling allowing nonprofit hospitals to qualify as § 501(c)(3) charitable organizations); *Allen v. Wright*, 468 U.S. 737, 753-56 (1984) (parents of public school children lacked standing to challenge IRS tax treatment of private schools), *modified on other grounds by Lexmark*, 134 S. Ct. 1377; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 343-44 (2006) (taxpayers lacked standing to challenge tax credits that favored one Ohio business). The mere allegation that “illegal activity” benefits a third party and therefore affects “public revenues” is not the kind of concrete injury that confers standing. *Cuno*, 547 U.S. at 344. Even where the plaintiff is a *competitor* of an entity receiving allegedly illegal advantages from tax or other policy, the plaintiff has no standing without *concrete* allegations of harm. The Supreme Court has “never accepted” a “theory of standing” under which a plaintiff has standing merely because “a competitor benefits from something allegedly unlawful.” *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 731 (2013); see also *Am. Soc. of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 147 (D.C. Cir. 1977) (company had no standing to challenge tax-exempt status of competitor); cf. *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910, 916 (6th Cir. 2002) (one casino lacked standing to contest government action authorizing nearby casino).

At bottom, this is a suit that brings to court a long-debated political question: What is the proper scope of gambling in Ohio? That is a question for the political branches. Cf. *State ex rel. LetOhioVote.org v. Brunner*, 123 Ohio St. 3d 322, 2009-Ohio-4900 (granting writ to permit

referendum regarding video-lottery statutes); Veto Message of Gov. Kasich re: Am. Sub. H.B. 494 (Dec. 19, 2014) (line-item veto regarding distribution of video-lottery proceeds). And standing is the doctrine that ensures the question remains there rather than in the courts. As the United States Supreme Court has reminded, few exercises of “the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them.” *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). Indeed, in an era of “frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so.” *Id.* The importance of the formal rules of standing are magnified further still in “constitutional litigation” like this, which “can result in rules of wide applicability that are beyond [legislative] power to change.” *Id.*

With 13 plaintiffs and 17 counts, there are 221 possible claims in this case. That makes it especially important to heed the admonition that “standing is not dispensed in gross.” *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). That is, each claim for relief must be prosecuted by a plaintiff with standing to advance that claim. *See State ex rel. Am. Subcontractors Assn., Inc. v. Ohio State Univ.*, 129 Ohio St. 3d 111, 115, 2011-Ohio-2881 ¶¶ 16-17 (dismissing some claims for lack of standing, but not others). The diverse mixture of plaintiffs and claims here proves the point: If all 13 were in a room together, they could not agree on what they want from this lawsuit. Some, like Walgate, Jr., want to curtail or eliminate gambling in Ohio. *See, e.g.*, Am. Compl. Count 1. Others, like Paula Bolyard, want to ensure that the money produced from gambling benefits education. *See id.* Count 3. Some, like Sandra Walgate, both want to curtail

gambling, but also ensure that gambling money aids the schools. *See id.* ¶ 4. And at least one wants to *increase* gambling opportunities in Ohio. *See id.* ¶ 10.

Fortunately, the standing issues for all of these combinations of plaintiffs and claims can be grouped into four categories. First, Plaintiffs allege that the negative effects of gambling are harming them and their communities. Next, Plaintiffs claim that as parents and a teacher of public school children, they have been harmed because certain casino revenues are exempted from taxes flowing to public schools. Third, at least one Plaintiff claims standing because some casino revenues are exempted from a tax that a Plaintiff pays. Finally, and seemingly at odds with his fellow Plaintiffs, one Plaintiff claims he is being harmed because Section 6 prevents him from opening his own gambling venture. We discuss each in turn.

A. Plaintiffs cannot establish standing on account of gambling’s purported negative effects.

First, Plaintiffs claim that they have standing to challenge the Acts on account of the negative effects that gambling has on them and their communities. Plaintiff Walgate Jr. contends that he is adversely affected by gambling because he is a recovering gambling addict, and his past gambling has harmed his family. *See Am. Compl.* ¶ 1. His mother, Sandra Walgate, also alleges that his gambling has caused her “great distress.” *See id.* ¶ 4. Plaintiffs Abraham and Zanotti claimed for the first time in briefing and affidavits submitted in opposition to the State’s motion to dismiss—but not in the Amended Complaint itself, *see id.* ¶¶ 3, 9—that their communities will be harmed by increased gambling. *See Mem. Contra Kasich Mot. to Dismiss Exs. A-B, State ex rel. Walgate v. Kasich*, No. 11-CV-13126 (Franklin Cnty. C.P. Jan. 5, 2012). Finally, Plaintiff Roundtable alleges that it is a policy organization opposed to gambling, and that one of its non-party members has been distressed because of her father’s gambling addiction. *See Am. Compl.* ¶ 2.

None of these allegations suffices. These alleged harms of gambling would not be redressed even if Plaintiffs win this lawsuit. Furthermore, the harms alleged, such as increased temptation to return to addiction, are speculative. Finally, whatever else may be said of the alleged harms, they were not caused by the challenged Acts, and thus lack the requisite nexus for standing.

1. The relief Plaintiffs request will not redress the purported harms of gambling.

Plaintiffs fail to demonstrate how the harms they allege would be redressed by their suit. This alone is fatal to Plaintiffs' standing. For an injury to be redressable for standing purposes, it must be "likely" that a favorable outcome in the litigation will offer complete relief from the harm alleged. *See ProgressOhio.org*, 2014 Ohio-2382 at ¶ 7; *Lujan*, 504 U.S. at 568-71 (plurality op.). The harms Plaintiffs allege here simply will not be ameliorated by the relief they seek. They challenge *how* some gambling will be conducted, but not *whether* gambling will exist in Ohio at all. The temptation to gamble will remain even if Plaintiffs secure everything they seek in the Amended Complaint. That is true both as to the Casino claims and the VLT claims.

For example, Plaintiffs challenge several aspects of how the casinos are operated. These casinos have already been built and are operational, and Plaintiffs do not request that they be closed. Instead, Plaintiffs' claims with respect to the casinos only challenge (1) how the casinos' gross taxable revenue is defined, *see* Am. Compl. Counts 8, 11-12, 14; (2) whether the Cleveland casino's development plan constitutes a single "facility," *id.* Count 13; and (3) whether Plaintiff Kinsey should be allowed to open an additional casino gaming facility, *id.* Count 17. But how a casino is taxed, whether it operates in one building or two, or whether Kinsey can offer more gambling options to Ohioans will not affect Walgate Jr.'s gambling propensity. Even if

Plaintiffs were successful on these claims, the result would only affect *how* the casinos operate; it would not reduce casino gambling or force the casinos to shut their doors. Indeed, with respect to Count 17, Plaintiffs' requested relief would in fact *increase* gambling in Ohio. This is insufficient redressability for standing based on a theory that the harm to the Plaintiffs arises from gambling's negative effects. *See Lujan*, 504 U.S. at 571 (pl. op.).

Similarly, Plaintiffs' requested relief with respect to the VLTs will not redress the overall harms they fear from gambling. For example, whether the Acts improperly delegate the authority to operate the VLTs to private actors, rather than the Ohio Lottery Commission, *see* Am. Compl. Count 2, has no effect on whether VLTs will be installed around the State (as they have already been). Likewise, whether all net proceeds from VLTs flow to education, *see id.* Count 3, has no effect on whether VLTs will proliferate under the Act. More fundamentally, because statutes limit the location that VLTs can be installed to pre-existing gambling sites (namely, horseracing tracks), the law already assures that VLTs cannot spread gambling geographically within a community or to new communities. VLTs can only be installed at horseracing tracks. *See* R.C. 3770.21(A)(1) (building into the definition of a VLT a requirement that it be "located at a facility owned by a holder of a permit" pursuant to Ohio Admin. Code 3769-1-05); O.A.C. 3769-1-05 (defining a "permit" as a one "to conduct a horse racing meeting"). Since VLTs must be placed alongside other gambling (on horses), any change to VLT operation that a victory in this suit might net would not change the community *effects* of VLTs or non-VLT gambling. Plaintiffs' allegations on this point are ideological, not consequential.

Plaintiffs' pleading failure here is not unique. The generalized claim that gambling's community effects confer standing on individuals is a claim that the courts have repeatedly

rejected. For example, the federal D.C. Circuit affirmed a Rule 12 dismissal of a case where the plaintiff alleged that he had “suffered injury by living in a gambling community.” *Jackson v. United States*, 1993 WL 439821, *1 (D.D.C. Oct. 20, 1993) *aff’d*, No. 93-5346, 1994 WL 71560 (D.C. Cir. Feb. 28, 1994). And the federal Fifth Circuit has twice affirmed Rule 12 dismissals of allegations that operating a casino would damage a plaintiff’s way of life by “increasing crime and altering the community.” *Willis v. Fordice*, 55 F.3d 633, 1995 WL 314414, at *1 (5th Cir. 1995) (Table); *Langley v. Dardenne*, 77 F.3d 479, 1996 WL 46781, at *2 (5th Cir. 1996) (Table); *see also Schulz v. State*, 731 N.E.2d 1041, 1045 (Ind. App. 2000) (landowners had no standing to challenge grant of gambling license because “adverse effects that the casino development will have on their own land and lifestyle” were “too remote to confer standing” (emphasis added)); *Sears v. Hull*, 961 P.2d 1013, 1018 (Ariz. 1998) (“generalized harm” from gambling did not confer standing). Those injuries, the appeals court held, were no different from the possible harms to all “other residents in the community,” and therefore did not confer standing. *Willis*, 1995 WL 314414, at *1.

The Plaintiffs here, despite their numerosity, fare *worse* on their standing claims than the federal plaintiffs in *Jackson*, *Willis*, and *Langley* because those plaintiffs sought to fully eliminate gambling from their communities. The Plaintiffs here ask only to change how casinos and VLT facilities operate. That immodest goal is the height of a generalized grievance and gives them no standing to sue.

2. The negative effects of the casino and VLT gambling challenged here are speculative and hypothetical, and are not causally related to the Acts

Plaintiffs also fail to demonstrate that the harms they complain of are “concrete,” rather than conjectural or hypothetical, and that there is a “causal connection” between the negative effects of gambling and the provisions of the Acts that Plaintiffs challenge. *Lujan*, 504 U.S. at

560. Standing cannot be grounded in bare allegations that a plaintiff fears that harm will occur. *See, e.g., Los Angeles v. Lyons*, 461 U.S. 95, 101-03 (1983); *Am. Subcontractors*, 2011-Ohio-2881 ¶ 12 (no standing where allegations were “not supported”). Rather, the injury must be “real and immediate,” *Lyons*, 461 U.S. at 102 (quotation marks omitted), and “certainly impending,” *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (quotation marks omitted); *see also Am. Subcontractors*, 2011-Ohio-2881 ¶ 12 (injury must be “concrete and not simply abstract or suspected” (quotation marks omitted)). Here, Plaintiffs allege only hypothetical harms that may never occur, and also fail to draw a causal connection between the Acts and those harms. Thus, Plaintiffs lack standing.

For example, the harm caused by Walgate Jr.’s past struggles with gambling addiction was not caused by the Acts. More critically, because the Complaint does not seek to end all gambling in Ohio, the harms of the subset of gambling that the Complaint targets are not causally related to the harms that Walgate, Jr. and others allege from gambling *generally*.

Similarly, Plaintiffs Abraham and Zanotti claim that their communities will be harmed by the increase in gambling authorized by the Acts—though they do so not in the Complaint (where their sole allegations are that they reside in Cuyahoga County)—but only in response to the State’s motion to dismiss. But such claims, like Walgate Jr.’s, are pure speculation. The affidavits making this point reveal their inadequacy on their face. The first affiant was a non-party and her statement addressed only the general behavioral patterns of compulsive gamblers; it did not allege any injury to Plaintiffs from the Acts. *See Lorenz Aff.* ¶¶ 4-5. The second affiant, Zanotti, offered nothing more than conclusory allegations that VLTs and casinos will increase public corruption and governmental costs. *See Zanotti Aff.* ¶¶ 1-5.

These affidavits recite conclusions, not concrete allegations that support standing. *See J.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004) (noting that while a court may consider affidavits outside of the pleadings on a jurisdictional issue, it may not rely on conclusory statements). Similarly conclusory allegations about the harms of gambling have met with dismissal for lack of standing. *See, e.g., Citizens Against Casino Gambling in Erie Cnty. v. Hogen*, No. 07-CV-0451S, 2008 WL 2746566, at *18-22 (W.D.N.Y. July 8, 2008) (although those living in the “neighborhood” of the proposed casino had standing, affidavits testifying that the casino will adversely impact the poor and vulnerable residents of Erie County, and that the casino “will result in increased county government costs” generally did not confer standing to sue); *Willis*, 1995 WL 314414; *Langley*, 1996 WL 46781. At best, such an injury is shared by the public generally, and is thus not the kind of concrete, individualized injury required for standing. *Masterson*, 162 Ohio St. at 368; *Lexmark*, 134 S. Ct. at 1387 n.3.

3. Roundtable cannot establish association standing

Finally, Roundtable cannot establish association standing because none of its members has standing. *See Bicking*, 71 Ohio St. 3d at 320. The Complaint only identifies Plaintiffs Walgate Jr. and Zanotti, and non-party Laura Adams, as Roundtable members. As shown above, neither Walgate, Jr. nor Zanotti has individual standing; Roundtable therefore does not have association standing through either of them. As for Ms. Adams, the Complaint says only that she “has suffered great distress . . . as a result of her father’s addiction to gambling.” Am. Compl. at ¶ 2. This sentence is her only appearance in the Complaint, and her allegation—like Walgate Jr.’s—is insufficient to establish standing. Because Roundtable has not identified any members who can establish standing on their own, Roundtable cannot have association standing to bring claims on behalf of its membership. *Bicking*, 71 Ohio St. 3d at 320; *Am. Subcontractors*, 2011-

Ohio-2881 ¶ 16 (associations had no standing because they could not establish “that any of their members [had] been injured”).

B. Plaintiffs cannot establish standing merely because they work at, or their children are enrolled in, public schools

Six Plaintiffs assert that they have standing either because their children attend public schools or they teach at public schools that are funded in part by lottery and casino revenues. *See* Am. Compl. Counts 3, 4, 10. These Plaintiffs appear to contend that the Acts unconstitutionally divert funds from education by (1) defining the “net proceeds” from VLTs too broadly, thereby excluding some revenues from education, *see id.* Counts 3, 10; and (2) replacing \$900 million in education funding from other sources with \$900 million in education funding from VLT revenues, *see id.* Count 4. None of these Plaintiffs have standing to bring claims on these grounds.

1. Standing rules have no special school-funding exception

There is no special “public school teacher or parent” standing exception in Ohio. Therefore, as in any case seeking to enjoin an official act, the parents and teacher must “allege and prove damages to themselves different in character from that sustained by the public generally.” *Masterson*, 162 Ohio St. at 368. For example, applying general standing principles, the Tenth District has found that parents and teachers lack standing to bring claims that their school districts are being under-funded because of legislation, reasoning that such claims do not demonstrate that the parents or teachers are being harmed in a manner “different than that suffered by the public.” *Toledo City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 18 N.E.3d 505, 2014-Ohio-3741 ¶¶ 52-59 (10th Dist.), *appeal filed*, No. 2014-1769 (Oct. 20, 2014). In that case, the plaintiff parents and teachers alleged the same grounds for standing as were alleged by the parents and teacher here: that “they are Ohio taxpayers; that they live in one of the districts, that

they own real property within that district; and that they are parents of children who attend public schools within that district. The Individual Plaintiffs in the Dayton City School District additionally allege that the district employs them as public school teachers.” *Id.* ¶ 55.

The Tenth District in that case affirmed dismissal for lack of standing because the parents and teachers did not “establish damage . . . different in character from that sustained by others living in the school district.” *Id.* Specifically, it noted that “none of the Individual Plaintiffs have alleged that their children have been denied specific educational opportunities due to ODE’s failure to fund their district at the statutory rate or that they lost their jobs as a result of ODE’s conduct as alleged in the complaint.” *Id.* ¶ 58. Without more, the Tenth District held that the parents and teachers could not demonstrate an injury different from that suffered by the public, and thus their claims amounted to “nothing more than unsupported legal conclusions” and were insufficient to establish injury-in-fact. *Id.* ¶ 59.

Similarly, a federal suit was resolved on a motion to dismiss and initially affirmed on appeal where the complaint alleged injury to a school district “and its students” from a loss of funds. *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 of Pima Cnty., Ariz. v. Kirk*, 91 F.3d 1240, 1245 (9th Cir. 1996) (quoting complaint), *dismissed for lack of jurisdiction on reh’g en banc*, 109 F.3d 634 (9th Cir. 1997). None of the students “alleged a program that affect[ed] him as an individual that will be scaled back.” *Id.* Thus, the court concluded, the complaint offered “no basis” for believing that the students suffered “particularized harm or distinct injury.” *Id.* See also, e.g., *Fed. Way Sch. Dist. No. 210 v. State*, 219 P.3d 941, 949 (Wash. 2009) (finding no standing where “individual parent[s], student[s], and teacher[s]” did not establish “any benefit they are personally being denied” by a funding change).

Likewise, in a recent case the New Hampshire Supreme Court found that parents and teachers had no standing based on a claim that a state law caused “the loss of money to local school districts.” *Duncan v. State*, 102 A.3d 913, 927 (N.H. 2014). As that court explained, the fact that plaintiffs had “school-aged children or [were] public school teachers” established only a “special interest in education,” not a concrete harm, and was insufficient to confer standing. *Id.* at 926-27 (citation omitted).

Here, the Plaintiffs allege the same kind of barebones facts that fell short in *Toledo*, *Indian Oasis-Baboquivari*, *Federal Way*, and *Duncan*. The parents here alleged only that they are taxpayers in Ohio, that they reside in specific counties or cities within the state, and that their children are enrolled in their respective public school systems. *See* Am. Compl. ¶¶ 6-8. Like the parents in *Toledo*, the parents here do not allege that their children have been denied specific educational opportunities or have been harmed in any specific manner. Thus, the parents here lack standing because they have not shown a concrete, actual harm caused by the challenged legislation. *See Toledo City Sch. Dist. Bd. of Educ.*, 2014-Ohio-3741, ¶¶ 58-60; *see also Gannon v. State*, 319 P.3d 1196, 1211-13 (Kan. 2014) (holding that students lacked standing to challenge school funding where they alleged only that they attended an allegedly affected school district).

2. Sandra Walgate has waived the argument that she has standing as a teacher, and in any event her claim fails

Sandra Walgate’s allegations require further elaboration. She appears to allege that she has standing because she is a public school teacher, *see* Am. Compl. ¶ 4, but she waived this argument by failing to appeal the Tenth District’s finding that she lacked standing. *See* Pls.’ Mem. in Supp. of Jur. at 11 (failing to mention Sandra Walgate); Resp. in Op. at 10 n.1 (noting Plaintiffs’ waiver); *compare* Pls.’ Br. at 32-33 (discussing standing only “for parents of public

school children”), *with id.* at 35 (claiming that “Sandra Walgate ha[s] standing under this theory by reason of [her] status as [a] public school . . . teacher”).

Even if the Court bypasses the waiver, Sandra Walgate’s claim of standing fails for the same reasons that the parents’ claim fails. As with the parents, Sandra Walgate does not allege any concrete harm flowing from the alleged funding changes. She does not, for example, allege that the funding changes cost her a job. *See, e.g., Toledo City Sch. Dist. Bd. of Educ.*, 2014-Ohio-3741 ¶ 58 (affirming dismissal for lack of standing where complaint contained no allegation that teacher “lost [a] job[.]”); *compare* Am. Compl. ¶ 4 (alleging only that Sandra Walgate is “a teacher employed” by an Ohio school district).

3. The harm Plaintiffs allege arising from the Acts’ replacement of education funds with VLT revenues is speculative and thus insufficient for standing

As to the claim that the Acts unconstitutionally divert funds from education by changing the source of \$900 million in education funding, *see* Am. Compl. Count 4, that claim is speculative and the purported harm is hypothetical. Indeed, Plaintiffs do not even allege an actual deficiency in school funding. At most, they allege an injury that *may* arise in the *future*, if the VLT revenues are insufficient to fund education and the school districts are harmed. Biennial budgeting makes this a claim regarding future budgets, not the challenged Acts. (And, paradoxically, if Plaintiffs succeed in shutting down the VLTs entirely, *see* Am. Compl. Count 1, the schools would lose that revenue.) Even then, the parents and teacher would need to show that their children have experienced a diminution of educational opportunities because of the future funding decrease. Because the harm alleged is one that will only arise if unknown events in the future occur, it is speculative and cannot be the basis for the teacher’s or parents’ standing here. *See Clapper*, 133 S. Ct. at 1150 (no standing where allegations involved “speculative chain of possibilities . . . based on potential future” government actions); *Ohio Contract Carriers Ass’n*

v. Pub. Utils. Comm'n, 140 Ohio St. 160, 161 (1942) (“speculative interest is not sufficient” for standing) (quotation marks omitted).

4. Plaintiffs cannot assert third-party standing on behalf of the district

Taken together, the parents and teacher allege speculative, generalized harms that, even if true, would be felt by the public school system as a whole. But it is well established that litigants must assert their own rights, not those of third parties. *N. Canton v. Canton*, 114 Ohio St. 3d 253, 2007-Ohio-4005 ¶ 14 (“[A] litigant must assert its own rights, not the claims of third parties.”). Third-party standing is particularly disfavored, *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (third-party standing is “not looked favorably upon”); *Settlers Bank v. Burton*, Nos. 12CA36, 12CA38, 2014-Ohio-335 ¶ 53 (4th Dist.) (“third-party standing is not favored”), and may only be available “when a claimant (i) suffers its own injury in fact, (ii) possesses a sufficiently ‘close relationship with the person who possesses the right,’ and (iii) shows some ‘hindrance’ that stands in the way of the claimant seeking relief.” *N. Canton*, 2007-Ohio-4005 ¶ 14 (quoting *Kowalski*, 543 U.S. at 130).

Here, even if Plaintiffs had asserted third-party standing (and they have not), they could not demonstrate that the public school districts were “hindered” in some way that prevents them from seeking relief. *See, e.g., N. Canton*, 2007-Ohio-4005 ¶ 17 (finding that the plaintiff “failed to demonstrate that [the third party] was hindered” where the third party “did not choose to file suit,” did not “attempt[] to intervene,” and “nothing . . . prohibit[ed the third party] from asserting its own claim”); *Util. Serv. Partners, Inc. v. Pub. Util. Comm'n*, 124 Ohio St. 3d 284, 2009-Ohio-6764 ¶ 52 (finding that natural gas line warranty company lacked third-party standing to bring takings claim because it could not demonstrate “that any barrier would hinder [the third parties] from asserting [their] own takings claim[s]”). Nor, as shown above, have the parents and teacher demonstrated their “own injury in fact” necessary for third-party standing.

If anyone suffers concrete harm from the way the Acts affect education funding, it is the school districts, not the parents and teacher. These Plaintiffs lack standing.

C. Plaintiffs do not qualify for “special fund” taxpayer standing merely by paying the commercial-activity tax

Some Plaintiffs additionally claim to have “special fund” taxpayer standing based on their payment of the general commercial-activity tax. Others appear to claim such standing despite not paying the tax themselves. Neither group qualifies for this narrow form of standing.

For starters, the commercial-activity tax (CAT) does not create a special fund. That is apparent from the language of the tax, the analogy to the general revenue fund, and analogous precedent. Start with the text. The CAT is levied on “each person with taxable gross receipts” doing business in Ohio. R.C. 5751.02(A). Few taxes are more general. The purposes of the tax are equally expansive: it is levied to fund “the needs of this state and its local governments.” *Id.* The CAT is simply not a collection for a special fund.

Next, consider an analogy to the General Revenue Fund. Like the money collected by the CAT, the General Revenue Fund is ultimately disbursed into funds that benefit ever more discrete groups of Ohioans. That does not make the General Revenue Fund a special fund. Likewise, there is no direct connection between the collection and distribution of the CAT money such as to make it a special fund. It is unlike the fund in *Masterson*, which was collected from “a special class of taxpayers,” 162 Ohio St. at 369, and unlike the fund in *State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 2006-Ohio-3677, which was collected from employers to benefit employees, *see* R.C. 4123.30.

Finally, analogous precedent rejects the claim that the CAT generates revenue for a special fund. *See, e.g., Dann*, 2006-Ohio-3677 ¶ 9 (gas tax does not pay into special fund, despite Ohio Const. art. XII, § 5a limiting fuel-tax revenue to certain uses); *State ex rel. N. Ohio*

Chapter of Associated Builders & Contractors., Inc. v. Barberton City Sch. Bd. of Educ., 188 Ohio App. 3d 395, 2010-Ohio-1826 ¶ 21 (9th Dist.) (bond levy for school construction not a special fund); *Brown v. Columbus City Schs. Bd. of Educ.*, No. 08AP-1067, 2009-Ohio-3230 ¶¶ 2, 13 (10th Dist.) (taxes on city residents do not create special fund for city school district).

These general problems with the special-fund allegations pale in comparison to the specific: Neither the corporate nor the individual Plaintiffs that have ostensibly challenged how the CAT applies to casinos has alleged the kind of connection to a fund required by *Masterson*. Linda Agnew and Agnew Sign & Lighting assert that they have “special fund” taxpayer standing because Agnew Sign & Lighting pays the commercial-activity tax, a portion of which go to the Funds. R.C. 5751.20(B). Agnew Sign & Lighting takes aim at those portions of the Acts that exempt certain amounts of the casinos’ gross receipts from the generally applicable commercial-activity tax. *See* Am. Compl. Counts 11, 12, 14, 15. Linda Agnew alleges standing as the owner of Agnew Sign & Lighting. *See id.* ¶ 5.

Neither Agnew nor Agnew Sign & Lighting have “special fund” taxpayer standing. As for Agnew, she cannot have standing on account of her company’s alleged injury. Even if Agnew Sign & Lighting had alleged sufficient injury (and it has not), that harm is personal to the corporation and cannot be asserted by Agnew as its shareholder where Agnew Sign & Lighting is a plaintiff. *See Util. Serv. Partners, Inc.*, 2009-Ohio-6764, ¶ 49 (noting that except in limited circumstances not applicable here, “[t]o have standing, the general rule is that ‘a litigant must assert its own rights, not the claims of third parties’” (quoting *N. Canton*, 2007-Ohio-4005 ¶ 11)); *Diva’s Inc. v. City of Bangor*, 411 F.3d 30, 42 (1st Cir. 2005) (even sole shareholders do not have standing to assert rights of corporation).

As for Agnew Sign & Lighting, it does not have “special fund” taxpayer standing either. Agnew Sign & Lighting did not plead any “special interest” in a public fund that would entitle it to “special fund” taxpayer standing. This Court has long held that “a taxpayer can not bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he had some special interest therein by reason of which his own property rights are put in jeopardy.” *Masterson*, 162 Ohio St. at 368. This “special fund” taxpayer standing is a narrow exception to the ordinary rule against taxpayer standing, and only applies in special circumstances where the administration of a special fund—or laws enacted relating thereto—harms the subset of the general population that pays into the special fund.

Here, the Complaint does not allege any harm relating to the administration of the Funds themselves. Rather, Agnew Sign & Lighting merely argues that casinos will be taxed differently from other commercial entities in Ohio. *See* Am. Comp. Counts 11, 14. This is insufficient to trigger “special fund” standing, for two reasons: One, it does not allege the requisite “special interest” in a public fund, and two, to the extent there is any harm, it is a harm shared equally by all. Indeed, “harm” is a difficult barrier for plaintiffs here because a statute mandates that any shortfalls in the Funds must be offset by transfers from the General Revenue Fund, into which all taxpayers pay. *See* R.C. 5751.22(D) (shortfalls in the Local Government Fund); R.C. 5751.21(G) (shortfalls in the School District Fund).

To the extent the parents and teacher assert claims about the payment of the CAT, *see* Am. Compl. Counts 12, 14, 15, they lack standing for the same reasons that Linda Agnew and Agnew Sign & Lighting lack standing. Furthermore, unlike Agnew Sign & Lighting, the parents and teacher do not allege that they pay the CAT. Thus, even if payment of the tax was sufficient

to establish standing—and it is not—the parents and teacher still could not establish “special fund” standing because they do not *pay* into these funds.

D. Plaintiff Kinsey cannot establish unequal-treatment standing

Seemingly at odds with the other plaintiffs, Kinsey alleged that he was “being deprived of the right to exercise the trade or business of casino gaming” by Article XV, Section 6(C) of the Ohio Constitution, and that “but for the provisions” of that Section, “[h]e would engage in casino gaming in Ohio.” Am. Compl. ¶ 10. Kinsey makes this claim under the Fourteenth Amendment. *See* Am. Compl. Count 17. Kinsey’s allegations make him the black sheep of the Plaintiffs: Unlike all of the others, Kinsey wants to *increase* the availability of gambling in Ohio. In any event, Kinsey’s bare, unsupported allegations are insufficient to establish standing to challenge Section 6(C) of Article XV.

1. Plaintiff Kinsey lacks standing because the relief he seeks would not redress the harm he alleges

As we show above, to have standing a plaintiff must demonstrate that the requested relief will redress the alleged harm. *Bicking*, 71 Ohio St. 3d at 320. Kinsey requests that the court strike down Article XV, Section 6(C) in its entirety as violating the Fourteenth Amendment. *See* Am. Compl. at Prayer for Relief, subsection (o) (asking for declaration that “Art. XV, § 6 (C) . . . violate[s] Amendment XIV of the United States Constitution”). Kinsey’s purported harm is that Section 6(C) infringes on his right to make a living because it limits the number of entities that can engage in casino gaming. *See* Am. Compl. ¶ 120. Thus, for Kinsey to show sufficient redressability, striking down Section 6(C) must open the door for Kinsey to engage in casino gaming. But that relief leaves the door sealed tight.

Kinsey cannot make that showing because Section 6(C) acts as an *exception* to Ohio’s general prohibition of gambling. If (C) is stricken, all that remains in Section 6 is the general

prohibition against gambling. *See* Oh. Const. art. XV, § 6 (banning lotteries “[e]xcept as otherwise provided in this section”). This ban would continue to prevent Kinsey from engaging in casino gaming. Thus, Kinsey’s requested relief would not redress the harm he alleges. *Cf. Midwest Media Prop., LLC v. Symmes Twp., Oh.*, 503 F.3d 456, 461-62 (6th Cir. 2007) (Sutton, J.) (plaintiffs lacked standing to challenge advertising ban where plaintiffs’ proposed advertising would still be banned by other unchallenged statutes and regulations).

2. Kinsey lacks standing because he does not allege that he was “able and ready” to engage in casino gaming

Generally, in order to demonstrate standing to challenge a “barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group,” Plaintiff Kinsey must “demonstrate that [he] is *able and ready to bid on contracts* and that a discriminatory policy prevents [him] from doing so on an equal basis.” *N.E. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) (emphasis added), *see Schwartzwald*, 2012-Ohio-5017 (following federal precedents). In the absence of allegations that a plaintiff is “able and ready” to engage in the proposed activity, a plaintiff’s claim fails for lack of standing. Furthermore, as with traditional standing, generalized grievances shared by all are insufficient, even when claiming an equal protection violation. *See United States v. Hays*, 515 U.S. 737, 743-44 (1995).

Cases applying the “able and ready” standard show the shortcomings of Kinsey’s allegations. The Ninth Circuit has found that two plaintiffs lacked standing to bring an equal protection challenge where they failed to demonstrate that they were “able and ready” to conduct a business that would benefit from Hawaii’s race-based business and homestead benefit programs if the plaintiffs were Hawaiian (which they were not). *See Carroll v. Nakatani*, 342 F.3d 934, 938, 941-43, 947 (9th Cir. 2003). There, one of the plaintiffs filed an incomplete

application for a business loan, without complying with many of the application's requirements and without submitting a colorable business plan. The other did not apply for any benefit under the challenged scheme, and merely asserted objections to the race-based classifications in the challenged legislation. The Ninth Circuit found that neither plaintiff had standing because neither could demonstrate that they were "able and ready" to start businesses that would be benefitted by the challenged legislation. *Id.*

Even cases finding the "able and ready" test satisfied, show why Kinsey does not have standing. In *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397 (6th Cir. 1999), the Sixth Circuit addressed a Fourteenth Amendment challenge in the context of a bidding process for a casino license. There, the district court found that Lac Vieux did not have standing because it did not sufficiently allege that it was "able and ready" to submit a proposal for a casino license. *Id.* at 403. The Sixth Circuit reversed, finding that Lac Vieux's allegations demonstrated that it was "able and ready" to submit a proposal: In its second amended complaint, Lac Vieux had alleged that it owned and operated multi-million-dollar casinos in Michigan, that it had "arranged for the development . . . of a casino resort project in downtown Detroit," that it had selected the site for such a project and projected to spend between \$200 million and \$300 million on the development, and that "[a]t all times relevant herein, [it] has been ready and has had the ability to submit the requisite information for a casino development proposal." *Id.* at 404. Lac Vieux also submitted an affidavit from its Executive Director testifying that "the Tribe was, and is, ready, and has the ability to submit a proposal," and that "[t]he Tribe has adequate financial resources to pay the fees required in connection with the selection process." *Id.* at 405.

Here, Plaintiff Kinsey’s bare allegation that he “would engage in casino gaming in Ohio” is insufficient to demonstrate that he was “able and ready” to do so. Like the plaintiffs in *Carroll*, Kinsey did not allege that he was “able and ready” to engage in casino gaming. Nor did he allege, for example, that he had experience engaging in casino gaming in Ohio, that he had the funding to do so, or that he was even capable of applying for a gaming license with the Ohio Casino Control Commission or the Ohio Lottery Commission. *See, e.g., Lac Vieux Desert Band*, 172 F.3d at 404-05. The Tenth District thus properly found that Kinsey’s unadorned statement that he “would engage in casino gaming” was insufficient to establish standing. *See Carroll*, 342 F.3d at 941-43, 947; *cf. Beztak Land Co. v. City of Detroit*, 298 F.3d 559 (6th Cir. 2002) (dismissing for lack of standing where complaint failed to allege plaintiff had intention of building and operating a casino).

E. Plaintiffs’ arguments do not withstand scrutiny

In response to all of this, Plaintiffs offer one general point and four specific theories about their standing. None surmounts the barriers that their allegations are merely conclusions, that their harms are generalized grievances shared by all citizens, and that the remedies they seek will not redress these alleged harms.

Plaintiffs’ argument (at 14-19) that a *statute* (either that authorizing mandamus suits or that permitting declaratory judgments) gives them standing is waived, runs headlong into *ProgressOhio.org*, and does not change the substantive analysis anyway. *Start* with what this Court recently said about waiver in standing cases. A theory of standing not raised “in the lower courts” is waived. *ProgerssOhio.org*, 2014-Ohio-2382 ¶ 18. As there, Plaintiffs here waived the argument that somehow a general procedural statute confers standing because they did not raise that argument below. *Next*, consider the core lesson of *ProgressOhio.org*. It holds unequivocally that the “Ohio Constitution expressly requires standing for cases filed in common

pleas courts,” so that “a common pleas court [that] proceeds in an action in which the plaintiff lacks standing . . . violates Article IV of the Ohio Constitution.” *Id.* ¶ 11. No statute can alter that constitutional imperative. *Finally*, the statutes Plaintiffs cite are irrelevant because they do no more than codify constitutional standing principles. Plaintiffs recognize this, as they agree that the *statutory* requirements to launch a declaratory-judgment suit are “essentially the same” as the constitutional standing limits. *See* Pls.’ Br. at 18. The analysis under the mandamus statute leads to the same overlap. As Plaintiffs recognize by citing *Sheward* (at 17), the mandamus *statute* does no more than codify the constitutional requirements of standing to bring a mandamus suit. (Plus, as we discuss in proposition 3 below, arguments that Plaintiffs have standing to litigate public duties are not before the Court because that proposition was dismissed in light of *ProgressOhio.org*). It may be that the requirements for mandamus differ depending on whether the relator asks to enforce a personal right or a public one, *see Sheward*, 86 Ohio St. 3d 451 at syl. ¶ 1, or whether the action is in common pleas court or an appellate court, *ProgressOhio.org*, 2014-Ohio-2382 ¶ 11, but the mandamus *statute* does not change the *substance* of whether these Plaintiffs have standing here.

Because these general statutory arguments simply point to the substantive law of standing, we turn to Plaintiffs’ four specific arguments that they have standing.

1. Because the alleged harms of gambling do not distinguish between legal and illegal gambling, Plaintiffs’ remedies would not alleviate their alleged harms

Plaintiffs first offer a puzzling distinction between constitutional and unconstitutional gambling, and suggest that their injury flows uniquely from unconstitutional gambling. *See, e.g.*, Pls.’ Br. at 31 (“[I]njury in this case is the negative effects of unconstitutional gambling, not the negative effects of constitutional gambling.”). But Plaintiffs provide no reason why unconstitutional gambling is more harmful than—or indeed is even distinguishable from—

constitutional gambling. If the Constitution were amended to allow more casinos locations, would Walgate, Jr. not be tempted by the gambling authorized there? Nor can Plaintiffs' position be correct, as it requires the Court to assume that the Plaintiffs will succeed on the merits in order to establish standing. Even Plaintiffs recognize that this is contrary to law. *See id.* at 18 (standing "does not require a determination of whether appellants have the legal rights claimed, since that is an issue to be determined on the merits" (citation omitted)). It is well established that "[s]tanding in no way depends on the merits of the plaintiffs' contention that particular conduct is illegal." *Warth*, 422 U.S. at 500. Distinguishing legal and illegal gambling might matter in some suits, but not this one. Distinguishing the two shows better than pages of analysis can that Plaintiffs' suit is ideological, not personally consequential.

2. Plaintiffs' authorities regarding injury-in-fact are off base.

Plaintiffs next cite (at 23-24) three out-of-state decisions and an Ohio common pleas case to prop up their claim that they have standing. None helps their case.

Patchak, for example, does little to aid the analysis here. *See Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011), *aff'd sub. nom. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012). The claimed injury there was concrete and the chosen remedy would have avoided all harm. The plaintiff alleged that he lived near a rural, sparsely populated tract of land that was to be developed for a casino expected to attract 3.1 million visitors per year and that the increase in visitors would destroy the peace and tranquility of the area and would increase both pollution and crime. *Id.* at 703. The D.C. Circuit found that the impact of the casino development on Patchak's way of life was a sufficient injury-in-fact. *Id.* at 704. It also found that the complained-of action (a land transfer from the Secretary to a tribe) was the cause of Patchak's injury, and that the injunction Patchak sought—which would prevent

the casino from being developed in the first place—would redress the harms he alleged. *Id.* *Patchak* is not a useful guide to the analysis here.

Amador likewise does not help Plaintiffs. Again, the injury and the remedy in that case were nothing like this case. In *Amador*, the plaintiff was a county, within which an Indian tribe planned to develop a casino with the Secretary of the Interior's approval. *Amador Cnty v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011). The county sought an order requiring the Secretary to reject the planned casino, claiming that the casino would increase the county's infrastructure costs and change the character of its community. *Id.* at 378. The Secretary did not challenge the county's claimed injury, which the D.C. Circuit found was a sufficient injury-in-fact. *Id.* The D.C. Circuit also found that the injunction requested by the county, which would prevent the development of the casino in toto, would redress the harms the county had alleged. Thus, the court found that Amador County had standing. *Id.* Here, the Plaintiffs' numerous alleged harms are many steps removed from the direct injury the county faced. Furthermore, while the relief in *Amador* would have fully redressed the plaintiff's harms by eliminating gambling entirely, here Plaintiffs' requests for relief would not. *Amador* may have been about gambling, but the useful similarity ends there.

Turning from federal court to a New York state court does not aid Plaintiffs' quest for helpful authorities because New York standing law does not resemble Ohio's. Plaintiffs cite a New York intermediate-appellate case, *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 275 A.D.2d 145 (N.Y. App. Div. 2000), as an example where a court has found that non-profit corporations and associations had demonstrated sufficient harm from the expansion of casino gambling for standing purposes. Unlike Ohio, New York allows broad taxpayer standing to challenge expenditures of state funds without requiring traditional standing elements such as

injury-in-fact. See N.Y. State Fin. § 123-b. The court in *Saratoga County* relied on that law in concluding that the taxpayer-plaintiffs had standing. See 275 A.D.2d at 154. While the court also found that the non-profits had standing on account of the claimed harms from casino gaming, that observation was dicta in light of the court’s prior finding that the citizen-taxpayers had standing, because standing as to one is standing as to all. See, e.g., *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Cnty. of Rensselaer v. Regan*, 80 N.Y.2d 988, 991 n. (1992). Indeed, in a later appeal in the same case, New York’s highest court found that it was unnecessary to decide whether the non-profits had standing because the citizen-taxpayers had standing under State Finance Law § 123-b. See *Saratoga Cnty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 813 (2003) (“[b]ecause . . . the citizen-taxpayers have standing, it is not necessary to address the State’s challenge as to the other plaintiffs.” (citing *Regan*)). And as one New York jurist summarized, New York courts consistently take a “liberal view towards standing.” *Silver v. Pataki*, 274 A.D.2d 57, 68 (N.Y. App. Div. 2000) (Williams, J., dissenting), *aff’d as modified*, 96 N.Y.2d 532 (2001).

Plaintiffs also cannot rely on the Ohio common pleas decision in *State ex rel. Ohio Roundtable v. Taft*, 119 Ohio Misc. 2d 49, 2002-Ohio-3669 ¶ 47 (Franklin Cnty. C.P.) because it does no more than conclude without analysis that additional gambling was a concrete harm to a recovering addict. The court did not consider causation or redressability. Addressing only injury, the court observed that a recovering addicted gambler and his mother had previously been harmed by the son’s gambling addiction. *Id.* Skipping the causation and redressability elements, the court then declared that the gambler and his mother had standing. *Id.* ¶ 49. That conclusion about injury is wrong for the reasons we detail above. The decision is also wrong because it excuses the failure to show causation and redressability.

Shifting from substance to procedure, Plaintiffs look to *Massachusetts v. EPA*, 549 U.S. 497 (2007) to highlight the affidavits they submitted. Again, the comparison falls flat. Plaintiffs contend (at 27) that the affidavits in that case, like the affidavits here, were uncontested, and thus were taken by the United States Supreme Court as conclusively establishing the facts asserted for purposes of standing. Thus, Plaintiffs claim, if the affidavits of Lorenz and Zanotti are taken as true, Plaintiffs have met their burden to establish standing. Plaintiffs are mistaken.

For starters, both of Plaintiffs' affidavits concern only the injury-in-fact prong of the standing analysis; they say nothing of causation or redressability. Thus, even if the affidavits were taken as true, Plaintiffs would still want for causation and redressability, as discussed above.

Both affidavits also use conclusions, not facts, in aid of the Plaintiffs' standing. That is a fatal flaw because, while uncontested factual statements are presumed true at the motion to dismiss phase, bare conclusions are not. *See State ex rel. Hickman v. Capots*, 45 Ohio St. 3d 324, 324 (1989) ("Unsupported conclusions of a complaint are not considered admitted, and are not sufficient to withstand a motion to dismiss." (citations omitted)); *Mitchell v. Lawson Milk Co.*, 40 Ohio St. 3d 190, 192-93 (1988); *Barnesville Educ. Ass'n v. Barnesville Exempted Vill. Sch. Dist. Bd. of Educ.*, No. 06 BE 32, 2007-Ohio-1109 ¶ 13 (7th Dist.) ("[E]ven if couched as factual allegations, legal conclusions are not taken as true."); *Thomas v. Jackson Hewitt, Inc.*, 192 Ohio App. 3d 732, 2011-Ohio-618 ¶ 22 (affirming dismissal for lack of standing where "sole allegation" of injury was "conclusory assertion" that plaintiffs "were damaged"). This bedrock rule avoids gutting the standing doctrine because "[v]irtually every injury . . . can be made the basis for a claim . . . if [an] unsupported conclusion" is enough. *Mitchell*, 40 Ohio St. 3d at 193.

The shortcomings of Plaintiffs' affidavits are placed in even sharper relief when compared to those in *Massachusetts v. EPA*. The affidavits there traded in specifics; the affidavits here state ultimate conclusions. *See Massachusetts*, 549 U.S. at 522, 526 (noting that the uncontested affidavits demonstrated that “sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming” and that the rising sea levels “harmed and will continue to harm Massachusetts” by subsuming its shorelines).

A final point about *Massachusetts v. EPA*: The court there recognized that traditional standing requirements may be loosened when the plaintiff is a State, because “States are not normal litigants” and are “entitled to special solicitude in our standing analysis” not available to private litigants. *Id.* at 518, 520. *See also id.* at 536 (Roberts, C.J., dissenting) (accusing the majority of “chang[ing] the rules” of standing for states). That loosening does not apply here.

3. Plaintiffs cite no appellate case supporting their theory that parents of schoolchildren have standing in this context.

Plaintiffs next turn (at 32-33) to the notion that parents of schoolchildren have standing to challenge *statewide* legislation that *might* affect the total dollars flowing to their school district. Plaintiffs cite four cases in support of this proposition, but none helps their cause.

Plaintiffs cite *Board of Education v. Walter*, 58 Ohio St. 2d 368 (1979) and *DeRolph v. Ohio*, 78 Ohio St. 3d 193 (1992), two cases that both lack a rigorous discussion of standing. The defendants in *Walter* did “not challenge[] the standing of the students.” 58 Ohio St. 3d at 388. Nor was standing an issue in the *DeRolph* opinion. Instead, each case focused on the political question doctrine. Indeed, the portions of *Walter* that Plaintiffs quote concerned the defendants' claim there that the case was not justiciable under the political question doctrine. *See Walter*, 58 Ohio St. 2d at 383-85 (“defendants . . . contend[] that the issue is a ‘political question.’”). As in *Walter*, the primary justiciability challenge in *DeRolph* was a claim that the issue of school

funding was a nonjusticiable political question. *See* 78 Ohio St. 3d at 198 (“We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question.”).

Further distancing those cases from this one, both *Walter* and *DeRolph* were decided before this Court’s decision in *ProgressOhio.org*, which ended any doubt that standing is not waivable. *See State ex rel. Jones v. Suster*, 84 Ohio St. 3d 70, 77 (1998) (“[I]ack of standing” does not challenge “the subject matter jurisdiction of the court” and therefore can be waived) (pl. op.). The Court did not have a definitive duty to sua sponte assess the plaintiffs’ standing in *Walter* or *DeRolph*. *See State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Bur. of Workers’ Comp.*, 108 Ohio St. 3d 432, 2006-Ohio-1327 ¶ 46 (2006) (“when questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us”) (quotation marks omitted); *see also Winn*, 131 S. Ct. at 1448 (“When a potential jurisdictional defect is neither noted nor discussed . . . the decision does not stand for the proposition that no defect existed.”); *United States v. Stoerr*, 695 F.3d 271, 277 n.5 (3d Cir. 2012) (“drive-by jurisdictional ruling[s] . . . do[] not create binding precedent”).

Plaintiffs’ citation to *Brown v. Columbus City Schools Board of Education*, No. 08AP-1067, 2009-Ohio-3230 (10th Dist.) fares no better. In *Brown*, the Tenth District affirmed the trial court’s decision that the plaintiffs lacked standing. In dicta, the court added that “Appellants alleged only that they were taxpayers in Columbus. Appellants do not allege they are students in the Columbus City Schools system or are parents of students in the school system.” *Id.* ¶ 13. Plaintiffs assert (at 33-34) that this statement proves their standing here. But in a later case, the Tenth District itself rejected that interpretation of *Brown*: “The Individual Plaintiffs argue that the *Brown* decision stands for the proposition that taxpayers in a public

school district have standing to sue ODE if they allege that they are parents of public school students in the District. While we agree that a taxpayer who has a child attending school in the District may have a greater interest in public school funding issues than the general public, *this fact alone does not tip the scales in favor of the Individual Plaintiffs.*” *Toledo City Sch. Dist. Bd. of Educ.*, 2014-Ohio-3741 ¶ 57 (emphasis added). As noted above, plaintiffs must show more to establish that they have standing to sue by “alleg[ing] and prov[ing] damages to themselves different in character from that sustained by the public generally.” *Masterson*, 162 Ohio St. at 368.

Finally, Plaintiffs again look to *State ex rel. Ohio Roundtable* in support of the proposition that the parents here have standing. There, the court found, without any analysis, that one plaintiff had standing to sue based on the allegations that his child attended public school and was “being deprived of the benefit guaranteed by the Ohio Constitution that all proceeds from lotteries in Ohio shall be used to support public education.” 2002-Ohio-3669 ¶ 46. The common pleas court did not discuss how the parent’s purported injury was “different from that sustained by the public generally” as required by *Masterson*—an error that was not corrected on appeal because the issue of standing was not raised before the Tenth District, *State ex rel. Ohio Roundtable v. Taft*, 2003-Ohio-3340 (10th Dist.), and therefore was likely waived under this Court’s then-existing caselaw, *Jones*, 84 Ohio St. 3d at 77 (pl. op.).

4. Plaintiffs cite no cases showing how they qualify for “special fund” taxpayer standing

Last, Plaintiffs turn to special-fund standing and offer extensive quotations from two of this Court’s decisions. See *Racing Guild of Ohio, Local 304, Serv. Emps. Int’l Union, AFL-CIO, CLC v. Ohio State Racing Comm’n*, 28 Ohio St. 3d 317 (1986); *Dann*, 2006-Ohio-3677. Neither establishes that Plaintiffs have “special fund” taxpayer standing here.

In *Racing Guild*, the Court found that pari-mutuel clerks who paid license fees into the Ohio State Racing Commission's operating account had "special fund" standing to challenge the Commission's allegedly illegal actions which, if wrongful, would have "inevitabl[y]" resulted in higher administrative costs or lesser services rendered to the clerks, or both. 28 Ohio St. 3d at 322. There, the harm alleged was that the Commission's actions reduced the funds in the Commission's operating account, resulting either in the need for an increase in the license fees paid by the clerks, or more frequent payments. In either case, the Court found that the clerks' property rights were "placed in jeopardy" by the Commission's actions. *Id.*

In contrast, Plaintiffs here did not allege harm to the Funds. Unlike the funds in *Racing Guild*, here any shortfall in the Funds would not require additional inflows from taxpayers because R.C. 5751.21(G) and 5751.22(D) require that shortfalls be made up by transfers from the General Revenue Fund, not from increased CAT taxes. Further, even if such harm had been alleged, it would be felt by the public and not merely by those paying into the Funds.

Dann is even less relevant. In *Dann*, the Court addressed whether weekly reports relating to the Bureau of Workers' Compensation were protected by the qualified executive privilege; standing was not at issue. 2006-Ohio-3677 ¶¶ 1, 41. *Dann* contended that he needed reports withheld by the governor because he intended to file suit concerning wrongdoing in (1) the Bureau of Workers' Compensation's investment practices and losses, and (2) the illegal use of public funds stemming from a "climate of corruption" in other state agencies. *See, e.g., id.* ¶ 7. In analyzing whether *Dann's* proffer was a sufficient showing of "particularized, rather than generalized, need" under Ohio's privilege laws, the Court commented that *Dann's* plan to sue for the illegal use of public funds based on general taxpayer standing was insufficient to show a particularized need, in part because *Dann* would lack standing to bring such a suit. *Id.* ¶ 9-10. It

then noted that “arguably” Dann would have “special fund” taxpayer standing for his claim concerning the Bureau of Workers’ Compensation, “because he had paid into that fund as an employer” and thus might be able to sue for misappropriation or administration of its funds. *Id.* ¶ 10. The Court held that this potential “special interest in the Workers’ Compensation Fund . . . differentiate[d] Dann’s need to access gubernatorial communications concerning that fund from his generalized need to review communications regarding other Ohio executive departments.” *Id.* That is, *Dann* held that the “particularized need” standard for claims of executive privilege cannot be met if the party seeking the executive documents for a potential suit would certainly lack standing to bring that suit, but the standard is met if the petitioner *might* have standing to do so. *Id.* at ¶¶ 9-10. But the Court did not decide that Dann in fact had standing to sue, because that issue was not before it and thus would constitute an advisory opinion.

Unlike this case, the petitioner’s standing was not at issue in *Dann*. Nor can the Court’s decision in *Dann* be read, as Plaintiffs here would suggest, as a blanket grant of standing to any who pay into a special fund. At best, *Dann* suggests that an “arguably” viable claim of “special need” standing will be sufficient for purposes of overcoming an executive privilege; it says nothing about whether that petitioner’s claim of “special need” standing will be sufficient to survive a Rule 12(B) motion to dismiss.

State Defendant-Appellees’ Proposition of Law No. 2:

Dismissal for lack of standing is proper, without a further opportunity to amend a complaint, when plaintiffs never sought to amend and offered no facts, by affidavits or otherwise, showing a redressable injury-in-fact.

Plaintiffs supplement their merits argument with a claim that the trial court should have, sua sponte, allowed them to further amend their pleadings before dismissing their case for lack of standing. *See* Pls.’ Br. at 38. But Plaintiffs never sought leave from the trial court to do so, never proposed a Second Amended Complaint, and never otherwise spelled out the facts that

would cure their standing problem (and still have not done so, even in their briefing to this Court). And Plaintiffs *effectively* amended the Complaint a second time when they submitted affidavits in opposition to the motions to dismiss. This procedural complaint fares no better than the substantive attacks on the lower courts' judgments.

Once the State Defendants moved to dismiss, Plaintiffs were notified of the standing defects in their Complaint and should have sought leave to amend if they had more to say. *See Helfrich v. City of Pataskala*, No. 02CA38, 2003-Ohio-847 ¶ 29 (5th Dist.) (“The dismissal arose as a result of a motion to dismiss. That motion gave appellant notice and an opportunity to amend the complaint.”). Indeed, Plaintiffs *already* amended their Complaint, one month *after* the State Defendants moved to dismiss, and thus *after* Plaintiffs were put on notice of the standing defects. *See* Mot. to Dismiss of Ohio Governor John R. Kasich, *State ex rel. Walgate v. Kasich*, No. 11-CV-13126, at Part III.C (Franklin Cnty. C.P. Dec. 9, 2011) (arguing lack of standing); Am. Compl. (filed January 5, 2012). If Plaintiffs had further factual allegations to make, that was their chance to do so. Plaintiffs long ago passed up the opportunity to amend the complaint *again*.

Nor can Plaintiffs argue that they requested a second opportunity to amend before the common pleas court. At most, Plaintiffs made a passing reference to the idea of amending when they opposed Defendants' motions to dismiss. That does not suffice; a reference in an opposition brief is not a motion for leave to amend under Civ. Rule 15(A). *See White v. Roch*, No. 22239, 2005-Ohio-1127 ¶ 8 (9th Dist.) (trial court properly denied leave to amend where plaintiff failed to file Rule 15(A) motion before complaint was dismissed); *accord Moore v. Rickenbacker*, No. 00AP-1259, 2001 WL 460901 (10th Dist. May 3, 2001). The trial court had no duty to sua sponte order Plaintiffs to file a second amended complaint before granting Defendants' motions

to dismiss. *Moore*, 2001 WL 460901 at * 2; *see also AAA Am. Constr., Inc. v. Alpha Graphic*, No. 84320, 2005-Ohio-2822 ¶ 9 (8th Dist.) (“[O]rdinarily, a court has no duty under Civ. R. 15(A) to order sua sponte that a party file an amended complaint.”). Having failed to make such a motion, Plaintiffs cannot now ask this Court for relief it should have sought in the trial court.

In any event, the affidavits that Plaintiffs offered when opposing the motion to dismiss erased any abuse by the trial judge in not sua sponte ordering leave to amend. Whatever the propriety of these affidavits in a Rule 12(B)(6) opposition, the affidavits were the functional equivalent of the second amended complaint that Plaintiffs now say they should have filed. Despite multiple opportunities to show their standing, Plaintiffs have not done so. Further opportunities to make that showing would be futile.

State Defendant-Appellees’ Proposition of Law No. 3:

This Court specifically rejected a proposition about public-rights standing in light of ProgressOhio.org. Plaintiffs’ arguments about that proposition are improper, and fail anyway.

Plaintiffs conclude by explicitly arguing matters that this Court declined to review. In a section unattached to any proposition of law, Plaintiffs say that the Court can exercise its original jurisdiction to decide the mandamus counts of the Amended Complaint because these Plaintiffs would have standing under the *Sheward* “public rights” exception. But Plaintiffs admit that this issue—which was raised in Proposition of Law I—was dismissed as improvidently granted, and therefore is not a part of this appeal. *See, e.g., Pls.’ Br.* at 39 (“this Court has declined to review this issue”); 140 Ohio St. 3d 1412, 2014-Ohio-3785 (dismissing Proposition I).

This Court’s prior dismissal bars Plaintiffs from re-raising the claim. Time and again, this Court has said that the practice of accepting some issues on appeal effectively settles the issues not accepted. *See, e.g., Meyer v. United Parcel Serv., Inc.*, 122 Ohio St. 3d 104, 2009-Ohio-2463 ¶ 8 n.3 (noting that because the Court did not accept the cross-appeal, “the court of

appeals' determination [of the cross-appealed issue] . . . stands as conclusively established and is not within the scope of this appeal"); *State v. Warren*, 118 Ohio St. 3d 200, 2008-Ohio-2011 ¶ 55 ("Because we declined to review Warren's propositions of law on these issues, this argument is at least arguably beyond the scope of this appeal.") (pl. op.); *Sheaffer v. Westfield Ins. Co.*, 110 Ohio St. 3d, 2006-Ohio-4476, syl. ("Under the law-of-the-case doctrine, the denial of jurisdiction over a discretionary appeal by this court settles the issue of law appealed.").

Plaintiffs recognize this problem, as they do not request any relief in this section of their brief. *See* Pls.' Br. at 38-49. Instead, they say that this Court *would* have original jurisdiction over a number of their claims *if* they re-filed in this Court. *See, e.g., id.* at 39 ("[T]his ruling will not bring closure to appellants' citizen standing mandamus claim, because appellants *can file it in this Court pursuant to its original jurisdiction in mandamus.*" (emphasis added)). But that is not this case, and any ruling from this Court concerning Plaintiffs' argument would be advisory and therefore improper. *Dohme v. Eurand Am., Inc.*, 130 Ohio St. 3d 168, 174, 2011-Ohio-4609 ¶ 27 ("It is well settled that this court does not issue advisory opinions." (collecting cases)).

Even indulging this hypothetical, Plaintiffs are wrong that they would have standing to launch an original mandamus suit. As we detail above, Plaintiffs do not satisfy the elements of traditional standing. And even under the rare "public right" exception in *Sheward*, Plaintiffs would lack standing because the statutes at issue here are not comparable to those in *Sheward*. In *Sheward* and its progeny, this Court has explained that "[n]ot all alleged illegalities or irregularities" qualify for public right standing. 86 Ohio St. 3d at 503 (quotation marks omitted). The Court "expressed quite clearly" that it "will entertain a public action only 'in the *rare and extraordinary case*'" affecting the very fabric of society, such as when the legislature attempts to strip the judiciary of its power. *Id.* at 504 (emphasis added) (quotation marks omitted). Indeed,

in the numerous cases since *Sheward*, the Court has applied the “public right” exception only once. In *State ex rel. Ohio AFL-CIO v. Ohio Bur. of Workers’ Comp.*, 97 Ohio St. 3d 504, 2002-Ohio-6717, the Court found public right standing because the legislation challenged in that case, which required widespread mandatory drug testing, “affect[ed] virtually everyone who work[ed] in Ohio.” *Id.* ¶ 12. In all other instances, the Court has declined to apply the *Sheward* exception. See, e.g., *ProgressOhio.org*, 2014-Ohio-2382 ¶ 12 (no *Sheward* standing for plaintiffs seeking to challenge the JobsOhio Act); *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St. 3d 261, 2005-Ohio-1508 ¶ 47 (challenge to disbursement of unclaimed funds not “rare and extraordinary” case); *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am.*, 2006-Ohio-1327 at ¶ 51 (*Sheward* exception is “narrow” and does not apply if case “presents only a general and abstract question concerning the constitutionality of a legislative act”).

Plaintiffs do not dispute that this case lacks the “rare and extraordinary” qualities needed under *Sheward*—a concession that would be fatal to their hypothetical future case. Instead, they contend that *Sheward* itself is an *unconstitutional* limit on Article IV, Section 2 because it limits this Court’s original jurisdiction. See Pls.’ Br. at 40 (“The rule of *Sheward*, placing a ‘rare and extraordinary’ limit on this Court’s original jurisdiction in mandamus is constitutionally invalid”). Needless to say, that issue is not before this Court either. Nor is the argument correct.

Plaintiffs’ view (at 39-40) that Article IV prohibits all limits on original actions is not the law. See, e.g., *State ex rel. Flanagan v. Lucas*, 139 Ohio St. 3d 559, 2014-Ohio-2588 ¶ 29 (dismissing an action because plaintiff lacked standing to prosecute in quo warranto) (pl. op.); *id.* at ¶ 30 (Kennedy, J., concurring) (“No matter how enticing the merits of a case, the merits do not justify allowing a party who lacks standing to bring it.”); *State ex rel. E. Cleveland Fire Fighters’ Ass’n, Local 500, Int’l Ass’n of Fire Fighters v. Jenkins*, 96 Ohio St. 3d 68, 2002-Ohio-

3527 ¶ 10 (“for persons other than the Attorney General or a prosecuting attorney, an action in quo warranto may be brought by an individual as a private citizen only when he personally is claiming title to a public office”) (quotation marks omitted); *State ex rel. Cleveland Right to Life v. State of Ohio Controlling Bd.*, 138 Ohio St. 3d 57, 2013-Ohio-5632 ¶¶ 40, 41 (O’Donnell, J., dissenting) (arguing that political question doctrine precluded original action). As these authorities show, several justiciability doctrines are at work in original actions. Plaintiffs must show more than mere disagreement with these cases to justify discarding all that precedent. They do not even try. *See Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, syl. ¶ 1 (four-factor test for determining when a prior decision should be overruled).

Finally, even if Plaintiffs were able to overcome all of these hurdles, their hypothetical original action in this Court would nevertheless fail because their mandamus claims, at their core, are merely requests for declaratory judgments dressed up as mandamus and thus not properly the subject of this Court’s original jurisdiction. This Court has long held that, “if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed for want of jurisdiction.” *State ex rel. Grendell v. Davidson*, 86 Ohio St. 3d 629, 634 (1999). The Court will look to the Complaint “to see whether it actually seeks to prevent, rather than to compel, official action.” *State ex rel. Stamps v. Montgomery Cnty. Automatic Data Processing Bd.*, 42 Ohio St. 3d 164, 166 (1989). If a mandamus claim really seeks to prevent official action, it is properly understood as a declaratory judgment action, and will be dismissed. *See Davidson*, 86 Ohio St. 3d at 634; *Montgomery Cnty. Automatic Data Processing Bd.*, 42 Ohio St. 3d at 166. Similarly, if a declaratory judgment action would provide an adequate remedy at law, an action in mandamus should be dismissed.

See State ex rel. Linndale v. Teske, 74 Ohio St. 3d 1415 (1995) (Table) (dismissing mandamus action sua sponte because “declaratory judgment [was] an adequate remedy at law”).

The Amended Complaint includes five claims seeking writs of mandamus. Each mandamus-based claim duplicates another seeking identical relief by means of a declaratory judgment, an injunction, or both. *Compare id.* Counts 2-4, 11-13 *with id.* Counts 9-10, 14-16; *see id.* ¶ 121 (requesting declaratory judgment and injunctions with respect to the same subject matters as Plaintiffs’ mandamus claims). Plaintiffs’ own Complaint demonstrates the adequacy of alternative remedies, and any mandamus action filed under this Court’s original jurisdiction would be dismissed. *Grendell*, 86 Ohio St. 3d at 634.

CONCLUSION

For the above reasons, the Court should affirm the Tenth District’s judgment.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio

/s Eric E. Murphy
ERIC E. MURPHY* (0083284)
State Solicitor

**Counsel of Record*

MICHAEL J. HENDERSHOT (0081842)

Chief Deputy Solicitor

STEPHEN P. CARNEY (0063460)

MATTHEW R. CUSHING (0092674)

Deputy Solicitors

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

eric.murphy@ohioattorneygeneral.gov

Counsel for State Defendants-Appellees
Ohio Governor John R. Kasich, Ohio Casino
Control Commission, Ohio Lottery
Commission, and Ohio Tax Commissioner
Joseph W. Testa

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of State Defendants-Appellees was served by regular U.S. mail this 26th day of January, 2015 upon the following:

Thomas W. Connors
James W. Wherley, Jr.
Black, McCusky, Souers & Arbaugh
220 Market Avenue South, Suite 1000
Canton, Ohio 44702-2116

Counsel for 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

Christopher S. Williams
James F. Lang
Matthew M. Mendoza
Alexander B. Reich
Lindsey E. Sacher
Calfee, Halter & Griswold, LLP
The Calfee Building
1405 East Sixth Street
Cleveland, Ohio 44114-1607

Counsel for Intervening Defendants-Appellees
Rock Ohio Caesars LLC, Rock Ohio
Caesars Cleveland LLC, and Rock Ohio
Caesars Cincinnati LLC

Alan H. Abes
Jocelyn C. DeMars
Dinsmore & Shohl, LLP
255 E. 5th Street, Suite 1900
Cincinnati, Ohio 45202

Counsel for Intervening Defendant-Appellee
Thistledown Racetrack, LLC

Matthew Fornshell
Albert G. Lin
Elizabeth E. Cary
John Oberle
Ice Miller, LLP
250 West Street
Columbus, Ohio 43215

Counsel for Intervening Defendants-Appellees
Raceway Park, Inc., HLC/PDC Holdings, LLC,
Central Ohio Gaming Ventures, LLC, and
Toledo Gaming Ventures, LLC

Charles R. Saxbe
James D. Abrams
Irv Berliner
Celia M. Kilgard
Taft Stettinius & Hollister, LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213

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

/s Eric E. Murphy
Eric E. Murphy
State Solicitor

APPENDIX

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

CIVIL DIVISION

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

DECISION AND ENTRY

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

AND

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

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

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

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

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

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

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

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

I. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

A. Plaintiffs' Allegations

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

1. Video Lottery Terminals

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

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

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

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

the constitutional requirement that the entire net proceeds of lotteries be used for education. According to Plaintiffs, Article XV, Section 6 of the Constitution prevents the General Assembly from using lottery proceeds to replace general revenue funds formerly allocated to education. In conjunction with Counts III and IV, Count X seeks a writ of mandamus to compel the Lottery Commission to “ensure that the full entire net proceeds of any lottery games are used for education programs in Ohio.” (Amended Complaint, ¶175).

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

2. Casinos

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

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

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

3. Procedural Allegations

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

B. Standing to Bring Suit

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

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

C. Defendants' Motions to Dismiss

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

II. STANDARD OF REVIEW

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

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

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

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

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

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

According to the Tenth District Court of Appeals:

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

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

IV. LAW AND ANALYSIS

A. Plaintiffs Do Not Have Standing as Citizens or Taxpayers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

² Mr. Walgate's claim is familiar to this Court, as it was also analyzed in Judge Hogan's 2002 opinion of *Ohio Roundtable v. Taft*, 2002-Ohio-3669. In *Taft*, the Walgates and Ohio Roundtable attempted to prevent Ohio from joining the Mega Millions lottery game. Judge Hogan found the Walgates had standing based upon these alleged injuries. However, *Taft* is not only non binding on this Court, it has since been distinguished in *Brinkman v. Miami University*, 12th Dist. No. CA2006, 2007-Ohio-437, ¶158, as a public action standing case. Public action standing has been narrowed since *Taft* and is further analyzed below.

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

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

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

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

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

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

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

E. Plaintiff Ohio Roundtable Cannot Establish Organizational Standing

An association has standing on behalf of its members when “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Ohio Contractors Assn. v. Bicking*, 71 Ohio St.3d 318, 320, 643 N.E.2d 1088 (1994), (quoting *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383, 394 (1977)). However, the association must also establish that its members have suffered actual injury that is concrete, not abstract. *Id at 320*, (quoting *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 40, 96 S.Ct. 1917, 48 L.ed.2d 450 (1976)). The determination of this issue rests on the first element of the *Bicking* test: do Plaintiff’s members otherwise have standing to sue?

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

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

V. CONCLUSION

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

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

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

DECISION

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

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

Costs to Plaintiffs.

THIS IS A FINAL APPEALABLE ORDER.

IT IS SO ORDERED.

TIMOTHY S. HORTON, JUDGE

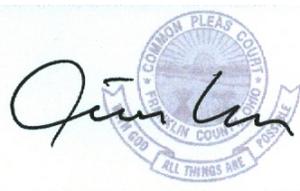
CC:

ALL PARTIES OF RECORD

Franklin County Court of Common Pleas

Date: 05-30-2012
Case Title: ROBERT L WALGATE JR -VS- OHIO STATE GOVERNOR JOHN R KASICH
Case Number: 11CV013126
Type: MOTION GRANTED

It Is So Ordered.

A blue circular seal of the Franklin County Court of Common Pleas, Ohio, is centered on the page. The seal features a sunburst in the center and the text "FRANKLIN COUNTY COURT OF COMMON PLEAS OHIO" around the perimeter. A banner at the bottom of the seal reads "ALL THINGS ARE POSSIBLE". Overlaid on the seal is a handwritten signature in black ink, which appears to be "Timothy S. Horton".

/s/ Judge Timothy S. Horton

Court Disposition

Case Number: 11CV013126

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

Case Terminated: 08 - Dismissal with/without prejudice

Final Appealable Order: Yes

Motion Tie Off Information:

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

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

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

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