

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

Case No. 2:08-cv-11858-AC-RSW
Hon. Avern Cohn

vs.

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

Defendants,

**MGM GRAND DETROIT, LLC'S
MOTION FOR JUDGMENT ON
THE PLEADINGS**

and

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

Intervening Defendant.

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MGM Grand Detroit, LLC ("MGM"), through its counsel, Dickinson Wright PLLC, moves for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). In support of its motion, MGM relies upon the facts, authority and argument set forth in its accompanying Brief in Support of Motion for Judgment on the Pleadings.

Pursuant to L.R. 7.1(a), MGM contacted Plaintiffs' counsel on August 20, 2008, and sought concurrence in the relief requested in this motion. Such concurrence was denied.

WHEREFORE, MGM respectfully requests that the Court grant judgment on the pleadings and dismiss Plaintiffs' First Amended Complaint in its entirety.

Respectfully submitted,

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I hereby certify that on August 21, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to Phillip B. Maxwell, Edward Draugelis, and Donald S. McGehee.

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STATEMENT OF QUESTIONS PRESENTED

In 2004, Michigan voters passed Proposal 1, which amended the Michigan Constitution in relevant part to require voter approval of any laws allowing for the expansion of gaming in the state. However, Proposal 1 contains an exemption for gaming in Indian casinos and in the three existing Detroit casinos. Plaintiffs represent Michigan horse racing establishments and seek to challenge Proposal 1 on various constitutional grounds.

I. Have Plaintiffs failed to state a plausible claim that Proposal 1 violates their First Amendment right to petition the government for redress of grievances, where Proposal 1 simply requires that voters approve any proposed expansion of gambling in the state?

II. Have Plaintiffs failed to state a plausible claim that Proposal 1 violates the Commerce Clause, where Proposal 1 does not discriminate against out-of-state gaming interests in favor of in-state gaming interests and does not otherwise unduly burden interstate commerce?

III. Have Plaintiffs failed to state a plausible claim that Proposal 1 violates the Equal Protection Clause, where Plaintiffs are not similarly situated either to Indian tribes or to the existing Detroit casinos, and where Proposal 1's exemption for gaming in those entities is rationally related to the state's legitimate interests in strictly regulating the proliferation of gaming in the state and in supporting the economic development of both Indian tribes and the City of Detroit?

IV. Have Plaintiffs failed to state a plausible claim that Proposal 1 violates their Due Process rights, where Proposal 1 rationally distinguishes Indian tribes and the existing Detroit casinos from other gaming interests, where Proposal 1 implicates no First Amendment rights such that it cannot be challenged as overbroad, and where Plaintiffs cannot show that Proposal 1 is vague as applied to them?

V. Should the Court decline to exercise supplemental jurisdiction over Plaintiffs' state law claims, where any such claims are more properly heard by a Michigan state court?

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I. INTRODUCTION AND RELEVANT FACTUAL HISTORY

Plaintiffs' First Amended Complaint ("Complaint") sets forth various constitutional challenges to Mich Const, art. 4, § 41, which was proposed to, and adopted by, Michigan voters in the 2004 general election as Proposal 1. As adopted pursuant to Proposal 1, article 4, § 41 of the Michigan Constitution provides in full as follows:

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

As relevant here, Proposal 1 requires statewide voter approval in order for gambling to be expanded in Michigan, but exempts gaming in the three existing Detroit casinos.¹ Proposal 1 also exempts Indian tribal gaming, which is authorized under federal law and subject to federal regulation under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701 *et seq.*²

¹ The exception for gaming in the three Detroit casinos enables the Michigan legislature to amend the Michigan Gaming Control and Revenue Act to expand the types of games permitted in the three Detroit casinos. Under article 2, § 9 of the Michigan Constitution, such an amendment requires an affirmative vote of three-quarters of the members of each house of the legislature. The addition of more casinos or other gambling venues in Detroit or expanding the types of gaming offered at those other venues would be subject to a public vote.

² As a practical matter, the exception for tribal gaming has no effect because Indian gaming is authorized by the IGRA and states such as Michigan which authorize other forms of gaming may not prohibit or restrict Indian gaming. *See generally Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996) (holding that the IGRA completely preempts state laws regulating gambling on Indian lands). Indeed, the preemptive effect of the IGRA is noted in Michigan's Gaming Control and Revenue Act. *See* M.C.L. § 432.205 ("If a federal court or agency rules or federal legislation is enacted that allows a state to regulate gambling on Native American land or land held in trust by the United States for a federally recognized Indian tribe, the legislature shall enact legislation creating a new act consistent with this act to regulate

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Plaintiffs, who represent horse racing interests wishing to expand the type of gambling offered at Michigan horse racing tracks, seek to have Proposal 1 declared invalid and to enjoin its enforcement.

In their First Amended Complaint, Plaintiffs allege that Proposal 1 violates the United States Constitution because it (1) treats similarly situated entities differently in that it only requires horse racing tracks – but not the existing Detroit casinos – to seek voter approval for any expansion of existing gambling; and (2) protects the existing casinos' interests from economic competition. Plaintiffs assert that the provision violates (a) their First Amendment right to petition the government for redress of grievances, (b) the Commerce Clause, and (c) their Equal Protection and Due Process rights (Plaintiffs' Due Process challenge is primarily a claim that Proposal 1 is vague and overbroad). Each of these constitutional claims is being brought pursuant to 42 U.S.C. § 1983.³

Plaintiffs' First Amended Complaint should be dismissed because Plaintiffs have failed to state any plausible claim that Proposal 1 violates the United States Constitution. Plaintiffs' First Amendment claim fails because in no sense does Proposal 1 infringe upon Plaintiffs' ability to seek legislation permitting them to expand the types of gaming activities they offer. Proposal 1 merely requires that any such legislation be approved by a majority of statewide voters and a majority of voters in the affected city or town. Courts have consistently upheld similar limitations in the face of First Amendment challenges.

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casinos that are operated on Native American land or land held in trust by the United States for a federally recognized Indian tribe.")

³ It is well established that "[a] prima facie case under § 1983 has two elements: "(1) the defendant must be acting under the color of state law, and (2) the offending conduct must deprive the plaintiff of rights secured by federal law." *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). Although Plaintiffs also alleged numerous state law claims, their federal constitutional claims brought under § 1983 serve as the sole basis for federal jurisdiction.

Plaintiffs have also failed to alleged a cognizable claim that Proposal 1 violates the Commerce Clause because it neither discriminates against out-of-state gaming interests in favor of in-state gaming interests, nor does it unduly burden interstate commerce.

Plaintiffs' Equal Protection claim must likewise be dismissed. In addition to the fact that Plaintiffs are not similarly situated either to Indian tribes or to the existing Detroit casinos, Proposal 1's exemption for gaming in those entities is rationally related to the state's legitimate interests in strictly regulating the proliferation of gambling in the state and in supporting the economic development of both Indian tribes and the City of Detroit.

This same rationale is also fatal to Plaintiffs' Due Process claim to the extent it alleges that Proposal 1 is not evenhandedly applied to all gaming establishments. Nor can Plaintiffs maintain a plausible claim that Proposal 1 is either vague or overbroad. Since Proposal 1 does not implicate any First Amendment rights, the overbreadth doctrine is inapplicable, and Plaintiffs are limited to claiming that Proposal 1 is vague as applied to them. They cannot conceivably maintain such a claim because Proposal 1 is clear and unambiguous in requiring statewide voter approval in order for Plaintiffs to expand the types of gaming activities they offer. Consequently, the manner in which Proposal 1 may or may not apply to others is irrelevant.

Finally, the Court should decline to exercise supplemental jurisdiction over Plaintiffs' state law claims since any such claims are more properly heard by a Michigan state court.

For these reasons, and as further discussed below, the Court should grant judgment on the pleadings under Fed. R. Civ. P. 12(c) in favor of MGM and the state Defendants and dismiss Plaintiffs' First Amended Complaint in its entirety.

II. ARGUMENT

A. **Applicable Standards for Reviewing a Motion for Judgment On the Pleadings**

MGM seeks judgment on the pleadings under Fed. R. Civ. P. 12(c). The Sixth Circuit recently summarized the standards for reviewing a Rule 12(c) motion in the wake of the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S.Ct. 1955 (2007), which raised the bar in terms of what it takes for a complaint to survive either a motion to dismiss or for judgment on the pleadings. Although *Twombly* involved a motion brought under Rule 12(b)(6), motions for judgment on the pleadings under Rule 12(c) are reviewed "using the same standard as applies to a review of a motion to dismiss under Rule 12(b)(6)." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007).

As the Sixth Circuit recently explained in *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291 (6th Cir. 2008), although the factual allegations in a complaint are to be taken as true, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do Factual allegations must be enough to raise a right to relief above the speculative level. . . ." *Id.* at 295 (citing *Twombly*, 127 S.Ct. at 1964-1965) (internal quotation marks omitted). Thus, under *Twombly*, "a complaint containing a statement of facts that merely creates a suspicion of a legally cognizable right of action is insufficient." *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516, 519 (6th Cir. 2008). Instead, the factual allegations in a complaint must "state a claim to relief that is plausible on its face." *Id.* (citing *Twombly*, 127 S.Ct. at 1965, 1974).⁴ Put another

⁴ As the Sixth Circuit observed in *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007), the *Twombly* Court specifically "disavowed the oft-quoted Rule 12(b)(6) standard of *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)"

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way, "[t]o state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory." *League of United Latin American Citizens v. Bredesen*, 500 F.3d 523, 528 (6th Cir. 2007).

In assessing Plaintiffs' constitutional challenges to Proposal 1, it is also important to keep in mind "the venerable rule of statutory construction that a statute is presumed to be constitutional unless shown otherwise," and that "the same deference applies to the work of a state's citizenry acting through a ballot initiative." *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 636 (10th Cir. 1998).

B. Plaintiffs Have Failed to State a Plausible Claim That Proposal 1 Violates Plaintiffs' Right Under the First Amendment to Petition the Government for Redress of Grievances

In their First Amended Complaint, Plaintiffs assert that by requiring a statewide referendum before any additional gambling will be permitted in the state, Proposal 1 erects a "barrier to legislative access" and, therefore, "violates the First Amendment's right to petition the government for redress of grievances." (See First Amended Complaint at ¶¶ 19-20). Contrary to Plaintiffs' allegations, and as further discussed below, *Proposal 1 does not infringe on Plaintiffs' access to the government to redress their grievances. Rather, it merely provides for a different method than Plaintiffs desire.* Because Plaintiffs have failed to state a valid claim for relief under the First Amendment, that claim must be dismissed as a matter of law.

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(recognizing 'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief')."

1. Courts Have Consistently Rejected First Amendment Challenges Directed at State Constitutional Provisions, Statutes, and Ordinances That Establish Particular Methods for Passing Laws

Generally, the First Amendment does not apply to actions of the States, but instead applies only to actions of the federal government, as it provides that "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." But, the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall ... deprive any person of life, liberty, or property without due process of law," and has been construed to incorporate portions of the First Amendment, including the First Amendment's freedoms of speech, press, and to petition for redress of grievances as against the States. *Gitlow v. New York*, 268 U.S. 652 (1925); *Near v. Minnesota*, 283 U.S. 697 (1931); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967) (holding that the First Amendment freedoms against federal encroachment are entitled, under the Fourteenth Amendment, to the same protection against the States).

While the First Amendment's right to "petition the Government for redress of grievances," is considered to be "among the most precious of the liberties safeguarded by the Bill of Rights," *Union Mine Workers*, 389 U.S. at 222, courts have routinely upheld state constitutional provisions, statutes, and ordinances setting forth general procedures for, and limitations on, the enactment of legislation, finding that they do not violate any aspect of the First Amendment. For instance, in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 264 (6th Cir. 1995), *vacated and remanded for further consideration on other grounds*, 518 U.S. 1001 (1996), *cert denied after remand*, 525 U.S. 943 (1998), the Sixth Circuit rejected a challenge to a city ordinance that prevented the City of Cincinnati and its

various Boards and Commissions from enacting or enforcing "any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment."

While the district court concluded that the provision "infringed the plaintiffs' purported 'fundamental right to equal access to the political process,' as well as First Amendment rights of free speech and association and the right to petition the government for redress of grievances," *id.* at 265, the Sixth Circuit reversed, holding that the provision did no such thing:

The instant Amendment deprived no one of the right to vote, nor did it reduce the relative weight of any person's vote. Pursuant to the Amendment, homosexuals remained empowered to vote for City Council members and to lobby those Council members concerning issues of interest. The only effect of the Amendment upon Cincinnati citizens was to render futile the lobbying of Council for preferential enactments for homosexuals *qua* homosexuals because the electorate placed the enactment of such legislation beyond the scope of Council's authority. The Amendment does not impair homosexuals and other interested parties from seeking to repeal the Amendment on another day through the same political process by which Issue 3 became law—the charter amendment procedure. ... As the *realization* of their political agenda is not constitutionally guaranteed, the narrow restriction created by the Amendment upon the political avenues available to the unidentifiable and non-protected class of homosexuals and their allies respecting a narrow spectrum of substantive issues clearly does not rise to constitutional dimensions. Those who opposed Issue 3 simply lost one battle of an ongoing political dispute.

Id. at 269 (internal citations omitted). For these reasons, the court held that "the plaintiffs' right to petition the government for redress of grievances has not been violated." *Id.* at 270.

The Tenth Circuit utilized a similar analysis to reject speech-based claims in *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1085-86 (10th Cir. 2006), in which wildlife and animal advocacy groups brought a First Amendment challenge to a state constitutional provision that required a supermajority for passing wildlife-related initiatives. The plaintiffs claimed that the provision unconstitutionally burdened political speech. The district court

dismissed the plaintiffs' First Amendment claims despite acknowledging that "[t]he rule makes it more difficult to pass a wildlife initiative." *Id.* at 1087 (internal quotations omitted). The Tenth Circuit affirmed, finding that the state law, which merely set forth the manner in which a wildlife initiative could get passed, did not violate the First Amendment:

Under the Plaintiffs' theory, every structural feature of government that makes some political outcomes less likely than others ... violates the First Amendment. Constitutions and rules of procedure routinely make legislation, and thus advocacy, on certain subjects more difficult by requiring a supermajority vote to enact bills on certain subjects. ... [I]f it violates the First Amendment to remove certain issues from the vicissitudes of ordinary democratic policies, constitutions themselves are unconstitutional. ... *The First Amendment ensures that all points of view may be heard; it does not ensure that all points of view are equally likely to prevail.*

Id. at 1100-01 (emphasis added).

Although not decided in the context of the First Amendment's right to petition the government for redress of grievances, the Supreme Court's decision in *James v. Valtierra*, 402 U.S. 137, 139 (1971), is also instructive. In *James*, the Court rejected a challenge brought by citizens of California against a state constitutional provision requiring that any low-rent housing project be approved by a majority of qualified electors in the area where the low-rent housing project was to be constructed. In holding that the provision did not violate Equal Protection principles, the Court observed that a state is free to require referendums on certain subjects:

Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice. ... [Appellees] suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people.

Id. at 141-42. *See also* *Risser v. Thompson*, 930 F.2d 549, 553 (7th Cir. 1991) (rejecting claim that Wisconsin's constitutional line-item veto provision reduces the effectiveness of citizens' speech through their legislators).

2. Because Proposal 1 Does Nothing More Than Require a Statewide Vote for Any Future Expansion of Gaming Activity, It Does Not Implicate Plaintiffs' First Amendment Rights

Applying these principles here, Plaintiffs have failed to state a cognizable claim for violation of their First Amendment right to petition the government for redress of grievances. As the authorities discussed above make clear, there is no authority to support the proposition that a citizen's First Amendment right to petition the government for redress is infringed by a state constitutional provision that does no more than establish a particular law-making procedure that limits the power of the state's legislators by instead requiring a statewide referendum. Plaintiffs have not lost their right to petition the government for redress. Although Plaintiffs do not like the *manner* in which they are required to undertake that process, the fact that it may be more difficult to expand gaming than before Proposal 1 was enacted does not violate Plaintiffs' First Amendment rights. As in *Equality Foundation*, Plaintiffs are free to seek the repeal of Proposal 1 in the same manner it was originally enacted, or to pursue an expansion of their existing gaming activities in accordance with Proposal 1's requirements. Either way, the narrow restriction created by Proposal 1 upon the political avenues available to race track owners and other interested parties seeking to expand gambling in Michigan simply does not rise to constitutional dimensions. Consequently, Plaintiffs' claim that Proposal 1 violates the First Amendment fails as a matter of law and must be dismissed.

C. Plaintiffs Have Failed to State a Plausible Claim for Relief Under the Commerce Clause

Plaintiffs have similarly failed to state a valid claim that Proposal 1 violates the Commerce Clause, U.S. Const. art. I, § 8. This is because Plaintiffs have not alleged, nor could they allege, a plausible claim that Proposal 1 either discriminates against out-of-state gaming interests or unduly burdens interstate commerce.

1. Under the Supreme Court's "Dormant" Commerce Clause Jurisprudence, States May Not Discriminate Against Out-of-State Entities or Unduly Burden Interstate Commerce

On its face, the Commerce Clause provides Congress with the power "to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." However, there is also a "dormant" aspect of the Commerce Clause that prohibits states from passing laws that "discriminate[] against or unduly burden[] interstate commerce." *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). As the Supreme Court recently observed in *Dep't of Revenue of Kentucky v. Davis*, ___ U.S. ___, 128 S.Ct. 1801 (2008), dormant Commerce Clause principles are "driven by concern about 'economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Id.* at 1808 (citation omitted).

Under the "resulting protocol for dormant Commerce Clause analysis," courts first ask "whether a challenged law discriminates against interstate commerce." *Id.* Such a law is considered "virtually per se invalid . . . and will survive only if it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* However, a deferential standard applies to laws that "regulate evenhandedly to effectuate a legitimate local interest," even if they have an "incidental" effect on interstate commerce. *Pike v.*

Bruce Church, Inc., 397 U.S. 137, 142 (1970). Nondiscriminatory laws "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Davis*, 128 S.Ct. at 1808 (citing *Pike*, 397 U.S. at 142).⁵

Thus, absent a showing of facially discriminatory treatment against out-of-state economic interests,⁶ the question is whether the state law impedes interstate commerce in such a manner as to give rise to a legitimate Commerce Clause concern. In answering this question, it is important to bear in mind that "[t]he States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citation and internal quotation marks omitted). As a result, courts must "look in every case to 'the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.'" *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm.*, 461 U.S. 375, 390 (1983). As the Supreme Court observed in *Tracy*, the only "genuinely nondiscriminatory" laws that the

⁵ See also *Lenscrafters, Inc. v. Robinson*, 403 F.3d 798, 802 (6th Cir. 2005) ("If the statute is found to be discriminatory, it is virtually per se invalid and the Court applies the 'strictest scrutiny.' If, on the other hand, the statute is not discriminatory, we proceed to the second step to determine whether 'the burdens on interstate commerce are 'clearly excessive in relation to the putative local benefits.'" (citations and internal quotation marks omitted); *Nat'l Solid Wastes Management Ass'n v. Granholm*, 344 F. Supp. 2d 559, 566 (E.D. Mich. 1994) (same).

⁶ See, e.g., *Granholm v. Heald*, 544 U.S. 460 (2005) (striking down a Michigan statute found to provide a competitive advantage to in-state wineries over out-of-state wineries); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (striking down an Oklahoma statute requiring "Oklahoma coal-fired electric generating plants producing power for sale in Oklahoma to burn a mixture of coal containing at least 10% Oklahoma-mined coal").

Court had found to have violated the dormant Commerce Clause were those that "undermined a compelling need for national uniformity in regulation." *See Tracy*, 519 U.S. at 298, n. 12.⁷

2. Plaintiffs Have Failed to State a Cognizable Claim That Proposal 1 Either Facially Discriminates Against Out-of-State Entities Seeking to Conduct Casino Gaming in Michigan, or That It Unduly Burdens Interstate Commerce

In their First Amended Complaint, Plaintiffs allege the following Commerce Clause violation:

Art. IV, Section 41 . . . violates the Commerce Clause of the U.S. Constitution, Article I, Section 8, Clause 3, because the disparate treatment of the racetrack interests effected by Art. IV, Section 41, protects the interests of a discrete group, i.e. the casino interests from economic competition, by making it easier for those interests to facilitate changes in the laws that govern their operations.

(First Amended Complaint, ¶ 22). Applying the established dormant Commerce Clause principles discussed above, Plaintiffs have utterly failed to state a plausible claim that Proposal 1 either facially discriminates against out-of-state entities, or that it "unduly burdens" interstate commerce. Indeed, Plaintiffs' First Amended Complaint is bereft of any factual allegations that would even remotely support such claims.

While Plaintiffs point to the exception provided by Proposal 1 for tribal gaming and gaming in existing Detroit casinos, such a claim fails to state a valid cause of action under the dormant Commerce Clause because the exception provided in Proposal 1 treats in-state and out-of-state gaming entities *exactly the same* in that all such entities (with the sole exception of Indian tribes and the existing Detroit casinos) are required to obtain voter approval in order to further expand gambling within the state. In other words, Proposal 1 simply does not

⁷ As examples, *Tracy* cited *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (addressing a conflict in state laws governing truck mud flaps), and *Southern Pacific Co. v. Arizona ex rel Sullivan*, 325 U.S. 761 (1945) (striking down a state law concerning train lengths).

discriminate against *out-of-state entities*, and likewise does not place an "undue burden" on interstate commerce.

Support for this conclusion can be found in the Fourth Circuit's decision in *U.S. v. Garrett*, 122 Fed. Appx. 628 (4th Cir. 2005). At issue in *Garrett* were North Carolina statutes permitting gambling only on Indian tribal lands. The defendant in *Garrett* was indicted for violation of North Carolina's gaming laws when he sold video poker machines to various non-Native American establishments, including an Elks Lodge. *Garrett*, 122 Fed. Appx. at 629. The defendant argued, among other things, that the North Carolina statutes violated the dormant Commerce Clause because they permitted Indian casinos to conduct gaming under a tribal-state compact, while at the same time criminalizing the defendant's sale of gaming machines to the Elks Lodge. *Id.* at 633-634.

In affirming the district court's denial of the defendant's motion to dismiss his indictment, the Fourth Circuit held that the defendant's alleged discriminatory treatment did not give rise to a Commerce Clause violation because the North Carolina laws did not draw a distinction *between residents and non-residents*, and did not otherwise unduly burden interstate commerce:

The dormant commerce clause is violated when the laws of a state treat in-state entities and out-of-state entities differently. The Supreme Court has also found a violation of the dormant commerce clause when state laws were ostensibly applied equally, yet the burden on interstate commerce outweighed the benefits of such a law. For example, the Supreme Court invalidated a state law requiring a particular type of mud flap on trucks because it was too burdensome to require truckers transporting goods in interstate commerce to stop at the state line and change an accessory on their vehicles. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959).

Garrett's claims are not at all similar to the typical dormant commerce clause cases. *Cf. Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) (North Carolina ABC laws treated in-state manufacturers of wine differently than out-of-state manufacturers and thus violated the dormant commerce clause). In this case, regardless of whether a citizen or entity lives in North Carolina or in another state, that person or entity will be prosecuted for a violation of gambling laws if gambling mechanisms are provided to non-Native American establishments, but

not be prosecuted when the end users are Native American-run establishments operating on tribal lands. Thus, there is no unequal treatment vis-à-vis North Carolinians and residents of other states. Nor are the North Carolina laws unduly burdensome on interstate commerce.

Garrett, 122 Fed. Appx. at 634.

Like the challenged state laws at issue in *Garrett*, Proposal 1 does not discriminate against out-of-state gaming interests in favor of in-state gaming interests. As discussed, with the limited exception of Indian tribes and the three existing Detroit casinos, *all* entities seeking to further expand gambling within the State of Michigan – regardless whether those entities are from in-state or out-of-state – are required to obtain voter approval. Simply put, gaming interests "are not subjected to different laws because of their residence inside or outside of [Michigan]." *Garrett*, 122 Fed. Appx. at 634. In fact, any such claim here would be nonsensical given that MGM Grand Detroit, LLC, is a *Delaware* limited liability company. Thus, Plaintiffs have failed to allege (because they cannot) any facial discrimination against interstate commerce.

Plaintiffs also have failed to identify any incidental burden that Proposal 1 places on interstate commerce, let alone allege a viable basis for the Court to find that any such burden is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. To the contrary, Proposal 1 represents a valid exercise of Michigan's authority to protect the health, safety, and welfare of its citizens. It can hardly be disputed that regulation of gambling within Michigan's borders is a matter of legitimate local concern.⁸ Thus, Proposal 1 should not be subject to interference "under the guise of the commerce clause." *Davis*, 128 S.Ct. at 1810 (noting that "a government function is not susceptible to standard dormant Commerce Clause

⁸ *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 443 (8th Cir. 2007) ("Regulating gambling is a legitimate public purpose"); *Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003) (noting that "the regulation of gambling 'lies at the heart of the state's police power'" (citation omitted)).

scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors").

For these reasons, Plaintiffs have failed to state a violation of the Commerce Clause. Accordingly, Count II of their First Amended Complaint should be dismissed.

D. Plaintiffs Have Failed to State a Plausible Equal Protection Claim

Plaintiffs also contend that Proposal 1 "violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, in that similarly situated interests have been treated differently, without justification." (First Amended Complaint at ¶ 24). More specifically, Plaintiffs allege that Proposal 1 cannot, consistent with Equal Protection principles, provide an exemption from "statewide and local balloting before any form of gambling can be authorized" that is available to "the casino interests" and not horse racing tracks.

Plaintiffs' Equal Protection claim fails for two reasons. First, Plaintiffs have failed to allege (and cannot do so) that they are similarly situated to Indian tribes and the three existing Detroit casinos, and thus cannot establish the kind of disparate treatment required to sustain an Equal Protection claim. Second, and in any event, Plaintiffs have failed to allege a plausible claim that any disparity in treatment is not rationally related to a legitimate state interest.

1. Plaintiffs Fail to Meet the Threshold Requirement for an Equal Protection Claim, Which is the Disparate Treatment of Similarly Situated Entities

The Equal Protection Clause commands that no state shall "deny to any person within its jurisdiction the equal protection of laws." U.S. Const. Amend. XIV, § 1. It is "essentially a direction that all persons shall be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Thus, "[e]qual protection principles are violated when the government

treats differently people who are alike." *Olympic Arms v. Magaw*, 91 F. Supp. 2d 1061, 1070 (E.D. Mich. 2000) (citation omitted).

The threshold element for any Equal Protection claim is disparate treatment. *Oldham v. Cincinnati Public Schools*, 118 F. Supp. 2d 867, 871 (S.D. Ohio 2000). "To succeed on an equal protection claim, [a plaintiff] 'must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the treatment was the result of intentional or purposeful discrimination.'" *Veney v. T.V. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) (quoting *Morrison v. Garaghty*, 239 F.3d 648, 654 (4th Cir. 2001)). In this regard, the alleged disparate treatment must exist between two individuals, or in this case groups, that are similarly situated "in every material respect." *Ross v. Duggan*, 402 F.3d 575, 587-88 (6th Cir. 2004) (emphasis in original); see also *37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614, 622 (6th Cir. 1997) (concluding that the plaintiff, who alleged disparate treatment between vendors of alcohol, failed to explain how all alcohol sales are "similarly situated").

In the first instance, the classification made here by Proposal 1 is not between individuals or entities. The classification is between Indian gaming and gaming in up to three casinos in Detroit on the one hand and all other gaming on the other.

In addition, Plaintiffs have failed to plead disparate treatment between similarly situated groups. The only characteristic identified by Plaintiffs as shared by those subject to Proposal 1 is that each are actual or potential "gaming licensees" generally. Other than the asserted possession of a "state gaming license," Plaintiffs do not so much as attempt to allege *any* material similarities between either Indian tribes or the existing Detroit casinos and other "gaming licensees," let alone allege that they are similarly situated "in every material respect." And in point of fact, there are plain differences between the entities allegedly exempt from local and

statewide balloting under Proposal 1 (i.e., Indian tribes and the existing Detroit casinos) and other "gaming licensees" such as horse racing tracks.

As to Indian tribes, they are *sovereign nations* expressly authorized under the federal IGRA to conduct gaming activities on tribal reservations, and are subject to special oversight in conjunction with federally-approved tribal-state gaming compacts.⁹ The three Detroit casinos are similarly unique in that they have been specifically authorized to provide casino gaming since the passage of Proposition E by Michigan voters in November 1996. Unlike any other entity providing any sort of "gaming" activities, the casinos' gaming operations are subject to detailed and unique taxes, fees, and regulations in accordance with Michigan's Gaming Control and Revenue Act of 1997 (GCRA), as amended, M.C.L. § 432.201 *et seq.* As summarized on the website for the Michigan Gaming Control Board,¹⁰ the GCRA:

- Vests the Michigan Gaming Control Board (a Type I state agency within the Michigan Department of Treasury) with exclusive authority to license, regulate, and control the three authorized Detroit casinos.
- Authorizes the MGCB to promulgate necessary Administrative Rules to properly implement, administer and enforce the amended Act.
- Provides for the licensing, regulation, and control of casino gaming operations, manufacturers and distributors of gaming equipment and supplies, casino employees, and those who participate in gaming.
- Establishes licensing standards and procedures for issuance of casino licenses, casino supplier licenses, and casino employee licenses.
- Imposes civil and criminal penalties for violation of the Act.
- Authorizes and imposes certain taxes and fees on casinos and others involved in casino gaming, including a 19% wagering tax.

⁹ See <http://www.michigan.gov/mgcb/0,1607,7-120-1380-12858--,00.html> (last accessed, August 13, 2008).

¹⁰ Available at <http://www.michigan.gov/mgcb/0,1607,7-120-1380-12857--,00.html> (last accessed, August 13, 2008).

- Provides for the distribution of casino tax revenue for K-12 public education in Michigan, and for capital improvement, youth programs, and tax relief in the City of Detroit.
- Creates certain funds for the operation of the Board to license, regulate and control casino gaming; and funds for compulsive gambling prevention programs and other casino-related State programs.
- Requires certain safeguards by casino licensees to prevent compulsive and underage gambling.
- Prohibits political contributions by certain persons with interests in casino and supplier license applicants and licensees to state and local political candidates and committees.
- Establishes a Code of Ethics for members, employees and agents of the Board, license applicants, licensees, and others involved in gaming.

To say the least, Plaintiffs are hard-pressed to claim any "similarity" between the Detroit casinos and themselves (or any other so-called "gaming licensees"). Accordingly, Plaintiffs have not satisfied the threshold element of a claim for violation of Equal Protection. For that reason alone, Plaintiffs' Equal Protection claim must be dismissed.

2. Even if Plaintiffs Could Show That They Are Similarly Situated to Indian Tribes or the Existing Detroit Casinos, Proposal 1 Easily Passes Muster Under the Applicable Rational Basis Review Standard

Plaintiffs' Equal Protection claim also fails because any disparate treatment of Indian tribal casinos and the Detroit casinos is rationally related to a legitimate state interest.

a) Proposal 1 Is Subject Only to Rational Basis Review

In analyzing Equal Protection claims, courts apply differing levels of scrutiny depending on the nature of the classifications being made by the challenged regulation. "When a statute or ordinance uniquely impacts adversely a suspect class or invades a fundamental right, the rigorous strict scrutiny standard will apply, but when it does not the ordinance is tested under the rational

relationship standard." *Mount Elliot Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 406 (6th Cir. 1999) (citation omitted).

Here, Plaintiffs are not members of a "suspect class" (e.g., a class based on race or national origin). Plaintiffs also fail to identify any fundamental right that is being invaded. Although Plaintiffs have alleged a violation of their First Amendment rights to petition the government for redress of grievances, that claim, as discussed above, fails as a matter of law. Plaintiffs cannot repackage their same deficient allegations of a First Amendment violation in order to elevate the level of scrutiny with respect to their Equal Protection claim. *See Wirzburger v. Galvin*, 412 F.3d 271, 282 (1st Cir. 2005) ("Where a plaintiff's First Amendment Free Exercise claim has failed, the Supreme Court has applied only rational basis scrutiny in its subsequent review of an equal protection fundamental right to religious free exercise claim based on the same facts.") (citing *Locke v. Davey*, 540 U.S. 712, 721 n. 3 (2004)); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007). Thus, rational basis review is appropriate.

b) Proposal 1 Is Rationally Related to the State's Legitimate Interest in Regulating Gambling and in Promoting the Economic Development of Indian Tribes and the City of Detroit

"Under the rational relationship standard, 'legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate [governmental] interest.'" *Olympic Arms*, 91 F. Supp. 2d at 1071 (quoting *City of Cleburne*, 473 U.S. at 440); *see also Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) ("On rational basis review a classification in a statute comes to us bearing a strong presumption of validity.")

"In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against Equal Protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications*, 508 U.S. at 313. This is because "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will be eventually rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Id.* at 314 (citation omitted).

Given the deference afforded properly enacted legislation and the heavy burden imposed upon a plaintiff, "those attacking the rationality of the legislative classification have the burden to 'negative every conceivable basis which might support it.'" *Id.* at 315 (citation omitted). Under a rational-basis analysis, "classifications will be set aside only if *no grounds* can be conceived to justify them." *Olympic Arms*, 91 F. Supp. 2d at 1072 (citation omitted). Thus, although Plaintiffs imply that Proposal 1 was intended to target horse racing tracks in order to prevent them from competing against the Detroit casinos, any such alleged motivation, in addition to being speculative (and, quite frankly, nonsensical given that Proposal 1 was passed by a majority of Michigan voters), is entirely irrelevant for purposes of rational basis review. *Beach Communications*, 508 U.S. at 315.

Applying these principles, Plaintiffs' Equal Protection claim falls far short of meeting the burden imposed under rational-basis review. As an initial matter, it is well-settled that states have a legitimate government interest in regulating the gaming industry. *See Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003) ("[A] state has a paramount interest in the health, welfare, safety and morals of its citizens. And because the regulation of lotteries, betting, poker, and other

games of chance touch on all of the above aspects of the quality of life of state citizens the regulation of gambling lies at the heart of the state's police power. It is thus beyond question that [the state] has a legitimate government interest in the supervision of the video gaming industry.") (citations omitted); *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 399 F.3d 1276, 1278 (11th Cir. 2005) (same); *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 439 (8th Cir. 2007) ("The regulation of gambling – including its expansion and contraction – is a significant and legitimate public purpose for [the legislation at issue].") Accordingly, any legislation that rationally furthers a state's legitimate public purpose in regulating gambling must be upheld.

Here, it is entirely rational for Michigan voters to have adopted Proposal 1 as a reasonable means for limiting the further expansion of gambling in the state. Because states clearly have the power "to prohibit gambling altogether," they also are free to regulate gambling "by degree, one step at a time, addressing the phase of the problem which seems most acute to the legislative mind." *Helton*, 330 F.3d at 246. Applying such an analysis in *Helton*, the Fourth Circuit upheld against an Equal Protection challenge a North Carolina law that, in an attempt to "prevent an influx of [video gaming] machines . . . made the operation of certain machines illegal unless exempted by a grandfather clause under the statute." *Id.* at 244. The court explained:

North Carolina has a legitimate interest in restricting the number of new gaming machines in the state as a means of limiting the impact of gambling on the lives of its citizens or as a prelude to banning such a practice altogether. The establishment of two dates – one on which any such machine must have been in operation within the State and the other, earlier date upon which the machine must have been listed on the tax rolls rationally furthers that purpose.

Id. at 246.

Similarly here, the decision made by Michigan voters to make it more difficult to expand certain types of gaming activities, and to provide a limited exception for gaming in tribal and

existing Detroit casinos, was an entirely rational means of advancing the state's legitimate interest in limiting the further proliferation of gambling in the state. It is not difficult to perceive a rational basis behind Proposal 1's distinction between Indian tribes and the Detroit casinos on the one hand, and other gaming institutions, such as horse racing tracks, on the other. Indian tribes have always enjoyed a special status under federal law and are recognized as "a separate people with their own political institutions." *U.S. v. Antelope*, 430 U.S. 641, 645 (1977). Thus, it has been recognized that "gaming preferences for Indian tribes conducted on tribal land are a rational means" of furthering the legitimate government interest of promoting the tribes' economic development. *Garrett*, 122 Fed. Appx. at 633. The State of Michigan is also preempted by federal law from prohibiting or restricting the expansion of Indian gaming. *See generally Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996) (holding that the IGRA completely preempts state laws regulating gambling on Indian lands).

Likewise, the distinction between the Detroit casinos and other gaming institutions is amply rational. As discussed, Michigan voters passed Proposition E in 1996 to allow casino gaming in Michigan, but only within the city limits of Detroit and limited to not more than three casinos. It is well known, and can hardly be disputed, that this initiative was spurred largely by the belief that casino gaming in Detroit would help revitalize the city's long-depressed economy. From its outset, therefore, casino gaming in Detroit has been at the forefront of an economic revitalization movement within the city.¹¹ Thus, it is entirely reasonable to exempt the three Detroit casinos, which have had special significance in both the state and local economies since

¹¹Michigan's Gaming Control and Revenue Act requires Detroit casino developers to enter into development agreements with the City of Detroit. M.C.L. § 432.206(1)(b). Among other things, the development agreements required the casino developers to construct, in addition to their casinos, large hotel and convention complexes. It is well known in Detroit that MGM invested over \$800 million on its permanent complex which opened in October 2007.

their inception, from limitations imposed on other gaming establishments, especially in light of the extensive and unique regulations to which the casinos are subjected under Michigan's Gaming Control and Revenue Act. In addition to that obvious fact, the state has imposed a 19% wagering tax – one of the highest such taxes in the nation – on the net win of Detroit casinos, with proceeds divided between the State and the City. It would be difficult indeed to support such a high rate of taxation without protection of the Detroit casino market.

The exception for tribal gaming and gaming in the existing Detroit casinos may not be Plaintiffs' policy choice, but it is hardly irrational. Consequently, Plaintiffs have failed to state a valid Equal Protection claim.

E. Plaintiffs Have Failed to State a Plausible Due Process Claim

Plaintiffs further allege that Proposal 1 violates the Due Process Clauses of the Fifth and Fourteenth Amendments for three reasons: first, because it "target[s] particular licensees, the race tracks," instead of all licensees; second, because it is overbroad and vague; and third, because its overbreadth "impinges on Plaintiffs' First Amendment Right to Petition for redress of grievances." (Complaint, ¶¶ 26-28). None of these arguments withstands scrutiny.

1. Proposal 1 Makes a Rational Distinction Between Indian Tribes and the Detroit Casinos and Other Gaming Institutions

To the extent Plaintiffs claim that Proposal 1 violates their Due Process rights because it "did not effect an across-the-board requirement of state-wide and local balloting" on all gambling establishments, that claim fails for all of the same reasons that their Equal Protection claim fails because the analysis is precisely the same. *See, e.g., Lenscrafters*, 403 F.3d at 806-807 (using the same rational basis review standard to analyze Due Process and Equal Protection challenges

brought against a state law drawing distinctions between retail optical stores and licensed optometrists).

2. Plaintiffs Lack Standing to Raise a Vagueness Challenge

To the extent Plaintiffs seek to challenge Proposal 1 on vagueness grounds, they lack standing to maintain such a claim. It is well-established that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756 (1974). This Court employed this familiar standing principle to reject the plaintiffs' vagueness challenge in *Michigan Wolfdog Assoc., Inc. v. St. Clair County*, 122 F. Supp. 2d 794, 802-803 (E.D. Mich. 2000) (Gadola, J.). There, the plaintiffs argued, among other things, that the definition of "wolf-dog" in Michigan's Wolf-Dog Cross Act, MCL 287.1001, *et seq.*, was unconstitutionally vague. This Court held, however, that the plaintiffs could not challenge the Act on vagueness grounds because the Act clearly applied to the *plaintiffs themselves*, who admitted to owning wolfdogs or wolf-dog crosses and had clear notice that the statute applied to them. *Id.* at 799.

In the same vein, it is manifest in this case that Proposal 1 applies to prevent Plaintiffs from seeking legislation (at least without the approval of a majority of state-wide and local voters) to authorize any new "form[s] of gambling" on their premises. Although Plaintiffs contend that the phrase "forms of gambling" is ambiguous, it clearly applies to preclude the sorts of gaming activities Plaintiffs wish to offer. Indeed, the crux of Plaintiffs' First Amended Complaint is that Proposal 1 has impeded their ability to seek passage of certain bills that "would have permitted account wagering, off-track racing theatres, and video lottery terminals (VLTs) at the state's race tracks." (First Amended Complaint, ¶ 12). Proposal 1, therefore, clearly applies

to preclude the "forms of gambling" being sought by Plaintiffs. Accordingly, Plaintiffs lack standing to challenge Proposal 1 as unconstitutionally vague.

3. Proposal 1 is Not Unconstitutionally Vague

But even assuming that Plaintiffs have standing to raise a vagueness challenge, their due process claim nevertheless fails because Proposal 1 is not "vague" by any stretch.

The void-for-vagueness doctrine derives from due process principles mandating that a statute requiring or prohibiting certain conduct be "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *Nelson v. United States*, 796 F.2d 164, 167 (6th Cir. 1986) (citations and internal quotation marks omitted). Because, as discussed previously, Proposal 1 does not infringe upon Plaintiffs' First Amendment rights, they must show that Proposal 1 is "unconstitutionally vague as applied to the specific facts of the case, not whether it is unconstitutional on its face." *United States v. Midwest Fireworks Mfg. Co., Inc.*, 248 F.3d 563, 567-568 (6th Cir. 2001) (citation and internal quotation marks omitted).¹² Moreover, laws do not become "impermissibly vague simply because it may be difficult to determine whether marginal cases fall within their scope." *Id.* at 568 (citation and internal quotation marks omitted). "So long as we use words to govern human conduct, there will be gray areas in the law. But parties cannot raise these hypothetical gray areas in an 'as

¹²Even if the Court were to entertain a facial vagueness challenge to Proposal 1, it would still fail. "In a facial challenge to the . . . vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Rendon v. Transportation Security Admin.*, 424 F.3d 475, 480 (6th Cir. 2005) (citation and quotation marks omitted). "If the statute does not proscribe a 'substantial' amount of constitutionally protected conduct, a party may raise a . . . vagueness challenge only if 'the enactment is impermissibly vague in all of its applications.'" *Id.* (citation and quotation marks omitted). Because gambling "implicates no constitutionally protected right," *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993), in order to succeed on a facial vagueness challenge Plaintiffs would have to show that Proposal 1 is "impermissibly vague in all of its applications." As discussed, Plaintiffs cannot make such a showing here because Proposal 1 indisputably applies to them.

applied' challenge." *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). Finally, economic legislation is "subject to a less strict vagueness test" than a penal statute. *Midwest Fireworks*, 248 F.3d at 568 (citation and internal quotation marks omitted)

Applying these principles, Proposal 1 is not unconstitutionally vague. Rather, Proposal 1 states, in no uncertain terms and as clearly applied to Plaintiffs, that it prohibits any law enacted after January 1, 2004, "that authorizes any form of gambling," unless it is approved by a majority of electors in a statewide general election *and* a majority of electors in the relevant township or city. Despite Plaintiffs' contention, these provisions can be easily understood by a person of common intelligence, and they clearly preclude the very gaming activities that Plaintiffs seek to provide on their premises. Thus, Plaintiffs' vagueness challenge fails.

4. The Overbreadth Doctrine Has No Application

Finally, Plaintiffs are mistaken in their effort to challenge Proposal 1 on the ground that it is overbroad.

The overbreadth doctrine is "an exception to traditional rules of standing and is applicable only in First Amendment cases in order to ensure that an overbroad statute does not act to 'chill' the exercise of rights guaranteed protection." *United States v. Blaszak*, 349 F.3d 881, 888 (6th Cir. 2003) (quoting *Leonardson v. City of East Lansing*, 896 F.2d 190 (6th Cir. 1990)). "In order for a statute to be found unconstitutional on its face on overbreadth grounds, 'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court . . .'" *Leonardson*, 896 F.2d at 195 (citation omitted). Thus, "[i]f a statute does not implicate the First Amendment . . . then 'a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.'" *Blaszak*, 349 F.3d at 888 (citation omitted).

In this case, Plaintiffs do not, and cannot, allege that Proposal 1 chills constitutionally protected speech. Nor, as discussed previously, can they establish that Proposal 1 implicates First Amendment rights (or, for that matter, any other constitutionally protected rights). Therefore, Plaintiffs' reliance on the overbreadth doctrine is misplaced.

In sum, because Plaintiffs have failed to state any plausible claim that their Due Process rights have been violated, that claim must be dismissed.

F. The Court Should Decline to Exercise Supplemental Jurisdiction Over Plaintiffs' State Law Claims

Finally, the Court should decline to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims. As the Sixth Circuit recently observed in *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514, 521 (6th Cir. 2007):

[O]nce a federal court has dismissed a plaintiff's federal law claim, it should not reach state law claims. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). "Residual jurisdiction should be exercised only in cases where the interests of judicial economy and the avoidance of multiplicity of litigation outweigh our concern over needlessly deciding state law issues." *Moon v. Harrison Piping Supply*, 465 F.3d 719, 728 (6th Cir.2006).

Here, dismissal of Plaintiffs' various state law claims is appropriate because any issue concerning whether Proposal 1 violates either Michigan law or the Michigan Constitution would, as a matter of both comity and judicial economy, be better heard by the Michigan state courts. *Id.* at 522 (noting the Supreme Court's "general comity-related principle that residual supplemental jurisdiction be exercised with hesitation, to avoid needless decisions of state law").

III. CONCLUSION

For all of these reasons, MGM respectfully requests that the Court grant judgment on the pleadings and dismiss Plaintiffs' First Amended Complaint in its entirety.

Respectfully submitted,

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I hereby certify that on August 21, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to Phillip B. Maxwell, Edward Draugelis, and Donald S. McGehee.

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