

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,

**INTERVENING DEFENDANT  
MGM GRAND DETROIT, LLC'S  
REPLY BRIEF IN SUPPORT OF  
ITS MOTION FOR JUDGMENT  
ON THE PLEADINGS**

and

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

Intervening Defendant.

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I. ARGUMENT

A. **Despite Repeated Attempts To Restate Their Case, Plaintiffs' Claims Are Still Not Cognizable**

In their multi-pronged response to MGM Grand Detroit, LLC's Motion for Judgment on the Pleadings, which includes seeking to file a Second Amended Complaint together with a "Motion for Partial Summary Judgment," Plaintiffs sidestep the analysis by which the validity of their constitutional claims must be judged. Under the proper analysis, it is evident that none of Plaintiffs' claims is cognizable as a matter of law. Plaintiffs' additional factual allegations, affidavits, and exhibits do not change this outcome, and thus should be disregarded by the Court for purposes of MGM's Motion for Judgment on the Pleadings.<sup>1</sup>

B. **Plaintiffs' Equal Protection Claim Is Not Cognizable Because Proposal 1 Does Not Treat Similarly Situated Entities Differently And Because Proposal 1 Easily Survives Rational Basis Review**

Contrary to the assertions of the Plaintiffs, Proposal 1 does not single out racetrack owners for treatment different from others. Proposal 1 does not classify people or business entities. It establishes classifications based on the form of gaming. Proposal 1 distinguishes between tribal gaming and gaming in up to three casinos in Detroit on the one hand, and all other forms of gaming on the other. This fact alone is fatal to Plaintiffs' case.

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<sup>1</sup> Although Fed. R. Civ. P. 12(d) allows parties to present materials outside of the pleadings, it does not require courts to consider them. As set forth in MGM's separate Response to Plaintiffs' Motion for Partial Summary Judgment, MGM further notes that Plaintiffs' request for partial summary judgment in their favor is procedurally defective. First, it is premised on a proposed Second Amended Complaint that has not yet been accepted for filing. Second, as discovery has not even commenced, summary judgment in Plaintiffs' favor on any of their counts would be premature. *See Legend Mobile, Inc. v. Revels*, 2007 WL 674718, \* 4 (E.D. Mich 2007) (Cohn, J.) (**Exhibit 1**). Third, Plaintiffs' "motion" does not comply with this Court's standing order regarding summary judgment motions which, among other things, requires the moving party to file a "statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law." The Court's standing order provides that "failure to submit such a statement constitutes grounds for denial of the motion."

But even if this were not true, Plaintiffs' claim still fails. "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." *Veney v. T.V. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) (internal quotation omitted). For entities to be similarly situated, they must be similarly situated "*in every material respect*." *Ross v. Duggan*, 402 F.3d 574, 587-88 (6th Cir. 2004 ) (emphasis in original).

Plaintiffs claim that they are similarly situated to the casinos and the tribes in that, as horse racing licensees, they fall within a category described as "gaming licensees," which is purportedly broad enough to encompass all businesses offering gambling opportunities no matter how different the nature of their activities. (Plaintiffs' brief at pp. 15-16). However, Plaintiffs do not allege any facts suggesting that they are in fact similarly situated to the casinos and the tribes in any respect when it comes to Proposal 1 and its effect on *casino gambling*, yet alone "*in every material respect*."

Moreover, for the reasons set forth in MGM's main brief at pp. 17-18, Plaintiffs are clearly not similarly situated to the casinos and tribes. Indeed, Plaintiffs' primary argument on this issue is that they, like the casinos, are subject to detailed regulations and oversight. (Plaintiffs' brief, pp. 15-16). That argument misses the mark, however, because the regulations and oversight to which Plaintiffs are subject have nothing whatsoever to do with *casino gaming*. Indeed, the fact that Plaintiffs' activities have long been regulated by entirely different rules, and have been overseen by a different state agency, only supports the fact that the people of Michigan view Plaintiffs' horse racing activities as materially different than casino gaming.

Even assuming that Plaintiffs could demonstrate that they are similarly situated to the casinos and tribes, Proposal 1 easily survives rational basis review. To the extent Plaintiffs claim

that there is no rational basis for Proposal 1 because it is "mere economic protectionism" (*see* Plaintiffs' brief at pp. 17-19), such a claim lacks merit. Plaintiffs rely on *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), which struck down a state law that prohibited the sale of caskets by anyone not licensed as a "funeral director." The Court held that the law did not survive rational basis review because its sole purpose and effect was to "privilege certain businessmen over others at the expense of consumers." *Id.* at 229. The same can hardly be said about Proposal 1. As discussed in MGM's main brief at pp. 21-22, it is entirely rational for Michigan voters to have adopted Proposal 1 as a means for limiting the further expansion of gambling in the state, including Proposal 1's limited exception for gaming in tribal and existing Detroit casinos. *See Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003) ("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 . . . . 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.").<sup>2</sup>

Although Plaintiffs repeatedly point out that the existing Detroit casinos backed Proposal 1, their argument fails to recognize that Proposal 1 was passed by *the voters of the state of Michigan*. Thus, it is not the intent of *the casinos* who allegedly backed Proposal 1 that governs in the Equal Protection context, but the intent of the electorate that voted for it, which in this case appears to have been to limit the spread of casino-style gambling in Michigan, and not punish or

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<sup>2</sup> Similarly without merit is Plaintiffs' reliance on *Players International, Inc. v. United States*, 988 F. Supp. 497 (D. N.J. 1997). That case is inapposite because it involved a state law that sought to regulate commercial speech, and thus was required to survive heightened scrutiny under the First Amendment. Plaintiffs also distort the holding of *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 215; 378 N.W.2d 337 (1985), which simply held that a citizens group did not have a right to solicit signatures for an initiative petition inside privately owned shopping centers. Thus, that case also has no bearing on Plaintiffs' claims.

discriminate against any identifiable group. As recently explained in *Coalition to Defend Affirmative Action v. Regents of Univ. of Michigan*, 539 F. Supp. 2d 924, 951 (E.D. Mich. 2008), even in the race context, a plaintiff challenging a measure such as Proposal 1 on Equal Protection grounds must show that it was enacted "because of, not merely in spite of, its adverse effects upon an identifiable group'." (Citation omitted). Plaintiffs cannot by any stretch allege a plausible claim that the voters of the state of Michigan passed Proposal 1 "because of" a desire to single out horse racing tracks. For the same reason, there is no plausible merit to Plaintiffs' claim of "intentional" discrimination (*see* Plaintiffs' brief at pp. 19-20). Nowhere in their First Amended Complaint do Plaintiffs allege, nor can they, that Proposal 1 was passed by the voters in order to protect the existing Detroit casinos from competition.

Plaintiffs also seek to challenge Proposal 1 by arguing that it is ineffective in limiting the proliferation of gambling. (*See* Plaintiffs' brief at pp. 20-24). This, however, is not a relevant consideration in determining whether Proposal 1 violates the Equal Protection rights of horse racing tracks. "[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). "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." *Id.* Thus, if there are "plausible reasons" for the challenged law, the judiciary's "inquiry is at an end." *Id.* at 313-314 (citation omitted). Finally, the Court should reject Plaintiffs' attempt to analogize Proposal 1 to the state constitutional provision struck down in *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer*, the Supreme Court struck down Colorado's Amendment 2, which explicitly prevented the state from

enacting, adopting, or enforcing laws "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination." *Id.* at 625. The Court believed that Amendment 2 was so abhorrent in its "bare . . . desire to harm a politically unpopular group" that it did not survive even rational basis review. *Id.* at 634.

That amendment was not in any manner like Proposal 1, which at its core merely provides certain democratic controls over the spread of gambling in Michigan and then provides limited exceptions to account for countervailing interests. Moreover, *Romer* did not, as Plaintiffs suggest, apply any form of "heightened scrutiny" when reviewing Colorado's Amendment 2. As the Sixth Circuit observed in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati (On Remand)*, 128 F.3d 289, 294 (6th Cir. 1997), the *Romer* Court simply felt that Amendment 2 was "invidiously discriminatory and not rationally connected to the advancement of any legitimate state objective." For Plaintiffs to compare Proposal 1 with what was at issue in *Romer* borders on the absurd.<sup>3</sup>

**C. Plaintiffs' First Amendment Claim Is Not Cognizable Because Proposal 1 Does Not Limit Political Advocacy Or Punish Political Activity**

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<sup>3</sup> Similarly lacking in any substance is Plaintiffs' criticism of the fact that MGM, in its main brief, cited the Sixth Circuit's pre-*Romer* decision in *Equality Foundation* to the extent it rejected the plaintiffs' First Amendment challenge in that case. As Plaintiffs note (and as MGM itself noted in its brief), the Supreme Court vacated the Sixth Circuit's original opinion and remanded for reconsideration in light of *Romer*. However, the Supreme Court's decision had nothing to do with the Sixth Circuit's First Amendment analysis. Rather, it was limited to the Sixth Circuit's conclusion that the plaintiffs' Equal Protection rights were not violated, a decision that the Sixth Circuit reaffirmed on remand. In any event, the Sixth Circuit itself has routinely relied on decisions that have been "vacated on other grounds." *See, e.g., Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1110 (6th Cir. 2008); *U.S. ex rel. Snapp, Inc. v. Ford Motor Co.*, 532 F.3d 496, 499 n. 2 (6th Cir. 2008).

"Although the First Amendment protects political speech . . . , it does not protect the right to make law." *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006). For this reason, courts have consistently upheld laws that make it more difficult to pass certain kinds of legislation, or to secure certain government benefits via legislation, so long as those laws do not limit political advocacy itself or punish parties for having engaged in (or having refrained from engaging in) political activity. *See id*; *see also Marijuana Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002) (rejecting First Amendment challenge to a federal law that denied the District of Columbia the "authority to 'enact ... any law' reducing penalties associated with possession, use, or distribution of marijuana"); *Wellwood v. Johnson*, 172 F.3d 1007, 1008-1009 (8th Cir. 1999) (rejecting First Amendment challenge to state laws increasing the number of signatures needed to place certain initiative measures on the ballot).

Plaintiffs argue that Proposal 1 places them on an "uneven playing field." (Plaintiffs' brief at p. 32). Even if proven, this claim does not implicate First Amendment concerns. Plaintiffs do not allege any facts suggesting that Proposal 1 limits political advocacy itself. Plaintiffs also do not allege any facts suggesting that Proposal 1 acts to punish Plaintiffs for having engaged in (or having refrained from engaging in) political activity.

At pp. 29-32 of their brief, Plaintiffs rely heavily on comparing their case to *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd. (Lac Vieux I)*, 1999 F.3d 397 (6th Cir. 1999), in which (together with *Lac Vieux II*, 276 F.3d 876) the Sixth Circuit held a Detroit ordinance unconstitutional under the First Amendment. However, *Lac Vieux I* is not analogous to Plaintiffs' case and is therefore inapposite.

The ordinance at issue in *Lac Vieux I* mandated that, when reviewing competitive bids to select which three developers could enter into casino development agreements with the city,

Detroit grant a preference to the two developers who had previously sponsored and funded the initiative legislation necessary to legalize gambling in Detroit. The Court struck down the ordinance not because it contained built-in "preferences," as Plaintiffs seem to believe, but because it "grant[ed] benefits and impose[d] burdens according to whether an individual or entity sufficiently supported a particular political issue," and thus implicated the First Amendment. *Id.* at 409. In other words, the Lac Vieux tribe was excluded because it did not actively support the gambling initiative, while other developers did. By contrast, even if Proposal 1 could be said to favor the existing casinos and the tribes, *it does not grant any benefits or impose any burdens "according to whether an . . . entity sufficiently supported a particular political issue" in the past.* Plaintiffs do not and cannot plausibly allege that the voters passed Proposal 1 in order to "reward" the existing casinos and tribes for supporting it, or to "punish" horse racing tracks for their opposition to it. Therefore, the crucial First Amendment concern addressed in *Lac Vieux I* is absent in Plaintiffs' case.

Despite Plaintiffs' assertion, the fact that the conduct of an initiative campaign involves "core political speech"<sup>4</sup> does not transform this into a First Amendment case. Proposal 1 in no way seeks to regulate or limit in any way Plaintiffs' right to engage in political speech. As the saying goes, one thing has nothing to do with the other. Plaintiffs had, and continue to have, every right to engage in whatever political speech they wish. In that regard, and despite Plaintiffs' attempt to distinguish it, this case is no different than *Initiative and Referendum Institute*, 450 F.3d at 1085-86, 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. Although the plaintiffs claimed that the provision

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<sup>4</sup> See, e.g., *Meyer v. Grant*, 486 U.S. 414 (1988), which Plaintiffs cite at p. 32 of their brief.

unconstitutionally burdened political speech, the Tenth Circuit rejected that notion, observing that "[t]he 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 1101.

**D. Plaintiffs' Dormant Commerce Clause Claim Is Not Cognizable Because Proposal 1 Does Not Discriminate Against Out-Of-State Competitors And Does Not Unduly Burden Interstate Commerce**

There are two tests by which to measure if a state law may violate the dormant Commerce Clause. The first test is whether the law regulates in such a way as to "benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Kentucky v. Davis*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1801, 1808 (2008). The second test is whether the law unduly burdens interstate commerce. *Id.*

In their response to MGM's motion at pp. 34-36, Plaintiffs argue that Proposal 1 interferes with interstate commerce because a large portion of Plaintiffs' revenue is derived from interstate simulcasting of horse racing, and because Proposal 1's limitation of casino gaming to Indian tribes and the existing casinos has adversely affected those revenues. Even if those factual assertions are proven, however, they do not add up to a dormant Commerce Clause violation. As an initial matter, and as discussed in MGM's main brief at pp. 12-14, Plaintiffs do not allege any facts suggesting that Proposal 1 either seeks to, or as a practical matter does, benefit in-state economic interests by burdening out-of-state competitors. In fact, Plaintiffs' claim is premised on their assertion that Proposal 1 discriminates against *them*. However, Plaintiffs are Michigan partnerships and Michigan corporations operating in Michigan. They are not out-of-state entities. Thus, each and every one of the authorities cited at pp. 33-35 of Plaintiffs' brief addressing discrimination against out-of-state businesses is totally irrelevant here.

Moreover, Plaintiffs cannot plausibly allege that Proposal 1 burdens, yet alone *unduly* burdens, interstate commerce. Again, Plaintiffs merely claim that as a result of Proposal 1, their

horse racing revenues derived from interstate simulcasting have decreased. Apparently, Plaintiffs' logic is that if a law negatively impacts the revenue potential of a business that derives some of its revenue from interstate commerce, then that law violates the dormant Commerce Clause. Such logic is not supported by dormant Commerce Clause jurisprudence.

Moreover, Plaintiffs' claim that the "horse racing business" is interstate in nature (*see* Plaintiffs' brief at p. 34) is irrelevant here because, simply put, *Proposal 1 does not regulate horse racing*. In short, it is not enough for Plaintiffs to allege that because they derive *horse racing* revenue from out-of-state, this somehow gives rise to a dormant Commerce Clause claim. Proposal 1 has nothing whatsoever to do with horse racing, and Plaintiffs do not and cannot allege otherwise.

**E. Plaintiffs' Due Process Claim Is Not Cognizable Because Proposal 1 Does Not Deprive Plaintiffs Of Constitutionally Protected Property**

In order to claim a Due Process violation, a plaintiff must first prove that he has a protected "life, liberty, or property interest" in the thing deprived. *Bauss v. Plymouth Twp.*, 408 F. Supp. 2d 363, 367 (E.D. Mich. 2005). A plaintiff who does not have a "legitimate claim of entitlement" to receiving a benefit from the government does not have a protected property interest in that benefit. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Aside from being a mere restatement of their Equal Protection claim (*see* MGM's main brief at pp. 23-24), Plaintiffs' Due Process claim fails because Proposal 1 does not deprive them of constitutionally protected property. Plaintiffs maintain that Proposal 1 does not apply "across the board" to all "gaming licensees." (Plaintiffs' brief at pp. 38-39). Even if proven, this allegation does not translate into a Due Process violation. Plaintiffs do not have, and have never had, a protected property interest in engaging in any and all activities that might be economically profitable for them. As the Supreme Court explained in *Roth*, 408 U.S. at 577, "[t]o have a

property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Plaintiffs do not allege any facts suggesting that they have a "legitimate claim of entitlement" to offering their patrons methods of gambling outside the scope of their racing licenses.

Indeed, Plaintiffs cannot establish that Proposal 1 deprives them of a constitutionally protected property interest precisely because *Proposal 1 does not interfere in any way with Plaintiffs' racing licenses*. In that regard, the cases Plaintiffs cite on this issue merely underscore the deficiency in their case. (See Plaintiffs' brief at pp. 36-39). The decisions in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 716 (6th Cir. 1991), and *Club Misty, Inc. v. Laski*, 208 F.3d 615, 619 (7th Cir. 2000), simply held that a liquor licensee must be afforded due process before his liquor license is revoked. The court in *Balmoral Racing Club, Inc. v. Illinois Racing Bd.*, 151 Ill.2d 367, 407 (Ill. 1992), held that the Illinois Racing Board must afford a racing licensee due process before denying it racing dates for a season. Quite obviously, these cases do not support the proposition that a racing licensee has a protected property interest in offering its patrons methods of gambling outside the scope of its license. Thus, there is no basis for Plaintiffs to assert that they have been deprived of any interest protected by the Due Process Clause.

## II. CONCLUSION

For all the foregoing reasons, as well as those set forth in MGM's main brief, MGM respectfully requests that the Court grant judgment on the pleadings under Fed. R. Civ. P. 12(c) and dismiss Plaintiffs' First Amended Complaint in its entirety.

Respectfully submitted,

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Dated: December 22, 2008

I hereby certify that on December 22, 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, Donald S. McGehee, and Jessica Hodgson.

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