

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,

v

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

Defendants,

and

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

Intervening Defendant.

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Case No. 2:08-CV-11858-AC-RSW

Honorable Avern Cohn

**DEFENDANTS' REPLY BRIEF
IN SUPPORT OF THEIR MOTION
FOR JUDGMENT ON THE
PLEADINGS**

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CONTROLLING OR MOST APPROPRIATE AUTHORITY

Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 658-659, 666; 113 S.Ct. 2297; 124 L.Ed.2d 586 (1993)

Bacon v. Kent-Ottawa Metropolitan Water Authority, 354 Mich. 159, 170; 92 N.W.2d 492 (1958)

Brookpark Entertainment, Inc v. Taft, 951 F.2d 710, 716 (6th Cir. 1991)

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 87; 107 S.Ct. 1637; 95 L.Ed.2d 67 (1987)

Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary v. Regents of The University of Michigan, 539 F. Supp. 2d 924, 950 (2008)

Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002)

Dep't. of Revenue of Kentucky v. Davis, 128 S. Ct. 1801, ___; 170 L.Ed.2d 689; 2008 U.S. LEXIS 4312 (2008)

Equality Foundation of Greater Cincinnati, Inc., v. City of Cincinnati, 54 F.3d 261, 266 (6th Cir. 1995), vacated on other grounds, 116 S.Ct. 2519 (1996)

FCC v. Beach Communications, Inc., 508 U.S. 307, 313; 113 S. Ct. 2096; 124 L.Ed.2d 211 (1993)

Faris v. Long, 2008 U.S. Dist. LEXIS 16930 (ED Tenn.)

Garita Hotel Ltd. Pshp. v. Ponce Fed. Bank, 958 F.2d 15, 18-19 (1st Cir. 1992)

Gulch Gaming, Inc. v. South Dakota, 781 F. Supp. 621 (Dist. SD 1991)

Heller v. Doe, 509 U.S. 312, 319; 113 S.Ct. 2637; 125 L.Ed.2d 257 (1993)

Initiative and Referendum Institute v. Walker, 450 F.3d 1082, 1089 (10th Cir. 2006)

Jones v. Bates, 127 F.3d 839, 860-61 (9th Cir. 1997)

Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd. (Lac Vieux I), 172 F.3d 397 (6th Cir. 1999)

Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd. (Lac Vieux II), 276 F.3d 876 (6th Cir. 2002)

Lawrence v. Texas, 539 U.S. 558, 580; 123 S.Ct. 2472; 156 L.Ed. 2d 508 (2003)

Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ., 232 F.3d 1334, 1341-1342 (10th Cir. 2000)

Oakland Co. Prosecuting Atty. v. 46th Judicial Dist. Judge, 76 Mich. App. 318, 326; 256 N.W.2d 776 (1977)

People v. Perks, 259 Mich. App. 100, 109; 672 N.W.2d 902 (2003)

Renne v. Geary, 501 U.S. 312, 319; 111 S.Ct. 2331; 115 L.Ed.2d 288 (1991)

Shapiro v. Thompson, 394 U.S. 618, 627; 89 S.Ct. 1322; 22 L.Ed. 600 (1969)

Stanley v. General Motors Corp., 71 F.R.D. 99 (ED Wis. 1976)

Taxpayers of Michigan Against Casinos (TOMAC I) v. State, 471 Mich. 306, 312, 319; 685 N.W.2d 221 (2004).

M.C.L. § 432.101

M.C.L. § 432.103a(8)

M.C.L. § 432.105a

M.C.L. § 432.105d(4)

M.C.L. § 432.206(4)(g)

M.C.L. § 750.310a

Mich. Const. 1963, art. 4, §41

25 U.S.C. § 2701

I. Introduction

Plaintiffs in this action rest their response to Defendants' Motion for Judgment on the Pleadings on a number of faulty premises. The shaky legal foundation of their claims crumbles when exposed to the language of the constitutional provision under attack, Mich. Const. 1963, art. 4, §41, and applicable law. As further discussed below, Mich. Const. 1963, art. 4, §41 does not violate:

- (1) the Equal Protection Clause, given that it does not classify "gaming licensees" and it is rationally related to a legitimate government purpose;
- (2) the First Amendment, given that Defendants' arguments supporting dismissal stand unopposed and Plaintiffs merely assert new legally baseless claims;
- (3) Due Process, because Plaintiffs have not asserted a deprivation of any protected interest by virtue of Mich. Const. 1963, art. 4, §41; or
- (4) the Commerce Clause, in light of the provision's equal treatment of in-state and out-of-state interests.

Moreover, Plaintiffs lack standing to raise these claims. Consequently, Plaintiffs' First Amended Complaint fails, as argued in Defendants' Motion for Judgment on the Pleadings, and Defendants are entitled to judgment as a matter of law.

II. Plaintiffs Cannot Convert Defendants' Motion for Judgment on the Pleadings into a Motion for Summary Judgment

As an initial matter, Plaintiffs have improperly based their Response to Defendants' Motion for Judgment on the Pleadings on allegations contained in a *proposed* Second Amended Complaint, which Plaintiffs have not been granted leave to file. Thus, Defendants object to the consideration of Plaintiffs' arguments that are based on the proposed Second Amended Complaint. Defendants' motion was based on the First Amended Complaint, and Plaintiffs must defend that pleading in order to survive Defendants' motion.

Similarly, Defendants object to Plaintiffs' attempt to convert their motion into a Motion for Summary Judgment by submitting evidence with their brief.¹ FRCP 12(d) provides:

If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Plaintiffs' submission of evidence does not automatically convert Defendants' motion into a motion for summary judgment; the relevant question is whether the court, in its discretion, chooses to consider the materials.² Defendants request that the Court exclude the extraneous materials Plaintiffs have submitted, or, if the Court declines to do so, provide Defendants with the required notice that the Court will proceed as though Defendants sought summary judgment under Rule 56 and give Defendants an opportunity to present all the material that is pertinent to the motion.³

III. Plaintiffs Lack Standing

Plaintiffs are unable to cross the hurdle of justiciability in this case because they have not suffered a concrete injury that was caused by the amendment of Mich. Const. 1963, art. 4, § 41. As later discussed in the context of Plaintiffs' Equal Protection claim, the amendment's provisions do not classify groups of people or businesses; rather, the provisions discuss procedures for passing various laws. Thus, Plaintiffs' reliance on cases in which a law imposed

¹ See Plaintiffs' Response to Defendants' Motions to Dismiss; Plaintiffs' Cross-Motion for Partial Summary Judgment [docket no. 27] at 2 (asserting that "Defendants' pending motions are treated as motions for summary judgment" because Plaintiffs presented matters outside the pleadings).

² See *Garita Hotel Ltd. Pshp. v. Ponce Fed. Bank*, 958 F.2d 15, 18-19 (CA 1, 1992); *Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ.*, 232 F.3d 1334, 1341-1342 (CA 10, 2000).

³ See *Stanley v. General Motors Corp.*, 71 F.R.D. 99 (ED Wis. 1976); see, e.g., *Faris v. Long*, 2008 U.S. Dist. LEXIS 16930 (ED Tenn.) at 3 and n. 2. Defendants are responding to Plaintiffs' Cross-Motion for Partial Summary Judgment, which was improperly combined with their Response to Defendants' Motion to Dismiss, in a separate document.

hurdles for specific groups of people is misplaced.⁴ Because the amendment in question does not operate as Plaintiffs claim, they have not sustained the injury suffered by the plaintiffs in the cited cases.⁵

Plaintiffs assert that the "looming 'future event,'" that creates threatened injury is extinction of their business because they cannot conduct other forms of wagering without changes in the law. But removing the voter-approval requirements will not authorize an additional legalized method of gambling at the racetracks. Accordingly, Plaintiffs' perceived injury is not redressable through this action. Just as in *Renne v. Geary*,⁶ where redressability was doubted because a law, in addition to the one under attack, prohibited the same behavior, Plaintiffs would nevertheless face the current illegality of gambling with Video Lottery Terminals at the racetracks. The bills Plaintiffs championed died, and it is at best speculative to claim that eliminating the voter-approval requirement would lead to their subsequent enactment.⁷

⁴ See *Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 658-659, 666; 113 S.Ct. 2297; 124 L.Ed.2d 586 (1993) (where a minority-business enterprise ordinance required a percentage of city contracts to be set aside for certain groups of people); see *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999) (where a law included a preference to be granted by the government to applicants who had taken a particular position on a political issue).

⁵ Plaintiffs also rely on *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006), to support standing to raise a "chilled speech" First Amendment claim. Because Plaintiffs did not raise such a claim in the First Amended Complaint, discussion of standing to support that claim is irrelevant.

⁶ 501 U.S. 312, 319; 111 S.Ct. 2331; 115 L.Ed.2d 288 (1991).

⁷ Plaintiffs claim that they were injured by "the illegal preemption of [P]laintiff's [sic] legislation." Plaintiffs show no illegality in the failure of the racino legislation to pass.

IV. Equal Protection

A. The Classifications Plaintiffs Rely On Do Not Exist in Mich. Const. 1963, art 4, § 41

As Defendants argued in their initial brief, the language of art. 4, § 41 does not create a classification of persons or businesses subject to an Equal Protection claim; rather, at most, the provision classifies various governmental decisions concerning gambling. Plaintiffs nevertheless respond that the provision creates two classes of gaming licensees: (1) those who have to get voter approval of laws in their favor, and (2) those who do not. Simple analysis of the language of the provision shows that this is not the case. The voter-approval provision applies to "law[s] . . . that authorize[] any form of gambling" and "establish[ment]" of certain "new state lottery games." Excluded from the scope of the voter-approval requirement are "gambling in up to three casinos in the City of Detroit" and "Indian Tribal gaming."

Gaming licensees are not mentioned in the provision; thus, no gaming licensee has to get voter approval of anything. And, conversely, no gaming licensee has received an exemption from getting voter approval. But looking deeper, the provision applies to laws authorizing gambling—whether conducted by a licensee or not. For example, if the Legislature chose to authorize private citizens to gamble at home on poker games,⁸ the law authorizing the gambling would be subject to the voter-approval requirements, yet no "licensees" would necessarily be involved. The same analysis would apply to other laws permitting gambling that is not regulated by a state agency.⁹ Thus, "gaming licensees" are not a classification under the provision.

⁸ This activity is currently prohibited by MCL 750.301. See *Oakland Co. Prosecuting Atty. v. 46th Judicial Dist. Judge*, 76 Mich. App. 318, 326; 256 N.W.2d 776 (1977).

⁹ Such situations already exist under Michigan law. See e.g. M.C.L. § 432.105a (permitting unlicensed gambling on certain bingo games); M.C.L. § 432.105d(4) (permitting "qualified organizations" to hold certain unlicensed raffles); M.C.L. § 750.310a (excluding from the gambling prohibition certain "bowling card games" at bowling centers).

Just as gaming licensees are not classified for purposes of the provision's application, they are not classified for purposes of its exceptions, whether they currently operate casinos in Detroit or not. And the exclusion of Indian Tribal gaming, as Plaintiffs concede, is a matter of federal law. State laws do not authorize gaming for federally recognized Indian Tribes,¹⁰ so there is no legal purpose in extending the constitutional provision to Indian Tribal gaming. The compacts with the Indian Tribes are contracts,¹¹ not "law[s] enacted," so the voter-approval requirement does not extend to them in any event.

Further, Plaintiffs inaccurately represent the legal status of the Tribes, the race tracks, and three Detroit casinos. First, Plaintiffs assert that all three groups are "gaming licensees." But tribal gaming is not subject to state licensure, so the Tribes are not "gaming licensees."¹² Second, Plaintiffs assert that the Tribes, race tracks, and three Detroit casinos are the only entities authorized to engage in Class III gaming in Michigan, as defined by the Indian Gaming Regulatory Act (IGRA).¹³ But Plaintiffs disregard that "qualified organizations" may receive licenses under the Traxler-McCauley-Law-Bowman Bingo Act¹⁴ to conduct "millionaire parties" involving casino-style gaming,¹⁵ some of which is Class III. Because of these inaccuracies, Plaintiffs' classification argument fails.

Plaintiffs further assert that the "effects" of the provision must be considered in determining whether it creates the asserted classification, rather than the language of the provisions at issue. But the case upon which Plaintiffs rely for this proposition, *Shapiro v.*

¹⁰ See *TOMAC I*, 471 Mich. at 319-320 (explaining the State's lack of regulatory authority over Indian Tribal gaming outside the compacts).

¹¹ See *Taxpayers of Michigan Against Casinos (TOMAC I) v. State*, 471 Mich. 306, 312, 319; 685 N.W.2d 221 (2004).

¹² See *TOMAC I*, 471 Mich. at 319-320.

¹³ 25 U.S.C. §§ 2701 *et seq.*

¹⁴ M.C.L. § 432.101 *et seq.*

¹⁵ See M.C.L. § 432.103a(8).

Thompson,¹⁶ measured the effects that arose *based on the language* of the provisions at issue.¹⁷ Similarly, an examination of Mich. Const. 1963, art 4, § 41 must begin with the language of the provision, which defines its scope and, consequently, what effects it will have. The language of the provision is the best reflection of the ratifiers' intent,¹⁸ and it is their intent that matters.¹⁹ Plaintiffs' portrayal of the intent of some of the *proponents* of the amendment as invidious has no bearing on this Court's resolution of Plaintiffs' Equal Protection claim.²⁰ Regardless, as revealed above, the multiple implications of the provision beyond "gaming licensees" demonstrate that the effects of art. 4, § 41 are not as Plaintiffs portray them.

Finally, Plaintiffs' misapprehension of one of Defendants' arguments on this issue causes additional problems with their analysis. As Defendants have stated, because the definition of "city" in the Michigan Gaming Control and Revenue Act (MGCRA) is not limited to Detroit (given that another city could meet the requirements of the definition at some time in the future, in light of population changes, without an amendment of the definition), the reference to "gambling in up to three casinos in the City of Detroit" is not a reference to the MGCB regulated

¹⁶ 394 U.S. 618, 627; 89 S.Ct. 1322; 22 L.Ed. 600 (1969).

¹⁷ See *Shapiro*, 394 U.S. 618, 622 at n. 2, 623 at n. 3, 626 n. 5 (quoting the statutes that expressly imposed a residency requirement as a prerequisite to receiving benefits).

¹⁸ *People v. Perks*, 259 Mich. App. 100, 109; 672 N.W.2d 902 (2003).

¹⁹ See *Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary v. Regents of The University of Michigan*, 539 F. Supp. 2d 924, 950 (2008) (examining the intent of the electorate in voting on a referendum, not the intent of those who proposed or promoted the referendum); *Bacon v. Kent-Ottawa Metropolitan Water Authority*, 354 Mich. 159, 170; 92 N.W.2d 492 (1958).

²⁰ Plaintiffs cite *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002), for the proposition that economic protectionism is not a rational basis for legislation. Again, Plaintiffs erroneously focus on why, according to Plaintiffs, some of the *proponents* of the amendment sought to have it added to the constitution. See *Jones v. Bates*, 127 F.3d 839, 860-61 (9th Cir. 1997) (rejecting materials issued by opponents and advocacy groups as indicative of voter intent concerning an initiative). Plaintiffs also argue that using the initiative process to injure a competitor is inappropriate under Michigan's Constitution. This claim is not part of the First Amended Complaint.

casinos. Plaintiffs, however, assert that the casinos could seek to amend the MGCRA by changing the definition of "city" and, thus, permit expansion by any of the three Detroit casinos outside of Detroit.

Plaintiffs' argument is problematic for at least three reasons. First, Plaintiffs miss that the definition of "city" would not have to be amended; it is already not limited to Detroit. Second, Plaintiffs disregard that the MGCRA limits casino ownership interests: a person cannot hold a greater than ten percent interest in more than one licensed casino.²¹ Thus, the current casino licensees could not have unfettered expansion outside of Detroit. Third, and even more glaring, Plaintiffs' assertion that the current casino licensees could expand, unfettered, outside of Detroit disregards that laws that authorize a form of gambling outside the city of Detroit (or in more than three casinos in Detroit) are subject to the voter-approval requirements, whether conducted by the current MGCB-regulated casino licensees or not.²² Despite Plaintiffs' classification argument, the exception for "gambling in up to three casinos in the City of Detroit" is about *where* gambling is conducted, not *who* conducts it.

B. Mich. Const. 1963, Art. 4, § 41 Is Rationally Related to the Legitimate Government Interests That Plaintiffs Concede Exist

Plaintiffs concede that assisting Detroit's economy and restricting the growth of casino gaming (the government interests Defendants submitted in favor of the validity of Mich. Const. 1963, art. 4, § 41) are legitimate governmental concerns, yet they claim that "the exclusion of tribal gaming and the three Detroit casinos from the reach of art. IV, § 41 do[es] not serve these

²¹ See M.C.L. § 432.206(4)(g).

²² Arguably, a law that amends the definition of "city" to permit gaming in a location where it is currently prohibited could be construed as a law that authorizes a form of gambling. Defendants take no position on whether the voter-approval requirements would apply.

goals."²³ As mentioned above, the exclusion of tribal gaming is a matter of federal law. As for excluding gambling in up to three casinos in Detroit, permitting an industry to exist within a defined area is rationally related to the legitimate interest of assisting with Detroit's economy, as well as to restricting the growth of casino gaming across the state. On rational basis review, it is not the court's role to examine the wisdom of the means through which this goal is accomplished;²⁴ thus, the success of the measure does not determine its validity. Moreover, whether less restrictive means for achieving the governmental interests exist is also beyond the scope of rational basis review. A classification "'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.'"²⁵ Plaintiffs have not met their burden of eliminating every possible justification in support of the classification.²⁶

Defendants attempt to find a heightened form of scrutiny in *Romer v. Evans*.²⁷ But *Romer* was decided under rational basis review.²⁸ Moreover, *Equality Foundation of Greater Cincinnati, Inc., v. City of Cincinnati*,²⁹ although vacated on grounds other than those for which Defendants have cited it,³⁰ maintains persuasive applicability: "[T]he realization of [the group's] political agenda [was] not constitutionally guaranteed;" "[t]hose who opposed [the amendment]

²³ Plaintiffs' Brief at 24.

²⁴ See *Heller v. Doe*, 509 U.S. 312, 319; 113 S.Ct. 2637; 125 L.Ed.2d 257 (1993) (stating that "rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices'"), quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313; 113 S.Ct. 2096; 124 L.Ed.2d 211 (1993).

²⁵ *Heller*, 509 U.S. at 320, quoting *Beach Communications, supra* at 313.

²⁶ *Beach Communications*, 508 U.S. at 315.

²⁷ 517 U.S. 620; 116 S.Ct. 1620; 134 L.Ed.2d 855 (1996).

²⁸ *Romer*, 517 U.S. at 631-632; *Lawrence v. Texas*, 539 U.S. 558, 580; 123 S.Ct. 2472; 156 L.Ed.2d 508 (2003).

²⁹ 54 F.3d 261, 266 (6th Cir. 1995), vacated on other grounds, 116 S.Ct. 2519 (1996).

³⁰ See Defendants' Brief at 12 n. 44, 15.

simply lost one battle of an ongoing political dispute."³¹ Similarly, Plaintiffs are not guaranteed laws that further their agenda of increasing the permissible forms of gambling at racetracks in Michigan. They lost one battle, but that loss does not amount to a violation of Equal Protection.

V. Mich. Const. 1963, Art. 4, § 41 Does Not Violate The First Amendment

Plaintiffs provide no response to the arguments raised in Defendants' Motion for Judgment on the Pleadings on this issue. Rather, they raise two First Amendment claims that were not asserted in the First Amended Complaint: (1) that Defendants' speech is chilled through Mich. Const. 1963, art. 4, § 41;³² and (2) that the First Amendment is violated because they "compete for their legislative goals on an uneven playing field."³³ Defendants' arguments supporting dismissal of the First Amendment claims in the First Amended Complaint stand unopposed, and the claims should be dismissed.

VI. Plaintiffs' Due Process Rights Have Not Been Violated

The First Amended Complaint asserts claims that Mich. Const. 1963, art. 4, § 41 is both impermissibly overbroad and vague and therefore violates Due Process. But Plaintiffs have not responded to Defendants' arguments supporting dismissing these claims. Thus, Defendants should be awarded judgment as a matter of law.

³¹ *Equality Foundation*, 54 F.3d at 269.

³² See Plaintiffs' Brief at 29-32. This claim is purportedly contained in Plaintiffs' proposed Second Amended Complaint. Nevertheless, it would fail as a matter of law because, unlike laws invalidated on this basis, Mich. Const. 1963, art. 4, § 41 does not reward or punish any political activity through its requirements or exceptions. Compare *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd. (Lac Vieux I)*, 172 F.3d 397 (6th Cir. 1999); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd. (Lac Vieux II)*, 276 F.3d 876 (6th Cir. 2002). If Plaintiffs formally request leave to file a Second Amended Complaint, Defendants reserve the right to further brief this issue.

³³ See Plaintiffs' Brief at 32. This claim, too, would fail, as explained regarding Plaintiffs' equal protection claim. Defendants also reserve the right to further brief this issue.

Instead of responding to the matters raised in Defendants' motion, Plaintiffs assert that, as licensees, they hold an interest that is subject to due process protection. The existence of such an interest is not presently an issue in dispute in this case. But Plaintiffs have not alleged in the First Amended Complaint that they have been *deprived* of their asserted protected interest without due process of law, which is essential to a procedural due process claim.³⁴ Consequently, Plaintiffs have failed to assert a due process violation.

In any event, Mich. Const. 1963, art. 4, § 41 has no impact whatsoever on Plaintiffs' licenses. The present situation is wholly distinguishable from the situation in *Brookpark Entertainment, Inc. v. Taft*,³⁵ where a law permitted citizens to vote to revoke a liquor license issued to a particular establishment. As explained concerning Plaintiffs' Equal Protection claim, the provision at issue does not mention, much less single out, licensees. It does not imperil licenses in any way.

VII. Mich. Const. 1963, Art. 4, § 41 Does Not Violate The Commerce Clause

Facts demonstrating that a business *engages in* interstate commerce, without more, are insufficient to support a claim that a law impacting that business impermissibly burdens interstate commerce.³⁶ "The modern law of . . . the dormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interest by burdening out-of-state competitors.'"³⁷ Significantly, Plaintiffs are not out-of-state competitors of the other gambling interests they cite. Moreover, because the provision at

³⁴ See *Brookpark Entertainment, Inc v. Taft*, 951 F.2d 710, 716 (6th Cir. 1991).

³⁵ 951 F.2d 710 (6th Cir. 1991).

³⁶ Plaintiffs contend that Defendants argue that art. 4, § 41 has no affect on interstate commerce. On the contrary, Defendants focused on the relevant inquiry—whether the provision imposes an excessive burden on interstate commerce in relation to the putative local benefits.

³⁷ *Dep't. of Revenue of Kentucky v. Davis*, 128 S. Ct. 1801, ___; 170 L.Ed.2d 689; 2008 U.S. LEXIS 4312 (2008), quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274; 108 S. Ct. 1803; 100 L.Ed.2d 302 (1988).

issue here is a facially neutral, it should be upheld, given that its effects on interstate commerce are only incidental, rather than clearly excessive in relation to the putative local benefits.

Plaintiffs cannot show that the provision they attack burdens interstate commerce at all. The most they have shown through their improperly submitted evidence is that they derive substantial revenue from interstate commerce through simulcast wagering and that there is a possibility that their ability to conduct *other* forms of gambling is complicated by Mich. Const. 1963, art. 4, § 41. Plaintiffs currently may conduct simulcast wagering legally, unaffected by the voter-approval requirements.

Rather than the facial discrimination between in-state and out-of-state interests condemned in *Gulch Gaming, Inc. v. South Dakota*,³⁸ the situation here is more like that described in *CTS Corp. v. Dynamics Corp. of America*:³⁹

The principal objects of dormant *Commerce Clause* scrutiny are statutes that discriminate against interstate commerce. . . . The Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it "visits effects equally upon both interstate and local business"

Further, "[b]ecause nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce."⁴⁰ Similarly, the amendment at issue imposes the same burden on in-state and out-of-state businesses and does not violate the Commerce Clause.

³⁸ 781 F. Supp. 621 (Dist. SD 1991).

³⁹ 481 U.S. 69, 87; 107 S.Ct. 1637; 95 L.Ed.2d 67 (1987).

⁴⁰ *Id.* at 88.

VIII. State Law Claims

Plaintiffs do not object to Defendants' assertions that the state law claims raised in the First Amended Complaint should be dismissed. Consequently, for the reasons argued in Defendants' brief, the state law claims should be dismissed.

IX. Conclusion

Plaintiffs paint the meaning of Mich. Const. 1963, art. 4, § 41 with broad, imprecise strokes. Additionally, they attempt to switch boats mid-stream, presenting legal claims not presented in the First Amended Complaint. Defendants ask the Court decide their motion for judgment on the pleadings, focused on the claims raised in the First Amended Complaint. For the reasons articulated above, as well as in Defendants' brief in support of their motion, the claims Plaintiffs have raised in the First Amended Complaint are legally unsupportable and should be dismissed as a matter of law.

Respectfully submitted,

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