

Senate Select Committee on Gaming  
Written Testimony of Nicholas A. Pittner,

June 10, 2019

Chairman Schuring, Members of the Committee:

I regret that I am unable to appear in person, but offer the following written testimony regarding S. B. 176. I have been engaged in the practice of law for over 50 years and served as lead trial counsel for the Plaintiffs in Ohio's long-running school funding litigation known as *DeRolph v. State*. My appearance here today is on my own behalf as a private citizen, and not on behalf of any client.

The current version of S.B. 176 raises the fundamental question of whether it currently lies within the authority of the General Assembly to enact. Here's why I believe that to be a concern. By way of background, The Ohio Lottery first became part of the Ohio constitution in 1973 when Article XV, Section 6 was approved by the voters. One of the key selling points at the time was the promise that the proceeds would go to support public schools. As enacted, the Ohio Constitution provides that "...the entire net proceeds of any lottery \*\*\* shall be used solely for the support of elementary, secondary, vocational and special education programs...". Ohio Constitution, Article XV, Section 6(A). Thus, when the voters approved the Ohio Lottery they did so with a clear understanding that the all of the net profit would be used to support public education. The amendment also included limiting language to ensure that no competing lotteries could be operated: "Except as otherwise provided in this section, lotteries, and the sale of lottery tickets, for any purpose whatsoever, shall forever be prohibited in this State."

In 2009 the Constitution was again amended, this time to permit casino gambling. Article XV, Section 6 now authorizes three specific types of gambling in Ohio: A) state-run lotteries; B) charitable bingo and, C) casino gaming. Notably, sports gaming is not included, thus raising the fundamental question of whether the General Assembly can authorize any form of sports gambling that is not one of the three types of gambling enumerated in the Constitution. The Legislative Service Commission raised this issue in its analysis of S.B. 176, questioning whether the sports gambling provisions of the proposed legislation, though characterized in part as a "lottery," in fact met the constitutional requirement. Left unstated in the Commission's analysis was the much larger question of

whether the legislature can enact any form of sports gambling legislation without first amending the Ohio Constitution.

By way of example, does my bet on Ohio State to win the Ohio State/Michigan football game constitute either a “lottery”, “charitable bingo” or “casino gambling”? S.B. 176 attempts to thread the needle by directing the Lottery Commission to create and a sports gaming “pool’ which would be offered as part of the Ohio Lottery. However, it looks like a much larger piece of the action would go to online wagering and in-person gambling at sports gaming facilities, all of which are regulated by the Ohio Casino Control Commission. If the drafter’s notion is that making these kinds of sports gambling subject to control of the Casino Commission somehow legitimizes it as “casino gambling”, a quick review of the 2009 casino amendment will demonstrate why this could be a problem. First, there are only four casinos in four specific locations in Ohio: Cleveland, Toledo, Columbus and Cincinnati. Casino gambling is authorized only at the four specified locations, and includes “...any type of slot machine or table game wagering, using money, casino credit or any representative of value , authorized in any of the states of Indiana, Michigan, Pennsylvania and West Virginia as of January 1, 2009.” Nowhere is there any reference to sports gambling, either on line or in a sports gaming facility, as an approved gambling activity of a casino. The specificity of the casino monopoly language argues against any broad interpretation that could try to shove the round sports gambling peg into the square, casino monopoly hole, and simply assigning the taxing and regulation of sports gaming to the Casino Commission does not fill that void.

It certainly could be argued that the technology has vastly changed since the voters approved the Ohio Lottery, and even casino gambling. For example, it is now possible to engage in casino gambling on your cell-phone in some states, but not Ohio - at least not yet. Likewise, it could also be argued that public policy also has changed and gambling is now more acceptable than it was in the past. Finally, it would be noted that the Constitution does not expressly prohibit legislation authorizing other forms of gambling. These issues will likely fall to the courts to decide.

Assuming that, as has been stated, the General Assembly is intent on legalizing sports gambling in this session I would offer that there are two goals that should be met by that legislation. The first goal is to keep the promise made to Ohio’s voters when legalized gambling was first approved in 1973 and make

sure that all of the tax revenue from sports gaming goes to benefit Ohio's public schools. The second goal should be to fashion legislation as consistent with the requirements of the Constitution as possible. Again, the Lottery would appear to be the better choice because, unlike the casino provisions, "Lottery" is undefined and leaves more discretion to the legislature to fashion a sports gambling form of lottery offerings. However, I personally hope the current "sports pool" concept is not included.

Thanks for your attention.

Respectfully submitted,

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