

### **House Bill 298 is Unconstitutional**

My name is Nathaniel Fouch and I am an attorney from Dayton and a scholar of the Ohio Constitution. I previously clerked for Justice DeWine on the Supreme Court of Ohio and my work has been cited by that court. I am submitting my written testimony against House Bill 298 on the grounds that it is unconstitutional as written. The Ohio Constitution provides that, subject to certain highly defined exceptions, “lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.”<sup>1</sup> By purporting to legalize and regulate internet gambling, this bill attempts to affect something the Ohio Constitution expressly forbids. It is your moral and legal duty as legislators to vote against this bill.

The Ohio Constitution is “the supreme law” of our state. To quote the Supreme Court of Ohio, our state constitution “is the expression of the will of the people, subject to amendment only by the people, and neither the Legislature by legislative enactment, nor the courts by judicial interpretation, can repeal or modify such expression or destroy the plain language and meaning of the Constitution, otherwise there would be no purpose in having a Constitution.”<sup>2</sup>

In our system of government, the state Constitution is “a limitation of powers,” meaning “the General Assembly of Ohio may enact any law which is not prohibited by the Constitution.”<sup>3</sup> How do you as legislators determine what is prohibited by the Ohio Constitution? The best way is by reading the plain text of the document. This is, after all, what the Supreme Court of Ohio does when it reviews the constitutionality of your enactments.<sup>4</sup> To get the fullest view of an Ohio constitutional provision’s meaning, you must “look first to the text of the document as understood in light of our history and traditions.”<sup>6</sup>

When Ohio’s second and current constitution was ratified by voters in 1851, Article XV, Section 6 read: “Lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.” This firm prohibition remained in place until 1973, when the section was amended to permit the General Assembly to establish a state lottery. The section was amended again to permit charitable bingo in 1975. After failed referenda in 1990, 1996, and 2008, the section was further amended in 2009 to permit the establishment of casinos at particular locations. Notably with each amendment liberalizing gambling laws, the voters of Ohio kept in place the strict language that, these limited exceptions aside, “lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.” In determining whether the bill before you is constitutional, your job as legislators is to discern whether the modes of gaming it purports to authorize fit within one of the highly specific and narrow exceptions to Article XV, Section 6’s general prohibition on lotteries.

The 1851 Constitution was adopted directly by the voters of Ohio.<sup>7</sup> The Supreme Court of Ohio recently declared that “In construing constitutional text that was ratified by direct vote, we consider how the language would have been understood by the voters” who adopted the text.<sup>8</sup>

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<sup>1</sup> Ohio Const., art. XV, § 6.

<sup>2</sup> Hoffman v. Knollman, 135 Ohio St. 170, 181 (1939).

<sup>4</sup> Angell v. Toledo, 153 Ohio St. 179, 181 (1950).

<sup>5</sup> See Newburgh Hts. v. State, 2022-Ohio-1642, ¶ 17 (“in construing the Ohio Constitution, our duty is to determine and give effect to the meaning expressed in its plain language”).

<sup>6</sup> State v. Smith, 2020-Ohio-4441, ¶ 29.

<sup>7</sup> See Ohio Const., 1851 schedule.

That means “considering how the words and phrases would be understood by the voters in their normal and ordinary usage.”<sup>9</sup> The reason this is important is that the constitution is “an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government.”<sup>10</sup> Evidence from the time of the Ohio Constitution’s ratification clearly shows the prohibition on “lotteries” includes the practices referred to as internet gambling in House Bill 298.

Contemporaneous with the Ohio Constitution, *Bouvier’s Law Dictionary*—the most popular law dictionary in the United States in that period—defined “Lottery” as “a scheme for the distribution of prizes by chance.”<sup>11</sup> This definition was echoed in the then-current edition of Webster’s Dictionary, which similarly defined “Lottery” as “A scheme for the distribution of prizes by chance, or the distribution itself.”<sup>12</sup> Another period dictionary defines it as “A game of hazard in which small sums are ventured for the chance of obtaining a greater value.”<sup>13</sup> The original meaning of “lotteries” is inextricably linked with the element of chance as opposed to skill.

This meaning becomes even more apparent when contrasted with the definitions of similar terms. The Webster’s Dictionary quoted above defined “Game” or “Gaming” as “An exercise or play for amusement or winning a stake,” before noting that “Some games depend on skill, others on hazard.”<sup>14</sup> In defining the same terms, *Bouvier’s Law Dictionary* notes that “There are some games which depend altogether upon skill, others, upon chance, and some others are of a mixed nature. Billiards is an example of the first; lottery, of the second; and backgammon of the last.”<sup>15</sup>

Ohio’s constitutional framers also recognized that lotteries are but one form of gaming. At the state’s second Constitutional Convention, one delegate giving a speech against the bar from public office for duelists, offered up another example where the Convention had singled out a particular offense. Referring to the provision which would become Article XV, Section 6, lawyer and delegate Joseph McCormick noted that, “Of the same nature, also, has been the action of this body in relation to lotteries and lottery tickets, *without embracing any other species of gambling*.”<sup>16</sup> This is evidence that the framers identified lottery as a distinct form of gambling.

That understanding of lotteries is consistent with history. Under Ohio’s 1802 Constitution (which did not contain an express anti-lottery provision), the General Assembly passed an act designed specifically “to prevent lotteries”<sup>17</sup> The law defined “lottery” to

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<sup>8</sup> Centerville v. Knab, 2020-Ohio-5219, ¶ 22.

<sup>9</sup> *Id.*

<sup>10</sup> Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 58 (2d ed. 1871).

<sup>11</sup> 2 *Bouvier’s Law Dictionary* 94 (3d ed. 1848).

<sup>12</sup> Noah Webster, *An American Dictionary of the English Language* 677 (Chauncey Goodrich ed. 1847).

<sup>13</sup> Joseph E. Worcester, *A Universal and Critical Dictionary of the English Language* 427 (1846).

<sup>14</sup> Webster, *supra* note 10, at 492.

<sup>15</sup> 1 *Bouvier’s Law Dictionary* 602 (3d ed. 1848).

<sup>16</sup> (Emphasis added.) 2 *Official Reports of the Debates and Proceedings of the Ohio State Convention* 1330 (1851).

<sup>17</sup> 28 Ohio Laws 37.

encompass any “scheme of chance, of any kind or description, by whatever name, title, or style the same may be denominated or known.”<sup>18</sup>

Courts have also read Article XV, Section 6 in the same way. The Supreme Court of Ohio noted it was “interesting . . . that when the people of the state adopted the Constitution of 1851, nothing therein was said of gaming or gambling as such, or in the Amendments to that Constitution later adopted. The prohibition of the Constitution was against lotteries and the sale of lottery tickets only.”<sup>19</sup> The Ninth District Court of Appeals went so far as to give a definition for the term “lottery” en route to construing Article XV, Section 6. It stated, consistent with the original meaning that I’ve expounded here, that “A lottery is a scheme whereby a monetary consideration is paid and the winner of the prize is determined by lot or chance.”<sup>20</sup>

Reading the plain text of Article XV, Section 6, “in light of our history and traditions,”<sup>21</sup> House Bill 298 is unconstitutional. The Bill purports to allow “internet gambling games,” which it defines to include games “involving a virtual representation of spinning reels or wheels, *with the outcome of the game being randomly generated by a theoretical random-number-generating computer program,*” and games “involving a virtual representation of cards, dice, tiles, or other physical equipment *that provides a random outcome, with the outcome of the game being determined by that equipment or determined by a theoretical random-number generating computer program.*”<sup>22</sup> These “internet gambling games” are nothing more than “schemes for the distribution of prizes by chance.” In other words, they are lotteries, and unconstitutional unless one of three exceptions to the Constitution apply to save them.

There are only three exceptions to the Constitution’s permanent prohibition on lotteries, and none of these apply to salvage House Bill 298. Article XV, Section 6(A) permits the General Assembly to “authorize an agency of the state to conduct lotteries.” Section 6(B) permits the General Assembly to “authorize and regulate the operation of bingo to be conducted by charitable organizations for charitable purposes.” And Section 6(C) authorizes “casino gaming” at four specific locations in the state.

This last provision expands the traditional definition of “lottery” to include casino gambling. After all, the casino-gaming exception is an express carveout from Article XV, Section 6’s default prohibition on lotteries. As an exception, it would be superfluous unless the gambling activities allowed under the casino-gaming exception were not otherwise prohibited “lotteries.” And it is a time-honored canon that constitutions should not be read in a way that renders any of its terms superfluous.<sup>24</sup> By this textualist reading, the Ohio Constitution’s

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<sup>18</sup> *Id.*

<sup>19</sup> *Mills-Jennings of Ohio, Inc. v. Department of Liquor Control*, 70 Ohio St. 2d 95, 99–100 (1982).

<sup>20</sup> *State ex rel. Gabalac v. New Universal Congregation of Living Souls*, 55 Ohio App. 2d 96, 97 (9th Dist. 1977).

<sup>21</sup> *Smith*, 2020-Ohio-4441, ¶ 29.

<sup>22</sup> (Emphasis added.) H.B. 298, p. 72, 2097–2110 (proposing to amend R.C. 3771.01(F)).

<sup>23</sup> (Emphasis added.) *Id.* at p. 305, ll. 8956–8959 (proposing to amend R.C. 3770.01(E)).

<sup>24</sup> *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 120–121 (1915) (“effect should be given to every part of the instrument as amended, and in the absence of a clear reason to the contrary no portion of a written constitution

prohibition on “lotteries” captures casino gaming except for that occurring at the four locations provided for in the casino-gaming exception.

Getting into the weeds of the provision, Sections 6(A) (state-run lottery) and 6(B) (charitable bingo), are wholly inapplicable to the operation of this Bill; Section 6(C) has the best chance of saving this Bill, but it, too, fails. Article XV, Section 6(C) authorizes “casino gaming” at “four casino facilities,”<sup>25</sup> which are so surgically defined that the constitutional section listing the casino locations lists over fifty different tax parcels by number.<sup>26</sup> The expansion of casinos into Ohio was so limited that voters had to approve a second constitutional amendment just to move one of the four proposed casinos to a new set of tax parcels. Not only is “casino gaming” exclusively authorized at the four facilities, but “shall be conducted only by licensed casino operators of the four casino facilities or by licensed management companies retained by such casino operators.”<sup>27</sup> The bottom line is that the Ohio Constitution’s exceptions to the general prohibition on lotteries are well-defined and tied to the four facilities it authorizes. General internet lotteries or games of chance unconnected with those physical facilities and their operators cannot claim any sanction under Article XV, Section 6.

The Bill is also unconstitutional because it *empowers* the Ohio Casino Commission to approve “lotteries” the Constitution prohibits—House Bill 298 permits (and thus allows the Commission to approve) games whereby money is paid and the winner is determined by lot or chance. In constitutional terms, the bill unconstitutionally empowers the Commission to approve lotteries that the Constitution prohibits.

Further, by broadly empowering the Ohio Casino Commission to determine what games are legal, the Bill effectively empowers the Commission to legislate. The Ohio Constitution vests legislative power in the legislature and in the People acting by initiative or referendum, not in the executive branch. That means the Bill is likely to be construed as an unconstitutional delegation of legislative authority to the executive branch—and an expansion of the administrative state!

For 120 years, the Ohio Constitution forbade lotteries, full stop. Narrow exceptions to the strict prohibition were introduced in 1973 (permitting a state-run lottery), 1975 (permitting charitable bingo), and 2009 (permitting casino gaming at four firmly set locations). House Bill 298 purports to legalize lotteries that do not fall into any of these narrow and well-defined exceptions. This Bill then is unconstitutional, and a vote for it undermines our constitutional system and exposes the state to costly and unnecessary litigation, which it will lose before a 6–1 originalist-textualist majority of the Supreme Court of Ohio. I urge you to reject it.

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should be regarded as superfluous. The addition or change should be considered as having been made for some purpose”).

<sup>25</sup> Ohio Const., art. XV, § 6(C)(1).

<sup>26</sup> Ohio Const., art. XV, § 6(C)(9).

<sup>27</sup> Ohio Const., art. XV, § 6(C)(6).