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STATE OF MICHIGAN

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Opinion No. 7002

December 17, 1998

CAMPAIGN FINANCE ACT:

CASINOS:

CONSTITUTIONAL LAW:

ELECTIONS:

GAMBLING:

INITIATIVE AND REFERENDUM:

LEGISLATURE:

POLITICAL ACTIVITY:

Constitutionality of prohibiting political contributions by casino operators, suppliers and other persons

Vote needed for legislative amendments of an initiated law

Subsections (d)(i) and (ii) of section 7b(4) of the Michigan Gaming Control and Revenue Act do not prohibit casino and supplier licensees and other related persons from making political contributions to certain specified persons prior to the effective date of the Act and, therefore, do not violate the *ex post facto* clause of US Const, art I, § 10, cl 1, or Const 1963, art 1, § 10.

Sections 7b(4) and (5) of the Michigan Gaming Control and Revenue Act, to the extent that they prohibit political contributions by a spouse, parent, child, or spouse of a child of a licensee or of a person with an interest in a licensee or casino enterprise, restrict political expression in violation of the First Amendment of US Const, Am I, and are, therefore, unconstitutional.

Sections 7b(4) and (5) of the Michigan Gaming Control and Revenue Act, to the extent that they prohibit political contributions by licensees and other specified persons to candidates for elective office or to candidate committees, do not restrict political expression in violation of the First Amendment of US Const, Am I.

Subsections (d)(i) and (ii) of section 7b(4) of the Michigan Gaming Control and Revenue Act, to the extent that they prohibit political contributions by casino license applicants to candidates for elective office or to candidate committees for one year prior to applying for a license, do not restrict political expression in violation of the First Amendment of US Const, Am I. To the extent that subsections 7b(4)(d)(i) and (ii) retroactively prohibit political contributions by supplier licensees to candidates for elective office or to

candidate committees for one year prior to applying for a license, they do restrict political expression in violation of the First Amendment of US Const, Am I, and are, therefore, unconstitutional.

If an initiated law is adopted by the people, subsequent legislative amendments to the initiated law must be approved by three-fourths of the members elected to and serving in both houses of the Legislature. This result obtains even where the proposed amendment is a modification of a prior legislative amendment not included in the original initiated law adopted by the people.

Opinion No. 7002

December 17, 1998

Honorable Curtis Hertel
State Representative
The Capitol
Lansing Michigan

You have asked five questions regarding the Michigan Gaming Control and Revenue Act, 1996 Initiated Law, as amended by 1997 PA 69, MCL 432.201 *et seq*; MSA 18.969(201) *et seq* (Act).¹ Four of these questions relate to sections 7b(4) and (5) of the Act. Your fifth question deals with legislative amendments of an initiated law.

The Act implements and regulates casino gambling in Michigan. The title of the Act establishes its scope: An act to provide for the licensing, regulation, and control of casino gaming operations, manufacturers and distributors of gaming devices and gaming related equipment and supplies, and persons who participate in gaming; . . . *to restrict certain political contributions*; to establish a code of ethics for certain persons involved in gaming.

(Emphasis added.)

Sections 7b(4) and (5) of the Act restrict political contributions made by specified persons as follows:

(4) A licensee or person who has an interest in a licensee or casino enterprise, or the spouse, parent, child, or spouse of a child or a licensee or person who has an interest in a licensee or casino enterprise, shall not make a contribution to a candidate or a committee during the following periods:

(d) During either of the following, whichever is shorter:

(i) The period beginning on or after the effective date of this amendatory act.

(ii) The period beginning 1 year prior to applying for a license.

(5) A licensee or person who has an interest in a licensee or casino enterprise, or the spouse, parent, child, or spouse of a child or a licensee or a person who has an interest in a licensee or casino enterprise, shall not make a contribution to a candidate or committee through a legal entity that is established, directed, or controlled by any of the persons described in this subsection during the time period described in subsection (4).

Violation of section 7b is a felony punishable by ten years imprisonment and/or a \$100,000 fine and a permanent ban from licensure. Section 18(1).

Your first question asks whether subsections (d)(i) and (ii) of section 7b(4) of the Act, to the extent that they prohibit casino and supplier licensees and other related persons from making political contributions to certain specified persons for a period of one year prior to applying for a license, violate the *ex post facto* clause of US Const, art I, § 10, cl 1, or Const 1963, art 1, § 10.

US Const, art I, § 10, cl 1, expressly prohibits the states from passing "any . . . *ex post facto* law." The same prohibition is found in Const 1963, art 1, § 10. The application of these provisions was explained in *People v Slocum*, 213 Mich App 239, 243; 539 NW2d 572 (1995), as follows:

The test for determining whether a criminal law violates the Ex Post Facto Clause of our Constitution, Const 1963, art 1, § 10, involves two elements: (1) whether the law is retrospective, i.e. whether it applies to events that occurred before its enactment, and (2) whether it disadvantages the offender, *People v Davis*, 181 Mich App 354, 357; 448 NW2d 842 (1989). A statute disadvantages an offender if (1) it makes punishable that which was not, (2) it makes an act a more serious offense, (3) it increases a punishment, or (4) it allows the prosecutor to convict on less evidence. *People v Harvy*, 174 Mich App 58, 60; 435 NW2d 456 (1989), quoting *People v Moon*, 125 Mich App 773, 776; 337 NW2d 293 (1983).

Subsections (d)(i) and (ii) of section 7b(4) of the Act prohibit certain political contributions which occur during a period which is the shorter of either the period commencing with the enactment of the Act and the date the licensee applies for a license or one year before the putative licensee applies for a license. By its very terms, under no circumstances does the Act extend to behavior occurring before the effective date of the Act. Only that behavior which occurs on or after the Act's effective date is subject to criminal sanctions. Accordingly, these subsections do not violate the *ex post facto* clause.

It is my opinion, therefore, in answer to your first question, that subsections (d)(i) and (ii) of section 7b(4) of the Michigan Gaming Control and Revenue Act do not prohibit casino and supplier licensees and other related persons from making political contributions to certain specified persons prior to the effective date of the Act and, therefore, do not violate the *ex post facto* clause of US Const, art I, § 10, cl 1, or Const 1963, art 1, § 10.

Your second question asks whether sections 7b(4) and (5) of the Act, to the extent that they prohibit political contributions by a spouse, parent, child, or spouse of a child or a licensee or person with an interest in a licensee or casino enterprise, restricts political expression in violation of the First Amendment of US Const, Am I.

The First Amendment, which is made applicable to the states by the Fourteenth Amendment,² provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In *Buckley v Valeo*, 424 US 1; 96 S Ct 612; 46 L Ed 2d 659 (1976), the seminal decision on governmental authority to regulate campaign financing, the United States Supreme Court considered the constitutionality of certain provisions of the Federal Election Campaign Act of 1971.³ This federal act limited, *inter alia*, individual contributions and candidate expenditures in presidential campaigns. The Court concluded that the federal act's contribution and expenditure limitations "operate in an area of the most fundamental First Amendment activities . . . The First Amendment affords the broadest protection to such political expression." 424 US at 14. In approving the federal Act's limitations on the amount of campaign contributions, the Court cautioned that any governmental intrusion on this form of political expression must be narrowly tailored to serve a compelling state interest. 424 US at 44-45. Observing that "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined," 424 US at 26-27, the Court accepted the government's contention that a limitation on individual contributions promoted a compelling interest in protecting the elective process from the "actuality and appearance of corruption." 424 US at 26.

Cases following *Buckley* have adhered to the notion that the prevention of corruption in the political process constitutes a compelling state interest. See, e.g., *Federal Election Comm v National Conservative Political Action Committee*, 470 US 480, 496-497; 105 S Ct 1459; 84 L Ed 2d 455 (1985) "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances," and *Austin v Michigan Chamber of Commerce*, 494 US 652, 658-659; 110 S Ct 1391; 108 L Ed 2d 652 (1990).

The State of Michigan has a compelling interest in preventing corruption and the appearance of corruption in the casino-related political process. The political contribution limitations contained in section 7b of the Act further this compelling state interest. A decision of the Superior Court of New Jersey, Appellate Division, which reviewed a New Jersey statute prohibiting certain casino employees from contributing to candidates for public office, supports this conclusion. In *Soto v New Jersey*, 565 A2d 1088 (1989) *cert den*, 121 N.J. 608, 583 A2d 310; *cert den* 496 US 937, 110 S Ct 3216, 110 L Ed 2d 664 (1990), the court found that the state's imposition of a total ban on political contributions by casino officers or employees furthered a compelling state interest in preventing corruption or the appearance of corruption in the regulation and operation of casinos. The court observed that:

[C]ontributions by casino licensees, both corporate and individual, give the appearance of attempting to "buy" political influence and favoritism, and in fact, have the very real potential for causing such favoritism to occur. . . .

565 A2d 1096 citing "Report and Recommendations on Casino Gambling" New Jersey State Commission of Investigation, April 1977. After finding that "[g]ambling is an activity rife with evil . . . prepotent in its mischief in terms of the public welfare and morality" 565 A2d at 1097 [quoting *Knight v Margate*, 431 A2d 833, 842 (1981)], the *Soto* court stated:

Given the acknowledged vulnerability of the casino industry to organized crime and the compelling interest in maintaining the public trust, not only in the casino industry but also the governmental process which so closely regulates it, there is no viable alternative available to prevent the appearance of, or actual corruption of the political process in New Jersey. As noted by Justice Pollock in *Greenberg* "[a] public perception that improper influence has infiltrated the [regulatory and judicial] processes, however slightly, would undermine the trust that is essential to continued confidence in the industry and, what is more important, in state government."

565 A2d at 1098 (citations omitted).

Having concluded that the political contribution limitations imposed by sections 7b(4) and (5) of the Act furthers a compelling state interest, the analysis requires a review of these restrictions to determine whether they are sufficiently narrow in scope to serve the state's interest. In *Buckley*, the Supreme Court explained that only those regulatory provisions which employ a means closely drawn to avoid unnecessary abridgement of associational freedoms will pass constitutional muster. 424 US at 26. Moreover, the Court has ruled that "[w]hen a law burdens core political speech, we apply 'exacting scrutiny' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v Ohio Elections Comm*, 514 US 334, 347; 115 S Ct 1511; 131 L Ed 2d 426 (1995). "[A] statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression." *Gooding v Wilson*, 405 US 518, 522-523; 92 S Ct 1103; 31 L Ed 2d 408 (1972).

Therefore, the analysis of sections 7b(4) and (5) of the Act must focus on whether this ban on political contributions is sufficiently narrow in scope to prevent corruption or the appearance of corruption in the casino-related political process. Sections 7b(4) and (5) criminalize political contributions by the "spouse, parent, child, or spouse of a child or a licensee or person who has an interest in a licensee or casino enterprise." This prohibition apparently targets family contributions made on behalf of a licensee or a person having an interest in a licensee. Its provisions, however, impermissibly extend to other persons who may have no stake whatever in the casino-related political process. The "exacting level of scrutiny" enunciated by the Court in *McIntyre*, 514 US at 347, will not allow such a broad intrusion on the First Amendment political expression rights of persons who bear no relationship to this state's compelling

interest in preventing corruption or the appearance of corruption in the regulation and operation of casinos. This conclusion should not be misinterpreted to permit a family member to act as an agent of a licensee in making a prohibited political contribution or to permit a licensee to use a family member as a subterfuge in order to accomplish that which is otherwise prohibited by the Act.

It is my opinion, therefore, in answer to your second question, that sections 7b(4) and (5) of the Michigan Gaming Control and Revenue Act, to the extent that they prohibit political contributions by a spouse, parent, child, or spouse of a child or a licensee or of a person with an interest in a licensee or casino enterprise, restrict political expression in violation of the First Amendment of US Const, Am I, and are, therefore, unconstitutional.

Your third question asks whether sections 7b(4) and (5) of the Act, to the extent that they prohibit political contributions by licensees and other specified persons to candidates for elective offices or to candidate committees, restrict political expression in violation of the First Amendment of US Const, Am I.

Sections 7b(4) and (5) of the Act prohibit political contributions by licensees and others to "a candidate or committee." The Act's definition of "candidate" includes "[t]he holder of any state, legislative, or local elective office." Section 7b(1)(a)(ii). Sections 7b(4) and (5), therefore, prohibit political contributions by licensees and others to candidates and committees of candidates for elective office.

The Act's ban on contributions by licensees and other specified persons to candidates for elective office, or their committees, seeks to deter corruption or the appearance of corruption in casino matters which may come before elected public officials. As stated in the response to question two above, the State of Michigan has a compelling interest in preventing corruption or the appearance of corruption in casino-related political process. The Act's prohibition against political contributions to candidates for elective office or to candidate committees is narrowly drawn to further this compelling interest.

A similar prohibition against political contributions was upheld by the Illinois Supreme Court in *Schiller Park Colonial Inn, Inc. v Berz*, 349 NE2d 61 (1976). In *Schiller Park*, decided after *Buckley*, a group of liquor licensees challenged an Illinois law prohibiting liquor licensees and their employees from contributing directly or indirectly to a political party or a political candidate. The Illinois law applied the political contribution ban to *all candidates*, not merely those whose official duties included a relationship to liquor regulation. In rejecting the argument that the ban was unconstitutionally overbroad, the court stated:

It is difficult and probably impossible to determine precisely which officeholders will be in a position to exercise influence in the area of liquor regulation. The nature of our political system and past history suggests that political officials or public officers may wield powers or possess influence beyond the powers and influence inherent in their official duties. In attempting to prevent liquor licensees from obtaining influence in the area of liquor regulation, therefore, the legislature acted reasonably in proscribing the giving of campaign contributions by liquor licensees to any candidate.

349 NE2d at 67.

Applying *Buckley*, *supra*, the court concluded that the prohibition against political contributions did not restrict the constitutional rights of liquor licensees to a greater degree than was necessary to further the state interests involved. Similarly, the instant Act's prohibition against political contributions to candidates or committees does not restrict the rights of licensees to a greater degree than is necessary to further the state's interest in deterring corruption in the casino-related political process.

It is my opinion, therefore, in answer to your third question, that sections 7b(4) and (5) of the Michigan Gaming Control and Revenue Act, to the extent that they prohibit political contributions by licensees and other specified persons to candidates for elective office or to candidate committees, do not restrict political expression in violation of the First Amendment of US Const, Am I.

Your fourth question asks whether subsections (d)(i) and (ii) of section 7b(4) of the Act, to the extent that they prohibit political contributions by licensees and other specified persons to candidates for elective

office or to candidate committees for a period of one year *prior* to applying for a license, restrict political expression in violation of the First Amendment of US Const, Am I.

The Act's definition of "licensee" includes both casino licensees and supplier licensees. Section 7b(1)(c) and (d). The Act, however, imposes requirements on putative casino license applicants in the year prior to applying for a license which are not applicable to supplier license applicants. These differing requirements compel separate analyses of *casino* license applicants and *supplier* license applicants as they are affected by the Act's prohibition against political contributions for one year prior to applying for a license.

The Act establishes eligibility requirements for persons applying to the Michigan Gaming Control Board for a casino license. A person is eligible to apply for a casino license if: (1) the "city" where the casino is proposed has enacted an ordinance approving casino gaming; (2) if the person has entered into a certified development agreement with the "city"; and (3) the person has a history of, or a bona fide plan for, investment or community involvement in the "city" where the casino is proposed to be operated. Section 6(1). These eligibility requirements contemplate a continuing relationship between the casino license applicant and the city well in advance of application for licensure.

The provisions in subsections (d)(i) and (ii) of section 7b(4) which prohibit political contributions by putative casino license applicants during the one-year period prior to applying for a casino license are intended to deter corruption and the appearance of corruption during a city's adoption of an ordinance which approves casinos, and during the negotiations toward a casino development agreement. Applying *Buckley, supra*, the state has a compelling interest in deterring corruption and the appearance of corruption during the period of interaction between a putative casino license applicant and the representatives of the relevant city. The prohibition against political contributions by casino license applicants during the period beginning one year prior to application is sufficiently narrow to accomplish this objective.

Eligibility requirements for persons applying to the Michigan Gaming Control Board for a license to supply goods or services to a casino are established in the Act and in rules adopted by the Michigan Gaming Control Board. Board rules require that a putative supplier must have a written agreement with a casino licensee or applicant before they may apply for a supplier license. 1998 MR 6, R 432 1324(2)(n). Thus, for putative supplier license applicants, access to casino generated financial rewards comes through interaction with a casino licensee or applicant and not through a relationship with government.

After obtaining a written agreement from a casino licensee or applicant, a person may apply for a supplier license by filing an application and paying the required application fee. Section 7a(1). Unlike putative casino licensees, prospective suppliers have no obligation to interact with the city prior to licensure. Moreover, many suppliers may not contemplate applying for license until immediately prior to rendering agreed upon services or providing necessary supplies. The prohibitions in subsections d(i) and (ii) of section 7b(4) would criminalize political contributions made during the one-year period prior to a person applying for a supplier license, even though the applicant did not contemplate supplying casino goods or services when he or she made the contribution. The First Amendment does not permit such broad intrusions on political expression.

For reasons detailed in the analysis of questions two and three above, the state has a compelling interest in preventing corruption and the appearance of corruption in the casino-related political process. As they apply to supplier license applicants, the prohibitions against political contributions in the year prior to applying for licensure do not further this interest. In the absence of a statutory obligation or a commercial motivation to interact with any elected public official prior to licensure, there is little risk of political favor being extended in exchange for political contributions during the period beginning one year prior to applying for a license. As to this ban on political contributions, the rigorous standards established in *Buckley, supra*, are not satisfied.⁴

It is my opinion, therefore, in answer to your fourth question, that subsections (d)(i) and (ii) of section 7b(4) of the Michigan Gaming Control and Revenue Act, to the extent that they prohibit political contributions by casino license applicants to candidates for elective office or to candidate committees for one year prior to applying for a license, do not restrict political expression in violation of the First

Amendment of US Const, Am I. It is my further opinion that, to the extent subsections (d)(i) and (ii) of section 7b(4) prohibit political contributions by supplier licensees to candidates for elective office or to candidate committees for one year prior to applying for a license, they do restrict political expression in violation of the First Amendment of US Const, Am I, and are, therefore, unconstitutional.

As noted above, certain provisions within section 7b of the Michigan Gaming Control and Revenue Act are unconstitutional and, therefore, unenforceable. MCL 8.5; MSA 2.216, provides that acts are declared severable if the surviving provisions can be given effect. *Avis Rent-A-Car System v City of Romulus*, 400 Mich 337, 348; 254 NW2d 555 (1977). There is no language in the Act suggesting that the Legislature intended its provisions to be nonseverable. Moreover, section 7b of the Act provides for other limitations on political contributions by persons involved in the casino process which survive constitutional scrutiny and, thus, are enforceable. The provisions in the Act that are unaffected by this opinion, therefore, remain enforceable.

Your fifth question asks if an initiated law is adopted by the people, must subsequent legislative amendments to the initiated law be approved by three-fourths of the members elected to and serving in both houses of the Legislature, even where the proposed amendment is a modification of a prior legislative amendment.

Initiative and referendum are governed by Const 1963, art 2, § 9, and by the Michigan Election Law, Chapter 22, MCL 168.471 *et seq*; MSA 6.1471 *et seq*. Const 1963, art 2, § 9 provides, in pertinent part, as follows:

The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum.

No law initiated or adopted by the people shall be subject to the veto power of the governor, and no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by three-fourths of the members elected to and serving in each house of the legislature.

At the November 5, 1996, general election, the people approved an initiative proposal designated as Proposal E, the Michigan Gaming Control and Revenue Act. Thereafter, the Legislature, consistent with Const 1963, art 2 § 9, amended the initiated law by a three-fourths vote of both houses of the Legislature. The amendments, namely 1997 PA 69, were signed into law by the Governor on July 17, 1997, and became immediately effective. Among the amendments contained in 1997 PA 69 is section 7b which prohibits political contributions by licensees, their relatives, and other specified persons having an interest in a licensee. The initiated law, as adopted by the people, did not contain these restrictions on political contributions.

The impetus of the initiative power granted by Michigan's constitution was discussed by the Michigan Supreme Court in *Hamilton v Secretary of State*, 227 Mich 111, 130; 198 NW 843 (1924):

The initiative found its birth in the fact that political parties repeatedly made promises to the electorate both in and out of their platforms to favor and pass certain legislation for which there was a popular demand. As soon as election was over their promises were forgotten, and no effort was made to redeem them. These promises were made so often and then forgotten that the electorate at last through sheer desperation took matters into its own hands and constructed a constitutional procedure by which it could effect changes in the Constitution and bring about desired legislation without the aid of the Legislature. It was in this mood that the electorate gave birth to the constitutional provision under consideration.

More recently, in *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 217; 378 NW2d 377 (1985), the court referred to the initiative process as a "gun-behind-the-door to be taken up on occasions when the legislature itself does not respond to popular demands."

In *Woodland*, the court found that Const 1963, art 2, § 9, is an express limitation on the authority of the Legislature. 423 Mich at 214. The court has previously held that while voter-approved legislation may be amended by the Legislature, the power to amend is subject to express constitutional limitation. *Advisory Opinion on Constitutionality of 1982 PA 47*, 418 Mich 49, 69; 340 NW2d 817 (1983). Opinions of this office have construed the initiative provisions narrowly, subjecting legislative amendment of initiated law to the express limitations imposed by Const 1963, art 2, § 9. OAG, 1979-1980, No 5627, p 547 (January 17, 1980), concluded that:

Therefore, any law enacted by the Legislature, to amend or repeal such initiated measure must be passed by favorable vote of three-fourths of the members elected to and serving in each house of the Legislature.

These authorities compel a narrow interpretation of the Legislature's authority to amend any provision of an initiated law, regardless of whether the provision was included in the law as passed by the Legislature. Nothing in the history of Const 1963, art 2, § 9, suggests that initiated laws, once amended by a three-fourths vote of both houses of the Legislature, may thereafter be altered or amended by a simple majority of the Legislature.

It is my opinion, therefore, in answer to your fifth question, that if an initiated law is adopted by the people, subsequent legislative amendments to the initiated law must be approved by three-fourths of the members elected to and serving in both houses of the Legislature. This result obtains even where the proposed amendment is a modification of a prior legislative amendment not included in the original initiated law adopted by the people.

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¹ At the time it amended the 1996 Initiated Law, the Legislature enacted the Casino Interest Registration Act, 1997 PA 74, MCL 432.271 *et seq*; MSA 18.969(401) *et seq*, which, however, is not the subject of your request and is, therefore, not analyzed by this opinion.

² *Cantwell v Connecticut*, 310 US 296; 60 S Ct 900; 84 L Ed 1213 (1940).

³ 2 USC 431.

⁴ The Act's prohibition against political contributions by supplier licensees *after* their licensure is not the subject of your questions and is, therefore, not addressed by this opinion.
