

ORIGINAL

In the  
Supreme Court of Ohio

PICKAWAY COUNTY SKILLED GAMING LLC, et al.,	:	Case No. 2009-1559
	:	
	:	
Plaintiffs-Appellants/ Cross-Appellees,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
	:	
v.	:	
	:	Court of Appeals Case No. 08AP-1032
RICHARD CORDRAY, OHIO ATTORNEY GENERAL,	:	
	:	
Defendant-Appellee/ Cross-Appellant.	:	
	:	

**COMBINED MEMORANDUM OPPOSING JURISDICTION AS TO APPEAL  
AND SUPPORTING JURISDICTION AS TO CROSS-APPEAL  
OF DEFENDANT-APPELLEE-CROSS-APPELLANT RICHARD CORDRAY,  
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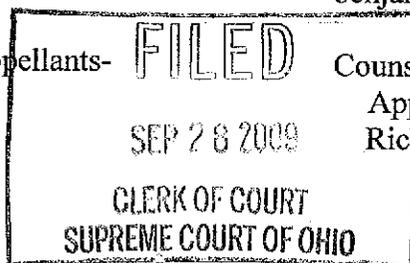
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## INTRODUCTION

The Court should review the issues raised in the Attorney General's cross-appeal in this case, but it should deny jurisdiction over the appeal filed by Plaintiffs-Appellees Pickaway County Skilled Gaming, LLC and Stephen S. Cline (together, "PCSG"). The Attorney General's cross-appeal warrants review because it implicates two critical issues: (1) the State's ability to combat unregulated gambling; and (2) the standard for assessing, in an equal protection challenge, whether the General Assembly had a "rational basis" for enacting a law. In the decision below, the appeals court held that the General Assembly had no rational basis for including a \$10 prize limit in a law that distinguishes legal "skill-based amusement machines" from illegal slot machines, and the court's reasoning and result both call for this Court's review. See *Pickaway Cty. Skilled Gaming v. Cordray* (10th Dist.), 2009-Ohio-3483 ("App. Op.," attached to PCSG Jurisdictional Mem. as Ex. 1). The court's invalidation of the prize limit cripples the fight against unregulated slot machines, and its flawed equal protection analysis threatens virtually every area of law. In sharp contrast, however, the issues raised in Plaintiffs' appeal do not warrant review, as they involve the application of settled law to this one context. Equally important, the need to review the State's issues is *not* a reason to fold in Plaintiffs' appeal; in fact, the reverse is true: adding minor issues to the case would distract from a focus on the issues that really matter.

First, the invalidation of the prize limit, standing alone, warrants the Court's review as a matter of great public interest, because that invalidation re-opens a loophole that had allowed a flood of slot machines throughout Ohio in recent years. Ohio law had long distinguished between machines or games involving "skill" versus "chance," thus allowing harmless pinball machines and video games to remain legal, while banning traditional slot machines, in which players pay money for a chance to win money. But modern technology allowed slot machines to

be disguised as “video games,” as manufacturers re-programmed the random-chance mechanics to allow a dash of purported “player skill.” Law-enforcement efforts were bogged down in litigation, because proving that a machine operated by chance versus skill under the old law was no easy task, requiring computer scientists and engineering experts, along with judges and lawyers. And a machine that crossed the line could be re-programmed in days, to stay a step ahead of the law. That is not to say that proof at trial was not possible, but the expense, along with the ease of modifying machines post-trial, meant that a new approach was needed.

The General Assembly accordingly amended the definition of “skill-based amusement machine” to refine the criteria for applying traditional skill/chance principles, and more important, it added a new element: a prize limit that forbids cash prizes and limits the value of merchandise prizes to ten dollars per play. That common-sense factor recognizes that the essence of gambling turns not just on a pure skill/chance distinction—for, after all, poker and many classic forms of gambling merge skill and chance—but that the gambling instinct is driven by the chance of a big cash payoff, as opposed to the joy of playing a game. Thus, the appeals court erred greatly in saying that this factor has no rational basis, and the court’s lack of deference to the General Assembly’s judgment warrants review.

If the decision below stands, Ohio can expect to see a new flood of slot machines, just like the massive influx of such machines that led to the emergency legislation at issue. Notably, the “skill game” claim places these machines outside any regulation. So at a time when Ohioans have been debating whether to have limited, regulated gaming—whether video lottery terminals under State control at racetracks, or casinos in select locations, and so on—this loophole allows gambling machines to be placed in bars, restaurants, stores, and everywhere, including in large

“game arcades” lined up with hundreds of machines promising big payoffs. And if such machines are treated as video games, children may play them, too. All this calls for review.

Second, the appeals court’s equal protection analysis independently warrants review, as it broke established rules and opened the door for a free-floating power to review laws for “rationality.” Beyond failing to defer properly to the General Assembly, it rewrote equal protection law in two ways. It applied equal protection to a classification between *machines*, ignoring the rule that equal protection applies only when a law classifies *people*, or even companies, in some way. And the court improperly asked whether the prize limit was related to the interest the court thought was most important—separating skill from chance—rather than the State’s valid, stated interest in addressing the broader gambling instinct by limiting prizes.

Although the Court should review the above issues, it should deny review of the three issues raised in PCSG’s separate appeal. As detailed below, none of PCSG’s three propositions warrants review, because all involve the application of well-settled law to this context, and the decision below does not affect other cases. The standards for vagueness and overbreadth, and for single-subject challenges, are well-known, and the appeals court’s application of them was straightforward. Any appeal to hearing “the whole package” is outweighed by the practical reality that a five-issue case, mixing major and minor issues, would dilute the parties’ and Court’s attention and limited resources, such as page limits and argument time. Thus, although the Attorney General would prefer a full grant over both appeals to a full denial of review, the better course is to review solely the Attorney General’s cross-appeal.

For these and other reasons below, the Court should review the Attorney General’s cross-appeal and reverse the decision below as to the \$10 prize limit, and it should deny review over PCSG’s appeal.

## STATEMENT OF THE CASE AND FACTS

**A. The \$10 prize limit at issue was adopted in response to a “skill game” loophole that had allowed a flood of unregulated slot machines to enter Ohio in recent years.**

The law at issue here was enacted in 2007, but it is best understood against the backdrop of Ohio’s older law and a 2003 enactment. In 2003, the General Assembly enacted House Bill 95, which amended the Ohio Revised Code’s definition of “slot machine” to exclude “skill-based amusement machines” from its criminal prohibitions. That concept, although first codified in those terms in 2003, was drawn from decades of case law that applied a “skill” versus “chance” distinction to separate illegal slot machines from harmless amusement machines, such as pinball machines and video games. See, e.g., *Progress Vending v. Dep’t of Liquor Control*, 1978 Ohio App. Lexis 10370. The 2003 law defined “skill-based amusement machine,” in the newly enacted R.C. 2915.01(AAA), to provide that the outcome of play on a skill-based amusement machine “is not determined largely or wholly by chance.”

That definition, combined with modern technology, proved to be less straightforward than it seemed. Determining whether a machine met the standard was not merely a legal question, but also a technical one, based on a particular machine’s programming. Unlike traditional slot machines, in which wheels spun randomly when a handle was pulled, modern video slot machines include computer chips that randomly generate outcomes. But if a machine is programmed to allow some player control to interact with the chance element, the question whether chance “largely or wholly” controlled outcomes required expert analysis by computer technicians. While proof at trial was possible, law enforcement efforts, both pre-trial and at trial, became costly and time-consuming. And even when a machine was shown to cross the line, it could easily be reprogrammed.

News articles documented the machines' growth, the legal uncertainty, and the enforcement problems. See *Dayton Daily News*, "Court allows Tic Tac Fruit machines to stay for now; Machines called gambling by law officials, who want them banned.," Nov. 11, 2006 ("St. Clair said sometimes the vendor and the business owner have the ability to program the machines to determine when the player would win and how often."); *Mansfield News Journal*, "Gambling Machine Orders not Clear to Chances Owner," August 24, 2007 (observing that parlor owner could modify machines within thirty days).

Ohio was soon flooded with gaming machines that offered cash payouts and were suspected of being illegal slot machines. Local governments asked the State for help. For instance, on August 20, 2007, the Summit County Council passed resolution No. 2007-454 urging the General Assembly to address the problem by year's end. The resolution noted that "local governments are ill-equipped to enforce/administer these machines within their jurisdictions." The council opined that the law's ambiguity and the difficulty of enforcement created an "administrative nightmare for local officials wasting valuable taxpayer resources."

**B. The Governor declared an emergency and tried to address the issue, along with the Attorney General, using then-existing statutes and executive orders.**

The Governor and Attorney General first tried to address the problem using existing statutes and new executive orders. On August 22, 2007, the Governor issued Executive Order 2007-28S, declaring that the spread of illegal gambling machines in Ohio created an emergency. The Executive Order recited the conditions giving rise to the emergency, including that the "Ohio Department of Public Safety ('ODPS'), through the Ohio Investigative Unit ('OIU') has documented an increase in the number of illegal gambling machines around the State of Ohio," Executive Order at ¶ 1, and it cited multiple harmful effects, such as associated crime, *id.* at ¶ 4, players' loss of funds, *id.*, and the manipulation of the games' programming to make the odds of

winning less than what players were led to believe, *id.* at ¶ 2. The Order found that “operators of these illegal machines have represented to consumers of these games that they are skill-based amusement machines,” but the Order found that these claims were untrue, as machines “are, in fact, dependent upon a chance event or other circumstances over which consumers have no control.” *Id.* The Order also opined that difficulties in enforcement were caused by “the imprecision of the statutory term ‘skill-based amusement machine.’” *Id.* at ¶ 3.

The Attorney General, following the Governor’s order, promulgated Ohio Adm. Code 109:4-3-31, which was based on his rulemaking authority under the Consumer Sales Practices Act, R.C. Chapter 1345. The rule declared that civil consumer protections applied, because players were consumers buying the service of playing the machines. The rule declared that falsely representing an illegal slot machine as a legal skill-based amusement machine violated the CSPA. Ohio Adm. Code 109:4-3-31(A). The rule also prohibited certain activities in connection with otherwise legal skill-based amusement machines: it prohibited awarding cash prizes and imposed a \$10-per-play limit on the wholesale value of merchandise prizes. Ohio Adm. Code 109:4-3-31(D)(1)(a)(ii)-(iv).

This rule was enjoined, however, by a common pleas court that found that the rule violated the doctrine of the separation of powers. See *Fraternal Order of Eagles Aerie 2171 Meigs, Inc. v. Ohio Dep’t of Public Safety*, Case No. 06CVH11-14726, Decision Granting Pl. Mot. for Prelim. Injunction, Sept. 21, 2007. The court enjoined the rule’s enforcement, but it agreed with the Attorney General that “confusion as to the law has led to the current state of affairs” and found that “it is in the interest of all parties, and the public in general, to have this issue addressed expeditiously.” *Id.* at 36.

**C. The General Assembly enacted the \$10 prize limit and refined the skill/chance definition to combat the ongoing emergency and to address the “skill game” loophole.**

After the administrative rule was enjoined, the General Assembly enacted Amended Substitute House Bill Number 177 to address the same emergency that the Governor and Attorney General sought to address through the administrative rule. The General Assembly declared an emergency under Section 1d of Article II of the Ohio Constitution, stating that “[t]he reason for this necessity lies in the fact that a change in the definition of ‘skill-based amusement machine’ must be made very soon to clarify the legality of the operation of these machines.” H.B. 177, § 3. The General Assembly was aware not only that the problem inhered in that definition, but also that—as the Governor’s order, local government input, and press coverage cited above indicated—the practical issues about the computer technology meant that any further refinement in defining skill and chance would not solve the problem.

Consequently, the General Assembly decided to adopt the Governor’s and Attorney General’s approach, and to address not just the skill/chance distinction but also the prize payoffs. In one provision, the Assembly prohibited the payment of cash prizes. R.C. 2915.01(AAA)(1)(a). In another, the Assembly limited the value of merchandise prizes to ten dollars per play, as measured by the wholesale purchase price. R.C. 2915.01(AAA)(1)(b)-(c).

In addition, the General Assembly refined the skill/chance distinction in this context, enacting R.C. 2915.01(AAA)(2) to provide that a machine could not be a skill-based amusement machine if it paid cash or if it met any of several indicia that showed that player skill did not control the outcome. Those indicia include (a) whether “the ability of a player to succeed at the game is impacted by the number or ratio of prior wins to prior losses of players playing the game,” (b) whether winning “is not based solely on the player achieving the object of the game” or on his score, (c) whether the outcome or prize value “can be controlled by a source other than

any player playing the game,” (d) whether “the success of any player is or may be determined by a chance event that cannot be altered by player actions,” (e) whether a player’s ability “to succeed at the game is determined by game features not visible or known to the player,” and (f) whether a player’s ability to win “is impacted by the exercise of a skill that no reasonable player could exercise.” R.C. 2915.01(AAA)(2)(a)-(f).

After the General Assembly passed the bill and the Governor signed it, the law took immediate effect as an emergency measure.

**D. The trial court upheld the law, but the appeals court reversed as to the \$10 prize cap.**

PCSG sued in the Franklin County Court of Common Pleas on October 31, 2007, alleging that H.B. 177 violated due process and equal protection, as well as the single-subject rule and the referendum rights provided in the Ohio Constitution. The named defendants were then-Attorney General Marc Dann, then-Director of the Department of Public Safety Henry Guzman, and the Sheriff and Prosecutor of Pickaway County. All but the Attorney General were dismissed.

The trial court upheld the law against all challenges. See Decision of October 16, 2008 (1) Denying Plaintiffs’ Motion to Strike filed September 8, 2008; (2) Denying Plaintiffs’ Motion for Summary Judgment filed August 5, 2008; and (3) Granting Defendants’ Motion [for Summary Judgment] filed August 28, 2008 (“Com. Pl. Op.,” attached as Ex. 1). The Decision granted summary judgment in favor of the Attorney General. Final judgment was entered on October 30, 2008. In rejecting PCSG’s equal protection challenge to R.C. 2915.01(AAA)(1)’s \$10 limit on merchandise prize values, the trial court found as follows:

[A]lthough the restriction on the kind and value of prizes from a “skill-based amusement machine” is not rationally related to whether or not a machine is “skill-based,” this restriction is rationally related in determining whether a machine is for “amusement,” in that the legislature could reasonably conclude that high-value prizes and certain kinds of prizes are more closely associated with gambling.

Com. Pl. Op. at 15.

On appeal, the Tenth District Court of Appeals affirmed the trial court in rejecting several other constitutional challenges, App. Op. at ¶¶ 26-27, 39, 62-63, 68, but it reversed the trial court on the \$10 limit, *id.* at ¶¶ 50-51. See also PCSG Jur. Mem. at 2-3 (summarizing other challenges). The Tenth District held that R.C. 2915.01(AAA)(1) violated the Equal Protection Clauses of the U.S. and Ohio Constitutions. *Id.* Unlike the trial court, however, the Tenth District did not address the issue of whether the amusement factor could be independently regulated. Instead, it focused on the skill/chance distinction, declared that to be the “essential ingredient” and thus the State interest at stake, and asked whether the \$10 limit was rationally related to implementing that distinction. *Id.* at ¶ 50. Specifically, it explained its view that “[t]he essential ingredient that differentiates merely playing a game for amusement (which can include the added amusement of a prize) and playing a game for amusement that constitutes gambling, is whether the outcome is determined in whole or in part by chance.” *Id.* The Tenth District concluded that “though the state certainly has a legitimate interest in regulating gambling, we fail to discern how the distinction between machines that reward players with prizes worth over \$10 and those that reward players with prizes worth \$10 or less is rationally related to the goal of furthering that interest.” *Id.* It struck down the limit, and it not only reversed the trial court’s grant of summary judgment to the Attorney General, but it also ordered summary judgment to be entered in PCSG’s favor on its equal protection claim. *Id.* at ¶ 69.

Upon the Attorney General’s motion, the Tenth District stayed execution of its judgment pending this appeal. The Attorney General now asks this Court to review the decision below.

**THE ATTORNEY GENERAL'S CROSS-APPEAL IS OF GREAT PUBLIC OR  
GENERAL INTEREST AND RAISES SUBSTANTIAL CONSTITUTIONAL  
QUESTIONS**

- A. The appeals court's invalidation of the \$10 prize limit warrants review, as the State's power to regulate gambling is of great public interest and raises a substantial constitutional issue.**

The invalidation of the prize limit, standing alone, warrants the Court's review, as that invalidation is the proverbial thread that, once pulled, could unravel the fabric of Ohio's laws against gambling.

First, the State's power to regulate or prohibit gambling is of great public interest, and the decision below placed a new constitutional limit on that power. Ohio's approach to legal and illegal gambling has long been an important issue for our citizens, and the debate has intensified in recent years, and even in recent months, as shown by ballot issues, legislative and executive policy changes, and even this Court's docket. See, e.g., *State ex rel. Scioto Downs, Inc. v. Brunner*, Case No. 2009-1294. Ohioans' opinions vary widely on what the law should be, from those who oppose even the existing lottery to those who want full-fledged casinos around the State. But whatever the law should be, most or all Ohioans agree that (1) Ohio's policy should be shaped deliberately by lawmakers and citizens, and our legal landscape should not be dramatically altered by litigation-created loopholes, and (2) Ohio's laws should be enforced.

The decision below upsets both principles. The decision not only dramatically changes Ohio's gambling laws, but it apparently prevents the General Assembly from addressing *any* gambling issues by regulating prizes or payoffs, because the court announced—as a constitutional limit—that the Assembly could only monitor the line between skill and chance, and that the Assembly has no “rational basis” for addressing prizes as well. App. Op. at ¶ 50. That is, the Assembly cannot just amend the statute, as it does when a court decision exposes a statutory loophole; the decision below ties the Assembly's hands. And in addition to rewriting

the rules about what is legal or not, the decision impedes enforcement even as against machines that are plainly illegal. That problem arises because, as noted above, the skill/chance distinction is hard to apply, so by eliminating the use of the prize element as another way to police machines, enforcement against illegal machines will be impeded.

Second, the public interest is implicated because the invalidation of the prize limit will not only halt enforcement against existing machines, but it will lead to a new flood of such machines, because an ongoing surge was finally slowed when the General Assembly enacted the prize limit. With the loophole re-opened, that influx will resume, because, again, the appeals court seems to have taken the issue of prize amounts off the table. Worse yet, although the decision appears to target only the \$10 limit on merchandise prizes, thus allowing prizes of unlimited value, the ruling also casts a cloud over the law forbidding outright cash prizes, for two reasons. First, the court's language alternates between describing the \$10 limit, which is contained in R.C. 2915.01(AAA)(1) (a)-(c), *id.* at ¶¶ 45, 50, and referring more broadly to R.C. 2915.01(AAA)(1) in its conclusion, *id.* at ¶ 69, which would encompass the ban on cash prizes. Second, even if that overbroad wording carries no such effect, the court's *reasoning* threatens the ban on cash payouts in the next case. After all, if the General Assembly truly has no rational basis to address the value of a merchandise prize, but can only police the line between skill and chance, that logic suggests that prizes cannot be limited in type, not just in value.

Finally, while the above reasons show the need for review, which is all that matters at this stage, the Attorney General notes that this decision is profoundly wrong on the merits. Whatever the best policy should be, no one has a constitutional right to play games for unlimited prizes. The law is valid, and the decision below is wrong.

**B. The appeals court's equal protection analysis independently warrants review, because the court's entire framework violates established principles and opens the door to unlimited judicial review of legislative policy decisions.**

In addition to upending a critical gambling law, the appeals court also erred in its basic approach to equal protection analysis, and the nature of the errors is so broad that review is needed. These structural errors go beyond the failure to grant proper deference in applying the rational basis test to this provision. Rather, the court erred in even applying equal protection doctrine to begin with, and it compounded that error by improperly framing the rational-basis question. Those errors warrant review because they affect virtually every area of law.

First, equal protection principles do not even apply here, because that clause governs only classifications among *persons*, including corporations as persons, but it does not extend to classifications of *machines*. See *Burnett v. Motorists Mut. Ins. Cos.* (2008), 118 Ohio St. 3d 493, 2008-Ohio-2751, ¶¶ 30-42. *Burnett* is precisely on point. *Burnett* involved a claim that an insurance-coverage statute impermissibly distinguished between “insureds injured by a tortfeasor driving a vehicle owned by, furnished to, or available for the regular use of a named insured (or his or her family members) and insureds injured by a tortfeasor driving a different vehicle.” *Id.* at ¶ 36. This Court explained that this statute did not classify insureds or tortfeasors as people, but classified different *vehicles*: “It is [the] tortfeasor’s vehicle, not his identity, that determines whether [the provision] applies.” *Id.* Consequently, equal protection analysis did not even apply, because “the preliminary step in conducting an equal protection analysis regarding a particular statute is to examine the classifications created by the statute in question,” and “where there is no classification, there is no discrimination which would offend the Equal Protection Clauses.” *Id.* at ¶ 31. And a plaintiff must identify the relevant classification: where a party “has failed to identify the appropriate class, we need not construct one for her in order to proceed with the analysis,” and “an equal protection analysis is not required.” *Id.* at ¶ 37. Here, as in *Burnett*,

Plaintiff PCSG failed to identify any classification of people, and the appeals court leaped over that “preliminary step,” analyzing the classification of *machines*, App. Op. at ¶ 45, which are no more worthy of equal protection than vehicles were in *Burnett*.

Second, after making the mistake of applying equal protection analysis in the absence of a qualifying classification, the court compounded its error by assessing the rational basis of the \$10 prize limit against *its* favored purpose—namely, the distinction between skill and chance in the operation of machines—rather than the State’s valid, stated interest in addressing the *amusement* component of “skill-based amusement machines.” See App. Op. at ¶¶ 46, 50. In rational basis analysis, this choice of interest, as a baseline, is critical. The court is not supposed to assess whether the stated interest is “important enough,” as it does when it asks if an interest is a “compelling” one under strict scrutiny. Rather, the State names a valid interest, and the court asks whether the law it issue is rationally related to *that interest*; challengers “have the burden to negative every conceivable basis which might support” a challenged law. *FCC v. Beach Commc’ns* (1993), 508 U.S. 307, 315; see also *Vance v. Bradley* (1979), 440 U.S. 93, 97 (requiring consideration of “any combination of legitimate purposes”).

The sole limit, under rational basis review, arises if an interest is not even “legitimate.” See *U.S. Dep’t of Agriculture v. Moreno* (1973), 413 U.S. 528, 534 (rejecting as illegitimate a stated purpose “to prevent so-called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program”). Here, the appeals court never expressly said that a State interest in prize value was illegitimate, but if it implicitly said so, such a finding would be wrong. The court’s reasoning seems to say that the skill/chance line is a better match, not that the interest in prize value is invalid, as it called the skill/chance line the “essential ingredient” in distinguishing slot machines from skill-based amusement machines. App. Op. at ¶ 50. That has profound effects,

for, as happened here, a court can easily find a violation if it moves the goalposts to a different interest, as of course there could be a mismatch between a law and some other interest.

Both of the above errors require review not just because of the magnitude of the errors, but because their very nature means that they can affect any challenged law, and in a way that expands judicial power almost without limit. If a court can subject any law to “rational basis” test without a predicate classification, and if it can also re-define the interest at stake rather than measure a law against its stated purpose, then the once-deferential rational basis test would render any law vulnerable to policy-based second guessing.

Finally, the appeals court ended its opinion with one last mistake that creates bad precedent for a wide swath of cases. After reversing the grant of summary judgment in the State’s favor, the court did not remand the case for trial on the equal protection claim, but it instead ordered summary judgment for PCSG. But that full reversal is rarely, if ever, warranted in rational basis cases. Summary judgment for a government defendant makes sense, because often the government’s interest is so plain, as a matter of law, that no facts at trial can change that. But even where that standard is not met as a matter of law, the State deserves a chance to show its interest, and the rational basis for a law, by putting on evidence. The appeals court did not find, nor could it, that the State could prove no facts justifying the law, so it erred in precluding that.

For all these reasons, the Court should accept jurisdiction over the Attorney General’s cross-appeal and resolve these issues. But, as detailed below, it should deny PCSG’s appeal.

**PCSG’S APPEAL IS NOT OF GREAT PUBLIC OR GENERAL INTEREST AND DOES NOT RAISE ANY SUBSTANTIAL CONSTITUTIONAL QUESTION**

Although the Court should review the Attorney General’s cross-appeal, it should deny review over PCSG’s appeal. None of PCSG’s issues would warrant review on its own—that is, if the Attorney General’s cross-appeal were not present—because PCSG’s issues involve the

application of settled law to this one context. Further, if PCSG's issues do not independently warrant review, the Court should not grant them merely because they are present in the same case as issues that do require review. In fact, the reverse is true: the case will proceed best if the Court limits its review to the important issues and rejects the minor ones.

**A. PCSG's first vagueness claim, which is based solely on claims about seizing machines and not about convictions at trial, does not warrant review.**

PCSG's first argues that the refined skill/chance provisions of R.C. 2915.01(AAA)(2) are vague because they purportedly allow law enforcement too much discretion in seizing machines, and PCSG says that a defendant's later acquittal at trial is not enough to prevent a vagueness problem. PCSG's novel theory of vagueness does not warrant review.

As an initial matter, it is important to note the precise nature of this claim, not to resolve it fully on the merits, but to assess the need—or lack of need—for review. PCSG says the law is vague because law enforcement officers cannot assess a machine's legality from the outside—that is, without opening it up and testing the software—and PCSG says that fact will inevitably lead to arbitrary enforcement. PCSG Jur. Mem. at 2, 6-8. Notably, PCSG does not dispute the appeals court's holding that the law's standards are precise enough to apply at trial. See *id.*; see App. Op. at ¶¶ 60-62. Nor does PCSG challenge the court's holding that the law precisely informs machine operators what the law requires, so that they may conform their conduct and avoid violating the law. See PCSG Jur. Mem. at 2, 6-8; App. Op. at ¶ 62. Instead, PCSG bases its entire claim on the theory of arbitrary and improper seizure, that is, that police will seize machines arbitrarily, based on the inability to assess a machine from the outside.

This theory not only dooms PCSG's claims on the merits, as explained in the Argument section below, but it also shows why the issue does not warrant review, as PCSG cites no cases recognizing such a theory of vagueness, let alone applying it. The settled test for vagueness

challenges asks *first* whether a law “provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence,” and *second* whether it is “specific enough to prevent official arbitrariness or discrimination in its enforcement.” App. Op. at ¶ 55 (citing *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, ¶ 84); *Akron v. Rowland*, 67 Ohio St. 3d 374, 387, 1993-Ohio-222; *Grayned v. Rockford* (1972), 408 U.S. 104, 108-09. Not only is the first prong essential, but also, in applying the second, courts have always considered the problem of arbitrary enforcement by examining both arrest and conviction *together*. That is, a vague law improperly empowers the police because those they arrest could be convicted, so that their discretionary power to arrest translates into discretion over who is convicted; and further, the lack of instruction to a citizen makes compliance impossible. PCSG cites no cases in which any court has invalidated a law on vagueness grounds based solely on the possibility of mistaken arrest. Thus, review is not warranted, because the law in this area is well-settled, and PCSG has not shown how its novel theory, even if allowed in the abstract, affects much.

The “improper seizure” theory suffers other flaws as well, which make this case a poor vehicle to consider an expansion of vagueness law. First, PCSG’s concern with front-end seizure, divorced from any concern about back-end conviction, might carry more weight if the concern were *arrest* of people, not seizure of property. To be sure, the right to property generally is an important right, but if the property at issue is contraband, whether drugs or gambling devices and so on, no such rights attach. Moreover, the issue here is not a permanent taking, but a temporary seizure, so it does not implicate property-rights cases such as *Horney*, 110 Ohio St. 3d 353, or property rights generally. Second, PCSG chose to bring a facial challenge, not an as-applied one, and it did so in an area that does not trigger the broader protections of the First Amendment, so it must show that *all* applications of the law are invalid.

See App. Op. at ¶¶ 52, 62. That, too, makes this a poor vehicle for even considering expanding the protections of vagueness law.

Finally, the Attorney General stresses that the problems in enforcing the line between skill and chance under the old law—thus showing the need for the \$10 prize limit as an independent law—are distinct from the issues that PCSG raises in this proposition. In its proposition, PCSG argues that difficulties in *initially* assessing a machine’s reliance on skill or chance are enough to render the law vague and unconstitutional, even if those issues can be resolved at trial. And PCSG says that such difficulties render such an assessment *impossible* initially, not merely difficult. By contrast, the Attorney General’s concern about the skill-versus-chance assessment is not that it is impossible—indeed, it *could* be done at trial, albeit at great expense—and further, the Attorney General’s concern does not relate to any legal issues with the actual skill-versus-chance provisions. Rather, the distinct concern was, and still is, that such assessments are burdensome (not impossible), and that such a burden provides a rational basis for enacting the separate prize limit, thus addressing a different element of the gambling problem and bypassing the need to resolve the skill-versus-chance issue in many cases. This distinction means that there is no actual linkage between the Attorney General’s cross-appeal and PCSG’s appeal on this proposition, despite any superficial similarity in the references to the skill-versus-chance issues.

**B. PCSG’s second vagueness claim, which is based on its mistaken theory that the prize-resale provisions impose strict liability, does not warrant review.**

PCSG’s second vagueness claim also does not warrant review. In its second proposition, PCSG attacks neither the laws governing what types of machines are illegal, nor the prize limit itself. Rather, it attacks a provision in R.C. 2915.06 that bars someone from evading the prize limit by “buying” an allowable prize—i.e., merchandise worth less than \$10—by giving the prize-winner, in exchange for the prize, any of the items disallowed as prizes by R.C.

2915.01(BBB)—i.e., cash or near-cash-equivalents such as gift cards, or commodities such as tobacco. This provision is a common-sense prophylactic that is needed to enforce the initial prize limit. Otherwise, an unscrupulous operator could evade the prize limits by having his machines dispense some token prize, and the operator could direct winners, with a wink and nod, to a partner set up at an adjoining counter or building who “buys” the token prizes for large cash amounts. While the provision’s sensible origin is notable, what is more important is that PCSG’s appeal on this issue does not warrant review. Unlike the issue above, in which PCSG asks the Court to extend the law to a novel theory, PCSG asks the Court here to reverse course on well-settled law.

PCSG’s theory proceeds in two steps, and the two-step nature is a fatal flaw for PCSG. First, it claims that the restriction on resale is a strict liability law, rather than a law that uses Ohio’s default mens rea of recklessness. PCSG Jur. Mem. at 9-11. Second, PCSG argues that such a strict liability standard renders the statute unconstitutional. It is vague, says PCSG, because a later reseller, such as someone who buys such a prize at a yard sale, has no way of knowing whether an item was once a game prize, so he could unwittingly break the law if he resold the item later at his own yard sale. *Id.* at 12. And it is overbroad, PCSG says, because it restricts citizens’ fundamental right to dispose of their property as they wish. *Id.* at 11.

First, PCSG’s theory does no warrant review because, as matter of statutory interpretation and strict liability, it asks the Court to go far beyond its settled approach, without justification. The Court has always held that the recklessness default applies unless the statute “plainly indicates a purpose to impose strict criminal liability,” R.C. 2901.21(B) (emphasis added); *State v. Fairbanks*, 117 Ohio St. 3d 543, 2008-Ohio-1470, ¶ 13. PCSG says that such “plain indication” is shown here because the law was adopted as an emergency and because the law

involves gambling, which is “mala prohibita” or harmful to the public. The Court’s strict liability inquiry has never considered a statute’s “emergency” enactment, and rightly so, as emergency status concerns only the need for immediacy, not an offender’s mental state. Nor has the Court ever endorsed global strict liability for all offenses in an area of law that includes some strict liability provisions, such as gambling or drugs; it has only considered that factor along with other statutory indications. See, e.g., *State v. Wac* (1981), 68 Ohio St. 2d 84, 86-87; *State v. Lozier*, 101 Ohio St. 3d 161, 2004-Ohio-732, ¶ 39. And the provision PCSG attacks is not directly an anti-gambling law; rather, it indirectly reinforces anti-gambling laws, so there is no need to impose strict liability on anyone involved in transactions far removed from any gambling. And without a plausible statutory argument, PCSG cannot reach constitutional issues.

Second, PCSG’s argument cannot possibly prevail, and thus is not worth review, because PCSG asks the Court to adopt a statutory construction that renders a law unconstitutional—despite the well-settled rule that “courts have a duty to liberally construe statutes in order to save them from constitutional infirmities.” *Eppley v. Tri-Valley Local Sch. Dist. Bd. of Educ.*, 122 Ohio St. 3d 56, 2009-Ohio-1970, ¶ 12. Because the Court is “obligated to indulge every reasonable interpretation” to save a statute, *State v. Stambaugh* (1987), 34 Ohio St. 3d 34, 36, PCSG would have to show not just that its reading is the “better” one; it would have to show that rejecting strict liability is unreasonable. And here, the duty to preserve statutes intersects with the strict liability inquiry in a way that makes PCSG’s argument collapse, because both are forms of ascertaining and implementing legislative intent. The “plain indication” rule asks whether the General Assembly intended strict liability; the “saving construction” canon presumes that the Assembly intended laws to be constitutional. R.C. 1.47(A). But PCSG asks the Court to

conclude that the General Assembly *intended* a standard that renders (in PCSG’s view) the statute unconstitutional, and thus applicable to no one, even those who are reckless.

Finally, and equally important, the appeals court’s holding in favor of a recklessness requirement—even if arguably wrong, though it is not—insulates any innocent resellers from prosecution, so all of PCSG’s complaints about the poor yard sale buyers ring hollow. That is, PCSG claims that a great public interest is demonstrated by the number of people whose rights could be affected, PCSG Jur. Mem. at 3, but the undeniable fact is that those innocent resellers would *not* be affected unless strict liability were imposed. Indeed, granting review could conceivably harm such people: If the Court somehow adopted strict liability, but held that such liability is not unconstitutional, they would face liability. While that outcome is admittedly unlikely, it is at least possible, while by contrast, granting review could not in any scenario help those non-reckless sellers, as they are now perfectly safe. The law only “threatens” those who are reckless, such as those who would exchange cash for prizes as a way to evade the prize limit.

In sum, review is not warranted on this issue.

**C. PCSG’s single-subject claim does not warrant review.**

PCSG’s third and final proposition of law says that the bill adopting these changes violated the single-subject rule, and that issue does not warrant review either. The standard for resolving single-subject challenges is well-settled, and nothing about the application in this case raises any issues needing review. The appeals court’s application here was both straightforward and correct, as this bill came nowhere near reaching the “disunity” that is required to trigger a violation of the single-subject requirement. See App. Op. at ¶¶ 23-26; *State ex rel. Ohio Civil Serv. Employees Ass’n. v. SERB*, 104 Ohio St. 3d 122, 2004-Ohio-6363, ¶ 28.

**D. Although the best course is to review only the Attorney General's cross-appeal, a partial or full grant of both parties' appeals is better than a full denial of review.**

For all of the reasons above, the Attorney General urges the Court to grant review over only his cross-appeal, and to deny review over PCSG's appealed issues. Again, allowing the whole case to proceed would not give the Court, the parties, or citizens any benefit, because, as explained above, PCSG's issues do not warrant review on their own. To the contrary, including the lesser issues in the case—if the Court grants review over the Attorney General's cross-appeal, as it should—would only dilute the parties' and the Court's available page limits and argument time, taking away from the critical equal protection issue and the \$10 prize limit.

Nevertheless, the Attorney General urges that if the Court disagrees with our primary recommendation, and views the case as all or nothing, it would be better to review the entire case rather than deny both sides' appeals. Further, the Attorney General notes that PCSG's second and third propositions are especially unworthy of review, so even if the Court grants PCSG's appeal, it should accept only PCSG's proposition one.

## ARGUMENT

Because the merits of the issues raised by the Attorney General's cross-appeal, and by PCSG's appeal, are largely set out above in explaining the need to review our some issues and not others, the arguments below summarize briefly the five potential Propositions of Law.

### **Cross-Appellant Attorney General's Proposition of Law No. 1:**

*Equal protection analysis applies only when a plaintiff identifies a classification among persons, natural or corporate. Further, in asking whether a distinction "is rationally related to some legitimate state interest," the court must consider all legitimate interests, including any that the government identifies.*

As explained above in Part B of the reasons to grant review of the Attorney General's cross-appeal, the court below erred in several ways in how it approached its equal protection analysis, in addition to its ultimate error in finding no rational basis for the \$10 prize limit. First, the court erred in applying equal protection analysis to a classification among different machines, without identifying—or requiring PCSG to identify—a classification among persons, natural or corporate. The appeals court referred only to “the General Assembly’s distinction between skill-based amusement machines that award prizes worth more than \$ 10 and identical machines that award prizes worth \$ 10 or less,” App. Op. at ¶ 45, without identifying any persons. Just as a classification among vehicles was not enough in *Burnett*, 2008-Ohio-2751, ¶¶ 30-42, so, too, the machine comparison here fails to trigger any equal protection claim at all. Such a classification is a “preliminary step,” and “where there is no classification, there is no discrimination which would offend the Equal Protection Clauses.” *Id.* at ¶ 31.

Second, the court erred in defining the State's interest as rooted only in the skill versus chance distinction, rather than the State's proffered interest in addressing the prize element independently. The court said that the “essential ingredient that differentiates merely playing a game for amusement (which can include the added amusement of a prize) and playing a game for

amusement that constitutes gambling, is whether the outcome is determined in whole or in part by chance.” App. Op. at ¶ 50. The court acknowledged that the State urged consideration of the link between prize value and the amusement element, *id.* at ¶ 45, but when it applied the test, it looked only to the skill/chance issue, *id.* at ¶ 50. It is not surprising that the court found no rational link between prize value and whether a machine is skill-based, *id.*, but the problem was its choice to consider only that interest as the baseline. The General Assembly decides what ingredients are essential, and what interests to pursue, as long as they are valid.

The court also erred in finding no rational basis for the prize limit, as discussed below, and it also erred in granting PCSG summary judgment, beyond reversing summary judgment for the Attorney General.

**Cross-Appellant Attorney General’s Proposition of Law No. 2:**

*The limit on the value of merchandise prizes in R.C. 2915.01(AAA)(1) does not violate the equal protection clauses of the U.S. and Ohio Constitutions.*

The court below erred in finding that no rational basis could support the General Assembly’s decision to limit the value of prizes that can be awarded for a skill-based amusement machine. Both the Ohio and U.S. Constitutions guarantee equal protection under the law, and the analysis under each provision is the same. *State v. Thompson*, 95 Ohio St. 3d 264, 2002-Ohio-2124, ¶ 11; *Eppley v. Tri-Valley Local Sch. Dist. Bd. of Educ.*, 122 Ohio St. 3d 56, 2009-Ohio-1970, ¶ 11. PCSG conceded below that no suspect class or fundamental right is at issue in its equal protection claim, so a rational basis test applies. *Id.* at ¶ 14. Under rational basis review, “a statutory distinction does not violate the Equal Protection Clause ‘if any state of facts reasonably may be conceived to justify it.’” *Sullivan v. Stroop* (1990), 496 U.S. 478, 485 (quoting *Bowen v. Gilliard* (1987), 483 U.S. 587, 601). The State’s interest in controlling and regulating of gambling is undisputed. *Ah Sin v. Wittman* (1905), 198 U.S. 500, 505-506; *Joseph*

*Bros. Co. v. Brown* (1979), 65 Ohio App. 2d 43. Therefore, if the \$10 prize limit of R.C. 2915.01(AAA)(1) bears any rational relation to that authority, it must be upheld.

The prize limit bears a rational relationship to the regulation of gambling because, while chance is a factor in the issue of gambling, it is the lure of large prizes that makes gambling attractive to many—if not all—of the consumers who play the games. The Equal Protection Clause “does not demand for the purpose of rational-basis review that a legislature or governing decision maker actually articulate at any time the purpose or rationale supporting its classification.” *Nordlinger v. Hahn* (1992), 505 U.S. 1, 15. Here, both the legislative and executive branches have concluded that, as the trial court observed, “high-value prizes and certain kinds of prizes are more closely associated with gambling, while the permitted, low-value prizes are less likely to be connected with gambling and are consistent with playing for amusement.” Com. Pl. Op. at 15.

The Tenth District’s focus on the element of chance as the “essential ingredient that differentiates” amusement and gambling, to the exclusion of the prize value as equally valid ingredient, was mistaken. Not only does the term “skill-based amusement machines” include both concepts equally, but further, the importance of the prize element is rooted in the baseline definition of “scheme of chance,” R.C. 2915.01(C), from which the slot machine and skill-based amusement machines flow. A scheme of chance includes slot machines and any “other scheme in which a participant gives a valuable consideration for a chance to win a prize.” See also *Fisher v. Neusser* (1996), 74 Ohio St. 3d 506, 510 (“The essential elements of a lottery are prize, chance and consideration.”). Accordingly, the State is permitted to regulate the value of prizes awarded for skill-based amusement machines, and the Tenth District erred in holding otherwise.

**Appellee Attorney General's Proposition of Law No. 3 (response to PCSG Proposition 1):**

*R.C. 2915.01(AAA)(2), which defines certain machines as illegal slot machines if they meet any of several criteria indicating that chance, not a player's skill, determines the outcome, is not void for vagueness.*

As summarized above, in explaining why this issue does not warrant review, a law is void for vagueness, thus violating due process, if it fails to “provide[] sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence,” and if it fails to be “specific enough to prevent official arbitrariness or discrimination in its enforcement.” App. Op. at ¶ 55 (citing *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, ¶ 84); *Akron v. Rowland*, 67 Ohio St. 3d 374, 387, 1993-Ohio-222; *Grayned v. Rockford* (1972), 408 U.S. 104, 108-09. Here, PCSG does not challenge the first prong at all, regarding guidance to a person of ordinary intelligence. And as to the second prong, it does not argue that arbitrary enforcement extends through the full enforcement result of conviction; rather, it argues only that the law leads to a purportedly arbitrary seizure of property, and it says that alone is enough to render the law void for vagueness. PCSG's claim fails on several levels.

First, PCSG cites no case, and the Attorney General is aware of none, in which a court invalidated a law on vagueness grounds based solely on a theory of arbitrary property seizure, or even of arbitrary arrest, when there is no dispute about the law's precision for purposes of conviction and no dispute about the law's clarity in telling citizens how to comply.

Second, although PCSG does not raise those other elements in its Jurisdictional Memorandum, any belated attempt to revive such claims would be unavailing. The law provides, as the appeals court found, precise guidance to machine operators as to what types of machines are legal or illegal. The software in such machines can easily be programmed to prevent the features that would render the machines illegal slot machines. In addition, the machine operators or vendors are the only relevant group to consider for this inquiry, not those

playing the game, as only they are the ones who must adjust the machines to conform their conduct to the law.<sup>1</sup> In addition, PCSG could not successfully revive any claim that the law is imprecise as to what is need to convict at trial, for, as the appeals court explained, the provisions of R.C. 29015.01(AAA)(2) are precise.

Third, even PCSG's claims about arbitrary seizures of property are mistaken. Given the need to prove any charges at trial, and the expense of trying and failing, law enforcement will not be able to "arbitrarily" pursue those it does not like. At worst, law enforcement could make good-faith mistakes in seizing machines, but that does not raise the arbitrary enforcement concerns that animated *Rowland* and other cases, which are rooted in the danger of discriminatory enforcement against people, especially when based on race. See *Rowland*, 67 Ohio St. 3d at 384 ("As much as we would like it to be otherwise, we must acknowledge that without definite statutory language, criminal laws are susceptible to arbitrary enforcement, most often to the detriment of racial and ethnic minorities"); *Kolender v. Lawson* (1983), 461 U.S. 352, 361 (noting concern over "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure"). And other remedies are available against such wrongful seizures, whether in Section 1983 actions, or cases seeking declaratory relief as to specific machines with injunctions against seizure. Indeed, the latter

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<sup>1</sup> To be sure, the appeals court rejected the Attorney General's argument that the statute imposes criminal liability only upon operators and vendors, not upon individual players. App. Op. at ¶ 58. But even if the appeals court was right on that score, the criminal prohibition against "facilitating" illegal schemes of chance of games of chance, R.C. 2915.02(A)(2), applies only to those who do so "knowingly," so a player who does not know he is playing an illegal machine is ultimately unaffected, even if he is "covered" by the statute in the abstract. In addition, the appeals court was wrong, because "facilitating" gambling cannot include merely playing the games or schemes, as that reading would render superfluous R.C. 2915.02(A)(4), which prohibits "[e]ngag[ing] in betting or in playing any scheme or game of chance as a substantial source of income or livelihood." It makes no sense to prohibit playing "as a substantial source of income" if even one act of playing could constitute "facilitating."

relief has been common in the area of skill-based amusement machines. See *Fraternal Order of Eagles Aerie 2171 Meigs, Inc. v. Ohio Dep't of Public Safety*, Case No. 06CVH11-14726, Temporary Restraining Order, Nov. 6, 2006 (restraining seizure of certain machines).

Consequently, PCSG's vagueness attack on R.C. 2915.01(AAA)(2) fails.

**Appellee Attorney General's Proposition of Law No. 4 (response to PCSG Proposition 2):**

*The limits on buying prizes with cash or other items, provided for by R.C. 2915.01(BBB) in conjunction with R.C. 2915.06, do not impose strict liability and are not unconstitutionally vague or overbroad.*

The prize-exchange law prevents easy evasion of the ten-dollar prize limit. It ensures that a prize winner may not immediately exchange an allowable merchandise prize for any of the items that could not themselves be awarded as prizes, such as cash, near-cash-equivalents like gift cards, tobacco, and so on. R.C. 2591.01(BBB); R.C. 2915.06. Formally, the ban does not fall on the prize-winner; instead, it prevents any other person from giving the prohibited items in exchange for the prize. PCSG's attack on this provision has two steps: First, it argues that the statute should be read to impose strict liability on all buyers down a chain of resale, and second, it argues that imposing such liability is unconstitutional. This argument fails on several levels.

First, as explained above, PCSG's argument for imposing strict liability fails on its own terms. The Court's precedents, along with R.C. 2901.21(B)'s express mandate, apply the default mens rea of recklessness unless the statute "plainly indicates a purpose to impose strict criminal liability," R.C. (emphasis added); *State v. Fairbanks*, 117 Ohio St. 3d 543, 2008-Ohio-1470, ¶ 13. No plain indication exists here; neither of PCSG's purported indicators is enough. The law's enactment as an emergency measure shows only that the General Assembly wanted the law to be effective immediately; that does not mean that it wanted to work a certain way once enacted.

Nor is strict liability "plainly indicated" merely because the statute relates to gambling. The General Assembly has never indicated that all gambling laws automatically impose strict

liability unless otherwise stated, and the Court has never found such “per se” liability for an entire field. Instead, it has always looked to the statutes at issue for plain indications, with the nature of the crime as just one factor. See, e.g., *State v. Wac* (1981), 68 Ohio St. 2d 84, 86-87; *State v. Lozier*, 101 Ohio St. 3d 161, 2004-Ohio-732, ¶ 39. The prize-exchange restriction is an especially poor candidate for strict liability, as it is not itself an anti-gambling law, but exists to reinforce anti-gambling laws in one specific way. Thus, its operation makes more sense with a recklessness standard. Someone buying a prize innocently, without any recklessness, is of course not “gambling” or facilitating it. If the game was played long ago, the terms of a sale between a seller and buyer far removed from the gaming simply do not implicate the law or its purpose. The law’s purpose is met if it prevents those at the game, or near enough to be reckless, from trading prizes for money as a way to evade the prize limit.

Second, even if PCSG could otherwise show that its statutory argument for imposing strict liability is viable, it would still fail because it asks the Court to choose the statutory interpretation that renders the statute *unconstitutional*, in plain violation of the well-settled duty to avoid constitutional problems by reading statutes to save them, not invalidate them. *Eppley*, 122 Ohio St. 3d 56, 2009-Ohio-1970, ¶ 12; *Stambaugh*, 34 Ohio St. 3d at 36; *State v. Dorso* (1983), 4 Ohio St. 3d 60, 61 (noting that rule applies specifically to vagueness challenges). Thus, PCSG would have to show that the relying on the default recklessness standard is unreasonable, and that the strict-liability reading is the only reasonable construction. In short, PCSG asks the Court to conclude that the General Assembly “plainly indicated” its intent to adopt a standard that PCSG says is unconstitutional, so that the Assembly’s intent leaves no law in place to apply to anyone, as opposed to applying to those who are reckless.

PCSG offers no way around this barrier. Even under its theory, the Court would have to first adopt its statutory argument that this provision imposes strict liability, and only then could the Court reach—let alone adopt—PCSG’s constitutional arguments. In other words, PCSG offers no argument at all for finding the resale restrictions unconstitutional without relying on the premise that strict liability applies. Because that alone dooms its claim, it is not necessary to elaborate on the flaws in the constitutional arguments themselves, but those, too, are flawed.

Consequently, PCSG’s attack on the prize-exchange provision fails.

**Appellee Attorney General’s Proposition of Law No. 5 (response to PCSG Proposition 3):**

*The adoption of H.B. 177, which includes the statutory provisions at issue, did not violate the single-subject clause of Ohio’s Constitution.*

Finally, the adoption of H.B. 177 did not violate the single-subject clause, which provides that “[n]o bill shall contain more than one subject, which shall be clearly expressed in its title.” The “one-subject provision is not directed at plurality but at disunity in subject matter.” *State ex rel. Ohio Civil Serv. Employees Ass’n v. SERB*, 104 Ohio St. 3d 122, 2004-Ohio-6363, ¶ 28 (citing *Dix*, 11 Ohio St. 3d at 146); see also *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections* (1991), 62 Ohio St. 3d 145, 148. Only a “manifestly gross and fraudulent violation” of the single-subject clause renders a bill unconstitutional. *In re Nowak*, 104 Ohio St. 3d 466, 2004-Ohio-6777, ¶ 54; *State ex rel. Ohio AFL-CIO v. Voinovich* (1994), 69 Ohio St.3d 225, 229; *Dix*, 11 Ohio St. 3d at 145. A manifestly gross and fraudulent violation exists where there is such a “blatant disunity between” the challenged provision and its enacting bill that no rational reason exists for their combination. *Simmons-Harris v. Goff* (1999), 86 Ohio St. 3d 1, 16. In sum, “[t]he mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics.” *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d at 229 (quoting *Hoover v. Board of County Comm’rs* (1985), 19 Ohio St. 3d 1, 6).

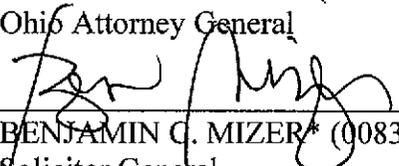
Here, H.B. 177 does not violate the single-subject clause because its provisions are rationally related to the common purpose of regulating gambling. All topics in the bill, from limits on ownership of race tracks where gambling is authorized, to explaining the type of gambling machines that are authorized, to limiting payouts from gambling machines, relate to the single subject of gambling. PCSG's contrary claim, that "gambling" is not a single subject, would work an unprecedented change in the range of matter considered to be a "single subject" for purposes of this clause, so its claim should be rejected.

### CONCLUSION

The Court should accept jurisdiction over the Attorney General's cross-appeal and reverse the portion of the appeals court's decision invalidating R.C. 2915.01(AAA)(1) as to the \$10 prize limit, and it should deny jurisdiction over PCSG's appeal on all other issues.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

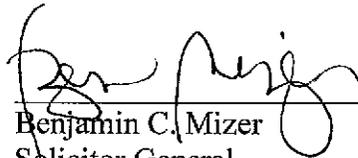
I certify that a copy of the foregoing Combined Memorandum Opposing Jurisdiction as to Appeal and Supporting Jurisdiction as to Cross-Appeal of Defendant-Appellee-Cross-Appellant Richard Cordray, Ohio Attorney General, was served by U.S. mail this 28th day of September, 2009, upon the following counsel:

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

PICKAWAY COUNTY SKILLED GAMING, :  
LLC, et al.,

Plaintiffs, :

v. : Case No. 07CVH10-14821

OHIO ATTORNEY GENERAL, et al., : Judge Schneider

Defendants. :

DECISION (1) DENYING PLAINTIFFS' MOTION TO STRIKE,  
FILED SEPTEMBER 8, 2008;  
(2) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT,  
FILED AUGUST 5, 2008; AND  
(3) GRANTING DEFENDANT'S MOTION TO DISMISS,  
FILED AUGUST 28, 2008  
(Case Terminated)

Rendered this 14 day of October, 2008.

Schneider, J.

I. Motion to Strike

On September 8, 2008, plaintiffs' filed their motion to strike defendants' summary-judgment motion and defendant's memorandum contra plaintiffs' summary-judgment motion. Plaintiffs argue that defendants' motion and memorandum contra are untimely.

In this regard, plaintiffs' motion is unwarranted. The Civil Rules prefer that cases be decided on their merits, and plaintiffs have failed to show prejudice resulting from the delayed filing of defendants' motion/memorandum contra. In the interest of deciding this case on its merits, defendants will be permitted to file their motion and memorandum contra.

II. Summary Judgment

A party seeking summary judgment must demonstrate that

(1) [n]o genuine issue as to any material fact

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EXHIBIT 1

remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Welco Indus., Inc. v. Applied Cos. (1993), 67 Ohio St. 3d 344, 346 (brackets in original) (quoting Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317, 327); see Hicks v. Leffler (Franklin 1997), 119 Ohio App. 3d 424, 427 (citing Bastic v. Connor (1988), 37 Ohio St. 3d 144). In this regard, "the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case."

Dresher v. Burt (1996), 75 Ohio St. 3d 280, 292 (emphasis in original); see Hicks, 119 Ohio App. 3d at 427 (citing Dresher, 75 Ohio St. 3d at 293).

Civ. R. 56(E) provides in part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

See Mathis v. Cleveland Public Library (1984), 9 Ohio St. 3d 199; Hoffman v. Davidson (1987), 31 Ohio St. 3d 60. Moreover, "[a] motion for summary judgment forces the nonmoving party to produce evidence on any issue for which it bears the burden of production at trial." Wing v. Anchor

Media, Ltd. of Texas (1991), 59 Ohio St. 3d 108, 111. Additionally, the factual dispute must be "material." Buckeye Union Ins., 68 Ohio App. 3d at 22 (citing Anderson v. Liberty Lobby, Inc. (1986), 477 U.S. 242) ("If one's case is supported by only a 'scintilla' of evidence, or if his evidence is 'merely colorable' or not 'significantly probative,' summary judgment should be entered."). However, "a moving party does not discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove his case. The assertion must be backed by some evidence . . . ." Dresher, 75 Ohio St. 3d at 293 (emphasis in original) (distinguishing Celotex Corp. v. Catrett (1986), 477 U.S. 317).

### III. Discussion of Summary-Judgment Motions

On August 5, 2008, plaintiffs filed their motion for summary judgment. On August 28, defendants filed their cross-motion for summary judgment.

Plaintiffs' complaint seeks a declaratory judgment that O.R.C. 2915.01(AAA)(1)&(2) and O.R.C. 2915.06 "are unconstitutional under the Equal Protection Clause and Due Process Clause of the Ohio and United States Constitutions" and that O.R.C. 2915.06 "is also an unconstitutional deprivation of Plaintiffs' property rights"; that "Am. Sub. H.B. No. 177 violates" Ohio Const. Art. II, §1d as to the legislation's passage as an emergency measure, "violates the right reserved to the people for a referendum," and violates

Ohio Const. Art. II, §15's one-subject rule.

The Ohio Supreme Court has discussed the standard of proof in a constitutional challenge as follows:

Initially, we must acknowledge that legislative enactments are entitled to a strong presumption of constitutionality. *N. Ohio Patrolmen's Benevolent Assn. v. Parma* (1980), 61 Ohio St. 2d 375, 377, 15 O.O.3d 450, 402 N.E.2d 519. When the constitutionality of legislation is attacked, we must interpret the applicable constitutional provisions and acknowledge that "a court has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government. When the validity of a statute is challenged on constitutional grounds, the sole function of the court is to determine whether it transcends the limits of legislative power." *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Edn.* (1942), 139 Ohio St. 427, 438, 22 O.O. 494, 40 N.E.2d 913. A statute should not be declared unconstitutional "unless it 'appears beyond a reasonable doubt that the legislation and constitutional provision are clearly incompatible.'" *Kelleys Island Caddy Shack, Inc. v. Zaino*, 96 Ohio St.3d 375, 2002 Ohio 4930, 775 N.E.2d 489, P 10, quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. Furthermore, a statute "must be enforced unless it is in clear and irreconcilable conflict with some express provision of the constitution." *Spivey v. Ohio* (N.D. Ohio 1998), 999 F.Supp. 987, 999. . . .

. . . . The two types of challenges require different standards of proof. To prevail on a facial constitutional challenge, the challenger must prove the constitutional defect, using the highest standard of proof, which is also used in criminal cases, proof beyond a reasonable doubt. *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. To prevail on a constitutional challenge to the statute as applied, the challenger must present clear and convincing evidence of the statute's constitutional defect. *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, 28 O.O. 295, 55 N.E.2d 629, paragraph six of the syllabus. "'Clear and

convincing evidence is that measure or degree of proof which is more than a mere "preponderance of evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *Lansdowne v. Beacon Journal Publishing Co.* (1987), 32 Ohio St.3d 176, 180-181, 512 N.E.2d 979, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 53 O.O. 361, 120 N.E.2d 118, paragraph three of the syllabus.

State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ. (2006), 111 Ohio St. 3d 568, 573-74; see Beagle v. Walden (1997), 78 Ohio St. 3d 59, 61 (quoting Fabrey v. McDonald Police Dep't (1994), 70 Ohio St. 3d 351, 352; Williams v. Scudder (1921), 102 Ohio St. 305 (syllabus, paras. 3-4)).

The Ohio Supreme Court has also held as follows:

"In reviewing a statute, a court, if possible, will uphold its constitutionality. *Winslow-Spacarb, Inc. v. Evatt* (1945), 144 Ohio St. 471, 475, 30 Ohio Op. 97, 99, 59 N.E.2d 924, 926. All reasonable doubts as to the constitutionality of a statute must be resolved in its favor. *Dickman*. Courts have a duty to liberally construe statutes in order to save them from constitutional infirmities. *Wilson v. Kennedy* (1949), 151 Ohio St. 485, 492, 39 Ohio Op. 301, 304, 86 N.E.2d 722, 725." *Hughes*, 79 Ohio St. 3d at 307, 681 N.E.2d at 432.

Desenco, Inc. v. Akron (1999), 84 Ohio St. 3d 535, 538.

As Ohio Cong. of Parents & Teachers has held, the standard of proof to prevail on a constitutional challenge is high. Although plaintiffs' complaint raises a facial challenge to the statutory provisions, plaintiffs' motion largely consists of arguments about the statute as applied

and so is unwarranted.

In contrast, defendants have demonstrated that they are entitled to summary judgment as a matter of law.

First, the statutory provisions are not void for vagueness.

The Ohio Supreme Court has held as follows:

"When a statute is challenged under the due-process doctrine prohibiting vagueness, the court must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate compliance of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006 Ohio 3799, 853 N.E.2d 1115, P 84, citing *Kolender v. Lawson* (1983), 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903. Moreover, laws directed to economic matters are subject to a less strict vagueness test than laws interfering with the exercise of constitutionally protected rights. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982), 455 U.S. 489, 498-499, 102 S.Ct. 1186, 71 L.Ed.2d 362.

**Facial Challenge.** A court examining a facial-vagueness challenge to a statute that implicates no constitutionally protected conduct will uphold that challenge only if the statute is impermissibly vague in all of its applications. *Hoffman Estates*, 455 U.S. at 494-495, 102 S.Ct. 1186, 71 L.Ed.2d 362. Yet Columbia makes no claim or showing that the statutes are invalid in all applications. Therefore, we reject Columbia's facial challenge.

Columbia Gas Transmission Corp. v. Levin (2008), 117 Ohio St. 3d 122, 130 (emphasis in original).

Although plaintiffs argue that the definition of "skill-based amusement machine" based on the wholesale price of a merchandise prize (O.R.C. 2915.01(AAA)(1)) and the

exclusion of certain machines from the definition of "skill-based amusement machine" (O.R.C. 2915.01(AAA)(2)) are unconstitutionally vague in violation of the United States and Ohio Constitutions' due-process clauses, each of these statutory provisions is not "impermissibly vague in all of its applications." That plaintiffs might be able to envision a situation in which the statute, as applied, is unconstitutional does not show that the statute is unconstitutionally vague on its face. "Moreover, the void-for-vagueness doctrine 'does not require statutes to be drafted with scientific precision.'" Levin, 117 Ohio St. 3d at 131 (quoting Perez v. Cleveland (1997), 78 Ohio St. 3d 376, 378).

Likewise, contrary to plaintiffs' arguments, O.R.C. 2915.06 is not unconstitutionally vague as violating the due-process clauses. Plaintiffs argue that this statutory provision, which prohibits giving a person items listed in O.R.C. 2915.01(BBB) and makes a violation a first-degree misdemeanor, "criminalizes the action of purchasing an item where the purchaser has no way of determining whether the prize was a reward for playing a skill-based amusement game" and that "[a]n infinite number of transactions can be subject to criminalization." However, although an unconstitutional application of the statute might be imagined, O.R.C. 2915.06 is not "impermissibly vague in all of its applications."

Also, the mere fact that evidence might be necessary to determine whether the statute has been violated does not show that the statute is unconstitutionally vague.

In addition, O.R.C. 2915.06 does not impose strict liability on a person who innocently purchases a prize won from playing a "skill-based amusement machine." Rather, "[w]hen the section defining an offense . . . neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." O.R.C. 2901.21(B).

Second, the statutory provisions do not violate Ohio Const. Art. I, §1 & §19.

Section 1 states, "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of . . . acquiring, possessing, and protecting property." Section 19 states, "Private property shall ever be held inviolate, but subservient to the public welfare. . . ." However, these constitutional provisions do not prohibit all regulation regarding property or otherwise preclude a ban on gambling. See Holeton v. Crouse Cartage Co. (2001), 92 Ohio St. 3d 115, 121 ("No government could long continue to function if all property rights were unqualifiedly inviolate. But, on the other hand, the constitutional guaranty of the right of private property would be hollow if all legislation enacted in the name of the public welfare were per se valid. ").

Rather, the Ohio Supreme Court has discussed Section 19 as follows:

Section 19 requires that "legislation must be reasonable, not arbitrary, and must confer upon the public a benefit commensurate with its burdens upon private property." *Holeton*, 92 Ohio St.3d at 121, 748 N.E.2d 1111, quoting *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 546, 21 O.O. 422, 38 N.E.2d 70. See, also, *Froelich v. Cleveland* (1919), 99 Ohio St. 376, 391, 124 N.E. 212 (laws "must be suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation").

Groch v. GMC (2008), 117 Ohio St. 3d 192, 200.

Likewise, plaintiffs cite no applicable legal authority which has held that O.R.C. 2915.06 or any other statute which "prohibits individuals from selling their property" necessarily requires a strict-scrutiny analysis.

Rather, the Ohio Supreme Court has held as follows:

Pursuant to its police powers, the General Assembly has the authority to enact laws defining criminal conduct and to prescribe its punishment. We recognize that this authority is not unfettered and that almost every exercise of the police power will necessarily interfere with the enjoyment of liberty or the acquisition or possession of property, or involve an injury to a person. See *Benjamin v. Columbus* (1957), 167 Ohio St. 103, 110, 4 Ohio Op. 2d 113, 117, 146 N.E.2d 854, 860. Nevertheless, laws passed by virtue of the police power will be upheld if they bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public, and are not arbitrary, discriminatory, capricious or unreasonable. *Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539, 26 Ohio Op. 116, 118, 49 N.E.2d 412, 414. The federal test is similar. To

determine whether such statutes are constitutional under federal scrutiny, we must decide if there is a rational relationship between the statute and its purpose. *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St. 3d 351, 354, 639 N.E.2d 31, 34 citing *Martinez v. California* (1980), 444 U.S. 277, 283, 100 S. Ct. 553, 558, 62 L. Ed. 2d 481, 488.

State v. Thompkins (1996), 75 Ohio St. 3d 558, 560 (emphasis added); cf. Vogler v. Sidney (Shelby App., Sept. 16, 1987), No. 17-86-15, 1987 Ohio App. LEXIS 8769, at \*5 ("gambling devices are not lawful property and, hence, private rights are not assertable therein").

As such, the Ohio Constitution's declarations on the importance and sanctity of private property are not absolute prohibitions on regulations concerning private property, including "skill-based amusement machine[s]." Likewise, O.R.C. 2915.06's prohibition on exchanging prohibited items for a prize from a "skill-based amusement machine" is reasonably related to prevent machine operators from evading the restrictions on prohibited items. In contrast, plaintiffs cite no legal authority which has held that liability for such an exchange is never-ending or that an innocent exchange of such a prize would render a person strictly liable under the statute. In any event, the statute is not "impermissibly vague in all of its applications."

Third, O.R.C. 2915.01(AAA)(1) does not violate the equal-protection clauses of the United States or Ohio

Constitutions.

"[T]he Equal Protection Clause of the United States Constitution, contained in the Fourteenth Amendment, and the Equal Protection Clause of the Ohio Constitution, contained in Section 2, Article I, are functionally equivalent." Desenco, 84 Ohio St. 3d at 544 (citing Austintown Twp. Bd. of Trustees v. Tracy (1996), 76 Ohio St. 3d 353, 359); see Capital Leasing of Ohio, Inc. v. Columbus Muni. Airport Auth. (S.D. Ohio 1998), 13 F. Supp. 2d 640, 652 n.22.

The rational-basis test in the context of an equal-protection challenge is discussed as follows:

Under federal rational-basis analysis, 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." Fed. Communications Comm. v. Beach Communications, Inc. (1993), 508 U.S. 307, 313, 113 S. Ct. 2096, 2101, 124 L. Ed. 2d 211, 221. A rational relationship will exist under rational-basis review if "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, see Cleburne v. Cleburne Living Ctr., Inc. [1985], 473 U.S. [432], 446 [473 U.S. 432, 105 S. Ct. 3249, 3257, 87 L. Ed. 2d 313, 324]." Nordlinger v. Hahn (1992), 505 U.S. 1, 11, 112 S. Ct. 2326, 2332, 120 L. Ed. 2d 1, 13.

Importantly, a state has no obligation whatsoever "to produce evidence to sustain the rationality of a statutory classification." Heller v. Doe (1993), 509 U.S. 312, 320, 113 S. Ct. 2637, 2643, 125 L. Ed. 2d 257, 271. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." Beach Communications, supra, 508 U.S. at 315, 113 S. Ct. at 2102, 124 L. Ed. 2d at 222. "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Heller, supra, quoting Lehnhausen v.

*Lake Shore Auto Parts Co.* (1973), 410 U.S. 356, 364, 93 S. Ct. 1001, 1006, 35 L. Ed. 2d 351, 358. Furthermore, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because "it is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams* [1970], 397 U.S. [471] 485 [90 S. Ct. 1153, 1161, 25 L. Ed. 2d 491, 501-502], quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [31 S. Ct. 337, 340, 55 L. Ed. 369, 377] (1911). \* \* \* " *Heller*, 509 U.S. at 321, 113 S. Ct. at 2643, 125 L. Ed. 2d at 271.

American Ass'n of Univ. Professors, Central St. Univ. Chapter v. Central St. Univ. (1999), 87 Ohio St. 3d 55, 58 (brackets in original).

The Ohio Supreme Court has also discussed equal protection as follows:

Cities and states are free to draw distinctions in how they treat certain citizens. "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn* (1992), 505 U.S. 1, 10, 120 L. Ed. 2d 1, 112 S. Ct. 2326.

In most cases, courts give a large degree of deference to legislatures when reviewing a statute on an equal protection basis. A classification warrants some kind of heightened review only when it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic; otherwise, "the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.*

"The Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship

of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." Id. [*Fitzgerald v. Racing Assn. of Cent. Iowa* (2003), 539 U.S. 103], quoting *Nordlinger*, 505 U.S.1, 11-12, 112 S. Ct. 2326, 120 L. Ed. 2d 1.

*Park Corp. v. City of Brook Park* (2004), 102 Ohio St. 3d 166, 169-70; see *Pica Corp. v. Tracy* (Franklin 1994), 97 Ohio App. 3d 42, 47 ("As long as there is a reasonable distinction, or difference in state policy, a statute may discriminate in favor of a certain class without being deemed arbitrary or violative of equal protection rights."); *Fabrey v. McDonald Vill. Police Dep't* (1994), 70 Ohio St. 3d 351, 353 ("Where neither a fundamental right nor a suspect class is involved, a legislative classification passes muster if the state can show a rational basis for the unequal treatment of different groups.").

"Accordingly, legislative distinctions are invalid only if they bear no relation to the state's goals and no ground can be conceived to justify them." *Dickman v. Elida Community Fire Co.* (Allen 2001), 141 Ohio App. 3d 589, 592 (per curiam) (citing *Fabrey*, 70 Ohio St. 3d at 353). Likewise, "[a] classification does not fail rational-basis review because 'it is not made with mathematical nicety or because in practice it results in some inequality.'" *Central St.*, 87 Ohio St. 3d at 58; see *Capital Leasing*, 13 F. Supp. 2d at 656 ("as the Supreme Court has said, the judiciary does not sit as a superlegislature to judge the

wisdom of the Port Authority's methods").

As plaintiffs concede, a rational-basis test is appropriate in determining whether O.R.C. 2915.01(AAA)(1) violates the equal-protection clauses. This is correct because "skill-based amusement machine[s]" or their operators are not a "suspect" class; the statute does not jeopardize the exercise of a "fundamental right"; it cannot be shown that no plausible, rational reason for the statute exists; and distinguishing among machines by limiting a prize's value and requiring that a prize or voucher be issued when and where the play took place is not "arbitrary or irrational." See State v. Posey (1988), 40 Ohio St. 3d 420, 425 ("With regard to the application of R.C. 2915.02 [prohibiting gambling for profit] to appellant FOE, no suspect classification is made and no fundamental right is curtailed. Accordingly, as with most social and economic legislation, we will uphold the classifications drawn by the statute if they are rationally related to a legitimate state interest."); Conley v. Shearer (1992), 64 Ohio St. 3d 284, 290 ("Generally, classifications based upon wealth do not trigger any heightened scrutiny under an equal protection analysis . . .; however, where fundamental rights are involved, a court will look more closely at laws which distinguish on the basis of wealth between those within and those outside a designated class.").

Nonetheless, contrary to plaintiffs' argument that

O.R.C. 2915.01(AAA)(1) "is a completely arbitrary statute without any rational basis," this statutory provision indeed possesses a rational basis. As defendants note, although the restriction on the kind and value of prizes from a "skill-based amusement machine" is not rationally related to whether or not a machine is "skill-based," this restriction is rationally related in determining whether a machine is for "amusement," in that the Legislature could reasonably conclude that high-value prizes and certain kinds of prizes are more closely associated with gambling, while the permitted, low-value prizes are less likely to be connected with gambling and are consistent with playing for amusement.

Also, the requirement that prizes be distributed at the machine's site at the time of play is rationally related to preventing machine operators from evading the statute's restrictions on prohibited prizes.

Fourth, Am. Sub. H.R. No. 177 does not violate the one-subject rule.

The one-subject rule is discussed as follows:

Statutes are presumed to be constitutional. *State v. Hayden*, 96 Ohio St.3d 211, 2002 Ohio 4169, at P7, 773 N.E.2d 502. Thus, a court may not declare a statute to be unconstitutional unless it appears beyond a reasonable doubt that "the legislation and constitutional provisions are clearly incompatible." *Id.*, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus.

The one-subject rule is set forth in Section 15(D), Article II of the Ohio Constitution, which provides that "[n]o bill shall contain more than one subject, which shall be clearly expressed in

its title \* \* \*." The purpose of the one-subject rule is to prevent the tactic of "logrolling," which occurs when legislators combine several distinct proposals into a single bill in order to gain passage, even though no single proposal may have obtained majority approval separately. *State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v. State Emp. Relations Bd.*, 104 Ohio St. 3d 122, 818 N.E.2d 688, 2004 Ohio 6363, at P26, (citations omitted).

However, to avoid interference with the legislative process, a court's role in enforcing the one-subject rule is limited. *Id.* at P27. Thus, "[t]he mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 496, 1999 Ohio 123, 715 N.E.2d 1062, quoting *Hoover v. Franklin Cty. Bd. of Commrs.* (1985), 19 Ohio St. 3d 1, 6, 19 Ohio B. 1, 482 N.E.2d 575. Accordingly, only "a manifestly gross and fraudulent violation of the one-subject provision \* \* \* will cause an enactment to be invalidated." *In re Nowak*, 104 Ohio St.3d 466, 2004 Ohio 6777, at P54, 820 N.E.2d 335. To determine whether a manifestly gross and fraudulent violation has occurred, courts need not look beyond the unnatural combinations themselves. Instead, "an analysis of any particular enactment is dependent upon the particular language and subject matter of the proposal," rather than upon extrinsic evidence of logrolling, and thus "an act which contains such unrelated provisions must necessarily be held to be invalid in order to effectuate the purpose of the rule." *Id.* at P71, quoting *State ex rel. Dix v. Celeste* (1984), 11 Ohio St. 3d 141, 143, 145, 11 Ohio B. 436, 464 N.E.2d 153.

State v. Watt (Mercer 2008), 175 Ohio App. 3d 613, 625 (brackets in original) see State Emp. Relations Bd., 104 Ohio St. 3d at 130 ("To conclude that a bill violates the one-subject rule, a court must determine that the bill includes a disunity of subject matter such that there is 'no discernible practical, rational or legitimate reason for

combining the provisions in one Act.'") (quoting Beagle v. Walden (1997), 78 Ohio St. 3d 59, 62).

Plaintiffs argue that O.R.C. 3769.07 and O.R.C. 2915.01 & 2915.06 "are actually incongruent—one involves the issuing of permits and the other involves creating and defining criminal acts." However, contrary to plaintiffs' arguments, it is not "impossible to imagine any standard that would justify combining these statutes into one subject." As previously discussed, the Ohio Supreme Court has held that "[t]he mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics" and that only "a manifestly gross and fraudulent violation of the one-subject provision . . . will cause an enactment to be invalidated." The statutory provisions concerning racetrack-licensing and "skill-based amusement machine[s]" both concern the regulation of gambling, including prohibitions on certain instances of gambling. In light of the great deference to which the Legislature is entitled and the broad construction to be given the one-subject rule, Am. Sub. H.R. No. 177 does not violate Ohio Const. Art. II, § 15(D)'s one-subject rule.

Fifth, plaintiffs cannot challenge the Legislature's passage of the statutory provisions as an emergency measure.

The Ohio Supreme Court has explicitly held, "The General Assembly has exclusive authority to determine that an emergency exists requiring an act to go into immediate

effect on its passage, and such determination is not reviewable by the courts." State ex rel. Schorr v. Kennedy (1937), 132 Ohio St. 510 (syllabus, para. 2). Kennedy has not been overruled and remains good law.

In contrast, plaintiffs' citation of authorities concerning municipal ordinances is irrelevant because the present case concerns statutes passed by the Legislature. Likewise, because the Legislature is the sole determiner as to whether legislation is properly passed as an emergency measure, the Legislature did not violate the constitutional right to a referendum on the basis of an alleged abuse of its emergency-measure power.

Thus, plaintiffs are not entitled to summary judgment, and defendants are entitled to summary judgment as a matter of law.

#### IV. Conclusion

Therefore, defendants' motion for summary judgment is GRANTED, and plaintiffs' motion to strike and motion for summary judgment are DENIED. Counsel for defendants shall prepare an appropriate entry and submit the proposed entry to counsel for the adverse parties pursuant to Loc. R. 25.01. A copy of this decision shall accompany the proposed entry when presented to the Court for signature.



CHARLES A. SCHNEIDER, JUDGE

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