

ORIGINAL

IN THE SUPREME COURT OF OHIO

Pickaway County Skilled Gaming, LLC.,
dba Spinners Skill Stop Game, et al.,

Appellants,

v.

Richard Cordray, Ohio Attorney General,

Appellee.

:
: On Appeal from the
: Franklin County Court of
: Appeals, Tenth Appellate District
:
:
: Court of Appeals
: Case No. 08AP-1032
:
:

09-1559

APPELLANTS PICKAWAY COUNTY SKILLED GAMING, LLC AND STEPHEN S. CLINE'S MEMORANDUM IN OPPOSITION TO JURISDICTION AS TO CROSS-APPEAL OF RICHARD CORDRAY, OHIO ATTORNEY GENERAL

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TABLE OF CONTENTS

	Page
THE ATTORNEY GENERAL’S CROSS-APPEAL DOES NOT PRESENT SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS NOT OF GREAT PUBLIC OR GENERAL INTEREST	1
STATEMENT OF THE CASE AND FACTS	2
ARGUMENTS IN OPPOSITION TO CROSS-APPELLANT’S MEMORANDUM IN SUPPORT OF JURISDICTION.....	6
<u>Response to Defendant-Appellee’s Propositions of Law Number 1 and Number 2:</u> The Attorney General’s contention that this Court should accept jurisdiction regarding the invalidation of the \$10 prize limit because that State’s power to regulate gambling is of great public interest and constitutional questions are raised is insufficient to warrant review when the Court of Appeals correctly applied the law regarding the Equal Protection Clause and the Attorney General has not proffered any arguments that cast doubt on the correctness of the determination that R.C. §2915.01(AAA)(1) violates the Equal Protection Clause. The limit set forth in R.C. §2915.01(AAA)(1) violates the Equal Protection Clause	6
CONCLUSION.....	14
CERTIFICATE OF SERVICE	15

THE ATTORNEY GENERAL'S CROSS-APPEAL DOES NOT PRESENT
SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS NOT OF GREAT PUBLIC OR
GENERAL INTEREST

Appellants, Pickaway County Skilled Gaming LLC dba Spinners Skill Stop Game ("Spinners"), and Stephen S. Cline ("Cline") (collectively, "Appellants"), respectfully request that this Court decline jurisdiction with respect to the Attorney General's Cross-Appeal. A review of the statute and the well-reasoned decision of the Court of Appeals regarding the amendment of R.C. §2915.01(AAA)(1) leaves no doubt that the Court of Appeals reached the appropriate determination that R.C. §2915.01(AAA)(1) violates the Equal Protection Clause. Amended R.C. §2915.01(AAA)(1) provided that prizes awarded for playing skill-based amusement machines could not exceed a wholesale value of \$10.00 (Ten Dollars) for a single play.

The Attorney General continues to press forward with the notion that the State must not allow gambling in the form of skill-based amusement machines provided by private business owners. This mantra continues in the face of the expansion of gambling provided by or benefiting the State in the form of Keno, video lottery terminals and casinos. As time moves forward and more and more gambling options are available to Ohio's citizens, the Attorney General's argument that slot machines should not be permitted in the State becomes as thin as onion skin paper.

Frankly, a review of the Attorney General's Combined Memorandum leaves one with the impression that the only purpose of the change in the law (and remember the law was essentially taken from the regulations drafted by former Attorney General Marc Dann) is to make the job of law enforcement officials easier since it is so difficult to identify the difference between a game of skill and chance. Instead of requiring law enforcement officials to do their jobs, the Attorney

General believes it is preferable to make Ohio citizens criminals for a penny and contend that that furthers a legitimate governmental interest.

Further, the Attorney General continues to argue, without one iota of evidence that "...a flood of unregulated slot machines" entered Ohio in recent years. Throughout the course of the present case and the case regarding the Attorney General's regulations under the Consumer Sales Practices Act, the Attorney General failed to show that Appellant's machines were impermissible slot machines rather than skill-based amusement machines. In fact, the Attorney General may be without proof that shows even a single slot machine was present in the State of Ohio. The argument that the loophole that allowed these mythical slot machines must remain closed is spurious at best and can not provide any support for the proposition that the case presents a question of great public or general interest. In fact, for the purposes of this case, the Attorney General, by failing to file an Answer to Plaintiffs' Complaint has admitted that Plaintiffs' machines are skill-based amusement machines.

This lack of evidence of slot machines and the complete lack of any other evidence submitted by the Attorney General in support of its Motion for Summary Judgment renders the Attorney General's argument that the case should be remanded for trial on this issue moot. The Attorney General had the opportunity to submit affidavits, take depositions, and provide expert testimony during the time that the case was pending before the Trial Court. The Attorney General chose to not submit any evidence and, thus, is now precluded from seeking a trial on this issue as no genuine issues of material fact are present for determination.

STATEMENT OF CASE AND FACTS

Appellants own and operate Spinners, an amusement game arcade located in Circleville. Spinners is a members-only organization that requires members to pay an annual fee in exchange

for membership rights and privileges. The arcade contains 150 skill-based amusement machines for use by its members.

The Attorney General, in coordination with the Governor's office, devised a ban on Appellants' lawful skill-based amusement machines declaring the machines "illegal" under an Administrative Rule promulgated by the Attorney General. Appellants filed Case No. 07-CVH-09-11902, *Pickaway County Skilled Gaming, LLC. v. Marc Dann, Attorney General*. Appellants sought and received a Temporary Restraining Order against enforcement by the Attorney General. That action was later dismissed as moot.

Also during this time, Sub.H.B. No. 177, introduced on April 24, 2007 was pending in the Ohio House of Representatives. The bill amended R.C. §3769.07, an anti-trust provision, that proposed increasing the number of horse racing tracks that one person could own. No vote had been taken on it and on October 10, 2007, the Ohio House of Representatives voted to pass Sub.H.B. No. 177 with amendments proposed that day. The amendments added an Emergency Clause to the bill, enacted R.C. §§2915.06 and 2915.061, and amended R.C. § 2915.01(AAA) using language virtually identical to that used in the administrative rule that the Attorney General had promulgated. On October 25, 2007, the bill was signed into law by Governor Strickland.

Spinners re-opened after Appellant Cline made substantial alterations to the operation of the business which he believed were in compliance with the new law.

On October 31, 2007, Appellants filed the present action seeking a declaration that Am.Sub.H.B. No. 177 was unconstitutional in whole or part and seeking a permanent injunction against the Appellee enjoining enforcement of R.C. §2915.01, *et seq.* as amended. Cross-motions for summary judgment were filed by the parties as to all claims. On October 30, 2008,

the Trial Court granted Appellee's Motion for Summary Judgment and denied Appellants' Motion for Summary Judgment. Appellants appealed to the Tenth District Court of Appeals.

On July 16, 2009, the Court of Appeals held that R.C. §2915.01(AAA)(1), which provided that prizes awarded for playing skill-based amusement machines could not exceed a wholesale value of \$10.00 (Ten Dollars) for a single play, violated the Equal Protection Clauses of the Ohio and Federal Constitutions as there was no rational relationship between limiting the value of the prize to \$10.00 (Ten Dollars) and furthering the governmental interest in regulating gambling. This determination is the subject of the Attorney General's Cross-Appeal. The Appellate Court also ruled that Appellants' assignment of error that R.C. §2915.01(AAA)(1) violated the Due Process Clauses of the State and Federal Constitutions was moot.

ARGUMENTS IN OPPOSITION TO CROSS-APPELLANT'S MEMORANDUM IN
SUPPORT OF JURISDICTION

Response to Defendant-Appellee's Propositions of Law Number 1 and Number 2: The Attorney General's contention that this Court should accept jurisdiction regarding the invalidation of the \$10 prize limit because that State's power to regulate gambling is of great public interest and constitutional questions are raised is insufficient to warrant review when the Court of Appeals correctly applied the law regarding the Equal Protection Clause and the Attorney General has not proffered any arguments that cast doubt on the correctness of the determination that R.C. §2915.01(AAA)(1) violates the Equal Protection Clause. The limit set forth in R.C. §2915.01(AAA)(1) violates the Equal Protection Clause.

Cross-Appellant, the Attorney General of the State of Ohio, requests that this Court accept jurisdiction on the basis that the Tenth District Court of Appeals' decision finding R.C. §2915.01(AAA)(1) is "profoundly wrong on the merits." One of the bases for the Attorney General's contention is that the statute does not create a classification of persons at all. While a review of the Memorandum in Support of Jurisdiction by the Attorney General could lead to the conclusion that the Court of Appeals misapplied the law, the Attorney General in his numerous

motions, memoranda contra and briefs never made this argument. In fact, the Attorney General, the Trial Judge, nor the three judges of the Tenth Appellate District ever argued or considered this issue. The Attorney General waited until he was seeking jurisdiction with this Court to set forth this argument. None of the four judges who considered this case ever questioned whether a classification subject to the Equal Protection requirements existed as such classification was evident. This is a new argument not considered by the Courts below nor proffered by the Attorney General in the proceedings below. The obvious reason for this argument appearing for the first time is that the argument is completely without merit and does not justify the Court accepting jurisdiction in this case.

The Attorney General relies on a case recently decided by this Court, *Burnett v. Motorists Mut. Ins. Cos.* (2008), 118 Ohio St. 3d 493, 2008-Ohio-2751. The Attorney General claims that *Burnett* is “precisely on point.” In fact, *Burnett* is not on point and addresses an entirely different statute and set of circumstances.

In *Burnett*, this Court determined that former R.C. 3937.18(K)(2) did not create an actual classification of persons in the plaintiff’s situation and the Equal Protection Clause was not applicable. *Id.* at ¶42. The statute created a distinction between a motor vehicle owned, furnished or available for use by an insured (or a family member) seeking uninsured motorist benefits for personal injuries due to the negligence of a driver and a motor vehicle not owned, furnished or available for the regular use of an injured insured (or family member). *Id.* at ¶34.

The plaintiff had argued that the statute created a classification between “injured persons related to the tortfeasor and living in the household of the insured versus all other injured persons.” *Id.* at ¶42. This Court reasoned that this was not the distinction that was being made as the statute would apply regardless of whether a family member of the injured plaintiff

negligently operated the owned auto or a friend of the injured plaintiff operated the owned auto. *Id.* at ¶¶33-38. The most important statement of the case for consideration here is: “Under R.C. 3937.18(K)(2), it doesn't matter who the tortfeasor is.” *Id.* at ¶34, quoting *Morris v. United Ohio Ins. Co.*, 160 Ohio App.3d 663, 2005 Ohio 2025, P15.

The glaring difference between *Burnett* and the present case is that in *Burnett*, the negligent driver of the vehicle has no consequences from the application of the statute. The plaintiff in *Burnett* was seeking uninsured motorist coverage. The application of the statute in one manner or another would not have affected the liability of the negligent driver or changed the amount of damages for which the negligent driver was liable. In fact, the driver of the owned auto had absolutely nothing to do with the statute. In the present case, the application of R.C. §2915.01(AAA)(1) has consequences for the individuals who receive the prizes. One individual is a criminal and the other individual is not a criminal. The difference between the former and the latter is \$.01 (one cent) under the statute. While the plaintiffs in *Burnett* failed to identify a classification, clearly the plaintiffs in this case have identified a classification and it was entirely proper for the lower courts to apply the Equal Protection analysis to the statute.

It is well-settled that “[u]nder the rational basis test, a challenged statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthers a legitimate legislative objective.” *McKinley v. Ohio Bureau Workers' Compensation* (2006), 170 Ohio St. 3d 161, P33 (citations omitted). “When a fundamental right is not involved, a statute comports with due process under the Ohio Constitution ‘if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary.’” *Dickman v. Elida Community Fire Co.* (2001), 141 Ohio App. 3d 589, 591-592 (citation omitted). In its simplest terms, the Equal Protection Clause of both the Ohio and

Federal Constitutions prevents the government from treating people differently under its laws on an arbitrary basis; those in similar circumstances must be treated similarly. *State v. Snyder* (2003), 155 Ohio App. 3d 453, P42.

The Attorney General's next basis for seeking the jurisdiction of the Court is the contention that the Court of Appeals should have accepted, without question, that the alleged purpose of R.C. §2915.01(AAA)(1) to regulate the "amusement" aspect of skill-based amusement machines. R.C. §2915.01(AAA)(1) contains the only definition of skill-based amusement machines under the criminal statutes regarding gambling.

Initially, a review of the Decision of the Court of Appeals clearly shows, despite the Attorney General's argument otherwise, that the Court of Appeals was considering the stated purpose of addressing the amusement component of skill-based amusement machines. The Court of Appeals specifically stated 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.
See App. Op. at ¶50.

This conclusion came from a review of a number of cases previously decided by this Court that addressed the issue of gambling. Unfortunately for the Attorney General, the conclusion was not favorable to his position.

The Attorney General contends that the \$10 prize limit is intended to ensure that the individuals are playing the machines for amusement. The Attorney General fails to realize that it has long-been established that "amusement" itself has value.

Amusement has value and added amusement has additional value, and where added amusement is subject to be procured by chance without the payment of additional consideration therefor, there is involved in the game the elements of

gambling, namely, price, chance and a prize. (*Kraus v. Cleveland*, 135 Ohio St. 43, approved and followed.)
Stillmaker v. Dept. of Liquor Control (1969), 18 Ohio St. 2d 200 (Syllabus Number Two)

This Court went on to say that “[t]he *prize*, then, is added amusement without additional cost.”
Id. at 204 (emphasis in original).

A review of the Court of Appeals’ decision and the cases cited therein, leads one to the conclusion that the statute can not rationally use the value of a prize to determine whether or not a game is being played for amusement because amusement itself is a prize. One cannot define a word by using that word in the definition, thus, the long-established distinction between skill and chance must be used to determine whether an individual is gambling. This must be the requirement, not because it is the Court’s preference, but because it is the only rational determination that can be used.

While this Court has viewed legislation that does not involve a fundamental right with every deference to the Legislature, this Court does not hesitate to find that a law violates the Equal Protection Clause when the violation is as obvious as the one in the present case. In fact, this Court found that the Equal Protection Clause was violated where the amount of benefits received from the Firemen and Policemen's Death Benefit Fund by a widow were not adjusted upward due to her minor children reaching the age of majority. *Roseman v. Firemen and Policemen's Death Benefit Fund* (1993), 66 Ohio St. 3d 443 (Syllabus). The benefit fund is funded by money from the State and any gifts to the fund. There are no employee contributions. *Id.* at 445. The intent was to provide the “full monthly salary” of a fireman or policeman killed in the line of duty. *Id.* at 448. The statute divided the benefits between the surviving spouse and minor children. However, when a minor child reached the age of majority or ceased attending college, the surviving spouse’s share was not adjusted upward for the benefits no longer received

by the child. A widow without children received a full benefit. *Id.* at 448-449. This Court concluded that:

We can conceive of no reasonable justification for the statute to operate in this manner. For a surviving spouse in appellee's situation, the statutory scheme abandons the overall purpose of continuing the income stream as if the decedent had lived. Whether the statute operates this way through a calculated decision of the General Assembly or through an oversight, the classification as it affects appellee bears no rational relationship to any legitimate state purpose.
Id. at 449.

This Court considered and rejected a number of proposed rationales offered by the Fund. Initially, the Fund contended that the lack of an adjustment in the spouse's benefits was justified because R.C. §3333.26(B) provided for a tuition-free education at a state university and there were other benefits available that justified the lack of an adjustment. The Court noted that there was no indication that the statutes were intended to work together and to make this conclusion would be to "engage in pure speculation." *Id.* at 449-450. The Court concluded that the "argued justification is not reasonable." *Id.* at 450. The Fund also argued that the classification furthered the legitimate state purpose of preserving funds. The Court stated that this was not a valid justification when the preservation was accomplished by an arbitrary classification. *Id.* Ultimately, this Court stated that "The classification created by the operation of R.C. 742.63(H) bears no rational relationship to any discernible legitimate governmental interest. Therefore, the classification is irrelevant to achievement of the state's purpose." *Id.*

The Attorney General's argument that the Tenth District Court of Appeals failed to give the necessary deference to the stated purpose of the legislation is not supported by a review of the decision and should not be a basis for granting jurisdiction for the cross-appeal. Further, the classification that makes citizens criminals on the basis of a penny violates the Equal Protection Clause.

If this Court, however, should decide to accept jurisdiction of the cross-appeal, this Court should also consider whether Ohio Revised Code §2915.01(AAA) is void for vagueness or, in the alternative, remand the case to the Tenth District Court of Appeals for consideration of this issue. The Court of Appeals determined that this issue was moot as the Court already held that §2915.01(AAA) (A)(1) violated the Equal Protection. App. Op. at ¶54. The Trial Court summarily dismissed the argument stating that while one can envision a situation in which the application of the statute is unconstitutional, that did not show that the statute was vague in violation of the constitution on its face.

The crux of the void-for-vagueness doctrine is that a statute's prohibitions must be clearly defined. This requirement enables individuals to conform their conduct and allows law enforcement officials to perform their duties using an objective standard. Appellants' contention is that the statute is void-for-vagueness due to the inability of individuals and law enforcement officials to determine the "wholesale value" of a merchandise prize in every application.

The Franklin County Court of Common Pleas has previously stated that:

Inasmuch as the owner of the furniture is Glick's Furniture Store, the value to be placed upon the furniture would be the wholesale replacement value to Glick's. This appellee concedes. Even though the jury might possibly have some knowledge of the retail value of furniture, the average juror [that is, the person of ordinary intelligence] would be in no position to know the wholesale value of such furniture.

State v. Leibowitz, 1978 Ohio App. LEXIS 8571, *5 (10th Dis., September 28, 1978).

The Due Process Clause of the Fourteenth Amendment of the Constitution states, "[no State shall] deprive any person of property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend XIV, §1. Similarly, the Ohio Constitution provides, "every person, for an injury done him in his lands, goods,

person, or reputation, shall have remedy by due course of law.” Ohio Const., Art 1, §16. The analysis under the Due Process clauses of the Federal and State Constitutions are identical.

‘Due process requires that the terms of a criminal statute be reasonably clear and definite and that there be ascertainable standards of guilt on which citizens, courts, and the police may rely. A person cannot be punished simply because the state believes that he or she is *probably* a criminal. *City of Akron v. Rowland* (1993), 67 Ohio St. 3d 374, 381-382 (citing *Grayned v. Rockford* (1972), 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed. 2d 222, 227-228).

The pivotal issue in the determination of whether the statute is void-for-vagueness that was never addressed by the Trial Court or the Court of Appeals is whether the wholesale value of a merchandise prize is sufficiently definite to allow a person of ordinary intelligence a reasonable opportunity to know what is prohibited.

Defendant-Appellee admitted that the law is void for vagueness. When asked to admit that the wholesale value of a merchandise prize can not be determined by externally viewing the prize, Defendant-Appellee answered as follows:

Deny. The market value of an item of merchandise may be determined by the purchase price paid for the item or by comparing the item to similar items.

Defendant-Appellee can only answer the Request for Admission by altering the request. The statute provides that the wholesale value of a merchandise prize can not exceed ten dollars (\$10.00) per single play. Defendant-Appellee never addresses the method by which an individual can determine the wholesale value. The wholesale value and market value of an item are two different values. Neither R.C. §§2915.01, *et seq.* nor any other provision of the Ohio Revised Code defines “wholesale value.”

Clearly, there is absolutely no method available to the individual playing a skill-based amusement machine to know whether the merchandise prize he or she is receiving per single play is worth \$9.99 or \$10.01 as the former is permitted under the statute while the latter is not.

This example is applicable to all ranges of value. A person can not determine whether the wholesale value is \$2.00 or \$15.00, \$5.00 or \$20.00. This determination can not be made because a person of ordinary intelligence is not expected to know the wholesale value of an item.

With respect to a business owner of a skilled-based amusement machine establishment, if that owner purchases an item for a merchandise prize from a wholesaler for \$9.75 and then the price rises so that at the time the business owner gives the prize as a reward for a single play on a skill-based amusement machine, the wholesale price for purchasing from the same wholesaler is \$10.25, the business owner would be in violation of the statute at the time of the awarding of the merchandise prize. If the business owner is giving a reward for fifteen (15) plays, and the wholesale value of the merchandise at the time of purchase, which was \$145.00, has risen to \$155.00, the business owner would also be in violation of the statute. Since the statute prohibits the distribution of a prize with a certain value, the value would have to be determined at the time of the distribution. The business owner can not know the wholesale value of the wholesale prize at the time of the distribution, and, therefore, neither the business owner nor law enforcement officials can determine whether his actions are permitted or prohibited by the statute.

In *State v. Cunningham* (1990), 67 Ohio App. 3d 366, the Court determined that conviction of the theft of property of a value of \$300.00 was against the manifest weight of the evidence. *Id.* at 367-368. While the property had price tags that totaled in excess of \$300.00 (three hundred dollars), the store was discounting the merchandise at least 20% (twenty percent) so that the discounted value of the property was less than \$300.00 (three hundred dollars). Therefore, the Court held that the defendant could be convicted of theft, but not of theft of property of a value of \$300.00 (three hundred dollars). *Id.* at 368. The Court noted "...that the value of goods offered for sale to the public could be demonstrated by evidence as to the price at

which such property is offered to and purchased by the market **at the time in question.**” *Id.*
(internal citation omitted) (emphasis added).

Despite the clear mandate that the wholesale value of a merchandise prize be determined at the time of the awarding of the prize, Appellee contends that the relevant point in time is when the business owner purchases the prize. When asked to admit whether the wholesale value of a merchandise prize may be different at the time of purchase and the time of the award of the prize, Defendant again reworded the request for admission and responded as follows:

Deny. The purchase price of an item of merchandise is determined at the time of the purchase.

The statute is also void-for-vagueness based upon the inability of individuals and law enforcement officials to determine the wholesale value of a merchandise prize. The term “wholesale prize” is no different than the term “prowling” considered by the Ohio Supreme Court in a case involving a municipal ordinance. In that case, the Supreme Court reasoned that:

The ordinance essentially prohibits prowling in circumstances ‘which warrant a reasonable man to believe that the safety of persons or security of property * * * is threatened.’ It elucidates ‘prowling’ by describing it as ‘lingering, lurking, or standing idly around...’ However, such elucidation of the proscribed activity describes no certain, definite action or type of action that would stamp such activity with an element of criminality. So a person merely waiting on a street corner for a ride would not have ‘fair notice’ that his activity constituted ‘prowling.’

The qualifying clause of ‘prowling,’ which requires that people or property be threatened, does not save the ordinance; for this qualification still permits the law enforcement officer to make a judgment that is without adequate guidelines and is too subjective.

There are many ordinary acts that could be criminally proscribed, depending upon the interpretation of an individual officer. This violates the mandate of *Harriss* that ‘no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.’
City of Cincinnati v. Taylor (1973), 36 Ohio St. 2d 73, 75-76.

The municipal ordinance under consideration had additional language that attempted to define the term “prowling,” yet that additional language was insufficient to define the term in a manner that satisfied the constitutional requirements. The term “wholesale value” does not have any additional language defining the term and this Court has already held that “...the average juror [that is, the person of ordinary intelligence] would be in no position to know the wholesale value...” *Leibowitz*, supra.

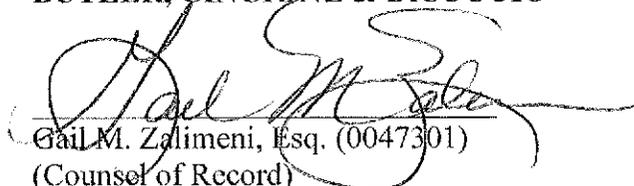
While the Trial Court summarily rejected Appellants’ arguments regarding the unconstitutionality of R.C. §2915.01(AAA)(2) and the Court of Appeals determined that the issue was moot, if this Court decides to accept jurisdiction over the Attorney General’s Cross-Appeal, this Court should also consider the issue of whether the statute is void for vagueness.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court not accept jurisdiction in this case to review the Tenth District Court of Appeals’ determination that R.C. §2915.01(AAA)(1) violates the Equal Protection Clause.

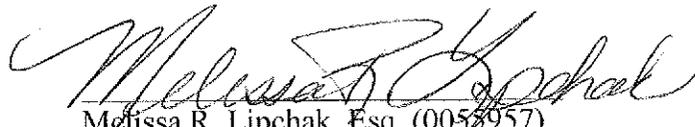
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify the a true copy of the foregoing Appellants Pickaway County Skilled Gaming, LLC and Stephen S. Cline's Memorandum in Opposition to Jurisdiction to Cross-Appeals of Richard Cordray, Ohio Attorney General was duly served upon the following counsel of record via Hand Delivery on October 27th, 2009:

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