

ORIGINAL

IN THE SUPREME COURT OF OHIO

PICKAWAY COUNTY SKILLED GAMING LLC, et al.)	
)	On Appeal from the Franklin
)	County Court of Appeals,
Plaintiffs/Appellants/Cross-Appellees,)	Tenth Appellate District
)	
v.)	Supreme Court
)	Case No. 09-1559
RICHARD CORDRAY, OHIO ATTORNEY GENERAL)	
)	Court of Appeals
)	Case No. 08AP-1032
Defendant/Appellee/Cross-Appellant.)	

MERIT BRIEF OF *AMICUS CURIAE* OHIO COIN MACHINE ASSOCIATION IN SUPPORT OF PLAINTIFFS/APPELLANTS/CROSS-APPELLEES, PICKAWAY COUNTY SKILLED GAMING, LLC AND STEPHEN S. CLINE

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TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

STATEMENT OF INTEREST OF *AMICUS CURIAE*.....1

STATEMENT OF THE CASE AND FACTS2

ARGUMENT5

 I. INTRODUCTION.....5

 II. THE APPLICABLE EQUAL PROTECTION STANDARD.....5

 III. THE COURT OF APPEALS DECISION SHOULD BE AFFIRMED.....7

 A. THE TEN-DOLLAR CAP UNCONSTITUTIONALLY DISCRIMINATES AGAINST
 CERTAIN OPERATORS OF GAMES OF SKILL ON AN IRRATIONAL AND
 ARBITRARY BASIS.8

 B. THE TEN-DOLLAR CAP IS NOT RATIONALLY RELATED TO THE STATE’S
 INTEREST IN REGULATING GAMBLING.....17

 C. THE TEN-DOLLAR CAP IS NOT RATIONALLY RELATED TO THE STATE’S
 INTEREST IN PREVENTING THE GAMING PUBLIC FROM OVER-SPENDING ON
 GAMES OF SKILL.....19

CONCLUSION.....22

CERTIFICATE OF SERVICE23

TABLE OF AUTHORITIES

Cases

<u>Adamsky v. Buckeye Local School Dist.</u> (1995), 73 Ohio St.3d 360, 653 N.E.2d 212.....	7, 9, 21
<u>Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, W. Va.</u> (1989), 488 U.S. 336, 109 S.Ct. 633	13
<u>Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.</u> (1999), 87 Ohio St.3d 55, 717 N.E.2d 286	7, 20
<u>City of Cleburne, Tex. v. Cleburne Living Center</u> (1985), 473 U.S. 432, 105 S.Ct. 3249.....	13
<u>Cossack v. City of Los Angeles</u> (1974), 11 Cal.3d 726, 523 P.2d 260	15
<u>Gaines v. Preterm-Cleveland, Inc.</u> (1987), 33 Ohio St.3d 54, 514 N.E.2d 709.....	11
<u>Jimenez v. Weinberger</u> (1974), 417 U.S. 628, 94 S.Ct. 2496.....	14
<u>Kinney v. Kaiser-Aluminum & Chemical Corp.</u> (1975), 41 Ohio St.2d 120, 322 N.E.2d 880.....	13
<u>McCrone v. Bank One Corp.</u> (2005), 107 Ohio St.3d 272, 839 N.E.2d 1	6
<u>Metropolitan Life Ins. Co. v. Ward</u> (1985), 470 U.S. 869, 105 S.Ct. 1676.....	14
<u>Oliver v. Kaiser Community Health Found.</u> (1983), 5 Ohio St.3d 111, 449 N.E.2d 438.....	11
<u>Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray</u> (2009), 183 Ohio App.3d 390, 917 N.E.2d 305	18, 21
<u>Primes v. Tyler</u> (1975), 43 Ohio St.2d 195, 331 N.E.2d 723	12
<u>Ragland v. Forsythe</u> (1984), 282 Ark. 43, 666 S.W.2d 680	16
<u>Roseman v. Firemen & Policemen's Death Benefit Fund</u> (1993), 66 Ohio St.3d 443, 613 N.E.2d 574	5, 7, 10, 21
<u>State v. Bloss</u> (1980), 62 Haw. 147, 613 P.2d 354	14, 19
<u>State v. Buckley</u> (1968), 16 Ohio St.2d 128, 243 N.E.2d 66.....	5
<u>State ex rel. Nyitray v. Industrial Com'n of Ohio</u> (1983), 2 Ohio St.3d 173, 443 N.E.2d 962.....	5
<u>State v. Peoples</u> (2004), 102 Ohio St.3d 460, 812 N.E.2d 963.....	8
<u>U. S. Dept. of Agriculture v. Moreno</u> (1973), 413 U.S. 528, 93 S.Ct. 2821	14

Village of Willowbrook v. Olech (2000), 528 U.S. 562, 120 S.Ct. 1073.....13

Statutes

R.C. 2305.11(A).....11

R.C. 2915.01(AAA).....2, 3

R.C. 2915.01(AAA)(1)3, 4, 5, 6, 8, 16

R.C. 2915.01(AAA)(2)19

R.C. 2915.02(A)(2).....6

R.C. 2915.02(F)6

R.C. 2915.064

R.C. 2915.0613

Other Authorities

Amended Sub House Bill No. 177.....2

Executive Order 2007 – 28S2, 17

Ohio Admin. Code 109:4-3-312

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Founded in 1974, the Ohio Coin Machine Association (“OCMA”) is a statewide organization of coin machine operators who own and operate coin-operated amusement equipment such as jukeboxes, pool tables, pinball machines, electronic dart boards, video games, skee ball, crane games, etc..., and place this equipment in bars, fraternal/veteran organizations, restaurants and other public entertainment establishments. OCMA’s mission is to act as a unifying force to address matters and issues that affect the coin machine industry. OCMA members also work collectively to benefit the organization, individual members, and the general public.

OCMA monitors needs, trends, and activities in the coin machine industry in Ohio and nationally; identifies and determines organizational policy on legislation and litigation affecting its members; presents its views to the appropriate governmental bodies; participates in many civic and charitable events in local communities; provides a forum where members can exchange ideas and information on increasing profitability and developing a sense of community; and inform the public of the role of the coin machine industry in local communities, and its commitment to ethical practices.

This case presents the Court with an opportunity to determine the Constitutionality of the provision in Ohio’s Gambling statutes which sets a ten-dollar cap on the wholesale value of non-cash prizes awarded to successful players of games of skill. Specifically, this case presents the issue of whether the ten-dollar cap deprives certain game-of-skill operators of Equal Protection of the law, in violation of the United States and Ohio Constitutions. It is the position of OCMA that the ten-dollar cap unconstitutionally discriminates against certain operators of games of skill on an irrational and arbitrary basis.

STATEMENT OF THE CASE AND FACTS

This case arises from the executive and legislative actions taken in recent years to combat the problem of illegal gambling in the State of Ohio. By Executive Order 2007 – 28S (“the Executive Order”), dated August 22, 2007, Governor Ted Strickland determined that the spread of illegal gambling machines in Ohio constituted an emergency which justified the suspension of the normal administrative rulemaking process. Accordingly, the Governor authorized the immediate implementation of Rule 109:4-3-31 of the Ohio Administrative Code (“the Rule”), regarding skill-based amusement machines and unfair and deceptive practices in consumer transactions.

The governmental interest identified by the Governor in the Executive Order was the prevention of the negative effects of illegal gambling machines, specifically the following: (1) consumers over-spending in playing illegal gambling machines in the hopes of receiving a large pay-out; and (2) an increase in other criminal and illegal activities due to the proliferation of illegal gambling machines. The Governor further indicated in the Executive Order that the Rule would enhance and strengthen the State’s efforts to eliminate illegal gambling machines in Ohio communities by more clearly defining the term “skill-based amusement machine.”

At the time of the issuance of the Executive Order, Amended Sub House Bill No. 177 (the “Bill”) was pending in the Ohio House of Representatives. The Bill was aimed at amending R.C. 3769.07, an antitrust provision, to permit one person to own two Ohio horse-racing tracks; previously, a person was only permitted to own one such track. On October 10, 2007, the Ohio House voted to pass the Bill with amendments proposed that same day by Representative Latta. Among other things, Representative Latta’s amendments changed parts of R.C. 2915.01(AAA), including the definition of “skill-based amusement machine.” The language of the amendments

to R.C. 2915.01(AAA) was virtually identical to the language used in the Rule. Following passage by the Ohio Senate, Governor Strickland signed the Bill into law on October 25, 2007.

As enacted, R.C. 2915.01(AAA)(1) (sometimes referred to herein as “the Statute”) provides as follows:

(AAA)(1) “Skill-based amusement machine” means a mechanical, video, digital, or electronic device that rewards the player or players, if at all, only with merchandise prizes or with redeemable vouchers redeemable only for merchandise prizes, provided that with respect to rewards for playing the game all of the following apply:

(a) The wholesale value of a merchandise prize awarded as a result of the single play of a machine does not exceed ten dollars;

(b) Redeemable vouchers awarded for any single play of a machine are not redeemable for a merchandise prize with a wholesale value of more than ten dollars;

(c) Redeemable vouchers are not redeemable for a merchandise prize that has a wholesale value of more than ten dollars times the fewest number of single plays necessary to accrue the redeemable vouchers required to obtain that prize; and

(d) Any redeemable vouchers or merchandise prizes are distributed at the site of the skill-based amusement machine at the time of play.

The structure of Chapter 2915, entitled “Gambling¹,” is such that any game of skill that would be considered a “skill-based amusement machine,” but for the fact that it awards prizes worth more than ten dollars, constitutes an illegal gambling machine (*i.e.*, a “scheme of chance,” “game of chance,” or a “gambling device”). By virtue of R.C. 2915.02(F), any operator of a game of skill that awards prizes worth more than ten dollars is guilty of a first-degree

¹ R.C. 2915.061 provides that “[a]ny regulation of skill-based amusement machines shall be governed by this chapter [Chapter 2915, entitled “Gambling”] and not by Chapter 1345 of the Revised Code.”

misdemeanor, or, if the operator had previously been convicted of any gambling offense, a fifth-degree felony.

This litigation began shortly after the Rule was implemented, but before the enactment of the Statute. On the day the Rule was implemented, the Attorney General sent Plaintiffs/Appellants/Cross-Appellees, Pickaway County Skilled Gaming, LLC and Stephen S. Cline (“Cross-Appellees”) a cease and desist order regarding the operation of games of skill at Spinners, Cross-Appellees’ members-only arcade. Cross-Appellees filed a complaint for declaratory judgment and injunctive relief in the Franklin County Court of Common Pleas on September 5, 2007, in which they challenged the constitutionality of the Rule on a number of grounds. The case was dismissed when the passage of the Bill rendered the challenge to the Rule moot.

On October 31, 2007, Cross-Appellees filed another declaratory judgment action, in which they made similar constitutional challenges against R.C. 2915.01(AAA)(1) and 2915.06. The Trial Court erroneously held, *inter alia*, that the ten-dollar cap at issue did not violate the Equal Protection Clauses of the U.S. and Ohio Constitutions.

The Tenth District Court of Appeals affirmed the Trial Court’s decision with regard to all the Cross-Appellees assignments of error, save one: the assignment that the Trial Court erred by upholding the constitutionality of the ten-dollar cap. The Court of Appeals rightly held, *inter alia*, that the ten-dollar cap violated the Equal Protection Clauses of the U.S. and Ohio Constitutions.

All parties appealed the Court of Appeals’ decision to this Court, and, on December 2, 2009, this Court accepted jurisdiction with regard to Cross-Appellant’s Proposition of Law No.

II only: “[t]he 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 of Appeals did not err in holding that the ten-dollar cap at issue violates the Equal Protection Clauses of the U.S. and Ohio Constitutions. In support of its position on this issue, *Amicus Curiae*, OCMA, presents the following argument.

ARGUMENT

I. INTRODUCTION

The decision of the Court of Appeals should be affirmed because the ten-dollar cap unconstitutionally discriminates against certain operators of games of skill on an irrational and arbitrary basis. As set forth below, there is no merit to Cross-Appellant’s argument that the ten-dollar cap is constitutional because it purportedly advances the State’s interest in (1) regulating gambling; or (2) preventing the gaming public from over-spending on games of skill.

II. THE APPLICABLE EQUAL PROTECTION STANDARD

“[E]qual protection requires that class legislation apply alike to all persons within a class, and that reasonable grounds exist for making a distinction between those within and those without a designated class.” State v. Buckley (1968), 16 Ohio St.2d 128, 134, 243 N.E.2d 66, 71 (internal citation omitted). “The ‘reasonableness’ of a statutory classification is dependent upon the purpose of the Act.” State ex rel. Nyitray v. Industrial Com’n of Ohio (1983), 2 Ohio St.3d 173, 175, 443 N.E.2d 962, 964 (citing Carrington v. Rash (1965), 380 U.S. 89, 93, 85 S.Ct. 775, 778; McLaughlin v. Florida (1964), 379 U.S. 184, 191, 85 S.Ct. 283, 287).

“If no suspect class or fundamental right is involved, the classification will be subject to a ‘rational basis’ level of scrutiny.” Roseman v. Firemen & Policemen's Death Benefit Fund (1993), 66 Ohio St.3d 443, 447, 613 N.E.2d 574, 577 (internal citations omitted). “The

classification will not violate the Equal Protection Clause if it bears a rational relationship to a legitimate governmental interest.” *Id.* (internal citations omitted).

OCMA respectfully submits that R.C. 2915.01(AAA)(1) creates a class of “operators of games of skill.”² It is undisputed that no suspect class or fundamental right is implicated by the Statute, and that rational-basis scrutiny applies in this case.

“The rational-basis test involves a two-step analysis. We must first identify a valid state interest. Second, we must determine whether the method or means by which the state has chosen to advance that interest is rational.” *McCrone v. Bank One Corp.* (2005), 107 Ohio St.3d 272, 274, 839 N.E.2d 1, 5 (internal citation omitted). “[A] statutory classification will be found to violate equal protection if it treats similarly situated people in a different manner based upon an

² As argued by Cross-Appellees, R.C. 2915.01(AAA)(1) also creates a class of “players of games of skill” and irrationally and arbitrarily discriminates against certain of those players on the basis of the wholesale value of the prize awarded by particular games of skill. As noted above, any game of skill that awards prizes worth more than ten dollars constitutes an illegal for-profit “game of chance” or “scheme of chance,” rather than a “skill-based amusement machine.” Additionally, R.C. 2915.02(A)(2) provides that “(A) No person shall...[e]stablish, promote, or operate or knowingly engage in conduct that facilitates any game of chance conducted for profit or any scheme of chance.” Significantly, the prohibition against conduct that “facilitates” any for-profit “game of chance” or “scheme of chance” is broad enough to encompass the simple act of playing, even if no prize is won. By operation of R.C. 2915.02(F), therefore, any player of a game of skill that awards prizes worth more than ten dollars is guilty of a first-degree misdemeanor (a fifth degree felony if the player has a prior gambling conviction).

Indeed, the argument that the ten-dollar cap deprives certain players of equal protection may be even more compelling than the argument pertaining to operators. At least operators can, theoretically, ensure compliance with the ten-dollar cap because they can control the wholesale value of the prizes awarded by their machines (or, at least, the wholesale value of those prizes at the time the operators purchase them). Although average players of games of skill may be able to estimate the retail value of prizes with reasonable accuracy because of their experiences as consumers, they likely lack the ability to accurately estimate wholesale value. Because players will probably not know the wholesale value of the prizes awarded by any particular game of skill, players will not know whether they are committing a crime by playing that game. Heightening the irrational and arbitrary manner in which the ten-dollar cap discriminates against players is the fact that children and young people, the demographic most likely to play games of skill, are, paradoxically, the population least capable of both (1) accurately estimating a particular prize’s wholesale value; and (2) resisting the draw of an enjoyable game where they know that the wholesale value of the prizes awarded by that game exceeds the ten-dollar cap.

illogical and arbitrary basis.” Adamsky v. Buckeye Local School Dist. (1995), 73 Ohio St.3d 360, 362, 653 N.E.2d 212, 214 (internal citation omitted). “[I]f a classification is not justified by a legitimate state interest, this court must strike down the discriminatory law creating the classification which treats similarly situated individuals differently.” Roseman v. Firemen & Policemen's Death Benefit Fund (1993), 66 Ohio St.3d 443, 447, 613 N.E.2d 574, 577 (internal citation omitted).

“[T]he federal and Ohio Equal Protection Clauses are to be construed and analyzed identically.” Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ. (1999), 87 Ohio St.3d 55, 60, 717 N.E.2d 286, 291. “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.’” Id. at 58, 290 (citing Fed. Communications Comm. v. Beach Communications, Inc. (1993), 508 U.S. 307, 313, 113 S.Ct. 2096, 2101). “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.’” Id. (citing Cleburne v. Cleburne Living Ctr., Inc. (1985), 473 U.S. 432, 446, 105 S.Ct. 3249, 3257; Nordlinger v. Hahn (1992), 505 U.S. 1, 11, 112 S.Ct. 2326, 2332).

While OCMA does not dispute that the governmental interests advanced by Cross-Appellant are legitimate, it vigorously opposes Cross-Appellant’s argument that the ten-dollar cap is rationally related to those interests. Consequently, OCMA urges the Court to affirm the decision of the Court of Appeals, invalidating the ten-dollar cap.

III. THE COURT OF APPEALS DECISION SHOULD BE AFFIRMED.

Notwithstanding Cross-Appellant’s arguments, the Court of Appeals decision should be affirmed. As set forth below, the ten-dollar cap unconstitutionally discriminates against certain

operators of games of skill on an irrational and arbitrary basis. By completely divorcing prize value from the rate of return a game of skill must yield in order to allow operators to recoup their capital expenditures, the ten-dollar cap irrationally deprives certain game-of-skill operators of the value of their investments and does substantial damage to the Ohio market for games of skill. The ten-dollar cap violates the Equal Protection Clauses of the U.S. and Ohio Constitutions, as it is not rationally related to the State's interest in (1) regulating gambling; or (2) preventing the gaming public from over-spending on games of skill.

A. THE TEN-DOLLAR CAP UNCONSTITUTIONALLY DISCRIMINATES AGAINST CERTAIN OPERATORS OF GAMES OF SKILL ON AN IRRATIONAL AND ARBITRARY BASIS.

R.C. 2915.01(AAA)(1) unconstitutionally treats certain operators of games of skill differently from other, similarly situated operators on an irrational and arbitrary basis. In imposing the ten-dollar cap, the General Assembly simply rubberstamped the ten-dollar figure which was apparently pulled out of thin air by the Governor and/or Attorney General. The legislature thereby deprived certain game-of-skill operators (*i.e.*, those whose machines happen to award prizes in excess of ten dollars in value) of equal protection by subjecting those individuals to criminal sanction, while permitting other operators, whose games are (aside from the prize value) indistinguishable from those prohibited by the Statute, to conduct their business freely. As set forth below, this Court has not hesitated to strike down statutory provisions, which, like R.C. 2915.01(AAA)(1), fail rational basis scrutiny by operating in such an irrational and arbitrary manner. OCMA respectfully submits that the Court should similarly strike down the ten-dollar cap at issue in this case.

In State v. Peoples (2004), 102 Ohio St.3d 460, 812 N.E.2d 963, the Court held that former R.C. 2929.20(B)(3) violated the Equal Protection Clause of the Ohio Constitution. The

law at issue permitted prisoners who were sentenced to incarceration for five or more, but fewer than ten, years to apply for early judicial release after five years of incarceration. The effect was to preclude an individual sentenced to exactly five years, but no other members of the statutorily created class, from applying for early release. The governmental interests advanced by the state in support of the subject statute included: (1) protecting the public from future crime; (2) punishing criminal offenders; and (3) containing the costs of criminal sentences. Applying rational basis scrutiny, Justice Pfeifer, writing for the majority, reasoned that the statute at issue was not rationally related to any of these governmental interests. Specifically, Justice Pfeifer noted the following:

We conclude that denying judicial release to offenders sentenced to five years while allowing it for offenders sentenced to longer prison terms is not rationally related to public safety or to punishment... We fail to see how preventing offenders sentenced to exactly five years from applying for judicial release helps contain costs when it requires the state to pay the costs of incarcerating offenders for a longer period of time than if they were judicially released.

Id. at ¶¶7-8. Accordingly, the Court invalidated R.C. 2929.20(B)(3) on Equal Protection grounds.

Similarly, in Adamsky v. Buckeye Local School Dist. (1995), 73 Ohio St.3d 360, 653 N.E.2d 212, the Court held that Ohio's two-year statute of limitations for personal injury claims against political subdivisions, R.C. 2744.04(A), was unconstitutional as applied to minors. The personal injury case was brought by a former student against a public school district nearly six years after a volleyball base fell on her foot during gym class, but less than two years after she turned eighteen. The Court reasoned that the statute in question:

creates a classification of all persons injured by torts committed by the state or a political subdivision and gives them a two-year period to bring suit. However, R.C. 2744.04(A) treats members of this class differently. Adults have the full two years after the cause

of action accrued to bring suit, whereas some minors [(i.e., those on whose behalf no personal injury claim against a political subdivision would be initiated within two years)], by virtue of their lack of standing to bring suit before they reach majority, are barred from pursuing their claims.

Id. at 363, 214. The governmental interests advanced in support of the statute included: (1) to preserve political subdivisions' fiscal resources; and (2) to prevent plaintiffs from sleeping on their legal rights to the detriment of defendants. Applying rational basis scrutiny, the Court reasoned that R.C. 2744.04(A) generally furthered these valid governmental interests, but that it irrationally and arbitrarily treated minors differently. Consequently, the Court invalidated the statute, as applied to minors, on equal protection grounds.

In Roseman v. Firemen & Policemen's Death Benefit Fund (1993), 66 Ohio St.3d 443, 613 N.E.2d 574, the Court held as follows:

Under R.C. 742.63, which details how benefits from the Firemen and Policemen's Death Benefit Fund are to be distributed in the event of a member's death in the line of duty, surviving spouses of members with children become situated similarly to surviving spouses of members without children once the children lose their eligibility for benefits. R.C. 742.63(H), by preventing the recalculation of benefits to be paid to the spouse of a member whose children become ineligible to receive benefits, unjustifiably discriminates against such a spouse, and violates the Equal Protection Clauses of the Ohio and United States Constitutions.

Id. at ¶1 of Syllabus. In so holding, the Court rejected the argument that the statute at issue was rationally related to either of the two following governmental interests: (1) to provide for surviving family members of firefighters and law enforcement personnel who are killed as a result of injuries sustained in the line of duty; and (2) the preservation of state money. While conceding that the former interest was laudable, the Court nevertheless concluded that it could not justify the arbitrary operation of the statute. With regard to the latter interest, the Court concluded that, although cost savings could be a valid reason to create a classification, it was not

valid where the goal was accomplished only by treating a class member in an arbitrary manner. Accordingly, the Court noted that “the classification is irrelevant to achievement of the state’s purpose” and invalidated the statute on equal protection grounds. *Id.* at 450, 579.

Likewise, in Gaines v. Preterm-Cleveland, Inc. (1987), 33 Ohio St.3d 54, 54, 514 N.E.2d 709, 711, the Court held, *inter alia*, as follows: “R.C. 2305.11(B) is unconstitutional as applied to adult medical malpractice litigants who, following discovery, do not have the time provided by R.C. 2305.11(A) in which to file their actions.” *Id.* at ¶2 of Syllabus. The law at issue provided for a four-year statute of repose for medical malpractice actions, which the Court considered in the context of its decision in Oliver v. Kaiser Community Health Found. (1983), 5 Ohio St.3d 111, 449 N.E.2d 438, which interpreted R.C. 2305.11(A) to provide that a medical malpractice plaintiff must have one year following discovery of injury to pursue his or her claims. The Court framed the issue and its conclusion in the following terms:

The question presented by the instant cause is whether the legislation can constitutionally endow some, but not all, medical malpractice claimants with a meaningful period in which to institute legal action. We hold that the distinction drawn in the legislation, between those who discover their claims in time to enjoy a full year to organize a legal action, and those who do not, does not rationally further the goal of alleviating the alleged medical malpractice crisis in this state.

Id. at 58, 714. The Court reasoned that the classification created by the statute, which deprived an individual who did not discover his or her injury until more than three, but less than four, years after the alleged malpractice of a reasonable period within which to seek legal recourse, bore no rational relation to the stated governmental interest of remedying the perceived medical malpractice crisis:

No reasonable grounds can be conceived which would justify denying a full year for filing a claim to a single class of litigants based solely on when they were able to discover the existence of a claim. It follows that R.C. 2305.11(B) is not rationally calculated

to further the legislature's legitimate objective. Accordingly, as applied in this case, we conclude that R.C. 2305.11(B) is violative of the right to equal protection guaranteed by Section 2, Article I of the Ohio Constitution.

Id. at 59, 715.

In Primes v. Tyler (1975), 43 Ohio St.2d 195, 331 N.E.2d 723, the Court held that R.C. 4515.02, the Ohio guest statute, violated the Equal Protection Clause of the Ohio Constitution. The statute operated to prevent an injured nonpaying passenger from suing the owner, operator, or person responsible for the operation of a motor vehicle for injuries sustained while riding in the motor vehicle, unless that person's injury arose from the owner/operator/responsible person's willful or wanton misconduct. The Court framed the unconstitutional effect of the guest statute in the following terms:

Prior to the enactment of the guest statute, paying passengers and nonpaying guests could recover for injuries negligently inflicted by their driver. Under the statute, however, a paying passenger may still recover against a driver for ordinary negligence, but a nonpaying guest is wholly precluded from such recovery. The guest is denied all opportunity to disprove that any suit filed by him would be fraudulent, collusive or destructive of hospitality.

Id. at 200, 727.

The Primes Court noted that “[t]he statute's twofold objective has been described as to preserve the hospitality of the host-driver and to prevent the possibility of fraudulent, collusive lawsuits against insurance companies.” Id. at 197, 725. The Court determined that “the prevention of spurious claims is not ‘suitably furthered’...by the guest statute nor by the differential treatment afforded therein to guests and passengers” because “the statute does nothing to prevent, but perhaps encourages, a guest to present a fraudulent claim that he paid for the ride or that the driver was guilty of willful and wanton misconduct, and prove such claim with perjury and the collusive assistance of the driver.” Id. at 200-01, 727. The Court further

reasoned that “the differential treatment afforded therein to guests and passengers cannot be justified by an alleged interest in fostering the amorphous concept of hospitality” because “[a] driver would obviously foster a greater sense of hospitality to a friend or relative ‘guest’ than to someone from whom he collects a transportation fee.” *Id.* at 201-02, 727-28. Consequently, the Court invalidated the guest statute on Equal Protection grounds. *See also, Kinney v. Kaiser-Aluminum & Chemical Corp.* (1975), 41 Ohio St.2d 120, 322 N.E.2d 880 (*held*, the jurisdictional prerequisites to the maintenance of a claim for death benefits, codified in R.C. 4123.59 in the then-existing Workmen’s Compensation Act, violated the Equal Protection Clause of the Ohio Constitution under rational-basis scrutiny).

The Supreme Court of the United States, applying rational-basis scrutiny, has similarly invalidated government action which, like the ten-dollar cap at issue in this case, deprives persons of equal protection of the law. *See, e.g., Village of Willowbrook v. Olech* (2000), 528 U.S. 562, 120 S.Ct. 1073 (*held*, village’s irrational and arbitrary demand for a larger than necessary easement in order to connect the respondent’s home to the municipal water supply violated the Equal Protection Clause); *Allegheny Pittsburgh Coal Co. v. County Com’n of Webster County, W. Va.* (1989), 488 U.S. 336, 109 S.Ct. 633 (*held*, county’s real estate tax assessments of petitioners’ property, which treated petitioners differently from other similarly situated property owners, was discriminatory and not rationally related to the governmental purpose of assessing properties at true current value); *City of Cleburne, Tex. v. Cleburne Living Center* (1985), 473 U.S. 432, 105 S.Ct. 3249 (*held*, municipality’s requirement of a special use permit for a proposed group home for people with cognitive disabilities violated the Equal Protection Clause because it treated this variety of group home differently from other similarly situated group homes based, apparently, upon irrational prejudice, rather than upon any rational

public interest); Metropolitan Life Ins. Co. v. Ward (1985), 470 U.S. 869, 869, 105 S.Ct. 1676, 1677 (*held*, the Alabama domestic preference tax statute, imposing a higher premiums tax rate upon out-of-state insurance companies than upon domestic insurance companies, violates the Equal Protection Clause because it furthers no legitimate state purpose); Jimenez v. Weinberger (1974), 417 U.S. 628, 94 S.Ct. 2496 (*held*, Social Security statutory scheme which denied benefits to illegitimate children of disabled insured born after the onset of disability, but did not deny benefits to similarly situated illegitimate children, violated the Equal Protection Clause because it was not rationally related to the legitimate governmental interest of preventing spurious claims); U. S. Dept. of Agriculture v. Moreno (1973), 413 U.S. 528, 93 S.Ct. 2821 (*held*, amendment to the Food Stamp Act which rendered ineligible any household containing an individual unrelated to any other member of the household violated the Equal Protection Clause because it treated similarly situated food stamp recipients differently without rationally furthering the legitimate governmental interest in (1) safeguarding health and well-being of the population, and raising levels of nutrition among low-income households; and/or (2) promoting the agricultural economy).

Other States' highest Courts have likewise invalidated statutory provisions which, like the ten-dollar cap at issue in this case, fail equal protection rational basis scrutiny. In State v. Bloss (1980), 62 Haw. 147, 613 P.2d 354, a case bearing a striking resemblance to the instant case, the Supreme Court of Hawaii, applying rational-basis scrutiny, held, *inter alia*, that Section 445-43, Hawaii Revised Statutes, which prohibited minors from playing or loitering near pinball machines, deprived certain operators of coin-operated games of skill of equal protection of the law. The unconstitutional effect of the statute was that the definition of those games within the prohibition of the statute included pinball machines, but not video games (which did not exist

when the statute was enacted), even though there was no meaningful difference between the level of skill involved in video games and modern pinball machines. Two legislative purposes were advanced in support of the challenged statute: “(1) protecting young people from harmful influences and (2) in preventing minors from spending their lunch money on coin-operated amusement devices.” *Id.* at 154, 359.

With regard to the former legislative purpose, the Bloss Court noted that, although the legislature did not define the term “harmful influences,” it was clear that the statute was enacted to aid the police in controlling gambling. In rejecting the argument that the statute at issue was rationally related to this governmental interest, the Court considered it significant that, between the enactment of the statute and the Court’s consideration thereof, pinball machines had evolved from games of chance, mostly located in “the atmosphere of the poolhall,” with all its attendant harmful influences, into games of skill that could be found side-by-side with video games in children’s arcades. Like the Court below in the instant case, the Supreme Court of Hawaii considered the role of chance to be the defining quality of gambling.

With regard to the latter legislative purpose, the Bloss Court reasoned as follows:

Laudatory as this avowed purpose may be, it does not require much imagination to conjure up other areas where a youngster may foolishly, yet legally, spend his lunch money. We are therefore not prepared to view this legislative purpose as a valid basis for classifying, on the facts of this case, a pinball machine separately from other amusement games of skill.

Id. at 156-57, 360. The Court concluded that “we are unable to discern a reasonable basis for classifying the modern pinball machine as an evil to be legislated against and not [video games],” and, accordingly, invalidated the statute on equal protection grounds. *See also, Cossack v. City of Los Angeles* (1974), 11 Cal.3d 726, 523 P.2d 260 (reasoning that a city ordinance prohibiting gambling devices deprived certain operators of coin-operated amusement

games of equal protection because it prevented the operation of modern pinball machines and other games of skill).

Similarly, in Ragland v. Forsythe (1984), 282 Ark. 43, 666 S.W.2d 680, the Supreme Court of Arkansas held that a state statute which regulated the ownership, operation, or leasing of coin-operated amusement devices, deprived an out-of-state operator of such devices of equal protection because it declared the operation of such devices a privilege available to Arkansas residents only. The Court noted that the sole purpose of the statute at issue was to impose a licensing tax on the business of ownership, operation, or leasing of coin-operated amusement devices. The Court reasoned that the residency requirement bore no rational relationship to this governmental interest, and, consequently, held the statute unconstitutional.

In this case, R.C. 2915.01(AAA)(1) creates a classification of operators of games of skill, but treats similarly situated members of the class differently on an irrational and arbitrary basis: the wholesale value of the prize a player can earn. Cross-Appellant makes no argument that the permitted games of skill differ from the prohibited games of skill in any respect other than prize value, and, in fact, there is no other difference. As set forth below, neither of the governmental interests advanced by Cross-Appellant bear any rational relationship to the ten-dollar cap.

Additionally, R.C. 2915.01(AAA)(1) places those game-of-skill operators who are irrationally and arbitrarily discriminated against by the ten-dollar cap in an untenable position. Those operators must choose between (1) complying with the ten-dollar cap, thereby suffering the economic loss of the value of their capital investment in skill-based games and contributing to the demise of the game-of-skill industry in Ohio; or (2) violate the ten-dollar cap, thereby risking criminal sanction.

The game-of-skill industry is a fast-evolving one in which complex and sophisticated games are constantly replaced by newer, more complex and more sophisticated ones. The gaming public has an appetite for ever more challenging games, so that gifted players can demonstrate their skills in ever more impressive ways. Additionally, the booming game-of-skill market is responsible for the infusion of millions of dollars into Ohio's economy. It should come as no surprise that the development of complex, sophisticated, and challenging games of skill is an expensive undertaking, and that the costs are passed along from game developers, to operators, and, in turn, to players. In light of these realities, it is clear that the ten-dollar cap is bad for Ohio business because it bears no relationship to the rate of return a game of skill must yield in order to (1) allow its operator to recoup the capital investment it has made in the game; and (2) afford to satisfy demand for challenging games by operating the next generation of complex, sophisticated, and—necessarily—expensive games of skill.

The ten-dollar cap stifles economic activity by effectively eliminating the high-end game-of-skill industry in Ohio. For that industry to function, operators must have an economic interest in operating the games, and players must have an economic interest in playing the games. The ten-dollar cap eradicates both. If the cap is upheld, Players seeking the challenge of state-of-the-art games of skill will be forced to look outside Ohio, and the money those individuals will spend to play complex, sophisticated games of skill will benefit the economies of other states and/or countries.

B. THE TEN-DOLLAR CAP IS NOT RATIONALLY RELATED TO THE STATE'S INTEREST IN REGULATING GAMBLING.

As noted above, in the Executive Order, the Governor indicated that the State interests purportedly served by the new definition of "skill-based amusement machine" were: (1) preventing consumers from over-spending in playing illegal gambling machines in the hopes of

receiving a large pay-out; and (2) preventing an increase in other criminal and illegal activities due to the proliferation of illegal gambling machines. Similarly, Cross-Appellant has framed one of the governmental interests purportedly served by the ten-dollar cap as the regulation of gambling.³ While OCMA does not dispute the legitimacy of this interest in regulating gambling, it respectfully submits that the ten-dollar cap bears no rational relationship to that interest.

The Court of Appeals rightly rejected Cross-Appellant's position that the ten-dollar cap is rationally related to the governmental interest in regulating gambling because the wholesale value of the prize has nothing to do with whether a particular activity constitutes gambling. Rather, the Court of Appeals noted that the defining quality of gambling, and what sets it apart from other activities, is the fact that the outcome is determined in whole or in part by chance. See, Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray (2009), 183 Ohio App.3d 390, 408, 917 N.E.2d 305, ¶¶48-51 (citing Westerhaus Co. v. Cincinnati (1956), 165 Ohio St. 327, 135 N.E.2d 318, ¶ five of the Syllabus; Fisher v. Neusser (1996), 74 Ohio St.3d 506, 510, 660 N.E.2d 435; Stillmaker v. Dept. of Liquor Control (1969), 18 Ohio St.2d 200, 249 N.E.2d 61, ¶ two of the Syllabus; Kraus v. Cleveland (1939), 135 Ohio St. 43, 46-47, 19 N.E.2d 159).

Cross-Appellant contends that the ten-dollar cap purportedly furthers the State's interest in regulating gambling by deterring operators from altering games of skill such that the altered games include factors other than player skill. Remarkably, though, Cross-Appellant concedes that, pursuant to R.C. 2915.01, the ten-dollar cap applies only to games of skill, and not to games of chance, schemes of chance, or gambling devices. As the ten-dollar cap has no application to chance-based machines, it cannot bear any rational relationship to the State's interest in

³ Although Cross-Appellant suggests, in the context of disputing the well-established principle that the essential quality of gambling is the element of chance, that the General Assembly has defined the term "gambling," that is not the case.

regulating illegal gambling devices. Cross-Appellant also concedes that R.C. 2915.01(AAA)(2) operates to prohibit any machine that includes an element of chance, however slight. Clearly, this ban would operate not only on machines originally designed to include an element of chance, but also any machine that is altered to become, in whole or in part, chance-based. As any chance-based machine is already statutorily banned, whatever prophylactic benefit Cross-Appellant contends the ten-dollar cap may have in preventing operators from altering a game of skill to include factors other than player skill is superfluous and overstated.

As correctly noted by the Court of Appeals, the ten-dollar cap not only lacks a rational relationship to the State's interest in regulating gambling. In fact, as demonstrated in the preceding paragraph, the ten-dollar cap has absolutely nothing to do with gambling. Consequently, this Court should affirm the decision of the Court of Appeals, holding that the ten-dollar cap violates the Equal Protection Clause of the U.S. and Ohio Constitutions.

C. THE TEN-DOLLAR CAP IS NOT RATIONALLY RELATED TO THE STATE'S INTEREST IN PREVENTING THE GAMING PUBLIC FROM OVER-SPENDING ON GAMES OF SKILL.

Notwithstanding the fact that the governmental interest that actually motivated the implementation of the ten-dollar cap was the State's interest in regulating gambling, Cross-Appellant advances an additional governmental interest which is purportedly served thereby: preventing the gaming public from over-spending on games of skill. OCMA respectfully submits that, while this may be a legitimate governmental interest, it bears no rational relationship to the ten-dollar cap.

The governmental interest in preventing the gaming public from over-spending on games of skill is analogous to the second interest advanced by the government in State v. Bloss. The Bloss Court rejected the argument that the statute prohibiting minors from loitering near pinball

machines was rationally related to the governmental interest in preventing minors from spending their lunch money on coin-operated amusement devices. As the Bloss Court observed, “[l]audatory as this avowed purpose may be, it does not require much imagination to conjure up other areas where a youngster may foolishly, yet legally, spend his lunch money.” Bloss, 62 Haw. at 156-57, 613 P.2d at 360. The same can be said of the ten-dollar cap in this case.

Cross-Appellant’s argument that the ten-dollar cap is rationally related to the governmental interest in preventing the gaming public from over-spending on games of skill is based upon the premise that, if the wholesale value of a prize earned by playing a particular game of skill exceeds ten dollars, then an individual will be induced by the “lure of the big prize, along with the thrill of the chase” to over-spend on playing the game. Merit Brief of Cross-Appellant, p. 19. If the prize has a wholesale value of only ten dollars or less, Cross-Appellant argues, then it is likely that the individual is playing the game for amusement, and not for big winnings. Cross-Appellant’s argument, like the one advanced in Bloss, is fatally flawed. Obviously, the total wholesale value of prizes won by any individual player is increased by the number of times that person plays. Even if the prizes are limited to a wholesale value of ten dollars or less, a player can, with repeated games played, still amass total prizes worth much, much more. In both this case and in Bloss, the fact that there is such an easy way to defeat this purported purpose of the Statute means that “the relationship of the classification to its goal is...so attenuated as to render the distinction arbitrary or irrational.” Cent. State Univ., 87 Ohio St.3d at 60, 717 N.E.2d at 291.

Similarly, Cross-Appellant raises the specter of addiction to so-called “high-dollar skilled games,” suggesting that the ten-dollar cap is a reasonable way to combat that problem. Merit Brief of Cross-Appellant, p. 20. Just as a player can amass prizes worth large amounts of money

by playing a game which awards a prize worth ten dollars or less multiple times, however, so too can a player become addicted to games with prizes worth less than ten dollars. Obviously, if as Cross-Appellant contends, it is the drive for a potential pay-day which drives a player to become addicted to a game, then that player is just as likely to become addicted regardless of whether it takes only one play to earn prizes worth a large amount of money or it takes many plays to do so.

Cross-Appellant's contention that the ten-dollar cap ensures that people will play games of skill for amusement is also flawed. While the act of playing a game of skill provides an individual with a certain amount of amusement, the fact that a prize is awarded to a successful player simply increases the amount of amusement received by the player. Logically, the greater the value of the prize, the greater the amount of amusement that results from playing a particular game of skill. As noted by the Court of Appeals, "[t]he...playing a game for amusement... can include the added amusement of a prize." Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray (2009), 183 Ohio App.3d 390, 917 N.E.2d 305, ¶51 (citing Kraus v. Cleveland (1939), 135 Ohio St. 43, 46-47, 19 N.E.2d 159).

In Adamsky v. Buckeye Local School Dist. (1995), 73 Ohio St.3d 360, 653 N.E.2d 212, this Court held that, even if a law generally furthers a legitimate governmental interest, it still violates the Equal Protection Clause of the U.S. and Ohio Constitutions if it irrationally and arbitrarily treats similarly situated members of the class differently. Likewise, in Roseman v. Firemen & Policemen's Death Benefit Fund (1993), 66 Ohio St.3d 443, 613 N.E.2d 574, this Court held that a law that treats particular class members in an arbitrary manner fails rational basis scrutiny, even where such arbitrary treatment furthers a valid governmental interest. In this case, as in Adamsky and Roseman, while the ten-dollar cap may generally further the State's interest in preventing the gaming public from over-spending on games of skill, it does so by

irrationally and arbitrarily discriminating against certain game-of-skill operators, but not other, similarly situated operators. Consequently, the Court should reject Cross-Appellant's argument that the ten-dollar cap is rationally related to the State's interest in preventing the gaming public from over-spending on games of skill.

CONCLUSION

For the reasons set forth above, the ten-dollar cap unconstitutionally discriminates against certain operators of games of skill on an irrational and arbitrary basis. The ten-dollar cap violates the Equal Protection Clauses of the U.S. and Ohio Constitutions, as it is not rationally related to the State's stated interest in (1) regulating gambling; or (2) preventing the gaming public from over-spending on games of skill.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing was served via regular U.S.

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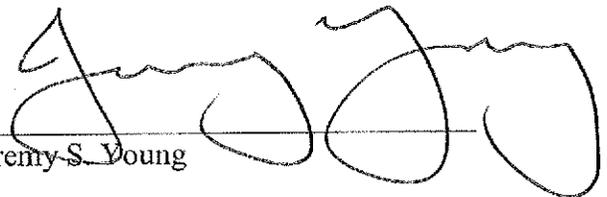
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