

IN THE OHIO SUPREME COURT

STATE OF OHIO, Ex. Rel.,  
Ohio Christian Alliance, et al.

CASE NO. 09-1648

Plaintiffs/Relators

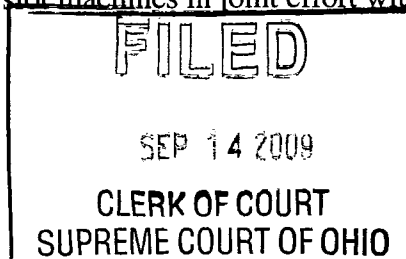
-vs-

TED STRICKLAND, GOVERNOR, et al.

Defendants/Respondents

RELATORS'/PLAINTIFFS' MOTION  
FOR TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION

Relators/Plaintiffs Ohio Christian Alliance, et al., by and through counsel, hereby move this Honorable Court, pursuant to Rule 65 of the Ohio Rules of Civil Procedure, for a Temporary Restraining Order and Preliminary Injunction immediately enjoining Respondents/Defendants Governor Ted Strickland, Ohio Lottery Commission, and its director, Kathleen Burke, and their respective agents, representatives, employees, independent contractors, and all those acting in concert with them, from violating the Ohio Constitution by taking any action to contract for, permit or allow video lottery terminals/slot machines to be used in Ohio pending this Court's determination whether the changes to R.C. § 3770 and the scope of R.C. §2915 in Am. HB1 were unconstitutionally adopted in violation of the single subject rule (Article II, Section 15(D)) and three day rule (Article II, Section 15(C)) in the Ohio Constitution, and whether the Commission's operation of such video lottery terminals/slot machines in joint effort with private

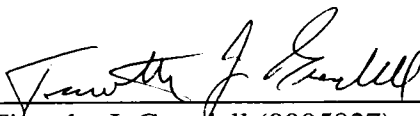


racetrack owners violates Article VIII, Section 4 of the Ohio Constitution. Such injunctive relief should include, but not be limited to:

1. A prohibition against the acceptance of any deposits for permits to operate video lottery terminals/slot machines in Ohio;
2. Prohibiting the execution of any contract, lease or agreement by the Commission to acquire video lottery terminals/slot machines;
3. Prohibiting the adoption of any rules by the Commission concerning the operation and use of video lottery terminals/slot machines in Ohio; and
4. Prohibiting the issuance of any permits to operate video lottery terminals/slot machines in Ohio.

A brief in support of this motion with supporting affidavit is attached. This motion is also supported by the Verified Complaint/Petition filed contemporaneously herewith.

Respectfully submitted,



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Timothy J. Grendell (0005827)  
Grendell & Simon Co., LPA  
6640 Harris Road  
Broadview Heights, OH 44147  
Telephone (440) 729-6145  
Facsimile (614) 220-0833

Attorney for Relators/Plaintiffs

**BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY INJUNCTION**

I. INTRODUCTION

Relators/Plaintiffs (“Relators”) are an organization representing Ohio citizens opposed to the expansion of gambling in Ohio and legislators who opposed and voted against Am. H.B. 1 (“H.B.1”). Relators challenge the constitutionality, validity, and enforceability of non-appropriation provisions in H.B.1, including changes to R.C. §3770, a regulatory statute concerning the Ohio Lottery, and changing the scope and applicability of R.C. §2915, a criminal statute governing criminal gambling activities in Ohio. Relators also challenge the attempt by Governor Strickland, the Ohio Lottery Commission and its director, Kathleen Burke, to expand the Ohio Lottery to allow for video lottery terminals/slot machines in a joint venture with the private owners of seven racetracks in Ohio on a 50/50 shared profit basis.

Relators’ challenge of the unconstitutional provisions in H.B.1 is based on the following:

1. The H.B.1 non-appropriation changes to R.C. §3770 and the scope of R.C. §2915 vitally altered the legislation from its original form as introduced and, therefore, violates the single subject rule requirement in Article II, Section 15(D) of the Ohio Constitution;
2. Passage of the vitally altered form of H.B.1 introduced by the approximately 3,000+ pages Conference Report on July 13, 2009, and passed by both the Ohio House and Ohio Senate on that same day, July 13, 2009, violated the three day consideration requirement in Article II, Section 15(C) of the Ohio Constitution;  
and
3. The exclusive joint effort, enterprise, or venture between the Ohio Lottery Commission and seven private racetrack owners, whereby the Lottery

Commission will purchase the video lottery terminals/slot machines and jointly operate and maintain those machines on the seven racetrack properties, splitting the profits on a 50/50 basis, constitutes an impermissible extension of the State's credit in aid of a private business and a prohibited joint ownership or association, in violation of Article VIII, Section 4 of the Ohio Constitution.

Relators' action is predicated both as one for mandamus and prohibition and as an original action for declaratory relief pursuant to the special jurisdiction given to this Court in R.C. §3770.21(D) pursuant to H.B.1.

Relators seek temporary and preliminary injunctive relief to ameliorate the irreparable harm caused by the present and ongoing violation of the Ohio Constitution caused by the violative provisions in H.B.1 and Relators' constitutional right to the State's compliance therewith.

## II. FACTS<sup>1</sup>

As initially introduced in the Ohio House on February 12, 2009, HB1 reflects and encompasses the State operating budget for fiscal years 2009-2010 and 2010-2011 as proposed by Governor Strickland.

The initial version of HB1, as filed with the clerk of the Ohio House, contains no proposed changes to Sections 3770.03, 3770.04 and 3770.12 of the Ohio Revised Code.

The initial version of HB1, as filed with the clerk of the Ohio House, contains no provision concerning Chapter §2915 of the Ohio Revised Code as to video lottery terminals and, in particular, did not contain the following provision: "Chapter §2915 of the Revised Code does not apply to, affect, or prohibit lotteries pursuant to this Chapter."

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<sup>1</sup> The facts stated herein are verified in the Verified Complaint/Petition filed by Relators contemporaneously herewith and the affidavit of State Representative Ron Amstutz attached hereto.

The version of HB1 passed by the Ohio House on April 30, 2009 contained no proposed changes to Sections 3770.03, 3770.04 and 3770.12 of the Revised Code as to video lottery terminals, contained no provisions concerning Chapter 2915 of the Ohio Revised Code, as to video lottery terminals, and, in particular, did **not** contain the following provision: “Chapter 2915 of the Revised Code does not apply to, affect, or prohibit lotteries pursuant to this Chapter”.

The version of HB1 passed by the Ohio Senate on June 3, 2009, contained no provision concerning Sections 3770.03, 3770.04 and 3770.12 of the Ohio Revised Code as to video lottery terminals, contained no provisions concerning Chapter 2915 of the Ohio Revised Code as to video lottery terminals, and, in particular, did **not** contain the following provision: “Chapter 2915 of the Revised Code does not apply to, affect, or prohibit lotteries pursuant to this Chapter”.

On June 10, 2009, the Ohio House voted not to concur in the Ohio Senate’s version of HB1.

On June 10, 2009, the Ohio House and Ohio Senate appointed a committee of conference (the “Conference Committee”) to address the matters of differences concerning HB1.

The Conference Committee only convened in open public meeting on two occasions. On June 11, 2009, the Conference Committee convened and heard testimony as to the then status of Ohio’s state operating budget and tax revenues. The Conference committee did not conduct another public meeting or convene again until July 13, 2009.

On July 13, 2009, at approximately 11:30 A.M., the Conference Committee met to review and accept a Conference Report that consisted of more than 1500 pages (the “Conference Report”), which had to be read in concert with the Senate passed version of HB1.

The Conference Report included numerous different subjects that changed Ohio substantive laws that were not appropriation provisions and contained provisions and amendments to Ohio law that were not matters of difference between the Ohio House passed version of HB1 and Ohio Senate passed version of HB1 and were not pertinent to or exclusively related to the original matters of difference between the two houses.

The Conference Report included changes and amendments to R.C. Section 3770, language concerning R.C. Chapter 2915, and a provision stating “Chapter 2915 of the Ohio Revised Code does not apply to, affect, or prohibit lotteries pursuant to this Chapter”.

**None** of the provisions, changes and video lottery terminals amendments to R.C. Chapter 3770, R.C. Chapter 2915 and the applicability of Chapter 2915 to lotteries were matters of difference between the two houses or pertinent to or exclusively related to the original matters of difference between the two houses.

On July 13, 2009 at approximately 12:30 P.M., the Conference Report was recommended by the Conference Committee.

On July 13, 2009 at approximately 5:00 P.M., the Conference report was approved by the Ohio House by a vote of 54-44, thereby approving HB1 as amended by the Conference Report.

On July 13, 2009 at approximately 9:30 P.M., the Conference Report was approved by the Ohio Senate by a vote of 17-15, thereby approving HB1 as amended by the conference Report.

On July 17, 2009, Governor Ted Strickland signed HB1 as amended.

The public and those who opposed the changes to R.C. Chapters 3770 and 2915 were never given any real opportunity to testify in opposition to the Conference Report or the separate

and distinct, non-appropriation statutory law changes made in HB1 with respect to R.C. Chapters 3770 and 2915.

R.C. Section 3770 is **not** an appropriation statute, it is a regulatory statute that governs the operations of the Ohio Lottery Commission.

R.C. Chapter 2915 is **not** an appropriation statute, it is a criminal statute that prohibits certain forms of gambling in Ohio.

On July 13, 2009, Governor Strickland issued a Directive to the Ohio Lottery Commission (copy attached as Exhibit A to the Verified Complaint/Petition filed herewith) (the "Strickland Directive") directing the Lottery Director to take steps to implement placement of Video Lottery Terminals ("VLT") (aka "slot machines") at licensed pari-mutuel betting facilities (commonly known as racetracks), and to adopt rules regarding such implementation and licensure of such operations.

Under the Ohio Constitution and Ohio law, Governor Strickland did not and does not have the legal authority to expand gambling in Ohio by use of VLT's or slot machines as unlawfully attempted by the Strickland Directive.

The Strickland Directive contravenes the will of the vast majority of Ohio citizens and electors, who have four times rejected such expansion of gambling in Ohio.

Pursuant to the Strickland Directive and HB1, the Commission has initiated action to adopt rules for the licensure and operation of VLT/slot machine facilities by the owners of seven horse racing facilities in Ohio, which rules provide for the sharing of the revenues generated by the VLT's/slot machines between the Ohio Lottery Commission and the private owners of the racing facilities on a 50/50 shared revenues basis. A copy of the pertinent portion of those rules are attached to the Ron Amstutz Affidavit attached hereto.

A Temporary Restraining Order and Preliminary Injunction are necessary to prevent such unconstitutional activity.

### III. LAW AND ARGUMENT

As this Court is well aware, courts consider the following factors in deciding whether to grant injunctive relief:

- (1) The likelihood or probability of Plaintiff's success on the merits;
- (2) Whether the issuance of the injunction will prevent irreparable harm to the Plaintiff (unless the Plaintiff is proceeding as a relator in a taxpayer's action, in which case irreparable harm is not required);
- (3) What injury to others will be caused by the granting of the injunction; and
- (4) Whether the public interest will be served by the granting of the injunction.

A Temporary Restraining Order and Preliminary Injunction should be granted in this case because there is a high likelihood of Relators succeeding on the merits of this case because the non-appropriation changes to R.C. §3770 and R.C. §2915 in the 3,120 pages of Conference Report released and passed by the Ohio Legislature in one day vitally altered the purpose of H.B.1, and, therefore, violated both the single subject rule and three day rule in Article II, Section 15 of the Ohio Constitution. *Dix v Celeste* (1984), 11 Ohio St.3d 141, 464 N.E.2d 153; *Simmons-Howard v Goff* (1999), 86 Ohio St.3d, 1, 711 N.E.2<sup>nd</sup> 203. Second, the violation of constitutional rights is per se irreparable harm, *Overstreet v. Lexington-Fayette Urban County Gov't* (6<sup>th</sup> Circuit 2002, 305 F. 3d 566, 578 (the denial of an injunction can cause irreparable harm if plaintiff's claim is based on the violation of a constitutional right) and the issuance of an injunction will prevent Relators from suffering irreparable harm by prohibiting the expansion of gambling in Ohio without prior voter approval or constitutional legislative action in violation of the Ohio Constitution. *Id.* Third, the granting of this injunction will not cause injury to any other person because it will maintain the status quo, prevent costly compliance actions by the

racetracks, and promote economic efficiency until this Court decides the merits of this case.

Fourth, the interests of Ohio's citizens will be served by this injunction, which would allow time for this Court to determine the constitutionality of Governor Strickland's, and the Lottery Commission's attempt to bring slot machines into Ohio, in contravention to the will of the majority of Ohioans who have voted against such gambling expansion four times, violate the Ohio Constitution.

A. RELATORS ARE LIKELY TO SUCCEED ON THE MERITS

1. H.B. 1 Violates the One-Subject Rule

This Court has enforced the single subject rule proscribed in Article II, Section 15(D) of the Ohio Constitution and invalidated legislative provisions added at the last minute to legislation on numerous occasions when, as in the present case, there is a "discontinuity between the non-appropriation provision and most other items in the legislation, the non-appropriation provision is a single sentence surrounded by hundreds of unrelated legislative provisions, creates a substantive program in a general appropriations bill, or vitally alters the legislation. *State ex rel. Ohio Civ. Serv. Employees Assn., AFSCME, Local 11, AFL-CIO v State Emp. Relations Bd.* (2004), 104 Ohio St.3d 122, 818 N.E.2d 686 (hereinafter "State ex rel. v. SERB"); *Simmons-Harris v Goff* (1999), 86 Ohio St.3d 1, 711 N.E.2d 203, (hereinafter "Goff"); *State ex. Rel. Ohio AFL-CIO v Voinovich* (1994), 69 Ohio St.3d 225, 631 N.E.2d 582 (hereinafter "Voinovich").

While this Court has indicated that its review of legislative compliance with the Ohio Constitution's single subject requirement is limited, this Court has expressly held that "Our review of legislation is not so deferential, however, as to effectively negate the one-subject provision. Despite our reluctance to interfere with the legislative process, we 'will not \* \* \* abdicate [our] duty to enforce the Ohio Constitution.'" *State ex rel. v. SERB*, 104 Ohio St.3d at

130, quoting, in part, *Dix v Celeste* (1984) 11 Ohio St.3d at 144, 464 N.E.2d 153. This Court addressed the single subject rule in the context of the state appropriations bill in *Simmons-Harris v Goff* (1999), 86 Ohio St.3d 1, 711 N.E.2d 203. In *Simmons-Harris* this Court held that the “one subject rule is part of our Constitution and therefore **must be enforced.**” *Id* at 15 (emphasis added).

In *Simmons-Harris*, this Court struck the Ohio School Voucher provision from the appropriations bill based on a violation of the single subject rule because of the diversity between that provision and most other items contained in the appropriations bill and the lack of a rational reason for their combination. *Id* at 16. In support of this Court’s action striking that provision as unconstitutional for single subject reasons, this Court noted that the voucher program “was created in a general appropriations bill consisting of over one thousand pages, of which it [the voucher provision] comprised only ten pages.” *Id* at 16-17.

This Court’s ruling in *Simmons-Harris* is on all fours with the present case and warrants the similar invalidation of the last minute changes to R.C. §3770, a regulatory statute governing the Ohio Lottery, and changes in the scope of R.C. §2915, a criminal statute concerning prohibited gambling activities. Both of these provisions were added at the last minute to H.B.1 in the Conference Report that substantially and vitally altered H.B.1 on the day it was passed – July 13, 2009. There simply is a blatant discontinuity between expansion of the Ohio Lottery program to permit slot machine gambling and most other items contained in H.B.1. This is especially true since the Legislature itself did **not** expand the Ohio Lottery’s purposes to include VLT’s/slot machines in H.B.1. That expansion action actually was undertaken by Governor Ted Strickland by his Directive (see Exhibit A attached to the Verified Complaint/Petition filed herewith). Since the Governor, not the Legislature, took the operative action to generate

additional revenues through the purported expansion of gambling permitted by the Ohio Lottery, the State cannot argue that the changes to R.C. §3770 and §2915 were rationally related to any appropriations action undertaken by the Ohio Legislature in H.B.1.

Moreover, the egregious nature of the attempt to perpetrate a last minute change in Ohio regulatory and criminal law in H.B.1 without adequate time for public review and input is further evidenced by the fact that these provisions consist of mere paragraphs, or in the case of R.C. §2915, mere sentences, in a bill consisting of 3,120 pages. If ten pages versus over a thousand pages was significant in *Simmons-Harris*, then a mere sentence or few paragraphs versus 3,120 pages should be overwhelmingly dispositive to find the last minute statutory changes to R.C. §§2915 and 3770 violate Ohio's single subject rule. *Id.*

This Court's decision in *State ex. Rel v SERB* (2004), 104 Ohio St.3d 122, 818 N.E.2d 686 further supports Relators' likelihood of success with its single subject unconstitutionality challenge in this case. In *State ex. Rel v SERB*, this Court held that a provision in an appropriations bill excluding OSFC employees from the collective bargaining process violated the single subject rule in Article II, Section 15(D) of the Ohio Constitution. In that case, this Court noted that the provision was a single sentence in a 226-page appropriation bill. In this case, the change to R.C. §2915 is a single sentence in a 3,120-page bill and the changes to R.C. §3770 consist of a few paragraphs in a bill containing 3,120 pages.

Most importantly, this Court in *State ex. Rel v SERB* rejected the State's argument that the changes in the bill in that case were all bound by appropriations, thus uniting to form a single subject, holding that the State's argument "stretches the one-subject concept to the point of breaking." *State ex. Rel v SERB* at 13, ¶33. This Court further correctly recognized that the

State's argument "renders the one-subject rule meaningless in the context of appropriations bills because virtually any statute arguably impacts the State budget, even if only tenuously." *Id.*

Since the Governor, not the Legislature, authorized the expansion of the lottery to include slot machines in Ohio, H.B.1 itself does not generate the revenues contemplated by such gambling expansion. Therefore, the amendment of R.C. §3770 and R.C. § 2915 do not clarify or alter the legislative appropriation of funds.

The one-subject rule was placed in the Ohio Constitution to prevent "logrolling" -- combining several proposals involving different subjects into a single bill. *Id* at p. 129, ¶ 26. The purpose of preventing logrolling is to prevent the partial attachment of a legislative provision that might not pass on its own as "a 'rider' -- a provision included in a bill that is 'so certain of adoption that this rider will survive adoption not on its own merits, but on [the merits of] the measure to which it is attached.'" *Id* at 131, ¶, quoting *Dix*, 11 Ohio St.3d at 143.

The inclusion in H.B. 1 of a one-sentence change to a criminal statute, R.C.§2915, and a regulatory statute, R.C. §3770, is a classic example of the type of non-appropriation (logrolling) rider prohibited by Article II, Section 15(D). *Id.* Indeed, the proof that the changes to Ohio law to permit slot machine gambling is a separate and distinct substantive issue is the existence of a previously introduced and currently pending separate, free standing racetrack slot machine bill – H.B. 250 - that seeks to make the changes in Ohio law to allow for slot machines at the racetracks added to H.B. 1 by rider through the Conference Report. See Affidavit of Rep. Ron Amstutz attached hereto.

By hastily adding the slot machine gambling expansion provisions to H.B. 1, Ohioans have been deprived of the right to discuss, debate, and speak in opposition to this major legislative-executive public policy change. *Dix*, 11 Ohio St.3d at 143 (“By limiting each bill to one subject, the issues presented can be better grasped and more intelligently discussed.”) In this case, the last minute addition of the slot machine changes to R.C. §3770 and R.C. §2915 by Conference Report precluded meaningful public discussion or legislative testimonial opposition to these substantive changes to existing Ohio criminal and regulatory laws. The severity of this deprivation of public input is enhanced by the fact that Ohioans on four occasions have voted not to change Ohio law to allow the expansion of gambling to include slot machines.

Based on this Court’s rulings in *Simmons-Harris* and *State ex rel. v SERB*, Relators are likely to succeed on their challenge of the last minute addition of the non-appropriation rider to change R.C. §3770 and R.C. §2915 through the Conference Report and H.B.1 as rewritten thereby.

2. Introduction and Passage of the Vitally Altered Conference Report Version of H.B.1 on the same day violated Article II, Section 15(C) of the Ohio Constitution.

This Court has also invalidated legislative enactments when, as in this case, the subject matter of the bill has been “vitally altered” on the grounds that the altered form of the bill was not considered on three different days as required by Section 15(C), Article II of the Ohio Constitution. *Hoover v Bd. Of Franklin Cty Commissioners* (1985), 19 Ohio St.3d 1, 482 N.E. 2d 575.

In this case, there is no question that the Conference Report version of H.B.1, which was first introduced on July 13, 2009 and became the version adopted by the Ohio House and Ohio Senate on that **same** day – July 13, 2009 – did not receive consideration by the Ohio House or the Ohio Senate on three different days. See Affidavit of Rep. Ron Amstutz attached hereto. Moreover, neither the Ohio House, nor the Ohio Senate, voted to suspend the three separate day requirement in Section 15(C), Article II of the Ohio Constitution. *Id.*

In this case, there is also little question that the last minute addition of the slot machine gambling changes in H.B.1 vitally altered the subject matter of that appropriation legislation by adding regulatory reforms to R.C. §3770 and criminal law changes to R.C. §2915. Indeed, a totally separate bill dealing with these distinctly separate subject matters was and remains pending in the Ohio House. See H.B. 250 attached to the Affidavit of Rep. Ron Amstutz attached hereto. Expanding gambling and changing Ohio's criminal code pertaining to gambling departs entirely from the appropriation theme of H.B.1. This is especially true in this case since the revenue generating action of expanding the Ohio Lottery was taken by Governor Strickland by his Directive and not by the Legislature in H.B. 1.

This case is a classic example of why Section 15(C) must be enforced. As this Court so aptly noted in *Voinovich*:

As articulated by Justice Douglas in his concurring opinion in *Hoover*, “the purpose of the ‘three reading’ rule is to prevent hasty action and to lessen the danger of ill—advised amendment at the last moment. The rule provides time for more publicity and greater discussion and affords each legislator an opportunity to study the proposed legislation, communicate with his or her constituents, note the comments of the press and become sensitive to public opinion.”

*Voinovich*, 69 Ohio St.3d at 233-34 (citation omitted).

In this case, the vitally altered 3,000 plus pages version of H.B.1, changing Ohio regulatory law governing the Lottery Commission and Ohio criminal law governing gambling, was introduced, passed by the Conference Committee, passed by the Ohio House, and passed by the Ohio Senate on the **same** day – July 13, 2009. See Rep. Amstutz’ Affidavit attached hereto. In fact, that vitally altered legislation was introduced and passed by the Legislature in less than twelve hours. *Id.*

This last minute action provided **no time** for publicity and discussion of the vitally altered bill and afforded each legislator (1) no opportunity to study the more than 3,000 pages in legislation, (2) no opportunity to communicate the non-appropriation regulatory and criminal law gambling changes in the vitally altered bill, (3) no opportunity to note the comments of the press (the press was given no time to comment), and (4) no time to become sensitive to public opinion. In fact, Ohioans (the public) were given no time to review or opine as to these vital substitutive alterations to H.B.1 in the Conference Report.

Unlike the situation in *Voinovich* where both houses deliberated on the main bill and its amendments “for several months and [h]earings were held and the issues were openly debated” *Voinovich*, 69 Ohio St.3d at 234, in this case, the last minute amendments to H.B.1 changing R.C. §3770 and R.C. §2915 were never debated for several hours, let alone several months, and were not the subject of hearings in both houses. See Rep. Amstutz Affidavit.

In this case, it would be difficult, if not impossible, to characterize the action changing R.C. §3770 and R.C. §2915 as anything but a “hasty action” that precipitated “ill-advised amendment at the last moment.” *Voinovich*, 69 Ohio St.3d at 234 (quoting *Hoover*).

Based on the foregoing, there is a high likelihood that Relators will succeed on their claim that the last minute vital alteration of H.B.1, without hearings on three separate days in each house, violated Article II, Section 15(C) of the Ohio Constitution.

4. The Joint Actions of the Ohio Lottery Commission Operating and Maintaining Slot Machines in Concert with the Seven Private Racetrack Owners on a 50/50 Share Revenue Basis Violates Section 4, Article VIII of the Ohio Constitution.

In addition to the fact that Relators will likely succeed on their unconstitutionally based single subject and three separate days of consideration claims, Relators also will likely succeed on their claim that the Commission's ownership and operation of the slot machines in concert with and on the premises of the seven private racetrack owners, on a 50/50 shared revenue basis, violates the prohibition against the State's use of its credit in aid of any private entity or participation in a joint enterprise with a private business association or venture. Article VIII, Section 4 of the Ohio Constitution.

In this case, the Commission will extend the credit of the state to purchase or lease the VLT's/ slot machines. The slot machines will be located on the private property of the racetrack owners, who will be given a permit from the State of Ohio to operation and maintain the slot machines on their private premises for a certain number of years. The Commission will require that those private premises be improved to the Commission's standards. The Commission will oversee and regulate the operation of the machines. The Commission and the private racetrack owners will share the revenues on a 50/50 basis. See Exhibit B to the verified Petition/complaint.

This arrangement is a classic violation of Section 4, Article VIII of the Ohio Constitution. *State ex. Rel Eisenberg v. Nett* (1974), 42 Ohio App.2d 73-75, 330 N.E.2d 434 (joinder of land

owned by the State with improvements by a private lessor creates the sort of “integral whole” that has been found to violate the joint owner clause in Section 4.”)

In this case the “integral whole” is created by the joinder of the slot machines owned by the State with the land and improvements owned by the private racetrack owners.

In this case, that State uses its credit to buy or lease the slot machines. The State is not simply regulating the gambling activities as it does with horse racing . The State is owning the gambling devices, but only receiving 50% of the revenues generated from these devices. The other 50% is going to the racetrack owners even though they are not paying for the slot machines or a portion of the slot machines. Therefore, the state is taking all of the cost risk of the machines that will generate \$.50 on the dollar for private racetrack owners. This is a classic example of the State using its credit and public money in aid of private business owners.

Moreover, the arrangement proposed by the Commission, while not expressly stated, has all the earmarks of a constitutionally prohibited joint enterprise or venture between the State/Commission and the private racetrack owners.

First, the racetrack owners are not performing a public service. *Taylor v Ross Cty. Commis.* (1872), 23 Ohio St.22. The operation of a slot parlor, like a racetrack, is a private enterprise, subject to governmental regulation.

Second, the State is not taking its share of the revenues as part of a sale or lease of the slot machines to the track owners. The State will own or be the lessor of these machines.

Third, the State is not receiving its share of the revenues as an administrative expense or inspection or regulatory fee. The State is participating directly in the sharing of the revenue from the jointly operated and maintained machines.

Fourth, and most importantly, the State and private racetrack owners will share equally in the oversight and profits generated by the machines and should the machines fail to cover costs, the State would bear a portion of losses that do not cover the cost of the machines to the State. The State will review and approve the racetrack owners' business plan and security plan. This is far more than regulatory oversight.

Finally, the State/Commission also would share control of the joint VLT/slot machine enterprise by issuing the permits allowing for the operation of the machines and establishing and controlling the standards, time and other aspects of the racetrack's slot parlors.

Simply put, this is not the situation where local businesses operate a lottery machine or keno machine for a small fee as with the current lottery. Rather, this is the State of Ohio joining with private racetrack owners to operate a slot machine parlor on a joint basis with the State providing the slot machines and the private racetrack owners providing the parlors, with a 50/50 split of the revenues. The State of Ohio cannot extend its credit and enter into a gambling venture with seven racetrack owner under the guise of the Lottery anymore than it can extend its credit and enter into gambling venture with Harrah's or Ceasar's or Circus to operate state owned slot machines in a provate owned casino.

Section 4, Article VIII of the Ohio Constitution was enacted to avoid precisely the mischief that the Governor and Commission now seek to pursue with the seven racetrack owners.

Based on the egregious nature of the Governor's and Commission's proposed actions, Relators will likely succeed on their Section 4, Article VIII based cause of action.

**B. RELATORS WILL SUFFER IRREPARABLE HARM UNLESS INJUNCTIVE RELIEF IS GRANTED.**

The Ohio Constitution and the limits governing single subject legislation, three separate days' consideration of legislation, and the use of the State's credit in aid of or in concert with private businesses protect Ohioans, including Relators. The violation of these constitutional standards will harm Relators, as well as all Ohio citizens. Such constitutional violation constitutes per se irreparable harm. See *Overstreet*, 305 F 3d 566,578.

Most importantly the Commission is requiring that the private racetrack owners pay the initial portion of the permit fee on September 15, 2009, a portion of which reported will be non-refundable. To the extent that the Commission's acceptance of such fee from the racetrack owners could expose the State, and Relators as taxpayers, to legal action by the racetrack owners or give rise to some type of contract or business interference claim or lacks defense by the racetrack owners, Relators' ability to pursue their constitutional claims could be jeopardized.

Therefore, Relators will be irreparably harmed unless the injunctive relief sought herein is granted.

**C. NO OTHERS WILL SUFFER INJURY FROM THE GRANTING OF THE  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY  
INJUNCTION**

Maintaining the status quo until this Court has ample opportunity to review and adjudicate the constitutional issues raised in this case is in the best interest of all Ohioans, Relators, Respondents and the racetrack owners.

The State currently does not permit slot machine gambling. Until this Court determines whether the provisions in H.B.1 concerning R.C. §3770 and R.C. §2715 were constitutionally adopted and whether the Commission's joint enterprise with private racetracks owners is constitutional, the State and all involved should take no action in furtherance of a gambling expansion that has essentially been rejected by Ohio voters in the past.

Since the State is not receiving revenues from slot machines and does not project such revenues, except the partially refundable permit fee advances, until May, 2011, the State will not be harmed by the delay necessary for this Court to adjudicate this matter.

The racetrack owners would actually benefit from an injunction since they would not have to place any permit fee money at risk until this Court decides on the constitutional issues that could negate the need for such payment.

In this case, issuance of the Temporary Restraining Order and Preliminary Injunction benefits all Ohioans by avoiding the potentially unnecessary economic and regulatory waste which would be created on the basis of unconstitutional actions until a final decision is reached by this Court in this case.

#### D. THE PUBLIC INTEREST WILL BE SERVED BY THIS INJUNCTION

The public interest in this case centers around the enforcement of the Ohio Constitution. The public interest will be served best by the well-reasoned and thoughtful review and adjudication of the serious constitutional issues raised by Relators in this case. This is particularly true since the issue as to the expansion of gambling to include slot machines has been rejected by Ohio voters in the past and the Governor's Directive and last minute vital alterations to R.C. §3770 and R.C. §2915 hastily rushed into H.B.1 and passed by the Legislature in less than twelve hours is contrary to such prior Ohio voter action.

The public's interest will not be served by the Commission's rush to implement slot machine gambling in Ohio and will not be served when constitutional rights are in jeopardy. Overstreet, 305. F. 3d 566, 578.

Accordingly, the requested Temporary Restraining Order and Preliminary Injunction are warranted in this case.

#### E. NO BOND IS REQUIRED

No bond should be required in this case for the following reasons:

- (1) Maintaining the status quo will not cost economic harm to Respondents since the State does not project to receive revenues from the VLT's/slot machines until May, 2011 and since the State will receive the full amount of its projected permit fees should it somehow prevail in this case.
- (2) Relators, as taxpayers and citizens enforcing their rights to the enforcement of the Ohio Constitution stand in the shoes of the State and, as such, should not be required to post a bond pursuant to the exception in Ohio Civil Rule 65. *Union-Scioto Local School District Bd. Of ed. V Union to Support Ass'n* (1992), 76 Ohio App.3d 792, 604 N.E. 2d 375.
- (3) Ohio courts have the legal authority to waive the bonding requirement. *Colquett v. Byd* (1979), 59 Ohio Misc. 45, 392 N.E.2d 1328. In this case, where Relators seek to assure compliance with the critical provisions of the Ohio Constitution, bond should be waived.

#### CONCLUSION

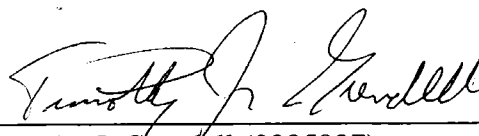
Relators have raised significant constitutional issues concerning the last minute changes to H.B.1 amending R.C. §3770 and R.C. §2915, all passed in one day, in violation of the Ohio Constitutional single subject rule and three separate day consideration rule. Relators also raise a valid cause of action challenging the State's involvement as VLT/slot machine owner venture partner with the private racetrack owners on a 50/50 shared revenue basis.

As demonstrated above and in the Verified Complaint/Petition filed herewith, Relators have a substantial likelihood of success in this case.

Granting a Temporary Restraining Order and Preliminary Injunction in this case is in the best interest of Relators, Respondents, the track owners and all Ohioans because of the serious constitutional issues now before this Court, and no bond should be required.

Therefore, for the reasons discussed above, Relators respectfully request that this Court grant the requested Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted,



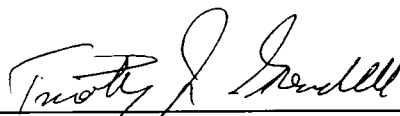
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Timothy J. Grendell (0005827)  
Grendell & Simon Co., LPA  
6640 Harris Road  
Broadview Heights, OH 44147  
Telephone (440) 729-6145  
Facsimile (614) 220-0833  
Attorney for Relators/Plaintiffs

NOTICE

Pursuant to Ohio Rules of Civil Procedure 65(A), the undersigned counsel certifies that the attached motion was given to Richard Cordray, Ohio Attorney General, by Facsimile and hand delivery on September 14, 2009.

Pursuant to Ohio Rules of Civil Procedure 65(A) the undersigned counsel certifies that the attached motion was given to all named Defendants/Respondents by hand delivery or facsimile on September 14, 2009.



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Timothy J. Grendell (0005827)  
Attorney for Relators/Plaintiffs