



# Placing a Dangerous Bet: Banning "Internet Cafes" to Benefit Casinos is Unconstitutional and Inadvisable.

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## Executive Summary

When Ohioans re-elected Republican majorities to the Ohio House and Senate last fall, few could have anticipated that one of Republican Leadership's top priorities would be to destroy over 800 politically weak small businesses.

Yet this is precisely what is attempted in House Bill 7 - - a bill that is virtually indistinguishable from the Obama Administration's habitual policies of dumping favors of politically-connected businesses while using regulation to destroy these businesses' competitors.

House Bill 7 would ban "internet cafes" in Ohio. And the bill has somehow made the Ohio House Republican Caucus's list of "first legislative initiatives." For the following reasons, this Bill is a serious affront to the conservatives that worked to elect House Republicans, and has no place on the conservative agenda, much less on a list of legislative *priorities*:

- (1) The ban violates the most basic principles of limited government: treating similarly situated parties equally, respecting property rights and voluntary transactions, and avoiding choosing sides between market competitors.*
- (2) The newfound interest in banning rather than regulating these business coincides with casino lobbying for the same.*
- (3) The ban violates the spirit, if not the letter, of Ohio's anti-cronyism provisions.*
- (4) The text of House Bill 7 violates the free speech protections of the state and federal constitutions.*
- (5) Assigning such a high priority to legislation picking winners and losers sends a dangerous message to the business community.*

Beginning a new legislative session by fast-tracking legislation that bans private business and picks winners and losers amongst business competitors is surely inadvisable. Fortunately, Ohio's state representatives and senators still have the opportunity to refute the notion that the statehouse is eminently pliable to casino influence, and to put a lid on this destructive constitutional quandary.

And Ohio's house and senate Republicans in particular should re-acquaint themselves with the conservative principles they run on before voting on this bill. Those who do so will vote "No" on HB 7.

## ***First Things First: What exactly are "Internet Cafes?"***

Internet cafes frequently sell many of the same products or services as a Kinkos - - internet time, computer access, phone cards and printing and copying access. However, there is a significant distinction: when patrons purchase any of the aforementioned items, they enter a sweepstakes, and have the ability to win money.

Meanwhile, cafes feature computer games that have the appearance of online poker, slot machines, and "keno" games. Importantly, however, patrons cannot gamble on these games: they can *play* these games using an access code associated with the item that they purchase; but whether they win or lose money is solely a function of the access code associated with their purchase, rather than a function of whether they play a good game of poker (patrons can simply claim their prize, if any, by virtue of their access code and without playing any of the online games, or they can play the games and claim their prize afterward). The result is predetermined before any games are played; and playing the games doesn't change the outcome.

Thus, the game screens essentially amount to a more entertaining way to determine whether one has succeeded in the sweepstakes. And unlike a "lottery," patrons are purchasing not a ticket, but something of actual value that can be used, irrespective of whether purchasing the item results in a "win."

Some venues have just a few computers, while others have over 100. There are at least 819 such businesses registered with the Ohio Attorney General as of the beginning of 2013, although it does not appear that every such business is registered.<sup>1</sup>

Critics believe the business model is too close to gambling; supporters say the over 800 businesses in Ohio are social-gathering sites that benefit communities through taxes and employ thousands of people.

While these establishments have proven popular, particularly in Northern Ohio, there are understandable reasons why some Ohioans may not be *in love* with the business model. However, the virtue of a free market lies in government tolerance for lawful business models that not every voter loves.

## ***What does House Bill 7 do?***

Several ranking Republican legislators have introduced a bill that all agree would, in essence, ban internet cafes by redefining sweepstakes, and attempting to define use of the cafes' computers as illegal gambling.

One sponsor indicated that the proposal redefines sweepstakes so the Internet cafes no longer qualify, effectively eliminating them. What happens to the 819 already operating in the state is unclear. "We're not trying to say McDonald's can't have their sweepstakes or you can't fill in a card and send it into Reader's Digest," the sponsor stated. "[a]ll those things would be permissible as they always have been."<sup>2</sup>

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<sup>1</sup> *Internet Sweepstakes Cafes: Unregulated Storefront Gambling in the Neighborhood*, by David O. Stewart, available at [http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/internet\\_sweepstakes\\_white\\_paper\\_121712.pdf](http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/internet_sweepstakes_white_paper_121712.pdf), at p. 5.

<sup>2</sup> *Bill Aims to Ban Internet Cafes*, by Alan Johnson, *The Columbus Dispatch*, November 20, 2012, available at <http://www.dispatch.com/content/stories/local/2012/11/20/Police-groups-urge-ban-of-Internet-cafes.html>

The Ohio Senate was skeptical of this last claim last fall, and allowed a similar version<sup>3</sup> of the bill to die in committee.

### ***The Driving Force Behind this Bill: The Baptist and the Bootlegger join forces***

What's really going on here, and why should Ohioans be concerned? The timeline associated with proposed internet cafe legislation suggests that Ohio's casinos, which view internet cafes as "competition," have gained traction with their new interest in wiping this form of competition off the map.

Since April of 2011 - - for over one and a half years - - legislators had been debating *how* to regulate internet cafes. House Bill 195 called for the regulation and licensing of "skill-based amusement machine operators and distributors and sweepstakes terminal device operators and distributors." This bill was methodically working its way through the Ohio House and Senate.

And then something happened: in the fall of 2012, casinos, through their trade association, the American Gaming Association, launched an all out assault against internet cafes. The AGA announced that in Ohio, "[r]esponsible public policy should prohibit Internet sweepstakes cafes, as numerous states have done."<sup>4</sup>

In a subsequent press release, the AGA audaciously reiterated its interest in destroying internet cafes, and explained that it was doing so to improve Ohio casinos' bottom lines: according to the casinos' spokesperson, "existing gaming businesses stand to lose," so "we're working with governors, state legislators and regulators *to deal with these establishments*."<sup>5</sup> The cafes, they claim, were "posing a threat to existing state-licensed businesses and the thousands of jobs they create."<sup>6</sup>

Rather suddenly, after almost two years of debate on how to *regulate* or *license* internet cafes, the tenor instantly changed around the statehouse. House Bill 605 was introduced to ban internet cafes on Nov. 15, 2012. And the now-active House Bill 7 more subtly bans the cafes by redefining "sweepstakes."

Despite this suggestive timeline, the specter of casino influence over the issue has operated largely in the shadows, perhaps because casino lobbyists and their allies have skillfully masked the defense of their state monopoly as a crusade for "the public welfare."

Essentially, they have merged their "bootlegger" intentions with "Baptist" arguments. "Bootlegger" and "Baptist" are terms used to identify a coalition of seemingly opposed groups who need each other in order to gain the acceptance of a policy proposal.<sup>7</sup> The model is taken from the observation that groups

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<sup>3</sup> While HB 615 outright banned internet cafes, HB 7 instead creates a regulatory structure that all agree makes it impossible for existing internet cafes' business model to operate.

<sup>4</sup> *Internet Sweepstakes Cafes: Unregulated Storefront Gambling in the Neighborhood*, by David O. Stewart, available at [http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/internet\\_sweepstakes\\_white\\_paper\\_121712.pdf](http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/internet_sweepstakes_white_paper_121712.pdf).

<sup>5</sup> *AGA Board of Directors Adopts Policy On Internet Sweepstakes Cafes*, January 9, 2013, available at <http://www.americangaming.org/newsroom/press-releases/aga-board-of-directors-adopts-policy-on-internet-sweepstakes-cafes>. Last checked February 11, 2013.

<sup>6</sup> Id.

<sup>7</sup> Jack High and Clayton Coppin (1988) discuss a classic case of such threat magnification in their analysis of "Wiley and the whiskey industry." They show that Harvey Washington Wiley, in his efforts to secure for himself the oversight of the Pure Food and Drugs Act being legislated in the first decade of the twentieth century, willfully overstated the risk associated with the consumption of rectified whiskey as compared with the risk associated with

may work toward the same end even though their interests in that end may diverge wildly, and the terms have their origin in explaining how the United States came to prohibit alcohol in the earlier twentieth century (a Baptist electorate votes its county dry, favoring bootleggers. Specifically, preachers demand prohibition of the sale of alcohol while criminal bootleggers want it to stay illegal for greater profit).

The Baptists provide the moral cover for the bootleggers' interests, providing "vital and vocal endorsement" for banning alcohol sales.<sup>8</sup> The Bootleggers work in less obvious ways to lubricate the political machinery. "Bootlegger, then, is a term for those who benefit economically, and Baptist for those who provide moral cover for the regulations."<sup>9</sup> And "neither well-varnished moral promptings nor unvarnished campaign contributions can do the job alone. It takes both"<sup>10</sup>

The phenomenon of the Bootlegger and Baptist is on full display here, although with a twist: unable to find any organized interests who oppose gambling on moral grounds while letting casinos off the hook, casinos and their political allies are *themselves* attempting to make the moral arguments against Ohio's small internet cafe businesses.

One sponsor of this bill insists "if it's acting like gambling, we need to treat it that way," and that "internet cafes have stretched the definition of sweepstakes so that it now looks like gambling — and neither the Ohio Constitution nor state law allows it."

Meanwhile, the casino lobby contends that internet cafes "are engaged in the business of gambling," and "[i]n the vast majority of communities where they operate, cafes lack regulation of (1) the integrity of the owners and operators, (2) the fairness of the games, (3) the exclusion of customers too young to gamble, and (4) their location, including the proximity to schools or churches. They do not educate customers about responsible gaming or contribute funds to combat problem gambling. In addition, neither the cafes nor the software companies that support them pay state or local gaming taxes. To the contrary, their largely unreported profits may siphon revenues from state-authorized businesses."<sup>11</sup>

However, in the face of applicable law, evidence, and reasoning, these arguments each appear to be hollow "moral cover" at best.

### ***Debunking the Bootleggers' "Baptist" Arguments***

The "moral" arguments advanced to ban internet cafes center on the claims that (1) they engage in "gambling;" (2) they are themselves "unconstitutional;" (3) they pay too few taxes; and (4) they are insufficiently regulated.

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straight whiskey. The two products, which are chemically identical, differ only in the amount of poisonous fusel oils they contain. And straight whiskey, contrary to what its name may suggest, contains a much higher concentration of such oils. Despite his documented knowledge of these facts, Wiley initiated a public campaign asserting that "straight whiskey was purer and more healthful than rectified" (1988, 301), thereby aligning straight-whiskey producers and the Women's Christian Temperance Union in his cause.

<sup>8</sup> *Bootleggers, Baptists, and Political Entrepreneurs*, by Randy T. Simmons, available at [http://www.independent.org/pdf/tir/tir\\_15\\_03\\_3\\_simmons.pdf](http://www.independent.org/pdf/tir/tir_15_03_3_simmons.pdf)

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Internet Sweepstakes Cafes: Unregulated Storefront Gambling in the Neighborhood*, *supra*.

### **"Baptist" Myth 1: "Internet cafes are engaged in gambling."**

In 2009, a Toledo Municipal Court judge dismissed misdemeanor gambling charges filed against the owner of a Toledo internet cafe, ruling that his business model was merely a clever promotion rather than illegal gambling.<sup>12</sup>

The Court, in determining that internet cafe games are not "gambling," explained that the "games [that] are played. . . are games in which the winner of any such game has been predetermined by a computer-generated system so that a purchaser could determine whether or not he was a winner instantly," and this business "has all the appearances of a sweepstakes."<sup>13</sup> Thus, the Court - - quite correctly - - concluded that because those who play computer games at internet cafes purchase actual products from the store at fair market value in order to have an opportunity to win a prize "the element of risk is absent from this case inasmuch as the purchaser of the [item] risks nothing. If the purchaser does not win a prize, he still retains the full purchase price of his [item]. . . The element of risk is missing."<sup>14</sup>

Thus, under current Ohio law, it is clearly the case that these businesses are not involved in "gambling." Moreover, the fact that legislature believes that it must pass a bill to make this the case undermines any argument that the cafes violate current law.

Finally, events in recent weeks have called into question whether these attempts at "gambling" prosecutions are politically-motivated. In a February 7 ruling, Cuyahoga County Court of Common Pleas Judge Deena Calabrese removed a Cuyahoga County prosecutor from the state's highest profile case, finding that the public office had improperly and impermissibly coordinated with casino lobbyists.<sup>15</sup>

### **"Baptist" Myth 2: "Internet cafes are prohibited by the Ohio Constitution."**

Sponsors of the bill make the unusual claim that the very existence of these private businesses is inherently "unconstitutional." However, the Ohio Constitution only prohibits "lotteries" without prior legislative authorization.

Section 6, Article XV of the Ohio Constitution provides "[e]xcept as otherwise provided in this section, lotteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State." a "lottery" is a "method of raising revenue by selling tickets and giving prizes to those who hold tickets with winning numbers that are drawn at random."<sup>16</sup> Internet cafes, selling products and services rather than tickets, are not lotteries.

Indeed, the cafes do not conduct "lotteries" or sell "lottery tickets" any more than McDonalds conducts a lottery when the sale of a large beverage is accompanied by the opportunity to earn potential winnings -- like McDonald's, internet cafes do not sell tickets - - they sell various consumer goods at fair market value. This is the essence of a lawful "sweepstakes": "a promotion in which a prize is awarded on the

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<sup>12</sup> Toledo Blade, *Ohio Lawmakers Seek Crackdown on Internet Cafes*, by Jim Provance, November 26, 2012, available at <http://www.toledoblade.com/Politics/2012/11/26/Ohio-lawmakers-seek-crackdown-on-Internet-cafes.html>.

<sup>13</sup> Toledo Municipal Court Case No. CRB-08-25138, unreported (November 18 2009). This decision was subsequently upheld by the Court of Appeals for the Sixth District of Ohio.

<sup>14</sup> Id.

<sup>15</sup> Cuyahoga County Common Pleas Case No. CR-12-563092 A-Q, February 7, 2012 Journal Entry on Motion to Disqualify Counsel, available at [http://media.cleveland.com/plain\\_dealer\\_metro/other/20130208\\_134812\[1\].pdf](http://media.cleveland.com/plain_dealer_metro/other/20130208_134812[1].pdf)

<sup>16</sup> Black's Law Dictionary, Fourth Edition (2011).

basis of chance rather than skill," where the consumer pays nothing above and beyond the fair market value of the item purchased for a chance to win.<sup>17</sup>

The difference between sweepstakes and lotteries is more than semantics - - the legal distinction has permitted businesses to conduct sweepstakes free of state and federal lottery law for generations.<sup>18</sup> And because their consumers pay nothing above the purchase price of the product or service they are buying for the opportunity to win prizes, internet cafes, while a new variation, remain quintessential examples of "sweepstakes."

Moreover, the default position of the Ohio Constitution is not that "all businesses are prohibited unless specifically authorized by the legislature." To the contrary, the Ohio Constitution is largely a charter of negative liberties, restricting *government* rather than business. Exceptions to this understanding are strictly construed against government regulation. This reality likely explains why legislators are proceeding legislatively rather than through the courts.

### **"Baptist" Myth 3: "Internet cafes pay no taxes to local government."**

Casinos argue that "[c]afes pay no gaming taxes whatever." However, as the casinos themselves are forced to acknowledge, solutions are already starting to take shape at the local level, where local government are setting up licensing regimes, which sometimes include stridently steep licensing fees and operating surcharges.<sup>19</sup>

For instance, officials in Beavercreek approved regulations requiring a \$7,500 operator's license fee, as well as a \$600 fee for each computer. Xenia requires a \$5,000 annual operators fee and a \$50 fee for each machine up to 50 machines. Those with more than \$50 machines are required to pay \$150 per machine. The Cities of Fremont and Marysville have also opted to license, tax, and regulate these businesses. These licensing fees are well in excess of those other local businesses pay.

To this end, one state senator has indicated that some mayors in her district say the cafes have helped with local government revenue.<sup>20</sup> Meanwhile, economists estimate that even at the current rate, internet cafes supply over \$21 million annually to local governments.<sup>21</sup>

### **"Baptist" Myth 4: "Internet cafes pose harm to the public that only a complete ban can rectify."**

This set of arguments unsurprisingly springs from the casino industry itself. They claim that the cafes should be shut down for a number of reasons that could easily be addressed through narrowly tailored regulation, rather than prohibition. Specifically, the casinos assert the following:

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<sup>17</sup> See, generally, *Sweepstakes Law Basics*, available at <http://www.lfirm.com/Marketing-Law-Basics-Table-of-Contents/Sweepstakes-Law-Basics.shtml>; also see *Unites States Postal Service Guide to Sweepstakes and Lotteries*, available at <http://about.usps.com/publications/pub546.pdf>

<sup>18</sup> Id.

<sup>19</sup> See *Internet SweepStakes Cafes*, supra., at p. 5.

<sup>20</sup> In this Senator's district, the City of North Ridgeville alone reports to have received over \$110,000 in licensing fees from internet cafes.

<sup>21</sup> See See *December 10, 2012 Testimony of J.C. Poindexter, Ph.D., regarding economic effects in Ohio of internet cafe operations*, delivered to the Ohio Senate Reform and Oversight Committee.

- (1) "Cafe owners and managers aren't licensed or subject to criminal background checks."
- (2) "No one regulates the fairness and integrity of cafe games."
- (3) Results are not reported publicly.
- (4) "Cafes pay no gaming taxes whatever."
- (5) "Cafes need not exclude underage gamblers, nor are they required to give their customers information about compulsive gambling counseling options."
- (6) "Cafes siphon gambling revenue from . . . commercial casinos, thereby reducing the funds that go to public education, health and social programs."<sup>22</sup>

On account of these objections, casinos demand that "state legislatures and law enforcement officials eliminate these unregulated gambling venues, which injure publicly-approved forms of gambling."<sup>23</sup> However, this is not a narrowly tailored solution to any of the problems casinos cite (other than one): the solution to the current lack of criminal background checks for internet cafe owners and operates is not *prohibition of over 800 small businesses*. Rather, it is, at most, *legislation requiring criminal background checks*. The same is true for each of the other objections cited above.

### ***Banning disfavored businesses to benefit favored businesses tramples on principles of limited government***

There is indeed one casino objection that cannot be accomplished short of prohibition: nothing other than prohibition will effectuate the result of stopping internet cafes from "siphoning gambling revenue from commercial casinos," and protecting casinos from "injury" in the free marketplace. Couched within this argument is the implication that casinos should enjoy favored status because they pay higher tax rates than other Ohio businesses.

However, as an initial matter, casinos could through this rationale argue that because there are bars, restaurants, clothing stores, and hotels at casinos, all nearby non-casino-run bars, restaurants, clothing stores, and hotels that may pay lower tax rates should be shut down. This is a rationale for cronyism that knows no end.

Of equal importance, basic constitutional liberties are denied when government acts solely to benefit the interests of a competing private party: courts and scholars from across the spectrum concur that "purely private interest legislation does not protect the general welfare; it treats one group of people differently from another group because of "raw exercise of political power."<sup>24</sup> Put another way, "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want" is a constitutionally impermissible

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<sup>22</sup> *Internet Sweepstakes Cafes: Unregulated Storefront Gambling in the Neighborhood*, by David O. Stewart, available at [http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/internet\\_sweepstakes\\_white\\_paper\\_121712.pdf](http://www.americangaming.org/sites/default/files/uploads/docs/whitepapers/internet_sweepstakes_white_paper_121712.pdf).

<sup>23</sup> *Id.*

<sup>24</sup> Jim Thompson, *Powers v. Harris: How the Tenth Circuit Buried Economic Liberties*, 82 *Denv. U.L.Rev.* 585, 599-600 (2005).

"capture of government power by faction."<sup>25</sup> And of course, James Madison's infamous warning against political factions capturing the legislative branch is the very thing that has given rise to constitutional guarantees of private property, equal protection, and due process.

Moreover, Ohio has explicitly and rightly rejected redistribution of property rights -- such as the right to do business -- to increase the tax base. In 2005, the United States Supreme Court issued an alarming and sharply-divided 5-4 decision in *Kelo v. New London* green-lighting the taking of Suzette Kelo's longtime home so that it could be given to the Pfizer Corporation, for the sole purpose of increasing the tax base.

Specifically, the Court found it to be a constitutionally-permissible "public purpose" to take property from A and give it to B for the purpose of "the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area," i.e. addition tax revenue for the local government.<sup>26</sup>

The four-Justice dissent, citing constitutional law from the founding period, responded by explaining that favoring certain private interests over other competing interests violates the basic premises of limited government: "[a]n ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority .... A few instances will suffice to explain what I mean ....[A] law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it."<sup>27</sup>

The dissenting Justices continued, observing that government actions targeted towards redistributing societal resources *merely to increase the tax base* have no place in a constitutionally-limited government, explaining "any single-family home that might be razed to make way for an apartment building, or any church that might be replaced with a retail store, or any small business that might be more lucrative if it were instead part of a national franchise, is inherently harmful to society and thus within the government's power to condemn [and] nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."<sup>28</sup>

House Bill 7, breathing legislative life into the casino's viewpoint, treats internet cafes as a Motel 6 and Casinos as a Ritz-Carlton; and it then effectuates the *Kelo* worldview: government can and should reallocate societal resources from small businesses to bigger businesses to increase the tax base.

However, Ohio rejects the *Kelo* worldview. In *Norwood v. Horney*, the Supreme Court of Ohio, rejected the notion that government may act "solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health;" and "[a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits \* \* \*."<sup>29</sup>

Additional background principles of limited government shed light on this dispute.

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<sup>25</sup> Cass Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1690 (1984).

<sup>26</sup> See *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S.Ct. 2655 (2005).

<sup>27</sup> *Id.*, citing *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798) (emphasis in original).

<sup>28</sup> *Id.*, at 506.

<sup>29</sup> *Norwood v. Horney* (2006), 110 Ohio St.3d 353, at 375, 853 N.E.2d 1115



The state of Ohio's regulatory power is rooted in and limited by nuisance theory and public necessity.”<sup>30</sup> Thus, “Government can impose new requirements for using property or prohibit previously lawful usage [only] *if its continued unchanged use constitutes a nuisance.*”<sup>31</sup> “By contrast, the government cannot impose new requirements for existing property *when its continued unchanged use does not constitute a nuisance.*”<sup>32</sup> “Nuisance” is defined as “the wrongful invasion of a legal right or interest,”<sup>33</sup> and a public nuisance is “an unreasonable interference with a right common to the general public.”<sup>34</sup>

In *City of Cincinnati v. Correll*, the Supreme Court of Ohio held that a regulation unduly interfered with property rights and small business, and ruled “[l]egislative bodies may not, under the guise of protecting the public interest, interfere with private business by imposing arbitrary, discriminatory, capricious or unreasonable restrictions upon lawful business.”<sup>35</sup> Similarly, in *Olds v. Klotz*, this Court observed that the regulation of business is only within the police power when “*the relation to the public interest and the common good is substantial* and the terms of the law or ordinance are reasonable and not arbitrary in character.”<sup>36</sup>

Ultimately, in Ohio “[t]he right to contract, the right to do business and the right to labor freely and without restraint are all constitutional rights equally sacred,”<sup>37</sup> and at the same time, Section 4 and 6 of Article 8 of the Ohio Constitution declare that an Ohio government must not “raise money for, or loan its credit to, or in aid of, any such company, corporation, or association.” Read together, these constitutional principles demand, at minimum, a level playing field where the state avoids taking sides.

There is simply no basis for determining that harmless voluntary transactions at internet cafes, wholly without “public health” consequences could constitute a “nuisance.” Meanwhile, the legislature - - and particularly Republicans who frequently label themselves as conservatives - - should steer clear of the business of stripping one set of Ohioans of these rights, simply to advance the monopoly of a more politically powerful set of out-of-state interest. And of course, not even “increased tax revenue for the state” can serve as justification for such action.

### ***The (surprising) unconstitutional suppression of free speech***

In addition to impairing economic liberties, perhaps one of the most surprising and self-defeating features of the ban is that it unconstitutionally burdens constitutionally protected speech, and would likely be invalidated soon after passage.

Often to the surprise of many legislators, the First Amendment and its Ohio analog are interpreted to protect not just political speech, but also “commercial speech.”

Under clear United States Supreme Court and Sixth Circuit precedent, “regulations that are triggered solely by speech are in fact regulations of speech.”<sup>38</sup>

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<sup>30</sup> See *State ex. rel. Killeen Realty Co. v. City of East Cleveland* (1959), 169 Ohio St. 375, 160 N.E.2d 1, (“the police power, however, is based on public necessity.”) (emphasis added).

<sup>31</sup> See *Ghaster Properties, Inc. v. Preston* (1964), 176 Ohio St. 425, 27 O.O.2d 388, 200 N.E.2d 328], supra, paragraphs two through four of the syllabus. (emphasis added).

<sup>32</sup> *Gates Co. v. Housing Appeals Bd.* (1967), 10 Ohio St.2d 48 [39 O.O.2d 42, 225 N.E.2d 222], syllabus.

<sup>33</sup> *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 432, 28 O.O. 369, 55 N.E.2d 724.

<sup>34</sup> Id.

<sup>35</sup> Id. (emphasis added).

<sup>36</sup> *Olds v. Klotz* (1936), 131 Ohio St. 447, 451, 3 N.E.2d 371, 373.

<sup>37</sup> *Eastwood Mall v. Slanco* (1998).

<sup>38</sup> *Commonwealth Brands, Inc. v. U.S.* Not Reported in F.Supp.2d, 2009 WL 3754273 (W.D.Ky. 2009). On appeal, the Sixth Circuit endorsed this reasoning. See *Discount Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, C.A.6 (Ky.),2012.

In its most recognizable form, commercial speech “usually [is] defined as speech that does no more than propose a commercial transaction.”<sup>39</sup> Moreover, advertising and promotional speech, including through signage and business cards, is undeniably protected speech: *Central Hudson* describes commercial speech as “advertising pure and simple” and “expression related solely to the economic interests of the speaker and its audience.”<sup>40</sup> Promotional activity is to be analyzed as commercial speech<sup>41</sup> and electronic “signs, it is clear, represent a medium of expression that the Free Speech Clause has long protected.”<sup>42</sup>

In a landmark 2011 ruling, the United States Supreme Court concluded that "commercial speech" even included "prescriber-identifying information," or "pharmacy records that reveal the prescribing practices of individual doctors."<sup>43</sup>

Proponents of House Bill 7 attempt to ban internet cafes by suppressing a similarly-obscure yet similarly-protected form of commercial speech. The proposed amendments to R.C. 2915, Ohio's gambling laws, attempt to ban internet cafes by defining them as "scheme of chance." However the proposed definition of "schemes of chance" regulates in response to protected speech: "the use of an electronic device to reveal the results of a game entry. . . ."<sup>44</sup> "Revealing the results of a game entry" is every bit as much protected speech as the "revealing pharmacy records that reveal prescribing practices" discussed in *Sorrell*.

The 1851 Center for Constitutional Law, in December 2012, succeeded in litigation that resulted in invalidation of the Ohio Precious Metal Dealers Act. The Court found that the Act, identical in structure to how House Bill 7 would operate if enacted, unconstitutionally infringed upon protected commercial speech by defining who was regulated in response to whether, and if so how, one communicated with the public. The entire Act was declared unconstitutional due to this constitutionally-defective definition of who was subject to regulation. Given the textual and structural changes that House Bill 7 would implement, a federal would have little trouble invalidating the amendments.

There would appear to be little incentive for legislators to enact legislation only against those that speak, and based upon a particular method of speech, rather than rooted in conduct. Legislators who recall their oath of office should pass on the opportunity.

### ***The economic case for simply letting the market work***

A recent analysis of the "economic consequences, for employment, sales volumes and incomes in the State of Ohio of Internet Cafe Operations" recently concluded that Ohio's 800 to 900 Internet Cafes created considerable job opportunities and economic activity.<sup>45</sup> North Carolina State economist J.C. Poindexter concludes that Ohio's internet cafes generate nearly 16,000 full time jobs - - these range from direct employment at the businesses to security, cleaning, book-keeping, cleaning, and catering.

Meanwhile, with licensing fees as high as \$25,000 per year per establishment these businesses operations are likely to generate a minimum of \$21 million in annual revenue for state and local governments, not

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<sup>39</sup> *United States v. United Foods, Inc.* (2001), 533 U.S. 405, 409, 121 S.Ct. 2334, 150 L.Ed.2d 438.

<sup>40</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of New York* (1980), 447 U.S. 557, 561.

<sup>41</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).

<sup>42</sup> *Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 818 (6th Cir.2005).

<sup>43</sup> *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 180 L.Ed.2d 544, 79 USLW 459 (2011)

<sup>44</sup> See proposed House Bill 7, proposed changes to 2915.01(C).

<sup>45</sup> See *December 10, 2012 Testimony of J.C. Poindexter, Ph.D, regarding economic effects in Ohio of internet cafe operations*, delivered to the Ohio Senate Reform and Oversight Committee.

including general sales tax revenue.<sup>46</sup> In all, Poindexter concludes these businesses may generate as much as \$760 million in economic activity.

Why destroy this economic activity, rather than allow Ohioans to benefit from it? Perhaps unusually to some, many Democrats seem to understand this - - Sen. Shirley Smith, D-Cleveland, has indicated that shutting down these small businesses, which are important to people's livelihoods, "*would be a travesty to this state.*" She said she favors regulation instead.

## ***Conclusion***

Ohio legislators must avoid embracing *the principle* that it's permissible to destroy the property and contract rights of one set of businesses at the behest of another set of more influential business. And the fact that the weaker businesses may not be universally popular cannot justify deviation from this principle. As James Madison famously explained "[p]eople should therefore be wary, of power strengthen[ing] itself by exercise, and entangl[ing] the question in precedents" - they should recognize "the consequences in the principle," and "avoid the consequences by denying the principle."<sup>47</sup>

It's relatively easy to dogmatize internet cafes. However, failure to stand on principle in this dispute between business competitors creates a slippery slope, transmitting the message to business and industry, lobbyists, and citizens that the codification of business advantages can be won at the statehouse, rather than earned by attracting voluntary business. This would only invite further lobbying to accomplish these ends. Today's internet cafes could be tomorrow's manufacturers, farmers, oil and gas producers, restaurants, or retail shops.

Mark Twain famously expressed "No man's life, liberty, or property are safe while the legislature is in session." Legislators should recognize the political "bootleggers" behind the "Baptists" here, take account of the intentions of the Ohio Constitution, and rebuff this effort to destroy over 800 small businesses and 16,000 jobs through House Bill 7.

***THE 1851 CENTER FOR CONSTITUTIONAL LAW is a non-partisan non-profit legal center dedicated to protecting the rights of Ohioans from government abuse. The center litigates property rights, taxation, free speech, and individual rights cases, and analyzes state and local policies touching on the role of government and constitutional liberties.***

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<sup>46</sup> Id.

<sup>47</sup> JAMES MADISON, A Memorial and Remonstrance Against Religious Assessments, in 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland et al. eds., 1973).

