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STATE OF KANSAS

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January 23, 1974

Opinion No. 74- 19

Honorable William W. Buntin
Representative, Fifty Fourth District
House of Representatives
Statehouse
Topeka, Kansas

Dear Representative Buntin:

Pursuant to Senate Concurrent Resolution No. 72, it is proposed to amend Article 15 of the Kansas Constitution by adding thereto section 3a, which states thus:

"Notwithstanding the provisions of section 3 of article 15 of the constitution of the state of Kansas the legislature may regulate, license and tax the operation or conduct of games of 'bingo,' as defined by law, by bona fide nonprofit religious, charitable, fraternal, educational and veterans organizations."

You inquire, first, whether the proposed amendment violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by "allowing Bingo to be played by one group while excluding another."

In Williams v. Rhodes, 393 U.S. 23 (1968), the Court stated thus:

"[T]his Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether

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or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."

In McGowan v. Maryland, 366 U.S. 420 (1961), the Court reiterated thus:

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that in practice their laws result in some inequality." 366 U.S. at 425.

The prohibition against lotteries in Article 15, § 3 of the Kansas Constitution is an assertion, grounded in the organic law of our state, of the police power of the state to prohibit that which was deemed harmful to the people and to the public welfare. In the early case of Yellow-Stone Kit v. State, 88 Ala. 196, 7 So. 338 (1890), the Court observed thus:

"The history of lotteries for the past three centuries in England, and for nearly a hundred years in America, shows that they have been schemes for the distribution of money or property by lot in which chances were sold for money, either directly, or through some cunning device. The evil flowing from them has been the cultivation of the gambling spirit, -- the hazarding the money with the hope by chance of obtaining a larger sum, -- often stimulating an inordinate love of gain, arousing the most violent passions of one's baser nature, sometimes tempting the gambler to risk all he possesses on the turn of a single card or cast of a single die, and 'tending, as centuries of human experiences now fully attest, to mendicancy and idleness on the one hand, and moral profligacy on the other.'"

In City of Roswell v. Jones, 67 P.2d 286 (N.M. 1937), the Court canvassed a number of statements of the evils attendant upon gambling, citing Wharton's Criminal Law, vol. 2, § 1778 for the following:

"Almost all modern states have, at some period of their history, employed lotteries as a means of revenue. But though they supply a ready mode of replenishing the public treasury, they have always been found to exert a mischievous influence upon the people. The poor are invited by them rather than the rich. They are diverted from persistent labor and patient thrift by the hope of sudden and splendid gains; and as it is the professed principle of these schemes to withhold a large part of their receipts, a necessary loss falls upon that class which can least afford to bear it."

The foregoing are but examples of the objectives which gambling and lottery prohibitions have historically been deemed to serve and promote, and of the evils they are designed to prevent.

In but one reported case our research has discovered has a court been called upon squarely to consider the validity of a legislative attempt to decriminalize only that gambling activity sponsored in "bona fide religious, patriotic, charitable, or fraternal clubs." In Fairchild v. Schanke, 113 N.E.2d 159 (Ind. 1953), that section of the enactment under consideration stated thus:

"It is hereby declared to be the policy of the assembly, recognizing the close relationship between professional gambling and other organized crime, to restrain all persons from seeking profit from gambling activities in this state; to restrain all persons from patronizing such activities when conducted for the profit of any person; to safeguard the public against evils induced by common gamblers and common gambling houses; and at the same time . . . to avoid restricting participation by individuals in sports and social pastimes which are not for profit, do not affect the public, and do not breach the pace"
[Emphasis by the court.]

The enumerated organizations were exempted from the proscriptions of the act. The Court stated the question before it bluntly:

"Is there any substantial distinction between a bona fide religious, patriotic, charitable or fraternal club seeking and receiving profit from the conduct of a lottery, the operation of slot machines, or any other gambling device, and an individual, a social club, or professional gambler who operates similar lottery enterprise, slot machines or other gambling devices?"

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"We can see none. Nor has any valid distinction been pointed out to us by appellants."

It was urged to the Court that

"the consequences to society are not the same if the profit from activities which constitute gambling goes to buy new athletic equipment for a Sunday school, as if such profits went to organized gambling, [and that] . . . the threat or danger to society is different from that posed by professional gambling."

Quoting from Harriman Institute v. Carrie Tingle Crippled Children's Hospital, 43 N.M. 1, 84 P.2d 1088 (1938), the Court quickly rejected this view.

"The gambling spirit feeds itself with as much relish upon a charity lottery as upon any other kind. If the average person be consumed with a desire to take a chance and get something for nothing, it matters not to him whether the promoter makes a profit or that profit goes to charity. Indeed, if it does go to charity, his participation wears a cloak of piety otherwise denied it. He thus may be persuaded to purchase tickets oftener and in larger volume because operated in the name of charity or religion. The point we seek to make is that widespread participation in a charity lottery is just as baneful in its effect upon the public as widespread participation in any other kind of lottery."

The Court found a further defect in the classification:

"In determining the construction of the act here in question this court will take judicial notice of the fact that there are many social clubs and service clubs in Indiana which do not come within the excluded class in the act, but which are by their nature related to those excluded and are similarly situated as to organization and general purpose. . . These clubs are subject to the act. They cannot, with immunity, operate gambling devices or conduct lotteries or gambling enterprises at any time or for any purpose, while the excluded clubs are exempt from the provisions of the act, thereby extending to them privileges and immunities which, upon the same terms, are not granted to other clubs and individuals similarly situated."

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The Indiana Supreme Court applied in this instance a more rigorous standard to determine permissible classifications than that generally applied by the Kansas Supreme Court. Nonetheless, as an assertion of the police power of the state through constitutional amendment, the proposed resolution must comply with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the classification must bear a reasonable relationship to a permissible state objective. The test most commonly applied by the Kansas Supreme Court was carefully enunciated in Tri-State Hotel Co. v. Londerholm, 195 Kan. 748, 408 P.2d 864 (1965):

"In determining whether a classification in a statute enacted under the police power is reasonable, the following guidelines appear evident from the decisions of this court: (1) A classification having some reasonable basis does not offend against Sections 1 and 2 of our Bill of Rights merely because it is not made with mathematical nicety or because in practice it results in some inequality; (2) there is no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities -- in a classification for governmental purposes there need not be an exact exclusion or inclusion of persons and things; (3) if any state of facts reasonably can be conceived that would sustain the Act, their existence at the time the law was enacted must be presumed; (4) within the zone of doubt and fair debate, the legislative determination is conclusive upon the court and must be upheld, and (5) one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

It may be argued in support of the proposed amendment, if adopted, that it represents a determination by the people that the operation of lottery bingo by nonprofit charitable, religious, fraternal, educational and veterans' organizations represents no threat to the thrift, industry, morals and security of the people, or to the peace and good order of the state, and that restriction of the privilege of lottery bingo to these groups represents no "invidious discrimination," but rather a determination that lottery bingo conducted not for profit and under the auspices of these bona fide groups is no longer deemed to be harmful to the health, safety, and morals of the people of the state.

The courts might very well find that differences in the damages to be feared, for example, lottery bingo conducted by such organizations, and organized gambling conducted by professional gamblers for profit, differ so in kind and degree that a classification

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such as that in S.C.R. No. 72, bears a reasonable relationship to a permissible state objective, that of asserting the regulatory power of the state over the one form, and prohibiting the other entirely.

The extended discussion above is offered to demonstrate the absence of any basis upon which we may conclude purely as a matter of law that the proposed classification in S.C.R. 72 constitutes an "invidious discrimination" or classification which is forbidden either by the Kansas or by the United States Constitution.

You inquire, secondly, whether the proposed amendment represents a renewed attempt to redefine the term "lottery" in such a manner as to exclude a game which has been held by the Kansas Supreme Court to constitute a lottery. In State v. Nelson, 210 Kan. 439, 502 P.2d 841 (1972), the court held that the Legislature could not, in framing a definition of a lottery which was prohibited under the gambling laws of the state criminal code, ascribe to that term any meaning other than that which the courts have heretofore given that term when interpreting Article 15, § 3 of the Kansas Constitution. In our view, the resolution in question here does not represent an attempt to redefine the term "lottery," or any constituent element thereof, but rather constitutes a modification of the heretofore total constitutional prohibition, to permit certain lotteries, i.e., bingo when conducted by one of the enumerated organizations, "notwithstanding" the general prohibition of Article 15, § 3.

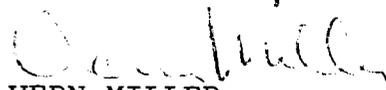
In State v. Nelson, supra, the Court condemned legislative action which was held to be at odds with the state constitution and the prior interpretive decisions of the Court which had become themselves part of the constitutional law of the state. That decision in no way, of course, inhibits amendment of the constitution itself.

Thus, in summary, there exists no basis upon which we may conclude as a matter of law that Senate Concurrent Resolution 72 sets forth a classification which constitutes an invidious or otherwise forbidden discrimination under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It is impossible within this short time, of course, to anticipate all the arguments of a constitutional nature or otherwise which might be raised against the amendment should it be approved. Similarly, it is not possible to predict the judgment of a court which was asked to pass upon the proposed classification and determine its reasonableness in the light of factual evidence legal arguments presented in an adversary setting. However, in our view, it is not possible to conclude purely as a matter of

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law other than that the proposed amendment does comply with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Moreover, it is our view that the proposed amendment does not violate either the spirit or the letter of State v. Nelson, supra.

Yours very truly,



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VM:JRM:jsm