

## [ Alerts and Updates ]

### Pennsylvania High Court Strikes Ban on Gaming Licensees' Political Contributions

May 6, 2009

The Pennsylvania Supreme Court, in *Peter DePaul v. Pennsylvania*,<sup>1</sup> invalidated an absolute ban on political contributions imposed on licensees and associated individuals by the Commonwealth of Pennsylvania's 2004 Gaming Act.<sup>2</sup> The court found the total restrictions on political contributions to be an unconstitutional restraint on protected rights of free expression guaranteed in the Pennsylvania Constitution. The Gaming Act forbade direct contributions of any amounts, as well as indirect contributions (to organizations that in turn supplied candidates), and required licensees to establish procedures to ensure compliance within their ranks.

The plaintiff, Peter DePaul, an investor and lifelong contributor to political campaigns, had been subjected to a consent decree requiring \$100,000 in fines and other restrictions for violations of the political contribution ban. The state supreme court now enjoins the enforcement of section 1513 of the Gaming Act ("Political Influence") and certain implementing procedures and penalties that supplemented the ban.

The Pennsylvania legislature had established a limited, regulated gaming industry in the commonwealth by authorizing the issuance of 14 licenses: seven racing licenses; five slots-only casinos and two resort-hotel licenses. The industry has been extremely successful: the seven casinos that have opened to date all far exceed predictions for gaming revenue and resultant tax revenue, which is imposed in Pennsylvania at approximately 55 percent. The total ban on political influence was an integral feature of the legislative plan, designed to "prevent the actual or apparent appearance of corruption that may result from large campaign contributions."<sup>3</sup>

The Gaming Act's prohibition was subjected to a "strict scrutiny" analysis following Pennsylvania precedent establishing political contributions as constituting expressive conduct protected by the Pennsylvania Constitution's grant of fundamental freedoms of political expression and association.<sup>4</sup> The court's opinion focused on whether the Gaming Act's restrictive provisions were narrowly tailored to accomplish a compelling state interest in banning contributions to campaigns and potential organizations.

The court interpreted Pennsylvania law to require a "strict scrutiny" analysis—regardless of whether the U.S. Supreme Court would similarly review potential contribution restrictions in this manner. The Pennsylvania Constitution's protection for freedom of expression and association is broader than those rights presented under the First Amendment of the U.S. Constitution.

The opinion, written by Chief Justice of the Supreme Court of Pennsylvania Ronald Castille, was joined by all but one member of the state high court. The sole dissenting justice argued that there was no "per se" rule against bans and that the legislation was necessary to achieve a compelling state interest. The majority's opinion quickly dismissed arguments that a total ban on political contributions was required to prevent political corruption or its appearance. This conclusion was reached despite a required "strong presumption of constitutionality" of challenged statutes. Nineteen states in addition to Pennsylvania permit "commercial gaming" (excepting lotteries, pari-mutuel wagering and tribal casinos), yet only five jurisdictions attempt to ban all political contributions by individuals.

Distinguishing the approaches taken by other state supreme courts, whose laws restricted contributions to a more select group of politicians (those directly involved in gaming regulation and enforcement), and also those states that limited (rather than banned)

the amount of the contribution, the court's ruling differed significantly from the precedents in Louisiana and New Jersey, where total bans had been approved by those state supreme courts. New Jersey's prohibition was more focused than Pennsylvania's, applying only to those classified as "casino key employees" and not to individual owners of an interest in a company that, in turn, owned an interest in a licensee, (such as in the case of Peter DePaul, a 13.6-percent holder in a limited partnership that had a 70-percent ownership in a planned Philadelphia casino).

Focusing on the Pennsylvania legislative expression that the corrupting influence of a "large contribution could erode public confidence in the system of representative government," the court questioned whether there was a compelling need of the commonwealth to eliminate all contributions to any political office, no matter how attenuated from a gaming interest, to meet the expressed legislative mandate. The "obvious disconnect" behind the chosen means and the articulated governmental interests required the ban to fall, according to the justices.

The decision confirms that political contributions constitute protected expression in Pennsylvania, but the court also cited, approvingly, language from the U.S. Supreme Court that the "quantity of communication by the contributor does not increase perceptively with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing."<sup>5</sup> Considering that Pennsylvania is more than a 50-percent partner in sharing gaming profits within the commonwealth, the ruling may reflect an acceptance that gaming is now a "mainstream" industry, no more susceptible to corruption than any other business sector, and should be treated accordingly.

While the impacted gaming-industry participants may appreciate the restoration of their "commercial-free expression," the obligation to deflect all requests for contributions from candidates and political parties was likely a convenience. Pennsylvania's gaming industry may now be "fair game" to be approached for contributions by politicians as a source of campaign revenue.

## For Further Information

If you have any questions about this Alert or would like more information, please contact [J. Scott Kramer](#), any [member](#) of the [Gaming Industry Group](#) or the attorney in the firm with whom you are regularly in contact.

## Notes

1. *Peter DePaul v. Commonwealth of Pa. & the Pa. Gaming Control Bd.*, 2009 Pa. LEXIS 670 (Apr. 30, 2009).
2. Pennsylvania Race Horse Development & Gaming Act, 4 Pa.C.S. § 1513 *et seq.* (2004).
3. 4 Pa.C.S. § 1102.
4. Pa. Const. art. 1, § 7 (2008).
5. *Buckley v. Valeo*, 424 U.S. 1.