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SUBJECT: Senate Bill 1 (2023)

I. EXECUTIVE SUMMARY

- Senate Bill 1 ("SB1") would legalize video lottery terminal ("VLT") gaming and sports wagering in Missouri. However, SB1's provisions on VLTs' revenue distributions to the VLT industry and veterans are unconstitutional:
    - SB1 creates a VLT revenue share with the VLT industry (the "Lottery Revenue Share").
    - The Missouri Constitution (Article III, Section 39(b)(3)) requires all lottery proceeds, except administrative expenses, be allocated exclusively to education and that cannot be altered by statute.
    - SB1's Lottery Revenue Share is not an administrative expense and violates Article III, Section 39(b)(3), rendering the Lottery Revenue Share unconstitutional.
    - Under the same principles, SB1 is not permitted to share VLT revenues with the Veterans' Commission Capital Improvement Trust Fund ("Veterans' Fund") as the VLT fee is likewise not an administrative expense.
- SB1's attempts to "deem" the Lottery Revenue Share and distribution to the Veterans' Fund an "administrative expense" are without effect as SB1 cannot amend the plain language of the Missouri Constitution.
- The Missouri Constitution does not distinguish between retail lottery and VLTs. SB1's Lottery Revenue Share may also violate equal protection rights as it discriminates against existing lottery retailers, who appropriately only receive administrative expenses.

II. SB1 is unconstitutional because the Lottery Revenue Share allocates monies that are not "administrative expenses" away from education.

Section 313.429.10 of SB1 violates Article III, Section 39(b)(3)'s requirement that all lottery proceeds minus "administrative expenses" go toward education. The bill, as currently drafted, provides:

> The remainder of video lottery game adjusted gross receipts, after the cost of the centralized computer system and administrative costs are paid and apportioned, shall be retained by video lottery game operators and shall be split evenly between video lottery game operators and video lottery game retailers as provided under an agreement.

See proposed Section 313.429.10, RSMo. This is in direct conflict with Article III, Section 39(b)(3) of the Missouri Constitution, which provides:

> The monies received from the Missouri state lottery shall be governed by appropriation of the general assembly. Beginning July 1, 1993, monies representing net proceeds after payment of prizes and administrative expenses shall be transferred by appropriation to the "Lottery Proceeds Fund" which is hereby created within the state treasury and such monies in the lottery proceeds fund shall be appropriated solely for public institutions of elementary, secondary and higher education.

The Constitution makes clear that all non-administrative expenses must go toward education. SB1 proposes to sweep non-administrative expenses to operators and retailers.

"If a statute conflicts with a constitutional provision or provisions, this Court must hold the statute invalid." *State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002) (citing *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991)). SB1's policy may be accomplished but it must be done through a Joint Resolution sending a constitutional amendment to the voters of the state.

III. SB1 is Likewise Unconstitutional Because No Money Can Be Shared with the Veteran's Trust Fund.

SB1 purports to charge a $300 annual "administrative fee" for each VLT in service to be deposited in the state lottery fund, and then attempts to direct the Commission to distribute the funds to the Veterans' Fund. *See* Section

313.429.3, RSMo. Again, Article III, Section 39(b)(3) requires "monies in the lottery proceeds fund…[to] be appropriated solely for public institutions of elementary, secondary and higher education." (emphasis added).

Absent a Constitutional amendment *via* Joint Resolution, lottery proceeds cannot be diverted from education to the Veterans' Fund. SB1's attempts to redefine the Constitution will be without effect and any attempt to take lottery proceeds away from education and allocate it to the Veteran's Fund is unconstitutional.

IV. The Lottery Proceeds SB1 Attempts to Allocate to the VLT Industry and Veterans' Fund cannot be Deemed by Statute to be "Administrative Expenses" under the Missouri Constitution.

SB1's attempts to label the Lottery Revenue Shares and allocations to the Veterans' Fund as an "administrative expense" runs afoul of the Constitution. The ability to interpret the Missouri Constitution is solely within the power of the judiciary, not the legislative branch. *See State ex rel. Cason v. Bond*, 495 S.W.2d 385, 393 n.3 (Mo. 1973) ("Interpretation of statutes as well as constitutional provisions is a judicial function"). The legislative branch cannot, therefore, alter the meaning of "administrative expense" by statute.

In interpreting the term "administrative expense", a court, not the legislature, will interpret the provision using its "plain, ordinary and natural meaning." *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. 1983). "The commonly understood meaning of words is derived from the dictionary." *Id.* Black's Law Dictionary defines "administrative expenses" as "overhead." BLACKS LAW DICTIONARY, 48 (8th ed. 2004). "Overhead" is defined as "those general charges or expenses in a business which cannot be charged up as belonging exclusively to any particular part of the work or product (as rent, taxes, insurance, lighting, heating, account and other office expenses, and depreciation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1608 (2002).

The Constitution states that lottery proceeds must go to education, unless used for an "administrative expense". SB1 cannot alter that definition, only a Joint Resolution amending the Constitution can do that. See *State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002).[1] As such, SB1 is unconstitutional even though it attempts to "deem" the allocations as "administrative expenses".

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[1] Courts in other jurisdictions have read limitations on lottery proceeds strictly and the term "expenses" narrowly. *See* Appendix A.

V. "Administrative Expenses" for All Operators Should be Substantially Similar

"Administrative expenses" for retail lottery tickets is approximately five percent and this percentage has been approved in Missouri since 1985. The amounts proposed in SB1 for revenue sharing among VLT operators and retailers and the Veterans' Fund is greater than five percent such that it would be unreasonable, inconsistent, and inequitable to label them "administrative expenses." This inequitable treatment may give rise to lottery retailers for an equal protection argument under the United States Constitution.

The retail lottery compensation has been sufficient since 1985 and it is reasonable to assume a Missouri Court will be comfortable with the definition of "administrative expense" that has stood for three decades. If VLTs suggest a larger allocation of lottery proceeds, it could not only create a fatal flaw in SB1, but it could create an issue with the retail lottery as well, unsettling a long-standing precedent in Missouri that benefits education.

APPENDIX A

SUMMARY OF LIMITATIONS ON LOTTERY PROCEEDS FROM OTHER JURSIDICTIONS

- *Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n,* 144 Idaho 23, 31, 156 P.3d 524, 532 (2007) (affirming the finding of the hearing officer for the Lottery Commission that a strict reading of I.C. § 67–7709(1)(a) affirmatively requires building rent to be taken out of the 20% net proceeds rather than being counted as part of the 15% administrative expenses, since the cost of facilities is not enumerated as a permitted expense in that section.)

- *Dalton v. Pataki*, 11 A.D.3d 62, 98, 780 N.Y.S.2d 47, 75 (2004), aff'd as modified, 5 N.Y.3d 243, 835 N.E.2d 1180 (2005) ("While we agree with the parties that vendor fees generally constitute a necessary administrative cost of housing and installing VLTs, those fees may not be artificially inflated to include expenses that are not necessary administrative costs. We are unpersuaded that reinvestment in breeding funds and enhanced purses is a necessary expense of the vendors housing VLTs, unlike such costs as space, staffing and security needs. In our view, by providing that 40%–50% of the vendor fee is to be reinvested in breeding funds and enhanced purses, the Legislature has signaled that the vendors themselves do not require that portion of the fee as compensation. Simply put, reinvestment in breeding funds and enhanced purses is not a reasonable, necessary expense or cost of maintaining VLTs and, thus, funds dedicated for that purpose cannot be deducted from the net proceeds of the lottery without violating the requirement in N.Y. Constitution, article I, § 9(1) that lottery revenues be used to support education.")

- *Ecumenical Ministries of Oregon v. Oregon State Lottery Comm'n*, 318 Or. 551, 871 P.2d 106 (1994) ("Because section 7(2) of Measure 5 does not include any category specifically denominated "costs of administration," that subsection informs us that the "costs of administration" of the lottery generally are categorized as "expenses" of the Commission and the State Lottery. Section 7(4) informs us that "expenses" are broadly and non-inclusively defined. However, we note that, although a broad range of goods and services apparently is permitted to be leased or purchased under section 7(4), those goods and services must be "required by the Commission" and must be "necessary for effectuating the purposes of this Act." That wording suggests that "expenses" relate to the internal implementation and management of the lottery.").
    - Statutorily authorized expenditure for gaming law enforcement was not permissible "cost of administration" under constitutional provision governing state lottery; "gaming law enforcement" was not limited to state lottery and did not constitute expense or cost of internal implementation or management of lottery.
    - Statutorily authorized expenditure for community mental health programs to treat gambling addiction was not permissible "cost of administration" under

constitutional provision governing state lottery; such programs did not constitute expense or cost of internal implementation or management of lottery.