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Via Email

Rebecca Kaldor
Executive Director
Washington Indian Gaming Association
525 Pear St. SE
Olympia, WA 98501
Rebecca@WashingtonIndianGaming.org

Re: **The Emergency Clause in Engrossed Substitute House Bill 2638 ("ESHB 2638")**

Dear Ms. Kaldor:

The Washington Indian Gaming Association ("WIGA") has engaged me to furnish my opinion on the validity of the "emergency clause" in ESHB 2638. Section 15 of that bill states, "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately." Although I am being paid by your association to provide my opinion, I have no other relationship to WIGA.

This letter provides my opinion on WIGA's question. As you know, I served as Attorney General of Washington for eight years, from 2005-2013. In that role, I supervised over 500 attorneys and more than 700 support staff, providing legal services to Washington state agencies including legal advice concerning the meaning, effect and constitutionality of proposed and adopted state legislation. My office and I were also asked by state legislators for legal advice on proposed bills and we ourselves offered 45 agency-request bills that were enacted and signed into law. In short, we frequently were consulted by our agency clients and members of the legislature on questions arising from proposed changes to state law.

As Attorney General, I was active in my office's handling of appellate cases including many questions of state and federal constitutional law. I reviewed the briefing and participated in the preparation for oral arguments by our attorneys in many cases being heard in the federal appellate courts, U.S. Supreme Court, and Washington Supreme Court. I successfully argued three U.S. Supreme Court cases and cases before the Ninth Circuit Court of Appeals and Washington Supreme Court. Since entering private practice, I have represented clients in

several matters involving questions of state and federal constitutional law, briefing and arguing cases in the Superior Court, Court of Appeals, and state Supreme Court.

To prepare this opinion, I have reviewed ESHB 2638 and its Senate companion, SSB 6394, along with Washington case law addressing the legislature's use of emergency clauses. I have also reviewed the opinion letter furnished to Maverick Gaming by former Justice Philip A. Talmadge, dated February 11, 2020. Based on my review of ESHB 2638 and SSB 6394 and of relevant case law, it is my opinion that the legislature's declaration of an emergency in ESHB 2638 is appropriate under the Washington constitution and likely would be upheld by Washington's courts if it were subsequently challenged.

Washington Law on the Use of Emergency Clauses

Washington's constitution vests the state's legislative authority in the legislature but "the people reserve to themselves" the power to propose and enact bills and laws by initiative, and to approve or reject any act "or part of any bill, act, or law passed by the legislature" by referendum. Wash. Const., art. II, § 1. When an enacted law is subjected to a referendum vote of the people, the law is suspended until that vote occurs in the next general election. A law passed by the legislature, however, may not be subject to a referendum where the legislature has determined that the law is "necessary for the immediate preservation of the public peace, health or safety, [or] support of the state government and its existing public institutions…." *Id.* at § 1(b). The constitution thus creates an exception to the people's referendum power over enacted "bills, acts or law" where the legislature in its discretion has decided that an act should take effect immediately.

The legislature's decision that an act should take effect immediately and not be subject to referendum is subject to judicial review. In reviewing challenges to enacted laws containing emergency clauses, the Washington Supreme Court has sought to balance the legislature's authority over legislation with the people's power to make, accept or reject laws. *See, e.g., State* ex rel. *Humiston v. Meyers*, 61 Wash. 2d 772, 777 (1963) ("[T]here is a most delicate balance between the emergent powers of the legislature and the people's right of referendum.").

In older Supreme Court cases such as its 1963 decision in *Humiston*, the Court adopted a narrower interpretation of the exception from referendum for acts deemed by the legislature to be "necessary for the immediate preservation of the public peace, health or safety." *See, e.g., State ex rel. Brislawn v. Meath*, 84 Wash. 302, 318, 147 P. 11, 16–17 (1915) (adopting a narrow interpretation of the public safety exception). In its decisions since 1963, however, the Supreme Court has stressed judicial deference to the legislature and has consistently ruled that emergency clauses will be upheld as valid: "Legislative declarations of fact, such as the existence of an emergency, are deemed conclusive unless they are 'obviously false and a palpable attempt at dissimulation.'" *See, e.g., City of Tacoma v. Luvene,* 118 Wash.2d 826, 851 (1992) (quoting *State ex rel. Hamilton v. Martin,* 173 Wash. 249, 257 (1933). Consequently, since doing so in 1963 in *Humiston*, the Supreme Court has not struck down an emergency clause in any bill, act, or law passed by the legislature.

Opponents of ESHB 2638 emphasize the Supreme Court's ruling in *Humiston* because the Court there struck down an emergency clause in a bill authorizing specified gambling activities. As the Maverick Gaming opinion letter notes, however, "The Court held that there was no emergency in the enactment of the legislation from the face of the legislation, aided by the Court's 'judicial knowledge.' The Court concluded the legislation was merely a clarification of a law that had

been in place for 54 years." (Citations omitted.) As one commentator wrote, "the court placed significant emphasis on the fact that the text of the act itself did not suggest any reason for an emergency clause." Bryan L. Page, "State of Emergency: Washington's Use of Emergency Clauses and the People's Right to Referendum," 44 Gonzaga L. Rev. 219, 245 (2008).

In the present case, and as detailed below, ESHB 2638 is replete with provisions evidencing the legislature's concerns with an emergent issue: the explosion of both legal and illicit sports wagering in the United States, triggered in significant part by the U.S. Supreme Court's 2018 ruling which struck down the federal statute banning most sports betting in America. The text of ESHB 2638 clearly suggests the reasons for its emergency clause. Of equal significance to my analysis and opinion, however, is the marked shift in the Washington Supreme Court's rulings on the legislature's use of emergency clauses since 1963. As noted above, the Court has not struck down any emergency clause since 1963 and has shifted from its older standard which narrowly interpreted the emergency exception in art. II, § 1(b) to a standard which is more deferential to the legislature's determination that an emergent situation requires that an act take immediate effect.

Two important and more recent cases applying the Court's current standard for emergency clauses are *CLEAN v. State*, 130 Wash. 2d 782 (1996) and *Wash. State Farm Bureau Fed'n v. Reed*, 154 Wash. 2d 668 (2005). In *CLEAN*, the Court cites *Humiston* in holding that legislative declarations of fact are deemed conclusive unless obviously false, and that any doubt will be resolved in favor of the legislature. In 2005, the Court reiterated in *Reed* its "well established" standard of review:

> …such legislative declaration of emergency and necessity for the enactment is conclusive and must be given effect, unless the declaration on its face is obviously false; and, in determining the truth or falsity of the legislative declaration, we will enter upon no inquiry as to the facts but must consider the question from what appears upon the face of the act, aided by the court's judicial knowledge. We must give to the action of the legislature and its declaration of an emergency every favorable presumption.

Reed at 675, quoting *CLEAN*, 130 Wash.2d at 807.

In analyzing the emergency exception, the *CLEAN* Court noted that in art. II, § 1(b), "The terms 'public peace, health or safety,' unfortunately, are not defined in the constitution. Those terms have, however, been interpreted in cases from this court as being synonymous with an exercise of the State's 'police power.' . . . The police power of the State is an attribute of sovereignty, an essential element of the power to govern, and this power exists without declaration, the only limitation upon it being that it must reasonably tend to promote some interest of the State, and not violate any constitutional mandate." *CLEAN*, 130 Wash.2d at 804-805. As is discussed below, in ESHB 2638 the legislature is exercising its well-recognized police power to protect public safety through the state's "policy of prohibiting all forms and means of gambling except where carefully and specifically authorized and regulated." ESHB 2638, §1.

It should also be noted that, consistent with current Supreme Court case law, Washington's courts are likely to defer to the legislature's use of an emergency clause in ESHB 2638 under separation of powers principles. In his concurring opinion in *CLEAN*, "Justice Talmadge argued that the legislature, with the benefit of committee hearings and public testimony, is the best branch of government to determine the factual question of when an emergency exists." Bryan, 44 Gonzaga L. Rev. at 249, citing *CLEAN* at 817. Justice Talmadge "also stressed that the court should be wary of violating the separation of powers principles and invading the province of a coordinate branch of

government (the legislature). He concluded that the people could challenge the bill through the initiative process, and if the people do not agree with the legislators' declaration of emergency in a bill the people may vote the legislators out of office." *Id.*, citing *CLEAN*, 130 Wash. 2d at 815, 817.

Opponents of ESHB 2638 have argued, however, that the Supreme Court's *CLEAN* ruling actually supports their position, noting the Court's statement there that, "In *Humiston,* we were confronted with legislation purporting to legalize certain gambling activities such as cardrooms, punchboards, etc. Clearly a provision authorizing gambling activities which had previously been illegal could not be considered as a response to an emergency. Here, the situation is far different." *Id.* at 808.

There are at least two important counterpoints to this argument. First, *Humiston* is a 1963 decision. Since then, the Supreme Court has consistently upheld the legislature's use of emergency clauses – including in its *CLEAN* ruling -- emphasizing that "this court is required to grant considerable deference to the Legislature's determination that an emergency exists, giving it every favorable presumption and deferring to its judgment unless it is obvious that the declaration of emergency is false." *CLEAN,* 130 Wash. 2d at 812.

Second, as was the case in *CLEAN*, "the situation is far different" for the legislature today, as it considers enactment of ESHB 2638 and SSB 6394, compared to the 1963 legislature which passed a bill legalizing bingo equipment and card rooms and clarifying existing laws. The legislature is grappling with the rapid legalization of sports wagering across the nation, in state after state, following the U.S. Supreme Court's 2018 decision striking down the federal statute prohibiting sports gambling. It must decide how to address a sea change in our country's gambling laws and a huge increase in sports wagering activity against the backdrop of the state's public policy "to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control." *See* RCW 9.46.010.

The Washington State Gambling Commission has informed the public and the legislature on several occasions regarding its concerns over the proliferation of illegal sports wagering which in recent years has been estimated to involve up to $150 billion in betting per year. *See* Staff Presentation: Sports Gambling Black Market, November 14, 2019, Brian Considine, Legal & Legislative Manager; James Drew, "Washington gambling chief sees black market explosion when sports betting is legalized," *The News Tribune*, July 20, 2019; "Gambling Commission agents break up illegal soccer betting ring in Wenatchee," WSGC press release, May 3, 2018. These facts are referenced explicitly and implicitly throughout the bills' text and are woven throughout their legislative history. *See, e.g.,* House Commerce & Gaming Committee, January 27, 2020, sports wagering work session, testimony of Brian Considine, Legal and Legislative Manager, Washington State Gambling Commission.

As was the case when the legislature was considering the Stadium Act in *CLEAN,* and weighing its options for keeping the Mariners in Seattle, today's legislature "has before it considerable evidence" that ESHB 2638 and SSB 6394 "would promote the general welfare of the citizenry, and that the state was faced with an emergency which made it necessary for the act to take effect immediately. As noted above, this court is required to grant considerable deference to the Legislature's determination that an emergency exists, giving it every favorable presumption and deferring to its judgment unless it is obvious that the declaration of emergency is false." *CLEAN* at 817.

Opinion on the Legislature's Emergency Declaration in ESHB 2638

As is evident from the face of ESHB 2638, the legislature's authorization of sports wagering in tribal casinos, under gaming compacts that are amended by mutual agreement of the state and individual tribes, is based on the legislature's determination that it is immediately necessary to authorize sports wagering on a very limited basis by restricting it to tribal casinos in Washington. In doing so, the legislature is exercising its well-understood police power to protect public safety through the state's "policy of prohibiting all forms and means of gambling except where carefully and specifically authorized and regulated." ESHB 2638, §1.

The text of ESHB 2638 is replete with provisions demonstrating the legislature's concern that the exploding national sports wagering market – both legal and illicit – be effectively addressed in Washington by restricting it to tribal casinos in the state. The bill's provisions would:

- Restrict sports wagering to tribal reservations, Sec. 1:
  It has long been the policy of this state to prohibit all forms and means of gambling except where carefully and specifically authorized and regulated. The legislature intends to further this policy by authorizing sports wagering on a very limited basis by restricting it to tribal casinos in the state of Washington.

- Ensure gaming compacts include safeguards for criminal enforcement and problem gambling, Sec. 2:
  (1) [Gaming compact] amendment [must] address[]:…issues related to criminal enforcement, including money laundering, sport integrity, and information sharing between the commission and the tribe related to such enforcement' and responsible and problem gambling.

- Require reporting to the commission of suspicious activities, Sec. 4:
  (3) The commission may require the submission of reports on suspicious activities or irregular betting activities to effectively identify players, wagering information, and suspicious and illegal transactions, including the laundering of illicit funds.

- Prohibit persons operating gambling related to sporting events to, per Sec. 6:
  (4) Alter or misrepresent the outcome of a game or other event on which wagers have been made after the outcome is made sure but before it is revealed to the players;
  (5) Place, increase, or decrease a bet or to determine the course of play after acquiring knowledge, not available to all players, of the outcome of the game or any event that affects the outcome of the game or which is the subject of the bet or to aid anyone in acquiring such knowledge for the purpose of placing, increasing, or decreasing a bet or determining the course of play contingent upon that event or outcome….

- Ensure sports integrity, Sec. 7:
  (5) In addition to its other powers and duties, the commission may ensure sport integrity and prevent and detect competition manipulation through education and enforcement of the penal provisions of this chapter or chapter 67.04 or 67.24 RCW, or any other state penal laws related to the integrity of sporting

events, athletic events, or competitions within the state.

- Enforce against suspicious or illegal wagering activities, Sec. 7:
(6) In addition to its other powers and duties, the commission may track and monitor gambling-related transactions occurring within the state to aid in its enforcement of the penal provisions of this chapter or chapter 9A.83 RCW, or any other state penal laws related to suspicious or illegal wagering activities, including the use of funds derived from illegal activity, wagers to conceal or launder funds derived from illegal activity, use of agents to place wagers, or use of false identification by a player.

- Fund enforcement actions in the illicit market for sports wagering, Sec. 14:
The sum of six million dollars is appropriated from the general fund—state for the fiscal year ending June 30, 2020, and is provided solely for expenditure into the gambling revolving account. The gambling commission may expend from the gambling revolving account from moneys attributable to the appropriation in this section solely for enforcement actions in the illicit market for sports wagering.

Given these and other provisions in the text of ESHB 2638, it is highly unlikely that a Washington court would find that on the bill's face its emergency declaration "is obviously false," and will instead "give to the action of the legislature and its declaration of an emergency every favorable presumption." *Reed* at 675, quoting *CLEAN*, 130 Wash.2d at 807.

In summary, because both the text of ESHB 2638 and its legislative history clearly convey the legislature's emergent concern over sports wagering; because the legislature possesses a well-established police power both to prohibit gambling and to authorize it on a very limited basis; and because for nearly 60 years the Supreme Court's rulings upholding emergency clauses have displayed considerable deference to the legislature's determination that an act should take effect immediately, it is my opinion that the addition of Sec. 15 to ESHB 2638 will withstand judicial scrutiny as clearly being within the legislature's purview.

Sincerely,

Rob McKenna

Robert M. McKenna