**SUPREME COURT OF LOUISIANA**

**NO. 99-CA-2337**

**CLAUDE M. PENN, JR., GLADNEY L. MANUEL, JR., FELICIANA VENTURES, INC., AND MANUEL'S I-10 AUTO & TRUCK STOP, INC.**

**VERSUS**

**STATE OF LOUISIANA, THROUGH THE HONORABLE MURPHY J. FOSTER, JR., GOVERNOR, THE HONORABLE RICHARD P. IEYOUB, ATTORNEY GENERAL, THE SUPERVISORY COMMITTEE ON CAMPAIGN FINANCE DISCLOSURE AND THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, LOUISIANA GAMING CONTROL BOARD**

**ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, HONORABLE JEWEL E. WELCH, JUDGE**

## JOHNSON, J., Concurring

During the First Extraordinary Session of 1996, the Louisiana Legislature passed Act 67 which enacted La. Rev. Stat. § 18:1505.2(L) relative to campaign finance. The provisions of La. Rev. Stat. § 18:1505.2(L) prohibit certain persons from making campaign contributions, loans, or transfers of funds to any candidate, any political committee of any such candidate, or any other political committee which supports or opposes any candidate. By enacting the provisions of La. Rev. Stat. § 18:1505.2(L), the legislature intended to promote confidence in the electoral process, and protect candidates and the election process from both real and perceived influence by special interests, particularly persons involved in the gaming industry of this state. The statute impacts persons holding a license or permit to distribute, manufacture, or service gaming devices and persons who own truck stops or licensed pari-mutuel or off-track wagering facilities that are licensed device establishments. Any person who has more than a ten percent interest directly, or a twenty-five percent interest indirectly, in any of the aforementioned legal entities is affected by the statute. The portions of La. Rev. Stat. Ann. § 18:1505.2(L) pertinent to the resolution of this case provide:

> (1) The legislature recognizes that it is essential to the operation of effective democratic government in this state that citizens have confidence in the electoral process and that elections be conducted so as to prevent influence and the appearance of influence of candidates for public office and of the election process by special interests, particularly by persons substantially interested in the gaming industry in this state.

> (2) No person to whom this Subsection is applicable as provided in Paragraph (3) of this Subsection shall make a contribution, loan, or transfer of funds, including but not limited to any in-kind contribution, as defined in this Chapter, to any candidate, any political committee of any such candidate, or to any other political committee which supports or opposes any candidate.
> (3) This Subsection shall be applicable to all of the following:
> (a)(i) Any person who holds a license or permit as a distributor of gaming devices, who holds a license or permit as a manufacturer of gaming devices, who holds a license or permit as a device service entity, and any person who owns a truck stop or a licensed pari-mutuel or off-track wagering facility which is a licensed device establishment, all pursuant to the Video Draw Poker Devices Control Law.
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> (b)(i) Any person who has an interest, directly or indirectly, in any legal entity included in Subparagraph (a) of this Paragraph. "Interest", as used in this Subparagraph means ownership by an individual or his spouse, either individually or collectively, of an interest which exceeds ten percent of any legal entity. An indirect interest is ownership through any number of layers of legal entities when twenty-five percent or more of each legal entity is owned by the legal entity ownership beneath it.

The present litigation also challenges Emergency Rule 107 as promulgated by the Louisiana Gaming Control Board in August, 1996. The Rule provides standards of conduct and ethical rules for members of the Gaming Control Board, their family members, employees of the Board, and all licensees of the Board. In pertinent part it provides:

> 6.b. No casino operator or any other licensee or permittee shall make a contribution or loan to, or expenditure on behalf of, a candidate or committee.

La. Admin. Code tit. 42, § 107.

The plaintiffs in this matter are persons who own truck stops licensed under the Video Draw Poker Devices Control Law as device establishments. They contend that La. Rev. Stat. Ann. § 18:1505.2(L)(3)(a)(i), La. Rev. Stat. Ann. § 18:1505.2(L)(3)(b)(i), and La. Admin. Code tit. 42, § 107 are violative of the First and Fourteenth Amendments of the United States Constitution, the equal protection provisions of Art. I, § 3 of the Louisiana Constitution, the freedom of expression and right of assembly and petition provisions in Art. I, §§ 7 and 9 of the Louisiana Constitution. Other persons prohibited from making campaign contributions by La. Rev. Stat. Ann. § 18:1505.2(L) have not joined in this litigation.[1]

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[1] La. Rev. Stat. Ann. § 18:1505.2(L)(3) also provides the following:

> (a)(ii) Any person who holds a license to conduct gaming activities on a riverboat, who holds a license or permit as a distributor or supplier of gaming devices or gaming equipment including slot machines, or who holds a license or permit as a manufacturer of gaming devices or gaming equipment including slot machines issued pursuant to the Louisiana Riverboat Economic Development and Gaming Control Act, and any person who owns a riverboat upon which gaming activities are licensed

Louisiana is one of eight states which has enacted a ban on campaign contributions by the gaming industry.[2] The most recent expression by this Court on restrictions in the gaming industry came in Brown v. State through Dept. of Public Safety, 96-2204 (La. 10/15/96), 680 So. 2d 1179, addressing the constitutionality of La. Rev. Stat. Ann. § 27:13(C)(6). In declaring the statute unconstitutional, we concluded that the prohibition on contributions to committees supporting or opposing ballot measures suppressed the free flow of information protected by the First Amendment. Id, p. 10, 680 So. 2d at 1183. This case presents the question left unanswered in Brown, that is whether the First Amendment protects campaign contributions to individual candidates and committees supporting or opposing those candidates.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Fourteenth Amendment makes this most important guarantee applicable to the states as well as the Congress. This guaranteed freedom of speech is essential to our society and a basic element of our fundamental law. The jurisprudence recognizes that the First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). Commitment to

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to be conducted.

(a)(iii) Any person who holds a license or entered into a contract for the conduct of casino gaming operations, who holds a license or permit as a distributor of gaming devices or gaming equipment including slot machines, or who holds a license or permit as a manufacturer of gaming devices or gaming equipment including slot machines issued pursuant to the Louisiana Economic Development and Gaming Corporation Act, and any person who owns a casino where such gaming activities are licensed.

(b)(ii) Any holding, intermediary, or subsidiary company of any person included in Subparagraph (a) of this Paragraph and any officer, director, trustee, or partner thereof.

(c) Any officer, director, trustee, partner, or senior management level employee or key employee as defined in R.S. 27:205(19) of any person included in Subparagraph (a) or (b) of this Paragraph.

(d) Any person subject to the provisions of R.S. 27:63(C)(4), 226(C)(4) or 261(D).

(e) The spouse of any person to whom this Subsection is made applicable by this Paragraph.

[2] Indiana, Iowa, Kentucky, Michigan, Nebraska, New Jersey and Virginia have statutes prohibiting contributions to candidates by certain employees in the gaming industry. The New Jersey Superior Court has addressed the constitutionality of its provisions in Petition of Soto v. State of New Jersey, 236 N.J. Super. 303, 565 A.2d 1088, certif. denied, 121 N.J. 608 (1989), and found the prohibition constitutional. The Michigan Attorney General has rendered an opinion that the Michigan statute is constitutional. See Michigan AG Opinion 7002 (Dec. 17, 1998).

this principle lends itself to the protection of campaign contributions and political speech.

The United States Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed. 2d 659 (1976), marks the inception of modern campaign finance jurisprudence, and is the seminal case on campaign contributions and expenditures in the context of First Amendment rights. It is only fitting that the resolution of this case start with Buckley. In addressing the contribution and expenditure limitations imposed by the 1974 amendments to the Federal Election Campaign Act of 1971, the Buckley Court concluded that limitations on campaign contributions do not violate the First Amendment of the Constitution. However, limitations on expenditures were found to be violative of First Amendment rights. In reaching this conclusion, the Court recognized that:

> The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed. 2d 1498 (1957). . . .. As the Court observed in Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed. 2d 35 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Id., at 14-15, 96 S.Ct. at 632.

The Court equated contributing and expending funds with political expression and determined that limitations on these activities implicate First Amendment rights:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Buckley, 414 U.S. at 19, 96 S.Ct. at 634-35 (footnotes omitted). Further, the contribution and expenditure limitations also bear upon the freedom of association:

> Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee . . . .

Id. at 22, 96 S.Ct. at 636.

In this case, we are faced with statutory provisions that prohibit, as opposed to limit, contributions. Buckley recognized that placing limits on the amount that any one person or group

may contribute to a candidate has a marginal restriction on that contributor's ability to engage in free communication. 424 U.S. at 20, 96 S.Ct. At 635. However, the persons included in La. Rev. Stat. Ann. §§ 18:1505.2(L)(3)(a)(i), 18:1505.2(L)(3)(b)(i), and La. Admin. Code tit. 42, §107 are not allowed to engage in free communication, nor are they allowed to affiliate with a candidate by making a contribution. Clearly these prohibitory provisions impinge upon First Amendment rights. Thus, the State's enactment of these provisions must withstand strict scrutiny in order to be upheld.

The State argues that Buckley does not require strict scrutiny for contribution limits, but only requires that limits be "closely drawn" to further a "sufficiently important" interest. The analysis employed in Buckley, while using different terms, still requires that the government meet an exacting standard to justify interfering with the right to participate in political activities. Further, the fact that the State has completely removed the right to contribute evidences far more interference than the marginal restriction recognized in Buckley.

"[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Department of Chicago v. Mosley, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed. 2d 212 (1972). A restriction on political speech must be subjected to the most exacting scrutiny, thus, requiring a showing that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed. 2d 794 (1983); See also, Colorado Republican Fed. Campaign Comm. v. Fed. Election Commission, 518 U.S. 604, 640-642, 116 S.Ct. 2309, 2328, 135 L.Ed. 2d 795 (1996) (Thomas, J., dissenting) ("Curbs on protected speech, we have repeatedly said, must be strictly scrutinized."); Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294, 102 S.Ct. 434, 436, 70 L.Ed. 2d 492 (1981) ("Regulation of First Amendment rights is always subject to exacting judicial review.")

Heretofore, the United States Supreme Court has identified one compelling governmental interest that justifies restrictions on campaign financing: "to limit the actuality and appearance of corruption resulting from large individual financial contributions." Buckley, 424 U.S. at 26, 96 S.Ct. at 638. As the Court explained, the prevention of actual corruption and the appearance of corruption is necessary to preserve our system of democracy:

> Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual contributions. . . . Here . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."

Id. at 26-27, 96 S.Ct. at 638-39 (citations and footnotes omitted).

Since Buckley, the decisions rendered by the United States Supreme Court in the area of campaign finance further explain permissible regulation of campaign contributions and expenditures. The Court has found no danger of corruption in independent expenditures by political action committees ("PACs") or political parties to justify limitations. See Colorado Republican, 518 U.S. at 618-19, 116 S.Ct. at 2309. Restrictions on individual contributions relating to initiative campaigns where there is no danger of an improper quid pro quo have been invalidated. See Citizens Against Rent Control, 454 U.S. at 298-300, 102 S.Ct. at 438-39. However, the Court upheld restrictions on indirect contributions to candidates, such as contributions to PACs . See California Medical Ass'n v. Federal Election Comm'n, 453 U.S. 182, 197-99, 101 S.Ct. 2712, 69 L.Ed. 2d 567 (1981). The corporate right to political expression was expanded with the invalidation of restrictions on corporate expenditures relating to ballot initiatives. See First National Bank v. Bellotti, 435 U.S. 765, 784, 98 S.Ct. 1407, 55 L.Ed. 2d 707 (1978). In 1990, the Court upheld restrictions on independent expenditures by corporations finding "the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures." See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660, 110 S.Ct. 1391, 108 L.Ed. 2d 652 (1990). Corporations are still allowed to express their political views through independent expenditures. The Michigan Act simply requires corporations to set-up separate segregated funds for political purposes. Additionally, nonbusiness, political corporations that are formed to promote political ideas, have no shareholders, and are independent from the influence of business corporations are protected from campaign finance limitations. See Federal Election Comm'n v. Massachusetts Citizens for

Life, 479 U.S. 238, 263-64, 107 S.Ct. 616, 93 L.Ed. 2d 539 (1986).

In the present matter, the State contends that the provisions of La. Rev. Stat. Ann. § 18:1505.2(L) are necessary to dispel the perception that the gaming industry is associated with political corruption; and, therefore, justifies the abridgement. Admittedly, the prevention of corruption justifies limitations on campaign contributions for individuals and corporations. But, here, the right to contribute has not been limited; the right has been removed. The jurisprudence has recognized no justification for removing the right to contribute. This Court has previously determined that the State may not restrict contributions to political committees organized to communicate ideas under the guise of preventing corruption. See Brown v. State Through Dept. of Public Safety, 96-2204 (La. 10/15/96), p. 10; 680 So. 2d 1179, 1183. In Brown, we stated that "[t]he corruption rationale only applies to candidate or candidate committee limitations." Id., citing Citizens Against Rent Control, 454 U.S. at 297, 102 S.Ct. at 438. The State asks that we now extend the corruption rationale to justify excluding entire categories of persons from the political process.

The State posits an actual and a perceived threat of corruption in the gambling industry because of the history of the industry in this State. While we are not blind to Louisiana's history of corruption in the gambling industry, the State offers no support for its contention that these prohibitions will prevent corruption. In defending a regulation that abridges First Amendment interests, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 664, 114 S.Ct. 2445, 2470, 129 L.Ed. 2d. 497 (1994). Here, the State has failed to meet this standard in defending the contribution ban.

Moreover, Buckley and its progeny recognized that it is the large contributions that threaten to undermine the integrity of our system of representative democracy. Buckley, at 26-27, 96 S.Ct. at 638-39. Fixing campaign contribution limits addresses this concern in a direct and material way. Here we are not faced with the threat of large contributions being given by the video poker licensees to secure a political *quid pro quo* because Louisiana's statutory campaign contribution limitations address this concern. See La. Rev. Stat. Ann. § 18:1505.2(H)(1)(a). Under the provisions of 18:1505.2(H)(1)(a), contributions for major offices are limited to $5,000; district offices are limited to $2,500; and other offices are limited to $1,000. As such, no video

poker licensee, or any other entity, could contribute more money to a candidate or candidate committee than the set limits.

The State also contends that the revenue generated by the video poker industry heightens the perception of corruption associated with the industry. For the fiscal year ending June 30, 1998, the video gaming industry generated $653,375,000 in net gaming proceeds from the devices, and for the fiscal year ending June 30, 1997, the industry generated $618,477,000 in net proceeds.

While these figures would seem to indicate vast accumulations of wealth within the video poker industry, the State's argument overlooks two important considerations. First, the figures relied upon to illustrate the vast revenues held by the video poker industry are the amounts received before the payment of franchise fees to the State. Depending on the type of establishment, these franchise fees range from 22.5% to 32.5% of net proceeds.[3] Thus, of the $653,375,000 generated in 1998, $183,579,000 was paid to the State in franchise fees, leaving a total of $469,796,000 in actual proceeds.[4] The second consideration overlooked is the fact that there are industries in this State that generate revenue far in excess of the sums generated by the video poker industry. The plaintiffs point out that in the list of the top 50 Louisiana companies ranked by net income for 1998, not a single gaming entity is listed. Plaintiffs' Brief, p. 10. Moreover, the top ranked company on the list, Entergy, had net income of $789,500,000 in 1998, far in excess of the entire video poker industry.[5] Plaintiffs' Brief, Exhibit E, Special Report: Louisiana Inc.: The Pelican State's Top 50 Stocks, Top 50 By Net Income, Times-Picayune (New Orleans), May 16, 1999, at K18). Further, the State has offered no proof that money from the video poker industry is more influential than money from any other special interest group.

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[3] Lounges, restaurants, hotels and motels pay 26% of net gaming proceeds to the State in franchise fees. Racetracks (pari-mutuel facilities) and off-track wagering facilities pay 22.5% of net gaming proceeds to the State in franchise fees. Truck stops pay 32.5% of net gaming proceeds to the State in franchise fees.

[4] The 1997 net proceeds of $618,477,000 required a $173,326,000 franchise fee payment, leaving the industry with $445,151,000 in revenue.

[5] It is also apparent from the list of the top 50 companies that there are other industries generating far more revenue than the video poker industry. As the list makes clear, McDermott International Inc. and J. Ray McDermott, S.A, energy services companies, had a combined net income of $409,300,000 for 1998; CenturyTel Inc., a member of the telecommunications industry, generated $228,800,000 in 1998; while a member of the banking industry, Hibernia Corp., generated $176,900,000 in 1998.

More glaring is the exclusion of certain groups under this statutory scheme. The statutes prohibit contributions by distributors, manufacturers, service entities, pari-mutuel facilities, off-track wagering facilities, and truck stops. However, owners of the devices, bars, restaurants, lounges, and clubs are not subject to the prohibition. The threat of actual or perceived corruption would seem to apply as well to actual owners of video poker devices, yet the statute singles out the persons licensed to service, manufacture, and distribute the devices.

For example, the record contains the affidavit of William L. Hall, a device owner who owns and operates approximately 120 video poker devices at various locations in the state, and is not prohibited from making contributions under La. Rev. Stat. Ann. § 18:1505.2 (L)(3)(a)(i) or (b)(i). The exclusion of owners from the statute, who are free to own an unlimited number of devices, seems to defeat the stated purpose of preventing corruption.

Likewise, the failure to include restaurants, lounges, and bars in the prohibition contravenes the State's expressed intent. The State contends the statute does not include these locations because these facilities are limited to three devices per establishment. See La. Rev. Stat. Ann. § 27:306(A)(2). In contrast, there is no limit on the number of devices which may be placed at off-track wagering and pari-mutuel facilities, and truck stops may operate up to 50 devices. See La. Rev. Stat. Ann. § 27:306(A)(3)-(4)(a). Presumably, the more devices a facility is allowed to have, the greater the possibility for corruption. The flaws in this reasoning are made evident when considered with the assertion that the perception of corruption is heightened for the video poker industry because of the high revenues generated by the industry. If the perception of corruption increases with the amount of revenue generated, then the amount of revenue should be the factor for determining inclusion in La. Rev. Stat. Ann. § 18:1505.2 (L)(3)(a)(i) and (b)(i), not the number of machines a facility is allowed to have. The included facilities, truck stops, off-track wagering facilities, and pari-mutuel facilities, generated net proceeds of $249,459,000 in fiscal year 1997-1998. While the excluded facilities, restaurants, lounges, and hotels/motels, generated net proceeds of $403,916,000 in fiscal year 1997-1998. If the State's theory is correct, then the perception of corruption should be greatest with the facilities excluded from the statutory prohibition.

The State's final contention, that in exchange for the privilege of obtaining a license to engage in gaming activities, a licensee is obliged to forego limited political rights, is also

untenable. In Posadas de Puerto Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed. 2d 266 (1986), the Court stated that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 478 U.S. at 345-46, 106 S.Ct. at 2979. This proposition, which supports the State's contention, was addressed again by the Court in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed. 2d 711 (1996). There the Court stated:

> As a matter of First Amendment doctrine, the Posadas syllogism is even less defensible. The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.
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> Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right.

Id. at 510, 116 S.Ct. at 1512-1513 (footnotes omitted).

Acceptance of a video poker license does not require the relinquishment of First Amendment rights to speech and association. Similarly, the State's attempt to support this argument with the jurisprudence upholding federal and state limitations on employee political activity is unpersuasive. While it is true that the acceptance of government employment carries with it the relinquishment of certain political rights, the jurisprudence recognizes a distinction in the manner in which the government can regulate its employees and private citizens. The United States Supreme Court has stated that "[government] may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." U.S. v. National Treasury Employees Union, 513 U.S. 454, 464, 115 S.Ct. 1003, 1012, 130 L.Ed. 2d 964 (1995). No such distinction is recognized for private citizens receiving a particular benefit from the government. Accordingly, the State's argument must fail.

This absolute ban on political contributions by a particular segment of society goes far beyond what Buckley endorsed. The First Amendment simply does not allow the State to target groups and exclude them from the political process. I am convinced that the broad prophylactic measures in La. Rev. Stat. Ann. § 18:1505.2(L)(3)(a)(i); La. Rev. Stat. Ann. § 18:1505.2(L)(3)(b)(i), insofar as it is applied to La. Rev. Stat. Ann. § 18:1505.2(L)(3)(a)(i), and

La. Admin. Code tit. 42, § 107, insofar as it precludes candidate and political committee contributions by video draw poker licensees, are unconstitutional under the First and Fourteenth Amendments of the United States Constitution.