17430 Laurel Park Drive North
Suite 120 E
Livonia, Michigan 48152
Website: www.mikecoxlaw.com

THE MIKE COX LAW FIRM PLLC

Telephone: (734)591-4002
Facsimile: (734)591-4006
Email: mc@mikecoxlaw.com

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Roger Hauck
State Rep., District 99
House Regulatory Committee
S-1288 House Office Building
P.O. Box 30014
Lansing, MI 48909
(517) 373-1789
rogerhauck@house.mi.gov

Re: The Legal Propriety of Senate Bills 396 and 397: Correcting the Myths Spread by Opponents of SB 396 and SB 397

Dear Representative Hauck:

I represent Northville Downs and write to address the misstatements and hyperbolic assertions made by a lawyer from the Duane Morris law firm on behalf of a cadre of casino and gaming interests in a letter dated May 12, 2021 ("Duane Morris" or "Duane Morris letter"). Like the author of the Duane Morris letter, I too have been involved with gaming and horse racing over the past 2 decades, both as a regulator in the public sector and a lawyer in the private sector; but all my experience has been here in Michigan—dealing with Michigan's Constitution, statutes, and administrative rules. As I understand it, Duane Morris seeks to make two points: (a) SB 396's proposed amendment of the Horse Racing Law of 1995, MCL 431.301 *et seq.*, to include historical horse racing ("HHR") is not "what constitutes pari-mutuel horse racing in the industry;"[1] and (b) SB 397's proposed inclusion of "video lottery" ("VLG" or "VLT") in the definition of "lottery" in McCauley-Traxler-Law-Bowman-McNeely Lottery Act is somehow an improper "expansion of gaming."[2] Whether intentional or not, these assertions are plain wrong and show a lack of understanding of both the development of horse racing in Michigan and the preeminent role of the Legislature in shaping policy and defining law under our 1963 Constitution.

The Mechanics of Historical Horse Racing

In HHR a player deposits her wager, and then the HHR terminal randomly chooses a race from a library of over 50,000 prior, historical races. Understandably, the HHR terminal does not identify the location or date of the prior race, nor the names of the horses and jockeys; but it does present the player with relevant handicapping information from the Daily Racing Form, such as the jockeys' and trainers' winning percentages, much as she would receive if betting on a live race in person at the track. Using this handicapping information, the player then picks the projected

[1] Duane Morris Ltr., p. 2.
[2] It is not clear what Duane Morris' argument is regarding or video lottery terminals because the letter never explains what is wrong about having the Lottery Commission locate lottery terminals at a horse racetrack. Instead, most of the letter focuses on HHR.

order of finish. Alternatively, the player may choose an auto-feature where the HHR terminal makes the choices for her. So, whether to use handicapping information as an experienced bettor would, along with her experience and knowledge, or by "throwing a dart at the wall" as a novice would on a visit to the track, that decision is entirely up to the HHR player – just like the choices available to any bettor who attends the track in person.

HHR payouts are based on traditional pari-mutuel rules. The player's wager is divvied up into several "betting pools" for different winning possibilities, such as picking the winner of the race, picking the top three finishers in exact order, or any of the three selections finishing first and second. The HHR terminal shows a replay of all or a portion of the race. If the player correctly picks some combination of win, place, or show, she receives money from that pool, while the money in each of the other pools continues to accumulate until another bettor wins it. And so it is that subsection 2(o) of SB 396 provides for "a wagering pool, which may include carryover pool money… [which comes from] a non-refundable contribution, to the pool serve as a seed or guarantee" much as pari-mutuel wagering occurs every day at Northville Downs.

The Duane Morris Argument

Because SB 396 seeks to amend Section 2, the "Definitions" section, of the Horse Racing Law of 1995 to include "races run in the past" in its definition of "Pari-mutuel" and "pari-mutuel wagering," Duane Morris claims this definition is not consistent with pari-mutuel horse racing "in the industry." Duane Morris claims this change would "allow for wagering that does not involve bettors sharing in pooled money bet on the same race(s), and thus effectively not meet the longstanding, accepted definition of pari-mutuel waging."[3] (Of course, in trifectas[4], superfectas,[5] Pick 4, Pick 5, Pick 6, Super Hi 5 and other races under current law, bettors are not necessarily sharing in pooled money bet on the same race.) Duane Morris goes on to assert further that because "(t)he player can simply let the machine pick"—ignoring the fact that a HHR bettor can choose to use her skill and knowledge and experience, along with the Racing Form handicapping information to make informed and skillful choices—this proposed amendment cannot be pari-mutuel racing. In line with this argument, Duane Morris essentially asserts this redundancy: "Betting on races that previously occurred is simply not permitted under current law."[6] But, of course, changing the current law is the entire point of a legislative amendment.

Further, in one long extended paragraph at the end of its letter, Duane Morris quotes the entirety of Const 1963, art 4, § 41 and then writes about the lottery and a prior federal case involving Northville Downs' *federal* claims that current law does not allow racetracks to have slot machines. But SB 397 does not authorize slot machines. In this disingenuous way, Duane Morris

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[3] Duane Morris Ltr., p. 2.

[4] In a trifecta the bettor bets on three horses to finish first, second and third, in that order. PlayMichigan, *Michigan Horse Racing and Betting* <https://www.playmichigan.com/horse-betting/> (accessed June 14, 2021).

[5] In a superfecta the bettor bets on four horses to finish first, second, third and fourth, in that order. PlayMichigan, *Michigan Horse Racing and Betting* <https://www.playmichigan.com/horse-betting/> (accessed June 14, 2021).

[6] Duane Morris Ltr., p. 5

does not address in any meaningful way why the Legislature cannot include video lottery gaming or video lottery terminals ("VLT") within the legislative definition of the lottery, nor why having done that, the Legislature cannot locate VLTs at racetracks, anymore than the Lottery locates lottery terminals in party stores and grocery stores.

Article 4, § 41 of the Constitution: What it prohibits and what it does not prohibit

Const 1961 art 4, § 41 provides:

> The legislature may authorize lotteries and permit the sale of lottery tickets in the manner provided by law. No law enacted after January 1, 2004, that authorizes any form of gambling shall be effective, nor after January 1, 2004, shall any new state lottery games utilizing table games or player operated mechanical or electronic devices be established, without the approval of a majority of electors voting in a statewide general election and a majority of electors voting in the township or city where gambling will take place. This section shall not apply to gambling in up to three casinos in the City of Detroit or to Indian tribal gaming. [7]

This provision has two distinct and separate prohibitions. The first prohibition in yellow highlighting is "(n)o law enacted after January 1, 2004 that authorizes any form of gambling shall be effective." This first prohibition prevents the Legislature from enacting "any form of gambling" that did not exist before January 1, 2004, unless a statewide ballot of Michigan's electors also approves that legislation. Because SB 396 only seeks to amend the Horse Racing Law of 1995, and does not involve the Lottery, only the first prohibition against "any form of gambling" arguably matters in any discussion of SB 396. And this prohibition is not an impediment to enactment of SB 396 because the Legislature first authorized license "horse racing" and "betting on horses" in 1933.

SB 396 and Historical Horse Racing

In 1933 the Legislature enacted its first statutory scheme to regulate horse racing as a "form of gambling"

During the 19th century neither the 1850 Constitution nor any Michigan statute prohibited betting on horse races; rather, under the common law of Michigan it was not prohibited nor regulated in any way.[8] While Joseph Oller invented pari-mutuel wagering in Paris during the 1860s,[9] Michigan citizens bet on horses and baseball using a variety of betting practices including "pool selling" where bettors bid for the right to select horses (or teams) to bet on.[10] It was not until

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[7] Const 1961 art 4, § 41 (Emphases and highlights added).
[8] See *People v Reilly,* 50 Mich 384; 15 NW 520 (1883).
[9] Bennett Liebman, *Pari-Mutuels: What Do They Mean And What Is at Stake in the 21st Century?*, 27 Marq Sports L Rev 45, 62 (2016).
[10] *Reilly,* 50 Mich 384.

1933 that the Legislature first regulated horse racing by enacting Act No. 199, Pub.Acts 1933. This 1933 act created the office of racing commissioner and charged him "to prescribe the rules, regulations, and conditions under which all horse racing should be conducted in Michigan, and also the rules governing and regulating betting on horse races" including pari-mutuel wagering.[11] Importantly, the Legislature did not strictly define what pari-mutuel was or what was or not part of pari-mutuel racing or wagering, but rather gave the racing commissioner great discretion to define pari-mutuel through the administrative rules he promulgated.

Contrary to what Duane Morris suggests in its letter, since 1933 the conduct of horse racing and pari-mutuel wagering has been amended and rewritten numerous times – the concept of pari-mutuel is neither sacrosanct nor is its definition fixed. And so it is that the Horse Racing Act of 1933 has been completely repealed and rewritten at least three times—by the Racing Law of 1959, MCL 431.31 *et seq*., and then by the Racing Law of 1980, MCL 431.61 *et seq.*, and most recently by the Horse Racing Law of 1995, MCL 431.301 *et seq*. This statement does not include ongoing amendments of various provisions of the succeeding racing laws in 1945, 1948, 2016, 2018, 2019 and other dates too numerous to list here. Indeed, it was not until 1995 that the Legislature authorized simulcasted races from out of state racetracks to qualify as permitted wagering under Michigan's pari-mutuel horse betting system.[12] And legislative changes in 2019 now give Michiganders the opportunity to bet on horse racing in Michigan and around the country from home on their mobile phones through advance deposit wagering. Accordingly, the Legislature has regularly updated the types and delivery of racing *within the form of gaming* – betting on horse races – in Michigan from the 19th century until today, based on both technological and sporting developments.

As a result, Michigan courts have recognized "horse racing" or "horse betting" as a legislatively authorized "form of gambling" for almost a century. In 1995, before casino gaming was approved by the voters, the Court of Appeals noted, "(b)y permitting some ***forms of gambling,*** including millionaire parties, lotteries, bingo, ***and horse betting***, the Legislature has shown that the public policy of this state does not absolutely prohibit gambling…"[13] And just two years before the voters ratified art 4, § 41, the Court of Appeals identified at least three-then existing forms of gambling in Michigan: "This state authorized ***horse racing***, M.C.L. § 431.301 *et seq.*, and established and operates a ***state lottery***, M.C.L. § 432.9, that is promoted through advertising. See M.C.L. § 432.41(4). Finally, a voter initiated law authorized ***casino gambling*** in the city of Detroit."[14] So whether called "horse racing" or "horse betting" or just "racing" as the Legislature

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[11] *Rohan v Detroit Racing Ass'n,* 314 Mich 326, 341; 22 NW2d 433, 438 (1946).

[12] See MCL 413.38(3).

[13] *Michigan Gaming Inst, Inc v State Bd of Educ*, 211 Mich App 514, 518; 536 NW2d 289, 291 (1995), rev'd, 451 Mich 899; 547 NW2d 882 (1996) (emphases added).

[14] *Taxpayers of Michigan Against Casinos v State*, 254 Mich App 23, 44–45; 657 NW2d 503, 515 (2002), aff'd in part, rev'd in part and remanded, 471 Mich 306; 685 NW2d 221 (2004).
See also the Supreme Court opinion in *Fid & Deposit Co of Md v Stordahl*, 353 Mich 354, 357; 91 NW2d 533, 535 (1958) where the Court noted in a case arising from an embezzlement from a bank: "Evidence was adduced tending to show that the [employee's] 'defalcation was wasted ***on horse racing and other forms of gambling.***" (emphasis added). Also, *Northville Downs v*

entitled its initial 1933 act, horse racing has a long history as a form of gambling in Michigan—a history that long predates the January 1, 2004 limitation in art 4, § 41.

There is no single or universal definition of pari-mutuel horse racing in the United States

In its letter, Duane Morris relies on a law review article, "*Pari-Mutuels: What Do They Mean and What Is at Stake in the 21st Century?*"[15] by Professor Bennett Leibman of the Albany Law School to point to one lone obscure attorney general opinion from Arizona to claim HHR terminals resemble casino slot machines. Ironically, the findings of Professor's Leibman's study of par-mutuel wagering in America outlined in that same article actually convincingly demonstrate that, contrary to Duane Morris' claims, there is no uniformity or consistency or "industry" standard or "magic words" that outline what "pari-mutuel" wagering entails.[16] For instance, while fourteen states mention pari-mutuel wagering their constitutions, "none of these states have any definitions of the term 'pari-mutuel.'"[17] In the same way, forty-three states have laws allowing pari-mutuel wagering, but "(t)he definitions [of pari-mutuel wagering] are often sparse and few are similar" and "(u)uniformity in these definitions are rarely present."[18] Thus, what is considered "pari-mutuel" is largely for each state legislature to decide.

It is inherently up to the Legislature to decide what laws to pass and to decide what the words in those laws mean. Our Constitution provides that all "the legislative power of the State of Michigan is vested in a senate and a house of representatives."[19] The Supreme Court has long held that "(t)he legislative power is the authority to make, alter, amend, and repeal laws."[20] So the Legislature has routinely defined what words in statutes mean, whether those words are fairly pedestrian terms like "resident" as the that term is used varyingly for taxation, licensing, criminal law or for university in-state-tuition purposes[21] or more novel and rare terms like "fantasy

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Granholm, 622 F3d 579, 589 (CA 6, 2010) ("***Before 1972, horse-racing was the only legal form of gambling*** in Michigan.") (emphasis added).

[15] Bennett Liebman, *Pari-Mutuels: What Do They Mean And What Is at Stake in the 21st Century?*, 27 Marq Sports L Rev 45, 94 (2016).

[16] "The restrictions limiting horse race wagering to pari-mutuels is further muddled by the fact that the term pari-mutuel is generally not defined by legislative or constitutional enactments." Liebman, *supra,* at 47-48.

[17] Liebman, *supra,* at 57.

[18] Liebman, *supra*, at 58.

[19] Const 1963, art 4, § 1.

[20] *Harsha v City of Detroit,* 261 Mich 586, 590; 246 NW 849, 850 (1933)

[21] "It is indisputable that the Legislature has the authority to define 'resident' or 'residence' for a given purpose. M.C.L.A. s 206.18; M.S.A. s 7.557(118), (state Income Tax Act defining resident), M.C.L.A. s 141.609; M.S.A. s 5.3194(19), (City Income Tax Act defining resident), M.C.L.A. s 168.11; M.S.A. s 6.1011, (Michigan Election Law defining residence), M.C.L.A. s 436.2l; M.S.A. s 18.972(12), (Liquor Control Act defining residence), M.C.L.A. s 3.701; M.S.A. s 4.146(1), (Interstate Compact on Juveniles defining residence)." *Schmidt v Regents of Univ of Mich,* 63 Mich App 54, 55; 233 NW2d 855, 855 (1975).

contest."[22]

Perhaps the best example illustrating this principle is the Legislature's recent enactment of a series of gaming bills that, among other things, provided more legislative definition regarding what activities can constitute gaming within a casino building. When enacted in 1997, the voter-initiated Gaming Control and Revenue Act, MCL 432.201 *et seq.*, provided that the playing of casino games was only permitted within a casino building.[23] During the ensuing two decades, as the internet proliferated, technology provided the opportunity to engage in playing casino games over the internet. Thus, when the Legislature enacted the Lawful Internet Gaming Act, MCL 432.301 *et. seq.*, in 2019, it provided that internet wagers are considered gaming within the licensee' casino building if the wagers are received by a server within a licensed casino building, even if the bettor is hundreds of miles away.[24] No one, including Duane Morris' casino clients, disputes that the Legislature could do this. And so, it is perfectly appropriate that when the Legislature sees fit to change or alter or supplement, or even repeal, legislative definitions, such as what the terms "pari-mutuel" and "pari-mutuel wagering" mean, it can do so. This is so because as the Supreme Court routinely instructs, "(o)ne Legislature cannot limit or restrict the power of its successor." [25] Thus, the Legislature is free to enact SB 396 with its amendment of the definition of "pari-mutuel" and "pari-mutuel wagering" if its members believe SB 396 as a policy has merit.

SB 397 and Video Lottery Terminals

In its letter Duane Morris states its opposition to the Legislature providing further definition in SB 397 as to what constitutes the state lottery and lottery games, including the use of video lottery terminals at racetracks, but never explains that opposition other than "such bill[s] would be ineffective pursuant to the Michigan Constitution."[26] Presumably Duane Morris is arguing that SB 397 violates the only constitutional prohibition regarding the lottery, the clause (highlighted in

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[22] See MCL 432.303(j) and MCL 432.502(d).

[23] See MCL 432.202(g), (x), (v), (w) and MCL 432.203.

[24] "An internet wager received by an internet gaming operator or its internet gaming platform providers is considered to be gambling or gaming that is conducted in the internet gaming operator's casino located in this state, regardless of the authorized participant's location at the time the participant initiates or otherwise places the internet wager." MCL 432.304(2).

[25] *Harsha v. City of Detroit,* 261 Mich 586, 590; 246 NW 849, 850 (1933). See more recently where Chief Justice McCormack implored the Legislature to revisit legislation to add and provide more definition: "I write separately ***to encourage the Legislature*** to amend MCL 777.37, offense variable (OV) 7, ***to define, or more clearly articulate its intent*** … As the Legislature appears poised to revisit the sentencing guidelines in the near future, I believe that these cases illustrate that OV 7 is an excellent example of one area that ***could benefit from further scrutiny and hopefully, further elucidation.***" *People v. Hardy,* 494 Mich 430, 448–49; 835 NW2d 340, 349–50 (2013) (emphases added).

[26] Duane Morris Letter, p. 5.

green above) in art 4, § 41:

> … nor after January 1, 2004, shall any new state lottery games utilizing table games or player operated mechanical or electronic devices be established, …[27]

No Michigan court has opined on what this clause means or prohibits. However, the Attorney General has already opined that this prohibition "does not apply to games that the Commissioner of the Bureau of State Lottery may authorize pursuant to the authority conferred under the existing provisions of the Traxler-McCauley-Law-Bowman Bingo Act, MCL 432.101 et seq."[28] Based on this broad authority, the Michigan Lottery has grown from its initial "Green Ticket" offering in 1972 to a $4.2 billion-dollar governmental enterprise that offers a vast variety of games, offered in a large number of playing styles, and delivered through a multitude of varied mediums. The delivery mediums now include terminal-based games, scratch-offs, pull-tabs, and online iLottery games.

The Bureau of State Lottery-owned, terminal-based offerings (as SB 397 provides for VLTs) are offered in party stores, groceries, bars, bowling alleys, and other land-based locations, and currently include games such as MegaMillions, Lotto 47, Powerball (which was first offered in 2010), Club Keno, standard Keno, Daily 4, Daily 5, and Fantasy 5. There is no federal or state court case or statute which prevents the Lottery from locating authorized lottery terminals in any venue, including, if the Legislature decides, VLTs at racetracks.[29] Further, employing "different game themes, play mechanics, and prize structure,"[30] the Bureau of State Lottery's iLottery program, which began in 2014—one decade after the ratification of art 4, § 41—now has sales over $1.8 billion, largely driven by sales on mobile devices all over Michigan. Last year iLottery's net win was over $219 million.[31]

The iLottery itself now offers at least 128 different games,[32] many of which have names such as "Blackjack Doubler", "Roll the Dice", "Lucky 7 x 7" and "Football Frenzy," which someone like Duane Morris could argue "resemble casinos slot machines" or "casino games" or "sports betting", but these games are, in fact, *bona fide* state lottery games owned and operated by the Bureau of State Lottery. Indeed, no one, including Duane Morris' clients, has ever alleged the Bureau of State Lottery violates art 4, § 41 by offering the iLottery games it offers.

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[27] Const 1961 art 4, § 41.

[28] 2006 Mich. Op. Att'y Gen. No. 7190 (Mar. 15, 2006).

[29] The case that Duane Morris cited, *Northville Downs v Granholm,* 622 F3d 579, 589 (CA 6 2010) has nothing to do with the powers or authority of the Michigan Lottery under Michigan law.

[30] Michigan Bureau of State Lottery, *Comprehensive Annual Financial Report*, 2020-2019, ("Lottery CFAR"), p. 18, available at <https://www.michiganlottery.com/about/financial-reports> (accessed June 14, 2021).

[31] Lottery CFAR, *supra*, at 42.

[32] Michigan Lottery, *Games Where to Play Online* <https://www.michiganlottery.com/games?WHERE_TO_PLAY=ONLINE> (accessed June 14, 2021).

Because the Bureau of State Lottery derives all its authority from legislative acts[33], it is entirely appropriate when the Legislature sees fits to amend McCauley-Traxler-Law-Bowman-McNeely Lottery Act through SB 397 to provide more definition regarding lottery or provide alternate modes of deliver of lottery games, including the use of video lottery terminals located at a racetrack.

Conclusion

If the Legislature believes it is appropriate and meritorious to enact either or both of Senate Bills 396 and 397, the Legislature will be acting within the powers granted it by the 1963 Michigan Constitution. If you have any questions about this memorandum or Senate Bills 396 and 397, please feel free to reach out to me by email, mc@mikecoxlaw.com, or telephone, 734-591-4002, at your convenience. Thank you for your consideration of this matter.

Very truly yours,

THE MIKE COX LAW FIRM, PLLC

Michael A. Cox, Esq.

[33] "An agency has no inherent power. Any authority it may have is vested by the Legislature, in statutes, or by the Constitution." *Deleeuw v Bd of State Canvassers,* 263 Mich App 497, 500; 688 NW2d 847 (2004). See also, 2010 Mich. Op. Att'y Gen. No. 7254 (Oct. 26, 2010)