Good morning Senators Larson and Guglielmo, Representatives Verrengia and Sredzinski and distinguished members of the Public Safety and Security Committee. I appreciate the opportunity to provide testimony concerning: House Bill 5305, An Act Concerning a Request for Proposals to Qualify an Entity to Develop a Casino Gaming Facility in the State; House Bill 5307, An Act Concerning Sports Wagering in the State; and Senate Bill 277, An Act Concerning Online Lottery Draw Games.

House Bill 5305, An Act Concerning a Request for Proposals to Qualify an Entity to Develop a Casino Gaming Facility in the State.

This bill would require the DCP and DECD Commissioners to jointly develop and issue a request for proposals ("RFP") to "qualify" an individual, business organization or Indian tribe to develop, manage and operate a "possible" casino gaming facility in the state. The bill sets forth criteria to be included in the RFP, requires the Commissioners to evaluate responses, authorizes the Commissioners to "qualify" one responder as eligible to develop, manage and operate a "possible" casino gaming facility, and requires the Commissioners to report their findings to the General Assembly no later than April 1, 2019. It also would repeal last year's legislation authorizing a business entity owned exclusively by the Mohegan Tribe and the Mashantucket Pequot Tribe (the "Tribes") to operate a casino gaming facility in East Windsor.

Importantly, HB 5305 does not authorize the operation of a casino gaming facility. On the contrary, it expressly provides that no one selected as qualified by the Commissioners "may operate a casino gaming facility in the state until the General Assembly has enacted legislation to provide for the licensing and operation of a casino gaming facility and such legislation has taken effect."

Whether to go forward with the proposed legislation is, in my view, strictly a policy decision. As a legal matter, however, it is my opinion that the proposed legislation would not run afoul of our existing agreements with the Tribes.

The pertinent provisions of both the tribal gaming compacts (the "Compacts") and the associated Memoranda of Understanding (the "MOUs") speak only to laws that authorize the operation of commercial casino games or video facsimiles of games of chance. Section 15(a) of the Compacts provides that the moratoria on the operation of video facsimile games by the Tribes terminates if "the existing laws or regulations of the State are amended to expressly
authorize the operation of any video games of chance for any purpose by any person, organization or entity." The MOUs, in turn, provide that the Tribes' obligation to make payments to the State shall continue "so long as no change in State law is enacted to permit the operation of video facsimiles or other commercial casino games by any other person and no other person within the State lawfully operates video facsimile games or other commercial games...." Mohegan MOU dated May 17, 1994, at 2 (emphasis added).

In 2015, my Office provided the Speaker of the House of Representatives with a letter stating that a similar bill, which merely permitted the Tribes to conduct an RFP but did not authorize anyone to actually operate a commercial casino, would not implicate or jeopardize the State's existing agreements with the Tribes. See May 27, 2015 Letter to Speaker Brendan Sharkey (copy attached).¹ That reasoning applies equally here and leads me to conclude that passage of HB 5305 would not provide the Tribes with legal justification to escrow or otherwise cease making payments to the State under the MOUs. Indeed, any attempt by the Tribes to cease making such payments to the State would itself constitute a breach of the MOUs and would put into serious legal jeopardy their authority to operate slot machines on their reservations. We are aware of no contrary legal analysis from the Tribes or any other source.

House Bill 5307, An Act Concerning Sports Wagering in the State.

This bill would amend a law passed last year requiring the DCP Commissioner to adopt regulations governing sports wagering to the extent permitted by state and federal law. It is not clear to us what the proposed amendment is intended to accomplish. Nevertheless, I urge the legislature to proceed carefully with respect to any proposals that would legalize sports wagering.

¹ My Office previously advised the General Assembly that authorization of the proposed off-reservation casino in East Windsor should be conditioned upon the approval of compact amendments by the Department of the Interior. Those amendments, including the Interior's approval and publication of them in the Federal Register, are necessary to ensure that the moratoria in the Compacts remain undisturbed and the exclusivity provisions of the MOUs are not breached. The General Assembly accepted this Office's advice when it passed legislation last year conditioning authorization of the East Windsor casino upon the Interior's approval of the Compact amendments. In accordance with that legislation, the Compact amendments were submitted to the Interior last year. My office and the Tribes are currently in litigation against the Interior concerning its failure to publish the proposed amendments in the Federal Register. In order to preempt a potential future dispute with the Tribes over the impact of the third casino on existing payment arrangements, I reiterate my strong view that requiring compact amendment approvals from the Interior, including publication in the Federal Register, as a condition to authorization of the proposed joint tribal casino is necessary to protect the state against substantial financial risk.
in this state if the federal prohibitions against such state laws are repealed or otherwise declared unlawful by the courts.

As many of you know, the United States Supreme Court presently is reviewing a challenge to the constitutionality of the federal law known as the Professional and Amateur Sports Protection Act of 1992 ("PASPA"). PASPA essentially prohibits states from enacting laws that permit and regulate sports wagering. In anticipation of a ruling striking down PASPA, which could come down as early as May or June of this year, many states are now considering legislation authorizing sports wagering.

Connecticut's agreements with the Tribes require the legislature to consider carefully a number of factors before legalizing sports wagering. In the event PASPA is struck down and state law continues to prohibit sports wagering (as it presently does), it is my view that because sports wagering is a Class III game under federal law and is not an authorized game under either of the respective Compacts, the Tribes would still be prohibited from conducting sports wagering on their reservations. If state law is amended to permit sports wagering, the Tribes could, under section 17 of the Compacts, ask the State to negotiate a new gaming compact permitting sports wagering on their reservations.

The Tribes may argue, however, that a state law permitting sports wagering in Connecticut would violate the exclusivity provisions of the MOUs. Those provisions state that the Tribes are relieved of their obligation to pay the State a portion of the gross operating revenues from the operation of video facsimiles of games of chance on their reservations if state law is changed to permit "video facsimiles or other commercial casino games." While sports wagering is not a video facsimile, whether it is a "commercial casino game" is an open question. That term is not defined in the MOUs or Compacts. My Office has not thoroughly researched whether sports wagering might constitute a "commercial casino game" for purposes of the MOUs and I do not at this time have a high degree of certainty about how a court might resolve that question.

If the state passed a law permitting sports wagering and a court concluded that it does constitute a commercial casino game, the Tribes could cease making payments to the State under the MOUs. In that event, however, the Tribes and the State would be restored to their respective rights under the Compact moratoria. Under those moratoria, the Tribe's authority to operate slot machines and other video facsimiles of games of chance on their respective reservations would remain an unresolved legal question, as it was prior to the time the MOUs were entered.

These are difficult and complex questions. They have significant fiscal and policy ramifications. My Office remains available to discuss these matters further and assist policy makers as they attempt to craft solutions.
Senate Bill 277, An Act Concerning Online Lottery Draw Games.

This bill purports to authorize the Connecticut Lottery Corporation ("CLC") to sell lottery tickets for a number of "lottery draw games," including Keno, through CLC's website, online service or mobile application. My Office previously has warned the legislature about the dangers associated with permitting CLC to offer online lottery games. In particular, any law authorizing CLC to offer games that might constitute video facsimiles of games of chance or commercial casino games for purposes of the Compacts or MOUs could potentially breach the MOUs or end the Compact moratoria. The question of whether any particular game or platform for playing a particular game constitutes a video facsimile game is a very complex and fact-specific inquiry.

Although the proposed legislation attempts to limit its authorization to a number of specific games that the CLC currently operates as "draw games", simply listing those games by name is not a prudent way to define draw games. As presently drafted, CLC could offer tickets online for virtually any game by simply renaming that game as one of the games the bill lists as a "draw game." In addition, while the bill purports to prohibit CLC from offering games that would violate the Compacts or MOUs, it does not address how or by whom such a determination would be made.

The bill also removes the current prohibition against CLC offering interactive online video games for promotional purposes if such games are offered in connection with the proposed program authorizing CLC to sell tickets online for lottery draw games. We do not recommend legislation authorizing CLC to offer interactive, on-line games even for promotional purposes, unless it is very clear that either: (1) there is no cost for playing the games (including any requirement that a lottery ticket have been purchased); or (2) the participant is not entitled to any form of prize or reward in connection with the game (including points or other "rewards" that can be used to purchase anything of value). Even then, the State should consult with the Tribes before enacting any such legislation because rewards programs, second-chance drawings and other similar proposals arguably constitute video facsimiles.

Lastly, the bill is silent about whether or how CLC would ensure that tickets are sold only within the State of Connecticut. Offering tickets online to out of state residents could have significant legal ramifications under the federal Uniform Internet Gaming Enforcement Act of 2006 ("UIGEA").

In short, due to the important and complex issues raised by the legislation and the significance of its ramifications, I strongly urge the Committee to proceed cautiously.

Thank you for the opportunity to testify about these important matters. Please feel free to contact me if you have any questions or concerns.
May 27, 2015

J. Brendan Sharkey  
Speaker of the House  
Legislative Office Building Room 4100  
Hartford, CT 06106

Re: Senate Bill 1090, An Act Concerning Gaming

Dear Speaker Sharkey:

You have asked whether the above-referenced legislation, as amended by the State Senate, implicates any of the legal issues I raised in my April 15, 2015 letter to legislative leaders about the original proposal. Senate Bill 1090, as amended, does not authorize casino gaming. As a result, it would have no impact on the current agreements between the Tribes and the State of Connecticut and would not increase or otherwise affect the likelihood of the State being obligated under federal law to negotiate gaming compacts with tribes that may gain federal recognition in the future. As I stated in my April 15, 2015 letter, I am sympathetic to the desire to promote jobs and economic development, assist the State in competing with gaming enterprises in neighboring states, and protect the economic well-being of our existing federally recognized tribes with whom Connecticut has a special and mutually beneficial relationship. Should the legislature go forward with the amended version of Senate Bill 1090, my Office remains available to assist lawmakers in any efforts to address the important legal issues that would be implicated by any future legislation authorizing casino gaming outside the Tribe’s reservations.

I hope this letter is helpful and responsive to your request. Please feel free to contact me with any additional questions or concerns.

Very Truly Yours,

George Jepsen