

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender, State
of Hawai‘i to the Senate Committee on Judiciary**

February 10, 2023

S.B. No. 591: RELATING TO GAMBLING

Chair Rhoads, Vice Chair Gabbard, and Members of the Committee:

The Office of the Public Defender opposes S.B. No. 591 because the proposed law is unconstitutional.

This amendment adds a new section to the Hawai‘i Penal Code by establishing the offense of Operation of Illegal Gambling Businesses as a class “C” felony. A person who operates a business that: (1) advances gambling activity; (2) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (3) has been or remains in substantially continuous operation for a period in excess of thirty days *or* has a gross revenue in excess of \$2,000 in any single day, is guilty of the offense operation of illegal gambling businesses. The proposed law also establishes probable cause that a business receives gross revenues in excess of \$2,000 in any single day if five or more persons conduct, finance, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, for the purpose of obtaining either a warrant of arrest or a search warrant.

Probable Cause

“Probable cause” is the legal basis that allows police to arrest someone, conduct a search, or seize property. This requirement comes from the Fourth Amendment to the United States Constitution, and Article I Section 7 of the Hawai‘i Constitution which state that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and *no Warrants shall issue, but upon probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched."

At the very least, in order for a court to issue a warrant, it must be supported by a showing of probable cause. To obtain a warrant, a law enforcement officer will sign an affidavit stating the facts that they know from their own observation, or from the observations of citizens or police informants. These facts support their claim that probable cause exists to conduct a search, seize property, or make an arrest. Probable cause exists when the facts and circumstances within one's knowledge and of which one has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that a *criminal offense* has been committed, and that evidence of the crime is concealed in the place to be searched. State v. Phillips 67 Haw. 535, 696 P.2d 346 (1985); State v. Decano 60 Haw. 205, 588 P.2d 909 (1978). The failure of any affidavit to establish probable cause will render a warrant invalid and the evidence recovered as a result thereof inadmissible at trial. Monick v. State 64 Haw. 399, 641 P.2d 1341 (1982); State v. Knight 63 Haw. 90, 691 P.2d 370 (1980).

S.B. No. 591 creates a new criminal offense for persons operating an illegal gambling business. The offense consists of three essential elements:

- (1) the business advances gambling activity;
- (2) the business involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
- (3) the business has been or remains in substantially continuous operation for a period in excess of thirty days; *or* has a gross revenue in excess of \$2,000 in any single day.

Element number three can be proved in two ways: (1) continuous operation for more than 30 days, or (2) gross revenue of more than \$2,000 in any single day. In order for a person to have committed the crime of operation of an illegal gambling business, *all* three elements listed above must have occurred. If one or more of the elements above are *not* in existence, there is no crime under this law.

In order to obtain a constitutionally valid warrant for the crime of operating an illegal gambling business, *probable cause must be established as to all three elements of the offense*. If an affidavit submitted by law enforcement failed to establish probable cause as to all three elements of the crime, a judge would be precluded from issuing a warrant under the protections provided under the United States and Hawai'i Constitutions.

The “Probable Cause” provision is unconstitutional

If this bill were to be passed into law, litigation on this issue would be certain. It has long been established, that state laws must at the very least, provide the same or greater protections (but not less) than does the United States Constitution. As the Hawai‘i Supreme Court explained: “where the legislature has enacted a valid statute that provides greater protection” to citizens from the power of the State “than [does] the constitution, conformance to the statutory mandate, and not the lower ... standard set forth by the state or federal constitutions, is required.” State v. Maldonado, 108 Hawai‘i 436, 444, 121 P.3d 901, 909 (2005).

The probable cause provision of S.B. No. 591 [*see* page 2 lines 1-7] lowers the constitutional protections requiring the establishment of “probable cause” (to obtain a warrant) by not requiring the presence of all elements of this offense. The provision nullifies proof of the third element of the offense¹ and would only require proof or evidence that the business operated for *two or more successive* days in order to establish “probable cause”² and obtain a warrant. In practice, the proposed provision would allow a person to be arrested, or their home to be searched *absent any evidence that the business’ gross revenue exceeds \$2,000 in any single day*. Under our current laws, this practice would be constitutionally impermissible as it provides less protection than does the Hawai‘i and United States Constitutions. As a result, any evidence seized under the provision would be thrown out, and any arrests made would be invalidated resulting in those cases being dismissed.

Thank you for the opportunity to comment on S.B. No. 591.

¹ Element three can be proven in two ways: (1) continuous operation for more than 30 days, *or* (2) gross revenue of more than \$2,000 in any single day.

² If five or more persons conduct, finance, supervise, direct, or own all or part of a gambling business and such business operates for **two or more successive days**, then, for the purposes of obtaining warrants for arrest, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of \$2,000 in any single day shall have been established. S.B. No. 591 Page 2 lines 1-7.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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OUR REFERENCE PO-HR

February 10, 2023

The Honorable Karl Rhoads, Chair
and Members
Committee on Judiciary
State Senate
Hawaii State Capitol
415 South Beretania Street, Room 016
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

SUBJECT: Senate Bill No. 591, Relating to Gambling.

I am Paul Okamoto, Acting Major of the Narcotics/Vice Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports Senate Bill No. 591, Relating to Gambling.

The HPD supports legislation that seeks to establish the operation of an illegal gambling business as a class C felony. Numerous studies have confirmed that gambling causes problems such as bankruptcy, theft, embezzlement, suicide, child abuse and neglect, divorce, incarceration, and homelessness. Studies have also demonstrated that gambling schemes are essentially regressive taxes on low-income people, those who can least afford to participate. The HPD supports this bill which creates a clear definition of "illegal gambling businesses" and forfeiture procedures and designates consequences.

The HPD urges you to support Senate Bill No. 591, Relating to Gambling. Thank you for the opportunity to testify.

APPROVED:

Sincerely,


Arthur J. Logan
Chief of Police


Paul Okamoto, Acting Major
Narcotics/Vice Division

SB-591

Submitted on: 2/9/2023 3:08:43 PM

Testimony for JDC on 2/10/2023 9:35:00 AM

Submitted By	Organization	Testifier Position	Testify
Inga Gibson	Testifying for Pono Advocacy	Comments	In Person

Comments:

February 10, 2023, 930am

RE: SB591 Relating to Illegal Gambling

Dear Chair Rhoads and Senate Judiciary Committee Members,

We respectfully request the Committee temporarily defer this measure until a later date to allow time for further discussions on the implications and enforceability of the bill with the Prosecutor's Office and Honolulu Police Department.

Thank you for your consideration of this request.

Inga Gibson

Pono Advocacy

SB-591

Submitted on: 2/4/2023 9:13:46 AM

Testimony for JDC on 2/10/2023 9:35:00 AM

Submitted By	Organization	Testifier Position	Testify
Victor K. Ramos	Individual	Support	Written Testimony Only

Comments:

SUPPORT

SB-591

Submitted on: 2/9/2023 6:03:11 AM

Testimony for JDC on 2/10/2023 9:35:00 AM

Submitted By	Organization	Testifier Position	Testify
Doreen Akamine	Individual	Support	Written Testimony Only

Comments:

Appreciate the effort to create this law to warn those contemplating the idea of a gambling business that it will be illegal and individuals can be charged and prosecuted as a Class C Felony. Hawaii must remain free of this type of activities. Part of the beauty and uniqueness of our island state is the lack of legalized gambling....in any form. The rationale of legalizing gambling game rooms because "others" are doing it is foolish. In addition, efforts to "divert" the spending to Hawaii of those going to Las Vegas is unproven, misinformed and misguided. During my informal poll of immediate family and friends (about 50 individuals) who frequently travel to Las Vegas (3-4 times a year), when asked if they would stop going to Las Vegas and gamble in Hawaii, 100% of them said NO. They said that *traveling* is what makes it fun and exciting. Thank you for your work.