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15-008
NO.
STATE OF NEBRASKA
OFFICIAL
MAY 13 2015
DEPT. OF JUSTICE

SUBJECT: LB 619 – Constitutionality of Legislation Defining Certain Forms of Poker as "Games of Skill" and Authorizing the Conduct of Poker Cash Games and Tournaments.

REQUESTED BY: Senator Merv Riepe
Nebraska Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
L. Jay Bartel, Assistant Attorney General

INTRODUCTION

LB 619, as amended by AM115, would authorize persons applying to the Nebraska Liquor Control Commission ["Commission"] for the issuance of a liquor license to apply for an endorsement to host poker games or tournaments. AM115, § 17. The Commission would also be allowed to issue, in conjunction with special designated liquor licenses, special designated poker licenses to host poker games and tournaments. AM115, § 6. Poker is defined to mean "a draw or community card game in which a player bets that the value of his or her hand is greater than the value of the hands held by others and each subsequent player must either equal or raise the bet or drop out." AM115, § 4. "Poker includes a draw poker game, such as five-card draw, in which a player determines whether to discard and then receive new cards from the dealer, and a community card game, such as Texas Hold'em and Omaha Hold'em, in which the player combines the cards he or she is holding with the community cards that all players share and the player with the highest hand at the end of the betting wins the pot unless the player is the only player playing once the other players have dropped out." *Id.* Section 5 of AM115 provides:

(1) The Legislature finds that:

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(a) Certain poker games require skill and players that are able to develop that skill may become professional poker players; and

(b) While poker does have a random component in the cards that players are dealt, there is more skill than luck for successful poker players in games where the player implements a strategy by making decisions that influence the other players and ultimately the game's outcome.

(2) It is the intent of the Legislature to recognize various forms of the card game poker as games of skill, including variations of draw and community card poker games.

Noting the prohibition in Neb. Const. art. III, § 24, against the Legislature's authorization of "any game of chance," you state that you are "concerned LB 619 and AM115 may violate the prohibition against authorizing games of chance, which would require the payment of money to play." In particular, you point to the language in § 5 of AM115 stating the Legislature's intent to "recognize various forms of the card game poker as games of skill, including variations of draw and community card poker games." In light of prior Attorney General opinions in which poker has been characterized as a game of chance, and the Nebraska Supreme Court's opinion in *Indoor Recreation Enterprises, Inc. v. Douglas,* 194 Neb. 715, 235 N.W.2d 398 (1975) affirming a trial court's finding that poker was a game of chance and not a game of skill, you ask us to address whether LB 619 and AM115, if enacted, would allow wagering on a game of chance in violation of art. III, § 24.

ANALYSIS

A. The Constitutional Prohibition Against the Legislature's Authorization of Any "Game of Chance."

Neb. Const. art. III, § 24 (1) provides: "Except as provided in this section, the Legislature shall not authorize any game of chance or any lottery or gift enterprise when the consideration for a chance to participate involves the payment of money for the purchase of property, services, or a chance or admission ticket or requires an expenditure of substantial effort or time." "[A] distinction is made in article III, § 24, between a 'game of chance' and 'lottery.'" *Stewart v. Advanced Gaming Technologies, Inc.,* 272 Neb. 471, 482, 723 N.W.2d 65, 74 (2006). "In paragraph (1) of article III, § 24, 'game of chance' and 'lottery' are referred to as distinct activities that are generally prohibited." *Id.* "However, paragraphs (2) and (3) provide that a 'lottery' may be authorized under certain conditions and with certain requirements." *Id.*

In *Op. Att'y Gen. No. 95085* (November 17, 1995), we concluded the Legislature could not enact legislation authorizing the use of slot machines, video, or electronic devices based on a slot machine theme, or video or electronic gambling devices based on games such as poker, blackjack, or dice, as a form of "lottery" permitted under art. III, § 24. We recognized that, while the Constitution permitted the Legislature to

establish lotteries for certain purposes, it was prohibited from authorizing "any game of chance." *Id.* at 11. Accordingly, art. III, § 24, prohibits the Legislature from authorizing any game, scheme or contest which constitutes a "game of chance."

B. The Dominant Factor Test Determines Whether a Game is One of Chance or Skill.

In *Baedero v. Caldwell,* 156 Neb. 489, 56 N.W.2d 706 (1953) ["*Baedero*"] the Nebraska Supreme Court considered whether a five-ball pinball machine capable of awarding free replays constituted a "game of chance" barred under art. III, § 24, as well as an illegal "gambling device" prohibited by Neb. Rev. Stat. § 28-945. Discussing the test for determining whether a game constituted a "game of chance," the Court stated:

> The test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game. . . .
>
> A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player.

Id. at 493-94, 56 N.W.2d at 709.

While noting that some element of skill may be involved in the playing of a pinball machine, the Court found that the element of chance was the dominant factor in determining the result of the game. Stating that "Article III, section 24, of the Constitution is clear, explicit, and unambiguous that the Legislature shall not authorize any game of chance," and that § 28-945 "conforms to the constitutional provision in banning any game of chance in this state," the Court concluded the pinball machine was a prohibited "game of chance," as well as an illegal "gambling device." *Id.* at 494-97, 56 N.W.2d at 710-11.

In *State ex rel. Spire v. Strawberries, Inc.,* 239 Neb. 1, 473 N.W.2d 428 (1991), the Court considered whether certain video gambling devices, authorized by a 1987 statute excluding mechanical, computer, electronic, or video gaming devices capable of awarding free games from the definition of "gambling device" under § 28-1107(2) (1989), were legal. The devices in question allowed the play of various games, including video poker, blackjack, and dice. *Id.* at 4, 473 N.W.2d at 432. The Attorney General argued that the statute purporting to authorize such devices violated the prohibition in art. III, § 24, against the Legislature's authorization of "games of chance."

In addressing the constitutionality of the statute, the Court stated that the "constitutional provision (art. III, § 24) had remained relatively unchanged since 1875," and, "[c]orrespondingly, the statute relating to the 'possession of gambling devices' enacted pursuant to [the] constitutional provision [had] also remained relatively

unchanged for 100 years." *Id.* at 6, 473 N.W.2d at 433. Discussing the scope of the prohibition against "games of chance" in the Constitution, the Court stated:

> Neb. Const. art. III, § 24, is in clear and unambiguous language and can be divided into three elements: (1) chance: "[t]he Legislature shall not authorize any game of chance"; (2) consideration: "when the consideration for a chance to participate involves the payment of money"; and (3) prize: "for the purchase of property [or] services."
>
> In defining these elements, this court has held that a game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or on the device or apparatus with which it is played. *Indoor Recreation Enterprises, Inc. v. Douglas,* 194 Neb. 715, 235 N.W.2d 398 (1975). *See, also, CONtact, Inc. v. State*, 212 Neb. 584, 324 N.W.2d 804 (1982) (a game of chance is one in which the winner is determined by mere luck and not by skill; the predominant nature of the game, i.e., skill or chance, determines its classification). Free replays are things of value and when obtained on a gambling device constitute property within the meaning of Neb. Const. art. III, § 24. *Baedero v. Caldwell,* 156 Neb. 489, 56 N.W.2d 706 (1953).

239 Neb. at 7, 473 N.W.2d at 434.

Applying the test for determining if a game constitutes a prohibited "game of chance," the Court determined the statute purporting to authorize the video gaming devices was unconstitutional, stating:

> Section 28-1107(2) attempts to exempt devices which would normally fall under the "games of chance" prohibition by redefining them. Subsection (2) provides that subsection (1) shall not apply to games used for amusement only and also attempts to exclude free replays from being considered as property under the "prize" element. Neb. Const. art. III, § 24, is clear. The court has already ruled that free replays on a device otherwise considered a gambling device constitute property within the meaning of the prohibition.
>
> The Legislature cannot avoid constitutional provisions by statutorily redefining constitutionally unacceptable activity. The Legislature's power of definition may not be employed to nullify or circumvent the provisions of the Nebraska Constitution. *MAPCO Ammonia Pipeline v. State Bd. of Equal.,* 238 Neb. 565, 471 N.W.2d 734 (1991). To redefine the activity that the Legislature seeks to permit would require an amendment to this state's Constitution. Absent such an amendment, § 28-1107(2) is unconstitutional for being in contravention of the express provision of Neb. Const. art. III, § 24.

239 Neb. at 8, 473 N.W.2d at 434.

Most recently, in *American Amusements Co. v. Nebraska Dep't of Revenue,* 282 Neb. 908, 807 N.W.2d 492 (2011) ["*American Amusements*"] the Supreme Court determined that a version of a video gaming device known as Bankshot was not an illegal gambling device. The Court noted that art. III, § 24, provides that "the Legislature shall not authorize any game of chance...," and that, in *Baedero*, it "held that the test for determining whether a game violated the constitutional and statutory prohibition against any game of chance was 'not whether [the game] contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game.'" 282 Neb. at 919, 807 N.W.2d at 500. The Court "reaffirm[ed] [its] prior holdings that gambling occurs in Nebraska when a bet is placed on an outcome that is determined predominantly by chance." *Id.* at 922, 807 N.W.2d at 502.

C. Judicial Decisions Applying the Dominant Factor Test to Determine if Poker is a Game of Chance or Skill.

In 1975, the Nebraska Supreme Court, applying the dominant factor test articulated in *Baedero*, affirmed a district court decision finding that poker and bridge were games of chance and not games of skill. *Indoor Recreation Enterprises, Inc. v. Douglas,* 194 Neb. 715, 235 N.W.2d 398 (1975) ["*Indoor Recreation*"]. *Indoor Recreation* was an action seeking a judgment declaring that poker, bridge, chess and checkers were games of skill, and that the playing of such games or operation of a place where such games were played did not violate the State's gambling laws. In deciding the issue, the Court relied on the "dominant factor" test for distinguishing between games of skill and games of chance employed in *Baedaro*, which requires that "[t]he test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game." 194 Neb. at 716-17, 235 N.W.2d at 400 (*quoting Baedaro,* 156 Neb. 489, 56 N.W.2d 705 (1953)).

In addressing this test, the Court cited an annotation stating that "'* * * games of cards are games of chance even though the element of skill is more or less involved, since the element of chance predominates....'" 194 Neb. at 717, 235 N.W.2d at 400 (*quoting* Annotation, *Games of Chance or Skill,* 135 A.L.R. 104 (1941)). The Court also cited the following observation made by the North Carolina Supreme Court concerning card games:

> 'It is a matter of universal knowledge that no game played with ordinary playing cards is unattended with risk, whatever may be the skill, experience, or intelligence of the gamesters engaging in it. From the very nature of such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed, or the effect of a given play or mode of playing, there must be unavoidable uncertainty as to the results.' 194 Neb. at 717, 35 N.W.2d at 400 (*quoting State v. Taylor,* 11 N.C. 680, 681-82, 16 S.E. 168, 169 (1892)).

In addition, the Court recognized that "'* * *the test of whether a game is one of skill or of chance, or one in which skill greatly predominates over chance, is not measured by the standard of experts or any limited class of players, but that of the average skill of a majority of players likely to play the game, * * *.'" 194 Neb. at 717, 35 N.W.2d at 401 (*quoting State v. Prevo,* 44 Haw. 665, 675-76, 361 P.2d 1044, 1050 (1961)).

In spite of expert testimony expressing the opinion that poker was a game of skill and not chance, the Court found there was sufficient evidence in the record to support the district court's conclusion "that the predominate purpose of the games in issue was chance." 194 Neb. at 719, 235 N.W.2d at 401. The Court found the expert's opinion was not binding on the court, and pointed to testimony by the expert on cross-examination agreeing that, "in 100 hands, the winner and the loser is going to be determined upon the deal of the cards...," which the expert conceded was based on "[l]uck." *Id.* The expert also acknowledged that "the initial deal in [a] draw poker game [was] also luck...," and agreed that, "in poker, in any one deal,..., the chance of getting any one of the two or three million hands would be called luck...." *Id.*

In addition to our Supreme Court's opinion in *Indoor Recreation*, numerous other courts have held that poker, in various forms, is a game in which the outcome is predominately determined by chance and not player skill. *See, e.g., Commonwealth v. Dent,* 992 A.2d 190, 196 (Pa. Super. Ct. 2010) ("Applying the 'predominate-factor test'..., while the outcome of poker may be dependent on skill to some degree, it is predominately a game of chance. While...skill can determine the outcome in a poker game, players are still subject to defeat at the turn of the cards.") (footnote omitted)); *Three Kings Holding, L.L.C. v. Six,* 45 Kan. App. 2d 1043, 1057, 225 P.3d. 1218, 1227 (Kan. Ct. App. 2011) (Determining variant of Texas Hold-em poker known as Kandu was a game of chance, noting "the weight of authority from other states" supported the conclusion that "chance dominates over skill in poker...."); *Joker Club, L.L.C. v. Hardin,* 183 N. C. App. 92, 99, 643 S.E.2d 626, 630 (N.C. Ct. App. 2007) ["*Hardin*"] ("We determine that chance predominates over skill in the game of poker, making that game a game of chance...."); *In re Advisory Opinion to the Governor,* 856 A.2d 320, 329 (R.I. 2004) (Recognizing that games, including poker, under proposal to allow casino gambling "that depend on an unpredictable and uncontrollable variable, such as in games involving cards and dice, are, as a matter of law, games of chance.").

The North Carolina Court of Appeals decision in *Hardin* contains an extensive analysis of the predominance of chance over skill inherent in the game of poker. Addressing the "logic underpinning North Carolina's interpretation of the predominate-factor test..., the court stated that test

> makes clear that while all games have elements of chance, games which can be determined by superior skill are not games of chance. For example, bowling, chess, and billiards are games of skill because skill determines the outcome. The game itself is static and the only factor separating the players is their relative skill levels. In short, the instrumentality for victory is in each player's hands and

> his fortunes will be determined by how skillfully he used that instrumentality. 183 N.C. App. at 98, 643 S.E.2d at 630.

In *Hardin*, expert testimony was presented by a professional poker player, a consultant who ran poker tournaments, a casino manager, and an amateur player. *Id.* at 96-97, 643 S.E.2d at 629. The professional poker player "testified that there are certain strategies to poker that allow a player to improve his mathematical odds over the course of a game...," and "that while in a single hand of poker, chance may defeat a skilled and experienced player, the skilled player is likely to prevail when multiple hands are played." *Id.* The consultant "also testified that skill will prevail over luck over a long period of time in the course of a poker tournament...," and "further stated that there are certain skills that players can develop to consistently win at poker, including patience, memory, and the ability to analyze odds." *Id.* The casino manager "testified that there are numerous skills needed for a player to succeed in poker,...," stating "that patience, knowledge of the odds, the ability to read people, and self-control are all necessary skills." *Id.* Finally, the amateur player "testified that his poker skills [had] improved greatly since he began studying poker and reading books on winning poker strategies..." and "that in his experience, poker is a game where skill prevails over chance." *Id.* The State's witness, a North Carolina Alcohol Law Enforcement officer, stated he had "played poker for more than 39 years...," and "testified that while there was skill involved in poker, luck ultimately prevailed." *Id.* The trial court "was unable to determine whether skill or chance predominated in poker, but concluded that poker [was] a game of chance." *Id.*

Affirming the trial court's ruling, the appeals court explained why poker was different than other games in which skill predominates in determining the outcome:

> Poker...presents players with different hands, making the players unequal in the same game and subject to defeat at the turn of a card. Although skills such as knowledge of human psychology, bluffing, and the ability to calculate and analyze odds make it more likely for skilled players to defeat novices, novices may yet prevail with a simple run of luck. No amount of skill can change a deuce into an ace. Thus, the instrumentality for victory is not entirely in the player's hand. 183 N.C. App. at 99, 643 S.E.2d at 630. In *State v. Taylor*, our Supreme Court noted this distinction. 111 N.C. 680, 16 S.E. 168 (1892).
>
> > It is a matter of universal knowledge that no game played with the ordinary playing cards is unattended with risk, whatever may be the skill, experience or intelligence of the gamesters engaged in it. From the very nature of such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed or the effect of a given play or mode of playing, there must be unavoidable uncertainty as to the results.
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> *Id.* at 681–82, 16 S.E. at 169.

> This is not so with bowling, where the player's skill determines whether he picks up the spare; or with billiards, where the shot will find the pocket or not according to its author's skill. During oral arguments, counsel for plaintiff analogized poker to golf, arguing that while a weekend golfer might, by luck, beat a professional golfer such as Tiger Woods on one hole, over the span of 18 holes, Woods' superior skill would prevail. The same would be true for a poker game, plaintiff contended, making poker, like golf, a game of skill. This analogy, while creative, is false. In golf, as in bowling or billiards, the players are presented with an equal challenge, with each determining his fortune by his own skill. Although chance inevitably intervenes, it is not inherent in the game and does not overcome skill, and the player maintains the opportunity to defeat chance with superior skill. Whereas in poker, a skilled player may give himself a statistical advantage but is always subject to defeat at the turn of a card, an instrumentality beyond his control. We think that is the critical difference.
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> For the reasons stated above, we determine that chance predominates over skill in the game of poker, making that game a game of chance. 183 N.C. App. at 99, 643 S.E.2d at 630-31.

While a majority of courts have found poker to be game of chance, some courts have concluded that at least certain forms of poker are games of skill. *See, e.g., Town of Mount Pleasant v. Chimento,* 401 S.C. 522, 533, 737 S.E.2d 830, 837 (S.C. 2013) (Upholding conviction for gambling based on wagering money on Texas-Hold'em game, "even though it is a game in which skill predominates."); *Bell Gardens Bicycle Club v. Dep't of Justice,* 36 Cal. App. 4th 717, ___, 42 Cal. Rptr. 2d 730, 744 (Cal. Ct. App. 1995) ("Jackpot poker" found to be illegal lottery that was "'piggy-backed' onto a legal poker game as a chance bonus that, unlike poker, does not predominately implicate a player's skill."). *See also Gallatin County v. D & R Music & Vending, Inc.,* 208 Mont. 138, 141-42, 676 P.2d 779, 781 (Mont. 1984) (Describing poker as "a game of skill and chance..." that is "played by individuals with one player pitting his skills and talents against those of the other players."); *State v. Coats,* 158 Or. 122, 133, 74 P.2d 1102, 1106 (Or. 1938) ("Poker, when played for money, is a gambling game, but, since it involves a substantial amount of skill and judgment, it cannot reasonably be contended that it is a lottery."). These cases, however, are of little assistance, as they involve no discussion of the relative degree of skill or chance in poker.[1]

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[1] While there is judicial disagreement as to whether versions of live poker are primarily games of chance or skill, video or electronic poker games have almost universally been recognized as games of chance. *E.g. State ex rel. Spire v. Strawberries, Inc.,* 239 Neb. 1, 473 N.W.2d 428 (1991) (Video poker and blackjack games were unauthorized games of chance.); *Score Family Fun Ctr., Inc. v. County of San Diego,* 225 Cal. App. 3d 1217, 122, 275 Cal. Rptr. 358, 361 (Cal. Ct. App. 1990) (Video game including variations of poker "present[ed] the user with, at most, only an illusion of skill..." and was "predominately a game of chance."). *Commonwealth v. Two Elec. Poker Game Machs.,*

A recent federal court decision from New York, however, contains an extensive discussion of the factual basis leading the court to conclude that Texas Hold'em poker is predominated by skill rather than chance. *United States v. Dicristina,* 886 F.Supp.2d 164 (E.D.N.Y. 2012), *rev'd on other grounds* 726 F.3d 92 (2d Cir. 2013), *cert. denied* ___ U.S. ___, 134 S.Ct. 1281 (2014) ["*Dicristina*"]. *Dicristina* was charged with operating an illegal gambling business involving Texas Hold'em poker games in violation of the Illegal Gambling Business Act ["IGBA"], 18 U.S.C. § 1955. 886 F.Supp.2d at 168. Before trial, Dicristina moved to dismiss the indictment on the ground that poker was not illegal under the IGBA, arguing that the IGBA did not include Texas Hold'em poker, and that poker was a skill based game, not a game of chance, and thus did not fall within the IGBA's definition of illegal gambling. *Id.* Following pretrial oral argument and expert testimony, the court ruled the question of whether poker constituted gambling under the IGBA was a matter of law, reserving decision on the motion to dismiss. *Id.* The case proceeded to trial, and Dicristina was convicted. *Id.* Dicristina then renewed his motion to dismiss asking for a judgment of acquittal. *Id.*

The district court initially determined that the listing of gambling activities in the IGBA, which did not specifically include poker, should be interpreted to include only activity sufficiently similar to the listed games. *Id.* at 226. The court found that the "governing criteria must be derived by determining what common characteristics unified the games listed in § 1955(b)(2) into a cohesive group." *Id.* Relying on "dictionary, common law, and other federal definitions of gambling...," the court found "the definition [was] limited to games of chance." *Id.* at 230. This led the court to decide the issue of whether poker (specifically, Texas Hold'em poker), was a game predominated by chance or skill. *Id.* at 231.

The court began by noting that "[g]ame play in poker is influenced by both the cards dealt (determined by chance) and the decisions made by the players (determined by skill)." *Id.* The court further reasoned that, "[w]hile players actions are influenced by chance events, their decisions are based on skill....," and that "[p]layer's decisions, in turn, affect game play, both in the hand being played and in subsequent hands." *Id.* The court stated that "[b]y bluffing, for example, players can overcome the power of chance and win a hand despite holding inferior cards...," and noted that "[t]he majority of poker hands end when one player induces his opponents to fold." *Id.* In that case, "[s]ince the cards are never revealed or compared, the players' decisions alone determine the outcome." *Id.*

The *Dicristina* court phrased "[t]he fundamental question" to be "not whether *some* chance or skill is involved in poker, but what element *predominates.*" *Id.*

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465 A.2d 973, 976-79 (Pa. Comm. Ct. 1983) (Outcome of draw poker video game was "largely determined by chance...," noting any skill involved was "not the same skill that can indeed determine the outcome in a game of poker between human players...when it is realized that holding, folding, bluffing and raising have no role to play in [video] poker.").

(emphasis in original). "To predominate, skill must account for a greater percentage of the outcome than chance—i.e., more than fifty percent." *Id.* In deciding this question, the court relied heavily on the testimony of Dicristina's expert, Dr. Randal D. Heeb, an economist, statistician, and player in national poker tournaments. *Id.* at 173, 231. The court found Dr. Heeb had "presented persuasive evidence proving that skill predominates over chance in poker...," and summarized his points as follows:

> (1) [P]oker involves a large number of complex decisions, which allow players of varying skill to differentiate themselves...; (2) many people play poker for a living and consistently win money over time....; (3) players who obtain superior results with other starting hands tend to obtain superior results with any given hand, indicating that the players' abilities, not the cards, are responsible for the results....; [and] (4) the published studies are all consistent with [these] conclusions. *Id.* at 231-32.

The court noted the government's expert, Dr. David DeRosa, an econometrician with no personal experience with poker who had not independently analyzed the game, did not submit any contrary testimony, or "any studies which support the conclusion that chance predominates over skill in poker." *Id.* at 185, 232. The court rejected Dr. DeRosa's implication that the relevant time frame to determine if poker was a game of skill or chance was "a single hand rather than the large number of hands evaluated by" Dr. Heeb, and found that, "[e]ven if a single hand is the relevant frame of reference, Dr. Heeb has shown that experts can outplay amateurs when dealt the same starting hand." *Id.* at 232-33. The court also noted Dr. Heeb's testimony concluding that "'the number of hands by which the higher skilled players predominate with a high degree of certainty could be played in a few sessions of poker...'," finding that Dr. Heeb had "shown persuasively that skilled players will predominate over the less skilled in a relatively short time." *Id.* at 233, 234.

Ultimately, the district court in *Dicristina* concluded Dr. DeRosa "provided no basis for the court to conclude that chance predominates over skill in poker...," and found Dr. Heeb's studies and conclusions "to be accurate and persuasive...." *Id.* at 234. Having found the Texas Hold'em poker played on Dicristina's premises was not predominately a game of chance, the court determined it was not gambling within the meaning of the IGBA, and dismissed the conviction and indictment. *Id.* at 234-35.[2]

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[2] The Second Circuit reversed the judgment of acquittal and reinstated the jury verdict and judgment of conviction, holding that poker was "gambling" under the plain terms of the IGBA. 726 F.3d at 106. In light of its interpretation of the IGBA, the appeals court noted that "the question of whether skill or chance predominates in poker [was] inapposite to [the] appeal." *Id.* at 100.

D. Studies and Literature Exploring the Relationship Between Chance and Skill in Poker.

In *Dicristina*, the district court, in finding that Texas Hold'em poker was a game predominated by skill, relied on statistical analyses performed by Dr. Heeb utilizing 415 million hands of No Limit Texas Hold-em played online at a poker website. 886 F.Supp.2d at 178. Using this data, "Dr. Heeb conducted two different analyses to evaluate the relative effect of skill and luck on players' success rate in poker." *Id.* at 179. First, Dr. Heeb, examined if a player's win rate on all hands was predictive of their success on a particular kind of hand. *Id.* Dr. Heeb "concluded that a player's skill had a statistically significant effect on the amount of money won or lost in a particular hand in poker." *Id.* at 181. Second, Dr. Heeb, using regression analysis, created 'a skill index that related to how skillfully the player played to what their actual win rates were.'" *Id.* His findings demonstrated that "'[t]he lowest skill players according to the predicted skill index in fact achieve[d] much worse results...,' while "[a]verage players still [didn't] do very well..." and "[v]ery good players [were] winning players.'" *Id.* at 182. In addition to his own analyses, Dr. Heeb relied on a number of other published studies which provided "additional empirical support for the fact that skill determines the outcome in poker." *Id.* at 193-94.[3]

In addition to Dr. Heeb's analyses and the studies cited in *Dicristina*, other literature supports the conclusion that skill predominates in poker. *See, e.g.,* Anthony Cabot and Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition,* 22 T. M. Cooley L. Rev. 443, 446 (2005) ["Cabot and Hannum"] (Concluding "[t]he collective expert opinion is unequivocal" that "poker is a game of skill, and in the long run, a skilled player will beat an unskilled player."); Robert Hannum and Anthony Cabot, *Toward Legalization of Poker: The Skill vs. Chance Debate,* UNLV

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[3] Among the studies listed were: Paco Hope & Sean McCulloch, Statistical Analysis of Texas Hold'em 6 (March 4, 2009) (unpublished article) (Analysis of 102 million hands of Texas Hold'em showing that 75 percent of poker hands ended when one player bets and induces his opponents to fold, so the cards are never revealed or compared, leading the authors to conclude that "in the sampled data, the vast majority of games are determined by something other than the value of the cards, since no player reveals any cards to determine the winner."; Noga Alon, Poker, Chance, and Skill 15-16 (unpublished manuscript) (Using computer model, concluding that "although like in essentially almost any other game there is some influence of chance in poker, the game is predominately a game of skill," and that "the significance of skill increases dramatically as the number of hands played grows."); Steven D. Levitt & Thomas J. Miles, The Role of Skill Versus Luck in Poker: Evidence from the World Series of Poker 12-14 (May 2011) (unpublished manuscript) (Analyzing data from the 2010 World Series of Poker, and finding that "[p]layers classified as high skill [based on past performance in other tournaments] are 12 percent more likely to make the final table....").

Gaming Res. & Rev. J. Vol. 13, Issue 1 (2009) (Summarizing scientific studies addressing the skill issue in poker, and concluding the "analysis and research presented" by the authors "suggest that poker is a game of predominantly skill, the skill elements expressed through the player's betting strategy; i.e., the decision on whether to check, bet, call, raise, or fold...," and noting that, "[t]hough the studies [in the paper] focused primarily on Texas Hold'em, with some examination of Seven Card Stud, similar results would be expected in other forms of poker.").

E. Constitutionality of LB 619's Authorization of Wagering on Certain Forms of Poker as Predominately Games of Skill.

In light of this background, the question presented is whether the Legislature's attempt to authorize wagering on certain forms of poker (draw and community card games, including Texas Hold'em), by defining these versions of poker as games of skill, is consistent with the Constitution's prohibition against the Legislature authorizing "any game of chance." It is axiomatic that "the Legislature may not circumvent or nullify the Constitution in defining terms in statutes." *State ex rel. Stenberg v. Omaha Exposition and Racing, Inc.,* 263 Neb. 991, 999, 644 N.W.2d 563, 570 (2002). The Legislature's "power to define [terms] is limited, since (1) the Legislature cannot abrogate or contradict an express constitutional provision and (2) the legislative definition must be reasonable, and cannot be arbitrary or unfounded." *MAPCO Ammonia Pipeline v. State Bd. of Equal.,* 238 Neb. 565, 571, 471 N.W.2d 734, 739 (1991), *cert. denied* 508 U.S. 960 (1993). Thus, the issue is whether legislation defining certain forms of poker (draw and community card games) as games of skill is improper, as these are games of chance under the dominant factor test adopted by the Nebraska Supreme Court to construe the term "game of chance" in art. III, § 24.

The Nebraska Supreme Court has already weighed in on this question, finding poker to be predominately a game of chance, not skill, in *Indoor Recreation.* The case refers to the game of poker generally, although the excerpts from cross-examination of the appellant's expert witness mention both draw and stud poker. There are four generally recognized categories of poker: "draw games, stud games, shared-or-community card games, and miscellaneous games." Cabot and Hannum at 451-52. LB 619 would define as games of skill only two versions of poker – draw poker games and community card poker games. As Texas Hold'em, currently the most popular and studied community card poker game, has taken on that status relatively recently, it was no doubt not among the forms of poker considered by the Court when *Indoor Recreation* was decided in 1975.

In draw poker, a common variant of poker referenced in *Indoor Recreation*, the initial deal of cards and the deal of replacement cards is completely random. None of the cards are exposed, so players have no knowledge of any other players' cards. Players do make decisions on which cards to discard, betting, and analyzing playing habits of other players. While these are no doubt decisions requiring the exercise of some skill, the absence of any knowledge of cards held by other players suggests that the outcome of a draw poker game is predominately determined by chance, as players

have no control over the cards dealt, a purely random event. As draw poker was one of the forms of poker noted in the testimony cited in *Indoor Recreation*, it appears the Nebraska Supreme Court has determined it is a game predominated by chance, not skill.

In contrast, in community card games, the community or common cards are exposed to players. For example, in Texas Hold'em, each player is initially dealt two cards face down. A round of betting then follows, during which a player may either start the betting, meet or raise the bet, or fold his or her cards. If the number of players is reduced to a single player, that player wins regardless of his or her hand. After this initial betting, three shared cards are placed face up, followed by another round of betting. One more shared card is flipped, followed by another round of betting. The last shared card is then flipped, and a final round of betting may occur. At that point, if two or more players are still active, the person with the highest hand wins. Cabbot and Hannum at 452.

Assessing whether skill or chance predominates in a community card game such as Texas Hold'em is a more difficult task than determining the relationship between skill and chance in draw poker. Unlike draw poker, Texas Hold'em involves decision-making by players at several stages in the form of betting, calling, or folding, including after the exposure of shared cards. The greater information provided players in Texas Hold'em appears to present the opportunity to exercise greater skill than in draw poker in making decisions which impact the outcome, as opposed to the outcome being determined by the cards. Indeed, *Dicristina* involved only the issue of whether the specific game of Texas Hold'em Poker was predominately a game of skill and not chance, and most, if not all of the evidence in that case (including the scientific studies) dealt specifically with Texas Hold'em Poker.

While the *Dicristina* decision and various studies and literature support concluding that Texas Hold'em Poker, at least when played for an extended period of time or in a tournament setting, is predominately a game of skill, it is far from clear that the Nebraska Supreme Court would reach the same conclusion if called upon to decide whether this form of poker is a game of chance or skill. Moreover, the type of fact finding necessary to determine that question is not a task which we can, or should, undertake. Ultimately, only a court could engage in the fact-finding required to weigh and evaluate the type of evidence presented in *Dicristina* to judge if Texas Hold'em, or any other type of poker, is predominately a game of chance or skill.

We can, however, note that the Nebraska Supreme Court, in determining poker was predominately a game of chance and not skill in the *Indoor Recreation* case, focused on testimony by the appellant's expert in response to questions about the odds of "winning the next hand," the odds of receiving a particular hand "in any one deal" or the "initial deal in different games," as well as questions about cards dealt "after" the initial deal. *Indoor Recreation,* 194 Neb. at 714, 235 N.W.2d at 401. This indicates the Court's focus was on the relationship between chance and skill in the outcome of a single poker hand, as opposed to judging the predominance of chance or skill over

multiple hands, either during a session of poker involving a number of hands or a poker tournament.[4] If the Court were to instead focus on evidence regarding the predominance of chance or skill over multiple hands in evaluating the status of either draw poker or Texas Hold'em poker as a game of chance or skill, that could impact the Court's determination as to whether these forms of poker are games of skill rather than games of chance.

Further, the Court has also stated that, in determining if chance or skill is the dominant factor in determining the outcome of a game, the game is to be evaluated from the standpoint of the average or typical player. *See Baedero,* 156 Neb. at 494, 56 N.W.2d at 709-10 ("'While the evidence shows that by long practice a certain amount of skill may be developed, yet we must view the operation and result of the machine as it is played by the mass of the patronizing public, with whom it is purely a game of chance.'" (q*uoting State ex rel. Dussault v. Kilburn,* 111 Mont. 400, 109 P.2d 1113, 1115 (Mont. 1941)). Thus, to the extent evidence of the predominance of skill over chance in poker is dependent on the ability of experienced, skilled players to prevail over typical or novice players, the Court may find this is not the appropriate standard to judge poker as a game of chance as opposed to skill.

The Court in *Indoor Recreation* also quoted with approval the North Carolina Supreme Court's decision in *State v. Taylor,* 11 N.C. 680, 16 S.E. 168 (1892), recognizing "unavoidable uncertainty as to the results" of card games "whatever may be the skill, experience, or intelligence of the" players. 194 Neb. at 717, 35 N.W.2d at 400. The recent opinion of the North Carolina Court of Appeals in *Hardin* also noted this early North Carolina Supreme Court decision in finding that chance predominates over skill in poker. 183 N.C. App. at 99, 643 S.E.2d at 630-31. Given our Supreme Court's previous citation to *State v. Taylor* in *Indoor Recreation*, it may find the rationale adopted by the *Hardin* court persuasive if called upon again to determine whether the type of poker games LB 619 would authorize are predominantly games of chance.[5]

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[4] The focus by courts on a single hand in assessing the degree of chance versus skill in poker has been criticized on the ground that it fails to consider the impact of skill over the course of repeated hands or rounds of play. Steven D. Levitt, Thomas J. Miles, and Andrew M. Rosenfeld, *Is Texas Hold'em a Game of Chance? A Legal and Economic Analysis,* 101 Geo. L. J. 581, 595-601 (2013).

[5] We note that, while LB 619 proposes to authorize betting on both draw poker and community card poker games, it does not alter the definition of gambling in Neb. Rev. Stat. § 28-1101(4) (2008), which provides, in part: "A person engages in gambling if he or she bets something of value upon the outcome of a future event, which is determined by an element of chance, *or upon the outcome of a game*, contest, or election...." (emphasis added). In *American Amusements*, the Court recently confirmed that the phrase "outcome is determined by an element of chance" means that "an activity is gambling ...if its outcome is predominantly caused by chance." 282 Neb. at 921, 807 N.W.2d at 502. Engaging in gambling under § 28-1101(4), however, also includes

Finally, to the extent the skill associated with poker is based on the ability to calculate odds or determine the probability of outcomes, some courts have not considered this to be sufficient to overcome the chance element. *See, e.g., People v. Turner,* 165 Misc.2d 222, 224, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1005) (While poker and blackjack "require considerable skill in calculating the probability of drawing particular cards..., they "are as much games of chance as [a pure lottery], since the outcome depends to a material degree upon the random distribution of cards....The skill of the player may increase the odds in the player's favor, but cannot determine the outcome regardless of the degree of skill employed."); *Opinion of the Justices,* 795 So.2d 630, 641 (Ala. 2001) ("Mathematicians, engineers, physical scientists, or others familiar with scientific calculations might be considered more 'skilled' at using the 'laws of probability' to predict a particular outcome. A guess by someone educated in any discipline still, in its essence, remains a guess."). Thus, the ability of a poker player to calculate odds or assess the probability of outcomes may not be viewed as a skill sufficient to overcome the chance element inherent in the random distribution of cards in any poker game.

CONCLUSION

LB 619, as amended, proposes to define draw poker and community card games like Texas Hold'em as games of skill, and to authorize betting on such games in either cash games or poker tournaments. If these forms of poker are games of chance, the Legislature cannot authorize them by defining them as games of skill. Based on the Nebraska Supreme Court's *Indoor Recreation* decision, and the nature in which it is played, draw poker appears to be a game whose outcome is determined primarily by chance, not player skill, at least when the outcome is viewed as the determination of a single hand. A community card game such as Texas Hold'em, however, differs in nature from draw poker, and there is empirical evidence indicating that, over multiple hands, skill plays a greater role than chance in outcome determination in this form of poker. It would be inappropriate for us to attempt to undertake the factfinding required to judge the predominance of chance or skill in either draw or community card poker games like Texas Hold'em in the context of play over multiple hands or in a tournament.

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betting something of value "upon the outcome of a game...." Thus, gambling includes any activity involving betting upon the outcome of a game, without any requirement that the game be only one of chance. Interpreting a statute prohibiting wagering on the outcome of a "game," the Supreme Court of South Carolina held wagering on Texas Hold'em, which it stated was "a game in which skill predominates," was unlawful as the statute included "betting money on the outcome of any 'game' whatsoever, regardless of the amount of skill involved in the game." *Town of Mount Pleasant v. Chimento,* 401 S.C. 522, 532-33, 737 S.E.2d 830, 837 (S.C. 2013). In order to remove any conflict between § 28-1101(4) and the betting proposed to be authorized on certain poker games in LB 619, the bill should be amended to exclude such betting from the definition of gambling in § 28-1101(4).

We can advise that a majority of courts have held that poker is predominately a game of chance and not skill, but there is also authority to the contrary. Accordingly, while the Legislature's recognition of draw and community card poker games as games of skill in LB 619 would likely be found by a court to be an improper attempt to authorize games of chance prohibited by art. III, § 24, we cannot say with complete certainty that LB 619 is unconstitutional on this basis.

Very truly yours,

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