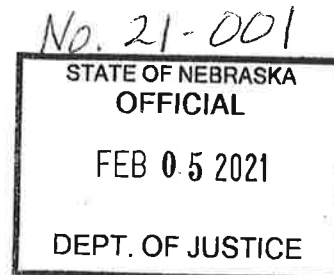




STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
FAX (402) 471-3297 or (402) 471-4725

DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: Whether Initiative Measure 430, which permits the operation of “games of chance” only by authorized gaming operators within licensed racetrack enclosures “[n]otwithstanding any other provision of law,” removes the authorization to conduct other forms of gaming which have been previously permitted (LB 580).

REQUESTED BY: Senator Mike Moser
Nebraska Legislature

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

INTRODUCTION

In November, Nebraska voters approved three initiative measures related to expanded gambling. Initiative Measure 429 amended Neb. Const. art. III, § 24, by adding a new subsection (5) permitting legislative authorization “of all forms of games of chance when such games of chance are conducted by authorized gaming operators within a licensed racetrack enclosure.” Initiative Measure 430 enacted a statute (known as the “Nebraska Racetrack Gaming Act” or “NRGA”) permitting the operation of games of chance by authorized gaming operators within licensed racetrack enclosures. Initiative Measure 431 enacted a statute providing for the taxation of revenue generated by authorized gaming operators conducting games of chance at licensed racetrack locations, and the distribution of those tax revenues.

Section 2 of the NRGA provides that, “[n]otwithstanding any other provision of law, . . . the operation of games of chance is permitted only by authorized gaming operators within licensed racetrack enclosures.” You have requested our opinion as to whether “the word ‘only’ in [this section] supersede[s] prior gambling legislation and in doing so remove[s] the authorization for other forms of gambling the conduct of which

was previously lawfully authorized?” If we conclude this section has such effect, you ask how this impacts existing statutory exclusions from criminal liability for persons and entities continuing to conduct those forms of gambling. To address these concerns, you have introduced LB 580, which proposes to remove the word “only” from section 2 of the NRGAs. You further ask whether “removing the word ‘only’ make[s] table games permissible at other locations beyond ‘licensed race track enclosures?’”

ANALYSIS

A. Relevant constitutional and statutory provisions.

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. (emphasis added).

In *State ex rel. McNally v. Evnen*, 307 Neb. 103, 948 N.W.2d 463 (2020) [*McNally*], the Nebraska Supreme Court found that submission of Initiative Measures 429, 430, and 431 did not violate the “single subject” requirement in Neb. Const. art. III, § 2. Discussing the history of the enactment of exceptions to the constitutional prohibition against “any game of chance or any lottery or gift enterprise,” a plurality of the Court stated:

Article III, § 24, of the Nebraska Constitution, which the Constitutional Initiative proposes to amend, begins: “[e]xcept as provided in this section, the Legislature shall not authorize any game of chance or any lottery” (Emphasis supplied.) This is an invitation to authorize expanded gambling by way of exceptions and, indeed, that has occurred. Both the people (through initiative) and the Legislature (by authorization) have accepted the invitation in art. III, § 24(1), to expand gambling. See art. III, § 24(2) through (4). Art. III, § 24, has been amended to include exceptions which permit, inter alia, wagering on horses at racetracks and, separately, lotteries. The proposed Constitutional Initiative exception accepts the constitutional offer to expand gambling and would permit games of chance at racetracks. *Id.* at 122-23, 948 N.W.2d at 479 (plurality opinion).

In his concurring opinion, Justice Cassel similarly described Initiative Measure 429 as follows:

The primary purpose of the proposal is to provide another exception to the basic prohibition of games of chance, lotteries, and gift enterprises under article III, § 24(1). The detail of “where” is naturally and necessarily related to the “what.” Expansion of gaming presumes some location. The racetrack limitation merely specifies the place. 307 Neb. at 135, 948 N.W.2d at 486 (Cassel, J., concurring).

As noted in *McNally*, exceptions to the general prohibition against legislation authorizing “any game of chance or any lottery or gift enterprise” have been made over the years by amendments to art. III, § 24, approved by the voters. One of those amendments, approved in 1968, allowed the Legislature to enact laws to authorize and regulate “lotteries, raffles, and gift enterprises which are intended solely as business promotions or the proceeds of which are to be used solely for charitable or community betterment purposes without profit to the promoter of such lotteries, raffles, or gift enterprises.” Neb. Const. art. III, § 24 (Cum. Supp. 1969). Another amendment, approved in 1992, permitted the Legislature to authorize a state lottery. Neb. Const. art. III, § 24(3) (Supp. 1993).¹ Subsection (2) of art. III, § 24, which reflects these amendments, currently provides:

The Legislature may authorize and regulate a state lottery pursuant to subsection (3) of this section and other lotteries, raffles, and gift enterprises which are intended solely as business promotions or the proceeds of which are to be used solely for charitable or community betterment purposes without profit to the promoter of such lotteries, raffles, or gift enterprises.

Consistent with these amendments, the Legislature has enacted laws authorizing the various forms of gaming permitted by the exceptions for the state lottery and “other lotteries, raffles, and gift enterprises” conducted for specified purposes. See Nebraska Pickle Card Lottery Act, Neb. Rev. Stat. §§ 9-301 to 9-356 (2012 and Cum. Supp. 2020); Nebraska Lottery and Raffle Act, Neb. Rev. Stat. §§ 9-401 to 9-437 (2012 and Cum. Supp. 2020); Nebraska Small Lottery and Raffle Act, Neb. Rev. Stat. §§ 9-501 to 9-513 (2012); Nebraska County and City Lottery Act, Neb. Rev. Stat. §§ 9-601 to 9-653 (2012 and Cum. Supp. 2020); Gift Enterprises, Neb. Rev. Stat. § 9-701 (Cum. Supp. 2020); and the State Lottery Act, Neb. Rev. Stat. §§ 9-801 to 9-841 (2012 and Cum. Supp. 2020).² Prior to enactment of the NRG Act, Neb. Rev. Stat. § 28-1113 (2016), part of the criminal statutes prohibiting gambling activities in Article 11 of Chapter 28, provided:

¹ In addition, parimutuel wagering on horse races when conducted within licensed racetrack enclosures was approved in 1934. Neb. Const. art. III, § 24 (Comp. Stat. 1934). A 1958 amendment approved allowing laws providing for the licensing and regulation of bingo games conducted by nonprofit associations in existence for five years. Neb. Const. art. III, § 24 (Cum. Supp. 1959). In 1988, an amendment was approved which authorized parimutuel wagering on the results of horse races “wherever run either within or outside of the state” Neb. Const. art. III, § 24 (Supp. 1989).

² The Legislature has also acted to permit wagering on horse races (including intrastate and interstate simulcast wagering) and the conduct of bingo. See Neb. Rev. Stat. §§ 2-1201 to 2-1222 (2012 and Cum. Supp. 2020); Nebraska Bingo Act, Neb. Rev. Stat. §§ 9-201 to 9-266 (2012 and Cum. Supp. 2020).

Nothing in this article shall be construed to:

- (1) Apply to or prohibit wagering on the results of horseraces by the parimutuel or certificate method when conducted by licensees within the racetrack enclosure at licensed horserace meetings; or
- (2) Prohibit or punish the conducting or participating in any bingo, lottery by the sale of pickle cards, lottery, raffle, or gift enterprise when conducted in accordance with the Nebraska Bingo Act, the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska Small Lottery and Raffle Act, the State Lottery Act, or section 9-701.

B. The Constitution distinguishes games of chance from other forms of gaming.

Subsection (1) of art. III, § 24, prohibits “any game of chance or any lottery or gift enterprise” unless an exception is allowed in that section of the Constitution. As noted, exceptions have been carved out for parimutuel wagering on horse races, bingo conducted by qualified nonprofit associations, the state lottery, and lotteries, raffles and gift enterprises conducted for specified purposes. Initiative 429 added a new exception allowing games of chance when conducted by authorized gaming operators at licensed racetracks.

In Op. Att’y Gen. No. 95085 (Nov. 17, 1995), this office considered whether slot machines or other electronic gaming devices could be authorized as “lotteries” if operated for community betterment purposes. Recognizing that “games of chance” and “lotteries” both share the common elements of prize, chance, and consideration, we concluded that, if the term “lottery” in the Constitution was “construed to authorize any scheme involving the elements of prize, chance, and consideration, the prohibition against ‘games of chance’ would be rendered meaningless.” *Id.* at 22. Thus, we concluded that, “in order to give effect to the separate recognition of ‘games of chance’ and ‘lotteries’ under art. III, § 24, the term ‘games of chance’ must be interpreted as a broad prohibition against gambling activities, and the term ‘lotteries,’ under the exception allowing such for community betterment purposes, must be interpreted in a narrower sense, as involving schemes in which tickets or tokens are distributed or sold and prize winners are either secretly predetermined or ultimately selected by some form of random drawing.” *Id.* at 23.

“It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose.” *Banks v. Heineman*, 286 Neb. 390, 398, 837 N.W.2d 70, 77-78 (2013). A constitutional provision “must be construed as a whole, and no part will be rejected as meaningless or surplusage, if such can be avoided.” *State ex rel. State Ry. Comm’n v. Ramsey*, 151 Neb. 333, 340-41, 37 N.W.2d 502, 207 (1949). By using both the terms “game of chance” and “lottery” in art. III, § 24, the Constitution necessarily distinguishes these two forms of gaming. The terms

“game of chance” and “lottery” in art. III, § 24, must be given separate and distinct meanings in order to give effect to both, and to avoid a construction rendering one of such terms as meaningless or surplusage.

C. The forms of gaming previously authorized under the specific exceptions in art. III, § 24, are distinct from the broad “games of chance” permitted by the passage of Initiative Measure 429.

As noted above, the forms of gaming the Legislature has authorized under exceptions in art. III, § 24, include parimutuel wagering on horse races, bingo, lotteries (including a state lottery), raffles, and gift enterprises. There was no exception permitting legislative authorization of any “game of chance” prior to adoption of Initiative Measure 429.

The statutes authorizing these forms of gaming reflect their distinction from the broad term “games of chance.” In particular, the various statutes pertaining to permissible “lotteries” are limited to schemes involving some form of tickets where winners are either predetermined or selected by random drawing. See, e.g., Neb. Rev. Stat. §§ 9-312 and 315 (2012); Neb. Rev. Stat. § 9-411(1) (2012); Neb. Rev. Stat. § 9-507(1) (2012); Neb. Rev. Stat. § 9-607(1)(c)(i) (2012)³; Neb. Rev. Stat. § 9-803(4) (2012).

The Nebraska Supreme Court has recognized the distinction drawn by the Constitution between keno, a form of lottery authorized under the Nebraska County and City Lottery Act, and “games of chance.” In *Stewart v. Advanced Gaming Technologies, Inc.*, 272 Neb. 471, 723 N.W.2d 65 (2006) [“*Stewart*”], the Court held a video keno initiative did not violate the resubmission clause in Neb. Const. art. III, § 2, because it proposed to amend statutes authorizing a lottery and was thus different from a prior measure proposing to allow games of chance at casinos. The Court noted the constitutional distinction between “games of chance” and “lotteries”:

In deciding the resubmission issue, it is important to note that a distinction is made in article III, § 24, between a “game of chance” and a “lottery.” In paragraph (1) of article III, § 24, “game of chance” and “lottery” are referred to as distinct activities that are generally prohibited. However, paragraphs (2) and (3) provide that a “lottery” may be authorized under certain conditions and with certain requirements.

³ The Nebraska County and City Lottery Act also permits a keno lottery “in which a player selects up to twenty numbers from a total of eighty numbers on a paper ticket and a computer, other electronic selection device, or electrically operated blower machine which is not player-activated randomly selects up to twenty numbers from the same pool of eighty numbers and the winning players are determined by the correct matching of the numbers on the paper ticket selected by the players with the numbers randomly selected by the computer, other electronic selection device, or electrically operated blower machine.” Neb. Rev. Stat. § 9-607(1)(c)(ii) (2012).

Lotteries have been authorized by the Legislature pursuant to certain statutes, including the Nebraska City and County Lottery Act [sic]. Keno in its traditional paper form has been authorized as a form of "lottery" under the Nebraska City and County Lottery Act [sic]. See § 9-607(1)(c)(ii). Whereas Initiative 417 proposed a constitutional amendment to permit the authorization of enactments by initiative permitting "games of chance" and Initiative 420 proposed a statutory amendment to authorize certain "games of chance," the Video Keno Initiative proposes to amend the statutory term "lottery" to authorize an additional method of playing keno. The Video Keno Initiative therefore has a fundamental theme of amending the types of legally authorized "lotteries," whereas the 2004 initiatives had a fundamental theme of expanding the types of constitutionally authorized "games of chance."

272 Neb. at 482, 723 N.W.2d at 74-75.⁴

Consistent with *Stewart*, and our 1995 opinion, "lotteries" authorized by art. III, § 24, are not "games of chance" for purposes of art. III, § 24. The same would apply to the other exceptions authorizing gaming in the form of parimutuel wagering on horse races, bingo, raffles, and gift enterprises.

D. Initiative Measure 429 did not alter the exceptions in art. III, 24, allowing forms of gaming other than "games of chance."

Initiative Measure 429 amended Neb. Const. art. III, § 24, by adding a new subsection (5) permitting legislative authorization "of all forms of games of chance when such games of chance are conducted by authorized gaming operators within a licensed racetrack enclosure." The initiative did not alter or amend any of the language in art. III, § 24, permitting the Legislature to allow gaming in the form of parimutuel wagering on horse races, bingo, lotteries, raffles, and gift enterprises. As these are distinct forms of gaming for purposes of art. III, § 24, the authorization of "games of chance" at licensed racetracks under Initiative Measure 429 did not affect the constitutional authorization for these other forms of gaming or limit their conduct to racetracks.

⁴ The Court declined to consider a claim that the Video Keno Initiative could not be enacted by statute and would require an amendment to the Nebraska Constitution because the proposed authorization of video keno would violate Neb. Const. art. III, § 24. This claim was found to be "a substantive constitutional challenge that [was] not justiciable unless and until the voters approve[d] the Video Keno Initiative." 272 Neb. at 488, 723 N.W.2d at 78. The initiative was not approved by the voters. Nebraska Blue Book 2018-19 at 257. This office has opined that legislative attempts to authorize video or electronic forms of keno violate art. III, § 24, as such gaming is a prohibited "game of chance," not a permissible "lottery" for community betterment purposes. Op. Att'y Gen. No. 97013 (Feb. 13, 1997); Op. Att'y Gen. No. 96007 (Jan. 22, 1996).

E. Initiative Measure 430 applies only to “games of chance” conducted by authorized operators at licensed racetracks as allowed by Initiative Measure 429.

The NRGGA, enacted by Initiative Measure 430, implements the constitutional amendment in Initiative Measure 429 by authorizing games of chance at licensed racetracks. Section 2 of the Initiative Measure 430 does so by providing:

Notwithstanding any other provision of law, and to the full extent permitted by the Constitution of Nebraska, including amendments to the Constitution of Nebraska adopted contemporaneously with the enactment of the Nebraska Racetrack Gaming Act, the operation of games of chance is permitted only by authorized operators within licensed racetrack enclosures as provided in the act.

For purposes of the NRGGA, “[g]ame of chance means any game which has the elements of chance, prize, and consideration, including any wager on a slot machine, table game, counter game, or card game.” Initiative Measure 430, § 3(3). “Game of chance does not include any game the operation of which is prohibited at a casino by federal law.” *Id.*

Your initial question is whether the word “only” in § 2 of the NRGGA “supersede[s] prior gambling legislation and in doing so remove[s] the authorization for other forms of gambling the conduct of which was previously lawfully authorized?” You express concern that, by permitting “games of chance” to be conducted “only” by authorized operators at licensed racetracks, “[n]otwithstanding any other provision of law”, the NRGGA takes away the prior authorization for gaming such as “the Nebraska State Lottery, City and County Lotteries, Pickle Card[s], Bingo, and business promotions.”

In construing a statute, effect must be given to its purpose and intent “as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.” *Piska v. Nebraska Dep’t of Social Services*, 252 Neb. 589, 594, 567 N.W.2d 544, 547 (1997). If possible, a statute should be construed to avoid “absurd, unconscionable, or unjust results.” *In re Estate of Eickmeyer*, 262 Neb. 17, 22, 628 N.W.2d 246, 250 (2001).

Initiative Measure 429 created a specific exception allowing “games of chance” when conducted by authorized gaming operators within licensed racetrack enclosures. Initiative Measure 430 properly recognizes that the constitutional amendment allows “games of chance” to be conducted “only” by authorized operators within licensed racetrack enclosures. The plain meaning of Initiative Measure 430, § 2, is that, “[n]otwithstanding any other provision of law,” “games of chance” are permitted only when conducted by authorized gaming operators within licensed racetrack enclosures. The Constitution has long distinguished between “games of chance” and other forms of gaming, such as parimutuel wagering on horse races, the state lottery, bingo, lotteries, raffles, and gift enterprises. Those other forms of gaming have been authorized under

separate exceptions in art. III, § 24, none of which were altered by the passage of Initiative Measure 429. Construing Initiative Measure 430, § 2, to impact forms of gaming previously allowed under different exceptions in art. III, § 24, is inconsistent with the limited authorization of “games of chance” at licensed racetrack enclosures under the initiative measures, and would lead to an absurd and unjust result.

Further, examination of the NRGAs in its entirety reveals no intent to affect the conduct of other forms of gaming. Sections 8 to 10 amended several criminal statutes relating to gambling which exclude from their operation activities under “the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska Small Lottery and Raffle Act, the State Lottery Act, or section 9-701” [Gift Enterprises]. The amendments add activities under “the Nebraska Racetrack Gaming Act” to the list of gaming excluded from the criminal statutes. Section 8(1) (Definition of advancing gambling activity); Section 8(4) (Definition of engaging in gambling); Section 9 (Possession of gambling records). Also, “game of chance” is added to the list of permissible activities when conducted under the NRGAs. Section 8(4)(d) (Definition of engaging in gambling); Section 8(5) (Definition of gambling device). Further, Section 10 retains the language in Neb. Rev. Stat. § 28-1113 providing:

Nothing in this article shall be construed to:

- (1) Apply to or prohibit wagering on the results of horseraces by the parimutuel or certificate method when conducted by licensees within the racetrack enclosure at licensed horserace meetings;
- (2) Prohibit or punish the conducting or participating in any bingo, lottery by the sale of pickle cards, lottery, raffle, or gift enterprise when conducted in accordance with the Nebraska Bingo Act, the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska Small Lottery and Raffle Act, the State Lottery Act, or section 9-701.

Section 10 adds a new subsection (3) stating the article also does not

[a]pply to or prohibit the operation of games of chance, whether using a gambling device or otherwise, by authorized gaming operators within licensed racetrack enclosures or the participation or playing of such games of chance, whether participated in or played using a gambling device or otherwise, by individuals twenty-one years of age or older within licensed racetrack enclosures as provided in the Nebraska Racetrack Gaming Act.

Statutes relating to the same subject matter are construed together “so as to maintain a consistent and sensible scheme.” *Japp v. Papio-Missouri River Natural Resources Dist.*, 271 Neb. 968, 973, 716 N.W.2d 707, 711 (2006). Construing the related provisions of the NRGAs together, the initiative recognizes the distinction between its authorization of “games of chance” permitted only when conducted by authorized

operators within licensed racetrack enclosures, and the other forms of gaming authorized under separate exceptions in art. III, 24, which the Legislature has permitted by statute.

Moreover, “[r]epeals by implication are not favored.” *State v. Thompson*, 294 Neb. 197, 202, 881 N.W.2d 609, 613 (2016). “A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.” *Id.* “In determining whether the new enactment is repugnant, we look at the new enactment for any indication of an evident legislative intent to repeal the former statute.” *Id.* Construing Measure 430 to remove the statutory authority to conduct other forms of gaming previously permitted would, in effect, amount to a repeal of those statutes by implication. Such a construction is unwarranted, as Measure 430 does not indicate an intent to affect any existing law permitting forms of gaming previously authorized.

In sum, nothing indicates Initiative Measure 430 was intended to impact or restrict the conduct of these other forms of gaming previously permitted under separate constitutional authority. We therefore conclude the measure does not “supersede” or “remove” authorization to conduct other lawful forms of gaming including parimutuel wagering on horse races, bingo, the state lottery, and lotteries, raffles, or gift enterprises. Having concluded that Initiative Measure 430 does not have such effect, we need not address your second question asking how this impacts existing statutory exclusions from criminal liability for persons and entities continuing to conduct those forms of gambling. The simple answer is it has no effect. In fact, as noted above, those exclusions are retained in Initiative Measure 430.

Finally, you ask whether LB 580, which proposes to remove the word “only” from Section 2 of Initiative 430, would make “table games permissible at other locations beyond ‘licensed race track enclosures’”?

While you do not define “table games,” the term is commonly associated with games of chance such as blackjack, craps, and roulette. Removing the word “only” from Section 2 would not authorize table games, or any other games of chance, at locations other than licensed racetrack enclosures. The measure would then provide “the operation of games of chance is permitted by authorized gaming operators within licensed racetrack enclosures.” Even if the word “only” is removed, games of chance could still only be operated at licensed racetracks.

Again, Initiative Measure 429 authorizes only legislation permitting games of chance when “conducted by authorized gaming operators within a licensed racetrack enclosure.” *McNally* confirms that Initiative Measure 430 requires games of chance allowed by Initiative Measure 429 be conducted by authorized operators within a licensed racetrack enclosure. 307 Neb. at 127, 948 N.W.2d at 482 (“[A]mong the features of that regulatory scheme is limiting operation of such games to racetrack enclosures.”) (plurality

Senator Mike Moser
Page 10

opinion). Thus, legislation attempting to authorize games of chance at other locations is not permitted under this constitutional amendment. Initiative Measure 430 is consistent with this limitation.

Very truly yours,

DOUGLAS J. PETERSON
Attorney General



L. Jay Bartel
Assistant Attorney General

Approved by:



Attorney General

pc Patrick J. O'Donnell
Clerk of the Nebraska Legislature

07-1381-29