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OAG 09-004

June 15, 2009

Subject: Video Lottery Terminals at Kentucky's Horse Race Tracks

Requested by: State Representative Jody Richards, 20th Legislative District

Written by: Jennifer Black Hans
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Syllabus: The General Assembly may authorize the Kentucky Lottery Corporation to establish, license, regulate and tax video lottery terminals at designated horse racing tracks under Ky. Const. § 226(1) without further amendment to the Kentucky Constitution.

Statutes construed: Ky. Const. § 226, KRS § 238.505, KRS § 154A.010, KRS § 154A.060, KRS § 154A.063

OAGs cited: OAG 05-003, OAG 99-008, OAG 93-58, OAG 92.127 and OAG 80-409

Opinion of the Attorney General

INTRODUCTION

By letter dated May 7, 2009, State Representative Jody Richards requests the Attorney General's opinion concerning whether electronic games at Kentucky's race tracks are allowed under Section 226 of the Kentucky Constitution.

A. Factual Context for Opinion

Pursuant to 40 KAR 1:020 Section 3, official opinions of the Attorney General must involve "an actual, current factual situation." After receiving Representative Richards' initial request, the Office of the Attorney General sent two (2) letters seeking additional information, particularly the specific draft legislation upon which his inquiry was based. In response, on June 1, 2009, Representative Richards wrote that the General Assembly was not in session, and, therefore, he could not provide a specific bill draft. In lieu of a specific bill draft, Representative Richards provided the following questions:

(1) Is a video lottery terminal whereby a patron wins by matching numbers, pictures, or symbols considered to be a slot machine and therefore prohibited under Section 226 of the Kentucky Constitution?
(2) Is it permissible for the Kentucky Lottery Corporation to allow one or more vendors to have or operate several video lottery terminals at a single location; several dozen terminals at the same location or several hundred terminals at the same location?

While *more* specific, the foregoing questions still did not provide a specific bill draft for legal analysis. Moreover, the additional questions presented are too conclusory to be useful to a legal opinion concerning whether electronic games at Kentucky's race tracks are allowed under Section 226 of the Kentucky Constitution. Therefore, this opinion will squarely address the initial, non-conclusory question presented by Representative Richards on May 7, 2009.

Since the date of Representative Richards' original request, additional facts have been presented on this question. On June 3, 2009, Governor Steve Beshear issued a Proclamation convening the General Assembly into Special Session to begin on June 15, 2009, for the sole purpose of considering the amendment of the Fiscal Year 2009-2010 state budgets and related budget reduction plans. On June 4, 2009, the Governor amended his Proclamation to include consideration of the following subjects:

(1) Enacting legislation authorizing the Kentucky Lottery Corporation to establish, license, regulate and tax video lottery terminals at authorized licensed racetracks in Kentucky.
(2) Amending or repealing only those provisions of the Kentucky Revised Statutes specifically necessary to implement the subjects and provisions of this amended Proclamation.
(3) Declaring an emergency thereby making any legislation enacted pursuant to this amended Proclamation effective upon the signature of the Governor.

On June 9, 2009, the Office of the Governor issued a draft of the legislation for which it seeks the General Assembly's consideration during the Special Session. This opinion will rely on the Governor's draft of the video lottery terminals gaming legislation[1] as the actual and current factual basis upon which its legal analysis will rest.

B. Authority for Opinion

KRS § 15.025 requires the Attorney General to furnish opinions when a public question of law is submitted by any member of the Legislature. The Attorney General possesses the authority to issue an opinion if the question presented in writing "is of such public interest that the Attorney General's opinion on the subject is deemed desirable." The question presented meets both of the foregoing conditions.

This opinion will seek to reconcile five (5) prior opinions of the Attorney General, which interpret Section 226 of the Kentucky Constitution. Specifically, the prior opinions to be analyzed are OAGs 80-409, 92-127, 93-058, 99-008 and 05-003. This will however be a new opinion that will offer a fresh review of the relevant constitutional, statutory and case law addressing the issue.

This opinion is limited in scope to the constitutional question presented and the factual context described above – specifically whether video lottery terminals at Kentucky's race tracks are permitted under Section 226 of the Kentucky Constitution. Policy considerations, such as long-term economic stability

[1] *See* Draft of gaming bill at web page for Governor Steve Beshear.

and forecasts, the financial health of the horse racing industry, and societal interests regarding gambling do not fall under the opinion authority of the Attorney General and will not be considered. Instead, these policy matters are appropriately left to legislative debate during the Special Session or during future Regular Sessions of the General Assembly.

ANALYSIS

A. Legal Issues Presented

The Governor's amended Proclamation convening a Special Session of the General Assembly includes as one of its sole purposes amending the Kentucky Revised Statutes to authorize the Kentucky State Lottery Corporation to establish, license, regulate and tax video lottery games and video lottery terminals (hereinafter "VLT") at licensed horse racing tracks in the Commonwealth of Kentucky. As discussed in the introduction to this opinion, the questions presented by Representative Richards on June 1, 2009, are not sufficiently detailed in their legal presumptions and are ultimately too conclusory to be a useful starting point for a legal analysis of the question regarding the constitutionality of VLTs at race tracks. It is also necessary for this opinion to step back and reassess the prior opinions issued on this subject, in order to more fully answer the current question before the General Assembly – may Kentucky's legislators consider the Governor's proposal concerning VLTs at Kentucky's race tracks without a constitutional amendment.

Using the context of the Governor's draft legislation concerning VLTs, this opinion will seek to answer the following two (2) legal questions:

(1) Is VLT gaming a "lottery" as provided under Section 226(3) of the Kentucky Constitution prohibiting "lotteries ... [and] schemes for similar purposes" unless otherwise exempted under Sections 226(1)?

(2) If VLT gaming is a lottery under Section 226(3), which would otherwise be constitutionally prohibited, does VLT gaming as proposed by the Governor's draft gaming bill fall within the "state lottery" exception contained in Section 226(1)?

B. History of Kentucky's Constitutional Prohibition on Lotteries & Its Exceptions

The history of Section 226 of Kentucky's Constitution of 1891 is significant to this legal inquiry, and therefore, is provided in summary below. As adopted by the 1891 Constitutional Convention, Section 226 of the Kentucky Constitution included explicit language forbidding "lotteries and gift enterprises ... [and] schemes for similar purposes."[2] This language, currently codified as §226(3), remained unchanged for nearly 100 years.

In 1988, Kentucky voters adopted a constitutional amendment, codified at §226(1), permitting the General Assembly to establish a Kentucky state lottery and a state lottery to be conducted in cooperation with other states. Soon thereafter, former Governor Wallace Wilkinson convened the General Assembly in Special Session. The 1988 Special Session of the Kentucky General Assembly passed and Governor Wilkinson signed into law enabling legislation adopting the Kentucky state lottery and creating the Kentucky Lottery Corporation, an independent, de jure municipal corporation and political subdivision of the Commonwealth of Kentucky. KRS 154A.020. The Kentucky Lottery Corporation was empowered to conduct and administer lottery games, which would result in "the maximization of revenues" to the state. KRS 154A.060. House Bill 1 as enacted (1988 Ex. Sess.) provided that "'Lottery' mean[t] ***any*** game of chance approved by the corporation and operated pursuant to this chapter." KRS § 154A.010(3) (1988 Ex. Sess.) (Emphasis supplied). Further, the HB 1 permitted the Kentucky Lottery Corporation to specify "the types of games to be conducted, including but not limited to, instant lotteries, on-line games *and other games traditional to the lottery...*" *Id.* (Emphasis supplied).

This authority was revised in 1990, when the General Assembly amended KRS Chapter 154A to prohibit the Kentucky Lottery Corporation from (1) approving or operating a lottery based on amateur athletics; (2) approving or operating any casino or similar gambling establishment; or (3) approving or

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[2] This language, including the phrase "schemes for similar purposes," was original to the 1891 Constitution. But cf. Jeffrey R. Soukup, *Rolling The Dice On Precedent And Wagering On Legislation: The Law Of Gambling Debt Enforceability In Kentucky After Kentucky Off-Track Betting, Inc. v. Mcburney and KRS § 372.005*, 95 Ky. L.J. 529, 534 (2006-2007) (stating that the 1992 amendment added the language "schemes for similar purposes," thereby expanding the prohibition).

operating any game played with cards, dice, dominos, slot machines, roulette wheels, or where winners are determined by the outcome of a sports contest. KRS § 154A.063, 1990 Ky. Acts ch. 470 § 77 (eff. 1990). Since 1990, Kentucky's statutory law has banned casino and casino-style gaming, including slot machines.

The significance of the 1990 amendment to the state lottery is highlighted here for legal as well as factual reasons. As is discussed below in section F of this opinion, if casino-style games and slot machines were unconstitutional, why then was there a need to ***ban*** these games by statute? Under a constitutional interpretation contrary to this opinion, such a legislative action would have therefore been superfluous. A universal tenant of statutory construction is that the General Assembly is presumed to have intended to do what it attempts to do by statutory enactment. *See Reyes v. Hardin County*, Ky., 55 S.W.3d 337 (2001), *quoted in Liquor Outlet, LLC v. Alcoholic Beverage Control Bd.*, Ky.App, 141 S.W.3d 378, 386 (2004).

Finally, in 1992, Kentucky's voters adopted a second constitutional amendment permitting the General Assembly to authorize charitable lotteries and charitable gift enterprises. Ky. Const. §226(2). In the next Regular Session in 1994, the General Assembly enacted legislation codified at KRS Chapter 238 permitting charitable gaming. Included within the definition of "charitable gaming" and "special limited charitable games" under this chapter were a broad category of games, including bingos, raffles, roulette, blackjack, poker, and keno. *See* KRS § 238.505(2), (17). Just as it did in the 1990 amendment to the state lottery, the General Assembly in its 1994 charitable gaming legislation prohibited slot machines and electronic gaming by statute. KRS § 238.505(2).

C. Constitutional Principles

An analysis of the foregoing sections of the Kentucky Constitution must rely on certain basic principles of constitutional law and construction. It is well established that state government possesses all powers not otherwise denied to it by the 1891 Constitution of Kentucky. *Rouse v. Johnson*, Ky. 28 S.W.2d 745 (1930). Specifically, the lawmaking power for the Commonwealth is vested to the General Assembly, which exists to exert the sovereign authority of state government. The Kentucky Supreme Court has specifically held that the General Assembly may enact legislation on any subject unless otherwise prohibited by the Constitu-

tion of Kentucky. *Legislative Research Commission v. Brown*, Ky., 664 S.W.2d 907, 913 (1984); *Brown v. Barkley*, Ky., 628 S.W.2d 616 (1982).

Legislative enactments carry a strong presumption of constitutionality. *Kentucky Sheriffs Assn Inc. v. Fischer*, Ky., 986 S.W.2d 444, 447 (1999); *Rose v. Council for Better Education, Inc.*, Ky., 790 S.W.2d 186, 209 (1989). Doubts regarding the constitutionality of a legislative enactment must be resolved in favor of the sovereign authority of the Commonwealth of Kentucky, which is retained by its citizenry and vested in the lawmaking authority of Kentucky's legislators, who are as representatives of its citizenry. *See, e.g., Kentucky Harlan Coal Company v. Holmes*, Ky., 872 S.W.2d 446 (1994); *Walters v. Bindner*, Ky., 435 S.W.2d 464, 467 (1968). In *Kentucky Sheriffs*, a state representative filed suit in Campbell County challenging the constitutionality of legislation increasing the allowable compensation for public officials. The Kentucky Supreme Court upheld the legislation and the law making power of the General Assembly, stating:

> Courts are obligated to "draw all reasonable inferences and implications" from a legislative enactment as a whole in order to sustain its validity, if possible. *Graham v. Mills*, Ky., 694 S.W.2d 698, 701 (1985). We will not disturb a legislative enactment based upon a finding of the General Assembly that is neither arbitrary nor capricious. *See Kentucky Harlan Coal Co. v. Holmes*, Ky., 872 S.W.2d 446, 455 (1994).

Kentucky Sheriffs Ass'n Inc. v. Fischer, supra at 447. Finally, the Kentucky Supreme Court has recognized that governmental officers who rely upon an Attorney General's opinion would be acting in good faith. *Babb v. Moore*, Ky., 374 S.W.2d 516 (1964).

D. The Meaning of "Lottery": *Commonwealth v. Kentucky Jockey Club*

In light of these constitutional principles, the decision of Kentucky's highest court in *Commonwealth v. Kentucky Jockey Club*, Ky., 38 S.W.2d 987 (1931) offers a sound constitutional framework upon which to base our current analysis. In *Jockey Club*, the Kentucky Court of Appeals upheld legislation authorizing parimutuel wagering on horse races, holding that such wagering is not a prohibited lottery. Representing the weight of authority among the states at the time, the

reasoning adopted in *Jockey Club*, still provides the best interpretation of state constitutional provisions addressing the lottery prohibition. Contrary to the conclusion opined in OAG 93-58, *see infra*, the *Jockey Club* decision is not an anomaly of law, but rather represents the current and enforceable constitutional interpretation on this point.

As stated in the historical section B above, Section 226(3) of the Kentucky Constitution of 1891 provides that

> Except as provided in this section, lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked.

Ky. Const. §226(3). The term "lotteries" is not defined by the Constitution. Rather, Section 226(3) distinguishes "lotteries" from other forms of gaming as prohibited, unless otherwise provided within one of the exceptions.

The authoritative and binding opinion issued by the Court in *Jockey Club* squarely addresses this point and defines "lotteries" narrowly. In *Jockey Club, supra*, the former Court of Appeals concluded that the prohibition against lotteries was not understood by those adopting the 1891 Constitution to outlaw other forms of gaming. *Id.* at 994. The Court carefully examined the proceedings of the 1890 Constitutional Convention to elucidate its interpretation:

> At the time section 226 was being considered in the convention that framed the Constitution, an amendment was proposed forbidding every species of gambling. Volume 1. *Debates of Constitutional Convention* p. 1172. The delegate who proposed the amendment was asked whether his proposition embraced the prohibition of betting upon the speed of horses, to which he responded that it was his purpose to forbid all species of gambling and all games of chance in every conceivable form. He argued that all gambling was equally wrong, and that it was unfair to denounce gambling in the form of a lottery and to countenance it in other forms, such as betting upon horse races, and the like. The delegate from Lexington argued that it was not the appropriate place to deal with pooling privileges

> upon race courses, and other forms of gambling, because lotteries theretofore had been licensed by the Legislature, and the object of the pending section was not to deal with any other species of gambling, but to prohibit the Legislature from granting licenses to lotteries. ***The amendment was rejected, thus indicating that it was the intention of the Convention not to include in section 226 anything but lotteries of the type familiar at the time.***

Jockey Club, 38 S.W.2d at 993 (Emphasis supplied) (citing 1 *Constitutional Proceedings & Debates in the 1890 Convention* 1172-1175.) The Court went on to explain its reliance on the Debates:

> The debates of a Constitutional Convention are not conclusive of the meaning of the Constitution, but it is proper to resort to them in order to ascertain the purpose sought to be accomplished by a particular provision ... [t]he debates by individual members may be equivocal, but the decisions of the Convention itself are authoritative as to what it intended.

Id. Therefore, the Court in *Jockey Club* relied upon the authoritative action of the Convention as a whole as evidenced by the Debates.

The specific definition adopted by the Court distinguished games of pure chance from games determined by any element of skill:

> A lottery, it is said, is a species of gambling, described as a scheme for the distribution of prizes or things of value, by lot or by chance, among persons who have paid, or agree to pay, a valuable consideration, for the chance to share in the distribution...

Id. at 992. Based on this interpretation of lotteries, the Court held that pari-mutuel wagering on horse racing did not fall within the general prohibition against lotteries. The Court opined that while chance may be essential to the result, a horse race depends on more than mere chance, as distinguished from a traditional concept of a lottery. *Id.* at 992.

Subsequent to the *Jockey Club* decision, lower court decisions in Kentucky's appellate courts have *generally* followed the reasoning that Section 226's lottery prohibition applies to games of pure chance. *See, e.g., Otto v. Kosofsky*, 476 S.W.2d 626, 629 (Ky. App. 1972) (Bingo Lottery Act permitting cities to authorize bingo fell within Section 226's lottery prohibition because, like a traditional

lottery, the outcome was determined **"purely by lot or chance"**) (emphasis supplied); *Commonwealth v. Malco-Memphis Theatres, Inc.*, 169 S.W.2d 596 (Ky. App. 1943) (Section 226 prohibited promotional drawing by theater). The appellate courts have consistently referenced the test set forth in *Jockey Club*, defining lottery as an activity which includes the following elements: (1) chance, (2) a prize and (3) consideration. *Malco-Memphis Theatres, supra* at 598. This "pure chance" rule is also referred to as the "English Rule." Similarly, other state courts have followed the *Jockey Club* opinion in holding that pari-mutuel wagering is not a prohibited lottery but rather a form of gaming that does not depend on mere chance. *Jockey Club, supra* at 992; *see also Barnes v. Bailey*, 706 S.W.2d 25, 32 (Mo. 1986); Opinion of the Justices No. 205, 251 So.2d 751, 753 (Ala. 1971); *State ex rel. Gavalac v. New Universal Congregation of Living Souls*, 379 N.W.2d 242, 244 (Ohio 1977).

Deviating but not completely departing from the *Jockey Club* decision are Kentucky Supreme Court cases adopting a broader interpretation of the constitutional lottery prohibition. *See A.B. Long Music Co.*, Ky., 429 S.W.2d 391, 394 (1968) (the word 'lottery' is a generic term embracing all schemes for the distribution of prizes by chance for consideration); *Commonwealth v. Allen*, Ky., 404 S.W.2d 464 (1966) (following Washington state precedent holding that a referral selling plan was a lottery). These cases follow more closely decisions from other states that prohibit as "lotteries" games that distribute a prize **predominantly by chance**. This is sometimes referred to as the "American Rule."

Kentucky case law may then be viewed as a hybrid with cases adopting both the English and American Rules regarding the meaning of lottery as used in Ky. Const. § 226(3). Under this hybrid precedent, games whereby a patron wins by matching numbers, pictures, or symbols are lotteries subject to the constitutional prohibition unless otherwise exempted. The electronic nature of the proposed gaming in the form of VLTs does not alter this conclusion. *See, e.g., Opinion of the Justices*, 795 So.2d 630, 642 (Ala. 2001) (holding that video poker games are "lotteries" since "no amount of skill will ever determine the ultimate outcome of a video game ... and the programmed gaming device will, 'over continuous play,' always prevail.")

A prior opinion of former Attorney General Steve Beshear supports our reliance on the reasoning adopted in the *Jockey Club* case. Also relying on the decision in *Jockey Club* and interpreting Section 226 of the Kentucky Constitution prior to the 1988 and 1992 amendments, OAG 80-409 opined that "there are

games of chance which are not lotteries ... [and] a distinction at law and in fact between gaming and lotteries which calls for a difference in treatment of the two." *Id.* OAG 80-409 concluded that certain games may be permitted by the General Assembly without violating Section 226. *Id.*

Unlike the facts presented in OAG 80-409, no party has currently proposed permitting certain games of chance, which are not lotteries. Rather, even those interests promoting expanded gambling concede for purposes of this inquiry that VLTs would be considered a lottery under §226(3), *unless* exempted under the state lottery as provided under §226(1).

E. The "State Lottery" Exemption

During the Regular Election of 1988, Kentucky voters approved a constitutional amendment, codified at Ky. Const. §226(1) permitting legislation for and the operation of a state lottery:

> The General Assembly may establish a state lottery to be conducted in cooperation with other states... [and] operated by or on behalf of the Commonwealth of Kentucky.

§226(1). During the course of the debates that resulted in §226(1), the legislature defeated language that would have constitutionally limited the state lottery to "weekly lotteries or drawings." HFA 3 to HB 1 (1988 Regular Session), Ky. H.R. Jour, 1988 Reg. Sess. at p. 2109. This House Floor Amendment sponsored by State Representative Louis Johnson was an explicit attempt to exclude games that could eventually be played on electronic devices or slot machines. The debate, which was captured on video by Kentucky Educational Television, demonstrates both the intent of Rep. Johnson in offering the amendment and the intent of the House in rejecting it. . *See Tapes of the proceedings of the General Assembly*, HB 1, HFA 3, March 11, 1988. Since §226(1) did not define "lottery," the framers' intent may be ascertained by reviewing the constitutional debates. *See, e.g., Barker v. Stearns & Lumber Co.*, 152 S.W.2d 953, 956 (Ky. 1941).

Representative Johnson offered his amendment by referencing a newspaper article about the confusion that occurred in New York and New Jersey concerning what was and was not intended by lottery amendments in those states. Representative Johnson expressed that his amendment was intended to

insure that electronic gaming and slot machines would not be the "logical next step" for the state lottery. In response, State Representative William Donnermeyer told the House that the amendment would have the opposite result, only generating confusion, and urged the House to vote against it. Representative Donnermeyer's comments included a statement, quoted in OAG 99-008, explaining that the language of the amendment itself did not include slot machines. House Amendment 3 was defeated on a roll call vote of 37-48. *Tapes of the proceedings, supra.*

It is authoritative that the legislature defeated the amendment. *Why* the amendment was rejected is another matter entirely. In opining that §226(1) prohibited VLT's, OAG 99-008 relied upon the comment of Representative Donnermeyer out of context and concluded that the legislature specifically relied on this "assurance" when rejecting the amendment. This conclusion in OAG 99-008 is highly speculative. To presume that the entire General Assembly voted on the amendment based entirely on a single comment is inconsistent with Kentucky law. It is the determination of the legislative body as a whole and not the comment of a single legislator that is controlling. This point was recently articulated by the Kentucky Supreme Court in a criminal case involving a question of legislative intention:

> Interpretations of Constitutions by rules of implication are most hazardous, and, if ever employed at all, it ought to be done in those instances only where the subject-matter and language leave no doubt that the intended meaning of the clause which may be under investigation may be reached in that way only, and be reached that way with approximate certainty.

Posey v. Commonwealth, 185 S.W.3d 170, 190 (Ky. 2006).

Once again, the *Jockey Club* case is illustrative: "The debates by individual members may be equivocal, but the decisions of the Convention itself are authoritative to what is intended." *Jockey Club*, 38 S.W. 2d at 993. Therefore, Kentucky's highest court guides us that while we may rely upon the authoritative action evidenced by a vote in legislative history, a comment made by a single representative during legislative debate cannot be controlling.

By squarely rejecting the Johnson floor amendment, the General Assembly adopted a broader scope for the term "state lottery," supporting a conclusion that §226(1) permits the General Assembly to authorize electronic gaming under the auspices of the Kentucky Lottery Corporation without need for a constitutional amendment. Once again, it is a universal rule of statutory construction that the legislature is presumed to have intention for its acts. *Reyes,* 55 S.W.3d at 342. More specifically, Kentucky precedent provides that "[a]ll statutes are presumed to be enacted for the furtherance of a purpose on the part of the legislature and should be construed so as to accomplish that end rather than to render them nugatory." *Commonwealth ex rel. Martin v. Tom Moore Distillery Co.,* 287 Ky. 125, 152 S.W.2d 962, 967 (1939).

F. Construction of Legislative Authority for Gaming under the State Lottery Exception

Further supporting the conclusion that the General Assembly possesses the constitutional authority to expand the state lottery is the General Assembly's own legislative construction of the 1988 and 1992 Amendments. A primary rule of statutory construction directs courts to "look to the history of the times and the state of existing things to ascertain the intention of the framers of the Constitution and the people adopting it, and a practical interpretation will be given to the end that the plainly manifested purpose of those who created the Constitution, or its amendments, may be carried out." *Keck v. Manning* , Ky., 231 S.W.2d 604, 607 (1950). Legislative construction of constitutional provisions contemporaneous to the adoption of the provisions is persuasive. *Shamburger v. Duncan,* Ky., 253 S.W.2d 388, 392 (1952).

Legislative construction of the state lottery exemption, supports the conclusion that the term "lottery" has the same meaning under Ky. Const. § 226(1) as it does under Ky. Const. § 226(3). A canon of construction holds that identical terms within a single act are intended to have the same meaning. *See, e.g., Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 479, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992); *Sullivan v. Stroop,* 496 U.S. 478, 484, 110 S.Ct. 2499, 110 L.Ed.2d 438 (1990). Contemporaneous to the adoption of the 1988 state lottery constitutional exemption, then-Governor Wallace Wilkinson called a special session of the General Assembly to enact House Bill 1 creating the state lottery and establishing the Kentucky Lottery Corporation. House Bill 1 defined lottery as "***any*** game of chance" not otherwise disapproved by statute. KRS § 154A.010(3) (1988 Ex. Sess.)

The original language adopted in HB 1 (1988 Ex. Sess.) also empowered the Kentucky Lottery Corporation to conduct games ***"including but not limited to,*** instant lotteries, on-line and traditional games." KRS 154A.060 (1988 Ex. Sess.), HB 1 at Section 5(1)(d)(1) (emphasis supplied). The provisions adopted and codified in 1988 clearly demonstrate that the General Assembly did not interpret the State Lottery Amendment as limiting the types of games the Kentucky Lottery Corporation could operate. The plain language of HB 1 – "including but not limited to"—expressly recognizes that other games may be adopted.

In 1990, the General Assembly withdrew via statute some of the breadth granted to the state lottery when it passed HB 814 codified at KRS 154A.063, in which it disapproved games based on sporting contests and casino and casino-type gaming. Subsequent to the 1990 statutory limits imposed by the legislature, the Attorney General issued an opinion considering whether a new Kentucky Lottery-Pick 7 Game, based on the Breeder's Cup qualified as a permissible lottery. OAG 92-127 adopted the definition of lottery adopted by the Courts under Section 226(3) (lottery prohibition) to define lottery under Section 226(1) (state lottery exemption). As such, the Attorney General opined that the new game, which included all the *Jockey Club* elements,[3] was a lottery authorized by Section 226(1) and KRS Chapter 154A to be conducted on behalf of the Commonwealth of Kentucky.

G. Reconciling the Prior Opinions

In 1993, former Attorney General Chris Gorman considered the question of expanded gambling under the State Lottery. Proposed at that time was the question of whether casino gambling could be authorized by the General Assembly without a constitutional amendment. OAG 93-58. Relying on cases from other states, particularly Indiana, *see State v. Nixon*, 384 N.E.2d 152 (1979), the Attorney General opined that Kentucky's *Jockey Club* case was an aberration and limited the case to its facts. Further, the opinion wrongly concluded that Kentucky case law adopts the "dominant factor" or American rule in interpreting the term "lottery." Further, it concluded that although "lottery" under §226(3) – the prohibition language – was broad enough to encompass casino-style gaming, the term "lottery" under §226(1) – within the context of the state lottery – was not.

[3] A "lottery" is a game of chance that distributes a prize for valuable consideration; whether a game qualifies as a "game of chance" depends on whether "chance permeates the entire scheme." OAG 92-127 at 3-4.

Therefore, it concluded that the General Assembly could not authorize the Kentucky State Lottery to adopt casino gaming.

OAG 93-58 and a subsequent opinion, OAG 99-08 relying on the same, were fundamentally flawed. First, reliance on the *Nixon* decision from Indiana is misplaced, since Indiana's constitutional language and history is not the same as Kentucky's and since the *Nixon* decision is directly contrary to Kentucky's own precedent – *Jockey Club*. Further, both OAG 93-58 and 99-08 present a strained reading of the term "lottery" and ignore that even the General Assembly believed in 1988 that it possessed the authority to allow the Kentucky Lottery Corporation to market *any* game of chance under the umbrella of the state lottery. These opinions also ignored the basic canon of legislative construction that presumes that the General Assembly has intention and purpose for its actions, *Reyes*, 55 S.W.3d at 342, for to presume otherwise would render legislative action superfluous or a nugatory. *Tom Moore Distillery Co.*, 152 S.W.2d at 967 (1939).

In 2005, the Attorney General considered an opinion request from the legislature regarding the question of expanded gambling. OAG 05-003. In response, the Attorney General opined that gaming that fell within the definition of a lottery could not be authorized by the legislature, except within one of the two constitutional exceptions provided under Section 226(1) and (2). However, the opinion also explained that the constitutional history of the lottery prohibition coupled with the "pure chance" line of cases suggested that gaming, which does not fall within the traditional definition of a lottery, may be permitted by statute, "which is inherently more flexible than the dictates of the [C]onstitution." *Id.* OAG 05-003, while departing from the 1993 and 1999 opinions, was in fact consistent with prior opinions, including OAG 92-127, *supra*, which permitted the Kentucky state lottery to market a game based on the Breeder's cup and OAG 80-409, *supra*, which adopted the *Jockey Club* reasoning as its own.

Therefore, OAG 05-003, OAG 92-127 and OAG 80-409 are consistent and offer reconciling views. Each of these prior opinions construes the term "lottery" to have the same meaning in both §226(1) and §226(3). Each of the above opinions adopts the reasoning of the *Jockey Club* decision at its binding definition of "lottery." Further, the consensus of these opinions supports our conclusion that the General Assembly may constitutionally authorize electronic gaming in the

form of VLTs within its law making power, consistent with constitutional and legislative history, and without the need for a constitutional amendment.

The two (2) opinions that have reached a contrary conclusion are simply not consistent with the relevant case law and are flawed in their constitutional and legislative construction. As such, we agree with OAG 05-003, which questioned the continuing validity of the prior inconsistent opinions

Expanding on the reasoning of OAG 05-003, this opinion intends to offer the binding constitutional principles and legislative history that offers the necessary underpinning for the conclusion that VLTs may be permitted by statute. What the General Assembly may do within its lawmaking power, it may similarly un-do. *Boone County v. Town of Verona*, Ky., 227 S.W. 804, 805 (1921); *Rouse v. Johnson*, Ky., 28 S.W.2d 745 (1930). "The General Assembly is not dependent upon the provisions of the Constitution to give it power to legislate upon a subject. Its powers of legislation extend into every zone wherein it is not prohibited by a provision of the Constitution, or, in other words, it may do whatever the Constitution does not prohibit its doing." *Lakes v. Goodloe*, Ky., 242 S.W. 632, 636 (1922).

G. Case Law from Other States

Other states with constitutional provisions and histories that are similar to Ky. Const. § 226 offer support for the opinion that the Kentucky General Assembly can authorize VLTs as proposed under the state lottery exception of Ky. Const. § 226(1). *In State of West Virginia ex rel Cities of Charleston, et al. v. West Virginia Economic Development Authority*, 588 S.E.2d 655 (W. Va. 2003), the West Virginia Supreme Court upheld as constitutional a statutory enactment closely tracking the VLT legislation proposed by Governor Beshear in his draft gaming bill. In the *West Virginia* case, the question presented was whether legislation authorizing VLTs at race tracks was constitutional pursuant to West Virginia's constitutional amendment authorizing that state's lottery. *Id.*

Expanded gaming opponents as petitioners argued that the Racetrack Video Lottery Act of 1994 and the Limited Video Lottery Act of 2001 violated West Virginia's constitutional provision prohibiting lotteries. At the outset, the court indicated that petitioners had a high bar to overcome, specifically that

legislative enactments carry a presumption of constitutionality. *Id.* at 664. The court then conducted a thorough overview of the constitutional history regarding gaming, which was virtually identical to Kentucky's, with an original prohibition against lotteries that was amended by the electorate in 1984 to permit a state lottery. *Id.* at 665

The court also directly considered and summarily rejected the petitioners' contention that the voters adopting the state lottery amendment never intended to amend the constitution to permit VLTs. *Id.* at 667. The court deferred to its own precedent, concluding that the term lottery had the same meaning when used in both constitutional provisions – the prohibition and the state lottery exemption. *Id.* Finally, the court turned to the legislature's own findings to support this conclusion, and granted them great deference. *Id.* at 669.

The West Virginia Supreme Court concluded:

> that the video lottery created pursuant to the Racetrack Video Lottery Act, W.Va.Code §§ 29-22A-1, *et seq.* , is a lottery which is regulated, controlled, owned and operated in the manner provided by general laws enacted by the West Virginia Legislature so that it properly and lawfully may be conducted in accordance with the exception to the prohibition against lotteries set forth in article VI, section 36 of the West Virginia Constitution. Further, we hold that the video lottery created pursuant to the Limited Video Lottery Act, W.Va.Code §§ 29-22B-101, *et seq.*, is a lottery which is regulated, controlled, owned and operated in the manner provided by general laws enacted by the West Virginia Legislature so that it properly and lawfully may be conducted in accordance with the exception to the prohibition against lotteries set forth in article VI, section 36 of the West Virginia Constitution.

Id. at 670.

The decision in *West Virginia* was followed by cases in Kansas and New York, which upheld expanded lottery acts regulated by and benefitting the state without further amendments to their respective state constitutions. *See, e.g., Dalton v. Pataki*, 835 N.E.2d 1180 (N.Y. 2005); *State ex rel Six, v. Kansas Lottery*, 186 P.3d 183 (Kan. 2008).

The New York Court of Appeals, interpreting amendments to the Indian Gaming Regulatory Act, held that video lottery gaming was a "lottery" within meaning of state constitution and that legislation permitting use of VLTs at designated racetracks was constitutional. *Dalton v. Pataki*, 835 N.E.2d at 1192-1193. The Court did distinguish VLTs operated from a central processing device from slot machines, which permit a single player to play against an individual machine. *Id.* This latter form of electronic gaming was compared by the Court to casino-style gaming (blackjack, poker or roulette), which the Court held would require a constitutional amendment. *Id.*

Even among favorable court opinions, such as *Dalton*, there is a distinction between slot machines and VLTs. The legislation proposed by Governor Beshear to be considered during the Special Session proposes the establishment of a central communication system to receive auditing programming information and to be used by the state to activate and disable VLTs. *See* Draft of gaming bill at Section 27. Therefore, as proposed, the VLTs contemplated by Kentucky would be consistent even under New York's analysis.

In Kansas, the Attorney General filed an original action challenging the constitutionality of the Expanded Lottery Act of 2007. *State ex rel Six, v. Kansas Lottery*, 186 P.3d 183. The factual circumstances considered by the Kansas Supreme Court were nearly identical to the circumstances presented now in Kentucky:

> This appeal asks us to resolve tension among the historical ban on lotteries contained in the Kansas Constitution, later amendments to the constitution that permit lotteries under certain circumstances, and recent legislative action seeking to increase state revenues by establishing supervised gambling venues.

Kansas Lottery, 186 P.3d at 186. The court upheld the statute enacting expanded gaming, which provided for gaming in casinos and at pari-mutuel racetracks in designated zones. *Id.* at 187.

The Kansas court relied on its own precedent, *Kansas ex rel. Stephan v. Finney*, 867 P.2d 1034 (Kan. 1994), which held that the state lottery amendment was sufficiently broad to encompass casino gaming. The court in *Kansas Lottery* (2008) therefore followed this precedent, and held that the language of the Kansas state

lottery amendment permitted its legislature to adopt casino gambling without further constitutional amendment. *Id.* at 190.

Unlike Kansas' case law, there is no specific Kentucky case holding that casino gaming is a lottery. While disagreeing with OAG 92-127 regarding the expanded gaming under the state lottery, OAG 93-58 (invalidated by OAG 05-003), does opine that casino-style gaming in the form of slot machines would constitute a "lottery" within the meaning of Section 226(3). However, the Governor's proposal does not seek to expand the Kentucky State Lottery to allow casinos, and this opinion does not and cannot consider such a hypothetical proposal. *See* 40 KAR 1:020 (3).

Other illustrative cases from other states had similar results. The Oregon Supreme Court upheld legislation authorizing the Oregon Lottery Commission to install VLTs in establishments previously licensed to sell alcohol. *Ecumenical Ministries of Oregon v. Oregon State Lottery Commission,* 871 P.2d 106 (Ore. 1994). In Pennsylvania, the state's highest court upheld the Race Horse Development and Gaming Act, which authorized gaming licenses to allow the installation and operation of slot machines to assist Pennsylvania's horse racing industry. *Pennsylvanians Against Gambling Expansion Fund v. Pennsylvania,* 877 A.2d 383 (Pa. 2005). Finally, in *Tichenor v. Missouri State Lottery Commission,* 742 S.W.2d 170 (Mo. 1988), the Missouri Supreme Court rejected the contention of petitioners that the state lottery exemption should be narrowly construed due to the historic prohibition on lotteries. Rather, the Missouri court adopted a liberal construction holding that it "should hesitate to imply restrictions which are not expressly stated." *Id.* at 174.

This opinion does not mean to suggest that the Kentucky courts are obligated to follow any precedent other than Kentucky's own decisions. Specifically, the foregoing cases from other states offer direct and tangible support for Kentucky courts to follow the binding precedent offered in the *Jockey Club* decision.

CONCLUSION

In sum, it is the opinion of the Attorney General that the General Assembly may authorize the Kentucky Lottery Corporation to operate video lottery terminals at designated horse racing tracks under Ky. Const. § 226(1) without further amendment to the Kentucky Constitution.

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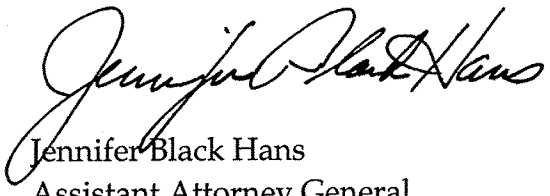

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