

Memorandum

To: Matthew R. Hortenstine, General Counsel, J&J Ventures Gaming, LLC
From: Chuck Hatfield, Partner
Re: Senate Bill 1 (Hoskins)
Date: February 7, 2023

We have been asked to examine whether the Missouri legislature has authority to authorize video lottery terminals to be a part of the Missouri state lottery system. After review of the current proposal (Senate Bill 1), the Missouri Constitution, and rulings of the Missouri Supreme Court, we conclude that the legislature does have the authority to do so. That is because the Constitution authorizes a state lottery.

I. Issue Overview

Under Section 39(b)(1), the general assembly may authorize a state lottery. They have done so, and created a State Lottery Commission that has expansive authority to oversee the state lottery system and authorize lottery games. *See* §§ 313.200 – 313.351, RSMo. Moreover, Section 39(b)(6) expressly directs the general assembly to "enact laws governing lottery ticket sales."

"Statutes are presumed to be constitutional until the contrary is shown. Every indulgence must be in favor of the legislature's handiwork." *Associated Industries of Missouri v. State Tax Comm'n*, 722 S.W.2d 916, 918 (Mo. 1987). The courts defer to the legislature's "superior means of information about the effects of legislation on the public." *Id.* at 919.

Senate Bill 1 ("SB 1") proposes a framework that, if adopted, would authorize video lottery games as just that, lottery games under the purview of the State Lottery Commission. The Constitution specifically authorizes what is being done in SB 1.

II. The Missouri Constitution Permits the General Assembly to Authorize a State Lottery and Enact Laws Governing the System

We understand that some have raised concerns about Article III, Section 39(9). That section is no barrier to the goals of SB 1. Section 39(9) prohibits the general assembly from creating *new* "lottery or gift enterprise[s]" systems not already

provided for in the Constitution and announces that games under the state lottery in Section 39(b) are specifically exempt from the general ban. Read together, Section 39(9) provides the exceptions to the general rule prohibiting the legislature from furthering lotteries and gift enterprises and Section 39(b) is one of those excepted categories. Because the legislature has already authorized a state lottery with a Commission empowered to oversee the state's lottery system and the general assembly is directed to enact laws governing lottery ticket sales, the framework proposed in SB 1 is constitutional.

Even if Section 39(9) did not include language with excepted categories, the legislature would still have the necessary authority to authorize lottery games within the existing state lottery framework. Because Section 39(b) is more specific in directly authorizing the legislature to enact laws governing lottery ticket sales than the general ban on lotteries and gift enterprises in Section 39(9), it controls. *See Earth Island Inst. v. Union Electric Co.*, 456 S.W.3d 27, 33 (Mo. 2015) (reiterating the applicability of the general/specific canon "[w]here there is no clear intention otherwise, a specific [provision] will not be controlled or nullified by a general one, regardless of the priority of enactment."); *see also State ex rel. Moore v. Toberman*, 250 S.W.2d 701, 705 (Mo. 1952) ("A constitutional provision should never be construed to work confusion and mischief unless no other reasonable construction is possible."). In other words, the plain language of Section 39(b) (even without the exception delineated in Section 39(9)) directly and clearly authorizes the legislature to create and maintain a state lottery with lottery games. Purporting to reach another conclusion "works confusion and mischief."

The limitation in Section 39(9) as applied to the instant case serves a couple of purposes: (1) to prohibit the general assembly from creating an entirely new lottery system outside of the state lottery authorized by Section 39(b), and (2) to prohibit the general assembly from putting gambling games outside of licensed riverboat casinos as outlined in Section 39(e). It does not prohibit the legislature from authorizing or regulating games *within* the already authorized state lottery system. SB 1 fits neatly within the existing constitutional framework. The proposed legislation does not create a new lottery system and does not place gambling games outside of licensed riverboat casinos. Video lottery terminals are true lottery games and therefore not restricted to the same limitations as games of skill.

III. Senate Bill 1 Appropriately Categorizes Video Lottery Terminals as Lottery Games Under the Regulatory Authority of the State Lottery Commission

A. Video Lottery Terminals are Not Games of Skill

Missouri's constitution permits gambling games on riverboat casinos. Art. III, § 39(e). Gambling games can include games of skill, games of chance, and lotteries. *Id.*; *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 62 (Mo. 1994) (articulating the distinctions between games of skill and chance to reiterate that "a game escapes the [then-existing] constitutional bar against lotteries if skill is predominant."). While there is no longer such a ban on games of chance and lotteries on riverboat casinos, the case provides clear instruction as to how to determine which games are true lotteries (games of chance) versus games of skill – instruction which is still helpful today.

Lotteries have the elements of consideration, chance, and prize and are games where "[n]o player's choice or will has any part in the lottery's result, nor can human reason, foresight, sagacity, or design enable a player to affect the game." *Id.* By contrast, games that are not lotteries "have an element of skill" where "skill increases the probability of winning" and "one person can be a better player than others." *Id.* at 62-63. Applied here, video lottery games are games of chance, and thus true lotteries. A player cannot improve chances of winning by practicing or developing an aptitude for the game. Rather, the player inserts currency and hopes for a winning ticket. As a pure lottery, the game can either fall under the regulatory authority of the Gaming Commission or the State Lottery Commission. The choice is up to the legislature.

To make clear which games are subject to the regulatory authority of the Missouri Gaming Commission, state statute provides definitions for "gambling games," "games of skill," and "games of chance."

- Section 313.800.1(13), RSMo, defines "gambling game" as "includ[ing] but not limited to, games of skill or games of chance on an excursion gambling boat but does not include gambling on sporting events; provided such games of chance are approved by amendment to the Missouri Constitution[.]"

- Section 313.800.1(14), RSMo, defines "games of chance" as "any gambling game in which the player's expected return is not favorably increased by the player's reason, foresight, dexterity, sagacity, design, information or strategy[.]"

- Section 313.800.1(15), RSMo, defines "games of skill" as "any gambling game in which there is an opportunity for the player to use the player's reason, foresight, dexterity, sagacity, design, information or strategy to favorably increase the player's expected return; including, but not limited to, the gambling games known as "poker", "blackjack" (twenty-one), "craps", "Caribbean stud", "pai gow poker", "Texas hold'em", "double down stud", and any video representation of such games[.]."

Had the legislature wanted to place video lottery terminals within the regulatory control of the Gaming Commission, it could have done so. But, it has chosen to place a true lottery game where it fits most appropriately and that is with the State Lottery Commission. These games are true lotteries which the State Lottery Commission may regulate because they are not games of skill. *See* § 313.230(1)(a); *Tichenor v. Missouri State Lottery Comm'n*, 742 S.W.2d 170, 175 (Mo. 1988).

B. Video Lottery Terminals are True Lottery Games

In 1984, Missouri voters approved a constitutional amendment authorizing the general assembly to create a state lottery.¹ The following legislative session the legislature passed Senate Bill 44 to establish the "State Lottery Law" codified in §§ 313.200 – 313.351, RSMo. In so doing, the general assembly triggered not only the creation of the State Lottery Commission but paved the way for the establishment of lottery games. To date, the state boasts 11 different lottery games ranging from the well-known Mega Millions to Club Keno.² The framework proposed in SB 1 is merely an extension of this existing authority to offer a new lottery game.

- Section 313.205(7), RSMo, defines "lottery game" as "any procedure authorized by written rule of the commission whereby prizes are distributed among persons who have paid, or have unconditionally agreed to pay, for tickets or shares which provide the opportunity to win such prizes."

- Section 313.230(1)(a), RSMo, permits the State Lottery Commission to issue rules and regulations concerning the operation of the Missouri State Lottery. Per the statute, such rules and regulations shall include, "[t]he type of lottery to be conducted" and states directly that lottery games may use "*player-activated terminals, which are coin- or currency-operated, to dispense lottery tickets[.]*" (emphasis added).

¹ CONSTITUTIONAL AMENDMENT NO. 5 – State lottery authorized. Permits legislature to set certain standards. Provides for division of funds received. There would be no cost to the state or local governments as all expenses would be paid from revenue derived from lottery proceeds.

² Missouri Lottery, *Games*, <https://www.molottery.com/games>, (last visited January 25, 2023).

SB 1 comports with the existing requirements and defines "video lottery game terminal" as "a player-activated terminal that exchanges coins, currency, tickets, ticket vouchers, or electronic payment methods approved by the commission for credit on a video lottery game terminal used to play video lottery games approved by the commission." SB 1, 102nd General Assembly, First Reg. Sess., § 313.427(12). Further, in exchange for the currency, players of video lottery games have the opportunity to receive a winning ticket that may result in a lottery prize. Under the provisions of SB 1, the video lottery gaming terminals dispense "tickets for winning plays" and the ticket shall "indicate the total amount of video lottery game terminal credits and the cash award." *Id.* at § 313.429.8(1). SB 1 contemplates the necessary requirements to meet existing constitutional and statutory considerations.

The proposed framework in SB 1 is clearly constitutional.

IV. Funding the Veterans' Commission Capital Improvement Trust Fund with Monies from the State Lottery Fund is Not Clearly Unconstitutional

We have also been asked to consider SB1's direction that certain payments be available to the Veterans' Commission Capital Improvement Trust Fund. To do so, we must consider the plain language of the Constitution.

Section 39(b) sets up two lottery funds: the "State Lottery Fund" and the "Lottery Proceeds Fund." Art. III, § 39(b)(2) and (b)(3). First, the State Lottery Fund, consists of "money received by the Missouri state lottery commission from the sale of Missouri lottery tickets, and from all other sources[.]" Art. III, § 39(b)(2). The Constitution then specifies that "monies received from the Missouri state lottery shall be governed by appropriation of the general assembly." Art. III, § 39(b)(3). Next, the Constitution creates the Lottery Proceeds Fund, which consists of "monies representing net proceeds after payment of prizes and administrative expenses" and directs that such monies "shall be appropriated solely for public institutions of elementary, secondary and higher education." *Id.* Section 39(b)(4) then provides that "[a] minimum of forty-five percent of the money received *from the sale of Missouri state lottery tickets* shall be awarded as prizes." (emphasis added).

Stated more plainly, the Constitution requires that lottery money, whether collected through the sale of lottery tickets or other sources, must go into the State Lottery Fund. That State Lottery Fund is subject to appropriation by the general assembly. Then, the Constitution specifically requires that at least forty-five percent of the money from lottery ticket sales must go directly toward payment of

prizes. There is no other specific directive for the use of the remaining funds, only a general statement that the net proceeds, after paying prizes and administrative expenses, goes to the Lottery Proceeds Fund. Reading this provision as only permitting the funds to be used for either prize payouts or administrative expenses reads in a specific limitation where no such limit exists. But, as discussed above, the legislature is vested with broad discretion on how it chooses to act. The more appropriate reading is that the forty-five percent prize payout is required and the rest of the monies can be used for administrative expenses and other purposes the legislature chooses to fund through its relatively expansive power of appropriation.

This reading is consistent with case law discussing appropriations. To suggest that the legislature is required to appropriate from the State Lottery Fund only to prizes and administrative expenses is to ignore the "subject to appropriations" language in the Constitution in a way that ties the hands of the legislature. Case law points out that such a result is inconsistent with the legislature's broad authority. *See State ex rel. Kansas City Symphony v. State*, 311 S.W.3d 272 (Mo. App. W.D. 2010) (holding that statutory directives mandating transfer of monies from the general revenue fund to a particular fund runs afoul of the appropriations requirement in Article III, Section 36); *see also State ex rel. Fath v. Henderson*, 160 Mo. 190, 60 S.W. 1093, 1097 (1901) (observing that "one general assembly cannot tie the hands of its successor[.]").

As a result, the language of Senate Bill 1, which allows payments to the Veteran's Commission, is consistent with both the plain language of the Constitution and case law on appropriation authority. It is within the legislature's prerogative to make these types of decisions and the Bill is constitutional.