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June 21, 2006

Honorable Don Perata  
Room 205, State Capitol

**INSTANT RACING MACHINES- #0617169**

Dear Senator Perata:

**QUESTION**

Does the California Constitution permit the Legislature to authorize wagering on historical horse races using Instant Racing machines?

**OPINION**

The California Constitution permits the Legislature to authorize wagering on historical horse races using Instant Racing machines.

**ANALYSIS**

By way of background, you have presented us with a method of betting on horse races called Instant Racing. Instant Racing is a means of placing parimutuel wagers on horse races through the use of self-service totalizator machines. These machines operate on the same basic principle as traditional self-service totalizator machines in current use at California racetracks. In either case, a patron places a wager at the machine and the machine transmits information regarding the wager to a centralized totalizator system. The central totalizator keeps track of all wagers placed into a given parimutuel pool, calculates the amount of "takeout" the racetrack is permitted, and calculates the payout for winning wagers. In addition to the traditional functions, however, the Instant Racing machines incorporate a new technology. This new technology permits a patron not only to place a wager using the machine, but also to watch the race (or a portion thereof), and view the official race results. After the race, the Instant Racing totalizator machine displays the results of the patron's wager using entertaining video and mechanical displays.

When placing a wager on an Instant Racing totalizator machine, a patron attempts to select the first three finishers of the race in exact order. The patron wins if (1) the patron's selections correctly match the top three finishers in exact order, (2) the patron's top two selections match the top two finishers in any order, (3) any of the patron's selections match either of the top two finishers in any order, or 4) the patron's top selection wins the race. The payout amount varies for the different types of wins, depending on how difficult it is to win in that particular manner. This is similar to traditional parimutuel wagering, where the trifecta (choosing the top three horses in order) has a higher payout than the exacta (choosing the top two winning horses) because it is more difficult to win.<sup>1</sup>

The substantive difference between Instant Racing and traditional parimutuel wagering on horse races is that, in Instant Racing, the patron has the option to wager on a previously run horse race. Each Instant Racing machine is connected to a central server that stores digital images of tens of thousands of historic races. Each race on the server is an actual horse race that was conducted by a licensed United States parimutuel facility and that concluded with official results. Each horse race presented has exactly 10 separate wagering interests (horses). The identity of the horses, the racetrack, and the date of the race are withheld from the patron until the wager has been placed. However, prior to placing the wager, the patron has the opportunity to examine one or more charts that display past performance data showing the relative merits of each of the entries as they actually existed on the date of the race. This data includes much of the same information that would have been included in publications available at the race track where and when the race was originally run, and includes the lifetime wins of the horse and jockey, how many times the horse, jockey, and trainer have each finished "in the money" in the past year, the lifetime earnings of the horse, and the winning percentage of the trainer and the jockey.

The issue is whether wagering on historical horse races is permitted under the California Constitution. That issue raises two questions: whether wagering on a historical horse race is within the scope of horse race wagering as authorized by the California Constitution, and whether wagering on a historical race would be considered some other form of gaming that is prohibited in the state.

In 1933, California voters enacted an amendment to the California Constitution to officially authorize horse racing (Proposition No. 3, June 27, 1933, special election). That authority is now embodied in subdivision (b) of Section 19 of Article IV of the California Constitution, which provides that the "Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results." In the exercise of that power, the Legislature has enacted a comprehensive plan for the licensing and control of horse racing and

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<sup>1</sup> It is our understanding that additional wagers on the race are possible, all of which are dependent upon the outcome of the horse race.

wagering on the outcome of horse races, which is known as the Horse Racing Law (Ch. 4 (commencing with Sec. 19400), Div. 8, B.& P.C.<sup>3</sup>).

As part of the Horse Racing Law, the Legislature has specified the types of races that may legally be run and wagered on, the method of distribution of race days and race weeks, and the allowed method of wagering. Legal horse races include thoroughbred races, quarter horse races, Arabian races, appaloosa races, paint horse races, and mixed breed races (Secs. 19414, 19417, 19417.5, 19417.7, and 19549.1). The only allowed method of wagering on horse races is through a parimutuel pool (Sec. 19593). In parimutuel wagering, the racetrack accepting the wager has no interest in the outcome of the race; rather, the wagered money is "pooled." The racetrack deducts a set amount from the pool to pay for horsemen's purses, operating expenses, and other costs. The balance of the pool is returned to patrons who place the winning wagers. (see Sec. 19411). The percentage going to the track remains the same no matter who wins or how many winners there are (Sec. 19590). Parimutuel wagers on horse races must be placed within the racing enclosure (Sec. 19591).

The definition of a horse race is set forth in Section 1420 of Title 4 of the California Code of Regulations, which reads, in pertinent part:

"'Race' means a contest among horses for a purse, stake or reward, contested at an authorized race meeting...."

That definition continues by listing various types of races, defining them by the prize offered or the horses involved. Nowhere in regulation, statute, or constitutional language is a horse race specifically limited to a live or simultaneously broadcast event.

In 1933, when the Horse Racing Law and related constitutional amendment passed, the technology to record and replay tens of thousands of historic races for wagering purposes did not exist. Thus, that technology was not contemplated by the originally enacted laws. However, it is a cardinal legal principle that the law making power of government is assigned to the Legislature, which, unless restrained by the Constitution, may deal with any subject within the scope of civil government (*Dean v. Kuchel* (1951) 37 Cal.2d 97). Because the Constitution does not specifically limit horse races to live races, it leaves to the Legislature the discretion to determine the definition of a horse race. A reasonable construction of a constitutional provision by the Legislature will be acquiesced in by the courts (*Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 692). In our view, the California Constitution does not prohibit wagering on historic races, and it is within the power of the Legislature to expressly permit the type of horse racing conducted on Instant Racing machines.

We next turn to subdivision (e) of Section 19 of Article IV of the California Constitution, which specifically prohibits "casinos of the type currently operating in Nevada and

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<sup>3</sup> All further section references are to the Business and Professions Code, unless otherwise specified.

New Jersey.” The California Supreme Court, in 1999, determined that this prohibition specifically applies to slot machines (*Hotel Employees and Restaurant Employees International Union v. Davis* (1999) 21 Cal.4th 585 (hereafter *Hotel Employees*)). *Hotel Employees* involved a suit to stop the enforcement of Proposition 5, allowing Indian gaming in California. The plaintiff union contended that allowing Indian gaming would be in violation of subdivision (e) of Section 19 of Article IV of the California Constitution, prohibiting casinos. To make this determination, the court had to interpret “casinos of the type currently operating in Nevada and New Jersey.” The court’s interpretation, based on casinos in Las Vegas and Atlantic City as they existed in 1984 when the constitutional amendment was passed, is that a prohibited casino is “one or more buildings, rooms, or facilities, whether separate or connected, that offer gambling activities including those statutorily prohibited in California, especially banked table games and slot machines” (*Hotel Employees*, at p. 605). Relying on the legislative history, the court also found that the provision was intended to “elevate statutory prohibitions on a set of gambling activities to a constitutional level” (*Hotel Employees*, at pp. 605-606).

Among the prohibitions elevated to a constitutional level by *Hotel Employees* is the prohibition of slot machines. Section 330b of the Penal Code defines “slot machines” as follows:

\* \* \*

“(d) ...[A] machine, apparatus, or device that is adapted, or may readily be converted, for use in a way that, as a result of the insertion of any piece of money or coin or other object, or by any other means, the machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance, or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or additional chance or right to use the slot machine or device, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value, or which may be given in trade, irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.

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<sup>3</sup> We note that subdivision (a) of Section 19 of Article IV of the California Constitution, originally adopted in 1849, specifically prohibits lotteries. The California Supreme Court, in *People v. Postma* (1945) 69 Cal.App.2d Supp. 814, 817, declined to decide whether horse racing was a lottery. However, as the court noted, the majority of cases in other jurisdictions have determined that horse racing is not a lottery because it involves a significant element of skill (*Ibid.*). In any event, because subdivision (b) of Section 19 of Article IV was enacted after subdivision (a) of that section, it would take precedence (see *Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 178).

This definition has essentially three elements: (1) something of value is given to play the machine, (2) the result is controlled by chance or made unpredictable through the operation of the machine, and (3) something of value may be won as a prize. There is no doubt that something of value is given to play the Instant Racing machines and that a prize of value may be won. The question remains whether this is a game of chance or made "unpredictable" to the user through the operation of the machine.

The California courts have determined that a machine is a "slot machine" under Section 330b of the Penal Code when it is predominantly a game of chance<sup>4</sup> or when the outcome, determined by the machine's operation, is unpredictable to the user. In *Trinkle v. Stroh* (1997) 60 Cal.App.4th 771, the court found that pinball machines that do not have "flippers" to control where the ball in play goes or jukeboxes that randomly give out extra songs, are slot machines under Section 330b of the Penal Code. Pinball machines that have flippers, however, have been classified as predominantly games of skill and are, therefore, not slot machines (subd. (f), Sec. 330b, Pen. C.; see also *Cossack v. Los Angeles* (1974) 11 Cal.3d 726). California courts have also found video card games to be slot machines under Section 330b of the Penal Code because, while appearing to involve some level of skill, the machine's operation makes the results of the game unpredictable to the user (*Score Family Fun Center, Inc. v. County of San Diego* (1990) 225 Cal.App.3d 1217 (hereafter *Score*)).

We think that the Instant Race machines are not predominantly games of chance. Because the person placing a bet is given much of the same information that he or she would be given for a live horse race, using Instant Racing machines involves a similar skill level in placing bets as is required at a live horse race meeting (see *People v. Postma*, supra, wherein the court summarizes decisions from other states that conclude that horse racing is less a matter of chance than skill). Of course, there are bettors who would choose to not use this information in both Instant Racing and live racing, but this does not change the nature of the game. In all types of horse racing, including Instant Racing machines, the odds may be improved through the use of skill and knowledge. With pinball machines, a player who does not use the flippers does not thereby make the machine a game of chance. "It is the character of the game rather than a particular player's skill or lack of it that determines whether the game is one of chance or skill" (*Finster v. Keller* (1971) 18 Cal.App.3d 836, 844).

The result of the Instant Racing game is also not "made unpredictable," in our view, by the operation of the machine. Subdivision (d) of Section 330b of the Penal Code requires either an "element of hazard or chance" or "other outcome of operation unpredictable [by the user]" to make the device a slot machine. In *Score*, the court assessed video card game machines to determine if they are slot machines. The owner of the machines argued that the player controlled, to an extent

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<sup>4</sup> *Finster v. Keller* (1971) 18 Cal.App.3d 836, 844 ("Chance' means that winning and losing depend on luck and fortune rather than, or at least more than, judgment and skill... The test is not whether the game contains an element of chance or an element of skill, but which of them is the dominating factor in determining the result of the game.")

sufficient to make it a game of skill, whether he or she won or lost. The player's skill at playing the chosen game, including poker, blackjack, and baccarat, either increased or decreased his or her chances of winning. One of the reasons that the court found the video card game machines to fall within the definition of slot machines, however, was that the functioning of the machine gave the user the illusion of skill without the reality. The user had no way of determining how many "decks" of cards were being used, if the decks were stacked, or any other objective facts about the cards because they existed only in the computer's programming (Id., at 1221). In the case of the Instant Racing games, the only operation of the machine that is beyond the control of the bettor is in the choice of the race, which occurs before the statistics are given to the bettor and before the bet is placed. Once the race has been chosen, the bettor has much of the same information that is available for choosing a winner at a live horse race, and any uncertainty interjected by the machine is removed. In fact, after the race is selected, the operation of the machine is very similar to that of the machines currently used to place wagers on live horse races, the differences being predominately how quickly the player can watch the race and the time between races. Instant Racing machines allow the player to watch only the end of the race (a "short version") and allow a player to bet on and watch more races in a given period of time than are conducted live at the racetrack. However, neither of these factors changes the predictability of, or the element of skill involved in making, the wager and are, therefore, not constitutionally relevant.<sup>5</sup>

Therefore, based on representations made to us about how the Instant Racing machine works, we conclude that Instant Racing would be considered to be predominantly a game of skill, that the outcome is not made unpredictable by the operation of the machine, and, consequently, that the Instant Racing machines are no more slot machines than the machines currently used to place bets on live horse races.<sup>6</sup> Additionally, because there is no requirement in the California Constitution that races be live or simultaneous to be considered horse races under subdivision (b) of Section 19 of Article IV, it is our view that the historic races used by the Instant Racing machines would be considered horse races that may be regulated by the Legislature.

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<sup>5</sup> The Wyoming Supreme Court found that the same Instant Racing machines were slot machines in *Wyoming Downs Rodeo Events v. Wyoming*, 2006 WY 55 (2006). However, this case is distinguishable because the Wyoming statute defining a "gaming device" is significantly broader than its California counterpart, Section 330b of the Penal Code, which defines "slot machines." The Attorney Generals of Oregon, Arkansas, and Alabama have all rendered opinions on this subject, none of which is instructive for California because of the variations in state statutes. No other state supreme court has considered the issue.


<sup>6</sup> It may also be argued that the authority of the Legislature to authorize horse racing is an exception to the other restrictions of Section 19 of Article IV if the California Constitution (see *Finster v. Keller*, supra, at p. 842). However, given our conclusion, we do not decide that issue.

Accordingly, it is our opinion that the California Constitution permits the Legislature to authorize wagering on historical horse races using Instant Racing machines as described above.

Very truly yours,

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