No. A23-1738

State of Minnesota
In Supreme Court

In the Matter of the Minnesota Racing Commission's Approval of Running Aces Casino, Hotel & Racetrack's Request to Amend its Plan of Operation,

Shakopee Mdewakanton Sioux Community,

Appellant/Cross-Respondent,

vs.

Minnesota Racing Commission, and
Running Aces Casino Hotel & Racetrack,

Respondents/Cross-Appellant.

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules & Regulations

Other Authorities

INTRODUCTION

Running Aces' leading argument on appeal is that the Court should not consider the merits of this case because the Community lacks standing. The Commission makes no such argument, because it has effectively conceded that the Community has standing and acknowledged the "substantial direct effect" its decision would have on the Community. The Community has standing because the Commission's approval of Running Aces' Amended Plan of Operation infringes on the Community's legally protected right to operate video games of chance. Permitting the card clubs to operate video games of chance—which Minnesota law expressly prohibits them from doing—also threatens the Community's revenues used to fund its government.

On the merits, Respondents' arguments boil down to (1) Electronic Table Games ("ETGs") are not simulations of card games, they are just traditional card games—despite the different rules for playing ETGs and myriad similarities between ETGs and video blackjack, video poker, and video baccarat; (2) ETGs are not video games—never mind the electronic touchscreens that look and operate as games on a video screen; (3) ETGs are not gambling devices because they are not fully automatic or self-contained—which ignores the statutory language and this Court's precedent holding that various devices that were not fully automatic were nevertheless gambling devices; (4) the ETG player tables—the exclusive mechanisms by which players play the games—are not "tables used for card playing" and the legislature did not intend to place any limits on the number of players per dealer; and (5) the Commission was not applying an unpromulgated rule when, since 2017, it has routinely approved the addition of, or changes to, ETGs at the card clubs "with the

understanding that the card games will be played 'live' without the use of a random number generator." None of these arguments withstand scrutiny.

The Court should call a spade a spade: ETGs are gambling devices and video games of chance that Running Aces cannot operate. And even if it could operate them, and even if they were card games, the Amended Plan of Operation contemplates 31 more tables used for card playing than Running Aces is permitted by statute to operate. Finally, the Commission has been unlawfully enforcing an unpromulgated rule. For all of these reasons, the Court of Appeals' decision should be reversed and the Commission's approval of the Amended Plan of Operation vacated.

I. THE COMMUNITY HAS STANDING

The Community has standing for three reasons. First, the Commission has effectively conceded that the Community has standing. The Commission consulted with the Community about the Community's concerns with Running Aces' request to expand ETG gaming at its card club—a consultation the Commission undertook because it concurred with the Community that its decision on Running Aces' Amended Plan of Operation would have a "substantial direct effect" on the Community. Consequently, the Commission has never challenged the Community's standing.

Second, the Community has a legally protected right to operate video games of chance commercially as a federally recognized tribe with a tribal-state gaming compact. Running Aces has no such right under current law. The Commission's decision to permit Running Aces to operate video games of chance upends this competition-restricted environment and thereby infringes on a legally protected right of the Community, which is

sufficient to confer standing on the Community to seek judicial review of the Commission decision.

Finally, the expansion of gaming at the card clubs threatens the Community's gaming revenue, which subsequently threatens its governmental functions.

A. The Bar for Standing to Appeal an Agency Decision Is Modest

Minnesota courts have long recognized a broad, presumptive right of parties to seek judicial review if they have suffered an injury as a result of agency action. *See Minn. Pub. Int. Rsch. Grp. v. Minn. Env't Quality Council*, 237 N.W.2d 375, 379 (1975) (explaining that persons injured may seek judicial review of agency decisions in the absence of statutory language to the contrary). Standing is "a low hurdle because relator need only ***allege*** injury in fact." *In re Appeal of the Selection Process for the Position of Electrician*, 674 N.W.2d 242, 247 (Minn. App. 2004) (emphasis added) (relator's alleged injury of being a highly qualified candidate who should not have received a low civil service ranking was sufficient to confer standing).

"Essentially, a potential litigant must allege injury in fact, or otherwise have a sufficient stake in the outcome, to have a court decide the merits of a dispute." *Id.* at 246. That can include injury "to a legally protected right," including a statutory grant of limited competition. *See City of St. Paul v. LaClair*, 479 N.W.2d 369, 371 (Minn. 1992) ("Standing to appeal is conferred when there is injury to a legally protected right.") (citation omitted); *Twin Ports Convalescent, Inc. v. Minn. State Bd. of Health*, 257 N.W.2d 343, 346, 348 (Minn. 1977) (plaintiffs had standing to challenge a competitor's licensure because they had an interest "arguably among those intended to be protected by the statute," where the

statute "manifest[s] a legislative intention to protect the public welfare against deleterious competition in the ambulance services field").

B. The Community Has Suffered an Injury in Fact

1. The Commission Acknowledged that the Community Would be Harmed by a Decision Expanding ETGs at Card Clubs

During the administrative process, the Commission consulted with the Community about Running Aces' Amended Plan of Operation under Minnesota's tribal consultation statute. MRC000124, MRC000289 (acknowledging occurrence of consultation). The tribal consultation statute requires agencies to consult with Tribal governments on matters that have Tribal implications, which means "rules, legislative proposals, policy statements or other actions that have ***substantial direct effects*** on one or more Minnesota Tribal governments . . . ." Minn. Stat. § 10.65, subds. 2(3), 3(d).[1] By holding a tribal consultation, the Commission acknowledged that the Community had a sufficient stake in the outcome of the proceedings and would suffer injury from a decision in Running Aces' favor, effectively conceding that the Community has standing to bring this appeal.

Further, at the Commission's October 19, 2023 meeting, one commissioner recognized the adverse impact a decision expanding ETGs would have on the Community

[1] Running Aces' only response to the Commission holding a tribal consultation is that the statute does not "create any right to administrative or judicial review." Running Aces' Brief ("RA Br.") 27 (quoting Minn. Stat. § 10.65, subd. 4). The language cited by Running Aces pertains to the right of a tribe to appeal an agency's failure to consult. The Community is not arguing that the Commission failed to consult. The Community's argument is that by consulting—and not challenging the tribe's standing on appeal—the Commission has demonstrated an awareness that its approval of the Amended Plan of Operation has a substantial direct effect on the Community.

when she questioned whether the purpose of the Commission was to support horse racing or the casinos. MRC000213, Tr. 14:23–25. The Commission anticipated that the Community's appeal would be heard on the merits. MRC000216, Tr. 17:7–9 ("[U]ltimately . . . [it will] be up to the courts to decide and not really us."). The Commission's actions and statements provide strong evidence that the Community has standing.

2. The Commission's Decision Invaded the Community's Legally Protected Right to Operate Video Games of Chance

The Community's legally protected right to operate gambling devices and video games of chance is harmed by the Commission's decision to expand gaming at Running Aces (and also Canterbury Park) to include video games of chance.[2]

a. State Law Grants Tribes a Competition-Restricted Environment

The state has by statute created a competition-restricted environment that allows tribal casinos to operate video games of chance commercially without interference from card clubs. The Community has a legal right under federal and state law to operate video games of chance and gambling devices. *See* Community's Opening Brief ("SMSC Br.") 8–10. Under the Federal Indian Gaming Regulatory Act ("IGRA") tribes may offer "class III" games including slot machines and video game versions of card games by compacting with a state. *Id.* at 9. IGRA's standard was met in Minnesota, and the legislature directed the

[2] Running Aces claims that the Court need not decide whether tribes can lawfully operate video games of chance. RA. Br. 20, n.7. But it is the Community's legal interest in offering video games of chance in a competition-restricted environment that is being infringed by the Commission's decision under review. That infringement of that legal right confers standing on the Community.

governor to negotiate compacts for such class III games with Minnesota's federally recognized tribes, including the Community. SMSC Br. 9; *see also* J. Williams, GAMBLING IN MINNESOTA: *A Short History* at 7 (Mar. 2005) ("If a state permitted a form of gambling for non-Indians for any purpose, including social or charitable purposes, a tribe in that state had the right to request negotiation of a compact that would permit that form of gambling on the tribe's land.")[3]; REPORT TO THE LEGISLATURE ON THE STATUS OF INDIAN GAMBLING IN MINNESOTA, Sept. 5, 1991, at 16 ("On July 14, 1989, Governor Perpich appointed a three-member committee to negotiate with the Indian Bands and Communities . . . [and] indicated its willingness to negotiate and enter into compacts governing Class III video games of chance and, perhaps at a future date, lotteries.").

In contrast, card clubs such as Running Aces may not operate gambling devices or video games of chance for commercial purposes, a restriction reemphasized by the legislature as recently as 2024. Minn. Stat. §§ 240.30, subd. 1; 240.071, 609.755, 609.76, subd. 1(5). And distributors of gambling devices cannot sell them to card clubs. *See* Minn. Stat. § 299L.07, subds. 2, 2a(b).

b. The Decision to Limit Video Games of Chance and Gambling Devices to Tribal Casinos was Based on Public Policy Considerations

Contrary to Running Aces' claim that "Minnesota law does not intend to give the Community a competitive advantage regarding gambling," RA Br. 20–22, the purpose of the statutory framework outlined above, and in the Community's opening brief, is to limit

[3] Available at https://www.house.mn.gov/hrd/pubs/gambhist.pdf.

the scope of commercial gambling on video games of chance to tribal casinos. Running Aces concedes as much, explaining that "the statutes reflect the State's interest in doing the minimal amount to ensure gambling did not expand and to regulate the industry." RA. Br. 21–22. The Community's opening brief described the purposeful ways in which the legislature has apportioned commercial gambling in the state, and how expansions of gambling have been the province of the legislature or the voters via constitutional amendment. *See* SMSC Br. 7–9; GAMBLING IN MINN. at 7 (explaining that the state's gambling policy is rooted in a historical desire to contain gambling).

This state's careful regulation of gambling also aligns with the public policy purposes that the state considered when entering into tribal-state compacts. IGRA was passed with the goal to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The state viewed Indian casinos as a route to economic self-sufficiency, a source of jobs to bring down the chronically high unemployment rate on Indian reservations, and an avenue for economic development in "some of the state's most sparsely populated and poorest areas." GAMBLING IN MINN. at 32.

Running Aces' claim that state statutes do not grant the Community a competition-restricted environment also ignores the laws passed ***after*** compacting occurred that prohibit other commercial actors, including Running Aces, from operating or possessing video games of chance—while excepting tribes from the reach of those laws. *E.g.*, Minn. Stat. §§ 240.071, 299L.07 (permitting the sale of gambling devices to "the governing body of a federally recognized Indian tribe that is authorized to operate the gambling device under a

tribal state compact under the Indian Gaming Regulatory Act" but providing no similar provision for card clubs), 609.755 (making it illegal to possess a gambling device except for amusement purposes or as allowed by statute); *see also* 1989 LAWS OF MINN. CH. 334, ART. 6 § 14 ["Indian Compacts"] at 2688 ("Section 9 may not be construed as prohibiting the state from entering into a tribal-state compact under the provisions of [IGRA] as it relates to video poker or video blackjack games of chance currently operated by Indian tribes in this state."). In sum, Minnesota statutes grant the Community a legally protected interest in operating video games of chance and gambling devices free from non-tribal entities' commercial involvement.

c. The Statutory Environment Around Gambling Resembles the Competition-Restricted Environment in *Twin Ports*

The statutory framework outlined above makes this case like this Court's *Twin Ports*, 257 N.W.2d 795, decision, and not the Court of Appeals' decision in *In re Dakota Telecomm. Grp.*, 590 N.W.2d 644 (Minn. App. 1999), which Running Aces relies on. *See* RA Br. 25. Contrary to Running Aces' assertion, *Twin Ports* does not stand for the limited proposition that a "competitor has standing to challenge another competitor's license when the license was issued following irregular procedure." RA Br. 25. In *Twin Ports*, the plaintiffs, two ambulance service providers, held a duopoly over ambulance service in Duluth. *See* 257 N.W.2d at 344. After a state agency granted a license to a competitor to operate in the plaintiffs' service territory, the plaintiffs contested the decision, arguing they were harmed by the decision because it would disrupt the competition-restricted environment in which they did business. *Id.* at 346.

The Court examined the statutes at play and determined that the laws regulating ambulance service in the state reflected a legislative purpose to limit competition to preserve the quality of service offered to the public. *Id.* at 348. On this basis, the Court held that the plaintiffs had suffered an injury in fact and shown an interest arguably among those intended to be protected by the statute. *Id.* at 346. Under *Twin Ports*, invasions of statutorily created competition-restricted environments are sufficient to confer standing. *Id.*

Similar to the ambulance service laws in *Twin Ports*, Minnesota's gambling laws have created a competition-restricted environment for gambling devices and video games of chance, granting tribal casinos the ability to offer these games commercially, something no other entity can do. Like *Twin Ports*, the limited competitive market was created with the public's interest in mind, both to limit the scope of gambling in Minnesota for the benefit of the public and to enhance tribal self-governance. Running Aces' invasion into this competition-limited environment, resting only on the Commission's approval, is sufficient to confer standing on the Community for this appeal.

Running Aces' reliance on *Dakota Telecommunications* is misplaced. First, Running Aces' argument is based on a false premise. It claims that, under *Dakota Telecommunications*, the Community does not have standing to "attempt to secure a monopoly by challenging [its] competitors' licenses." RA Br. 19. But the Community is not challenging Running Aces' license; it is challenging the Commission's decision permitting the operation of unlawful types of games, and too many of them.

Dakota Telecommunications is distinguishable for other reasons too. In *Dakota Telecommunications*, Bresnan Communications, a cable company with a nonexclusive

franchise license attempted to challenge the issuance of a license to a competing cable company to prevent the introduction of competition into the local cable communications market. 590 N.W.2d at 648. The Court of Appeals noted that the Cable Act—the statute at issue—was intended "to ***promote*** competition within the cable communications market." *Id.* at 647 (emphasis added). On this basis, the court held that Bresnan did not have standing to challenge its competitor's license. That is not the case here. Whereas in *Dakota Telecommunications* the state's policy was to encourage the rapid development of the cable industry through competition, the state's gambling laws are not intended to promote competition, but rather to limit gambling operations in the state to designated entities and to promote tribal self-sufficiency. *See* GAMBLING IN MINN. at 7, 32.

d. This Is a Case about Illegal Gambling Devices, Not Card Playing

Running Aces seeks to misdirect the Court's attention and analysis by arguing that the Community does not have a legally protected interest sufficient to confer standing because the statute under which the Commission approved Running Ace's Amended Plan of Operation, Minnesota Statutes chapter 240, applies to card playing and does not cover tribal gaming or video games of chance. RA Br. 21. Running Aces cites no case in support of this narrow view that standing can only arise based on the statute that the agency acted under, and the Community is aware of none. The Community's legally protected right pertains to video games of chance, as the Court of Appeals properly held. The Commission's decision expanding such gambling at card clubs infringes on that right.

Running Aces next argues that the Community does not have standing because the relevant card club statutes "invite competition in card-game gambling." RA Br. 21, 24. Running Aces is putting the cart before the horse. This argument assumes that Running Aces has succeeded in convincing the Court that ETGs are not video games of chance and only card games are at issue. But standing is something that is ***alleged*** based on the challenger's perceived injury, it does not require an analysis into the merits of the case. *In re Appeal of the Selection Process*, 674 N.W.2d at 246 ("In deciding standing, the court is to look at the complaining party, not the proposed issues."). Thus, the proper focus is on the Community's alleged harm to a legally protected interest to offer video games of chance and gambling devices, not card playing.

Regardless, even if the Court agrees that ETGs are not video games of chance, and so the Community's rights to operate card games (which Running Aces does not dispute) are what matter for standing purposes, the Community still has standing to challenge the Commission's decision as an unpromulgated rule and a violation of the 80-table limit because the card playing statutes do not invite competition either. The number of entities permitted to operate card games are limited. Only two horse racing licenses can be granted in the metro area and there are a limited number of federally recognized tribes in Minnesota that are permitted to operate card games under compacts. Minn. Stat. § 240.06, subd. 5, 5(a). State-licensed card clubs are prohibited from exceeding the legislative cap limiting operations to 80 tables used for card playing, while the Community and other tribes have no similar statutory limitations. Minn. Stat. § 240.30, subd. 8. Because the laws related to card-game gambling are also competition-restricting, the Community has standing to

challenge violations of law that impede or infringe on its legally protected rights to operate card games at its tribal casinos.

3. The Commission's Decision Will Cause Injury to the Community's Governmental Functions

Alternatively, the Community has standing because of its stake in the outcome of this case. As this Court said in *In re Appeal of the Selection Process*, a party has a right to challenge an agency decision if it has a "sufficient stake in the outcome." 674 N.W.2d at 246. The Community satisfies that standard.

The Community is a federally recognized tribe that uses the proceeds from its gaming operations to fund its government. *See* Amicus Curiae Brief of Mille Lacs Band of Ojibwe, et al. ("Tribal Am. Br.") 9–13 (delineating all of the essential services gaming revenue provides to tribal communities, including government services and infrastructure, health and housing, education and culture, environment and energy, public safety, and philanthropy). Running Aces', and Canterbury Park's, operation of gambling devices (ETGs) threatens the revenues received from the Community's gaming operations in favor of providing a return on investment for a private equity firm (in the case of Running Aces) and shareholders (in the case of Canterbury). MRC000096 (Letter from Community's Chairman to the Commission: "Running Aces' proposal seeks to expand a new form of gaming, which has not received any legislative scrutiny or authorization, that will adversely affect all Indian tribes in Minnesota but especially those located near a racetrack."). The way the Commission approved ETGs at Running Aces—automatically permitting the same games to be offered at Canterbury Park (*see* SMSC Br. 53–55)—brings the threat of

economic loss to the Community from these games to within a five-minute drive, at the closest intersection off Highway 169 to the Community.

The Community's stake in this appeal concerning unlawful commercial operation of video games of chance, which is unique to federally recognized Indian tribes in Minnesota, is sufficient to confer standing. It also makes this case unlike the run-of-the-mill competitor case cited by Running Aces. RA Br. 24–25 (citing *Dakota Telecomm.*).

In sum, the Community has standing to challenge the Commission's decision.

II. ETGS ARE UNLAWFUL VIDEO GAMES OF CHANCE

A. ETGs Are Video Games of Chance Under Both Statutory Definitions

ETGs are "video games of chance" under Minnesota law if they meet one of two alternative definitions. *See* Minn. Stat. § 609.75, subd. 8.[4] As the Community argued in its opening brief, ETGs meet both. SMSC Br. 39–44. Respondents' rebuttal is limited to asserting that (1) ETGs are not video games of chance under the first definition because they are not simulations of card games; and (2) ETGs are not video games of chance under the second definition because they are not "video games." The Community preempted both

[4] **Video game of chance.** A video game of chance is [1] a game or device that simulates one or more games commonly referred to as poker, blackjack, craps, hi-lo, roulette, or other common gambling forms, though not offering any type of pecuniary award or gain to players. [2] The term also includes any video game having one or more of the following characteristics:

(1) it is primarily a game of chance, and has no substantial elements of skill involved;

(2) it awards game credits or replays and contains a meter or device that records unplayed credits or replays. A video game that simulates horse racing that does not involve a prize payout is not a video game of chance.

of these arguments in its opening brief. *Id.* at 39–44. Respondents' one-page, combined responses offer no coherent basis to hold that ETGs are not video games of chance.

B. ETGs Are Simulations of Card Games

Respondents' first point, that ETGs fit under the definition of "card playing" under Minn. Stat. § 240.01, subd. 5, is irrelevant. *See* SMSC Br. 40–41. In short, a video game of chance (or gambling device) can also be "card playing." To conclude otherwise would render meaningless the legislature's specific inclusion of card games in the statute. Minn. Stat. § 609.75, subd. 8 (listing simulations of poker and blackjack as examples of video games of chance).

As the Community predicted, SMSC Br. 40–41, Respondents erroneously argue that ETGs are not "simulations" of traditional felt-table card games. This argument, too, fails.

The Commission argues that ETGs are not simulations because "simulating card games would require the challenged device to generate rather than record the outcome[.]" Minnesota Racing Commission Brief ("Comm'n Br.") 21. This argument is untethered to any statutory language. Further, Respondents disingenuously minimize the role of the ETG system in making this and other arguments. In truth, the ETG system does just about everything. For the player, the entire game is played through the ETG: it displays a graphical (video game) version of the cards; cash or vouchers are paid into the system; bets are placed at the ETG; and wins and losses are calculated and paid out by the system. SMSC Br. 15–19; MRC000189–92 (Interblock CEO interview describing ETGs as more

akin to video poker and blackjack than traditional table games).[5] The ETG dealer's role in the system is nominal according to Running Aces' own job description: "***The computer system tells the dealer what actions to take during each hand***." MRC000075 (emphasis added). The computer system can automatically start each game, tell players to make their bets, close bets, and confirm the game result—without any involvement of the dealer. MRC000044.

Running Aces adds that according to a dictionary definition that it found, there must be an "intent to deceive" for a game to be a simulation. RA Br. 37. But that is not even true under the definition that Running Aces cites. First, the definition refers to simulating "often" including an intent to deceive, not ***always*** including an intent to deceive. *Id.* Just because a simulation "often" includes an intent to deceive, according to Merriam Webster, that does not mean it must do so. Other dictionary definitions have no such gloss on the meaning of "simulate."[6] ETGs meet those other, more appropriate, definitions as they "replicate" the "appearance or character" of traditional felt-table games and they "create conditions or processes similar to" those traditional games. Second, Running Aces

[5] Running Aces includes a short argument about the iTable games along with an unsupported assertion that they are not video games. RA Br. 38. The Community responds to arguments related to iTable below. *See infra* Section III.B.

[6] *E.g.* AM. HERITAGE DICTIONARY OF THE ENG. LANGUAGE, https://ahdictionary.com/word/search.html?q=simulate ("To simulate is to replicate something's appearance or character"); CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/simulate ("to create conditions or processes similar to something that exists"); BRITANNICA DICTIONARY, https://www.britannica.com/dictionary/simulate ("to look, feel, or behave like (something)") (all last visited Apr. 19, 2024).

continues to omit the full definition, which prominently includes "*Imitate*" as a synonym at the end.[7] Certainly, ETGs imitate poker, baccarat, and blackjack.

Finally, Running Aces argues that the inclusion of rules for its ETGs in its plan of operation that are separate from the traditional felt-table games does not provide a basis for concluding that the games are simulations. RA Br. 37. But as the Community argued in its opening brief, if ETGs were merely regular card games, then there would be no need for different rules for the electronic games. SMSC Br. 41. It is necessary to have separate sets of ETG rules because ETGs are simulations of card games that could not actually be operated the same way as traditional card games. The rules themselves describe these differences.

For example, traditional blackjack does not involve the so-called "community hands" of ETGs, where all players play from the same set of cards dealt by the dealer. *Compare* MRC000336–42 (traditional blackjack rules), *with* MRC000350–51 (ETG community card blackjack rules). There is no way for the community-hand set up, which currently involves having 11 players all playing the same hands, to work without the ETG system: one would have to imagine a game in which 11 players crowd around a traditional table with a dealer, craning to see what cards she deals, and then somehow directing their separate decisions to take additional cards or hold. It would resemble the old children's game of "Twister" more than a card game. Even if it were physically possible, such a version of blackjack would defeat the purpose of ETGs, which is to give players space

[7] Available at https://www.merriam-webster.com/dictionary/simulating (last visited Apr.19, 2024) (emphasis in original).

away from other players and the dealer to play their game on a video touchscreen and to speed up the rate of betting. ETG blackjack is different than, but simulates, traditional blackjack. It is, therefore, a video game of chance under Minn. Stat. § 609.75, subd. 8.

Similarly, for the five-card poker game, the game does not work without the ETG system, as the dealer is constantly dealing cards and players are using a prior set of up to 5 cards, which is saved and displayed on the ETG's player screen, and uniquely deciding to replace cards 1 through 5 in the lineup. *See* MRC000352. A dealer, who is constantly dealing a new set of five cards, couldn't "save" the cards that an individual player is playing without the ETG system. Nor could players individually select which cards to keep and which to replace on a physical card table where each would be trying to build a different hand from the same physical cards.

C. ETGs Are Video Games

Respondents' ***only*** argument for why ETGs are not video games of chance under the second, two-part definition in the statute is that ETGs are not "video games." Comm'n Br. 22; RA Br. 37. This argument contradicts the common understanding of a video game and does not meet the Groucho Marx test[8] if one merely looks at pictures of the games in the Parties' briefs. SMSC Br. 17–20; RA Br. 17.

The Commission's argument on this point is that "it is clear from how [an ETG] functions that it is not a video game itself, but technology that allows a person to play the game taking place nearby." Comm'n Br. 22. The Commission does not explain how that

[8] "Who are you going to believe, me or your own two eyes?!?" *See* "*A Night at the Opera*," Metro-Goldwyn-Mayer (1935).

"technology" is not a video game when players use touchscreen video technology to play card games electronically. As the Community argued in its opening brief, ETGs are video games that graphically depict images of cards on a screen that players operate through touch to play video poker, blackjack, and baccarat electronically. SMSC Br. 41–42.

Running Aces argues that ETGs are not video games because players do not control images. RA Br. 37. But players absolutely control images. Players can be seen doing this in the pictures in the Community's Opening brief on page 17 and Running Aces' brief on page 35. *See also* MRC000178, 193, 196 (more pictures of the ETG video games).

Because ETGs are video games, and because Respondents do not dispute that ETGs meet the remaining alternative elements of the second definition of video game of chance, the Court should hold that ETGs are video games of chance. The Commission's decision, which approves their use at Running Aces, should therefore be vacated.

III. ETGS ARE UNLAWFUL GAMBLING DEVICES

Because ETGs are video games of chance, they are gambling devices. Minn. Stat. § 609.75, subd. 4 ("'Gambling device' also includes a video game of chance, as defined in subdivision 8."). But they are also gambling devices under the separate statutory definition set forth in Minn. Stat. § 609.75, subd. 4.[9] SMSC Br. 32–39. As the Community foreshadowed in its opening brief, Respondents' arguments that ETGs do not meet the definition revolve around variations of the argument that, for something to be a gambling

[9] **Gambling Device.** A gambling device is a contrivance the purpose of which is that for a consideration a player is afforded an opportunity to obtain something of value, other than free plays, automatically from the machine or otherwise, the award of which is determined principally by chance, whether or not the contrivance is actually played.

device, it must be fully automatic—***a requirement that does not exist in the statutory language***. *Id.* at 35. The Court should not be persuaded by their arguments.

Further, by definition, "associated equipment" does not include a gambling device. Because ETGs are gambling devices, they cannot be associated equipment. Minn. Stat. § 609.75, subd. 4a.

Finally, Respondents both rely heavily on an unpublished Court of Appeals decision from 2013 involving Running Aces, arguing that ETGs are similar to an iTable machine referenced in that opinion. Comm'n Br. 18–19 (relying on *In re Request of N. Metro Harness Initiative*, *LLC*, 2013 WL 4711204 (Minn. App. Sept. 3, 2013)); RA Br. 9-10 (same). Setting aside the nonbinding nature of that decision, whether the iTable was an illegal gambling device was not at issue in the case. And assuming it had been, ETGs do not resemble the iTable; they resemble the Table Master game that was at issue in the *North Metro Harness* case and that was determined to be a gambling device.

A. There is No Requirement that ETGs Must Be Fully Automatic to Be Gambling Devices

Respondents continue to make variations of the argument that, for a device to be a gambling device, it must be fully automatic. Comm'n Br. 17–20. There is no requirement that a device be fully automatic to fall under the definition of gambling device. Minn. Stat. § 609.75, subd. 4; SMSC Br. 34–37. This Court's precedents reinforce that position.[10] The stock clock game in *State v. Grimes* required a player or operator to wind it "up with a

[10] Running Aces concedes that the statutory definition follows the earlier cases addressing whether various contrivances were gambling devices. RA Br. 30. The Commission's brief does not address these cases.

crank," place cards on the machine, "'invest' a sum of money in some 'stock' represented by a particular card by purchasing a ticket from the owner of the machine," and pull a cord to make the machine work. 52 N.W. 42, 42 (Minn. 1892). The stock clock machine did not dispense winnings "automatically." The owner of the machine held the players' money and paid the winner, but that did not prevent the court from concluding, "The clock was the device." *Id.* The gum-vending machine that could award players a free beer in *State v. La Due* required a human being to distribute the free beer. 269 N.W. 527, 527-28 (Minn. 1936) (restaurant owner testified that LaDue "told me you could give beer when it paid, when it read ['beer']").[11] Similarly, mechanical slot machines in the pre-computer age, which are gambling devices under *Foley v. Whelan*, required players to insert their coins and pull levers to start the machines. 17 N.W.2d 367, 370 (Minn. 1945).

Respondents also downplay the automation of ETGs, to no avail. The Commission argues that ETGs are not gambling devices because "their purpose is to pass information between a dealer and a player, not determine a winner," Comm'n Br. 17, and that, "the opportunity to win something of value does not come automatically from the machine," *id*. There is no exception in the definition of gambling devices for devices that, *inter alia*. pass information, particularly when betting on that information occurs with the device. Regardless, ETGs do much more than pass information. A player's entire experience playing an ETG is through a video touchscreen. *See supra* Section II.B. The ETG system

[11] The conclusion that the gum machine with cylinders that could spell "beer," leading to the award of a free beer, was a gambling device was so apparent to the Court that it termed LaDue's appeal "frivolous and obviously useless." *Id.* at 528.

accepts bets, automatically displays graphical representations of cards that are dealt, calculates wins and losses, pays out winnings, and "tells the dealer what actions to take during each hand." *See supra* Section II.B. ETGs cannot be played without that system, which does everything besides physically deal the automatically shuffled cards.

Similarly, the Commission's assertion that ETGs "do nothing different than a player sitting at table's edge could accomplish by manually moving poker chips," Comm'n Br. 18, is belied by the technology itself. As discussed above, the variations of video blackjack and poker played on ETGs could not be played on a traditional felt-covered card table. *Supra* Section II.B. The Commission's argument also ignores the video player tables entirely. It is the player tables that accept the bettor's money, display credits from wins and losses, and print out receipts redeemable for cash.

In another framing of the same argument, the Commission argues that ETGs are not automatic enough "because without a human dealer dealing real cards, there would be no outcome to record" on the ETGs. Comm'n Br. 19. The same can be said about the ETG video player tables and the ETG system: without them, the games cannot be played. It is not as if a player could play an ETG if the video player table is turned off. They would just be sitting at an inoperable table. If the Commission's point is (again) that human involvement is necessary for ETGs to be played, so they must not be gambling devices, this Court's precedent dictates otherwise.

Finally, the Commission complains that the Community's interpretation of the phrase "automatically from the machine ***or otherwise***" in Section 609.75, subd. 4 (emphasis added), is too broad to the point that it would render the statutory language

meaningless.[12] *Compare* SMSC Br. 35–36, *with* Comm'n Br. 19–20. The Commission contends that "or otherwise" must refer to the machine, and thus the machine must provide the opportunity to obtain something of value itself. *Id.* That interpretation renders the language "or otherwise" surplusage, because if the machine provides the opportunity, it would do so "automatically."[13] The Community submits that the legislature inserted "or otherwise" to broaden the reach of the statute to cover the many ways that clever people could devise to modify gambling devices in an effort to avoid the statute's proscriptions, such as the inclusion of a human being in some aspect of the machine's functioning. The Community's interpretation is consistent with this Court's precedent, which predates but informs the modern statutory definition, holding that some human intervention does not exclude a device from being defined as a gambling device.

Running Aces makes similar unavailing arguments. First, Running Aces cites a dealer job description in the record—the same job description that makes clear that the dealer does nothing but follow prompts. MRC000075 ("The computer system tells the dealer what actions to take during each hand."); *see also* MRC000041–43 (showing the prompts the dealer and players see on the ETG system). Second, Running Aces argues that for ETGs to be gambling devices, they must be "devices in and of themselves." RA Br. 31. Again, this Court's precedent dictates otherwise. *See supra* Section III.A. Third, Running

[12] Running Aces does not address the Community's argument.

[13] AM. HERITAGE DICTIONARY OF THE ENG. LANGUAGE, ("*Automatic*") ("Acting or operating in a manner essentially independent of external influence or control . . . ."), https://ahdictionary.com/word/search.html?q=automatically (last visited Apr. 22, 2025).

Aces argues that—despite the obvious electronic nature of ETGs—they "are not machines but are better described as activities." RA Br. 31. These "activities" operate the same as video blackjack, poker, and baccarat, equipped with touchscreen player interfaces. SMSC Br. 6–7. ETGs are neither more nor less an "activity" than is the play of any other gambling device.

Finally, Respondents argue that ETGs are "associated equipment" because they merely "monitor" card games. RA Br. 32; *see also* Comm'n Br. 20. Again, under Minn. Stat. § 609.75, subd. 4a, for ETGs to be associated equipment, they cannot be gambling devices. Because they are gambling devices, they are not associated equipment. Regardless, the argument that ETGs only monitor card games is unsupported by the record. ETGs are nothing like the chalk board in the 1888 *Shaw* case cited by Running Aces in support of this argument—which did nothing more than list horses racing on a given day, the time of the race, and where the race was taking place. *State v. Shaw*, 39 N.W. 305, 307 (Minn. 1888).[14] Patrons could not interact with the board to place bets. *Id.* And the chalk board was not prompting both players and dealers, accepting and paying out bets, and calculating hand outcomes. ETGs do all of that. SMSC Br. 15–19.

The reasoning in *Shaw* also supports the conclusion that ETGs are gambling devices because, unlike the chalk board, "the manipulation or operation" of ETGs determines the result of the game. *Id.* Players select what to do with the community cards, how much they want to bet, and when—all on the video player tables. *Supra* Section II.B. Players do not,

[14] The Court in the "stock clock" case, *Grimes*, distinguished *Shaw* as well. 52 N.W. at 42.

for example, just see when card games are being played on an ETG. They actually ***play the game through the ETGs***; the devices are not mere conduits of information.

Finally, ETGs are unlike the listed examples of associated equipment in the statute: "cards, dice, computerized systems of betting at a race book or sports pool, computerized systems for monitoring slot machines or games of chance, devices for weighing or counting money, and links which connect progressive slot[s]." Minn. Stat. § 609.75, subd. 4a. Whereas ETGs are the game, and the entire experience for the player, the listed examples are tangential to the gambling experience. If anything, the cards—specifically listed in the statute—being dealt are the associated equipment.

B. The *North Metro Harness* Case Does Not Support or Require a Conclusion that ETGs Are "Associated Equipment"

Both Respondents erroneously rely on the Court of Appeals' unpublished 2013 decision in the *North Metro Harness* case. Comm'n Br. 18-19; RA Br. 9–10. At issue in *North Metro Harness* was whether substantial evidence supported the Commission's decision (supported by a finding from the Department of Public Safety's Alcohol and Gambling Enforcement Division) that a video blackjack game created by Table Master was an unlawful gambling device that Running Aces could not operate, and whether that decision was arbitrary and capricious. 2013 WL 4711204, at *4, *6. The court's discussion of "iTables," on which Respondents rely, was in the context of deciding whether the

Commission's decision was arbitrary and capricious. *Id.* at *6. The iTable device was not being challenged and thus whether it was being legally operated was not at issue.[15] *Id.*

Nevertheless, even assuming *North Metro Harness* were binding on this Court (it is not), the decision were published (it is not), and the legality of the iTable device were at issue (it was not), ETGs are materially different from iTables. First, iTables involve a traditional felt-covered table with only six places for players and a dealer. MRC000340. As seen below, touchscreens are embedded into the table. *Id.*

[16]

Second, players each receive their own hands from the dealer, just like in traditional blackjack. *Id.* There are no community hands, multi-hand betting, or the ability to deal to a potentially unlimited number of players. Third, because the game is so similar to traditional blackjack, there are no separate rules for the iTable blackjack game. Finally, the

[15] For the avoidance of doubt, the Community does not concede that the iTable is not a gambling device or video game of chance, an issue that is not presented here.

[16] Bally Tech., *Pinterest*, https://pin.it/4t2bTI2Zo (last visited Apr. 23, 2025).

iTable software does not run the game, like the ETG software, which prompts the dealer to deal cards and times the players' responses.

In contrast, the Table Master game that was actually at issue in *North Metro Harness*, looks almost identical to the ETGs:

[17]

It functions the same as an ETG, except that it has a digital dealer instead of a nominal human dealer following computer prompts. *N. Metro Harness*, 2013 WL 4711204, at *4. Given these parallels, if the Court is to give weight to the *North Metro Harness* case at all, that weight favors the Community's argument that ETGs are gambling devices.

[17] URCOMPED, https://urcomped.com/game/slotmachine/details/2009/tablemaster-fusion-blackjacksg-gaming (last visited Apr. 15, 2025).

IV. THE AMENDED PLAN OF OPERATION VIOLATES THE 80-TABLE STATUTORY LIMIT FOR CARD CLUBS

Assuming ETGs are card games, and this form of "card playing" is not a prohibited gambling device or video game of chance, it is still subject to the "limitations" set by Minn. Stat. § 240.30, subd. 8, which limits each card club to 80 tables "used for card playing." Under the Respondents' interpretation of what constitutes card playing, each player table is certainly "used for card playing." Because the Commission approved the operation of 111 tables used for card playing, its decision must be vacated. SMSC Br. 45–50.

The Commission argues no, it did not, because (1) player tables are not "tables" according to a dictionary definition selected by the Commission; (2) ETGs are just like moving a chair away from a traditional felt-table game, and that would not expand the number of tables; and (3) there is no indication that the legislature intended to limit the number of players. Comm'n Br. 10-12; *see also* RA Br. 40–41 (making the same argument regarding the number of players). None of these arguments excuses the evasion of the legislature's limitations on gaming at card clubs.

First, the Court should not follow the Commission's proffered dictionary definition—which also would not encompass the dealer table, as it is not a "smooth flat slab." Something like a kitchen table (what the definition pertains to) is not at issue here. What is at issue is whether player tables are "a tables used for card playing." Minn. Stat. § 240.30, subd. 8. The player tables that Respondents claim should not count toward the table limit are used exclusively for playing a digital card game.

Second, ETGs cannot be likened to simply moving a chair away from a traditional felt-covered table. This hypothetical is divorced from reality; no one claims to have witnessed such strained physical behavior in a casino. Regardless, ETGs are not like moving a chair back from a standard dealer table. Because of the community-card nature of the hands dealt at the ETG's dealer table, the electronic play of the game at the player tables, and the remote nature of each player from the dealer and other players, it is incomparable to any sort of play undertaken at a traditional table hosting both dealers and players. Instead, it is more akin to twelve separate, smaller traditional tables—each one displays all cards dealt each hand and eleven of them (the ones Respondents do not want counted) involve a player making betting decisions, cashing in and out, and deciding how to play their electronic, community cards.

Third, the 80-table limit is in a subdivision of the statute titled "limitations." Minn. Stat. § 240.30, subd. 8. The limitations in the statute refer to "tables used for card playing"—dealer tables and player tables equally meet that definition, as the ETG system cannot function without both of them. The Commission's approval of the Amended Plan of Operation allows Running Aces to have limitless players, which contravenes any reasonable interpretation[18] of the statute.

[18] The Commission claims that it adopted an interpretation of "tables used for card playing" that is consistent with the statute's plain language. Comm'n Br. 9. In truth, the Commission did not adopt any interpretation of the 80-table limit. The Commissioners deferred such interpretive work to the courts. MRC000216, Tr. 17:7–9 (commissioner's statement that the statute does not address whether player tables should count toward the limit but that is something that would ultimately be "up to the courts to decide" and "not us").

Finally, the Commission suggests that the Community's interpretation is "unworkable" because the number of tables would fluctuate depending on the number of players, instead of the number of dealers—which is in Running Aces' control. Comm'n Br. 14-15. This argument is untethered to how the Commission actually counts tables. The record here demonstrates that the Commission counts tables based on the number of physical tables on the floor plan. *See* MRC000388 (showing 78 total tables on Running Aces' floor plan, excluding the player tables). Because the number of counted tables is static—regardless of whether they are occupied—the Community's argument is not "unworkable."

Running Aces' arguments fare no better. First, Running Aces argues that the statute "unambiguously refers to where the cards are actually dealt." RA Br. 38. The statute says nothing about dealing: it refers to "tables used for card playing." With ETGs, both the dealer's table and each separate player table are "tables used for card playing."

Second, Running Aces argues that the Court should defer to the Commission's interpretation. RA Br. 39. The Commission did not provide any interpretation to which the Court could defer. Running Aces admits this only a few lines below its introduction of this argument. *Id.* ("And while the Commission 'did not provide its rationale' for interpreting the 80-table limit statute[….]") To the extent the Commission is adopting an interpretation now, through its appellate counsel's briefs, no deference is owed to such post-hoc rationalizations. *See J.D. Donovan, Inc. v. Minn. Dep't of Transp.*, 878 N.W.2d 1, 9, n.7 (Minn. 2016) (agency interpretations that are "tantamount to a litigation position" are not entitled to deference).

Third, Running Aces argues that the Community's interpretation requires adding words to the statute. RA Br. 40. Not so. Both dealer tables and player tables are "tables used for card playing." It is the combination of both types of tables that allows an electronic table game to be played.

Because the approved Amended Plan of Operation permits Running Aces to operate 31 tables more than is permitted by statute, the Commission's decision should be vacated.

V. THE COMMISSION WAS UNLAWFULLY APPLYING AN UNPROMULGATED RULE

As detailed in the Community's opening brief, SMSC Br. 50–57, the Commission has been unlawfully enforcing an unpromulgated rule to approve ETGs at both Running Aces and Canterbury Park. Respondents argue that (1) the Community cannot challenge an unpromulgated rule in a certiorari appeal and (2) the Commission was not unlawfully enforcing an unpromulgated rule.[19] Respondents are wrong on both arguments.

A. The Community Can Challenge the Enforcement of an Unpromulgated Rule in This Case

Respondents argue that unpromulgated rule challenges may only be brought under Minn. Stat. § 14.381. *See* Comm'n Br. 22; RA Br. 41–42. This assertion is incorrect under the language of the statute and is contrary to this Court's precedent. Section 14.381

[19] The Commission also argues that the Community failed to "properly raise this issue" because it "was not presented to [the Commission]" and therefore "no record was developed." Comm'n Br. 22. The Community explicitly requested the Commission to initiate notice-and-comment rulemaking in a letter. MRC000175–83. The Commission considered the request at the meeting. SMSC Br. 56–57 (citing MRC000214, Tr. 15:16–21 (commissioner stating that there may "need[] to be some rulemaking on this before we move forward")).

provides that "[a] person ***may petition*** the Office of Administrative Hearings seeking an order of an administrative law judge determining that an agency is enforcing or attempting to enforce a policy . . . as though it were a duly adopted rule" (emphasis added). The statute is permissive, providing one avenue for relief from an unpromulgated rule.

But Minnesota courts have repeatedly held that unpromulgated rule claims may also be raised through certiorari review when the alleged rule is applied in an agency action, such as a quasi-judicial decision. This Court has done so at least twice, including as recently as 2019. In *In re Minn. Living Assistance, Inc.*, and earlier in *White Bear Lake Care Ctr. v. Minn. Dep't of Pub. Welfare*, the Court reviewed unpromulgated rule claims on the merits in direct appeals from agency decisions. 934 N.W.2d 300, 307 (Minn. 2019); 319 N.W.2d 7, 9-10 (Minn. 1982). The same is true of multiple Court of Appeals decisions—including one cited by the Commission itself. *See* Comm'n Br. 23 (citing *Minn. Transitions Charter Sch. v. Comm'r of Educ.*, 844 N.W.2d 223, 226-34 (Minn. App. 2014) (considering unpromulgated rule challenge in a certiorari appeal)).

B. The Commission Unlawfully Applied an Unpromulgated Rule

Since 2017, the Commission has repeatedly enforced the unpromulgated ETG rule without undertaking formal rulemaking. The Commission approved ETGs in 2017 under the condition that the games "will be played 'live' without the use of a random number generator." MRC000082. The Commission admits that it continues to apply this "same condition" across all ETG approvals and even states that when it approved the Amended Plan of Operation in 2023, it did not (re)consider whether ETGs could lawfully be operated

at card clubs.[20] Comm'n Br. 15, 24. Yet, Respondents refuse to acknowledge that the Commission has been enforcing an unpromulgated rule and insist, against the evidence in the record, that its decision was made on a case-by-case basis.

First, Respondents' claim that the Commission made a case-by-case decision when it approved the Amended Plan of Operation under review is baseless. Comm'n Br. 24–25; RA Br. 3, 5, 18, 42. Since 2017, the Commission has applied the same conditions to approve ETGs at least four times, not counting the times that it made similar approvals for Canterbury Park. SMSC Br. 51–53. It admits now that it did not reconsider the issue even when, here, Running Aces sought to introduce new ETGs. Comm'n Br. 15; MRC000292– 93.

In support of this argument, the Commission relies on a Court of Appeals decision, *L & D Trucking v. Minn. Dep't of Transp.*, 600 N.W.2d 734 (Minn. App. 1999). Comm'n Br. 25. In *L & D Trucking*, MnDOT sent materials to contractors that announced its interpretation of "commercial establishments" excepted from a prevailing-wage law. *Id.* at 735. A district court concluded that the interpretation constituted unauthorized rulemaking and enjoined the agency from enforcing the unpromulgated rule. *Id.* MnDOT continued to

[20] To the extent the Commission intends to argue that ETGs cannot be challenged because the Amended Plan of Operation "did not propose any change to the technology used at Running Aces," Comm'n Br. 15, the argument should be rejected. The Amended Plan of Operation added a new dealer table, equipped with the ETG technology, and eleven new player tables. SMSC Br. 23–24. Those new games can be challenged, and a decision finding that they were unlawfully approved for any of the reasons the Community raises will impact the legality of other ETGs. Judicial review of ETGs should not be evaded, as the Commission approved a new ETG recently for which a separate appeal is pending. SMSC Br. 12.

perform detailed compliance reviews of companies that were potentially subject to the prevailing wage law and made at least one determination consistent with the rule it was prohibited from enforcing. *Id.* at 737. The companies challenged the enforcement, contending "that because MnDOT is enjoined from enforcing its published interpretation of the term 'commercial establishments' it is also enjoined from applying the statutory term on a case-by-case basis." *Id.* The court held that such a limitation on an agency's decisional power "would allow a contractor to avoid application of the prevailing-wage law simply by claiming it falls within the exception for certain 'commercial establishments.'" *Id.* The court rejected the argument and held that "such a result would be absurd." *Id.*

Here, in contrast, the Community is not arguing that the Commission cannot determine what games a card club can operate on a case-by-case basis. But when it does so through issuing and applying statements of general and prospective applicability, it is engaged in rulemaking without adhering to the rulemaking process set forth in the Minnesota Administrative Procedure Act ("MAPA"), Minn. Stat. Ch. 14. This Court has made clear that agencies may not circumvent MAPA by "announcing new policy in a case-by-case fashion." *In re Minn. Living Assistance*, 934 N.W.2d at 308–09. But that is exactly what the Commission did here. The Commission created an unpromulgated rule in 2017 and has continued to apply it—admitting that the Commission has not been determining whether ETGs constitute an unlawful gambling device or video game of chance each time new ETGs are added to a card room's floor plan. Comm'n Br. 15.

Second, Running Aces tries to rebut the Community's argument regarding the general and prospective effect of the Commission's rule by claiming that the direction that

ETGs approved for Running Aces are approved for all card clubs is language "from Running Aces' submission, not the Commission's approval." RA Br. 43. The premise of this argument—that it is not direction approved by the Commission—is false. The language is from the Amended Plan of Operation ***approved*** by the Commission. *See* Comm'n Br. 22; MRC000385. And once language is incorporated into a plan of operation, that language carries the full force of law. *See* Minn. Stat. § 240.30, subd. 7(c)-(d) (making it a "violation of law" and a "violation of a rule of the commission" to violate an approved plan of operation); *see also id.* §§ 240.22 (imposing civil fines for violations), 240.26, subd. 3 (imposing criminal penalties for violations). Additionally, the idea that language setting out a rule for all card clubs ("Any game approved by the Racing Commission shall be an approved game for all licensees") came from Running Aces is far-fetched. Running Aces has no control over which card games are approved. That power belongs to the Commission, which notably does not make this argument.

Third, Running Aces' contention that the Commission's repeated approvals of amended floor plans demonstrate the absence of a rule is likewise unpersuasive. RA Br. 42–43; *see also* Amicus Curiae Brief of Canterbury Park ("Canterbury Am. Br.") 13 (making similar point). Minn. Stat. § 240.30, subd. 6, requires card clubs to obtain approval from the Commission for all card games to be played, the time and location of card games, arrangement of the card tables, and more. That does not mean that the Commission considered the legality of ETGs each time, for example, Running Aces rearranged its tables. And the Commission has expressly admitted that it did not revisit that issue when it approved Running Aces' 2023 Amended Plan of Operation. Comm'n Br. 15. The same is

true for approvals of floor plans for Canterbury Park, which had to be amended for it to operate ETGs because ETGs are played with unique player tables and dealer tables that would not have been in Canterbury Park's prior layouts.

Finally, statements in Canterbury Park's amicus brief support the Community's arguments. Canterbury Park admits that it operates ETGs. Canterbury Am. Br. 1 ("Canterbury's card room, like Running Aces', includes [ETGs] pursuant to a floor plan approved by the Commission."). Canterbury does not claim that the Commission separately considered whether ETGs could be operated by card clubs in response to a request from Canterbury, because it did not. The Commission created an unpromulgated rule and has routinely applied it to permit the card clubs to operate all sorts of ETGs.

C. The Commission's Unpromulgated Rule Did Not Apply the Statute's Plain Language

Assuming the Community is correct that the Commission unlawfully applied an unpromulgated rule, the Commission argues that it merely applied the plain language of Minn. Stat. § 240.30 when it approved ETGs "with the understanding that the card games will be played 'live' without the use of a random number generator." Comm'n Br. 22, 26. But those terms appear nowhere in the statute. The statute allows "card playing activities," *id.*, subd. 6(a), not the digitized simulation of ETGs. The absence of any statutory reference to "games to be played live" or without using a "random number generator" supports the Community's position that the standard is an agency invention that does not fall under the plain-language exception.

The Court of Appeals decisions cited by the Commission do not support its position; if anything, they illustrate how the plain-language exception is inapplicable here. Comm'n Br. 23–24. In *Minn. Transitions*, the agency interpreted the term "district," which was defined in the statute as a "school district," to not include a charter school. 844 N.W.2d at 227. A charter school is plainly not a school district. In *Care Providers of Minn. v. Gomez*, the Department of Human Services sent assessment letters for the federal share of overpayments to medical providers because the statute required the department to recover the "federal share of the determined overpayments." 545 N.W.2d 45, 47 (Minn. App. 1996). Again, a plain and straightforward application of the statutory language occurred in that case. Finally, the issue in *First Nat'l Bank v. Auto. Fin. Corp*., was whether the challenged statutory language imposed a fiduciary duty—there was no challenge to an agency-related policy or unpromulgated rule. 661 N.W.2d 668, 674 (Minn. App. 2003). Thus, the exception is inapplicable here.

CONCLUSION

The Court should reverse the decision of the Court of Appeals and vacate the Commission's decision approving the 2023 Amended Plan of Operation, and impose additional appropriate relief as set forth in the Community's opening brief, SMSC Br. 57.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief contains 9,963 words and complies with the type and volume limitations of Rule 132 of the Minnesota Rules of Appellate Civil Procedure. This brief was prepared using a proportionally spaced typeface using Microsoft Word 2016 processing program in a 13 font size, and Times New Roman type style.

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