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MEMORANDUM

To: Chairman Barker
Members of the House Committee on Federal and State Affairs

From: Jason B. Long, Senior Assistant Revisor

Date: March 13, 2018

Subject: Legal barriers to sports wagering in Kansas

It is illegal under current law to place a bet on any sports event in Kansas. This memorandum reviews the state and federal legal barriers to conducting what is commonly referred to as sports wagering in this state.

Federal Law

Since 1992, federal law has prohibited most states from conducting sports wagering. The Professional and Amateur Sports Protection Act of 1992 (PASPA) states that it is

unlawful for ... a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact ... a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.¹

The PASPA provides four exceptions to its general prohibition. First, certain limited lotteries tied to the outcome of sporting events are permitted in a few states, such as Delaware and Oregon.² Nevada was "grandfathered" in so as to allow such wagering in that state.³ New Jersey was given an opportunity to authorize and conduct sports wagering if it had done so within one year after the PASPA was enacted.⁴ Finally, and most relevant to Kansas, the PASPA prohibition does not apply to parimutuel animal racing.⁵ It should be noted that the

¹ 28 U.S.C. § 3702.

² 28 U.S.C. § 3704(a)(1).

³ 28 U.S.C. § 3704(a)(2).

⁴ 28 U.S.C. § 3704(a)(3).

⁵ 28 U.S.C. § 3704(a)(4).

federal prohibition also extends to "Indian lands" as that term is defined under the Indian Gaming Regulatory Act.⁶

While New Jersey did not take advantage of the one-year exception and authorize sports wagering in the early 1990s, in 2011, the New Jersey Legislature submitted a referendum to the state's voters and the state constitution was ultimately amended to allow sports wagering. The state legislature subsequently passed a sports wagering law permitting the State to license sports wagering in casinos and racetracks. The state law was challenged as a violation of the PASPA by the major sports leagues, such as Major League Baseball, the National Football League, and the National Collegiate Athletic Association.

New Jersey argued that the PASPA is unconstitutional in that it violates the 10th Amendment to the U.S. Constitution by "commandeering" states to enforce the federal government's prohibition on sports wagering. The state also argued that the grandfather exception for Nevada violates the constitutional principle of equal sovereignty of the states by singling out Nevada for preferential treatment. Both arguments were rejected by the federal district court and the 3rd Circuit Court of Appeals, which upheld the PASPA as a constitutional federal law that simply preempts state law on sports wagering.⁷

New Jersey then enacted a second state law that merely repealed state laws prohibiting sports wagering. While not expressly authorizing any particular regulatory scheme for conducting sports wagering in New Jersey, the law removed state law barriers to sports wagering. This second act was also challenged by the national sports governing bodies as a violation of the PASPA. New Jersey's argument focused more on the nature of the second enactment in that it was a mere repeal of state statutes and not an affirmative authorization of sports wagering. New Jersey argued that federal law could not bar a state from repealing its own laws, and that to do so would be a 10th Amendment violation as the state would be "commandeered" by the federal government and be forced to keep certain laws on the books.⁸

This argument was also rejected at the trial court levels. This time the 3rd Circuit sitting *en banc* rejected the 10th Amendment argument as well as the equal sovereignty argument, which was raised again.⁹ The U.S. Supreme Court granted *certiorari* and oral argument was heard on December 4, 2017.

⁶ 28 U.S.C. § 3704(b). *See also*, 28 U.S.C. § 2703(4).

⁷ 730 F.3d 208 (3rd Cir. 2013).

⁸ 832 F.2d 389 (3rd Cir. 2016).

⁹ *Id.* at 401.

If the U.S. Supreme Court rules in favor of New Jersey on either argument to the extent that the PASPA is held unconstitutional, then there would likely no longer be a federal legal barrier to the states authorizing sports wagering. However, due to the nature of the New Jersey law that is being challenged and the constitutional arguments raised, the Court could issue a more narrow ruling that may only be applicable to New Jersey. In that case, Kansas would likely still be barred by federal law from authorizing sports wagering. Finally, if the Court rules in favor of the sports leagues, then the PASPA will remain valid federal law and sports wagering will remain illegal in Kansas.

State Law

In addition to federal legal barriers to sports wagering, there are two state law obstacles to authorizing sports wagering in Kansas. First, gambling is generally prohibited by Section 3 of Article 15 of the Constitution of the State of Kansas (State Constitution). The State Constitution contains three exceptions to the general prohibition. Bingo games may be conducted by nonprofit organizations.¹⁰ Likewise, parimutuel horse and dog racing may be conducted by nonprofit organizations.¹¹ Finally, the State may own and operate a state lottery.¹² The Kansas Expanded Lottery Act (KELA), which authorizes state-owned gambling at lottery gaming facilities and racetrack gaming facilities, has been held to fall under this exception.¹³

Unless a fourth exception is amended into the State Constitution, sports wagering would most likely need to be conducted as part of the state-owned lottery exception in order to be constitutional in Kansas. Whether sports wagering is authorized under the existing KELA or under a newly created sports wagering law, sports wagering would need to be owned by the State, and ultimate operational control over sports wagering would need to remain with the State.

The second legal barrier to sports wagering under state law is the existing statutory prohibition on sports wagering. State law currently provides that it is a Class B misdemeanor to bet on sports events.¹⁴ An exception to the criminal statutes to allow sports wagering would be necessary if the State were to allow individuals to place bets on sports events.

¹⁰ Art. 15, § 3a of the Constitution of the State of Kansas.

¹¹ Art. 15, § 3b of the Constitution of the State of Kansas.

¹² Art. 15, § 3c of the Constitution of the State of Kansas.

¹³ *State ex rel. Six v. Kansas Lottery*, 286 Kan. 557 (2008).

¹⁴ K.S.A. 2017 Supp. 21-6404. *See also*, K.S.A. 2017 Supp. 21-6403 (defining "bet").

Conclusion

The State of Kansas can only authorize sports wagering if the PASPA is either held unconstitutional by the U.S. Supreme Court, or if it is repealed or amended by Congress so as to allow the several states to authorize sports wagering. Until the federal legal barrier is resolved any state legislative action would likely be subject to a court challenge similar to what has occurred in New Jersey.

If the federal legal barrier is removed, the State may still only authorize sports wagering in accordance with the State Constitution. Absent a new constitutional amendment, this would require that the State own and control sports wagering. It would also require the repeal or amendment of current state criminal laws to allow sports wagering.