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**REVISOR of STATUTES**

LEGISLATURE of THE STATE of KANSAS  
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300 SW TENTH AVENUE ■ SUITE 24-E ■ TOPEKA, KS 66612 ■ (785) 296-2321

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**MEMORANDUM**

To: Chairman Estes  
Members of the 2018 Special Committee on Federal and State Affairs

From: Jason B. Long, Senior Assistant Revisor

Date: December 4, 2018

Subject: Legal barriers to sports wagering in Kansas

It is illegal under current law to place a bet in Kansas on any sports event. 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.<sup>1</sup>

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.<sup>2</sup> Nevada was "grandfathered" in to allow such wagering in that state.<sup>3</sup> 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, which the state did not.<sup>4</sup> Finally, and most relevant to Kansas, the PASPA prohibition does not apply to parimutuel animal racing.<sup>5</sup> It should be noted

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<sup>1</sup> 28 U.S.C. § 3702.

<sup>2</sup> 28 U.S.C. § 3704(a)(1).

<sup>3</sup> 28 U.S.C. § 3704(a)(2).

<sup>4</sup> 28 U.S.C. § 3704(a)(3).

<sup>5</sup> 28 U.S.C. § 3704(a)(4).

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

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 several 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 10<sup>th</sup> 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 3<sup>rd</sup> Circuit Court of Appeals, which upheld the PASPA as a constitutional federal law that simply preempts state law on sports wagering.<sup>7</sup>

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 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 10<sup>th</sup> Amendment violation as the state would be "commandeered" by the federal government and be forced to keep certain laws on the books.<sup>8</sup>

This argument was also rejected at the trial court level. The 3<sup>rd</sup> Circuit, sitting *en banc*, also rejected the 10<sup>th</sup> Amendment argument.<sup>9</sup> The U.S. Supreme Court granted *certiorari* and oral argument was heard on December 4, 2017.

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

<sup>7</sup> 730 F.3d 208 (3<sup>rd</sup> Cir. 2013).

<sup>8</sup> 832 F.2d 389 (3<sup>rd</sup> Cir. 2016).

<sup>9</sup> *Id.* at 401.

On May 14, 2018, the United States Supreme Court held that the PASPA violated the "anticommandeering" principle of our federal constitution by requiring states to continue their statutory prohibitions on sports wagering.<sup>10</sup> In *Murphy v. National Collegiate Athletic Association*, the Court explained that the anticommandeering doctrine "is simply the expression of a fundamental structural decision" in U.S. Constitution.<sup>11</sup> It is "the decision to withhold from Congress the power to issue orders directly to the States."<sup>12</sup> It prohibits the federal government from directly ordering the States to enforce federal law. In this case the federal law in question required states to maintain a statutory prohibition on sports wagering.

The Court held that although the States were not being required to take affirmative action, as had happened in prior "anticommandeering" cases, the federal restriction on the States' ability to repeal their sports wagering bans was effectively the same type of commandeering federal law prohibited by the U.S. Constitution.<sup>13</sup> J. Alito, writing for the Court, explained:

PASPA includes an exemption for States that permitted sports betting at the time of enactment, § 3704, but suppose Congress did not adopt such an exemption. Suppose Congress ordered States with legalized sports betting to take the affirmative step of criminalizing that activity and ordered the remaining States to retain their laws prohibiting sports betting. There is no good reason why the former would intrude more deeply on state sovereignty than the latter.<sup>14</sup>

After holding that the PASPA's prohibitions on state operation and authorization of sports wagering were unconstitutional, the Court also held that the remainder of the PASPA could not be severed from the offending portion rendering the entire law unconstitutional.<sup>15</sup> This included the provisions making it unlawful for individuals to operate, promote, or advertise sports wagering.

Since the Court struck down the PASPA, several states have enacted laws authorizing sports wagering.

### State Law

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

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<sup>10</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481 (2018).

<sup>11</sup> *Id.* at 1475.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1478.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1484.

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Kansas (Kansas Constitution). The Kansas Constitution contains three exceptions to the general prohibition. Bingo games may be conducted by nonprofit organizations.<sup>16</sup> Likewise, parimutuel horse and dog racing may be conducted by nonprofit organizations.<sup>17</sup> Finally, the State may own and operate a state lottery.<sup>18</sup> 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 last exception.<sup>19</sup>

Unless a fourth exception is added to the Kansas 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.<sup>20</sup> 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.

#### Conclusion

Although the U.S. Supreme Court removed the federal barrier to sports wagering in Kansas when it struck down the PASPA, the State may still only authorize sports wagering in accordance with the Kansas Constitution. Absent a constitutional amendment expressly authorizing such gaming, the State would need to own and control sports wagering. The Legislature would also need to repeal or amend the current state criminal laws to allow sports wagering.

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<sup>16</sup> Art. 15, § 3a of the Constitution of the State of Kansas.

<sup>17</sup> Art. 15, § 3b of the Constitution of the State of Kansas.

<sup>18</sup> Art. 15, § 3c of the Constitution of the State of Kansas.

<sup>19</sup> *State ex rel. Six v. Kansas Lottery*, 286 Kan. 557 (2008).

<sup>20</sup> K.S.A. 2017 Supp. 21-6404. *See also*, K.S.A. 2017 Supp. 21-6403 (defining "bet").