



Kentucky Bar Association Annual Convention

**MORE THAN A  
LAWYER**

Lexington, Kentucky  June 13-15, 2018

**THE POTENTIAL IMPACT OF  
*CHRISTIE v. NATIONAL  
COLLEGIATE ATHLETIC  
ASSOCIATION* ON THE  
FUTURE OF SPORTS BETTING  
IN KENTUCKY**

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Lexington, Kentucky

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**Kentucky Bar Association**

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**THE POTENTIAL IMPACT OF NAT'L COLLEGIATE ATHLETIC ASS'N v.  
GOVERNOR OF N.J. ON THE FUTURE OF SPORTS BETTING IN KENTUCKY**

Kerry O. Irwin

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**I. INTRODUCTION**

On June 27, 2017, the United States Supreme Court granted *certiorari* in the appeal of *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 832 F.3d 389 (3d Cir. 2016) ("*Christie II*"), New Jersey's ongoing (and second<sup>1</sup>) challenge to the Professional and Amateur Sports Protection Act ("PASPA"),<sup>2</sup> the federal statute that prohibits wagering on professional and amateur sports in most states. New Jersey challenged PASPA on several grounds including a violation of the Commerce Clause and the United States Constitution's anti-commandeering and equal sovereignty principles. The case was heard by the Supreme Court in early December 2017, and the Court is expected to rule in late spring or early summer of 2018, likely before the date of the KBA Annual Convention.

Meanwhile, although only a few states have a legal sports betting industry (outside of the daily fantasy sports industry), a sports betting black market thrives in the United States. The American Gaming Association ("AGA") estimates that \$150 billion was wagered on sports illegally in 2016.<sup>3</sup> As many states, including Kentucky, face substantial budget deficits, focus has turned to the potential revenue that could result from regulated sports wagering. Further, attitudes towards sports betting, even among national sports leagues, has evolved substantially. Both an NHL and an NFL franchise have recently established a home in Las Vegas, and it stands to reason that other professional teams may follow.

As of February 2018, the date of the submission of these materials, a growing number of states have introduced – and some states have passed – legislation that would spring into effect upon a ruling by the Court striking down PASPA, authorizing sports betting and ending the monopoly on the industry currently held by only a few states, most notably Nevada. Kentucky is among the states that have legislation pending in the form of two bills that would, respectively, amend Section 226 of the Constitution of Kentucky to authorize the General Assembly to

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<sup>1</sup> New Jersey initially challenged PASPA in *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013) ("*Christie I*"), discussed further, *infra* Section 3.1.1.

<sup>2</sup> Professional and Amateur Sports Protection Act, 28 U.S.C. §§3701-04.

<sup>3</sup> American Gaming Association, *The Sports Betting Opportunity: New Research Shows Legalized Sports Betting will Generate Economic Growth, American Jobs and Tax Revenues* at 1 (available at [https://www.americangaming.org/sites/default/files/sidebar\\_file/8.31.17.Oxford.pdf](https://www.americangaming.org/sites/default/files/sidebar_file/8.31.17.Oxford.pdf)) (last visited February 22, 2018) (citing Oxford Economics, *Economic Impact of Legalizing Sports Betting* (May 2017) (available at <https://www.americangaming.org/sites/default/files/AGA-Oxford%20-%20Sports%20Betting%20Economic%20Impact%20Report1.pdf>) (last visited February 22, 2018)).

define and permit casino gambling<sup>4</sup> and amend Kentucky's gambling statutes to authorize casino gambling<sup>5</sup> and one bill that would create a new section of KRS Chapter 230 to require the Kentucky Horse Racing Commission to institute a sports wagering system.<sup>6</sup> This paper discusses the history of the federal prohibition of sports betting, New Jersey's current challenge to PASPA, and the potential for legalized sports betting in the Commonwealth.

## II. SPORTS BETTING IN THE UNITED STATES

### A. Federal Framework

While several federal gambling laws apply to sports betting, and particularly sports betting across state lines, PASPA is the primary federal statute governing sports betting in the United States. PASPA, which was enacted in 1992, prohibits any governmental entity from sponsoring, operating, advertising, promoting, licensing or authorizing by law or compact any "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>7</sup> Section 3704 of PASPA then exempts certain state-sponsored sports betting, effectively grandfathering in a handful of states. First, pari-mutuel wagering on animal racing and jai-alai games are exempted.<sup>8</sup> This exception, together with an exemption under the Wire Act<sup>9</sup> and the enactment of the Interstate Horseracing Act,<sup>10</sup> are the reason that pari-mutuel wagering on horse racing is the primary form of sports betting that is legal in the majority of states. Second, PASPA

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<sup>4</sup> BR 197 (available at <http://www.lrc.ky.gov/recorddocuments/bill/18RS/BR197/bill.pdf>) (last visited February 22, 2018).

<sup>5</sup> BR 149 (available at <http://www.lrc.ky.gov/recorddocuments/bill/18RS/BR149/bill.pdf>) (last visited February 22, 2018).

<sup>6</sup> BR 155 (available at <http://www.lrc.ky.gov/recorddocuments/bill/18RS/BR155/bill.pdf>) (last visited February 22, 2018).

<sup>7</sup> 28 U.S.C. §2702. This section also prohibits any person from sponsoring, operating, advertising, or promoting, pursuant to the law or compact of a governmental entity, 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>8</sup> *Id.* at §3704(a)(4).

<sup>9</sup> The Wire Act prohibits the transmission of bets or wagers, or information assisting with the placing of bets or wagers, via a wire communication facility across state lines; however, the Wire Act does not apply to transmissions where the bet is legal in both the transmitting and the receiving state. 18 U.S.C. §1084(a)-(b).

<sup>10</sup> 15 U.S.C. §3701 *et seq.*

exempts any "betting, gambling, or wagering scheme, other than a lottery conducted exclusively in casinos located in a municipality, but only to the extent that (A) such scheme or a similar scheme was authorized, not later than one year after the effective date of [PASPA], to be operated in that municipality; and (B) any commercial casino gaming scheme was in operation in the municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality."<sup>11</sup> This exemption allowed states a one-year grace period to enact legislation that comported with the exemption. No state was able to enact such legislation within that time period.

PASPA also exempts "a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both (A) such scheme was authorized by a statute as in effect on October 2, 1991; and (B) a scheme described in Section 3702 (other than one based on pari-mutuel or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity."<sup>12</sup> Finally, PASPA exempts "a lottery, sweepstakes or other betting, gambling, or wagering scheme in operation in a State or other governmental entity to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990."<sup>13</sup> Together, these exemptions effectively exempted Nevada, Oregon, Delaware and Montana from the general sports betting prohibition. Nevada, of course, had full-scale sports betting. Delaware and Oregon had a parlay system, which is "a scheme that requires selecting multiple correct outcomes – built into their state lotteries."<sup>14</sup> And Montana allowed bars to offer various types of very limited sports pools.<sup>15</sup> As noted above, PASPA also would have exempted any state that enacted legislation authorizing sports betting during the one-year grace period, but no state took advantage of that exemption.

PASPA provides only civil injunctive relief, giving both the Department of Justice (the "DOJ") and "a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of

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<sup>11</sup> 28 U.S.C. §3704(3)(A)-(B).

<sup>12</sup> *Id.* at §3704(2)(A)-(B). PASPA's Senate Report indicates that this exemption attached to Nevada. S. REP NO. 102-248, at 10 (1991).

<sup>13</sup> *Id.* at §3704(1). PASPA's Senate Report indicates that this exemption attached to Delaware and Oregon. S. REP. No. 102-248, at 10 (1991).

<sup>14</sup> "Professional Sports Leagues' Big Bet: 'Evolving' Attitudes on Gambling," 28 *Stan. L. & Pol'y Rev.* 273 at 277.

<sup>15</sup> Mont. Admin. R. 23.16.1705 (2014).

such violation" the right to initiate a lawsuit.<sup>16</sup> This right factored into *Christie II*, as well as its predecessor challenge to PASPA, *Christie I*.<sup>17</sup>

Briefly, several other federal statutes govern gambling in the United States, although these statutes only target interstate gambling that crosses state lines. The genesis of the majority of these laws was in the mid-twentieth century, when "[s]ophisticated criminal organizations openly defied authorities and quickly 'became the primary operators of [illegal] sports gambling schemes throughout the United States.'"<sup>18</sup> In order to target organized crime, in 1961 Congress passed the Wire Act,<sup>19</sup> the Travel Act,<sup>20</sup> and the Interstate Transportation of Wagering Paraphernalia Act.<sup>21</sup> In 1964 Congress passed the Sports Bribery Act<sup>22</sup> and in 1970 Congress passed the Illegal Gambling Business Act.<sup>23</sup> Notably, these acts did not seem to accomplish much in the way of curbing illegal gambling in the U.S. A 1976 report by the Commission on the Review of the National Policy Toward Gambling found that "effective gambling law enforcement [is] an impossible task," and that over two-thirds of the population participated in gambling.<sup>24</sup> In 1983, roughly \$8 billion was wagered illegally on sports in the United States.<sup>25</sup> By 1989 the amount had reached \$50 billion<sup>26</sup> and has increased steadily until the present, although it is impossible to pinpoint the actual number wagered illegally, due to the lack of official statistics. These statistics factored into the passage of PASPA in 1992.

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<sup>16</sup> *Id.* at §3703.

<sup>17</sup> This history of *Christie I* and *Christie II* is discussed *infra* in Section II(3) of this paper.

<sup>18</sup> "Tackling PASPA: The Past, Present, and Future of Sports Gambling in America," 66 *DePaul L. Rev.* 23 at 27 (hereinafter "Tackling PASPA") (*quoting* Eric Meer, Note, "The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States," 2 *UNLV Gaming L.J.* 281, 284 (2011)).

<sup>19</sup> Act of Sept. 13, 1961, Pub. L. No. 87-216, 75 Stat. 491 (codified as amended at 18 U.S.C. §1084).

<sup>20</sup> Act of Sept. 13, 1961, Pub. L. No. 87-228, 75 Stat. 498 (codified as amended at 18 U.S.C. §1952).

<sup>21</sup> Act of Sept. 13, 1961, Pub. L. No. 87-218, 75 Stat. 492 (codified as amended at 18 U.S.C. §1953).

<sup>22</sup> Act of June 6, 1962, Pub. L. No. 88-316, 78 Stat. 293 (codified as amended at 18 U.S.C. §224).

<sup>23</sup> Act of Oct. 15, 1970, Pub. L. No. 91-452, 84 Stat. 937 (codified as amended at 18 U.S.C. §1955).

<sup>24</sup> "Comm'n Report on the Rev. of the Nat'l Pol'y toward Gambling, *Gambling in America* 169 (1976) at 35 and ix.

<sup>25</sup> Dan McGraw, "The National Bet," *U.S. News & World Rep.*, Apr. 7, 1997, at 46.

<sup>26</sup> Alexandra Berzon, "Betting Against a Gambling Ban," *Wall St. J.* (Dec. 17, 2012).

The two other federal statutes that impact interstate sports gambling are the Interstate Horseracing Act and the Unlawful Internet Gambling Enforcement Act ("UIGEA").<sup>27</sup> The former authorizes interstate wagering on horse racing (and, as amended, authorizes internet wagering on horse racing via account wagering operators), while the latter mainly targets banks and payment processors that process payments related to unlawful wagers placed over the internet. While the UIGEA may initially have targeted online poker, it has largely been involved in the regulation of daily fantasy sports. Ultimately, however, while the above federal statutes could play a role in gambling regulation if the larger prohibition is struck down, this paper focuses on PASPA and the ongoing challenge to its constitutionality in *Christie II*, as the fall of PASPA could result in legal sports betting in Kentucky.

## B. The Sports Betting Black Market in the United States

As noted, *supra*, the AGA estimates that \$150 billion was wagered on sports illegally in 2016 in the U.S.<sup>28</sup> Americans wagered an estimated \$4.7 billion on Super Bowl 51; yet, 97 percent of those wagers, or approximately \$4.5 billion, were placed illegally.<sup>29</sup> The combined total of wagering on both Super Bowl 51 and 2017 March Madness was more than \$15 billion; yet, only three percent of that number was wagered legally.<sup>30</sup> The AGA estimated \$92 billion in wagers was placed on NFL and college football games for the 2016-2017 season, but only \$2 billion of that total was wagered legally.<sup>31</sup> As noted above, the national sports leagues, which have the right to seek an injunction under PASPA, have traditionally opposed legalizing sports wagering, but the numbers cited, *supra*, do not support this position, especially if the leagues are arguing on the basis of integrity concerns. A highly regulated wagering scheme, such as Nevada's, imposes strict guidelines on operators and tracks wagers, revenue and unusual betting patterns. In contrast, the states without regulated gambling schemes operate in a kind of sports betting Wild West. The introduction – and proliferation – of daily fantasy sports has changed the sports betting landscape in the United States and, more importantly, created partnerships between sports leagues and contest operators, with most of the major sports leagues investing in daily fantasy sports. The leagues appear to now see the potential for partnerships between professional sports leagues and sports books. Not only have the Los Angeles Rams relocated to Las Vegas, and the NHL added the Las

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<sup>27</sup> 31 U.S.C. §§5361-5367.

<sup>28</sup> American Gaming Association, *The Sports Betting Opportunity*, *supra* note 3.

<sup>29</sup> Daniel Roberts, "Super Bowl Bets are at an All-Time High – and 97% are 'In the Dark,'" *Yahoo Finance* (Feb. 2, 2017) (available at <https://finance.yahoo.com/news/super-bowl-bets-are-at-an-all-time-high-and-97-are-in-the-dark-190700239.html>).

<sup>30</sup> Nicholas Casiello, Jr., *et al.*, "Update: U.S. Sports Betting," *American Gaming Lawyer* (Autumn 2017) at 7.

<sup>31</sup> *Id.*

Vegas Golden Knights, but the NBA and other leagues have begun lobbying efforts for certain state legislation that would authorize sports betting, provided that an "integrity fee" of one percent of all wagers placed is given to the applicable sports league. Removing league opposition – and replacing it with political and financial support – could undermine PASPA even without a constitutional challenge. However, the leagues and New Jersey, which has twice attempted to legalize sports betting, remain in opposition in New Jersey's ongoing legal battle to strike down PASPA.<sup>32</sup>

### III. **NAT'L COLLEGIATE ATHLETIC ASS'N V. GOVERNOR OF N.J.**

#### A. *Christie I*

New Jersey's initial attempt to legalize sports wagering came in 2012, when the state passed a referendum that amended the state's constitution to permit the legislature to "authorize by law wagering [...] on the results of professional, college, or amateur sport or athletic events."<sup>33</sup> Shortly thereafter, the legislature passed the Sports Wagering Law, which would permit state regulators to license sports wagering in casinos and racetracks, and for casinos to operate sports pools.<sup>34</sup> After the legislation was signed into law, the professional sports leagues, exercising their rights under PASPA, sued the state, alleging that the law violated PASPA ("*Christie I*").<sup>35</sup> New Jersey countered that PASPA was unconstitutional, in violation of the Commerce Clause and the U.S. Constitution's anti-commandeering and equal sovereignty principles.<sup>36</sup> The district court found PASPA to be constitutional, and the state appealed to the Third Circuit Court of Appeals.

In upholding the decision of the district court, the *Christie I* court found that the activity governed by PASPA – state-licensed wagering on sports – is interstate commerce activity that "may be regulated by Congress under the Commerce Clause because (1) wagering and the operations of

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<sup>32</sup> Delaware actually preceded New Jersey in challenging PASPA. In 2009, Delaware enacted legislation that would grant racetrack casinos the right to accept wagers on any professional or amateur sporting event. "Tackling PASPA" at 33. Prior to PASPA, Delaware had offered a weekly lottery game based on regularly scheduled NFL games, which game was grandfathered in via the PASPA exemptions. *Id.* The 2009 law, however, expanded the scope of Delaware's permissible sports wagering, allowing single-game bets. *Id.* The sports leagues filed a complaint and motion for an injunction against the state, and, on appeal, the Third Circuit held that PASPA barred the state from enacting the law, because under the exemption to PASPA the state was limited to the same scheme that it had previously conducted through its original games – multi-bet parlay wagers on NFL games. *OFC Comm. Baseball v. Markell*, 579 F.3d 293, 304 (3d Cir. 2009).

<sup>33</sup> N. J. Const. art. IV, §7, PP2(D), (F).

<sup>34</sup> N.J. Stat. Ann. §§5:12A-1 to -6 (West 2012 & Supp. 2014) (repealed 2014).

<sup>35</sup> *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013) ("*Christie I*").

<sup>36</sup> *Christie I*, 730 F.3d 208, 224-40 (3d Cir. 2013).

sports leagues are economic activity, (2) sporting events hosted all across the country 'substantially affect' interstate commerce, and (3) the \$500 billion that Americans gamble on sports each year also 'substantially affects interstate commerce.'<sup>37</sup> With respect to the state's anti-commandeering argument, the *Christie I* court found that "the anti-commandeering principle was not violated because PASPA merely invalidates state laws attempting to regulate sports gambling and 'does not require or coerce the states to lift a finger.'<sup>38</sup> Finally, the Third Circuit rejected New Jersey's argument that PASPA violated "the equal sovereignty of the states by singling out Nevada for preferential treatment and allowing only that State to maintain broad state-sponsored sports gambling," holding that, "while legislation under the Commerce Clause may be limited by the equal sovereignty principle in certain aspects, Congress is not prevented from enacting laws that treat states differently."<sup>39</sup> Because "the Commerce Clause authority is aimed at matters of national concern," laws enacted under the Clause "will necessarily affect states differently."<sup>40</sup> New Jersey's appeal to the Supreme Court was denied, so the state went back to the drawing board.

#### B. *Christie II*

New Jersey took the *Christie I* ruling as a kind of roadmap to navigating PASPA's prohibitions. Specifically, the Third Circuit had opined that: "[w]e do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering [...]. Under PASPA, on the one hand, a state may repeal its sports wagering ban, a move that will result in the expenditure of no resources or effort by any official. On the other hand, a state may choose to keep a complete ban on sports gambling, but it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be."<sup>41</sup> New Jersey, in response, enacted Senate Bill 2460 in 2014, which provided that:

Any rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed to the extent they apply or may be construed to apply at a casino or gambling

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<sup>37</sup> "Tackling PASPA," *supra* note 18, at 36-37 (citing *Christie I*, 730 F.3d 208, 224-25 (3d Cir. 2015)).

<sup>38</sup> *Id.* at 37 (citing *Christie I*, 730 F.3d 208, 231 (3d Cir. 2013)).

<sup>39</sup> *Id.* (citing *Christie I*, 730 F.3d 208, 238 (3d Cir. 2013)).

<sup>40</sup> *Id.*

<sup>41</sup> *Christie I*, 730 F.3d 208, 232-33 (3d Cir. 2013).

house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of wagers on professional, collegiate, or amateur sports contests or athletic events [...].<sup>42</sup>

Operating in the negative, the new law, by partially appealing its sports gambling prohibitions, effectively authorized sports gambling in casinos and racetracks licensed by the state.

The professional sports leagues were quick to challenge the 2014 law, filing a complaint for declaratory and injunctive relief against Governor Chris Christie,<sup>43</sup> arguing that the law was "nothing more than a de facto authorization of sports gambling."<sup>44</sup> Both the district court and the Third Circuit held that the 2014 law violated PASPA.<sup>45</sup> The Third Circuit noted that, because the law "provided specific instructions on who may legally place a bet" and "selectively dictated where a bet could be placed and on what sports," the practical effect of the law was more than a repeal, but that it "affirmatively authorized" sports betting, amounting to a prohibited "authorization" in violation of PASPA.<sup>46</sup> The Third Circuit did grant the state's request for a rehearing *en banc*, but upon rehearing, the Third Circuit again affirmed the district court, holding that, even though the 2014 law contained the word "repeal," it acted as an "affirmative authorization" of sports wagering.<sup>47</sup> The state appealed to the United States Supreme Court, which granted *certiorari* on June 27, 2017.<sup>48</sup> On December 4, 2017, the Supreme Court heard oral arguments on the appeal.<sup>49</sup> A decision will not likely come down until spring or early summer of 2018, and there is a great deal of speculation as to how the Court will rule.

As in the lower court rulings and *Christie I*, New Jersey's challenge to PASPA rests on the grounds that PASPA violates Congress's powers under the Commerce Clause, the Tenth Amendment's limitations on

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<sup>42</sup> N.J. Stat. Ann. §5:12A-7.

<sup>43</sup> See "Complaint for Declaratory & Injunctive Relief," *Christie II*, 61 F.Supp.3d 488 (D. N.J. 2014).

<sup>44</sup> *Id.* P. 5.

<sup>45</sup> *Christie II*, 61 F.Supp.3d 488, 506 (D.N.J. 2014), *aff'd on reh'g*, 832 F.3d 389 (3d Cir. 2016) (*en banc*).

<sup>46</sup> "Tackling PASPA," *supra* note 18, at 41 (*citing Christie II*, 799 F.3d 259, 266 (3d Cir. 2015)).

<sup>47</sup> *Christie II*, 832 F.3d 389, 397 (3d Cir. 2016) (*en banc*).

<sup>48</sup> [https://www.supremecourt.gov/orders/courtorders/062717zr\\_6537.pdf](https://www.supremecourt.gov/orders/courtorders/062717zr_6537.pdf).

<sup>49</sup> The full transcript of the oral arguments is available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/16-476\\_4fb4.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-476_4fb4.pdf).

Congress's powers and the Due Process Clause and equal protection principles.

Several parties filed amicus briefs in *Christie II*, including attorneys for the Trump administration, who filed a brief in support of the professional sports leagues that oppose legalizing sports betting.<sup>50</sup> The brief was filed by the Office of the Solicitor General, which had also argued that the Supreme Court should not hear New Jersey's appeal. The Supreme Court, in granting *certiorari*, went against this recommendation. In its brief, the Solicitor General argued that, to the extent that PASPA is unconstitutional, only a portion of PASPA is at issue (the provision that prohibits a state from enacting a sports betting law), which leaves open the possibility that the Supreme Court could only strike down that portion of the law.<sup>51</sup> New Jersey's argument – and the removal of the federal prohibition on sports betting – relies on the Supreme Court striking down PASPA in its entirety, rather than carving out a single provision, which would leave the general federal prohibition standing.

It is also possible that only the exemptions set forth in PASPA could be struck down in violation of the equal sovereignty doctrine. Lawyers for New Jersey have focused their equal sovereignty arguments on how PASPA favors Nevada. "The [DOJ] does not contend that PASPA's coverage is in any way 'related to the problem it targets.' Nor could it, for PASPA exempted from its sweep the States in which sports betting was most prevalent."<sup>52</sup> New Jersey also focused on PASPA's different treatment of grandfathered and non-grandfathered states: "PASPA plainly gives the disfavored States less sovereign power with respect to sports wagering than it gives to the favored States, because only the favored States have the power to decide whether to permit such wagering."<sup>53</sup> If the Supreme Court agrees with this argument but upholds the general prohibition, the Court could strike down only the exemptions, resulting in a federal ban on sports betting in Nevada and other grandfathered states.<sup>54</sup>

As of the writing of this paper in February 2018, several states have introduced or enacted legislation that would authorize sports betting in the event that the Supreme Court strikes down PASPA or Congress passes

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<sup>50</sup> <https://www.legalsportsreport.com/wp-content/uploads/2017/10/SG-SCOTUS-brief.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> Brief for Appellants Christopher J. Christie *et al.* at 13, *Christie I*, 730 F.3d 208 (3d Cir. 2013) (Nos. 13-1713, 13-1714 & 13-1715).

<sup>53</sup> Reply Brief for Appellants Christopher J. Christie *et al.* at 56, *Christie I*, 730 F.3d 208 (3d Cir. 2013).

<sup>54</sup> Nevada will be negatively impacted by either a partial or a complete repeal of PASPA. If New Jersey prevails on the equal sovereignty argument and the Court strikes down the exceptions, Nevada will lose all sports gambling revenue in its state. If the Court strikes down the federal prohibition in its entirety, Nevada will lose its *de facto* monopoly on legal sports wagering in the U.S.

legislation repealing PASPA and legalizing sports betting. Connecticut<sup>55</sup> and Mississippi<sup>56</sup> led the charge, with both enacting legislation in 2017. Pennsylvania in October 2017 passed a sweeping gaming expansion bill that regulates daily fantasy sports and also authorizes online poker and gambling.<sup>57</sup> The bill also authorizes the state to regulate and legalize sports betting.<sup>58</sup> As is the case in Connecticut and Mississippi, the law would require a change in federal law, either in the form of the Supreme Court striking down PASPA or Congress passing a new law legalizing sports betting at the federal level.<sup>59</sup> Under the Pennsylvania bill, current casinos could offer sports wagering if they obtain a new license and pay a one-time license fee of \$10 million. Gross revenue on sports betting would be taxed at a rate of 34 percent.<sup>60</sup> And wagering could be offered on both collegiate and professional sports.<sup>61</sup>

Three Midwestern states introduced sports betting bills – Illinois,<sup>62</sup> Missouri<sup>63</sup> and Iowa,<sup>64</sup> all three are states that already have expanded gaming in the form of casinos. Each bill would take effect if the Supreme Court strikes down PASPA.<sup>65</sup> The Illinois "Sports Betting Consumer

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<sup>55</sup> Legal Sports Report, "Connecticut Now on Deck for Sports Betting, as Governor Signs Bill into Law" (July 18, 2017) (available at <https://www.legalsportsreport.com/14632/connecticut-governor-signs-sports-betting-bill-law/>) (last visited February 23, 2018). In addition to needing a repeal of PASPA, the Connecticut law would also require the state repealing its existing prohibition on sports betting. *Id.*

<sup>56</sup> Legal Sports Report, "Mississippi is already Poised to Offer Legal Sports Betting, Thanks to Language in a Fantasy Sports Law (June 29, 2017) (available at <https://www.legalsportsreport.com/14536/mississippi-sports-betting-law/>) (last visited February 23, 2018). The Mississippi legislation was actually the first sports betting legislation passed (outside of New Jersey and Delaware) – the language was slipped into a fantasy sports bill.

<sup>57</sup> Legal Sports Report, "PA Governor Signs Sports Gambling Law, but What's Next?" (October 30, 2017) (available at <https://www.legalsportsreport.com/16339/pa-sports-betting-law/>) (last visited February 23, 2018).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> SB2478 (available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2478&GAID=14&DocTypeID=SB&SessionID=91&GA=100>) (last visited February 23, 2018).

<sup>63</sup> House Bill No. 2320 (available at <https://house.mo.gov/billtracking/bills181/hrbillspdf/6198H.021.pdf>) (last visited February 23, 2018).

<sup>64</sup> House Study Bill 592 (available at <https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=HSB592>) (last visited February 23, 2018).

Protection Act" allows for regulated sports betting absent a federal prohibition, although it does not establish actual fees or other constraints, leaving that to future regulations.<sup>66</sup> The Iowa bill would allow the state's casinos and racetracks to accept sports wagers, and also authorizes "any system of wagering as authorized by the commission."<sup>67</sup> The Missouri bill would allow casino boat operators or licensed daily fantasy sports operators to offer games based on sporting events.<sup>68</sup>

The West Virginia Senate passed a bill to legalize sports wagering in February 2018.<sup>69</sup> Specifically, the state's racetracks and The Greenbrier Resort would have the right to offer sports betting to patrons.<sup>70</sup> The bill is now pending before the West Virginia House of Delegates.<sup>71</sup> The legislation would authorize the state lottery to regulate sports wagering, would authorize online or mobile wagering if authorized by the lottery commission, and would tax operators at a rate of 10 percent on their gross gaming revenue.<sup>72</sup>

The National Basketball Association has lobbied for a one percent "integrity fee" for sports leagues in any sports betting bills (which the leagues generally receive in connection with legalized daily fantasy sports), and the fee does not appear in any of the enacted legislation or the majority of the pending legislation, which could lead to league opposition. However, New York has introduced a draft of a new sports betting bill that would include a compromise on the integrity fee issue.<sup>73</sup> The bill includes an integrity fee of 0.25 percent of total handle, which would be payable to the leagues upon which wagering would occur.<sup>74</sup>

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<sup>65</sup> Legal Sports Report, "Sports Betting is all the Rage in the Midwest: New Bills Pop up in Illinois, Iowa, Missouri" (January 31, 2018) (available at <https://www.legalsportsreport.com/18125/sports-betting-bills-llinois-iowa-missouri/>) (last visited February 23, 2018).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Senate Bill 415 (available at [http://www.wvlegislature.gov/Bill\\_Status/bills\\_history.cfm?INPUT=415&year=2018&sessiontype=RS](http://www.wvlegislature.gov/Bill_Status/bills_history.cfm?INPUT=415&year=2018&sessiontype=RS)) (last visited February 23, 2018).

<sup>70</sup> Legal Sports Report, "West Virginia Senate Says "Yes" to Sports Betting as Bill Gains Momentum" (February 20, 2018) (available at <https://www.legalsportsreport.com/18531/west-virginia-senate-passes-sports-betting/>) (last visited February 23, 2018).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See <https://www.legalsportsreport.com/wp-content/uploads/2018/02/NY-Sports-Discussion-Draft.pdf> (last visited February 23, 2018).

<sup>74</sup> Legal Sports Report, "This Might be the NY Sports Betting Bill to Watch: Legislation Surfaces with Compromise on 'Integrity Fee'" (February 2, 2018) (available at

Further, an Eilers & Krejcik Gaming report projects 32 states are likely to legalize sports betting in some fashion by 2023 if the federal ban on sports betting is lifted.<sup>75</sup> The report projects a U.S. market worth roughly \$6 billion in revenue.<sup>76</sup> There has also been movement on the federal legislative level: on May 25, 2017, the United States House of Representatives Energy and Commerce Committee released discussion draft legislation, the Gaming Accountability and Modernization Enhancement Act of 2017 ("GAME Act"), which proposed to repeal PASPA.<sup>77</sup> The GAME Act would provide that "individuals and governmental entities would not be subject to civil or criminal liability under federal law for engaging in a "gaming activity," through a gaming facility, where the activity is lawful under the law of the state in which the activity takes place."<sup>78</sup>

The E&K report was commissioned by the West Virginia Lottery. West Virginia's attorney general also authored an amicus brief filed in *Christie II* in support of New Jersey, along with 19 other states.<sup>79</sup> Kentucky Governor Matt Bevin also signed the bill; while Bevin has vocally opposed casino gambling in the state, his joining with West Virginia could indicate that the executive office may support legislative efforts to legalize sports betting in Kentucky.

#### IV. KENTUCKY GAMING FRAMEWORK

"Sports betting" is not expressly prohibited by statute in Kentucky. Rather, all wagering is prohibited in the Commonwealth, with certain limited exceptions, most familiarly pari-mutuel wagering on horse racing, the state lottery and charitable gaming. Section 226 of the Kentucky Constitution addresses gambling by addressing the constitutionality of state and charitable lotteries.<sup>80</sup> "Lotteries of

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<https://www.legalsportsreport.com/18574/new-ny-sports-betting-2018-bill/>) (last visited February 23, 2018).

<sup>75</sup> Dustin Gouker, "More than 30 States would Likely Legalize Sports Betting by 2023 if Federal Ban Ends, New Report Says," *Legal Sports Report* (September 26, 2017), <https://www.legalsportsreport.com/15759/sports-betting-future-eilers-report/>.

<sup>76</sup> *Id.*

<sup>77</sup> "Update: U.S. Sports Betting," *supra* note 30 at 10.

<sup>78</sup> *Id.*

<sup>79</sup> Brief of Amici Curiae States of West Virginia, 17 other States, and the Governors of Kentucky, Maryland, and North Dakota in Support of Petitioners, available at [https://www.legalsportsreport.com/wp-content/uploads/2017/09/West-Virginia-Amicus\\_9.5.pdf](https://www.legalsportsreport.com/wp-content/uploads/2017/09/West-Virginia-Amicus_9.5.pdf) (last visited February 23, 2018). See also Legal Sports Report, "Twenty States are Supporting New Jersey in Sports Betting Brief to US Supreme Court" (September 5, 2017) (available at <https://www.legalsportsreport.com/15390/states-support-nj-sports-betting-case/>) (last visited February 23, 2018). The other states that joined West Virginia are Arizona, Florida, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah and Wyoming.

any kind were illegal in Kentucky until section 226 was created through the passage of amendments in 1988 and 1992,<sup>81</sup> with the 1988 amendment authorizing lotteries operated by the state and the 1992 amendment authorizing "charitable lotteries" and "charitable gift enterprises."<sup>82</sup> All other lotteries are prohibited. "Lottery," as used in the Kentucky Constitution, encompasses a broad range of gambling activities, arguably encompassing sports betting, or at least casino gaming.<sup>83</sup> As noted by Kentucky's highest court in addressing Section 226, the "familiar elements of a lottery scheme" include "(1) the distribution of money or property – a prize, (2) chance, and (3) a valuable consideration paid or to be paid for the chance."<sup>84</sup> Because a sports bet necessarily involves consideration paid and the distribution of money as a prize, the applicability of the lottery prohibition to sports betting would likely fall on a determination of whether it was a game of chance or skill.

However, in a *per curiam* opinion, Kentucky's then-highest court held that a "lottery," as used in the Constitution, was distinguishable from other forms of gambling, and while there was no ambiguity in Section 226 with respect to lotteries, "the meaning, purpose, and reach of the words used must be deduced from the intention they express considered in the light of the history that pertains to the subject."<sup>85</sup> The court continued:

At the time section 226 was being considered in the convention that framed the Constitution, an amendment was proposed forbidding every species of gambling. Volume 1, Debates of Constitutional Convention p. 1172. The delegate who proposed

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<sup>80</sup> Ky. Const. §226.

<sup>81</sup> "Rolling the Dice on Precedent and Wagering on Legislation: The Law of Gambling Debt Enforceability in Kentucky after *Kentucky Off-Track Betting, Inc. v. McBurney* and KRS §372.005," 95 Ky. L. J. 529 at 533 (citing *Commonwealth v. Louisville Atlantis Cmty./Adapt, Inc.*, 971 S.W.2d 810, 814 (Ky. App. 1997)).

<sup>82</sup> *Id.* (citing Ky. Const. §226(1)-(2); *Louisville Atlantis Cmty.*, 971 S.W.2d at 814).

<sup>83</sup> *But see* 05-003 Op. Ky. Att'y Gen. 2-3 (2005), in which then Attorney General Gregory D. Stumbo opined that the constitutional prohibition only addressed the sale of lottery licenses, and that the framers of the prohibition of lotteries in the Kentucky Constitution were "confident gambling would continue to be effectively regulated by statute, and further that statutory law, which is inherently more flexible than the dictates of a constitution, was the best way to regulate other forms of gambling in the future." *Id.* at 2-8. Although Kentucky would have the authority to prohibit kinds of gambling through its police power, Stumbo felt that there was no constitutional barrier to the legalization of other forms of gaming. *Id.* This argument could certainly be used in the future to argue that the legislature could authorize sports betting via statute, rather than having to amend the Constitution to carve out this specific gambling activity. It should be noted, however, that Stumbo's efforts to support the cause of expanded gaming in the Commonwealth with this argument were unsuccessful.

<sup>84</sup> *Commonwealth v. Allen*, 404 S.W.2d 464, 466 (Ky. 1966) (citing *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160, 162 (Wash. 1965)).

<sup>85</sup> *Commonwealth v. Kentucky Jockey Club*, 38 S.W.2d 987, 992 (Ky. 1931) (addressing the applicability of the lottery prohibition to pari-mutuel wagering on horse racing).

the amendment was asked whether his proposition embraced the prohibition of betting upon the speed of horses, to which he responded that it was his purpose to forbid all species of gambling and all games of chance in every conceivable form. He argued that all gambling was equally wrong, and that it was unfair to denounce gambling in the form of a lottery and to countenance it in other forms, such as betting upon horse races and the like. [...] The amendment was rejected, thus indicating that it was the intention of the Convention not to include section 226 anything but lotteries of the type familiar at the time.<sup>86</sup>

Thus, the court concluded, "[i]t did not occur to any one during that period that betting on races, elections, or *similar forms of wagering* constituted a lottery."<sup>87</sup> It is, therefore, arguable that, based on Kentucky jurisprudence and legislative history, an amendment to the Kentucky Constitution would not be required to legalize sports betting in the Commonwealth.

However, there would clearly need to be statutory amendments to authorize sports betting. Again, while "sports betting" per se is not expressly mentioned in Kentucky's gambling statutes, the definitions therein encompass sports wagering operations. Chapter 528 of the Kentucky Revised Statutes prohibits promoting and/or permitting gambling activity.<sup>88</sup> The statute defines "gambling" as: "staking or risking something of value upon the outcome of a contest, game, gaming scheme, or gaming device which is based upon an element of chance, in accord with an agreement or understanding that someone will receive something of value in the event of a certain outcome."<sup>89</sup> This definition could engender the skill versus chance argument, but the Kentucky statutes further prohibit bookmaking,<sup>90</sup> which is defined by statute as "advancing gambling activity by unlawfully accepting bets upon the outcome of future contingent events from members of the public as a business."<sup>91</sup> This prohibition unequivocally applies to the operators of sports books. Pari-mutuel wagering on horse racing, the only legal form of "sports" wagering in the Commonwealth, is expressly authorized by statute.<sup>92</sup>

Based on the above, it is not surprising that the bills addressing expanded gaming that have been introduced in the Kentucky legislature have approached the issue by statutory amendment, constitutional amendment, or a combination of the two. It is also not surprising that expanded gaming bills, generally, have

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<sup>86</sup> *Id.* at 993.

<sup>87</sup> *Id.* (emphasis added).

<sup>88</sup> KRS 528.020.

<sup>89</sup> KRS 528.010(3)(a).

<sup>90</sup> KRS 528.020(1)(a).

<sup>91</sup> KRS 528.010(2).

<sup>92</sup> See KRS 230.210-230.990; 810 KAR 1:011(1).

been introduced in Kentucky. Like many states, Kentucky is facing a severe budget deficit, as well as a critical underfunding of its pension fund.<sup>93</sup>

## V. KENTUCKY LEGISLATION AS OF FEBRUARY, 2018

### A. BR 149 and BR 197

Expanded gaming bills introduced in the Kentucky House of Representatives in December 2017 by Representative Dennis Keene (D) and Representative Rick Rand (D) take the combined approach of a constitutional amendment and a statutory amendment.<sup>94</sup> BR 197 proposes to amend Section 226 of the Constitution to authorize the General Assembly to define and permit casino gaming.<sup>95</sup> Notably, prior to July 1, 2029, proceeds from casino gaming would be used to pay for oversight of casino gaming, with 100 percent of proceeds in excess of oversight costs going to the Kentucky Retirement Systems to fund its pension fund.<sup>96</sup> This provision would sunset; however, after July 1, 2029, the General Assembly would have the discretion to allocate the proceeds as it determined.<sup>97</sup>

As an amendment to the Constitution, BR 197 would be submitted to the voters of the Commonwealth for their ratification or rejection at the time and in the manner provided for under Sections 256 and 257 of the Constitution and under KRS 118.415. While amending the constitution is arguably not necessary for authorizing sports betting (as it wasn't necessary for authorizing pari-mutuel wagering on horse racing), the lottery prohibition more likely applies to many casino games, necessitating the amendment.<sup>98</sup>

Introduced by Representative Keene, the Minority Caucus Chair, BR 149 is the companion legislation that would legalize casinos by statute. Specifically, the legislation would:

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<sup>93</sup> See *U.S. News & World Report*, "Kentucky Governor says State Budget 'Won't be Pretty,'" (December 21, 2017) (available at <https://www.usnews.com/news/best-states/kentucky/articles/2017-12-21/kentucky-governor-says-state-budget-wont-be-pretty>) (last visited February 23, 2018).

<sup>94</sup> According to the Lexington *Herald Leader*, Sen. Morgan McGarvey (D) and Rep. Jerry Miller (R) have plans to introduce a casino bill in 2018. Lexington *Herald Leader*, "From Coal to Craps. Supporters push for casino in historic Eastern Kentucky town" (December 12, 2017) (available at <http://www.kentucky.com/news/state/article191228709.html>) (last visited February 23, 2018).

<sup>95</sup> BR 197, *supra* note 4.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *But see* 05-003 Op. Ky. Att'y Gen. 2-3 (2005), *supra* note 42.

Create a noncodified section to state the findings of the General Assembly; amend KRS 154A.010 to define, "authorizing location," "casino," "county," "county legislative body," "department," "full casino gaming," "gaming licensee," "gross gaming revenue," "handle," "licensee," "limited casino gaming," and "principal"; amend KRS 154A.030 to expand the Lottery Corporation board membership and duties; amend KRS 154A.040 to include casino licensees; amend 154A.063 to remove prohibition against casino gaming; create new sections of KRS Chapter 154A to require a local option election in any precinct wanting to host a casino; describe the duties of the county clerk and sheriff in a casino gaming local option election; state requirements for local option elections held on a day other than a regular election day; require the corporation to advertise an invitation to bid for casinos; require the corporation to evaluate all proposals for full casinos; establish initial licensing fees for full casinos at \$50 million with an initial licensing period of 10 years and annual renewal thereafter at \$6 million per year; permit limited casino gaming at horse racing tracks licensed under KRS Chapter 230; establish requirements for limited casinos; establish requirements for any track holding a limited casino license; establish requirements for principals of any corporation granted a casino license; create license application requirements for casino, manufacturer, or supplier's licenses; prohibit anyone not licensed from selling, leasing, or otherwise furnishing gaming supplies; prohibit anyone under the age of 21 from participating in casino gaming; require the Lottery Corporation to determine occupations related to casino gaming that require licensure and establish criteria for occupational licensing; permit the corporation to initiate disciplinary action against applicants and license holders; establish an appeal process; establish a gaming tax of 31 percent and limit that money to the benefit of the state retirement systems for the first 10 years; establish an admission tax of \$3 per person per day; establish the casino gaming revenue distribution trust fund; establish the regional tourism and infrastructure development fund and provide criteria for projects seeking money from the fund; waive 15 U.S.C. sec. 1172, 1173 and 1174 for devices authorized by this Act; require the corporation to promulgate administrative regulations to define and limit games and devices permitted for gaming in casinos; provide guidelines for exclusion or ejection of certain persons; define "cheat" and provide penalties for those who cheat at casino games; amend KRS 243.500 to exempt limited or full casino gaming; amend KRS 525.090 to exempt persons engaged in casino gaming; amend KRS 528.010 to exempt gambling activity and devices licensed under KRS

Chapter 154A; amend KRS 528.020 to conform; amend KRS 528.070 to exempt activity licensed under KRS Chapter 154A; amend KRS 528.080 to exempt those with the appropriate license required under KRS Chapter 154A; [and] amend KRS 528.100 to exempt limited or full casino gaming licensed under KRS Chapter 154A.<sup>99</sup>

Prior efforts to introduce casinos in Kentucky have been unsuccessful, however (in large part due to the disagreement about whether casinos should be limited to racetracks), and the legalization of historical horse racing at tracks has diminished some of the push for casinos. However, Representative Keene believes the "atmosphere is more receptive right now."<sup>100</sup> The bill would allow Kentucky's racetracks to offer casino gambling, and could add up to four casinos in the state.<sup>101</sup> Keene sees that wagering at these facilities could eventually include other sports, including basketball, baseball and football.<sup>102</sup> The proposed tax on handle under the casino bill would be 31 percent,<sup>103</sup> which is likely prohibitive at this point, although if there is further support for the bill the proposed tax rate would likely be lowered.

B. BR 155

In September 2017, State Senator Julian Carroll (D) filed a sports betting bill in the state legislature. The bill would vest regulatory power in the Kentucky Horse Racing Commission, and would take effect only if PASPA is repealed by Congress or struck down by the Supreme Court.<sup>104</sup> Additionally, the legislation would impose a \$250,000 license fee and a tax rate of 20 percent on handle.<sup>105</sup> Specifically, BR 155, as summarized, would:

Create a new section of KRS Chapter 230 to require the Kentucky Horse Racing Commission to institute a sports wagering system; amend KRS 230.210 to define "exempt

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<sup>99</sup> BR 149, *supra* note 5.

<sup>100</sup> WCPO, "Kentucky could get casinos, higher minimum wage, new tax on hybrid cars if Legislature Oks new bills" (December 21, 2017) (available at <https://www.wcpo.com/news/insider/kentucky-could-get-casinos-higher-minimum-wage-new-tax-on-hybrid-cars-if-legislature-oks-new-bills/?page=2>) (last visited February 23, 2018).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Legal Sports Report, "New Kentucky Bill Would Legalize Casinos, Possibly with Sports Betting" (December 22, 2017) (available at <https://www.legalsportsreport.com/17158/kentucky-casinos-sports-betting/>) (last visited February 23, 2018).

<sup>104</sup> BR 155, *supra* note 6.

<sup>105</sup> *Id.*

sports contest," "sports wagering," and "sports wagering facility"; amend KRS 230.215 to declare it the policy of the Commonwealth to encourage the conduct of wagering on sporting events, when allowed by federal law, and to vest forceful control over sports wagering in the racing commission; include consideration of members of professional and collegiate sports organizations in the Governor's appointments to the commission; amend KRS 230.240 to allow the director of the racing commission to take personnel action relating to sports wagering; amend KRS 230.260 to include promotion of fair sports wagering among the purposes of the racing commission; create a new section of KRS Chapter 230 to establish licensing requirements and establish a licensing fee of \$250,000; create a new section of KRS Chapter 230 to require the racing commission to promulgate administrative regulations prescribing the manner in which sports wagering shall be conducted; provide minimum criteria; prohibit participants from wagering on a sporting event; create a new section of KRS Chapter 230 to establish a 20 percent tax on the total amount wagered at sports wagering facilities; create a new section of KRS Chapter 230 to establish the sports wagering distribution trust fund and appropriate moneys from that fund; amend KRS 230.320 to include sports wagering among the activities that are regulated by the racing commission; amend KRS 230.360 to include sports wagering among the activities that are not subject to local control; [and] amend KRS 230.990 to establish penalties for tampering with the outcome of a sporting event and participant wagering on a sporting event [...].

As noted, the legislation would take effect only if PASPA is repealed by Congress or is rendered void by the Supreme Court.<sup>106</sup>

## VI. LOOKING FORWARD

### A. Outlook on *Christie II*

Presumably, by time of the KBA Annual Convention, the Supreme Court ruling in *Christie II* will have been handed down, and the future of sports wagering in the United States will be clearer. At the time of writing, speculation runs rampant, with many pro-gaming experts predicting a ruling in favor of New Jersey. Christopher Soriano of Legal Sports Report analyzed comments from the Justices shortly after the arguments. Justice Anthony Kennedy, usually a "swing" vote on the Court, commented that "[PASPA] leaves in place a state law that the state does not want, so the citizens of the State of New Jersey are bound to obey a law that the state doesn't want but that the federal government compels the state to have.

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<sup>106</sup> *Id.*

That sounds like commandeering."<sup>107</sup> Justice Samuel Alito "asked the attorney for the leagues why, if Congress wanted to prohibit sports betting, it simply did not go ahead and prohibit it, rather than affect how states legislate."<sup>108</sup> And Justice Stephen Breyer, "who conventional wisdom suggested might not be sympathetic to the state's position, closely questioned the leagues and the United States about how Congress can tell a state legislature that it cannot legislate. The tone of Justice Breyer's questioning strongly suggested a hostility to PASPA."<sup>109</sup> Soriano opined that at least five justices are sympathetic to New Jersey's position.<sup>110</sup> Fittingly, BetDSI, a Costa Rica sports book, has offered odds on the outcome of *Christie II*; reversal of the lower court is the favorite (at -145) with the complete upholding of PASPA at plus odds (+115).<sup>111</sup>

Not only have several states passed sports betting legislation, but the NBA and Major League Baseball are lobbying in various states, an indication that they at least believe that there is a potential that PASPA will be struck down or that Congress will repeal it. The leagues likely recognize that, to the extent that they want a share of wagers in the form of an integrity fee or otherwise, they need to be at the forefront as states are formulating legislation.

#### B. Outlook in Kentucky

As previously noted, while other expanded gaming bills have been unsuccessful in the Commonwealth, the current atmosphere – a state that is in need of supplementary funding for the budget and the pension fund – could be friendlier to a casino or sports wagering bill, especially in light of the general public approval of sports wagering. According to the AGA, 55 percent of Americans support the legalization of sports betting, with 72 percent of avid sports fans in favor, and 45 percent of non-sports fans in favor.<sup>112</sup> Further, 57 percent of Americans agree that regulated sports

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<sup>107</sup> Legal Sports Report, "Reading the Signals from the Supreme Court that US Sports Betting Ban may be Unconstitutional" (December 7, 2017) (available at <https://www.legalsportsreport.com/16866/paspa-unconstitutional-scotus/>) (last visited February 23, 2018). More vote counting indicating that the SCOTUS ruling could be favorable for New Jersey can be found here: <https://www.legalsportsreport.com/16809/scotus-sports-betting-case-votes/> (last visited February 23, 2018).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Sports Handle, "Sportsbook Offers Odds on Legalization of Sports Betting in New Jersey" (February 14, 2018) (available at <https://sportshandle.com/new-jersey-legal-sports-betting-odds/>) (last visited February 27, 2018).

<sup>112</sup> American Sports Betting Coalition, "The One Issue that Units All American Voters: Ending the Federal Sports Betting Ban" (available at [https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/5a78f06f41920224ca11e940/1517875311445/HLG\\_ASBC\\_2\\_5\\_One+Issue.pdf](https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/5a78f06f41920224ca11e940/1517875311445/HLG_ASBC_2_5_One+Issue.pdf)) (last visited February 27, 2018).

betting would protect consumers.<sup>113</sup> Kentucky already has a spectrum of gaming, from the state-supported lottery, including keno and mobile instant play gaming, to charitable gaming, to pari-mutuel wagering, including internet wagering with account wagering companies. It is likely that more expanded gaming bills will be introduced in 2018 and the timing of the Supreme Court ruling will impact the success of both the pending bills and any potential bills.

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<sup>113</sup> *Id.*

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18 RS BR 197

AN ACT proposing an amendment to Section 226 of the Constitution of Kentucky relating to casino gaming.

***Be it enacted by the General Assembly of the Commonwealth of Kentucky:***

→Section 1. It is proposed that Section 226 of the Constitution of Kentucky be amended to read as follows:

(1) The General Assembly may establish a Kentucky state lottery and may establish a state lottery to be conducted in cooperation with other states. Any lottery so established shall be operated by or on behalf of the Commonwealth of Kentucky.

(2) The General Assembly may by general law permit charitable lotteries and charitable gift enterprises and, if it does so, it shall:

(a) Define what constitutes a charity or charitable organization;

(b) Define the types of charitable lotteries and charitable gift enterprises which may be engaged in;

(c) Set standards for the conduct of charitable lotteries and charitable gift enterprises by charitable organizations;

(d) Provide for means of accounting for the amount of money raised by lotteries and gift enterprises and for assuring its expenditure only for charitable purposes;

(e) Provide suitable penalties for violation of statutes relating to charitable lotteries and charitable gift enterprises; and

(f) Pass whatever other general laws the General Assembly deems necessary to assure the proper functioning, honesty, and integrity of charitable lotteries and charitable gift enterprises, and the charitable purposes for which the funds are expended.

(3) **The General Assembly may by general law define and permit casino gaming and, if it does so:**

**(a) Shall provide for the oversight and control of casino gaming by an administrative body funded by license fees and taxes levied on casino gaming:**

**(b) Shall, prior to the fiscal year beginning July 1, 2029, allocate one hundred percent of the proceeds generated from licensing fees and taxation of casinos and casino gaming in excess of the amount required by paragraph (a) of this subsection to the Kentucky Employees Retirement System nonhazardous pension fund, the Kentucky Employees Retirement System hazardous pension fund, and the Kentucky Teachers' Retirement System pension fund in amounts the General Assembly determines best meet the needs of the respective funds at that time; and**

**(c) May, in the fiscal year beginning July 1, 2029, and thereafter, allocate all proceeds generated from licensing fees and taxation of casinos and casino gaming in excess of the amount required by paragraph (a) of this subsection.**

**(4)** Except as provided in this section, lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked.

→Section 2. This amendment shall be submitted to the voters of the Commonwealth for their ratification or rejection at the time and in the manner provided for under Sections 256 and 257 of the Constitution and under KRS 118.415.