WALLACH LEGAL, LLC

Statement to the Interim Joint Committee on
Licensing, Occupations, and Administrative Regulations

Constitutionality of Sports Betting

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Good morning, Chairman Koenig and members of the Committee.

Thank you for inviting me to testify today. My name is Daniel Wallach, and I am the founder of Wallach Legal LLC, a law firm focused primarily on sports wagering and gaming law. I am also the Co-Founding Director of the University of New Hampshire School of Law's Sports Wagering and Integrity Program, the nation's first law school certificate program dedicated to the study of sports wagering law and regulation. I am an adjunct professor at both UNH Law School and University of Miami School of Law. One of the classes that I teach focuses on state constitutional limits on gambling expansion, an appropriate subject for today.

Chairman Koenig has asked me to address the following question: Does the prohibition against "lotteries" in Section 226(3) of the Kentucky Constitution operate to prevent the General Assembly from legalizing sports wagering? Based on my extensive research and analysis of Kentucky law, which included reading the debates of the Constitutional Convention of 1890, I have concluded that the legislative authorization of sports wagering would not constitute the approval of a prohibited lottery nor would it necessitate an amendment to the Kentucky Constitution. To the contrary, it could be accomplished through new legislation enacted by the General Assembly. There are a number of compelling reasons that support this conclusion.

A. Section 226(3) of the Kentucky Constitution prohibits only "lotteries and gift enterprises," not all forms of gambling. As recognized by Kentucky's highest court, the framers of the Constitution expressly rejected a proposal to expand the prohibition to include other forms of gambling, including sports betting.

Sports betting is not expressly prohibited by the Kentucky Constitution. Likewise, the Constitution does not broadly prohibit *all* categories of gambling. Instead, it only reaches what Kentucky's highest court has repeatedly referred to as a "species" of gambling: lotteries and gift enterprises.[1] Those are the only categories of gambling that are prohibited by the Kentucky Constitution. To that end, Section 226(3) of the Kentucky Constitution states, in pertinent part, that "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."

[1] *See Commonwealth v. Malco-Memphis Theatres*, 293 Ky. 531, 169 S.W.2d 596, 598 (1943) (describing as a "species of gambling."); *Commonwealth v. Kentucky Jockey Club, Inc.*, 238 Ky. 739, 38 S.W.2d 987, 992 (1931) (characterizing a lottery as "a species of gambling."). *See also* OAG 05-003 Op. Ky. Att'y Gen., at p. 7 (Mar. 21, 2005) ("Section 226(3) of the Kentucky Constitution applies only to that *subcategory* of gaming traditionally identified as "lotteries.") (emphasis added)

So, what does the term "lotteries" mean in the context of Section 226, which was enacted back in 1892?[2] That term is not defined in the Constitution. For guidance, we must look to the debates surrounding the Constitutional Convention of 1890 for evidence of the framers' intent. *See Kentucky Jockey Club*, 38 S.W.2d at 992 ("The terms used are to be construed according to their meaning *at the time of the adoption of the Constitution* rather than at any other time.") (emphasis added); *Posey v. Commonwealth,* 185 S.W.3d 170, 192 (Ky. 2006) ("'It is a familiar aid in the interpretation of a provision of a constitution to examine the proceedings of the convention. If they clearly reveal the purpose of the particular provision the debates will be accepted as an indication of [their] meaning.'") (quoting *Barker v. Stearns Coal & Lumber Co.*, 287 Ky. 340, 152 S.W.2d 953, 956 (1941); *Talbott v. Pub. Serv. Comm'n*, 291 Ky. 109, 163 S.W.2d 33, 35 (1942) ("If there were any doubt as to the intent in this respect, it would be dissipated by reading the debates of the constitutional convention."); *Stickler v. Higgins*, 269 Ky. 260, 106 S.W.2d 1008, 1013 (1937) ("[T]he constitutional debates when consulted clearly indicate that no such interpretation was within the purpose or intention of the convention.").[3]

A review of the debates of the constitutional convention of 1890 reveals that the framers discussed the scope and breadth of Article 226's prohibition against "lotteries." As shown in those debates, the subject of sports betting came up as part of a proposed amendment to expand Section 226 to include "*all species of gambling*" – rather than just confining it to lotteries. *See Kentucky Jockey Club*, 38 S.W.2d at 993 (recounting the history behind the enactment of Section 226); *see also* Debates, Ky. Constitutional Convention of 1890, Vol. I, pp. 1173-75 [included in meeting packet] (indicating that Delegate John Thompson Funk proposed to add the following language "*Nor any other species of gambling or gaming*" to the eventually-enacted section which read "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 allowed.").

In proposing the amendment, Delegate Funk stated that he believed "[i]f one class of gambling is wrong, every other class of gambling is equally wrong. If it is the object of this Convention to stop one form of gambling, it is nothing but right and proper that the Convention should in the Constitution prohibit all." *Id.* at 1173. Drawing a clear distinction between lotteries and other forms of gambling, Delegate Funk cautioned the other convention delegates that "if [they] adopt this lottery clause, and [only] prohibit lotteries, [they would] simply [be] prohibiting gambling in one form and countenancing it in another. I believe that gambling in any form is wrong." *Id.* He added that "[i]f you are going to put down one class of gambling, let us put it all down. Do not say to one class of people. 'You shall not gamble,' and then to another class of people 'Go on with your gambling. One form is just as harmful to another." *Id.* at 1173-74.

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[2] *Commonwealth v. Malco-Memphis Theatres*, 293 Ky. 531, 169 S.W.2d 596, 597 (1943)

[3] *See also Kentucky Jockey Club*, 38 S.W.2d at 993 (stating that "it is proper to resort to [the debates of the constitutional convention] in order to ascertain the purpose sought to be accomplished by a particular provision where the language employed leaves the meaning in doubt."); *Agric. & Mech. Coll. v. Hager*, 121 Ky. 1, 87 S.W. 1125, 1128 (1905) ("Still another aid to a proper interpretation of the section is open to us; that is, a recourse to the debates of the constitutional convention. . . . [T]hey may properly be consulted in arriving at the meaning of doubtful phrases."); *Todd v. Johnson*, 99 Ky. 548, 36 S.W. 987, 993 (1896) ("[I]t is competent for us to look at contemporary interpretation, and to examine the debates of the convention framing the constitution. Though these by no means will be taken as an exclusive guide, they will serve in arriving at a proper conclusion.").

Crucially, when asked by another delegate if his proposed amendment covered betting on horse races (referred to in the debates as "betting upon the speed of horses"), Funk responded that it was his purpose to forbid "[a]ll species of gambling and all games of chance in every conceivable form." *Kentucky Jockey Club*, 38 S.W.2d at 993 (citing Vol. 1, Debates of the Constitutional Convention, p. 1172). Among the "species of gambling" that he indicated would be constitutionally prohibited under his proposed amendment was **sports betting** – which he called "**betting on baseball**." *See* Debates, Ky. Constitutional Convention of 1890, Vol. I, at p. 1174 [included in meeting packet]. Or, as he glibly put it, "I have tried to cover them all." *Id.*

The proposed amendment – which would have included a ban on "all species of gambling," including sports betting – was rejected by a 52-38 vote. See Vol. 1, *Debates of the Constitutional Convention*, p. 1175. In *Kentucky Jockey Club*, the Court of Appeals characterized the rejection of the broader amendment as "indicating that it was the intention of the Convention not to include in section 226 anything but lotteries of the type familiar at the time." 38 S.W.2d at 993. As the Court of Appeals noted, the framers were targeting a very specific lottery threat – "*the sale of lottery licenses*." *Id.*; OAG 05-003 Op. Ky. Att'y Gen., at p. 7 (Mar. 21, 2005) ("the debates between the framers of the Constitution lay bare their intention to address a specific and easily identifiable problem, the sale of lottery licenses, when they drafted Section 226. They were aware that existing statutory laws made other types of gambling illegal when they rejected the amendment offered to broaden the lottery prohibition to all forms of gambling.").

Since the framers were targeting only a limited problem– *i.e*., the sale of lottery licenses – the Court of Appeals stated that "[i]t did not occur to any one during that period that betting on races, elections, or *similar forms of wagering* constituted a lottery." *Id.*(emphasis added). Thus, for nearly a half century after the adoption of Section 226, "the General Assembly and the Court of Appeals have proceeded upon the general understanding that the whole subject of betting and gaming was within the power of the Legislature to prohibit, regulate, or classify, prohibiting in part and permitting in part, according to its view of the public policy to be enforced." *Id.* at 993-94.

This led the Court of Appeals to conclude in *Kentucky Jockey Club* that "[g]aming, betting and lotteries are **separate and distinct things in law and fact**, and have been recognized consistently as calling for different treatment and varying penalties." *Id.* at 994 (emphasis added) (noting that "the distinctions are well developed, clearly marked, and in most instances rigidly maintained.").

Based on the limited reach of Section 226, the Court of Appeals refused to strike down statutory provisions which had allowed pari-mutuel betting on horse races. In doing so, the parameters of legislative authority were delineated by Kentucky's then-highest court as follows:

> That all forms of gambling are evil and characterized by vicious tendencies does not alter the fact of *the individuality of each type*. We are unable . . . to declare that the section of the Constitution condemning lotteries was understood by the people who adopted it as outlawing betting upon horse races, by the pari-mutuel system, *or the other forms of betting*. It was then

> understood, and has been the accepted opinion that *the subjects of betting and gaming were within the absolute control of the police power, possessed by the Legislature*. It is the duty and function of the Legislature to discern and correct evils, and evils within that power are not limited to some definite injury to public safety or morals, but embrace the removal of obstacles to a greater public welfare.

Id. (emphasis added).

Although more than 85 years have passed since the *Kentucky Jockey Club* opinion was entered, it still provides the most thoughtful and relevant analysis of the questions at hand. As the Kentucky Attorney General has observed, "[c]ase law on the issue since that time, and up to the most recent published decision in 1971, has continued to recognize that the prohibition of 'lotteries' under Section 226(3) of the Kentucky Constitution applies only to that subcategory of gaming traditionally identified as 'lotteries.' Such lotteries are generally characterized by the purchase of a card or ticket which entitles the holder to a prize should, purely by chance or lot, the numbers, letters, or symbols on the ticket match a winning combination. These types of games are known by many names, bingo, beano, keno, and lotto, as well as in slang references such as 'numbers games.'" OAG 05-003 Op. Ky. Att'y Gen., at p. 7 (Mar. 21, 2005)

In sum, as made clear by the debates surrounding the Constitutional Convention of 1890, the relevant Kentucky case law (including the *Kentucky Jockey Club* decision), and advisory opinions from the state's attorney general, the following constitutional conclusions can easily be drawn:

1) The term "lotteries," as used in Section 226, is "separate and distinct" from other forms of gambling, including sports betting and pari-mutuel betting on horse races;

2) The constitutional prohibition on "lotteries" is to be read narrowly;

3) The object of Section 226 was simply to prohibit the sale of "lottery licenses," and not reach "other forms of gambling" (for which there were already statutory prohibitions on the books);

4) Other forms of gambling were intentionally excluded from this prohibition;

5) The framers of the Constitution even considered a proposed amendment that would have expanded the reach of Section 226 to include sports betting, but rejected it;

6) Hence, there is no constitutional barrier to the legalization of sports betting; and

7) The legislature is free to legalize sports betting through the enactment of a statutory regime.

B. Sports betting is not a constitutionally-prohibited lottery because lotteries are games of chance, whereas wagering on sports requires a substantial amount of skill to be successful.

While Kentucky's Constitution distinguishes lotteries from other forms of gambling, the Constitution itself does not define the term "lottery." Kentucky courts have described a lottery as "a *species* of gambling," defining it as a "scheme for the distribution of prizes or things of value *purely by lot or chance* among persons who have agreed to pay consideration for the chance to share in the distribution." *Otto v. Kosofsky*, 476 S.W.2d 626, 629 (Ky. Ct. App. 1971) (emphasis added). As Kentucky's Attorney General observed, "the case law is clear; to be a 'lottery' the winner must be chosen *purely by chance*." OAG 05-003 Op. Ky. Att'y Gen., at p. 7 (Mar. 21, 2005) (observing that "[i]n the early 1890's, when the current Kentucky Constitution was drafted and adopted, it is clear that the drafter's understanding of a lottery was a system in which players wager that a particular number will be selected in a *random drawing*.") (emphasis added)

By contrast, wagering on sporting events is widely considered to be a *contest of skill*, requiring substantial skill and knowledge to succeed. In other words, it is the anthesis of a random-chance lottery. This is amply supported by a number of state attorney general opinions. For example, in a 1991 advisory opinion, West Virginia's attorney general concluded that "the amount of skill involved in sports betting places this form of gambling outside the parameters of a lottery." W. Va. Op. Atty. Gen. (W.Va.A.G.), 1991 WL 628003, at *5 (Jan. 8, 1991).

Making an obvious comparison to random-chance lotteries, the West Virginia attorney general declared that [i]t would be naïve to believe that teams or players are chosen merely on the basis of their names, mascots, jersey colors or numbers." *Id.* Instead, the attorney general observed that "those who bet on sports usually take into consideration past records, who has the home field advantage, and a myriad of other factors that may influence the outcome of the event." *Id.*

In particular, the attorney general recognized that "statistics and other materials pertinent to sporting events are readily available for those who wish to study them and then place an informed bet using reason and judgment." *Id.* at *5-6. Drawing upon this array of information, "[t]he person making the bet is utilizing his knowledge about the sporting activity in order to enhance his chance of winning." *Id.* at *6. The use of such knowledge, the attorney general declared, "is the employment of skill." Therefore, the advisory opinion concluded that "sports betting does not fall within the state's constitutional prohibition against lotteries." *Id.*

Other states have likewise concluded that sports betting is not an impermissible lottery, with New York's attorney general declaring that sports betting involves "*substantial" (not slight skill)*," including "the exercise of a bettor's judgment in trying to . . . figure out the point spreads," whereas lotteries are decided by random chance. *See* 1984 N.Y. Op. Atty. Gen., Formal; Opinion 84-F1, at pp. 1, 8 & 10 (N.Y.A.G. 1984), available at 1984 WL 186643 (emphasis added).

Michigan's attorney general reached the same conclusion, opining that "*correctly predicting the outcome of sporting events does not constitute a 'lottery*.'" Mich. Op. Atty Gen. 367, 1990 WL 525920, at *1 (Aug. 17, 1990) (emphasis added). He noted that the Michigan Supreme Court "has consistently held that, because sports wagering activities involve at least some degree of skill on the part of the person placing the wager, such activities do not satisfy the 'chance' element, and, accordingly do not constitute a 'lottery' under Michigan law." *Id*.

Two recent attorney general opinions are also especially noteworthy.

In August 2018, Colorado's attorney general issued an advisory opinion concluding that sports betting is not a lottery that is subject to the restrictions in article XVIII, section 2 of the Colorado Constitution "because participants are able to exercise sufficient skill in selecting their wagers such that chance is not the 'controlling factor' in an award." Colorado Atty. Gen. Op No. 18-02, at pp. 5-6 (August 2, 2018). The attorney general explained that "sports bettors use skill to choose who they believe will win a sporting event or whether some sub-event will occur (such as a point spread or the outcome of a particular portion of an event). In selecting their bets, today's sports bettors have so much information available to them. This information includes schedules; team records, players' past performance data; past head-to-head data; injury reports; facility conditions; weather conditions; and more." *Id*. at pp. 6-7. The attorney general concluded that "[b]ecause a bettor can exercise skill in reviewing this information and selecting a wager, the element of chance is not the controlling factor in commercial sports betting." *Id.* at p. 7.

In December 2018, Tennessee's attorney general opined that some sports bets, such as "a contest that involves entrants placing bets on the outcome of an individual professional baseball game" would "appear to fall outside the parameters of Tennessee's lottery prohibition," citing the predominance of skill needed to succeed at sports betting. *See* Tenn. OAG Opinion No. 18-48, at p. 3. (Dec. 14, 2018). The attorney general explained that "persons who bet on such a game have a multitude of available sources of information to aid them in placing informed bets." *Id.* at 4.

Both of these states have recently enacted laws authorizing sports wagering.

To that same point, it's notable that of the 19 states that legalized sports betting since the fall of PASPA, at least *eight* have constitutional bans against lotteries.[4] Yet, there has not been a single challenge made to any of these state laws on the basis that their state-authorized sports wagering systems are somehow in violation of their own state constitutional ban on lotteries. Nor can there be. Such an assertion would be belied by the clear distinction between "skill-dominant" sports wagering and "random-chance" lotteries, and by the opinions of multiple state attorney generals.

The conclusion that sports wagering activities do not fall within the definition of a "lottery" is buttressed by federal law. Several federal statutes exclude sports wagering from the

[4] *See, e.g.*, Ark. Const., art. 19, § 14; Col. Const., art. 18, § 2; Del. Const., art. II, § 17; Mont. Const., art. III, 9; N.Y. Const., art. I, § 9; Oregon Const., art. 15, § 4; R.I. Const., art. 6, § 15; Tenn. Const., art. XI, § 5.

definition of a "lottery." For example, in 18 U.S.C. §§ 1301 through 1340, Congress has prohibited interstate mailings and broadcasts of lottery advertisements. In an effort to accommodate those states which have established state-operated lotteries, however, Congress has created a limited exemption from these prohibitions in 18 U.S.C. § 1307(a) for a "lottery conducted by a State acting under the authority of State law." Subsection (d) of that section defines the term "lottery," for purposes of that exemption, as follows: "[f]or the purposes of this section 'lottery' means the pooling of proceeds from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. '*Lottery' does not include the placing or accepting of bets or wagers on sporting events or contests*." (emphasis added)

Likewise, in the Interstate Transportation of Wagering Paraphernalia Act, which prohibits the distribution of wagering paraphernalia or other devices in interstate or foreign commerce for use in illegal gambling activities, Congress created an exemption for state-operated lotteries conducted under state law and expressly excluded sports wagering from the meaning of the term "lottery." *See* 18 U.S.C. § 1953(d)(4)(B) ("[T]he term "lottery" . . . does not include the placing or accepting of bets or wagers on sporting events or contests.").

Consistent with the above, federal law enforcement authorities have also asserted that wagering on sporting events requires a substantial amount of skill. In a 2012 case, the U.S. Department of Justice explained that "[s]ports bettors have every opportunity to employ superior knowledge of the games, the teams and players involved in order to exploit odds that do not reflect the true likelihoods of the possible outcomes." *United States v. Dicristina*, 886 F. Supp. 2d 164, 229 (E.D.N.Y. 2012), *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013).

Finally, because of the obvious similarity between betting on horse racing and betting on sports, it is helpful to look at various cases involving horse racing. And the outcome is the same. "Most states with a constitutional or statutory prohibition against lotteries that have considered whether betting on horse races constitutes a lottery have determined that they do not." Tenn. OAG Opinion No. 18-48, at p. 3 (Dec. 14, 2018).[5] As explained by Tennessee's attorney general:

> Courts have generally reasoned that chance does not control the outcome of horse races because the skill of the jockey and the condition, speed, and endurance of the jockey's horse are all factors that affect the result of the race. Moreover, bettors on horse races have sources of information that they may review before placing their bets. This information includes not only data on the actual race, but also previous records on the past performance of the jockeys and the horses. These sources allow the bettor to exercise his

[5] In a footnote, the Tennessee attorney general cited more than 15 judicial decisions, including from Kentucky's highest court, as standing for the proposition that horse race betting does not constitute a prohibited lottery. *Id.* at p. 3 & n. 4. In *Kentucky Jockey Club*, the Court of Appeals reviewed the issue of whether pari-mutuel legislation was an unconstitutional lottery. The court found, based on Kentucky's constitutional history, that horse race betting was not a lottery. 38 S.W.2d at 993-94. *See also Otto*, 476 S.W.2d at 628-29 ("*Kentucky Jockey Club* held that pari-mutuel betting at race tracks to be a form of gambling not prohibited by Section 226 of the Constitution.").

> judgment and discretion in determining the horse on which to bet. Thus, courts generally reason that chance does not predominate.

Id. at pp. 3-4. Drawing a straight line from horse race wagering to sports betting, Tennessee's attorney general reasoned that "[i]n a like manner, the winner of a professional baseball game is primarily determined on the participants' skill. And persons who bet on such a game have a multitude of available sources of information to aid them in placing informed bets." *Id.* at p. 4.

Even betting on dogs – commonly referred to as greyhound racing – entails a significant degree of skill. In a 1971 decision, the Alabama Supreme Court held that betting on the outcome of a dog race "is not determined by chance" and involves "[a] significant degree of skill." *Opinion of the Justices*, 251 So.2d 751, 753 (1971). *See also Scott v. Dunaway*, 228 Ark. 943, 311 S.W.2d 305 (1958) (holding that pari-mutuel betting upon greyhound races "affords an opportunity for exercise of judgment" and is not "completely controlled by chance," and therefore cannot be classified as a lottery and as violative of the state constitutional prohibition against lotteries); Ala. Atty Gen. Op. 2001-1134, at pp. 3-4 (Mar. 13, 2001) (noting that the handicapping information included in a proposed instant racing system "is identical to the handicapping information that was available on the day of the race," and includes "the information necessary for a bettor . . . to exercise 'a significant degree of skill . . . in picking the winning dog.").

Based upon this abundant legal authority – in a number of different contexts and drawing from a wide spectrum of federal and state sources of law (including from Kentucky's highest court and the debates preceding the adoption of the Kentucky Constitution) – I do not see how any reasonable decisionmaker or court could conclude that legal sports wagering as contemplated by this committee constitutes a forbidden "lottery" under Section 226 of the Kentucky Constitution.

Accordingly, it is my view the Legislature is free to enact legislation authorizing, licensing and regulating sports wagering within the Commonwealth of Kentucky without running afoul of the constitutional ban against "lotteries," which does not apply here.

I appreciate the opportunity to appear here today and welcome any questions that you may have. Thank you again for the opportunity to share my perspectives and insights.