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**TESTIMONY OF KEVIN M. FOWLER
BEFORE THE HOUSE COMMITTEE ON APPROPRIATIONS
IN OPPOSITION TO HOUSE BILL NO. 2173**

MARCH 23, 2017

Dear Chair Waymaster and Members of the Committee:

My name is Kevin Fowler and I am an attorney with the Topeka law firm of Frieden, Unrein & Forbes, LLP. I represent and appear on behalf of the Kansas Star Casino in Mulvane, Sumner County, Kansas (Kansas Star), the Boot Hill Casino & Resort in Dodge City, Ford County, Kansas (Boot Hill), and the Kansas Crossing Casino currently under construction and scheduled to open in Pittsburg, Crawford County, Kansas on March 31, 2017 (Kansas Crossing) in opposition to HB 2173.

HB 2173 promises to embroil the State in protracted litigation over constitutional, statutory and contractual issues and to expose the State to potential financial liability that could easily reach hundreds of millions of dollars. The bill seeks to dramatically change existing Kansas law by authorizing closed racetracks to reopen and operate as full-time casinos that will emphasize slot machines and simulcast gaming while providing limited live racing programs. Because HB 2173 asks the State to breach its commitments to private businesses that have been induced to invest approximately \$800 million in our economy, enactment of this measure should also be expected to have a substantial chilling effect on the State's ability to attract any significant future investments in Kansas.

Enacted as SB 66 in 2007, the Kansas Expanded Lottery Act, K.S.A. 74-8733 to 74-8773 (KELA), establishes the framework which has spurred nearly \$800 million of investment in the development of one state-owned and –operated casino in each of four Kansas gaming zones and affords three parimutuel racetracks the opportunity to operate slot machines under carefully prescribed conditions. All interested parties, including the owner of all parimutuel racetracks which have been closed for nearly a decade, supported the enactment of KELA. From its inception, KELA's authorization for slot machines at parimutuel racetracks and the distribution of net slot income has been intended to help racetracks subsidize the cost of live horse and greyhound racing without jeopardizing the operations of state lottery gaming facilities. However, HB 2173 abandons this framework through changes intended to

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encourage racetracks to reopen as casinos, with slot machines as a major profit center and limited racing programs, in direct competition with established lottery gaming facilities.

During the past decade, our lottery gaming facility managers have been induced to invest nearly \$800 million in developing Boot Hill, Kansas Star, Hollywood and Kansas Crossing, in part, based on statutory assurances that State would not authorize any “similar gaming facilities” prior to July 1, 2032. *See* K.S.A. 2016 Supp. 74-8734(h)(19). These assurances in KELA are also included in the written contracts between the State and each lottery gaming facility manager facilities. HB 2173 blatantly reneges on these commitments by dramatically changing KELA to authorize and encourage “similar gaming facilities” and state-sponsored competition that will jeopardize the financial stability and expectations of existing lottery gaming facilities. At a minimum, we believe that the enactment of HB 2173 will legally obligate the State to repay each lottery gaming facility manager an amount equal to its privilege fee plus interest on such amount compounded annually at the rate of 10%. *Id.* **Each lottery gaming facility management contract includes these provisions and, according to the Budget Director’s Fiscal Note to HB 2173, the State’s liability for repayment of privilege fees and compounded interest is estimated at approximately \$110.9 million to date.**

Kansas Attorney General Opinion No. 2016-6 (April 22, 2016) (a genuine copy of which is attached to this written testimony) addresses the potential legal and equitable consequences of enacting legislation such as HB 2173. This AG Opinion concludes that any legislative enactment allowing the residents of Sedgwick County to revote on whether the Kansas lottery should be authorized to place electronic gaming machines in Sedgwick County would:

- (1) violate the lottery gaming facility management contract between Kansas Star and the State, KELA, and the contract clause in Article 1 the United States Constitution (U.S. Const., art. 1, cl. 1);
- (2) require the State to repay the privilege fees together with interest at the rate of 10% compounded annually; and
- (3) potentially subject the State to common law damages for breach of contract, including benefit of the bargain damages or lost profits.

The Attorney General’s Opinion is based on established legal principles applicable to all four lottery gaming facility managers.

If you question how HB 2173 can violate the law when the actions of a previous Legislature are not generally binding on the current Legislature, the answer is best provided on page 18 of AG Opinion No. 2016-6, which quotes the Kansas Supreme Court’s explanation as follows:

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“ ‘As a general principle, one legislature is competent to repeal or modify any act of a former legislature, and one legislature cannot abridge the power of a succeeding legislature. This power is sometimes reserved by statutory provisions of a general nature. But this general principle has exceptions.... **Where a valid contract with the state has been entered into in pursuance of a legislative enactment a subsequent legislature cannot enact a law which provides for an abrogation of the contract.**’ ” (emphasis added).

This exception is based primarily on Article 1, clause 1 of the United States Constitution, which clearly provides that “No State shall ... pass any ... Law impairing the Obligation of Contracts.”

Although the parimutuel racing industry supported the enactment of KELA in 2007, none of the commercial racetracks sought to add slot machines under its statutory framework prior to the cessation of all parimutuel racing in August 2008 or the revocation of all parimutuel licenses in June 2010. Because The Woodlands, Wichita Greyhound Park and Camptown Greyhound Park have not been licensed parimutuel racetracks for nearly 7 years, any attempt to authorize or encourage these closed racetracks to reopen and operate slot machines except pursuant to the current provisions of KELA would violate Kansas law and materially breach each of the State’s lottery gaming facility management contracts. The State’s potential liability for such action could easily reach hundreds of millions of dollars.

Since 2007, KELA has provided that racetrack managers at three parimutuel licensee locations may contract with the Lottery to deploy up to 2,200 slot machines (with at least 600 machines allocated to and placed at each racetrack), to receive no more than 25% of net slot income and to distribute the remaining 75% of net slot income as prescribed by statute. Racetrack managers may also participate in a competitive bidding process involving state lottery gaming facilities for the privilege of deploying an additional 600 slot machines, with a starting minimum bid of \$2,500 per machine. However, HB 2173 changes these requirements to permit 2,800 slot machines at racetracks with at least 400 slot machines at each racetrack. The distribution of net slot income to racetrack managers will increase from 25% to between 61.5% and 68.1% of net slot income.

The distribution of such income to the State will decrease from 40% to 22%, although the State will receive no more than 11% of net slot income until the racetrack manager is reimbursed the amount paid to lottery gaming facilities for their privilege fees and compounded interest.

This written testimony also includes an Addendum addressing certain provisions of the bill in more detail. Thank you for affording me and my clients this opportunity to share our views with you in opposition to HB 2173. I would be pleased to answer any questions you may have regarding my testimony.



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April 22, 2016

ATTORNEY GENERAL OPINION NO. 2016-6

The Honorable Mark A. Kahrs
State Representative, 87th District
State Capitol, 286-N
300 S.W. 10th Avenue
Topeka, Kansas 66612

Re: State Boards, Commissions and Authorities—State Lottery—Kansas Expanded Lottery Act; Lottery Gaming Facilities; Gaming Facility Management Contract Requirements; Privilege Fees; Breach of Contract

Synopsis: A racetrack gaming facility in Sedgwick County, after the referendum vote against the placement of electronic gaming machines (EGMs) in the county, is a “similar gaming facility” as used in Paragraph 30 of the South Central Facility Management contract and K.S.A. 2015 Supp. 74-8734(h)(19)(A)(ii).

Enacting a statute that authorizes a revote in Sedgwick County, a county in which the placement and operation of electronic gaming machines at a parimutuel licensee location is currently prohibited by statute, may be a designation of an “additional area” in violation of Paragraph 30 of the South Central Facility Management contract and K.S.A. 2015 Supp. 74-8734(h)(19)(A)(ii). If this action by the State is determined to be a breach, one consequence may be the required repayment of the privilege fee plus interest on such amount, compounded annually at the rate of 10% pursuant to Paragraph 31 of the South Central Facility Management contract and K.S.A. 2015 Supp. 74-8734(h)(19)(B).

Three factors are considered when evaluating a claim that state law violates the United States Constitution Contract Clause: “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship; whether there is a significant and legitimate public purpose behind the legislation; and whether the adjustment of the contracting parties’ rights and responsibilities is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation’s adoption.” Cited

herein: K.S.A. 2015 Supp. 74-8702; 74-8733; 74-8734; 74-8737; 74-8740; 74-8741; 74-8742; 74-8743; 74-8744; 74-8746; K.S.A. 74-8802; Kan. Const., Art. 15 §§ 3, 3a, 3b, 3c, 3d.; 2016 House Bill 2537, New Section 10; U.S. Const., Art. 1, § 10.

* * *

Dear Representative Kahrs:

As State Representative for the 87th District, you ask our opinion on three issues related to the Kansas Expanded Lottery Act (KELA).¹ Specifically, you ask:

1. Would enactment of a bill, such as [2016] HB 2537, that permits a revote on electronic gaming machines at a racetrack in Sedgwick County breach the management contracts between the Kansas Lottery and the Lottery Gaming Facility Managers and thereby result in imposing on the State of Kansas repayment of privilege fees plus interest, as specified in K.S.A. [2015 Supp.] 74-8734(h)(19)?
2. Would such a breach of contracts subject the state to additional liabilities for damages?
3. Would such a breach of contracts occur at the time the bill is enacted?

Background on Gaming in Kansas

Some background on gaming in Kansas may be helpful. The Kansas Constitution provides that “[l]otteries and the sale of lottery tickets are forever prohibited.”² “[T]he term lottery, as used in Art. 15, § 3 of the Kansas Constitution, has been defined [by the Kansas Supreme Court] as any game, scheme, gift, enterprise, or similar contrivance wherein persons agree to give valuable consideration for the chance to win a prize or prizes.”³

Since the constitutional ban against lotteries was adopted in 1861, four voter-approved constitutional amendments to the ban against lotteries have been adopted to authorize charitable bingo,⁴ parimutuel wagering,⁵ state-owned and -operated lotteries,⁶ and

¹ K.S.A. 2015 Supp. 74-8733 *et seq.* “K.S.A. 74-8733 through 74-8773, and amendments thereto, shall be known and may be cited as the Kansas expanded lottery act. The Kansas expanded lottery act shall be part of and supplemental to the Kansas lottery act.” K.S.A. 2015 Supp. 74-8733(a).

² Kan. Const., Art. 15, § 3 was adopted in 1861.

³ *State ex rel. Stephan v. Finney*, 254 Kan. 632, 644 (1995).

⁴ Kan. Const., Art. 15, § 3a was adopted in 1974.

⁵ Kan. Const., Art. 15, § 3b was adopted in 1986.

⁶ Kan. Const., Art. 15, § 3c was adopted in 1986.

charitable raffles.⁷

The Kansas Lottery Act,⁸ the KELA and the Kansas Parimutuel Racing Act⁹ were enacted to execute the constitutional authorization for parimutuel wagering and a state-owned and -operated lottery. These acts, *inter alia*, control lotteries in Kansas.

The KELA became effective on April 19, 2007, upon publication in the *Kansas Register*.¹⁰ There are three requirements of the KELA that are pertinent to this opinion. Two requirements relate to lottery gaming facilities and the other relates to racetrack gaming facilities.

First, the KELA authorizes the Kansas Lottery, on behalf of the State, to operate one lottery gaming facility¹¹ in each gaming zone.¹² There are four statutorily created gaming zones:¹³ the northeast Kansas gaming zone, the south central Kansas gaming zone, the southwest Kansas gaming zone, and the southeast Kansas gaming zone. The Kansas Lottery's authority to operate a lottery gaming facility is subject to approval of a referendum in each county composing a gaming zone.¹⁴ "If a majority of the votes cast and counted at such election is in favor of approving the operation of a lottery gaming facility within the county, the Kansas lottery *may* operate a lottery gaming facility in such county, subject to the provisions of [the KELA]."¹⁵ Conversely, "[i]f a majority of the votes cast and counted at an election . . . is against permitting the operation of a lottery gaming facility within the county, the Kansas lottery *shall not* operate a lottery gaming facility in such county."¹⁶ The deadline for conducting the special election was not more than 180 days from April 19, 2007,¹⁷ which was October 16, 2007.

⁷ Kan. Const., Art. 15, § 3d was adopted in 2014.

⁸ K.S.A. 74-8701 through K.S.A. 74-8730.

⁹ K.S.A. 74-8801 through K.S.A. 74-8829.

¹⁰ 26 *Kansas Register*, No. 16 at 518 (2007). See L. 2007, Ch. 110, § 63.

¹¹ "Lottery gaming facility' means that portion of a building used for the purposes of operating, managing and maintaining lottery facility games." K.S.A. 2015 Supp. 74-8702(l).

¹² K.S.A. 2015 Supp. 74-8734(a).

¹³ "Gaming zone' means: (1) The northeast Kansas gaming zone, which consists of Wyandotte county; (2) the southeast Kansas gaming zone, which consists of Crawford and Cherokee counties; (3) the south central Kansas gaming zone, which consists of Sedgwick and Sumner counties; and (4) the southwest Kansas gaming zone, which consists of Ford county." K.S.A. 2015 Supp. 74-8702(f).

¹⁴ K.S.A. 2015 Supp. 74-8737(a). We note that "[t]he lottery commission may waive the requirement that an election be held pursuant to this section if the lottery commission determines that after December 31, 2004, and before the effective date of this act, the county has held an election of qualified voters pursuant to the county's home rule authority: (1) At which the ballot question was in substantial compliance with the requirements of this section; (2) which was administered by the county election officer in a manner consistent with the requirements of state election law; and (3) at which a majority of the votes cast and counted was in favor of the proposition." K.S.A. 2015 Supp. 74-8737(e).

¹⁵ K.S.A. 2015 Supp. 74-8737(c) (emphasis added).

¹⁶ *Id.* (emphasis added).

¹⁷ K.S.A. 2015 Supp. 74-8737(a).

The south central Kansas gaming zone comprises Sedgwick and Sumner counties.¹⁸ On August 7, 2007, within the 180 days required by statute, Sedgwick County held a special election in which the following propositions were presented to the electorate:¹⁹

Proposition No. 1

Shall the following be adopted?

Shall the Kansas lottery be authorized to operate a lottery gaming facility in Sedgwick County?

Proposition No. 2:

Shall the following be adopted?

Shall the Kansas lottery be authorized to place electronic gaming machines in Sedgwick County?

A majority of the Sedgwick County electorate participating in that election voted against operating a lottery gaming facility and also against placing EGMs²⁰ in Sedgwick County.²¹ That action left Sumner County as the only remaining county in the south central Kansas gaming zone that could have a lottery gaming facility. Sumner County had previously held a special election on December 20, 2005, and the electorate voted to approve a "destination resort casino," *i.e.*, a lottery gaming facility, in the county.²² On June 22, 2007,²³ the Kansas Lottery Commission determined that the December 20, 2005, election in Sumner County met the three requirements of K.S.A. 2015 Supp. 74-8737(e) and, therefore, waived the election requirement in K.S.A. 2015 Supp. 74-8737(a).²⁴

There is a lottery gaming facility in the northeast Kansas gaming zone,²⁵ the south central

¹⁸ K.S.A. 2015 Supp. 74-8702(f)(3).

¹⁹ http://www.sedgwickcounty.org/elections/election_results/spcl07/index.html (accessed March 12, 2016).

²⁰ In pertinent part, "[e]lectronic gaming machine" means any electronic, electromechanical, video or computerized device, contrivance or machine authorized by the Kansas lottery which, upon insertion of cash, tokens, electronic cards or any consideration, is available to play, operate or simulate the play of a game authorized by the Kansas lottery pursuant to the Kansas expanded lottery act, including, but not limited to, bingo, poker, blackjack, keno and slot machines, and which may deliver or entitle the player operating the machine to receive cash, tokens, merchandise or credits that may be redeemed for cash." K.S.A. 2015 Supp. 74-8702(c).

²¹ http://www.sedgwickcounty.org/elections/election_results/spcl07/index.html (accessed March 12, 2016).

²² Letter to Ed Van Petten, Kansas Lottery Executive Director from Shane J. Shields, Sumner County Clerk and Election Officer, May 8, 2007.

²³ Kansas Expanded Lottery Act Results of County Elections with Resulting Deadlines for Lottery Gaming Facility Manager Applications, Keith Kocher, Director of Program Assurance and Integrity, Kansas Lottery.

²⁴ *Id.*

²⁵ Hollywood Casino is located in Kansas City, Wyandotte County, Kansas.

Kansas gaming zone,²⁶ and the southwest Kansas gaming zone.²⁷ A lottery gaming facility management contract²⁸ in the southeast gaming zone was awarded in June of 2015.²⁹ Therefore, the State operates lottery gaming facilities in three of the four statutorily created gaming zones, and, assuming obligations under the southeast gaming zone contract are carried out, soon will operate the same in the fourth zone as authorized by the KELA.

The second requirement under the KELA pertinent to this opinion is the requirement that lottery gaming facility managers,³⁰ as part of the lottery gaming facility management contract, pay a one-time fee (privilege fee) to the state for the privilege of being selected as a lottery gaming facility manager.³¹ The privilege fee plus interest is to be returned to the lottery gaming facility manager upon a breach of contract as specified in the KELA and the lottery gaming facility management contract.³² The lottery gaming facility management contract also requires the manager to make a minimum investment to build the proposed lottery gaming facility.³³

In 2010, the Kansas Lottery entered into a lottery facility management contract for the south central gaming zone. That contract, which remains in effect, was signed October 19, 2010, by Ed Van Petten, then-Executive Director of the Kansas Lottery; and September 8, 2010, by M. Brent Stevens, Chief Executive Officer, Peninsula Gaming Partners, LLC (referred to as "Manager" in the contract and hereafter in this opinion).³⁴

²⁶ Kansas Star Casino is located in Mulvane, Sumner County, Kansas.

²⁷ Boot Hill Casino is located in Dodge City, Ford County, Kansas.

²⁸ "Lottery gaming facility management contract" means a contract, subcontract or collateral agreement between the state and a lottery gaming facility manager for the management of a lottery gaming facility, the business of which is owned and operated by the Kansas lottery, negotiated and signed by the executive director on behalf of the state." K.S.A. 2015 Supp. 74-8702(n).

²⁹ Kansas Crossing Casino, LC was selected as the lottery gaming facility manager of a lottery gaming facility in Pittsburg, Crawford County, Kansas. See *Board of County Comm'rs of Cherokee County, Kansas v. Kansas Racing and Gaming Com'n, et al.*, Shawnee County District Court Case No. 2015-CV-635.

³⁰ "Lottery gaming facility manager" means a corporation, limited liability company, resident Kansas American Indian tribe or other business entity authorized to construct and manage, or manage alone, pursuant to a lottery gaming facility management contract with the Kansas lottery, and on behalf of the state, a lottery gaming enterprise and lottery gaming facility." K.S.A. 2015 Supp. 7-8702(o).

³¹ The northeast and south central Kansas gaming zones were required to pay a privilege fee of \$25 million, and the southeast and southwest Kansas gaming zones were required to pay a privilege fee of \$5.5 million to the state treasurer for the privilege of being selected as a lottery gaming facility manager of a lottery gaming facility. K.S.A. 2015 Supp. 74-8734(h)(6).

³² K.S.A. 2015 Supp. 74-8734(h)(19)(B).

³³ "The commission shall not approve a management contract unless ... the commission determines that the proposed development consists of an investment in infrastructure, including ancillary lottery gaming facility operations, of at least \$225,000,000 in the northeast and south central Kansas gaming zones and of at least \$50,000,000 in the southeast and southwest Kansas gaming zones." K.S.A. 2015 Supp. 74-8734(g)(2).

³⁴ Subsequently, Boyd Gaming Corporation acquired Peninsula Gaming, LLC. The Kansas Lottery Commission approved of the acquisition. See *Minutes*, Kansas Lottery Commission, November 14, 2012. Through the acquisition, Peninsula's lottery gaming facility management contract with the State was transferred to Boyd Gaming Corporation as the lottery gaming facility manager.

This contract, hereafter referenced as the "South Central Facility Management contract," includes the following provisions:

Paragraph 8 contains the following clause:

[N]othing in this section will be interpreted to restrict, waive or delete any rights Manager may have to seek repayment of Managers' [sic] privilege fee if the Kansas Expanded Lottery Act were to be amended or repealed by a legislative body or declared unconstitutional in a future proceeding.

Paragraph 20 contains the following clause:

Nothing in this Agreement will be interpreted to restrict or to be prejudicial to any right or remedy Manager may have at law or equity ... to exercise any other right Manager may have under this Agreement or at law or equity to a refund of the privilege fee.

Paragraph 30 reads in its entirety:

Prohibitions Applicable to the State. The Kansas Lottery, acting on behalf of the State of Kansas, agrees by entering into this Agreement that:

- a) Neither the Kansas Lottery nor the State of Kansas will enter into a management contract for[] more than four (4) lottery gaming facilities or similar facilities in the four gaming zones outlined in the Kansas Expanded Lottery Act with one Lottery Gaming Facility in each gaming zone;
- b) Neither the Kansas Lottery nor the State of Kansas will designate additional areas of the state where operation of Lottery Gaming Facilities or similar gaming facilities will be authorized, other than those set out in the Kansas Expanded Lottery Act; or
- c) Neither the Kansas Lottery nor the State of Kansas will operate an aggregate of more than 2,800 Electronic Gaming Machines at all pari-mutuel licensee locations.³⁵

³⁵ Inclusion of this paragraph in the lottery facility management contract was required by K.S.A. 2015 Supp. 74-8734(h)(19), which provides that any lottery gaming facility management contract approved by the commission shall include the following enforceable provisions:

(A) Prohibiting the state, until July 1, 2032, from: (i) Entering into management contracts for more than four lottery gaming facilities or similar gaming facilities, one to be located in the northeast Kansas gaming zone, one to be located in the south central Kansas gaming zone, one to be located in the southwest Kansas gaming zone and one to be located in the southeast Kansas gaming zone; (ii) designating additional areas of the state where operation of lottery gaming facilities or similar gaming facilities would be authorized; or (iii) operating an aggregate of more than 2,800 electronic gaming machines at all

Paragraph 31 contains the following clauses:

State Payment for Breach. Manager will be entitled, as its sole monetary remedy, to payment in an amount equal to the actual privilege fee paid by Manager, plus interest on such amount, compounded annually at the rate of ten percent (10%), if the State of Kansas violates any provision in Paragraph 30 above during the term of this Agreement. The parties acknowledge and agree that nothing in this paragraph will be interpreted to prevent or limit any rights Manager may have to seek specific performance or other equitable relief against the Kansas Lottery or the State of Kansas to enforce the prohibitions contained in Paragraph 30.

Paragraph 59 contains the following clause:

Amendments. Except as otherwise provided in this paragraph, no amendment, waiver, or consent as to any provision in this Agreement will be effective unless it is in writing and agreed to by the Executive Director and Manager, and each such waiver or consent will be effective only in the specific instance and for the specific purpose for which given.... This Agreement will also be modified, in whole or in part, in order to comply with future statutory enactments or judicial interpretation of applicable law by a court of competent jurisdiction. This Agreement is subject to modification, in whole or in part, or cancellation, as deemed necessary by the Executive Director to comply with any future statutory enactments, subsequent regulatory changes, or judicial interpretations of applicable law by a court of competent jurisdiction occurring after this Agreement's execution, without additional consideration being exchanged between the parties. The parties agree nothing in this paragraph will be read to limit the remedies provided to Manager in Paragraphs 31 or 65.³⁶

Paragraph 59 also contains the following clause:

Notwithstanding[] any provision to the contrary, it is understood, acknowledged and agreed to by the parties hereto that amendments to the KELA after the date of execution of this Agreement shall not impair either

parimutuel licensee locations; and (B) requiring the state to repay to the lottery gaming facility manager an amount equal to the privilege fee paid by such lottery gaming facility manager, plus interest on such amount, compounded annually at the rate of 10%, if the state violates the prohibition provision described in (A).

We note that identical language appears in K.S.A. 2015 Supp. 74-8741(c)(4) under the KELA provisions relating to racetrack gaming facility management contracts.

³⁶ Paragraph 65 in the South Central Facility Management Contract provides for Manager's right to cease management activities under enumerated circumstances.

party's legal entitlements or remedies that would have been available at law or equity before the date of any such amendment.

The third requirement under the KELA pertinent to this opinion is the requirement that not more than an aggregate of 2,800 EGMs may be placed and operated at the three then-existing³⁷ parimutuel licensee locations.³⁸ The KELA authorizes the Kansas Lottery to "negotiate a racetrack gaming facility management contract to place [EGMs] at one parimutuel licensee location in each gaming zone except the southwest Kansas gaming zone."³⁹ Put simply, the KELA prohibits the placement of EGMs at racetrack gaming facilities anywhere in the State except at a parimutuel licensee location in the three gaming zones. At the time the KELA was enacted, there was a parimutuel licensee location in one county in the northeast Kansas gaming zone,⁴⁰ one county in the southeast Kansas gaming zone⁴¹ and one county in the south central Kansas gaming zone.⁴²

The placement of EGMs at a parimutuel licensee location is, as with the operation of a lottery gaming facility, subject to approval by the electorate of the county at an election conducted no more than 180 days after April 19, 2007, the effective date of the KELA.⁴³

³⁷ See generally, K.S.A. 2015 Supp. 74-8741 and 74-8744. Note that "[u]ntil lottery gaming facility management contracts for lottery gaming facilities in all gaming zones become binding, the total number of electronic gaming machines placed at all racetrack gaming facilities shall not exceed 2,200. When lottery gaming facility management contracts for lottery gaming facilities in all gaming zones have become binding, the lottery commission shall take privilege fee bids from the lottery gaming facility manager and racetrack gaming facility manager in each gaming zone for the remaining electronic gaming machines allocated to but not yet placed at the racetrack gaming facility in such zone. The minimum bid shall be a privilege fee of \$2,500 per electronic gaming machine. If the racetrack gaming facility manager submits the highest bid, the lottery commission shall place the remaining electronic gaming machines at the racetrack gaming facility. If the lottery gaming facility manager submits the highest bid, the commission shall not place any additional electronic gaming machines at the racetrack gaming facility." K.S.A. 2015 Supp. 74-8744(b)(1).

³⁸ "'Parimutuel licensee location' means a racetrack facility, as defined in K.S.A. 74-8802, and amendments thereto, owned or managed by the parimutuel licensee. A parimutuel licensee location may include any existing structure at such racetrack facility or any structure that may be constructed on real estate where such racetrack facility is located." K.S.A. 2015 Supp. 74-8702(w). "'Racetrack facility' means a racetrack within Kansas used for the racing of horses or greyhounds, or both, including the track surface, grandstands, clubhouse, all animal housing and handling areas, other areas in which a person may enter only upon payment of an admission fee or upon presentation of authorized credentials and such additional areas as designated by the commission." K.S.A. 74-8802 (cc).

³⁹ K.S.A. 2015 Supp. 74-8741(a).

⁴⁰ The Woodlands is located in Kansas City, Wyandotte County, Kansas and has been closed since 2008. See, *In the Matters of the Racing Association of Kansas East, et al.*, Kansas Racing and Gaming Commission Case No. 88-KRC-14.

⁴¹ Camptown Greyhound Park is located in Frontenac, Crawford County, Kansas and has been closed since 2000. See, *In the Matter of the Organization License of the Racing Association of Kansas Southeast, Inc. et al.*, Kansas Racing and Gaming Commission Case No. 88-KRC-18.

⁴² Wichita Greyhound Park is located in Wichita, Sedgwick County, Kansas and has been closed since 2008. See, *In the Matters of the Racing Association of Kansas East, et al.*, Kansas Racing and Gaming Commission Case No. 88-KRC-14.

⁴³ K.S.A. 2015 Supp. 74-8743(a). This provision provides for an election, within 180 days of the effective date of the KELA, in "each county where there is a pari-mutuel licensee location..." (emphasis added). In

“If a majority of the votes cast and counted at such election is in favor of approving the placement of electronic gaming machines in the county, the Kansas lottery *may* place and operate electronic gaming machines at a parimutuel licensee location in the county, subject to the provisions of this act.”⁴⁴ Conversely, “[i]f a majority of the votes cast and counted at an election under this section is against permitting placement of electronic gaming machines in the county, the Kansas lottery *shall not* place or operate electronic gaming machines at a parimutuel licensee location in the county.”⁴⁵

As stated previously, pursuant to the statutory referendum, a majority of the electorate in Sedgwick County voted against the placement of EGMs at a racetrack facility in Sedgwick County.⁴⁶ That action left Wyandotte County in the northeast Kansas gaming zone and Crawford County in the southeast Kansas gaming zone as the only counties that could place EGMs at a parimutuel licensee location if approved by the electorate. On June 5, 2007, within the 180 days required by statute, a majority of the electorate in Crawford County voted to approve the placement of EGMs at the parimutuel licensee location in the county.⁴⁷ On June 26, 2007, within the 180 days required by statute, a majority of the electorate in Wyandotte County approved the placement of EGMs at the parimutuel licensee location in the county.⁴⁸

There are no racetrack facilities operating in the state at this time.⁴⁹ Because conducting live horse racing⁵⁰ or greyhound racing⁵¹ is a prerequisite to operating EGMs at a racetrack gaming facility, there are no racetrack gaming facilities operating in the state at this time.

Notwithstanding the KELA requirement discussed above, 2016 House Bill 2537 provides, *inter alia*, for authorization and a process to obtain a revote in Sedgwick County on the following question:

the south central gaming zone, this provision was applicable only to Sedgwick County because there was no parimutuel licensee location in Sumner County.

⁴⁴ K.S.A. 2015 Supp. 74-8743(c) (emphasis added).

⁴⁵ *Id.* (emphasis added).

⁴⁶ Thus, since the time of the Sedgwick County referendum, and still today, there has existed no legal authority to place EGMs at a racetrack facility anywhere in the south central Kansas gaming zone. In that regard, the south central gaming zone since the Sedgwick County referendum has been like the southwest gaming zone in that, by operation of the KELA and other applicable provisions of law, only lottery gaming facilities, and not racetrack gaming facilities, may operate.

⁴⁷ Kansas Expanded Lottery Act Results of County Elections with Resulting Deadlines for Lottery Gaming Facility Manager Applications, Keith Kocher, Director of Program Assurance and Integrity, Kansas Lottery.

⁴⁸ *Id.*

⁴⁹ Don Brownlee, Executive Director of the Kansas Racing and Gaming Commission, Letter to Athena E. Andaya, Deputy Attorney General, February 18, 2016.

⁵⁰ K.S.A. 2015 Supp. 74-8746(a)(2).

⁵¹ K.S.A. 74-8746(a)(2) and (3).

Shall the operation of electronic gaming machines at the Wichita Greyhound Park by the Kansas lottery be permitted in Sedgwick [C]ounty?⁵²

With this background information presented, we now will discuss your questions in turn.

Would Enactment of a New Statute Permitting a Revote in Sedgwick County Cause a Breach of Contract

In your first question, you ask “would enactment of a bill, such as HB 2537, that permits a revote on electronic gaming machines at a racetrack in Sedgwick County breach the management contracts between the Kansas Lottery and the Lottery Gaming Facility Managers and thereby result in imposing on the State of Kansas repayment of privilege fees plus interest, as specified in [K.S.A. 2015 Supp.] 74-8734(h)(19)?”

We wish to clarify the question we are answering. First, the essence of your question is whether the State would incur liability under the four lottery gaming facility management contracts, such as for a breach; thus, that is necessarily a matter of contract law and ultimately is a question of whether “[t]he new statute prevent[s] the [State] from keeping [its] promise[s]”⁵³ made in the management contracts. Second, you ask specifically about a “revote on electronic gaming machines at a racetrack in Sedgwick County.” House Bill 2537 contains numerous other provisions, but we limit our opinion narrowly to what effect the provision authorizing a Sedgwick County revote may have; we offer no opinion on the potential effect of other provisions of House Bill 2537. Third, as noted above, there currently are four separate contracts in place between the State of Kansas (via the Kansas Lottery) and a lottery gaming facility manager, one in each of the four gaming zones. To analyze whether a breach of a contract may occur, it is necessary to analyze the pertinent contract provisions. Although provisions in the other three contracts may or may not be materially the same, in order to produce this opinion in a timely manner we are limiting our analysis to whether a breach of the contract for the south central gaming zone (in which Sedgwick County is located) would occur. We are expressing no opinion on how, if at all, a revote in Sedgwick County might implicate provisions of any other contract.

Thus, the specific question we are answering as your first question is this: Would enactment of the provision of 2016 House Bill 2537 that authorizes a revote on the placement of EGMs at a racetrack facility in Sedgwick County render the State liable to refund the privilege fee paid to the State under terms of the lottery gaming facility management contract between the Kansas Lottery and the lottery gaming facility manager in the south central gaming zone?

We think the answer to that question is yes for three separate reasons, any of which standing alone would lead to the same conclusion. First, a breach of contract likely would

⁵² 2016 House Bill 2537, New Section 10(b).

⁵³ See *Mobil Oil Exploration and Producing Southeast, Inc. v. U.S.*, 530 U.S. 604, 624 (2000).

arise under Paragraph 30 of the South Central Facility Management contract. Second, even without reliance on the provisions of Paragraph 30, Paragraph 8 authorizes the Manager to seek repayment of the privilege fee if the KELA “were to be amended ... by a legislative body...” and Paragraph 20 also expressly contemplates that a cause for demanding refund of the privilege fee may arise outside the provisions of Paragraphs 30 and 31. Third, even absent a breach pursuant to Paragraph 30 and Paragraph 8, Paragraph 59 of the South Central Facility Management contract would make the State financially liable for refunding the privilege fee. If Paragraph 30 is breached, then Paragraph 31 expressly provides the refunding of the privilege fee, plus interest, as the remedy. If any common law duty preserved under Paragraph 8 is breached, or if Paragraph 59 is breached, then refund of the privilege fee is a remedy that could be demanded by the Manager under general principles of contract law, and that remedy is expressly contemplated by Paragraph 20.

Breach of Contract under Paragraph 30 of the South Central Facility Management Contract

A breach of contract pursuant to Paragraph 30⁵⁴ may occur if, prior to July 1, 2032, any one or more of the following three circumstances occurs: (1) the state enters into a management contract for another lottery gaming facility or similar gaming facility because a lottery gaming facility management contract already has been let in each of the gaming zones; (2) the state expands gaming by designating additional areas where lottery gaming facilities or similar gaming facilities would be authorized in the State; or (3) the state operates more than an aggregate of 2,800 electronic gaming machines at all parimutuel licensee locations. If any of these circumstances occurs, repayment of the privilege fee plus interest on such amount, compounded annually at the rate of 10%, is triggered pursuant to Paragraph 31⁵⁵ of the South Central Facility Management contract.

The second circumstance is pertinent to your question. The key question is whether a revote on placement of EGMs at the racetrack facility in Sedgwick County would constitute a designation of an “additional” area where lottery gaming facilities or similar gaming facilities would be authorized in the State within the meaning of the second condition of Paragraph 30. If a revote in Sedgwick County permits the placement of EGMs at a racetrack gaming facility in Sedgwick County, where such a facility is now barred, then the answer to your question would turn on whether that facility is a “similar gaming facility.”

Designating Additional Areas

Paragraph 30 of the South Central Facility Management contract and K.S.A. 2015 Supp. 74-8734(h)(19)(A)(ii) prohibit designating *additional* areas of the state where operation of lottery gaming facilities or similar gaming facilities would be authorized. The question of law we are asked to determine is what is meant by the word “additional.” The term

⁵⁴ See also, K.S.A. 2015 Supp. 74-8734(h)(19)(A).

⁵⁵ See also, K.S.A. 2015 Supp. 74-8734(h)(19)(B).

“additional” is not defined in the Kansas Lottery Act, the KELA or the Kansas Parimutuel Racing Act. In determining whether a revote in Sedgwick County that permits the placement of EGMs at a racetrack gaming facility is an impermissible expansion by designation of an additional area for gaming and therefore a breach of contract, we must determine legislative intent.

An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history or other background considerations to construe the legislature's intent.⁵⁶

We think the language used by the Legislature is plain and unambiguous and, therefore, we do not resort to the use of the canons of construction or legislative history. To determine the ordinary and common meaning of “additional,” we turn to the Merriam-Webster Dictionary, which defines the term to mean “added” or “extra.”⁵⁷

As described above, the KELA provided for four gaming zones but expressly excluded placement of EGMs at a parimutuel licensee location in the southwest gaming zone, clearly leaving only three gaming zones potentially authorized to place and operate EGMs.⁵⁸ The KELA also required the named counties in each of the three gaming zones to seek a referendum vote to determine whether the placement of EGMs at the local racetrack facility would be allowed or prohibited. As a result of the votes described above, the KELA currently allows placement of EGMs at parimutuel licensee locations in Wyandotte and Crawford counties; in all other counties in the state, KELA prohibits the placement of EGMs at racetrack facilities.⁵⁹

Thus, although the KELA contemplated three zones for the potential placement of EGMs at a parimutuel licensee location, Sedgwick County's referendum vote against the placement of EGMs in that county effectively and expressly narrowed the number of authorized zones to two. To put the same point a different way, KELA expressly prohibited placement of EGMs at any racetrack facility in the southwest gaming zone and

⁵⁶ *State v. Keel*, 302 Kan. 560, 572 (2015) (internal citations omitted).

⁵⁷ Merriam-Webster.com/dictionary/additional (accessed March 12, 2016).

⁵⁸ K.S.A. 74-8741(a).

⁵⁹ The effect of Sedgwick County voters' rejection of the proposition to allow placement of EGMs at the racetrack facility in Sedgwick County was not merely to withhold the voters' assent from such placement; rather, under terms of the KELA, the effect was to affirmatively prohibit such placement. See K.S.A. 74-8743(c). “If a majority of the votes cast and counted at an election under this section is against permitting placement of electronic gaming machines in the county, the *Kansas lottery shall not* place or operate electronic gaming machines at a parimutuel licensee location in the county.” (Emphasis added).

KELA also created a mechanism that resulted in precisely the same result in the south central gaming zone.

Consequently, at the time the South Central Management Facility contract was executed, the parties to that contract were aware that state law prohibited the placement of EGMs at a parimutuel licensee location anywhere in the south central gaming zone. A subsequent change in statute that would result in placement of EGMs in Sedgwick County would allow EGMs in an “additional” area within the meaning of Paragraph 30 as the parties would have understood that meaning at the time they executed the contract.

The inquiry does not end with the conclusion that, on the facts presented here, a change in statute resulting in a successful revote in Sedgwick County would constitute the state “designating [an] additional area[]” in which gaming could occur. We also must analyze whether a racetrack gaming facility is a “similar” gaming facility.

Similar Gaming Facilities

The term “similar gaming facilities” is not defined in the Kansas Lottery Act, the KELA or the Kansas Parimutuel Racing Act. In determining whether a racetrack gaming facility is a similar gaming facility to a lottery gaming facility within the meaning of Paragraph 30, we must determine legislative intent.

We believe the language used by the Legislature is plain and unambiguous, and therefore, we do not resort to the use of the canons of construction or legislative history. To determine the ordinary and common meaning of “similar,” we turn to the Merriam-Webster Dictionary, which defines the term to mean “having characteristics in common: strictly comparable.”⁶⁰ Clearly, the term “similar” relates to “lottery gaming facilities.” A lottery gaming facility “means that portion of a building used for the purposes of operating, managing and maintaining lottery facility games.”⁶¹ Lottery facility games include EGMs and other games that are authorized at tribal gaming facilities.⁶²

A racetrack gaming facility,⁶³ on the other hand, “means that portion of a parimutuel licensee location where electronic gaming machines are operated, managed and maintained.”⁶⁴ It appears to us that the definitions of a lottery gaming facility and a racetrack gaming facility are very similar. The most significant similarity with both facilities is that the lottery facility games at both are owned and operated by the Kansas Lottery

⁶⁰ Merriam-Webster.com/dictionary/similar (accessed March 12, 2016).

⁶¹ K.S.A. 2015 Supp. 74-8702(l).

⁶² “‘Lottery facility games’ means any electronic gaming machines and any other games which, as of January 1, 2007, are authorized to be conducted or operated at a tribal gaming facility, as defined in K.S.A. 74-9802, and amendments thereto, located within the boundaries of this state.” K.S.A. 2015 Supp. 74-8702(j).

⁶³ A racetrack gaming facility should not be confused with a racetrack facility, as the terms refer to different facilities. A racetrack gaming facility is authorized to have EGMs while a racetrack facility is not.

⁶⁴ K.S.A. 2015 Supp. 74-8702(aa).

and regulated by the Kansas Racing and Gaming Commission.⁶⁵ Both facilities were subject to a mandatory statutory referendum within 180 days of the enactment of KELA to obtain authorization to operate in Kansas.⁶⁶ Both facilities, by definition, have a dedicated portion of a building that is to be used for purposes of operating, managing and maintaining lottery facility games, which include EGMs. Our last example in the nonexclusive list of similarities is that both facilities are required to include in the contract the identical enforceable provisions enumerated in K.S.A. 2015 Supp. 74-8734(h)(19) and K.S.A. 2015 Supp. 74-8741(c)(4), which is strong indicia of parity among these facilities.

Lottery gaming facilities and racetrack gaming facilities have characteristics in common and are clearly alike. In other words, these facilities are obviously similar within the plain meaning of that term. We then must consider whether anything in the KELA operates to transform what otherwise are obviously “similar” facilities into what might be described as “nonsimilar” facilities. On the facts as they exist here, we think not.

The distinguishing factors between the facilities are the location of the gaming facility and what types of lottery facility games are authorized to be operated at the particular gaming facility. Lottery gaming facilities are limited to the four gaming zones and may offer lottery facility games such as EGMs and table games. Racetrack gaming facilities are limited to the northeast Kansas gaming zone and the southeast Kansas gaming zone and may offer only EGMs at a parimutuel licensee location.

We think the strongest argument that could be made in favor of the proposition that the KELA has transformed facilities that are “similar” in plain language terms into facilities that are “nonsimilar” for KELA purposes is that the KELA has one set of statutory provisions for lottery gaming facilities and another set for parimutuel licensee locations authorized to operate EGMs. We acknowledge that an argument can be made from this statutory structure that a racetrack gaming facility is not similar to a lottery gaming facility, but we doubt it would succeed, particularly after a referendum vote prohibits the placement and operation of EGMs in the county. We do not think that those differences negate the other common characteristics both facilities share.⁶⁷

⁶⁵ K.S.A. 2015 Supp. 74-8734(h)(17) and (18), K.S.A. 2015 Supp. 74-8702(bb), K.S.A. 2015 Supp. 74-8741(c)(2).

⁶⁶ K.S.A. 2015 Supp. 74-8737 and 74-8743.

⁶⁷ To help clarify our reasoning on this point outside the specific context of a Sedgwick County revote and the dynamics of the south central gaming zone, consider a hypothetical situation in which the Legislature were to amend the KELA to allow placement of EGMs at a racetrack facility in the southwest zone. We think that action would be widely, and correctly, perceived as a violation of K.S.A. 2015 Supp. 74-8741(a) and (c)(4)(A)(ii) and the corresponding provisions in the pertinent lottery gaming facility management contract. Yet, because KELA currently prohibits placement of EGMs at any racetrack facility anywhere in either the southwest or south central zones, the only distinction between that hypothetical circumstance and the one in the south central gaming zone is that the KELA provided for a one-time vote that might have, but did not, authorized placement of EGMs at a racetrack facility in Sedgwick County. It seems to us that is a distinction without any relevant legal difference.

Accordingly, we opine that the term similar gaming facilities as used in Paragraph 30 in the South Central Facility Management contract⁶⁸ may include a racetrack gaming facility.⁶⁹

For the reasons set forth above, we opine that enacting a statute that authorizes a revote in Sedgwick County, a county in which the placement and operation of EGMs at a parimutuel licensee location is currently prohibited, would constitute the state designating an additional area in violation of Paragraph 30 in the South Central Facility Management contract and K.S.A. 2015 Supp. 74-8734(h)(19)(A)(ii). We also opine that, on the facts here, a racetrack gaming facility in Sedgwick County is a similar gaming facility as used in Paragraph 30 and K.S.A. 2015 Supp. 74-8734(h)(19)(A)(ii).

Pursuant to Paragraph 31 of the South Central Facility Management contract,⁷⁰ if the State violates Paragraph 30,⁷¹ the Manager is entitled to repayment of the privilege fee plus interest on such amount, compounded annually at the rate of 10%.

Liability for Repayment of Privilege Fee Under Paragraph 8

Paragraph 8 of the South Central Facility Management contract generally establishes that the Manager assumes the risk that the KELA may be invalidated, in whole or in part, through judicial action. Most of the provisions in Paragraph 8 specifically discuss various possibilities of judicial action related to the KELA. Oddly, however, Paragraph 8 also contains this clause:

[N]othing in this section will be interpreted to restrict, waive or delete any rights Manager may have to seek repayment of Managers' privilege fee if the Kansas Expanded Lottery Act were to be amended or repealed by a legislative body....

That clause is the only reference in Paragraph 8 to future legislative, as opposed to judicial, action. Thus, it stands alone. Notably, it contains no reference to Paragraph 30, the provision discussed above, that sets forth three circumstances in which the Manager may be entitled to repayment of its privilege fee. It appears, therefore, that this clause in Paragraph 8 is a freestanding reservation by the Manager of any right the Manager "may have" to "seek repayment of Managers' [sic] privilege fee" if the KELA "were to be amended...by a legislative body." By its plain language, Paragraph 8 does not create any right of the Manager to recover its privilege fee, but that paragraph expressly reserves any such right that may otherwise exist for the Manager and makes clear that nothing in the contract extinguishes any such right.⁷²

⁶⁸ See also, K.S.A. 2015 Supp. 74-8734(h)(19)(A)(ii).

⁶⁹ We believe the same analysis would apply to K.S.A. 2015 Supp. 74-8741(c)(4)(A) (ii).

⁷⁰ See also, K.S.A. 2015 Supp. 74-8734(h)(19)(B).

⁷¹ See also, K.S.A. 2015 Supp. 74-8734(h)(19)(A)(ii).

⁷² We note that this provision of Paragraph 8 appears to conflict with the provision of Paragraph 59 providing that "This Agreement will also be modified, in whole or in part, in order to comply with future statutory enactments ... This Agreement is subject to modification, in whole or in part, or cancellation, as

Thus, we must analyze whether the Manager would have such a right under the common law or under any other provision of law. If so, then a claim pursuant to any such right is expressly preserved by Paragraph 8 and the Manager could assert it.

Such a claim could be based upon a violation of the Contract Clause of the United States Constitution, which provides that no state shall pass any law impairing the obligation of contracts.⁷³ The Kansas Supreme Court has identified three factors that are to be considered when evaluating a claim that state law violates the Contract Clause:

[W]hether the state law has, in fact, operated as a substantial impairment of a contractual relationship; whether there is a significant and legitimate public purpose behind the legislation; and whether the adjustment of the contracting parties' rights and responsibilities is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.⁷⁴

We think the second and third prongs of that analysis essentially merge here, so we analyze the first and second prongs in turn. First, in determining whether the impairment of a contract resulting from an after-the-fact state legislative enactment is "substantial," courts consider a wide range of factors:

In making this determination [whether the contractual impairment is substantial], courts consider several factors, such as whether the impairment eliminates an important contractual right, affects terms upon which a party has relied, thwarts performance of an essential right, defeats an expectation of the parties, significantly alter[s] the duties of the parties, alters a financial term, or creates a significant financial hardship for one party.⁷⁵

At the time the parties entered into the South Central Facility Management contract, the parties to the contract were aware that Sedgwick County voters had rejected placement of EGMs at the parimutuel licensee location. They also were aware that the consequence of that decision by voters was to permanently foreclose such placement because, under the terms of the KELA, the "no" vote meant EGMs shall not be placed or operated there.⁷⁶ Presumably, the Manager took that information into account and relied upon it when entering into the contract. Whether a subsequent placement of EGMs in Sedgwick County is a substantial impairment to such contract would be a question of fact beyond

deemed necessary by the Executive Director to comply with any future statutory enactments..." It is, however, possible to read the two provisions in harmony by concluding that the Paragraph 59 provision reserves the right of the state to unilaterally modify the agreement, but Paragraph 8 reserves the right of the Manager to seek damages, including the refund of the privilege fee, if the state does so.

⁷³ U.S. Const., Art. 1, § 10, Cl. 1.

⁷⁴ *Zimmerman v. Board of County Com'rs*, 289 Kan. 926, 966 (2009) (citations omitted).

⁷⁵ 16A C.J.S. Constitutional Law § 508, March 2016 Update (internal citations omitted).

⁷⁶ K.S.A. 2015 Supp. 74-8743(c).

the scope of this opinion, but given market dynamics, we will assume without deciding that such a change would be substantial for contract-law purposes.⁷⁷ We think it likely the Manager would plausibly assert that it is.

If the threshold inquiry is met, the second factor in evaluating a claim that state law violates the Contract Clause would be to determine whether the law has a legitimate and important public purpose. “If a significant and legitimate purpose is not identified, then the state law is unconstitutional under the Contract Clause”⁷⁸ and the inquiry ends.

If a significant and legitimate public purpose is present regarding a regulation that significantly impairs a contract, then the court must determine [the third factor,] whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the adjustment.⁷⁹

We are uncertain what “significant and legitimate [public] purpose” would be served by enactment of legislation allowing a revote in Sedgwick County. Of course, certain constituent groups presumably would be pleased with that outcome, but that alone is unlikely to constitute a legally satisfactory public purpose. We acknowledge that the Legislature may be able credibly to assert the existence of a “significant and legitimate purpose,” but that would be a question of fact beyond the scope of this opinion, and it is not immediately obvious to us what such a purpose would be. Even if there were such a “significant and legitimate purpose,” however, it is not clear that statutory amendments authorizing a revote in Sedgwick County would be “based upon reasonable conditions and [be] of a character appropriate to the public purpose justifying the adjustment.”

Even if the Legislature were to assert such a public purpose, we caution that courts are unlikely to accept the Legislature’s assertion at face value. That is because in this case, the State (through the Kansas Lottery) is a party to the contract that would be impaired by enactment of new legislation allowing a revote in Sedgwick County:

If the contract allegedly impaired by a change in state law is one created, or entered into, by the State itself, the State’s self-interest is at stake, and a court determining whether the change violates the Contract Clause is required to pay less deference to the legislative determination of reasonableness and necessity.⁸⁰

⁷⁷ The State has represented as much in its separate efforts to keep the Wyandotte Nation from constructing a casino in Park City, which is in Sedgwick County. See letter from Governor Mark Parkinson to Assistant Secretary Larry Echo Hawk, U.S. Department of the Interior, dated September 13, 2010 (“[I]f the Wyandotte Nation were permitted to build a gaming facility on the Park City land, the will of the people in Sedgwick County, Kansas would be frustrated and the State of Kansas would experience reduced state tax revenue from a state-owned gaming facility slated to operate under state law in an adjacent county.”)

⁷⁸ 16A C.J.S. Constitutional Law § 508, March 2016 Update (internal citations omitted).

⁷⁹ *Id.*

⁸⁰ *Id.*

The Kansas Supreme Court has further explained principles of contract law applicable in situations in which the State is a party to a contract and the Legislature subsequently amends a statute in a manner affecting the rights and duties of parties to the contract.

For example, in *State ex rel. Speer v. Barker*,⁸¹ our Supreme Court explained that although the Legislature is free to repeal a statute under authority of which a contract was entered, the contract nevertheless would remain valid. To paraphrase the Court, although the Legislature may modify and repeal acts of former legislatures, and cannot abridge succeeding legislative action, where a contract is made under authority of law, the right of property arising from the contract cannot be divested by subsequent legislative action.⁸²

Our Supreme Court further explained:

As a general principle, one legislature is competent to repeal or modify any act of a former legislature, and one legislature cannot abridge the power of a succeeding legislature. This power is sometimes reserved by statutory provisions of a general nature. But this general principle has exceptions. ...Where a valid contract with the state has been entered into in pursuance of a legislative enactment a subsequent legislature cannot enact a law which provides for an abrogation of the contract.⁸³

Thus, we assume, without deciding, that the Manager would assert that the impairment of its contract resulting from the placement of EGMs in the South Central gaming zone is “significant.” We presume the Manager relied on the statutory prohibition on the placement of EGMs in Sedgwick County when deciding to enter into the contract. It is not obvious to us what the state’s “significant and legitimate” purpose would be in reversing the current statutory prohibition on placement of EGMs in Sedgwick County, but we think courts would give little deference to any legislative determination that such a purpose exists because the State itself is a party to the contract and “the State’s self-interest is at stake.” For all these reasons, we think the Manager would have a cause of action against the State for breach of its contract in violation of the Contract Clause.

Because the requirement in Paragraph 31 to refund the privilege fee applies only in the event of a breach under Paragraph 30, and not a breach under Paragraph 8, it cannot be determined with certainty what the remedy would be for a breach under Paragraph 8. However, we think it likely the Manager would demand refund of the privilege fee under general principles of contract law, and we note that Paragraph 20 expressly reserves any such right the Manager may have.

⁸¹ 4 Kan. 379 (1868).

⁸² *Id.* at 386. See also *State ex rel. Boynton v. Kansas State Highway Comm’n*, 139 Kan. 391, 393 (1934).

⁸³ *State ex rel. Boynton v. Kansas State Highway Comm’n*, 139 Kan. 391, 393 (1934).

Liability for Repayment of Privilege Fee Under Paragraph 59

Finally, even if the Manager did not have a cause against the State for breach of contract under Paragraph 30, or under Paragraph 8, a clause in Paragraph 59 grants the Manager a plain and unambiguous claim for breach in the event the Legislature were to effectively remove the KELA prohibition on EGMs at the racetrack facility in Sedgwick County.

The pertinent clause of Paragraph 59 reads as follows:

Notwithstanding[] any provision to the contrary, it is understood, acknowledged and agreed to by the parties hereto that amendments to the KELA after the date of execution of this Agreement shall not impair either party's legal entitlements or remedies *that would have been available at law or equity before the date of any such amendment.*⁸⁴

It is clear that if the State were to take action today, in the absence of enactment of new legislation, to allow placement of EGMs at the Wichita racetrack facility, that action would violate both the contract and state law. This is because the placement of such EGMs is currently barred by state law as a result of Sedgwick County voters rejecting a proposition for their placement.⁸⁵ If the State were to ignore that law and nonetheless proceed to allow unlawful placement of EGMs in Sedgwick County, that would violate the Constitution of the State of Kansas,⁸⁶ state law,⁸⁷ and the contract.⁸⁸ Viewed a different way, if there were an attempt notwithstanding current law to place EGMs in a Sedgwick County racetrack facility, the courts likely would block it because of the KELA prohibition, and the Manager would have standing to bring the lawsuit seeking such a remedy because of the negative effect that violating current state law presumably would have on the right to operate a lottery gaming facility in Sumner County that is secured by the contract. If the courts did not block the placement of EGMs in Sedgwick County in violation of state law, the Manager would have a strong claim for damages from lost market share due to the State's illegal operation of EGMs in the South Central gaming zone.

Because the manager has that legal remedy available today, then under Paragraph 59 the Manager would retain that remedy even if the Legislature were to enact a new statute authorizing a revote in Sedgwick County. The new statute might render the placement of EGMs in Sedgwick County lawful – *i.e.*, not a violation of state statute – but it could do nothing to alter the provision of Paragraph 59 of the contract, which specifically reserves to the Manager any “legal entitlements or remedies that would have been available at law or equity before the date of any such amendment.”

⁸⁴ Emphasis added.

⁸⁵ K.S.A. 2015 Supp. 74-8743(c).

⁸⁶ Kan. Const., Art. 15, § 3.

⁸⁷ K.S.A. 74-8740.

⁸⁸ Paragraphs 30 and 31 of the South Central Facility Management contract. See *also*, K.S.A. 2015 Supp. 74-8734(h)(19)(A)(ii) and (B).

As is the case with a violation of Paragraph 8, because the requirement in Paragraph 31 to refund the privilege fee applies only in the event of a breach under Paragraph 30, and not a breach under Paragraph 59, it cannot be determined with certainty what the remedy would be for a breach under Paragraph 59. However, we think it likely the Manager would demand refund of the privilege fee under general principles of contract law, and we note that Paragraph 20 expressly reserves any such right the Manager may have.

An Analogous Case

Because the United States Supreme Court confronted questions similar to yours in *Mobil Oil Exploration and Producing Southeast, Inc. v. United States*,⁸⁹ a review of that case is instructive in understanding how courts would be likely to analyze the first question you present. In that case, oil companies in 1981 had made up-front “bonus” payments to the United States of \$156 million for the rights to engage in specified offshore oil exploration and, in exchange, received 10-year renewable lease contracts with the United States.⁹⁰ During the term of the lease contract, Congress changed the law in a manner that imposed additional conditions that must be met before the Secretary of the Interior could approve the companies’ offshore drilling contemplated by the lease contracts. The companies sued the United States for breach of their lease contracts and demanded the government repay the up-front payments. In deciding the case, the Supreme Court set forth the general framework and applicable principles for analyzing similar claims of breach of contract arising when the government is party to a contract and later changes the law upon which the contract was based:

A description at the outset of the few basic contract law principles applicable to this action will help the reader understand the significance of the complex factual circumstances that follow. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. The Restatement of Contracts reflects many of the principles of contract law that are applicable to this action. As set forth in the Restatement of Contracts, the relevant principles specify that, when one party to a contract repudiates that contract, the other party is entitled to restitution for any benefit that he has conferred on the repudiating party by way of part performance or reliance. The Restatement explains that “repudiation” is a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach. And “total breach” is a breach that so substantially impairs the value of the contract to the injured party at the time of the breach that it is

⁸⁹ 530 U.S. 604 (2000).

⁹⁰ *Mobil Oil*, 530 U.S. at 609. In addition to the up-front “bonus” payments, the companies would be required to pay royalties on any ongoing production pursuant to the lease contracts.

just in the circumstances to allow him to recover damages based on all his remaining rights to performance.

As applied to this action, these principles amount to the following: If the Government said it would break, or did break, an important contractual promise, thereby substantially impairing the value of the contracts to the companies, then (unless the companies waived their rights to restitution) the Government must give the companies their money back. And it must do so whether the contracts would, or would not, ultimately have proved financially beneficial to the companies.⁹¹

The United States refused the oil companies' demand that it refund their up-front payments for three reasons: First, the government argued it did not breach the contracts or communicate intent to do so. Second, it argued any breach was not "substantial" and thus did not constitute repudiation of the contracts and should not result in a requirement for repayment. Third, it argued the companies had waived their rights to restitution.⁹²

It is instructive for our purposes that in rejecting the government's arguments, the Supreme Court looked to the terms of the lease agreements themselves.

First, the Supreme Court searched in vain for any provision in the lease contract that would have made the lease provisions subject to future changes in federal statutes that effectively altered the bargain between the parties. "Without some such contractual provision limiting the Government's power to impose new and different requirements, the companies would have spent \$156 million to buy next to nothing."⁹³ Although it would have been possible for the parties to have included in the lease contract such a provision, the Supreme Court was unwilling to find such a provision in the contract unless it was expressly included by the parties because any less-exacting expression was "not sufficient to produce the incorporation of future statutory requirements, which is what the Government needs to prevail."⁹⁴ Ultimately, the Supreme Court concluded that the later statutory changes made by Congress "were changes of a kind that the contracts did not foresee," were not "authorized by any ... contract[] ... provision," and thus enacting those statutory changes constituted the government "communicating its intent to violate the contracts."⁹⁵

Second, the Supreme Court analyzed the facts surrounding the case and concluded that the government's breach of its contracts was "not technical or insubstantial."⁹⁶ Citing the Restatement of Contracts, the Supreme Court observed the "breach was substantial, depriving the companies of the benefit of their bargain."⁹⁷ Specifically referencing the up-

⁹¹ *Mobil Oil*, 530 U.S. at 607-08 (internal punctuation and citations omitted).

⁹² *Mobil Oil*, 530 U.S. at 614.

⁹³ *Mobil Oil*, 530 U.S. at 616.

⁹⁴ *Id.*

⁹⁵ *Mobil Oil*, 530 U.S. at 620.

⁹⁶ *Mobil Oil*, 530 U.S. at 621.

⁹⁷ *Mobil Oil*, 530 U.S. at 621 (punctuation omitted).

front cash payments, the Supreme Court posed the following question: "Under these circumstances, if the companies did not at least buy the promise that the Government would not deviate significantly from those procedures and standards [in place at the time of the contract], then what did they buy?"⁹⁸

Third, the Supreme Court rejected the government's argument that the oil companies had waived any claim to restitution by accepting at least partial performance of the contract.⁹⁹

Ultimately, the Supreme Court concluded:

Contract law expresses no view about the wisdom of [a statute enacted after the contract was entered into by the government]. We have examined only that statute's consistency with the promises that the earlier contracts contained. We find that the oil companies gave the United States \$156 million in return for a contractual promise to follow the terms of pre-existing statutes and regulations. The new statute prevented the Government from keeping that promise. The breach substantially impaired the value of the contracts. And therefore the Government must give the companies their money back.¹⁰⁰

For similar reasons, we think it likely that if the Legislature were to unilaterally alter the terms of the bargain the state struck with the Manager and embedded in the contract by amending state law to allow unexpected competition, in the form of EGMs placed at the racetrack facility in Sedgwick County, that after-the-fact change in statute likely would "substantially impair[] the value of the contract[]". And therefore the [State] must give the [Manager its] money back."

Other Causes of Action

In your second question, you ask whether such a breach of contract subjects the state to additional liabilities for damages. We refer you to our extensive analysis above, which we think addresses this question. We further note that, although under Paragraph 31 of the South Central Facility Management contract, the exclusive remedy is refund of the privilege fee paid by the Manager, plus interest on such amount, compounded annually at the rate of 10 percent, that provision by its terms applies to breach under Paragraph 30 and does not apply to breach under other provisions of the contract.

Accrual of a Breach of Contract

In your third question, you ask whether such a breach of contract would occur at the time the bill is enacted. We believe you are asking when a cause of action accrues. In general,

⁹⁸ *Mobil Oil*, 530 U.S. at 620-21.

⁹⁹ *Mobil Oil*, 530 U.S. 622-623.

¹⁰⁰ *Mobil Oil*, 530 U.S. at 624 (citations and punctuation marks omitted).

[a] cause of action for breach of contract accrues when a contract is breached by the failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury it causes.¹⁰¹

The contract term or terms alleged to have been breached will dictate when accrual transpires. There also are general principles of contract law that, in applicable circumstances, allow an aggrieved party to seek judicial relief prior to the breach actually occurring. Because the timing of litigation can be influenced by matters of strategy that are not determined solely by the literal legal rights at issue, we do not offer an opinion on when an aggrieved party might seek judicial relief if the Legislature were to amend KELA to allow a revote in Sedgwick County.

Conclusion

In light of the analysis above, we think the Manager in the South Central gaming zone would have a cause of action to demand repayment of the privilege fee, to seek other damages or remedies allowed by contract law, or to enjoin the enforcement of any new statute permitting a revote on placement of EGMs at the Sedgwick County racetrack facility.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Athena E. Andaya

Athena E. Andaya
Deputy Attorney General

DS:AA:sb

¹⁰¹ *Ace Property & Cas. Ins. Co. v. Superior Boiler Works, Inc.*, 504 F.Supp.2d 1154, 1160 (D. Kan. 2007), reconsideration denied.

**ADDENDUM TO TESTIMONY OF KEVIN M. FOWLER
BEFORE THE HOUSE COMMITTEE ON APPROPRIATIONS
IN OPPOSITION TO HB 2173**

MARCH 23, 2017

Revote in Sedgwick County

New Section 4 of HB 2173 provides for a *special election* within 120 days of any valid petition containing at least 5,000 signatures of qualified voters in Sedgwick County requesting an election to determine whether the operation of electronic gaming machines by the Kansas Lottery shall be permitted at the Wichita Greyhound Park (WGP) in Sedgwick County. This provision for a second election or “revote” is legally objectionable for the reasons identified in Attorney General Opinion No. 2016-6. KELA gave the registered voters of each County within the four (4) Kansas gaming zones only one opportunity to determine whether to permit or prohibit the placement of electronic gaming machines in their respective County. Since a majority of Sedgwick County voters rejected slot machines in a special election held on August 7, 2007, KELA has prohibited the placement of such gaming machines there for nearly a decade. No provision of KELA authorizes a second vote or “revote” and the rejection of slot machines in 2007 has created reasonable reliance interests and settled expectations. Kansas Star has invested \$325 million in developing and improving its facilities, in part, based on its reasonable expectation that the State will comply with the statutory prohibition on placing electronic gaming machines anywhere in Sedgwick County.

Protracted and Expensive Litigation

New Section 5(a) of HB 2173 requires each lottery gaming facility manager aggrieved by the bill to file or join any legal action within 60 days from final approval of any racetrack gaming facility management contract. This provision virtually guarantees the prompt commencement of legal action.

New Section 5(b)(3) of HB 2173 requires each lottery gaming facility manager which files or joins such litigation to “place into escrow with the Kansas lottery, as liquidated damages, the sum of \$5,000,000 either in cash or surety bond.” In other words, any manager which desires to protect its constitutional, statutory and contractual rights must pay \$5 million as statutory “liquidated damages” in order to gain access to court and to preserve existing legal, equitable and contractual remedies.

No provision in Kansas law, including KELA, and no provision in any lottery gaming facility management contract authorizes or requires the payment of \$5 million as a condition precedent to seeking judicial relief against the State. The State’s self-serving imposition of any such “pay to litigate” requirement after-the-fact is not only patently unfair and unprecedented, we believe

that it would violate important constitutional guarantees, including equal protection, due process and the prohibition against state action impairing the obligations of contracts, and it would materially breach the State's contractual obligation of good faith and fair dealing.

The bill further provides that if the managers do not ultimately prevail in the litigation, each will forfeit its \$5 million escrow deposit and it shall be paid out to the State except for any amount necessary to reimburse the racetrack gaming facility manager for its litigation costs, including reasonable attorney's fees. Of course, no provision of HB 2173 requires the racetrack gaming facility manager to participate in such litigation and there is no corresponding provision which authorizes the lottery gaming facility managers to recover their litigation costs, including reasonable attorney's fees, when they prevail in this legal action.

New Section 5(b)(1) of HB 2173 provides that after the 60-day filing period closes, the racetrack gaming facility manager shall place into escrow cash or a surety bond equal to the amount of the privilege fees paid by each lottery gaming facility manager which has filed or joined the action, plus an amount equal to accrued interest on such privilege fees at the rate of 10% compounded annually. **It has been estimated that for all lottery gaming facility managers, this amount is approximately \$110.0 million to date.** This provision has serious implications for the State because New Section 5(d) of HB 2173 requires the State to reimburse the racetrack gaming facility manager the full amount of this liability from the 22% of net electronic gaming machine income otherwise due to the State under Section 11 of HB 2173. The rate of reimbursement is subject to negotiation between the racetrack gaming facility manager and the executive director of the Kansas Lottery, but New Section 5(b)(1) further specifies that in no event shall the percentage be less than 50% of the funds to which the State is entitled from the expanded lottery act revenue fund. **In other words, the ultimate liability for this \$110.9 million rests with the State and the racetrack gaming facility manager is held completely harmless.**

New Section 5(b)(2) of HB 2173 further provides that upon placing this estimated amount of \$110.9 million in escrow, the racetrack gaming facility manager may construct and operate the reopened racetrack facility "without exposure to a restraining order or injunction requested by any party for any purpose in any action pursuant to this section or otherwise." **This shocking and unprecedented provision purports to place the racetrack facility completely above the law since, regardless of whether the construction and operation of any such facility is finally held to be unlawful, no court may enjoin its continued operation "pursuant to this section or otherwise."** While the lottery gaming facility management contracts preserve the rights of lottery gaming facility managers to pursue equitable remedies, including specific performance of the State's contractual obligations, this provision directly interferes with our contracts by prohibiting any form of injunctive relief. In our view, the state's unilateral attempt to deprive lottery gaming facility managers of their right to seek such remedies would constitute a material breach of contract and violates various constitutional guarantees, including equal protection, due process and the prohibition against state action impairing the obligations of contracts.

Notwithstanding the language of the bill, we believe that provisional and permanent prospective injunctive relief would remain available against any state officer or private party who acts under the color of state law to deprive any lottery gaming facility manager of its rights under the Constitution and laws of the United States. (*See* 42 U.S.C. § 1983). Regardless of whether the State may be authorized under any circumstances to grant such blanket immunity to any private party, the State cannot insulate its officers or private parties from the requirements of federal law. Moreover, prevailing parties in litigation under 42 U.S.C. § 1983 are generally entitled to recover their reasonable attorney's fees from the losing party or parties under 42 U.S.C. § 1988.

Significant Reduction in Live Racing Requirements

Section 10 of HB 2173 establishes a fixed number of live racing weeks in Sedgwick County, Wyandotte County and Crawford County for the operation of slot machines, but authorizes exceptions. The bill authorizes slot machines at The Woodlands in Wyandotte County (WDS) while eliminating the current requirement to conduct at least 5,000 live greyhound races per year—a 100% reduction in such racing. The bill also authorizes slot machines at Camptown Greyhound Park in Crawford County (“CGP”) while reducing the required number of live greyhound races from at least 4,250 to 2,125—a 50% reduction in such racing. Any suggestion that HB 2173 promotes the live greyhound racing industry is squarely inconsistent with its provisions authorizing a 100% reduction in such racing at WDS and a 50% reduction in live greyhound racing at CGP.

The last time WDS held 60 horse racing days was in 1994. From 1995 through 2007, WDS held no more than half that number of racing days, presumably due to the authorized exception procedure, before its license was revoked in 2010 for failure to conduct required live races. More than a decade of experience prior to the cessation of live horseracing at WDS realistically suggests that the bill is unlikely to result in more than 30 live racing days per year.

Under HB 2173, WDS will be permitted to operate as a casino 365 days per year and to conduct horse racing on only 60 of those days. In other words, WDS will operate solely as a casino 87% of the time and as a casino with live racing only 17% of the time. Likewise, CGP will be authorized to operate as a casino 365 days per year and to conduct live greyhound racing on only 175 of those days. Thus, CGP will operate solely as a casino 53% of the time and as a casino with live greyhound racing only 47% of the time.

Section 10(a)(2) of HB 2173 relieves WDS of the current requirement in K.S.A. 2016 Supp. 74-8746(a)(2) to conduct “at least 100 live greyhound races each calendar week for at least the same number of weeks raced during calendar year 2003, with at least 13 live races conducted each day for not less than five days per week,” which we understand amounts to at least 5,000 live greyhound races per year. The bill would, therefore, authorize slot machines at this closed facility without any resumption of greyhound racing whatsoever and the elimination of at least 5,000 live greyhound races per year as currently required. By any measure, this change is substantial reduction in current live racing requirements for slot machines at WDS in Wyandotte County.

Section 10(a)(3) of HB 2173 provides that CGP must have “at least 85 live greyhound races each calendar week for at least 25 weeks with at least 12 live races conducted each day for not less than five days per week” instead of the number of the number of weeks raced during calendar year 2003 in Sedgwick County. *See* Section 10(a)(3). Because KELA currently authorizes the placement of slot machines at CGP only if the racetrack conducts 50 weeks of live greyhound racing per year, the bill cuts this live racing requirement in half (*i.e.*, from at least 4,250 to 2,125 live races per year). Moreover, 25 weeks is less than one-half of a year (175 days), and the number of races required during each of these weeks could be substantially lower unless the exception procedure is substantially amended.