

# NOT SO LUCKY IN KENTUCKY: CONSTITUTIONALITY OF KENTUCKY'S SLOT MACHINES

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## INTRODUCTION

If you ask the average American what Kentucky is known for, the words “horse racing” are a likely answer to follow. Along with “bourbon” and “fried chicken,” Kentucky is interconnected with the horse racing industry and is commonly known as the “Horse Capital of the World.”<sup>2</sup> Gambling has always been an integral part of horse racing in Kentucky ever since tracks began to open in 1875.<sup>3</sup> Fans flock to the betting windows at Churchill Downs, Keeneland, and Red Mile to bet on the races they are spectating, or even other races at different tracks through simulcasting.<sup>4</sup> Patrons pick horses for a multitude of reasons, such as recent horse performance, favorite trainer or jockey, or their favorite color worn by the horse and jockey.<sup>5</sup> The overall economic impact the industry has on Kentucky is extensive, accounting for thousands of jobs and millions in revenue, with wagering revenue accounting for a substantial amount.<sup>6</sup> Wagering is the main appeal for horse racing fans, and it is what has kept the sport alive in an age where professional team sports dominate the sporting industry.<sup>7</sup> With that said, horse racing wagering is the only type of gambling that is legal in the state of Kentucky (excluding charitable gaming and the state lottery) and is regulated by section 528 of the Kentucky statutes and the Kentucky Horse Racing Commission (KHRC).<sup>8</sup>

While these gambling laws of Kentucky have been explicitly clear, the lines have been blurred recently due to horse racing tracks introducing the Historical Horse Racing Machines (HHR machines) beginning in 2011.<sup>9</sup> These

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<sup>2</sup> See *Horse Capital of the World*, LEXINGTON VISITOR CTR., <https://www.visitlex.com/things-to-do/horses/> (last visited Dec. 10, 2022) [<https://perma.cc/5XTM-4U3Q>].

<sup>3</sup> John Isaac, *Guide to Online Casinos in Kentucky: The Best Kentucky Casino Sites for 2022*, ONLINE-GAMBLING, <https://www.online-gambling.com/us/kentucky/casinos/> (last visited Oct. 11, 2022) [<https://perma.cc/WU9M-GAQY>].

<sup>4</sup> M. Shannon Bishop, *And They're Off: The Legality of Interstate Pari-Mutuel Wagering and Its Impact on the Thoroughbred Horse Industry*, 89 KY. L.J. 711, 712 (2001).

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

<sup>6</sup> Economic Impact of the *EQUINE INDUSTRY in Kentucky*, KENTUCKYBRED.ORG, <https://www.kentuckybred.org/kentucky-equine-industry-impact/> (last visited Oct. 17, 2022) [<https://perma.cc/9CRH-6DZU>]; J. Shannon Neibergs, *Kentucky Parimutuel Revenue Policy Simulator*, GAMING RSCH. & REV. J. 17 (2000).

<sup>7</sup> *Horse Racing History*, WINNING PONIES.COM, <https://www.winningponies.com/horse-racing-history.html> (last visited Oct. 11, 2022) [<https://perma.cc/WW2G-9CYR>].

<sup>8</sup> See *Kentucky Online Casinos & Real Money Gambling*, LETS GAMBLE USA (Aug. 30, 2021), <https://www.letsgambleusa.com/kentucky/> [<https://perma.cc/4CSE-MSPL>].

<sup>9</sup> Adam K. Raymond, *How decades-old horse races saved a signature kentucky industry*, SPECTRUM NEWS 1 (Apr. 23, 2021), <https://spectrumnews1.com/ky/louisville/news/2021/04/21/the-rise-of->

HHR machines resemble the classic “slot machines” that are found in a typical Las Vegas casino with flashing lights, action-themed games, and instant-type betting<sup>10</sup>—the very type of casino-like gaming of chance that is illegal in Kentucky.<sup>11</sup> In fact, in 2020, the Supreme Court of Kentucky ruled these HHR machines are illegal and do not qualify as pari-mutuel wagering—the cornerstone of what is required for horse racing wagering to be considered legal under Kentucky statutes.<sup>12</sup> In response, the legislature, ignoring the Court’s criteria for what constitutes pari-mutuel wagering, simply adopted a new statutory definition for pari-mutuel wagering, one not shared by anyone outside Kentucky, to allow for the powerful horse industry to continue to exclusively run their slot-like gaming systems.<sup>13</sup> This legislation, Senate Bill 120 (commonly referred to as the “slots bill”), allowing this type of gambling was also passed without a Constitutional Amendment.<sup>14</sup> In other words, Kentuckians did not have any say in the implementation of these highly addictive gambling machines.

This Note concludes the legislation passed redefining the term “pari-mutuel wagering” is unconstitutional because it defies section 226 of the Kentucky Constitution, it is special legislation benefitting only a special interest, and it violates the separation of powers clause. Part I clarifies the factual definition of pari-mutuel wagering and why the HHR machines do not fall under this category. Part II outlines the language of the bill that redefined pari-mutuel wagering and its implications. Part III discusses how this act of legislation violates both section 226, and the separation of powers clause, of the Kentucky Constitution. Part IV addresses the inferior tax structure and clear favoritism of the horse industry. Lastly, Part V examines solutions in terms of why a constitutional amendment is required for expanded gaming such as this, and how legalized gaming should be taxed.

## I. WHAT IS PARI-MUTUEL WAGERING?

In the state of Kentucky, any wagering on horse racing must be based on a pari-mutuel system.<sup>15</sup> Section 226 of the State Constitution says that “lotteries and gift enterprises are forbidden, . . . and none shall be exercised, and no schemes for similar purposes shall be allowed.” meaning, as Kentucky courts have interpreted,

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historical-horse-racing-in-kentucky [https://perma.cc/E253-ZFTG]; Mike Murphy, *Kentucky Supreme Court Rules Against Historical Horse Racing*, BETTINGUSA.COM (Oct. 6, 2020), <https://www.bettingusa.com/supreme-court-kentucky-hhr-case/> [https://perma.cc/742C-QDRL].

<sup>10</sup> *Id.*

<sup>11</sup> Ky. Op. Att’y Gen. 93–58 (1993).

<sup>12</sup> *Fam. Tr. Found. of Ky., Inc. v. Ky. Horse Racing Comm’n*, 620 S.W.3d 595, 600–03 (Ky. 2020).

<sup>13</sup> Ky. Op. Att’y Gen. 93–58 (1993).

<sup>14</sup> Joe Sonka, *Kentucky Senate Passes Bill to Legalize Slot-Like Historical Horse Racing Machines*, LOUISVILLE COURIER J. (Feb. 9, 2021), <https://www.courier-journal.com/story/news/politics/ky-general-assembly/2021/02/09/senate-passes-bill-legalizing-historical-horse-racing-machines/4455009001/> [https://perma.cc/CR7G-6EAT].

<sup>15</sup> 811 KY. ADMIN. REGS. 2:060 (2021).

gambling is generally outlawed in the state of Kentucky.<sup>16</sup> There are key exceptions, however, such as the state lottery, charitable gaming and of course, pari-mutuel horse racing.<sup>17</sup>

Pari-mutuel wagering differs significantly from typical casino or sports wagering in that a bettor is betting against other bettors rather than against the association (“house”), like in a blackjack game, for example.<sup>18</sup> In other words, at any given horse race, there is a pool of money that consists of every bet that has been placed on that current race.<sup>19</sup> This pool of bets also dictates the odds and potential payout of each horse, which provides transparency to every bettor.<sup>20</sup> When the race ends, the pool of money is then disbursed to those with winning bets, and the payout to the winners depends on the final odds just before the race began with lower final odds resulting in a higher payout for the winners.<sup>21</sup>

If the bettors are only betting amongst themselves, what is in it for the racetrack owners, the horsemen, and horse owners? This is referred to as the “takeout,” which is a percentage of the winnings (usually 10-20% depending on the state and track) distributed among these participants of the race itself and to taxes.<sup>22</sup> Because the rates of the takeout do not change, the winning bettors are essentially paying a cut to the racetrack for putting on the race.<sup>23</sup>

#### *A. Common Meaning*

Given that KRS Chapter 230, which regulates pari-mutuel horse racing, does not define the term “pari-mutuel,” Kentucky courts have used a variety of sources to ascertain the commonly understood meaning of the term.<sup>24</sup> For example, the federal Interstate Horseracing Act of 1978, which was designed to standardize the practice of off-track betting, described pari-mutuel wagering as “[a]ny system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and

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<sup>16</sup> KY. CONST. § 226, Bishop, *supra* note 4, at 603.

<sup>17</sup> Jane Block, *Legal Betting, Poker & Casinos in Kentucky*, GAMBLING ONLINE (Oct. 15, 2021), <https://www.gamblingonline.com/laws/kentucky/> [https://perma.cc/3N5J-XJ6W].

<sup>18</sup> *Pari-Mutuel Betting—What It Is and How It Works*, NEW YORK SPORTS BETTING <https://www.nysportsbetting.com/guide/pari-mutuel/> (last visited Oct. 25, 2022) [https://perma.cc/3MKR-8VEB].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *What is a Takeout in Horse Betting*, EZHORSEBETTING (June 16, 2017), <https://www.ezhorsebetting.com/what-is-takeout-in-horse-betting/> [https://perma.cc/HVZ6-MZXM]; Paul Bergeron, *Why Horse Bettors Should Eye Takeout Rates and Bet Accordingly*, PLAYUSA (June 2, 2021), <https://www.playusa.com/why-horse-bettors-should-eye-takeout-rates/> [https://perma.cc/2XVS-PWRX].

<sup>23</sup> *Id.*

<sup>24</sup> *Fam. Tr. Found. of Ky. v. Ky. Horse Racing Comm’n*, 620 S.W.3d 595, 600 (Ky. 2020).

in which the participants are wagering with each other and not against the operator.”<sup>25</sup>

The term “pari-mutuel” comes from the French language with “pari” meaning “to bet” and “mutuel” meaning “mutual” or “reciprocal.”<sup>26</sup> In *Commonwealth v. Kentucky Jockey Club*, the Court of Appeals of Kentucky described pari-mutuel as:

[t]he operator of the machine does not bet at all. He merely conducts a game, which is played by the use of a certain machine, the effect of which is that all who buy pools on a given race bet as among themselves; the wagers of all constituting a pool going to the winner or winners. The operator receives 5 per cent. of the wages as his commission. But in selling ordinary pools on horse races the seller does not operate a “machine or contrivance used in betting.” Neither does he bet on a horse race.<sup>27</sup>

In addition, the KHRC’s regulatory definition matches squarely with these historic definitions in providing that it is: “wagering among themselves and not against the association and amounts wagered are placed in one or more designated wagering pools and the net pool is returned to the winning patrons.”<sup>28</sup>

The Kentucky courts, KHRC, and federal government agreed on the uniform definition. Thus, before the year 2021, “pari-mutuel” inarguably had a factual, universal meaning.

### ***B. HHR Machines are not Pari-Mutuel Wagering***

Despite the well-understood meaning of pari-mutuel, Kentucky horse tracks began to push the envelope (or simply throw the envelope away) by introducing the HHR machines in 2011.<sup>29</sup> “Triple Action Dragons”, “The Enforcer” and “Tiger Lord” are just a few of the hundreds of various HHR slot gaming themes.<sup>30</sup> The machine itself resembles that of a slot machine exactly. Money is inserted. The patron hits a button. Spinning wheels, lights and sounds stimulate each patron.<sup>31</sup>

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<sup>25</sup> International Horseracing Act of 1978, Pub. L. No. 95–515 § 3, 92 Stat. 1811, 1812 (1978).

<sup>26</sup> *Pari-Mutuel*, ONLINE ETYMOLOGY DICTIONARY (Jan. 15, 2020), <https://www.etymonline.com/word/pari-mutuel> [<https://perma.cc/UQ4H-YU55>].

<sup>27</sup> *Commonwealth v. Ky. Jockey Club*, 38 S.W.2d 987, 991 (Ky. Ct. App. 1931).

<sup>28</sup> 811 KY. ADMIN. REGS. 1:005 (effective May 31, 2019, the Commission revised its regulations).

<sup>29</sup> Raymond, *supra* note 9; Murphy, *supra* note 9.

<sup>30</sup> *Themed Games*, RED MILE GAMING & RACING, <https://redmileky.com/gaming/themed-games> (last visited Oct. 26, 2022) [<https://perma.cc/96N6-BCZR>].

<sup>31</sup> Brief for Appellant at 10, *Fam. Tr. Found. of Ky., Inc. v. Ky. Horse Racing Comm'n*, 620 S.W.3d 595 (Ky. 2020) (No. 2018-SC-000630-TG).

The horse tracks and KHRC justified the inception with the fact that the results produced by the machines were based on previously run races.<sup>32</sup> The Supreme Court of Kentucky in *Family Trust Foundation of Kentucky, Inc. v. Kentucky Horse Racing Commission* disagreed, however, and in a 7-0 ruling held the HHR machines did not constitute a pari-mutuel system of wagering.<sup>33</sup>

In the ruling Justice VanMeter explained that there are two essential elements that must be in place for pari-mutuel wagering, being “patrons are wagering among themselves and not against the association,” and “amounts wagered are placed in one or more designated wagering pools.”<sup>34</sup>

In order for patrons to be able to bet among themselves, there must be a discreet, individual event on which wagers are made.<sup>35</sup> For example, all horse races are discrete in that thousands of bettors are able to wager among themselves at the same time, which is absolutely necessary for pari-mutuel wagering to take place. The biggest key to this—as the court explained—is reciprocity.<sup>36</sup> Reciprocity, translated from the French word *mutuel*, means mutual dependence on another.<sup>37</sup> In wagering, this is the requirement for bettors to have dependence on each other’s bet or to “bet amongst themselves.”<sup>38</sup> In describing this reciprocity, Justice VanMeter stated, “Without providing simultaneous access to one historical horse race to the same group of patrons, no pari-mutuel pool can be created among the patrons in which they are wagering among themselves, setting the odds and the payout.”<sup>39</sup>

In addition to reciprocity, the second prong is that there must be one or more designated wagering pools for the given event.<sup>40</sup> In *Family Trust*, KHRC contended that because there was an “initial seed pool” created by the racetracks, the pool designation prong was satisfied.<sup>41</sup> The Supreme Court again disagreed stating:

“The betting pools are required to be established *only* by the patrons. And, as found by the trial court, based on testimony, a possibility exists that one patron could win all of the net pool, which would then require the association to step back in and replenish the seed pool. At such points, the pools are not created by the patrons as required by pari-mutuel wagering.”<sup>42</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Fam. Tr. Found. of Ky. v. Ky. Horse Racing Comm’n*, 620 S.W.3d 595, 600 (Ky. 2020).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 601.

<sup>37</sup> *Reciprocal*, INTERGLOT TRANSLATION DICTIONARY, <https://www.interglot.com/dictionary/en/fr/search?q=reciprocal> (last visited Oct. 26, 2022) [<https://perma.cc/VJJ9-KGW2>].

<sup>38</sup> *Fam. Tr. Found.*, 620 S.W.3d at 600.

<sup>39</sup> *Id.* at 601.

<sup>40</sup> *Id.* at 600.

<sup>41</sup> *Id.* at 599.

<sup>42</sup> *Id.* at 601.

In other words, when it comes to HHR machines, the association is the opposition on the other end of a given bet by a patron, making it impossible for pari-mutuel wagering to exist. Regardless of how the money lost by patrons is organized, the bottom line is that there cannot be a common pool among patrons when only the association establishes the “pool”—which is unavoidable with HHR machines.<sup>43</sup>

## II. THE “SLOTS BILL”

In response to the Supreme Court’s ruling that HHR machines did not constitute pari-mutuel wagering, the Kentucky General Assembly immediately passed Senate Bill 120 that simply redefined the term “pari-mutuel” under KRS Chapter 230 to fit the KHRC and keep the horse industry’s exclusive slot gaming business alive.<sup>44</sup> The “new” definition provided in KRS Chapter 230 is as follows:

“Pari-mutuel wagering”... means any method of wagering previously or hereafter approved by the racing commission in which one (1) or more patrons wager on a horse race or races, whether live, simulcast, or previously run. Wagers shall be placed in one (1) or more wagering pools, and wagers on different races or sets of races may be pooled together. Patrons may establish odds or payouts, and winning patrons share in amounts wagered including any carryover amounts, plus any amounts provided by an association less any deductions required, as approved by the racing commission and permitted by law. Pools may be paid out incrementally over time as approved by the racing commission.<sup>45</sup>

It is immediately apparent that the General Assembly completely ignored the factual definition of pari-mutuel. In the paragraph-long definition there is no mention of “patrons wagering among themselves and not against the association” or “wagering generated *only* by the patrons”—the two key requirements of pari-mutuel wagering the Supreme Court of Kentucky laid out just months prior to this bill.<sup>46</sup> As Martin Cothran for the Family Foundation put it, “the legislature... simply wrote a new definition for pari-mutuel wagering, one not shared by anyone outside Kentucky...rather than the horse tracks and their allies on the Kentucky Horse Racing Commission changing their actions to bring them into alignment with the

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<sup>43</sup> *Id.*

<sup>44</sup> S. 120, (2021) <https://apps.legislature.ky.gov/record/21RS/sb120.html> [<https://perma.cc/6S6W-MXXL>].

<sup>45</sup> *Id.*

<sup>46</sup> *Fam. Tr. Found.*, 620 S.W.3d at 600.

law, lawmakers simply changed the law to suit a very wealthy and influential special interest.”<sup>47</sup>

Not only did the legislature disregard the Supreme Court’s requirements of what constitutes pari-mutuel wagering, the substance of the new definition does not resemble what actual pari-mutuel wagering is.<sup>48</sup> Breaking down the first sentence, the statute states, “any method approved by the KHRC in which one or more patrons wager on a horse race.”<sup>49</sup> The key here is that it states “*one* or more.” [Opposite of what pari-mutuel actually means (wager among others, dependence on each other, reciprocity, etc.), allowing one person to make a bet against the association is exactly what it sounds like—a slot machine bet.<sup>50</sup>]

The second half of the definition attempts to address the “wagering pool” concept that is necessary for wagering to be pari-mutuel.<sup>51</sup> Remember, it must be a pool established *only* by the patrons on a discrete, finite event.<sup>52</sup> The legislature completely does away with this requirement as well. Instead of requiring patrons to establish the odds and pool, the bill states the “patrons *may* establish odds or payouts” giving leeway to the association to establish it themselves.<sup>53</sup> Also, pools “being paid out overtime” are the opposite of a pool created for a discrete event. Essentially, this gives the association authority to handle the wagers however it pleases with zero transparency to the patrons. Even though the legislature uses the term “pool,” this is simply a façade. Just as a typical casino does, the “house” keeps the money lost by patrons and pays that money out over time to their discretion.<sup>54</sup>

The implication of the bill is that it allows the horsetracks to run casinos (at the discretion of the KHRC, who has every incentive to only bolster the horsetracks) without fear of competition or consequences.<sup>55</sup> Prominent spokesperson of the Kentucky faithful and Kentucky Sports Radio founder, Matt Jones, has recognized the absurdity of the bill. Just after the bill was passed Jones stated, “In Kentucky we now have legal lottery and slot machines, the two worst forms of gambling that are the hardest to win, most regressive and addictive. Meanwhile sports gambling, poker, etc where you actually can win are still illegal. Logic and reason is not our strong suit.”<sup>56</sup>

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<sup>47</sup> *SB 120—The Slots Bill Was an Unconstitutional Millionaire’s Stimulus Bill*, THE FAMILY FOUNDATION (Feb. 15, 2021), <https://www.kentuckyfamily.org/sb-120-the-slots-bill-was-an-unconstitutional-millionaires-stimulus-bill/> [<https://perma.cc/XS5F-6RWZ>].

<sup>48</sup> S. 120 § 15, *supra* note 44 (current/final version).

<sup>49</sup> *Id.*

<sup>50</sup> WILLSTN-CN § 17:7.

<sup>51</sup> S. 120 § 15, *supra* note 44.

<sup>52</sup> *Fam. Tr. Found.*, 620 S.W.3d at 600.

<sup>53</sup> S. 120, *supra* note 44.

<sup>54</sup> WILLSTN-CN § 17:7.

<sup>55</sup> Jon Friedl, *Kentucky Slot Machine Casino Gambling*, PROFESSOR SLOTS (Sep. 22, 2021), <https://professorslots.com/kentucky-slot-machine-casino-gambling/> [<https://perma.cc/9687-M299>].

<sup>56</sup> Jennifer Newell, *PokerStars Settles with Kentucky After SCOTUS Petition*, LEGAL US POKER SITES (Sep. 27, 2021), <https://www.legaluspokersites.com/news/pokerstars-settles-with-kentucky/28193/> [<https://perma.cc/3SC8-E84A>].

Kentucky voters thought they were electing representatives who would act in their constituents' best interest—yet, what they got was the legalization of slot machines, which are a regressive tax on lower income individuals and more addictive than any other form of gambling.<sup>57</sup>

### III. SECTION 226 OF THE KENTUCKY CONSTITUTION AND THE SEPARATION OF POWERS

#### A. *HRR Machines Violate Section 226.*

Any proposed expanded form of gambling in Kentucky must pass the scrutiny of section

226 of the Kentucky Constitution, which states, “lotteries and gift enterprises are forbidden, and none shall be exercised, and no schemes for similar purposes shall be allowed.”<sup>58</sup> At the time of its adoption the framers of the current Kentucky Constitution understood the term “lottery” to mean a system in which players wager that a particular number will be selected in a random drawing.<sup>59</sup> The seminal case *Commonwealth v. Kentucky Jockey Club*,<sup>60</sup> delineated the scope of the provision and the definition of the term lottery in saying:

A lottery, it is said, is a species of gambling, described as a scheme for the distribution of prizes or things of value, by lot or by chance, among persons who have paid, or agree to pay, a valuable consideration, for the chance to share in the distribution...<sup>61</sup>

The court summarized this definition as comprising four elements “consideration, chance, prize, and means of disbursement.”<sup>62</sup> While pari-mutuel horse race betting clearly involves these four elements, the court still allowed for the exception of this type of gambling.<sup>63</sup> The essence of the holding was the element of skill rather than chance in horse race wagering.<sup>64</sup> The court found that “the clear weight of authority does not sustain the position . . . that the result of a horse race depends on mere chance within the meaning of that term in the definition of a lottery.”<sup>65</sup> At the core of this reasoning was the distinction between gaming, betting, and lotteries. As the court stated, “Gaming, betting, and lotteries are separate and distinct things in law

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<sup>57</sup> Joseph Bentivegna, *Sports Gambling is Another Tax on the Poor and Minorities*, CT VIEWPOINTS (Apr. 1, 2021), <https://ctmirror.org/category/ct-viewpoints/sports-gambling-is-another-tax-on-the-poor-and-minorities> [https://perma.cc/G29L-34T6].

<sup>58</sup> KY. CONST. § 226.

<sup>59</sup> Op. Att’y Gen. 05–003 (2005).

<sup>60</sup> *Kentucky Jockey Club*, 38 S.W.2d at 992.

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

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1009.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*



and in fact, and have been recognized consistently as calling for different treatment and varying penalties. The distinctions are well developed, clearly marked, and in most instances rigidly maintained.<sup>66</sup> To truly understand why the court allowed for pari-mutuel wagering, a dissection of these terms must be done.

The term “lottery,” as stated before, requires there be consideration, chance, prize, and means of disbursement.<sup>67</sup> Kentucky courts have interpreted this term broadly as any game distributing a prize predominately by chance for consideration.<sup>68</sup> In determining whether a device or system constitutes a lottery, the element of chance is most debated. Kentucky courts have ruled where chance is the “dominant factor” in deciding the outcome, the scheme is deemed a lottery and thus prohibited.<sup>69</sup> This dominant factor approach has prohibited numerous gambling schemes in Kentucky, including pinball machines,<sup>70</sup> promotional enterprises based on theater ticket sales,<sup>71</sup> pyramid schemes,<sup>72</sup> and numbers games.<sup>73</sup> All of these are lotteries in that chance is the predominant factor producing the result.

Historically, “gaming” refers to individuals participating in playing a game such as cards or dice, with a wager involved, and where chance is the controlling factor of the outcome.<sup>74</sup> The term “has a rather restricted meaning, and applies only to betting upon the result of some game played with cards, dice, machine, wheel, or other contrivance.”<sup>75</sup> Gaming and lotteries are often used interchangeably in that both involve a predominant factor of chance.<sup>76</sup> The term “lottery” is broader in that it encompasses all games of chance, including drawings, raffles, etc.<sup>77</sup> The bottom line is that both lotteries and gaming, because of their predominant factor of chance, are prohibited under section 226 of the Kentucky Constitution.<sup>78</sup>

The term “betting,” includes all forms of gambling, both legal and illegal in the state of Kentucky.<sup>79</sup> “To bet is to put to hazard a sum ascertained on a future happening of some event then uncertain; to gamble or game for money or other stakes; or to stake or pledge money or property on an event of a contingent issue, or to wager.”<sup>80</sup> The court in *McDevitt v Thomas* seemed to distinguish the wagering done under a lottery versus that of betting on horses:

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<sup>66</sup> *Id.* at 994.

<sup>67</sup> *Id.* at 992.

<sup>68</sup> *Otto v. Kosofsky*, 476 S.W.2d 626, 629 (Ky. 1971).

<sup>69</sup> Ky. Op. Att’y’s Gen. 93–58 (1993).

<sup>70</sup> *A. B. Long Music Co. v. Com.*, 429 S.W.2d 391 (Ky. 1968).

<sup>71</sup> *Commonwealth v. Malco-Memphis Theatres, Inc.*, 169 S.W.2d 596 (1943).

<sup>72</sup> *Commonwealth v. Allen*, 404 S.W.2d 464 (1966).

<sup>73</sup> *Gilley v. Commonwealth*, 229 S.W.2d 60 (1950).

<sup>74</sup> Kimberly C. Simmons, *Definitions of “Gambling” and “Gaming”*, 38 CORPUS JURIS SECUNDUM 5 (2022).

<sup>75</sup> *McDevitt v. Thomas*, 114 S.W. 273, 274 (1908).

<sup>76</sup> Op. Att’y’s Gen. 93–58 (1993).

<sup>77</sup> *Id.*

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

<sup>79</sup> *Id.*

<sup>80</sup> Kimberly C. Simmons, *Definitions of “Gambling” and “Gaming”—terms Descriptive of Related Acts*, 38 CORPUS JURIS SECUNDUM 6 (2022).

[T]he words “betting” and “wagering” have a much broader and more comprehensive meaning than the word “gaming.” They are unrestricted in their scope, and it is immaterial whether the subject of the wager is one denounced or prohibited by statute or not. The subject of a wager may be, and frequently is, a perfectly innocent pastime, or a legally authorized act; such as the test of speed of animals or men, or the result of an election, or it may be based upon a mere matter of opinion or the exercise of judgment, such as the height of a mountain, the width of a river, the distance of an object, or the weight of a given article.<sup>81</sup>

Years later, in *Kentucky Jockey Club*, the court legally authorized betting on horses, revolving around the idea that a wager is placed on the basis of an exercise of opinion or judgment.<sup>82</sup> That is to say, the betting that is legal under section 226 may not be on the basis of mere chance.<sup>83</sup> Precedent after *Kentucky Jockey Club* expanded on this concept as the courts began to view these issues under the light of a dominant factor approach.<sup>84</sup> This approach stipulates, “the test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the results of the game.”<sup>85</sup> This approach was used in the case of *Commonwealth v. Allen*, where the court held that “chance permeated the entire scheme,” rendering it a lottery.<sup>86</sup>

Applying the holding of *Kentucky Jockey Club* and its precedents to the present day issue of the HHR machines, it is clear the machines do not constitute legal wagering under section 226.<sup>87</sup> The only way the machines pass the scrutiny of section 226 is if they constitute pari-mutuel horse betting.<sup>88</sup> As discussed in Part I, the 7-0 ruling from the Kentucky Supreme Court answered the question of whether the machines use a pari-mutuel system.<sup>89</sup> The HHR machines do not work under a pari-mutuel system because there is no reciprocity and the patrons do not establish the wagering pools.<sup>90</sup>

In addition to not being under a pari-mutuel system, the very *nature* of wagering the HHR machines administer is unlawful under the holding of *Kentucky Jockey Club*, because the machines constitute a lottery prohibited by section 226.<sup>91</sup>

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<sup>81</sup> *McDevitt*, 114 S.W. at 274.

<sup>82</sup> *Kentucky Jockey Club*, 38 S.W.2d at 992.

<sup>83</sup> *Id.*

<sup>84</sup> Op. Att’y Gen. 93–58 (1993).

<sup>85</sup> Kimberly C. Simmons, *Definitions and Distinctions Regarding Games of Skill and Games of Chance*, 38 CORPUS JURIS SECUNDUM 2 (2022).

<sup>86</sup> *Commonwealth v. Allen*, 404 S.W.2d 464, 466 (1966).

<sup>87</sup> Brief for Petitioner at 10, Fam. Tr. Found. of Kentucky, Inc. v. Kentucky Horse Racing Comm’n, 620 S.W.3d 595 (Ky. 2020) (No. 2018-SC-0630-TG).

<sup>88</sup> *Kentucky Jockey Club*, 38 S.W.2d at 992.

<sup>89</sup> *Fam. Tr. Found.*, 620 S.W.3d at 600.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

The machines are a lottery as they operate on the basis of chance rather than an exercise of a patron’s judgment, opinion, or skill.<sup>92</sup> To place a bet on an HHR machine a patron merely approaches the machine, inserts money, presses a button, and within seconds either wins or loses.<sup>93</sup> There is no judgment or skill involved and the user experience is the same as playing a slot machine at a casino.<sup>94</sup>

The KHRC and horse tracks contend that because the machines produce results based on past races they are different from the standard casino slot machine.<sup>95</sup> However, while the mechanism may be different, the effect on the patron wagering is still the same—that is, randomness.<sup>96</sup> HHR machines generate numbers by selecting at random three different races from a database of historical races.<sup>97</sup> Whether or not a machine uses a random number generator or past races does not matter to the patron playing because the end result is that it is still random. There is no opportunity for skill or judgment. In actual horse racing or simulcasting a bettor has the chance to study statistics of each horse, see the horses in real time and learn the tendencies of jockeys and trainers.<sup>98</sup> In HHR gaming, however, these factors are not relevant, nor are they known to the bettor.<sup>99</sup> Ironically, Kentucky horse tracks such as Red Mile, even refer to the HHR system as “gaming”—a word narrowly used for casino games of chance, as previously mentioned.<sup>100</sup> Jordan Scot Flynn Hollander of the UNLV Gaming Law Journal addressed the issue of instant horse machines as it pertains to New Jersey in saying:

The random races that determine the outcome of games played on these devices are based on previously run races, not live races, nor are they based on actual-time simulcasting of those races...while instant horse wagering devices may be based on historical horse races, they are simply not the same as live and simulcast pari-mutuel wagering. They are slot machines with a different kind of random number generator.<sup>101</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> Brief for Petitioner at 10, *Fam. Tr. Found. of Kentucky, Inc. v. Kentucky Horse Racing Comm’n*, 620 S.W.3d 595 (Ky. 2020) (No. 2018-SC-0630-TG).

<sup>94</sup> *Id.*

<sup>95</sup> *Fam. Tr. Found.*, 620 S.W.3d at 600.

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

<sup>97</sup> Brief for Petitioner at 10, *Fam. Tr. Found. of Kentucky, Inc. v. Kentucky Horse Racing Comm’n*, 620 S.W.3d 595 (Ky. 2020) (No. 2018-SC-0630-TG).

<sup>98</sup> *Factors to Consider When Betting on Horse Racing*, THE PLAID HORSE (July 7, 2021), <https://www.theplaidhorse.com/2021/07/07/factors-to-consider-when-betting-on-horse-racing/> [<https://perma.cc/5EZH-H5M4>].

<sup>99</sup> Brief for Petitioner at 10, *Fam. Tr. Found. of Kentucky, Inc. v. Kentucky Horse Racing Comm’n*, 620 S.W.3d 595 (Ky. 2020) (No. 2018-SC-0630-TG).

<sup>100</sup> *Themed Games*, RED MILE GAMING & RACING, <https://redmileky.com/gaming/themed-games> (last visited Dec. 12, 2022) [<https://perma.cc/Y8F7-BNVZ>].

<sup>101</sup> Jordan Scot Flynn Hollander, *And They’re Off! Would Instant Horse Wagering in New Jersey Require Voter Approval?*, 6 UNLV GAMING L.J. 239 (2016).

The essence of the issue is that the mechanism, in which HHR machines operate, relies on a system of mere chance.<sup>102</sup> The same nature of mere chance that *Kentucky Jockey Club* distinguished as a lottery that is prohibited under section 226 of the Kentucky Constitution.<sup>103</sup>

Despite the HHR machines being in clear violation of this provision of the Kentucky Constitution, the General Assembly decided to circumvent this constitutional restriction on games of chance by redefining the word “pari-mutuel wagering” to include HHR machines.<sup>104</sup>

### ***B. Violation Of The Separation Of Powers Clause***

Section 27 of the Kentucky Constitution states, “The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.”<sup>105</sup> The idea of separation of powers has always been an integral part of the federal government and national constitution.<sup>106</sup> At the state level, “it is well settled law in the state of Kentucky that one branch of Kentucky’s tripartite government may not encroach upon the inherent powers granted to it by any other branch.”<sup>107</sup> The powers of each branch are also plainly delineated, being that, the legislature makes, the executive executes, and the judiciary construes the law.<sup>108</sup>

In the case of the HHR machines, the legislative branch of Kentucky completely ignored the powers of the judiciary. As discussed in Part II, under the slots bill, the General Assembly wrote an entirely new definition for “pari-mutuel,” only months after the Kentucky Supreme Court’s ruling that HHR machines did not constitute pari-mutuel wagering.<sup>109</sup> Not only does the new definition allow for wagering against the house, instead of among patrons (as required under a pari-mutuel system), it also allows for wagering on previously run races.<sup>110</sup> This provision was for the HHR machines. Even though they use “previously run races” simply as a random number generator, the inclusion of this provision and the elimination of reciprocity and patrons establishing the pools, are all the horse tracks needed to keep the HHR machines running.<sup>111</sup> While the legislature’s job is to

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

<sup>103</sup> *Kentucky Jockey Club*, 38 S.W.2d at 992.

<sup>104</sup> S. 120, *supra* note 44.

<sup>105</sup> KY. CONST. § 27.

<sup>106</sup> *Buckley v. Valeo*, 424 U.S. 1, 124 (1976).

<sup>107</sup> *Commonwealth ex rel. Beshear v. Bevin*, 575 S.W.3d 673, 681 (Ky. 2019).

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

<sup>109</sup> S. 120, *supra* note 44.

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

<sup>111</sup> Brief for Petitioner at 10, *Fam. Tr. Found. of Kentucky, Inc. v. Kentucky Horse Racing Comm’n*, 620 S.W.3d 595 (Ky. 2020) (No. 2018-SC-0630-TG).

make the law, the General Assembly in Kentucky decided it was also under their power to construe, and define it.<sup>112</sup>

Each branch of government is responsible for their duties and the courts' deference to the legislative branch has its limits.<sup>113</sup> These limits are in place for the protection of the people and for the courts to be able to construe the law as to what it means in reference to the Constitution.<sup>114</sup> There is perhaps no better example of these limits on legislative deference in the state of Kentucky than the seminal case in 1989 of *Rose v. Council for Better Educ., Inc.*<sup>115</sup>

In *Rose*, the Supreme Court of Kentucky interpreted section 183 of the Kentucky Constitution which states, "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State."<sup>116</sup> The court ruled that the General Assembly did not satisfy the constitutional requirement because it did not provide an efficient school system throughout the state.<sup>117</sup> Representatives of the General Assembly argued that they should have the sole discretionary power to determine whether the school system is constitutionally sufficient.<sup>118</sup> But the Supreme Court stood its ground. Chief Justice Stevens made it clear to the legislature that while the opinions of the legislature are given some weight and deference, the ultimate duty of enforcing the Constitution lies with the judiciary—"it is our sworn duty, to decide such questions when they are before us by applying the constitution."<sup>119</sup> As Justice Stevens stated the court is charged with the responsibility of holding the legislature accountable to the Constitution and to protect the rights of the people.<sup>120</sup> Expanding on this idea, Justice Stevens stated, "to avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty."<sup>121</sup> To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable."<sup>122</sup>

*Rose* is now viewed as a landmark case because it truly shows how the separation of powers is supposed to work.<sup>123</sup> Immediately after the ruling, the General Assembly acted with tremendous speed, reforming the educational system providing funding across the Commonwealth to public schools.<sup>124</sup> The legislature

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<sup>112</sup> S. 120, *supra* note 44.

<sup>113</sup> Sonja Ralston Elder, *STANDING UP TO LEGISLATIVE BULLIES: SEPARATION OF POWERS, STATE COURTS, AND EDUCATIONAL RIGHTS*, 57 DUKE L.J. 755 (2007).

<sup>114</sup> *Id.*

<sup>115</sup> *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

<sup>116</sup> KY. CONST. § 183.

<sup>117</sup> *Rose*, 790 S.W.2d at 213.

<sup>118</sup> *Id.* at 205.

<sup>119</sup> *Id.* at 209.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Elder, *supra* note 113.

<sup>124</sup> *Id.*

listened to the judiciary and Kentucky “sustained the most long-lasting, comprehensive education reforms in the nation.”<sup>125</sup>

Why is this relevant to the case of HHR machines in Kentucky? The holding of *Rose* revolved around the definition of one word—“efficient.”<sup>126</sup> Before *Rose*, the legislature thought they had the power to interpret what the word meant in the public school system.<sup>127</sup> Due to incentives such as reelection and seeking to please interest groups, the politicians’ definition of what “efficient” meant did not align with the purpose of section 183 and most importantly, the interest of the people.<sup>128</sup> That is where the judiciary steps in. Where the legislature fails to align with the values, purpose, and interest of the Constitution and its people, the judiciary’s role is to step in and enforce these interests.<sup>129</sup> In concluding the role of the judiciary in *Rose* Justice Stevens ended with these powerful words:

The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to do so. This duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public.<sup>130</sup>

In the case of HHR, the Supreme Court unanimously defined “*pari-mutuel*” as it applies to section 226 of the Constitution.<sup>131</sup> The purpose of section 226 was to prevent the proliferation of gambling on mere chance throughout the state of Kentucky.<sup>132</sup> Just like in *Rose*, the court defined what the law meant, protecting the purpose of the Constitution and the interest of the people.<sup>133</sup> Instead of allowing the court to construe what the law means, the legislature took it upon themselves to do just that.<sup>134</sup> The General Assembly decided they had the power to define and construe the law and implemented the new definition—a definition that is not shared by anyone outside the state of Kentucky.<sup>135</sup> A definition that goes against

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<sup>125</sup> Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485 (1999).

<sup>126</sup> *Rose*, 790 S.W.2d at 213.

<sup>127</sup> *Id.*

<sup>128</sup> Elder, *supra* note 113.

<sup>129</sup> *Id.*

<sup>130</sup> *Rose*, 790 S.W.2d at 209.

<sup>131</sup> *Fam. Tr. Found.*, 620 S.W.3d at 600.

<sup>132</sup> Op. Att’ys Gen. 93–58 (1993).

<sup>133</sup> *Rose*, 790 S.W.2d at 209.

<sup>134</sup> Martin Cothran, *SB 120 – THE SLOTS BILL – WAS AN UNCONSTITUTIONAL MILLIONAIRE’S STIMULUS BILL*, THE FAMILY FOUNDATION (Feb. 15, 2021), <https://www.kentuckyfamily.org/sb-120-the-slots-bill-was-an-unconstitutional-millionaires-stimulus-bill/> [<https://perma.cc/DC45-8T4Y>].

<sup>135</sup> *Id.*

the very purpose of section 226.<sup>136</sup> A definition that allows for the most addictive and regressive form of gambling to be spread throughout the Commonwealth.<sup>137</sup>

#### IV. THE LEGISLATURE’S FAVORITISM OF THE HORSE RACING INDUSTRY

After the legislature executed the slots bill, the floodgates have opened for the expansion of gaming in Kentucky. Various gaming machines, referred to as “gray machines” have already begun to show up across the state at gas stations, convenient stores, and bars.<sup>138</sup> Operators of the machines argue they operate just the same as the HHR machines, and in fact, allow for an opportunity of judgment and skill, unlike HHR machines.<sup>139</sup> Instead of merely pressing a button, a player wins a game by tapping the screen on an icon, to match three of the same icons in a row.<sup>140</sup> After all, if the horse racing industry can run machines of chance, why can another company not do the same with games of skill?

This is where the true interest of the legislature shows itself. Lawmakers have already begun to speak on the issue of gray machines simply because they do not support the horse racing industry like the HHR machines.<sup>141</sup> In fact, the legislature has already proposed a bill outlawing the gray machines.<sup>142</sup> Senate Majority Floor Leader, Damon Thayer, justified his position in opposing the gray machines saying they do not serve a “higher purpose.”<sup>143</sup> Just what is the higher purpose Senator Thayer is referring to? That would be the purpose of HHR, which is to benefit the horse industry, and a very small percentage actually going to the coffers of the state of Kentucky.<sup>144</sup> While the gray machines provide benefits to small business and proceeds to the Fraternal Order of Police, that does not seem to be the “higher purpose” Senator Thayer is looking for.<sup>145</sup> As Linda Blackford of Kentucky’s Herald Leader put it, “Damon Thayer and his allies showed how easy it is to make some formerly illegal slot machines legal and now the gray machine advocates want a shot. The horse people showed them a really good model: Shower your legislators with attention and donations and they will make your slot machines legal, too.”<sup>146</sup>

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<sup>136</sup> Op. Att’y’s Gen. 93–58 (1993).

<sup>137</sup> Joseph Bentivegna MD, *Sports Gambling Is Another Tax on the Poor and Minorities*, CT VIEWPOINTS (Apr. 1, 2021), <https://ctmirror.org/2021/04/01/sports-gambling-is-another-tax-on-the-poor-and-minorities/> [https://perma.cc/26VR-8Y3A].

<sup>138</sup> Janet Patton & Bill Estep, *Unregulated Slot Machines Are Flooding Kentucky, and Police Are Helping, for a Cut*, LEXINGTON HERALD LEADER (Feb. 6, 2022), <https://www.kentucky.com/news/politics-government/article257134862.html>.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> H. B. 606 (2022), <https://legiscan.com/KY/text/SB213/2022> [https://perma.cc/4482-5K4L].

<sup>143</sup> Patton & Estep, *supra* note 138.

<sup>144</sup> Linda Blackford, *New Slot Machines Show Confusion of Ky’s Gambling Laws. the Answer: Legalize Everything.*, LEXINGTON HERALD LEADER, <https://www.kentucky.com/opinion/linda-blackford/article257654873.html> (Feb. 6, 2022).

<sup>145</sup> Patton & Estep, *supra* note 138.

<sup>146</sup> Blackford, *supra* note 144.

The small percentage of HHR going to Kentucky's General Fund is a result of the appalling tax structure.<sup>147</sup> The tax structure of HHR is the most blatant evidence of the legislature catering to the whims of the horse industry. Currently, the state of Kentucky tax on HHR machines is only 1.5% of the handle, the total amount wagered on the machines by the public.<sup>148</sup> With this minute tax, the actual percentage that is then converted to the Kentucky General Fund is a mere 8% of the gross commission.<sup>149</sup> This is grossly lower than what relative states tax on their slot machines. Slots are taxed at 55% in Pennsylvania, 53.5% in West Virginia, 33% in Ohio, 40% in Indiana, and 50% in Illinois.<sup>150</sup>

### CONCLUSION

Putting aside the issue of the constitutionality of HHR machines, the first step Kentucky must take is to tax them. Between the years 2016 to 2021, betting on HHR machines in the state of Kentucky grew 463% with the total amount of \$3.6 billion being bet in the year 2021.<sup>151</sup> That is twice what Kentuckians bet on the lottery and live horse racing *combined*.<sup>152</sup> Yet, the General Fund collected only \$15 million in tax revenue in 2020, compared to \$274 million from the lottery.<sup>153</sup> As Democratic Representative Tina Bojanowski put it:

Through the backdoor of HHR slot machines, we now have slots in Kentucky. But because of the egregiously low tax rate, we are not seeing the tax revenue we should. We're paying the social costs of gambling but receiving almost none of the benefit.<sup>154</sup>

If Kentucky simply raised the tax rate to be in the range of other states, \$100 million would be raised annually for public investment, like health care and education.<sup>155</sup> The Kentucky legislature needs to act now and get Kentucky its fair share.

With that being said, the law the legislature passed allowing slot machines explicitly violates section 226 of the Constitution.<sup>156</sup> If this law is here to stay, there

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<sup>147</sup> Jason Bailey, *Letter to the Kentucky House of Representatives on Raising the Inadequate Tax Rate on HHR Slot Machines*, KENTUCKY CENTER FOR ECONOMIC POLICY (Feb. 20, 2021), <https://kypolicy.org/letter-to-kentucky-house-raising-hhr-slot-machine-tax-rate/> [<https://perma.cc/5544-263P>].

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Tina Bojanowski, *Kentucky Lawmakers Must Fix a Tax-Rate Mistake While Protecting Historical Horse Racing*, COURIER JOURNAL (Feb. 5, 2021), <https://www.courier-journal.com/story/opinion/2021/02/05/historic-horse-racing-kentucky-should-raise-tax-rate-machines/4412150001/> [<https://perma.cc/DS9V-UR4Z>].

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> S. 120, *supra* note 44.



is no bound to how far the legislature may go in expanding gaming in the state. As recently as March of 2022, lawmakers have introduced a bill to legalize sports betting that would be regulated by the KHRC.<sup>157</sup> If enacted, this bill would violate section 226, without giving a voice to the people, just as the slots bill did.

In order to solve this issue, Kentucky should introduce expanded gambling the proper way via a constitutional amendment. Whether it is slot machines in the form of HHR, sports gambling, or casino gambling in general, the *only* way these forms can be introduced without violating section 226 is through a constitutional amendment.<sup>158</sup> This would put the issue of expanded gambling to a vote, putting it in the hands of the people, rather than the legislature. Stan Cave, a Lexington-based attorney with the Family Foundation, is a proponent of this idea with any form of expanded gambling in Kentucky: “the plain language in Section 226 of the Kentucky Constitution, an opinion of the highest court in Kentucky at the time and two attorney general opinions make clear that a constitutional amendment is required to legalize sports wagering of the types being considered.”<sup>159</sup> A constitutional amendment is also how Kentucky legalized the state lottery in 1988.<sup>160</sup> Even though the lottery was clearly prohibited by section 226, a referendum by the people allowed this narrow exception, and the Kentucky Constitution was amended.<sup>161</sup> It is well founded that the legislature of a state cannot legalize any form of gambling that is within the scope and meaning of a prohibition in the constitution of the state, unless there is an amendment to the state constitution.<sup>162</sup> A look how a similar state has expanded gambling can be used as a model for Kentucky.

One of Kentucky’s neighboring states, Ohio, is a great example of using a constitutional amendment for casino gambling. Ohio’s gambling laws under the Ohio Constitution were almost identical to that of Kentucky’s in that “[l]otteries, and the sale of lottery tickets, for any purpose whatever, shall forever be prohibited in this State.”<sup>163</sup> In 2009, however, a constitutional amendment was put to a vote and the people in Ohio elected to allow casino gaming.<sup>164</sup> Features of the bill included a tax rate of 33% of all gross casino revenue (with details regarding how the money will be distributed), a requirement of \$50 million fee for any casino to

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<sup>157</sup> H. B. 606 (2022), <https://legiscan.com/KY/text/SB213/2022> [<https://perma.cc/N2BJ-7RRS>].

<sup>158</sup> Legislative Research Commission, *House Votes to Take a Gamble on Sports Betting*, TIMES TRIBUNE (Mar. 21, 2022), [https://www.thetimestribune.com/news/local\\_news/house-votes-to-take-a-gamble-on-sports-betting/article\\_20379d67-fd44-5358-bf8d-596e5a23b148.html](https://www.thetimestribune.com/news/local_news/house-votes-to-take-a-gamble-on-sports-betting/article_20379d67-fd44-5358-bf8d-596e5a23b148.html) [<https://perma.cc/9XJF-TKLS>].

<sup>159</sup> *Kentucky: Sports Betting Would Not Require Constitutional Amendment*, YOGONET, <https://www.yogonet.com/international/news/2019/12/19/51914-kentucky-sports-betting-would-not-require-constitutional-amendment> (last visited Dec. 21, 2022) [<https://perma.cc/DE5M-438K>].

<sup>160</sup> *Kentucky Lottery History*, LOTTERY-TICKETS.NET (Sept. 15, 2021), <https://www.lottery-tickets.net/kentucky-lottery/> [<https://perma.cc/32WY-YZHQ>].

<sup>161</sup> *Op. Att’ys Gen.* 93–58 (1993).

<sup>162</sup> Kimberly C. Simmons, *Statutory and Constitutional Provisions Regarding Gaming, Generally*, 38 CORPUS JURIS SECUNDUM 18 (2022).

<sup>163</sup> OHIO CONST. art. XV, § 6.

<sup>164</sup> *Ohio Casino Approval and Tax Distribution, Amendment 3*, BALLOTPEDIA (2009), [https://dev.ballotpedia.org/Ohio\\_Casino\\_Approval\\_and\\_Tax\\_Distribution,\\_Amendment\\_3](https://dev.ballotpedia.org/Ohio_Casino_Approval_and_Tax_Distribution,_Amendment_3) [<https://perma.cc/E8AJ-FW4X>].

open, and creating an Ohio gaming commission whose sole responsibility is to regulate casino gaming in Ohio.<sup>165</sup> Putting the issue of expanded gambling to a vote incentivizes the legislature to provide citizen-focused policies in the bill, as they did Ohio, because its passage is dependent on the peoples' approval (as a change to the state constitution should be). If the people of Kentucky elect to allow HHR slots, sports gambling, or casinos--vices they know will have great cost to Kentuckians—they no doubt will want their fair share of taxes and an *independent* gaming commission regulating it. A monopolistic horse racing industry having an entire gambling market to themselves, with the aligned horse racing commission regulating it, is not in the interest of the public. If gaming is going to enter the state, Kentuckians should have the ability to choose *if* it is done, and *how* it is done.

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<sup>165</sup> *Id.*