

To: Senate Judiciary Committee

From: Edward James Bain, Staff Attorney on behalf of Kansas Racing and Gaming Commission staff

Date: February 13, 2024

Re: Testimony in Opposition of SB 458

The staff of the Kansas Racing and Gaming Commission (KRG) thank Chairwoman Warren for the opportunity to address our concerns with SB 458 and present our opposition testimony. Also, a special thank you to Senators Warren, Bowers, Wilborn and Haley for their service and dedication to the Special Committee on Civil Asset Forfeitures. KRG believes the work of the Special Committee on Civil Asset Forfeiture and the Kansas Judicial Council moved us forward in this important discussion.

KRG is concerned about several of the recommended changes to the civil asset forfeiture laws in Kansas:

1. The proposed change to the standard of proof would cripple efforts to prevail in the forfeiture of cash and incentivize illegal gambling device owners to commingle cash from an illegal gambling device or gambling operation with cash from legitimate business operations.

2. The fee shifting recommendation would make attempting to forfeit cash unfeasible. Under the threat of paying several thousand dollars in legal fees if more than 50% of the seized cash is returned, the economics just don't add up. It would be a poor use of government funds to attempt to forfeit cash, considering the challenges of proving which cash is proceeds of illegal gambling or facilitates illegal gambling and which cash is proceeds from legitimate business operations.

3. The reduction in time, from 45 days to 14 days, for the law enforcement agency to submit a request for forfeiture to the county or district attorney in whose jurisdiction the seizure occurred will actually produce more litigation because of the pressure to act quickly and limited time for negotiation. Additionally, the KRG currently use most of the 45-day time period to negotiate with the claimant, investigate, and compile all of the statutorily mandated notice elements that are required to be forwarded to the county attorney.

4. Finally, the requirement that a state agency "engage the attorney general or other attorney approved by the attorney general" within 14 days of the county or district attorney declining the request for forfeiture is unnecessarily complex. The ping ponging of the case from agency to agency is inefficient and more complex than current practice and opens the door to case dismissal through no fault of the state agency due to the involvement of too many individuals that the proposed process requires.

## **I. Illegal Gambling Machines in Kansas**

### **A. History of illegal gambling machines and statutes in Kansas**

In 2007, the Kansas legislature made the operation of a “gray machine” a severity level 9 felony which was codified at K.S.A. 74-8761. K.S.A. 74-8761 also gave KRGC authority to investigate and prosecute individuals for the operation of gray machines. Gray machine is defined at K.S.A. 74-8702(h) which was also passed and codified in 2007. Gray machine is defined as:

*“any mechanical, electro-mechanical or electronic device, capable of being used for gambling, that is: (1) Not authorized by the Kansas lottery; (2) not linked to a lottery central computer system; (3) available to the public for play; or (4) capable of simulating a game played on an electronic gaming machine or any similar gambling game authorized pursuant to the Kansas expanded lottery act.”*

In 2011, the crime of operation or possession of a gray machine was declared overly broad and unconstitutional by the Kansas Supreme Court in *Dissmeyer v. State*, 292 Kan. 37, 249 P.3d 444. With the loss of crimes regarding gray machines also came the loss of KRGC authority to prosecute for the operation and possession of illegal gambling machines. Prosecution of felony illegal gambling machines was now left solely to the discretion of county and district attorneys under K.S.A. 21-6406, Commercial Gambling. Up until the creation of the White Collar Crime Fund in 2022, KRGC did not have authority to bring criminal charges even if charges are declined by a county or district attorney.

KRGC was left, however, with civil asset forfeiture as a tool to reign in the proliferation of illegal gambling machines. KRGC is authorized, if approved by the Attorney General, to proceed in civil asset forfeiture if a local county or district attorney declines to pursue the forfeiture. Civil asset forfeiture has proven to be an effective tool to slow the proliferation of illegal gambling devices in Kansas. The issue will never fully go away until a constitutional “gray machine” definition or “game of skill” prohibition is enacted, but civil asset forfeiture has given KRGC a path to remove the unlawful machines.

### **B. Current status of illegal gambling machines and use of forfeiture by KRGC**

KRGC agents estimate 6,000 illegal gambling devices are operating in Kansas. Machines are usually placed in gas stations or bars. Nearly every city in Kansas is affected by the existence of these machines, which use predatory tactics to target Kansans. Machine owners use the term “game of skill” in an attempt to skirt Kansas law, which prohibits games of chance. In reality, no amount of skill can increase an individual’s chance of winning on these illegal gambling devices.

Once an individual is ready to cash out their funds from the gambling device, the machine prints a paper receipt which the player takes to the employee at the cash register to redeem for cash. Most illegal machines pay out an average of 40-45% of the amount wagered, while electronic gaming machines at Kansas Lottery-owned casinos pay out, at a minimum, 87% of the average amount wagered.

Currently, KRGC agents work with local law enforcement to seize machines and cash that is proceeds of the illegal gambling device or used to facilitate illegal gambling activity. Though Kansas statute says contraband (the machines) can be summarily forfeited to the state (K.S.A. 60-4105(g)), case law requires due process be given to the machines before a final order of forfeiture. Cash seizures are usually settled by negotiation with the machine owner. The amount forfeited is

usually less than 50% of the cash seized, since cash is commingled between proceeds from the illegal machine and cash that is for use in the underlying legitimate business.

## **II. Proposed Changes to Civil Asset Forfeiture and its Effect on KRGC**

### **A. Standard of Proof**

Since the cost to replace a forfeited machine is relatively small compared to the profit the machines generate for the owners, the machine owner usually replaces the machine within a matter of days with new machines or machines moved from a different location. The real threat to the machine owner is having cash seized and forfeited. Once illegal machine owners become aware of the more stringent standard of proof, they will have no incentive to negotiate a settlement and will benefit by further commingling ill-gotten profits from the machines with the legitimate cash used to operate the gas station or bar. The threat of having cash forfeited is the best tool we have in stopping the proliferation of these illegal machines. Without that threat, the machine owner has no reason to stop placing illegal machines anywhere they can.

KRGC understands cash from the machines are comingled with the legitimate business operation which is why settlement is negotiated in most cases. Without the motivation to settle, machine owners will simply not negotiate knowing KRGC could never prove by a clear and convincing standard which cash is proceeds from the machine and which cash is legitimately the businesses.

### **B. Fee Shifting**

Another factor to consider in KRGC deciding whether to attempt to forfeit cash is the attorney fee shifting proposal.

If KRGC would attempt to forfeit cash, the claimant has no risk under the one-sided fee shifting proposal to negotiate a settlement. The fee shifting proposal may have its place in drug cases, but these illegal gambling companies have profited hundreds of thousands of dollars from Kansans. Allowing them a free bite at the apple with no threat of additional sanctions and using the checkbook of the government to do so seems counterintuitive.

Given the challenges of meeting the clear and convincing standard concerning commingled cash, it would be reckless for KRGC to expose taxpayers to the expense of litigation. Under a one-sided fee shifting statute, there would be no motivation for a claimant to negotiate in good faith. Illegal gambling device owners will figure out very quickly the conundrum KRGC is in, and benefit by not negotiating in good faith and by better concealing the nature of cash seized.

### **C. Reduction in Time to Submit Case**

Reducing the amount of time for law enforcement to submit the request for forfeiture to the county or district attorney from 45 days down 14 days will force agencies to spend less time on negotiation with the owner and more time on preparing the case for litigation. The current 45-day time period allows the agency to potentially negotiate settlement, investigate, and compile required documentation for submission to the county attorney.

Good advocacy and negotiation go a long way in the early days after a seizure. With one phone call, a claimant's attorney can usually gain much of the information they need and begin negotiations for settlement. With the proposed submission of the of the case to the county or district attorney within 14 days rather than the current 45 days after a seizure, this time for negotiation is lost and forces more seizure cases into litigation rather than a quick settlement. The claimant is not helped by potentially having to restart negotiations when the county or district attorney becomes involved or likely waiting to start negotiation entirely until the

government decides who will be representing it in the matter. The ability to settle cases quickly and without litigation will be impacted by the reduction in days before submission to the county or district attorney.

K.S.A. 60-4107(g) requires “a statement of facts and circumstances of the seizure, the estimated value of the property, the owner and lienholder of the property, the amount of any lien, and a summary of the facts relied on for forfeiture” all to be forwarded to the county or district attorney in the written request for forfeiture. Compiling all of this information and completing an investigation takes time. Reducing the time to submit the case to the county or district attorney to 14-days is simply not enough time to do a service to that county attorney.

#### **D. Process of Engaging an Attorney**

Proposed amendments to K.S.A. 60-4107(i)(2) require an assistant attorney general or other attorney approved by the AG to be engaged within 14 days after the county attorney declines to take the case.

This process is another barrier to a claimant beginning negotiation or a reason a claimant would not want to negotiate at all. The ping pong ball of the case bounces quickly from the agency attorney to the county or district attorney back to the agency attorney to the AG to an outside counsel or assistant AG or agency attorney. Who can keep track of all this? With the case bouncing around to so many individuals, the door is wide open for missing the 14-day window for engagement which then requires return of the property to the alleged wrongdoer, potentially at no fault of the state agency who is leading the forfeiture effort. The ping pong ball bouncing from agency to agency makes the case inefficient and more complex for both claimants and agencies.

### **III. Conclusion**

The Kansas Racing and Gaming Commission has a strong record of fair dealing with claimants through negotiation. The procedural safeguards already in place have been successful in preventing abuse by KRGC in seizures for gambling related offenses.

Based on the complicated nature of seizure of cash in illegal gambling related crimes, we propose that gambling crimes be exempted from the reforms we have outlined. Though illegal gambling machines are the biggest threat to the integrity of legal gaming in Kansas, we investigate and seize cash from illegal sports betting operations and illegal table game operations where the ability to forfeit cash through negotiation would also be critically undermined under reform proposals.

Thank you for your time and consideration.

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