

Kevin M. Fowler of Frieden & Forbes, LLP

Tel: (785) 354-1100

Senate Bill 322

In-Person Opposition Testimony

John C. Frieden*
Randall J. Forbes*
Kevin M. Fowler



Brenda L. Head
Timothy D. Resner

Of Counsel
Paul T. Davis

1414 S.W. Ashworth Place, Suite 201, Topeka, Kansas 66604
• www.fflawllp.com • Tel: 785-354-1100 • Fax: 785-354-1113

*Also admitted in Missouri

kfowler@fflawllp.com

**BEFORE THE SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS
TESTIMONY OF KEVIN M. FOWLER IN OPPOSITION TO SB 322
March 27, 2023**

Chairman Thompson and Members of the Committee:

My name is Kevin Fowler and I am an attorney with the Topeka law firm of Frieden & Forbes, LLP. I represent and appear on behalf of the managers of the Kansas Crossing Casino in Pittsburg, Crawford County, Kansas (“Kansas Crossing”) and the Kansas Star Casino in Mulvane, Sumner County, Kansas (“Kansas Star”) in opposition to SB 322.

We oppose SB 322 for four (4) reasons, which may be summarized as follows.

First, no conferee publicly opposed or expressed concern about any provision of the House Substitute for Substitute for Senate Bill No. 84 (“SB 84”) that was passed during the 2022 Session to establish the framework for legalizing sports wagering in Kansas. However, the provisions of SB 84 applicable to sports wagering by Indian tribes in Kansas (Sections 14 and 18) were supported in testimony from counsel for the Prairie Band Potawatomi Nation (“Prairie Band”) last session when the House Committee on Federal and State Affairs heard the predecessor provisions of Sections 13 and 17 in House Bill No. 2740 (“HB 2740”). We reasonably surmise that the Prairie Band’s supported and no party opposed Section 18(b) of SB 84 (the successor to Section 17 of HB 2740) because it establishes a fair and level playing field for all stakeholders interested in the provision of retail and mobile sports wagering in Kansas.

Second, SB 322 is inconsistent with the State’s longstanding gaming policies established in Article 15, §§ 3 and 3c of the Kansas Constitution, the Kansas Lottery Act (K.S.A. 74-8701 *et seq.*) and the Kansas Expanded Lottery Act (K.S.A. 74-8733 *et seq.* or “KELA”), as amended in 2022 by SB 84 84 without objection from any Indian tribe in Kansas. This policy prohibits any form of Class III gaming in Kansas unless the activity is owned and operated by the State, and any concerns about this provision should have been addressed last session.

Third, SB 322 is not required to comply with the federal Indian Regulatory Gaming Act, 25 U.S.C. § 2701 *et seq.* (“IGRA”). Because IGRA applies only to gaming within the boundaries of Indian lands, K.S.A. 2022 Supp. 46-2305(b) is entirely consistent with federal law. The repeal of this statutory provision in SB 322 is needed only if the Legislature wants to authorize the Governor and the tribes to negotiate state-tribal compacts that will permit tribal sports wagering beyond the boundaries of any compacting tribe’s Indian lands free from ownership and operation by the State.

- KELA, as amended by SB 84 in 2022, currently provides that any federally-recognized Indian tribe in Kansas desiring to participate in sports wagering beyond the boundaries of its Indian lands may do so by contracting with the State, through the Kansas lottery, on substantially the same terms and conditions as the State’s four (4) lottery gaming facility managers (“casino managers”). Of course, such sports wagering would be owned and operated by the State of Kansas and the State would receive 10% of all sports wagering revenue. Any tribe that does not want to be subject to these requirements is limited to sports wagering within the boundaries of its Indian lands.
- Unless the sports wagering activity is owned and operated by the State under KELA, any compact regarding sports wagering beyond the boundaries of Indian lands would violate the Kansas Constitution. *See* Kan. Const., art. 15 at §§ 3, 3c.

Fourth, SB 322 would disrupt the framework for sports wagering in Kansas in a manner that jeopardizes the interests of the State and its casino managers.

- Elimination of the requirement that all sports wagering beyond the boundaries of Indian lands must be owned and operated by the State would violate the Kansas Constitution, which is the ultimate expression of State gaming policy, and would likely subject the State of Kansas to litigation.
- State ownership and operation of sports wagering, as required under Article 15, Section 3c of the Kansas Constitution and KELA, enables the State to unilaterally dictate revenue sharing and regulation of the activity in Kansas. Enactment of SB 322 could arguably expand the application of IGRA with the State’s consent and reduce the State’s authority over tribal sports wagering beyond the boundaries of Indian lands in Kansas.
- By repealing the boundary restriction of K.S.A. 2022 46-2305(b), the Governor would not be prohibited from negotiating a state-tribal compact for statewide mobile sports wagering on materially better terms and conditions than those provided to state casino managers and their approved interactive sports wagering platform providers. If the Legislature subsequently refused to approve or ratify such a compact, it could be argued that such legislative action constitutes “bad faith” under IGRA and permit the Secretary of Interior to approve the compact rejected by the Legislature. In our view, SB 322 exposes the State to substantially more risk of litigation and adverse outcomes than keeping this Kansas statute in place.

- Enactment of SB 322 means that the State could also enter into gaming compacts regarding sports wagering using the "hub-and-spoke" model currently being litigated in Florida with the Seminole Tribe. A "hub-and-spoke" model would allow any tribe to conduct sports wagering outside of the boundaries of its Indian lands as long as the server processing such wagers is located on Indian lands. Under this model, tribes could conduct sports wagering through mobile applications and kiosks located in establishments, such as sports bars, anywhere in the State that can be connected to a tribal-based server. Because such wagers would be deemed to take place on Indian lands, this would expand the scope of IGRA, create sports wagering revenue that is not shared with the State and otherwise reduce State authority over such gaming activities.
- By removing language limiting compact terms to the tribe's boundaries, compacts could authorize statewide mobile sports wagering with no revenue share to the State, no regulation of such gaming by the Lottery or KRGC, and put the Lottery's casino managers and their platform providers at a significant competitive disadvantage. Moreover, it could create an economic incentive for platform providers to exit their operating agreements with state casino managers and contract with a tribe to operate, without any revenue-sharing requirements, to boost profits. This could lead to more attractive promotions and odds being offered to further disadvantage the state casino managers and platform providers and harm Lottery revenues.

The managers of Kansas Crossing and Kansas Star appreciate the opportunity to share our views with you and hope that SB 322 does not receive favorable consideration. I will be happy to stand for questions.

Sincerely,

/s/Kevin M. Fowler

Kevin M. Fowler

Frieden & Forbes, LLP