

The Safest Bet: A Comprehensive Review of the Fall of PASPA and the Rise of Sports Betting

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The Safest Bet: A Comprehensive Review of the Fall of PASPA and the Rise of Sports Betting

Daniel Boswell*

*In May of 2018, the United States Supreme Court held in *Murphy v. National Collegiate Athletic Association* that a federal prohibition on sports gambling was in violation of the anti-commandeering doctrine of the Tenth Amendment. In the wake of the decision, many commentators have opined that the opinion, authored by Justice Alito, may have serious implications on contentious political issues ranging from marijuana legalization to sanctuary cities. While the decision left state legislatures with the authority to permit sports gambling, it did not affirmatively close the door on federal oversight—a topic of much recent debate. This note will explore potential regulatory options at Congress’ disposal in a post-Murphy world.*

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I. BACKGROUND

A. *The Professional and Amateur Sports Protection Act of 1992*

America’s sports gambling landscape was changed forever in the wake of a late-1980’s scandal involving Major League Baseball’s all-time hits leader, Pete Rose. The *Dowd Report*, a 1989 investigatory piece authored by Special Counsel to the Commissioner John Dowd, asserted that Rose had placed wagers on a number of Cincinnati Reds baseball games during the 1987 season, while he was the Reds’ manager.¹ As a result, Pete Rose was effectively banished from Major League Baseball

¹ See generally JOHN DOWD, DOWD REPORT (1989).

for life, and a cloud formed over the integrity of professional sports.² Subsequent legislative action would attempt to alleviate growing national hysteria and scrub the stain of the Rose scandal from American sports.³

The Professional and Amateur Sports Protection Act (“PASPA”), was first introduced in the United States Senate by Sen. Dennis DeConcini in late February of 1991.⁴ Following its proposal, various Senate and House Judiciary subcommittees convened to discuss the “national problem”⁵: sports gambling. A 1991 Senate report explained that the “purpose of [PASPA] is to prohibit sports gambling conducted by, or authorized under the law of, any State or other government entity . . . to maintain the integrity of our national pastime.”⁶ PASPA gained popularity with support ranging from the commissioners of the four major sports leagues to evangelical leaders.⁷ A year and a half after its proposal, the Senate sent PASPA to the House of Representatives with overwhelming approval; PASPA was soon thereafter endorsed with approval by the House.⁸ On October 28th, 1992, President George H.W. Bush signed PASPA into law.⁹

PASPA made it unlawful for state governments to “sponsor, operate, advertise, promote, license, or authorize by law . . . [a] betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate . . . or on one or more performances of such athletes in such games.”¹⁰ This blanket prohibition was followed by multiple exceptions pertaining to PASPA’s

² See Ross Newhan, *Pete Rose Barred From Baseball by Giamatti: Reds' Manager Can Seek Reinstatement From Life Ban in Year; He Denies He Bet on the Sport*, L.A. TIMES (Aug. 25, 1989), http://articles.latimes.com/1989-08-25/news/mn-1036_1_pete-rose.

³ See *id.*; see also Michelle Minton, *Legalizing Sports Betting in the United States*, COMPETITIVE ENTERPRISE INSTITUTE (Mar. 15, 2018), <https://cei.org/content/legalizing-sports-betting-united-states> (“Without federal legislation, sports gambling is likely to spread on a piecemeal basis and ultimately develop an irreversible momentum.”); see also David Purdum, *Sports betting legalization: How we got here*, ESPN (May 22, 2018), http://www.espn.com/chalk/story/_/id/23561576/chalk-line-how-got-legalized-sports-betting (then-U.S. Rep. and former NBA player Tom McMillen explaining that “It was very non-controversial. It was right in the Pete Rose aftermath”).

⁴ S. 474, 102nd Cong. (1992).

⁵ Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 9 (1992).

⁶ S. REP. NO. 102-248 (1991); see also Will Green, *The Scope of PASPA: Parsing the Intent of the Federal US Sports Betting Law*, LEGAL SPORTS REPORT (Nov. 23, 2016), <http://www.legalsportsreport.com/12205/paspa-scope-and-intent-us-sports-betting/> (indicating that the intent of PASPA was to strictly prohibit the expansion of sports gambling into new sports).

⁷ See S. REP. NO. 102-248.

⁸ The United States Senate passed PASPA with 88 votes in favor and 5 votes against in the Roll Call Vote for the 2nd Session of the 102nd Congress.

⁹ Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (2012).

¹⁰ *Id.*

applicability.¹¹ First, PASPA would not apply to any State that had a State-conducted gambling scheme in operation at any time between January 1st, 1976 and August 31st, 1990.¹² Second, PASPA would not apply to any State that had a gambling scheme authorized by statute as of October 2nd, 1991, and had conducted such a scheme at any time between September 1st, 1989 and October 2nd, 1991.¹³ Third, New Jersey was specifically afforded a one-year grace period to authorize sports gambling, therefore, allowing the state to avoid PASPA's blanket prohibition.¹⁴

Senator Bill Bradley—a former New York Knicks guard and two-time NBA champion—was an early co-sponsor of PASPA, providing the bill with the jumpstart it needed to gain popularity. Though PASPA passed through Congress with thumping majorities in both the Senate and the House, it did have detractors. Senator Chuck Grassley championed states' rights.¹⁵ Therefore, his initial concern focused on PASPA's state-specific “grandfathering” scheme for exemptions from PASPA's blanket prohibition.¹⁶ Specifically, Senator Grassley believed that PASPA's scheme to prohibit sports gambling unfairly discriminated against many states in favor of just a few.¹⁷

Senator Grassley also initially flagged PASPA as a federalism issue, warning against the precedent the legislation would establish by allowing the Federal Government to prohibit state revenue raising programs.¹⁸ Grassley argued that “determinations of how to raise revenue have typically been left to the States.”¹⁹

Finally, Grassley voiced a concern that PASPA's grandfathering provisions would create a single-seller market for lawful sports gambling.²⁰ The resulting federal monopoly, Grassley argued, would slight the majority of the states by unfairly reserving an already multi-billion-dollar industry for just a few states.²¹

¹¹ *See id.* § 3704(a).

¹² *Id.* § 3704(a)(1).

¹³ *Id.* § 3704(a)(2).

¹⁴ *Id.* § 3704(a)(3); *see also* Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L. J. ONLINE 1, 6 (2017).

¹⁵ 138 CONG. REC. 12,974 (1992) (statement of Sen. Grassley).

¹⁶ *Id.* at 12,974-75.

¹⁷ *Id.* (“This bill purports to restrict gambling on sporting events by prohibiting certain States from conducting sports lotteries, and it does so by discriminating against many States . . . and preferring four States.”).

¹⁸ *See* S. REP. NO. 102-248 (1991).

¹⁹ *Id.*

²⁰ *See id.*

²¹ *See id.*

B. New Jersey's Challenges to PASPA

Senator Grassley's concerns about the constitutionality of PASPA proved prescient. On August 7, 2012, the four major professional sports leagues, plus the National Collegiate Athletic Association ("NCAA") filed suit against then-New Jersey Governor Chris Christie, alleging that the enactment of a 2012 New Jersey law permitting regulated sports betting in licensed locations within the state violated PASPA prohibitions.²² The District Court granted an injunction for the sports leagues, and New Jersey appealed to the Third Circuit. Ruling in favor of the sports leagues, the Third Circuit held in pertinent part that: (1) PASPA did not violate the equal sovereignty doctrine;²³ and (2) PASPA did not violate the anti-commandeering restrictions of the Tenth Amendment.²⁴

However, the Third Circuit planted a seed in the anti-commandeering section of its opinion that would become the basis of future litigation.²⁵ In a discussion on whether PASPA prohibits New Jersey from repealing its own anti-sports wagering provisions, the court stated that PASPA does not "prohibit New Jersey from repealing its ban on sports wagering."²⁶ Thus, the Third Circuit left open the possibility that New Jersey *could* repeal its own prohibition on sports betting at licensed casinos and racetracks throughout the state without running afoul of PASPA.²⁷

In 2014, the New Jersey state legislature took the message promulgated by the Third Circuit (even citing the court's dicta on state authority to repeal prohibitions on sports betting)²⁸ by passing a revised version of its 2012 bill into law.²⁹ Rather than authorizing sports gambling within the state—as the 2012 bill attempted to do—the revision acted as a repeal to a 1977 New Jersey law banning sports gambling.³⁰ Following Governor Chris Christie's signature of the bill on October 7, 2014, New

²² See Compl., *NCAA v. Christie*, 926 F.Supp.2d 551, 561 (D.N.J. 2013).

²³ See *Shelby County v. Holder*, 570 U.S. 529, 544 (2013); see also *NCAA v. Governor of N.J.*, 730 F.3d 208, 237 (3d Cir. 2013) ("[F]ar from singling out a handful of states for disfavored treatment, PASPA treats more favorably a single state.").

²⁴ See *NCAA*, 730 F.3d at 237 ("We hold that PASPA does not violate the anti-commandeering doctrine.").

²⁵ See *id.* at 232 ("But we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.").

²⁶ *Id.*

²⁷ See *id.* (emphasis added); see also Minton, *supra* note 3.

²⁸ S. 2460, 2014 Leg., 216th Sess. (N.J. 2014) (highlighting the Third Circuit's interpretation of PASPA where it "stated that it does 'not read PASPA to prohibit New Jersey from repealing its ban on sports wagering'").

²⁹ *Id.*

³⁰ *Id.* (The 1977 bill prohibited gambling by anyone under age 21 within the state and prevented betting on sports teams from New Jersey).

Jersey was intent on accepting sports bets at its racetracks and casinos as early as the following month.³¹

The major sports leagues filed suit against New Jersey again, just three days after Governor Christie signed the bill into law.³² In spite of the Third Circuit's admonition that PASPA did not bar New Jersey from repealing its own sports gambling prohibitions, the sports leagues maintained that the New Jersey state legislature had violated PASPA by doing just that.³³ Both the District Court and the Third Circuit found in favor of the sports leagues.³⁴ However, the make-up of the Third Circuit's panel in this case was likely essential to obtaining Supreme Court review.³⁵ The judge who wrote the majority opinion in *Christie I*—ruling against New Jersey—found in favor of New Jersey in *Christie II*.³⁶ As a result, the Third Circuit granted New Jersey's request for *en banc* review of the case.³⁷

Although the *en banc* review was facially unsuccessful for New Jersey, as the full panel of Third Circuit judges voted 9-3 in favor of affirming the prior ruling, the nature of the review was a win for New Jersey.³⁸ On October 7, 2016, New Jersey filed its appeal with the United States Supreme Court.³⁹ And on June 27, 2017, the Supreme Court announced that it would agree to hear New Jersey's appeal of the Third Circuit's decision.⁴⁰

C. *Murphy v. National Collegiate Athletic Association*⁴¹

On December 4, 2017, the Supreme Court heard the oral arguments for the State of New Jersey and the major sports leagues.⁴² The parties'

³¹ See David Purdum & Ryan Rodenburg, *The odds of legalized sports betting: New Jersey vs. the leagues*, ESPN (May 14, 2018), http://www.espn.com/chalk/story/_/id/22605881/the-odds-legalized-sports-betting-new-jersey-vs-leagues.

³² See Compl., *NCAA v. Christie*, 61 F.Supp.3d 488 (D.N.J. 2014).

³³ See *id.*

³⁴ See *NCAA v. Governor of N.J.*, 799 F.3d 259, 261 (3d Cir. 2015) (“PASPA, by its terms, prohibits states from authorizing by law sports gambling, and the 2014 [New Jersey] Law does exactly that.”).

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *id.* (en banc).

³⁸ See *id.*

³⁹ See Petition for Writ of Certiorari, *Christie v. NCAA*, No. 16-476, 2016 WL 5940876, at *6 (3d Cir. 2016).

⁴⁰ *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 832 F.3d 389 (3d Cir. 2016), cert. granted, *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

⁴¹ *Murphy v. NCAA*, 138 S.Ct. 1461 (2018) (When Phil Murphy was sworn in as governor of New Jersey, “*Christie v. National Collegiate Athletic Association*” was changed to “*Murphy v. National Collegiate Athletic Association*.”).

⁴² See Oral Argument Transcript, *Murphy*, 138 S.Ct. 1461 (No. 16-476).

main arguments and how the Court dealt with the answers to each inquiry will be described below.

i. Anti-Commandeering Principle

As it had for the better half of a decade, New Jersey relied primarily on two Supreme Court decisions supporting the argument that PASPA was unconstitutional because it was effectively a violation of the anti-commandeering principle of the Tenth Amendment.⁴³ It relied on *New York v. United States*, in which the Court held a challenged federal law unconstitutional because it ordered the State to regulate in accordance with federal standards.⁴⁴ It also relied on *Printz v. United States*, in which the Court held a federal statute unconstitutional because it compelled state officers to enforce federal law.⁴⁵ New Jersey contended that any state law that has the effect of permitting sports gambling, including a law totally or partially repealing a prior prohibition, amounts to an authorization.⁴⁶ Conversely, New Jersey argued that PASPA requires the states to maintain their existing laws outlawing sports betting.⁴⁷ The effect of PASPA, therefore, was to compel state officers to enforce federal law, like in *Printz*, thereby violating the anti-commandeering principle inherent in the Tenth Amendment.⁴⁸

Alternatively, the sports leagues attempted to frame the challenged PASPA provision narrowly, claiming PASPA does not commandeer the New Jersey State government because the provision lacked language requiring affirmative action by the State.⁴⁹ Distinguishing between PASPA and the laws challenged in *New York* and *Printz*, the sports leagues argued that the laws in those cases were invalid because they “told states what they must do instead of what they must not do.”⁵⁰ Therefore, according to the sports leagues: “commandeering occurs ‘only when Congress goes beyond precluding state action and affirmatively commands it.’”⁵¹

⁴³ See Murphy, *supra* note 40, at 1471. (The State relied primarily on *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997)).

⁴⁴ *Id.* (citing *New York v. United States*, 505 U.S. 144 (1992)).

⁴⁵ *Id.* (citing *Printz v. United States*, 521 U.S. 898 (1997)).

⁴⁶ *Id.* at 1473 (“Petitioners argue that the anti-authorization provision requires States to maintain their existing laws against sports gambling without alteration.”).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1478.

⁵¹ *Id.*

The Court was unpersuaded by the sports leagues' interpretation requiring an "affirmative" federal command to the states.⁵² Instead, the Court sided with New Jersey, finding that the PASPA provision prohibiting state authorization of sports gambling did violate the anti-commandeering rule.⁵³

ii. Supremacy Clause

The sports leagues also defended PASPA's anti-authorization provision on the ground that it was a valid preemption provision under the Supremacy Clause.⁵⁴ That is, that the provision should preempt any New Jersey state law on sports gambling.⁵⁵ The Court noted that for the PASPA provision to preempt state law it must: (1) represent the exercise of a power conferred to Congress by the Constitution; and (2) the PASPA provision must be best read as one that regulates private actors.⁵⁶ Rejecting this argument, however, the Court held that "the PASPA provision prohibiting state authorization of sports gambling is *not* a preemption provision because there is no way in which this provision can be understood as a regulation of private actors."⁵⁷

iii. Policy Disagreements

At the heart of New Jersey's original suit to take down PASPA was the state's financial struggles resulting from operations like Atlantic City's casinos and horse racing tracks.⁵⁸ However, Governor Christie's potential solution was a possible \$600 million influx in additional revenue should sports gambling be legalized, which could operate as at least a small fix to the state's budget crisis.⁵⁹

Indeed, in an amicus brief filed in support of New Jersey, the American Gaming Association ("AGA") opined that, generally, "a legal

⁵² See *id.* at 1472 (explaining that precluding state action and requiring affirmative state action are both subject to commandeering scrutiny because "[i]n either event, state legislatures are put under the direct control of Congress.").

⁵³ *Id.* at 1478 (holding that "[t]he PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule.").

⁵⁴ *Id.* at 1479.

⁵⁵ *Id.*

⁵⁶ See *id.* at 1480 ("Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore, the federal law takes precedence and the state law is preempted.").

⁵⁷ *Id.* at 1481 (emphasis added).

⁵⁸ See Bob Considine, *Could sports betting save New Jersey?*, TRUE JERSEY (Aug. 9, 2010), https://www.nj.com/insidejersey/index.ssf/2010/08/can_sports_betting_save_new_je.html.

⁵⁹ *Id.*

sports-betting industry could generate up to \$26.6 billion in total economic impact every year though GDP increases, tax[] dollars, and over 150,000 well-paying American jobs.”⁶⁰ Moreover, state governments would “be able to capitalize on these benefits by, for example, directing new revenues to law enforcement, social services, and other matters of vital citizen interest.”⁶¹ Solely in Nevada, it was estimated that a fully mature sports betting market generated around \$4.9 billion in spending on sports gambling in 2017.⁶²

Moreover, it was evident that PASPA had not eliminated corrupt sport match-fixing practices in its entirety, despite the law’s widespread support.⁶³ Thus, in spite of PASPA’s original intention to stop the spread of state-sponsored sports gambling, New Jersey and its supporters also argued that the statute effectively drove the sports gambling market underground, while simultaneously taking tax revenue away from the states and indirectly placing it into the hands of illegal offshore entities.⁶⁴ To put the size of this underground market in context, the AGA estimated that Americans illegally bet over \$150 billion per year on U.S. sporting events.⁶⁵ The market is not only dense, but also well-organized: in a 2015 investigation, the New York Times uncovered over 100 gambling sites—none of which were licensed by the state—connected to the internet at a Piscataway, New Jersey data center.⁶⁶ Thus, New Jersey posed the question: if PASPA not only failed to attain the goals it set out to achieve, but effectively promoted an underground market by inhibiting states’ ability to raise revenue, why was it still on the books?

Still, for years, the sports leagues and numerous lawmakers took solace in the fact that PASPA was purportedly sustaining the integrity of

⁶⁰ See Brief for American Gaming Association as Amicus Curiae Supporting Petitioners at 18, *Murphy*, 138 S. Ct. 1480 (Nos. 16-476, 16-477).

⁶¹ *Id.*

⁶² Minton, *supra* note 3.

⁶³ See generally Eric Ramsey, *Tennis Still Has A Betting Integrity Problem, We’re Reminded At Wimbledon*, LEGAL SPORTS REPORT (Jul. 13, 2018, 8:25 PDT), <https://www.legalsportsreport.com/21922/tennis-integrity-wimbledon/>, (“Leaked documents identify a ‘core group’ of 16 players ranked in the top 50, including Grand Slam winners, repeatedly flagged for fixing. Some had been offered \$50,000 or more to throw matches. None faced discipline, and all were still competing at the time of the report.”).

⁶⁴ See NCAA, *supra* note 23.

⁶⁵ Brief for American Gaming Association as Amicus Curiae Supporting Petitioners at 1, *Murphy*, 138 S. Ct. 1480 (No. 16-476).

⁶⁶ See Bogdanich, Glanz & Armendariz, *Cash Drops and Keystrokes: The Dark Reality of Sports Betting and Daily Fantasy Games*, N.Y. TIMES, <https://www.nytimes.com/interactive/2015/10/15/us/sports-betting-daily-fantasy-games-fanduel-draftkings.html?module=inline> (last visited Sep. 16, 2019).

professional and collegiate athletics.⁶⁷ Moreover, PASPA's supporters argued that the law would "protect sports from becoming a vehicle for promoting gambling among teenagers, ensuring that the values of character, cooperation, and good sportsmanship that have figured so heavily in the growth of athletic competition throughout American history were not significantly compromised."⁶⁸

While PASPA's supporters believed their stance on the issue of PASPA's actual utility to be morally superior, the protections that the law warranted to consumers may not have been so protective after all.⁶⁹ Many pundits hypothesize that the prohibitions of PASPA actually left consumers without legal protections when placing illegal wagers on sports and that PASPA created a more conducive environment for match-fixing.⁷⁰

II. MURPHY'S IMMEDIATE IMPACT

The Supreme Court's decision in *Murphy* has had an enormous impact on sports betting in the United States. By the start of the 2019 calendar year, seven states had regulated sports gaming industries, with over twenty more such bills filed in 2019.⁷¹

The remainder of Part II will examine significant adaptations to sports betting laws, beginning with Nevada, and continuing with the laws adopted by states that were among the first to regulate sports betting following the *Murphy* decision.⁷²

A. Nevada

Nevada was the pioneer for legalized sports gambling.⁷³ Riding the success of Las Vegas' newly legalized gambling market, Nevada became the first state to legalize sports betting, which had previously operated in

⁶⁷ See Dustin Gouker, *Three Giant Lies Sen. Orrin Hatch Just Told About Sports Betting*, THE LINES (May 23, 2018), <https://www.thelines.com/orrin-hatch-lies-on-sports-betting/>.

⁶⁸ See Bradley, *supra* note 5, at 6.

⁶⁹ See Gouker, *supra* note 67.

⁷⁰ *Id.*

⁷¹ Dustin Gouker, Legislative Tracker: Sports Betting, LEGAL SPORTS REPORT (Sep. 4, 2019, 10:02 PDT), <https://www.legalsportsreport.com/sportsbetting-bill-tracker/>.

⁷² The applicability of the figures and information provided in this section may only be relevant as of August of 2019.

⁷³ See Aaron Gray, *The Vegas Era: Major Sports Betting Legislation in the USA (Part II)*, SPORTS BETTING DIME, <https://www.sportsbettingdime.com/guides/legal/sports-betting-history-part-ii/> (last updated Jan. 25, 2019).

underground and organized crime associations throughout the country.⁷⁴ In 1949, sportsbooks (originally called “Turf Clubs”) began to pop up all over Las Vegas.⁷⁵ However, it was only fun and games for two years, at which point the federal government got involved in Nevada’s sports gambling industry for the first time.⁷⁶

In 1951, Congress levied a 10% federal excise tax on Las Vegas sportsbooks, which the books had to comply with to stay in operation.⁷⁷ While a 10% tax on the sportsbooks profits alone would have been harsh, this particular tax was on a sportsbooks’ entire “handle”⁷⁸ (total betting revenue), which meant that the books would have to pay a 10% tax as well as pay their customers’ winning bets back after they settled.⁷⁹ However, in 1974, Congress decreased the 10% tax to 2%, and again in 1984 from 2% to 0.5%.⁸⁰ Accordingly, the decreased burden on Nevada casinos allowed the sportsbooks to generate more revenue than ever before.⁸¹

B. Delaware

In 2009, Delaware attempted to expand upon its already existing lottery system to include expanded forms of its parlay product.⁸² Following the Court’s decision in *Murphy*, Delaware won the race to the sports betting market.⁸³ Delaware had reason to get on the ball early—the state only has about one million residents, and its fiduciary budget is heavily reliant on tourism from nearby states.⁸⁴ According to Delaware’s Director of Tourism, 17% of the state’s visitors participate in its gaming industry.⁸⁵ Thus, adopting a legalized sports betting scheme early on came

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ *See generally Sports Betting Handle vs. Revenue*, THE LINES (May 24, 2018), <https://www.thelines.com/sports-betting-handle-revenue/> (defining “handle” as “the total amount of money wagered by bettors at a sportsbook over a given period,” and defining “revenue” as “the amount of money a sportsbook retains from total handle after paying out winners.”).

⁷⁹ Gray, *supra* note 73.

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *Delaware Sports Betting*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/delaware> (last updated Aug. 9, 2019).

⁸³ *See id.* (“Delaware law permits sports betting, and became the first state outside of Nevada to book a legal, single-game wager.”).

⁸⁴ *See* Eric Ramsey, *Welcome to Delaware Sports Betting: Live Updates as State Joins Nevada With Single-Game Wagering*, LEGAL SPORTS REPORT (June 5, 2018, 8:47 PM), <https://www.legalsportsreport.com/20945/delaware-begins-booking-first-sports-bets-outside-nevada/>.

⁸⁵ *Id.*

as both an immediate financial incentive for Delaware, as well as a promotional opportunity for the state throughout the northeast.⁸⁶

By June of 2018, three casinos were permitted to accept bets in Delaware: Dover Downs, Delaware Park, and Harrington Raceway & Casino.⁸⁷ Yet, these casinos must deal with a tax structure very different from the one used in Nevada.⁸⁸ After winning bets are paid out, Delaware casinos are required to share 12.5% of their sportsbook handle with Scientific Games, the entity in charge of providing gambling products and services to the state's casinos.⁸⁹ After paying Scientific Games, the casinos are effectively taxed by Delaware at a 60% rate, because 50% of sportsbooks' winnings are directly taxed by the state, while an additional 10% goes towards supplementing horse racing purses from races run at Delaware race tracks.⁹⁰

C. New Jersey

While Delaware won the race to the sports betting industry post-*Murphy*, New Jersey won best-in-show by taking full advantage of the decision.⁹¹ On June 11, 2018, former Governor Christie's dream of legal sports wagering in the Garden State came to fruition when Governor Phil Murphy signed the sports betting bill into law.⁹² Compared with Delaware's three casinos accepting bets, New Jersey features up to nine casinos that can be accessed in person.⁹³ In Atlantic City alone, six casinos

⁸⁶ See *id.*

⁸⁷ See Rick Maese, *Delaware is the First New State to Bet on Sports Gambling, but it Might Not Pay Off*, WASH. POST (June 5, 2018), https://www.washingtonpost.com/news/sports/wp/2018/06/05/delaware-first-to-bet-on-sports-gambling-but-it-might-not-pay-off/?utm_term=.bc842b422948.

⁸⁸ See Adam Candee, *Is It 'Revenue Sharing' or High Taxes for Sports Betting? Ask Rhode Island, Delaware How They Slice the Pie*, LEGAL SPORTS REPORT (July 3, 2018, 5:46 PM), <https://www.legalsportsreport.com/21663/sports-betting-revenue-sharing/>.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See generally Associated Press, *'Stunning' numbers show N.J. has fallen in love with sports betting*, N.J.COM (Oct. 12, 2018), https://www.nj.com/news/index.ssf/2018/10/stunning_numbers_show_nj_has_fallen_in_love_with_sports_betting.html ("And it's already becoming clear that sports gamblers prefer to do their betting online or over their smart phones. Of the \$336 million in sports bets made in New Jersey so far, \$210 million were placed online as opposed to a casino or racetrack.").

⁹² See Ryan Hutchins, *Murphy Signs New Jersey Sports Betting Law After 7-Year Legal Fight*, POLITICO (June 11, 2018, 4:17 PM), <https://www.politico.com/states/new-jersey/story/2018/06/11/murphy-signs-new-jersey-sport-betting-law-after-7-year-legal-fight-461275>.

⁹³ See Post Sports Desk, *NJ Sports Betting: Where and how to Place Bets*, N.Y. POST (Dec. 17, 2018, 11:12 AM), <https://nypost.com/2018/12/17/nj-sports-betting-where-and-how-to-place-bets/>.

are now accepting sports wagers.⁹⁴ Moreover, New Jersey took full advantage of its new law with online forums and a handful of mobile betting apps, which can be accessed throughout the Garden State.⁹⁵ Already, New Jersey's online gaming industry has taken over retail venues in total value of bets made.⁹⁶ In November 2018 alone, a staggering 72% of money wagered on sports in New Jersey came via mobile and online channels.⁹⁷

Sports wagering in New Jersey is overseen by the New Jersey Division of Gaming Enforcement.⁹⁸ Sports betting at traditional sportsbooks is taxed at 8.5%, while entities accepting wagers online via URL's and mobile apps are taxed at a 13% rate.⁹⁹ Of note, New Jersey overtook Nevada for the highest monthly gaming handle generated in one state in May and June of 2019.¹⁰⁰ As evidenced by these awards, New Jersey has seen the most immediate success from its victory in legalized sports gaming, but the sustainability of that success may be threatened by legalization attempts in nearby states with potentially large online sports betting markets, such as Pennsylvania and New York.

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ Associated Press, *supra* note 91.

⁹⁷ Nicholas Garcia, *New Jersey Sports Betting Revenue Pulled in a Record November Haul*, PLAY USA (Dec. 13, 2018), <https://www.playusa.com/new-jersey-sports-betting-november/>.

⁹⁸ The Division of Gaming Enforcement has already shown that it will not hesitate to discipline New Jersey sportsbooks that fail to comply with current state law. See Erik Gibbs, *New Info Emerges on Caesars' Illegal Sports Bets in New Jersey*, CALVINAYRE.COM (Jan. 10, 2019), <https://calvinayre.com/2019/01/10/business/new-info-emerges-caesars-illegal-sports-bets-new-jersey/> (showing the New Jersey Division of Gaming Enforcement discipline of Caesars Entertainment); see also Steven Stradbroke, *Rush Street Fined \$30k for Underage NJ Online Gambling*, CALVINAYRE.COM (Jan. 24, 2019), <https://calvinayre.com/2019/01/24/business/new-jersey-fines-rush-street-underage-online-gambling/> (showing New Jersey Division of Gaming Enforcement's discipline of Rush Street Interactive).

⁹⁹ David Danzis, *Sports Betting Taxes on Par with Projections*, PRESS OF ATLANTIC CITY (Nov. 2, 2018), https://www.pressofatlanticcity.com/news/press/casinos_tourism/sports-betting-taxes-on-par-with-projections/article_6cb9b715-d085-58d0-8f58-d9947448b2d6.html.

¹⁰⁰ See Adam Candee, *Jersey Sure! NJ Sports Betting Passes Nevada for the First Time*, LEGAL SPORTS REPORT (June 27, 2019), <https://www.legalsportsreport.com/34031/nj-sports-betting-nevada-revenue-may-2019/>; see also Dustin Gouker, *New Jersey is the Leader of US Sports Betting, Beats Nevada Handle in July*, LEGAL SPORTS REPORT (Aug. 28, 2019), <https://www.legalsportsreport.com/35242/nevada-vs-new-jersey-july-sports-betting/>.

D. Mississippi

Mississippi officially became the fourth state (not including Nevada) to offer single-game sports wagering on August 1, 2018, just in time to accept wagers on the upcoming college football season.¹⁰¹ Mississippi immediately gained a regional edge, becoming the first state in the southeast to adopt legalized sports betting post-*Murphy*.¹⁰² The popular MGM sportsbook opened wagering activities at popular casinos in Biloxi and Tunica.¹⁰³ However, mobile and online wagering is currently not permitted outside of Mississippi's licensed casinos and, following the death of both Mississippi House Bill 1481 and Senate Bill 2667 in February of 2019, this is likely to remain the case.¹⁰⁴

Wagering within Mississippi is controlled by the Mississippi Gaming Commission ("MGC").¹⁰⁵ Mississippi sportsbooks are required to pay a 12% tax on their hold after paying out winning bets, which is slightly higher than the New Jersey rate.¹⁰⁶ Breaking that down, casinos in Mississippi pay 8% of their winnings to the state government and 4% of their winnings to the local municipalities in which they are located.¹⁰⁷

E. West Virginia

West Virginia was ahead of the game, enacting a sports betting law in March 2018 that took effect once *Murphy* was decided.¹⁰⁸ Thus, West Virginia was among one of the first states to offer regulated sports wagering following the decision, with its first bet paying out the day legal sports betting was first offered on September 1st, 2018.¹⁰⁹ At its launch, West Virginia featured just one sportsbook, the Hollywood Casino in

¹⁰¹ Mississippi's legal sports betting scheme came just in time to accept wagers on the upcoming football season. See Adam Candee, *New Day for Ole Miss as Mississippi Sports Betting Launches*, LEGAL SPORTS REPORT (Aug. 1, 2018), <https://www.legalsportsreport.com/22474/mississippi-sports-betting-launches/>.

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.*; see also Adam Candee, *Goodbye Mobile Mississippi Sports Betting Bills, We Hardly Knew Ye*, LEGAL SPORTS REPORT (Feb. 6, 2019), <https://www.legalsportsreport.com/28856/mobile-mississippi-sports-betting-bills-die/>.

¹⁰⁵ *Mississippi Sports Betting: Mississippi Sports Betting FAQ*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/mississippi/> (last updated Aug. 6, 2019) (The MGC "is charged with regulation oversight of the industry.").

¹⁰⁶ See Bobby Harrison, *Mississippi Rings Up \$1 Million in Revenue from Sports Betting*, SUN HERALD (Dec. 14, 2018, 5:00 AM), <https://www.sunherald.com/news/business/casino-gambling/article223079670.html>.

¹⁰⁷ *Id.*

¹⁰⁸ See *West Virginia Sports Betting*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/wv/> (last updated Aug. 28, 2019, 1:34 PM).

¹⁰⁹ See *id.*

Charlestown, in partnership with William Hill sportsbooks.¹¹⁰ Yet, as of late December 2018, the state boasted five fully operative sportsbooks as well as an important online sports wagering platform.¹¹¹ Sports gaming wagers in West Virginia are overseen by the state's Lottery Commission and are taxed by the state at a 10% clip.¹¹²

F. Pennsylvania

Pennsylvania became the seventh state to begin accepting wagers on sporting events in mid-November 2018, permitting wagers on both professional and collegiate activities, as well as accepting bets both in person and via mobile device platforms.¹¹³ Notably, the state's Gaming Control Board has come under scrutiny for the high tax rates it places on sports betting when compared to other states.¹¹⁴ Seen as an avenue to help supplement horse racing purses, as well as pension and health plans for Pennsylvania's horsemen, the state's 36% tax rate dwarfs the rates of Nevada, New Jersey, and Mississippi combined.¹¹⁵ Despite this heavy tax, Pennsylvania bettors placed over \$59 million in total sports wagers in July of 2019, a new monthly high for the state, due in large part to online wagering, which accounted for over two-thirds of all bets placed in the state.¹¹⁶ Compare these figures with those of Pennsylvania's casino market, which has become the second-largest in the United States behind only Nevada despite an astronomical 54% tax rate on slot revenue.¹¹⁷ According to state officials, Pennsylvania's casinos have generated at least \$2.3 billion in slot machine revenue alone over each of the past eight years.¹¹⁸

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² *Id.*

¹¹³ *See Pennsylvania Online Sports Betting*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/pa/> (last updated Sept. 5, 2019, 4:24 PM).

¹¹⁴ *See John Brennan, Pa's High Sports Betting Tax Rates Come Under the Microscope at Gaming Conference*, PENN BETS (Jan. 7, 2019), <https://www.pennbets.com/pa-sports-betting-tax-rate-nclgs/>.

¹¹⁵ *See id.*

¹¹⁶ Press Release, Pennsylvania Gaming Control Bd. Reports Gaming Revenue For July, Pennsylvania Gaming Control Board (Aug. 16, 2019) (on file with author).

¹¹⁷ *See Steven Ruddock, PA Sports Betting Off to Reasonably Fast Start Despite High Tax Rate*, LEGAL SPORTS REPORT (Jan. 23, 2019, 2:05 PM), <https://www.legalsportsreport.com/27911/pa-sports-betting-tax/>.

¹¹⁸ Brennan, *supra* note 114; *see discussion infra* Part IV, Section b (suggesting that the success of Pennsylvania's casinos and sports betting despite high tax rates may prompt other states to raise the rates at which they tax their betting schemes).

G. Rhode Island

Rhode Island legislators signed a sports betting bill into law on June 22, 2018.¹¹⁹ The state's gaming operations, which are overseen by the Rhode Island Lottery, are limited to just two casinos, the Twin River Casino in Lincoln and the Twin River Casino in Tiverton.¹²⁰ Rhode Island has perhaps the most interesting tax revenue split of any state to legalize sports betting to this point: 51% of every dollar wagered in Rhode Island sportsbooks goes back to the state's treasury, and 32% goes to International Game Technology, the partner of the state's casinos helping to operate sports betting.¹²¹ After those taxes are paid out, 17% of the remaining sports betting revenue stays in the hands of the respective casinos.¹²²

III. LET'S TALK OVERSIGHT

A. Calls for Oversight: Arguments in Favor and Against

i. Orrin Hatch and Chuck Schumer

Before sundown on the day that the *Murphy* decision was handed down, Senator Orrin Hatch issued a public statement and memo announcing his intent to submit federal legislation on sports betting.¹²³ As one of the architects of the now-defunct PASPA, Senator Hatch (R-UT) seemed to make it his swan song to once again place his name on a federal mandate on sports gambling.¹²⁴ On August 23rd, Senator Hatch promised on the Senate floor that a new piece of federal legislation would “kick-start” the federal discussion on sports betting, despite the fact that three states were already running full steam ahead with their own legalized sports gambling operations.¹²⁵

Similarly, Senator Chuck Schumer (D-NY) authored a memo directed at the Senate on August 29th, which outlined his proposed federal

¹¹⁹ *Rhode Island Sports Betting*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/ri> (last updated Apr. 29, 2019, 12:15 AM).

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See* Jordain Carney, *Hatch to Introduce Sports Betting Bill After Supreme Court Decision*, THE HILL (May 14, 2018, 1:17 PM), <https://thehill.com/blogs/floor-action/senate/387594-gop-senator-to-introduce-sports-betting-bill-after-supreme-court>.

¹²⁴ *See* Jill R. Dorson, *Need for Federal Sports Betting Law Just a Vanity Project for Hatch*, SPORTSHANDLE (Aug. 28, 2018), <https://sportshandle.com/need-for-federal-sports-betting-law-just-a-vanity-project-for-hatch/>.

¹²⁵ *Id.*

framework for sports betting regulation.¹²⁶ Senator Schumer took the position of an ‘everyman sports fan,’ arguing that federal oversight was imperative to protect “the sports games we all love to watch[.]”¹²⁷ Specifically, Senator Schumer gave three major suggestions in the memo.¹²⁸ First, he suggested the implementation of a legal sports betting age, similar to age twenty-one for alcohol sales, and also suggested that casinos be prohibited from advertising to young people.¹²⁹ Second, Senator Schumer recommended that entities accepting wagers on sporting events should be required to share information and suspicious trends with the leagues in order to “protect the integrity of the game[.]”¹³⁰ Lastly, Senator Schumer suggested that “official league data” should be required to determine the outcomes of consumers’ wagers, as well as some level of involvement for the major sports leagues in determining which betting options private casinos and sportsbooks may offer.¹³¹ In other words, the Senator suggested “protect[ing] consumers and individuals placing bets” by creating one official database for each league that the sportsbooks would be required to purchase and follow in setting odds for bettors.¹³²

ii. The American Gaming Association

The Senators’ suggestions were followed by immediate pushback from numerous organizations.¹³³ Namely, Sara Slane—the Senior Vice President of Public Affairs for the AGA—took issue with each of the Senators’ suggestions in a September 13, 2018 letter addressed to Senator Schumer.¹³⁴ Ms. Slane expressed the AGA’s disdain for the Senators’

¹²⁶ See Darren Rovell, *Senate Minority Leader Chuck Schumer Suggests Federal Framework for Sports Betting*, ESPN (Aug. 29, 2018), http://www.espn.com/chalk/story/_/id/24511871/chuck-schumer-suggests-federal-framework-sports-betting.

¹²⁷ Memorandum from Senate Democratic Leader Charles E. Schumer to U.S. Senate, *Protecting the Games We Love After Murphy v. NCAA* (Aug. 29, 2018) (on file with author).

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ See Letter from Sara Slane, Senior VP of Public Affairs, Am. Gaming Ass’n, to The Honorable Charles Schumer, Senate Majority Leader, U.S. Senate (Sept. 13, 2018), <https://www.americangaming.org/sites/default/files/AGA%20Letter%20to%20The%20Honorable%20Charles%20Schumer%209-13-18%20FINAL.PDF>; see also Michelle Minton, *Testimony of Michelle Minton on Post-PASPA: An Examination of Sports Betting in America*, COMPETITIVE ENTERPRISE INSTITUTE (Sept. 27, 2018), <https://cei.org/content/testimony-michelle-minton-post-paspa-examination-sports-betting-america>.

¹³⁴ Letter from Sara Slane, *supra* note 127.

hands-on approach to an industry that had just taken its first steps in decades toward liberation.¹³⁵ She discussed the AGA's position that there was actually no need for federal oversight, further expressing the sentiment that oversight can be achieved through "robust state regulation."¹³⁶ Crucially, the AGA asserted that "there is neither a need nor a legal precedent" to require sportsbook operators to purchase "official league data."¹³⁷ Instead, Slane wrote that "[a] healthy market of accurate, consistent sports betting data providers already exists and sportsbooks already avail themselves of such services in the commercial market."¹³⁸ And this makes sense, too: one official data company is much more likely to become corrupted and to set inflated prices that discourage competition than is a variety of data providers like the market that currently exists.¹³⁹ Lastly, Slane fought Schumer's suggestion that leagues ought to be involved in the types of wagers that sportsbooks would be allowed to accept,¹⁴⁰ arguing that sportsbook operators already have a significant economic incentive to avoid offering bets that pose a significant risk.¹⁴¹

iii. NBA, NFL, etc. Executives' Approach

Prior to the Supreme Court's decision in *Murphy*, the National Basketball Association's ("NBA") Assistant General Counsel and Senior Vice President Dan Spillane supplemented the New York State Senate's discussion before the Committee on Racing, Gaming, and Wagering with testimony providing the NBA's opinion on federal oversight for sports gambling.¹⁴² Spillane pinpointed a few key components that should be included in a comprehensive sports betting bill.¹⁴³ First, he suggested that such legislation should include transparency between gaming operators and the leagues regarding information on wagers on their leagues.¹⁴⁴ Specifically, Spillane suggested that gaming operators should be required to (a) inform the sports leagues of unusual betting activity, and (b) maintain centralized betting data to assist gaming operators in monitoring

¹³⁵ *See id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See* Dan Spillane, *Statement to New York State Senate Standing Committee on Racing, Gaming and Wagering* (Jan. 24, 2018), https://www.nysenate.gov/sites/default/files/1.24.18_testimony_of_national_basketball_association.pdf.

¹⁴³ *See id.*

¹⁴⁴ *See id.*

bets from one jurisdiction to the next.¹⁴⁵ Next, Spillane suggested that leagues should possess the right to restrict gaming operators from offering certain wagers on their events.¹⁴⁶ Furthermore, Spillane echoed the NCAA's policy argument in *Murphy*, calling for rigorous licensing programs to ensure that sportsbook operators were properly vetted, as well as age restrictions for consumers, and measures to address problem gambling.¹⁴⁷

Perhaps most importantly, Spillane suggested that the sports leagues will inherently assume an increased risk as a result of an increase in wagers on sports contests.¹⁴⁸ The NBA suggested that in order “[t]o compensate leagues for the risk and expense created by betting and the commercial value our product creates for betting operators, it would be reasonable for operators to pay each league one percent of the total amount bet on its games.”¹⁴⁹ This one-percent requirement is now commonly referred to as “integrity fees.”¹⁵⁰ Recently, integrity fees have been widely popularized by the major sports leagues as a way for the leagues to find additional profit in a world where it is now legal to wager on their product.¹⁵¹ In short, integrity fees would provide the leagues with a set percentage commission of the total bets wagered on their respective games in order to compensate each league for the increase in the amount of time and money that they will have to spend on data monitoring and integrity protocols.¹⁵²

iv. The “Other” September 27th Hearing

In late September 2018, while the vast majority of the nation was captivated by the confirmation hearings of now-Supreme Court Justice Brett Kavanaugh, a House Judiciary subcommittee was meeting just down the hall of the Capitol Building.¹⁵³ On the afternoon of September 27,

¹⁴⁵ *See id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See generally Sports Betting Integrity Fee*, THE LINES (May 24, 2018), <https://www.thelines.com/betting/integrity-fee/> (“The unlikely proposed marriage has come in the form of a demand — for lack of a better word — by both MLB and the NBA that an ‘integrity fee’ made payable to the leagues be included in all proposed sports betting legislation. In the leagues’ preferred iteration, the integrity fee would be an amount equal to 1 percent of sports betting handle over a given period, which equals about 20 percent of an operator’s revenue.”).

¹⁵¹ *See id.*

¹⁵² *See id.*

¹⁵³ *See* John Holden, *What We Learned About Sports Betting In Congress, Part One: The NFL*, LEGAL SPORTS REPORT (Oct. 9, 2018, 09:43 AM), <https://www.legalsportsreport.com/24772/congress-and-sports-betting-nfl/>.

2018, Congressman Jim Sensenbrenner (R-WI) provided his opening remarks in a House Judiciary Subcommittee on Crime hearing, the purpose of which was to discuss the possibility of federal legislation to oversee states' authorization of sports gambling.¹⁵⁴ There, Congressman Sensenbrenner outlined four possible options for Congress to consider in the coming months.¹⁵⁵

First, Congress could once again attempt to ban sports betting altogether.¹⁵⁶ That is, to come up with a piece of legislation similar to PASPA, without running afoul of any constitutional states' rights.¹⁵⁷ Reading Justice Alito's opinion in *Murphy*, this is a possible option; however, this option is the least plausible of the four at this juncture.¹⁵⁸

Second, Congress could choose to maintain what has now become the status quo in a post-*Murphy* world.¹⁵⁹ That is, continue to allow the states to regulate themselves on all issues relating to their own respective sports betting operations.¹⁶⁰ Maintaining the current sports betting climate would agree with the values of organizations like the American Gaming Association and many of the states that have already passed sports gambling legislation, but would come to the chagrin of the professional sports leagues, and certain Senators such as Hatch and Schumer.¹⁶¹

Third, Congress could create a meet-you-in-the-middle type of system that poses minimal disruption to the status quo. This type of legislation would impose required standards and restrictions on states should they choose to authorize sports gambling operations.¹⁶² Simply put, Congress could choose a route that results in minimal regulation through a means of minimal standards and requirements that states must meet in order to provide a healthy sports betting market.¹⁶³ For now, it seems that this is the most likely option, though there is criticism that even minimal federal regulation is unnecessary.¹⁶⁴ After all, many states would argue that most of the regulations put into place by new legislation are already covered in many of the states' own sports betting laws.¹⁶⁵

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ *See id.*; *see also* discussion *supra* pp. 20-21.

¹⁶² *See* Holden, *supra* note 153.

¹⁶³ *See id.*

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

Lastly, there is the option of full federal regulation of the sports betting industry.¹⁶⁶ A complete framework for federal oversight of the growing sports betting industry theoretically has no bounds: mandated integrity fees and official league data, age restrictions on state sponsored sports betting, and a host of other requirements that could be imposed on the states could be within Congress' regulatory reach.¹⁶⁷

B. A Discussion on Integrity Fees

To make a fully advised decision on which of the outlined Congressional approaches is most warranted, a total grasp of the intricacies of each approach is necessary. One of those intricacies is the integrity fee, which would provide the sports leagues with a set percentage commission of the total bets wagered on their respective leagues.¹⁶⁸ According to Spillane, integrity fees are justified because a legal sports betting market will force the leagues to invest time, effort, and resources into compliance programs that include bet monitoring and investigating.¹⁶⁹ This compensation would, in theory, help to alleviate any burden placed on the leagues for the increase in capital and resources that they will have to spend on increased data monitoring and integrity protocols.¹⁷⁰

Proponents of integrity fees have provided many reasons in support of such a fee.¹⁷¹ The most obvious reason being that integrity fees will help the sports leagues offset the increase in resources they will have to allocate toward compliance programs in response to the proliferation of sports gambling.¹⁷² There are certainly costs associated with the rise in sports betting volume that league offices will incur.¹⁷³ If implemented correctly, an integrity fee should theoretically provide an unquestionable increase in overall integrity.¹⁷⁴ However, before Congress places an integrity fee requirement on sportsbooks across the country, we must ask: is there not another way to recompense the sports leagues for their hardship?¹⁷⁵ After

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

¹⁶⁸ THE LINES, *supra* note 150.

¹⁶⁹ Spillane, *supra* note 142.

¹⁷⁰ THE LINES, *supra* note 150.

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *Sports Betting Integrity Fee*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/integrity-fee/>, (last updated Aug. 2, 2019, 03:04 PDT).

¹⁷⁴ *Id.*

¹⁷⁵ *See* Press Release, American Gaming Association, NBA & MLB Could See Combined \$1.7 Billion From Legalized Sports Betting (Oct. 18, 2018), <https://www.americangaming.org/new/nba-mlb-could-see-combined-1-7-billion-from-legalized-sports-betting/>.

all, don't the sports leagues already stand to gain from a healthy sports betting market in and of itself?¹⁷⁶

While the leagues will not receive direct monetary compensation from legal sports betting, a 2018 Nielsen Sports survey illustrates that, at a minimum, the secondary effects of state-sponsored sports betting are vast.¹⁷⁷ Those effects can be broken down into two categories: revenue from fan engagement and gaming-related revenue.¹⁷⁸

Revenue from fan engagement would include increased revenue from media rights, sponsorship, merchandise sales, and ticket sales.¹⁷⁹ The 2018 Nielsen study estimated that in a legal sports betting environment, the NFL would receive a \$2.326 billion increase in total revenue, with \$1.753 billion generated by fan engagement revenue and \$573 million in gaming-related revenue.¹⁸⁰ The NBA would receive an extra \$585 million, with \$425 million generated by fan engagement revenue and \$160 million in gaming-related revenue.¹⁸¹ The NHL figures are \$216 million in total: \$151 million from more fan engagement and \$65 million from gaming-related revenue.¹⁸² And the MLB would receive an increase of \$1.106 billion in total revenue, represented by an increase of \$952 million in fan engagement revenue and a \$154 million in gaming-revenue.¹⁸³ In total, the study estimates that a fully healthy sports betting market would drive an increase of \$4.2 billion in profits for the four major professional sports leagues combined,¹⁸⁴ not including profits for the NCAA, where Americans wagered \$10.4 billion on March Madness alone in 2017.¹⁸⁵

In contrast, various reports estimate that in a fully healthy sports betting market, state-sponsored sportsbooks would take in about \$200 billion in annual handle, or wagered bets alone.¹⁸⁶ Using this figure, a one percent integrity fee would amount to \$2 billion that sportsbooks would be required to hand over to the leagues each year from wagered bets

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ *Id.*

¹⁸⁰ American Gaming Association, *NBA & MLB Could See Combined \$1.7 Billion From Legalized Sports Betting*, *supra* note 175.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Am. Sports Betting Coal., *Our Position*, SPORTSBETTINGAMERICA.COM, <http://www.sportsbettinginamerica.com/industry-positioning/> (last visited Sept. 15, 2019).

¹⁸⁶ *See* Dustin Gouker, *Leagues Could Make Billions if States Implement Sports Betting 'Integrity Fees'*, LEGAL SPORTS REPORT (Jan. 9, 2018), <https://www.legalsportsreport.com/17430/leagues-sports-betting-integrity-fee-revenue/>.

alone.¹⁸⁷ From December 2016 through November 2017, Nevada sportsbooks had a handle of over \$4.8 billion.¹⁸⁸ Viewing this \$2 billion figure in light of the handle from 2016-2017 in Nevada sportsbooks, we can estimate that a 1 percent integrity fee would allot \$600 million to the NCAA, \$480 million to the MLB, \$440 million to the NFL, \$300 million to the NBA, and \$160 million to other sports.¹⁸⁹ The MLB, for example, would receive \$480 million from an integrity fee to support increased compliance costs.¹⁹⁰ However, that \$480 million figure pales in comparison to the \$1.106 billion the league would receive to just exist in a healthy sports betting market.¹⁹¹

C. The End Result: The Sports Wagering Market Integrity Act of 2018

On December 19, 2018, Senators Hatch and Schumer took the first step in a long, drawn out process that could eventually result in comprehensive legislation providing federal oversight to the expanding legal sports betting market.¹⁹² The aim of the bill is not to ban sports betting, but to “maintain a distinct [f]ederal interest in the integrity and character of professional and amateur sporting contests.”¹⁹³ While the bill did not pass in 2018, Hatch—who retired from the Senate at the end of the year—hoped that the bill would serve as a starting point for the 2019 Congress when it is time to pick up discussions and reintroduce the bill. So, what does that starting point look like?

To start, legal sportsbooks that have already opened across seven states, including sportsbooks in Nevada, would not be exempt from complying with federal standards.¹⁹⁴ Importantly, the bill would “[r]equire that sports wagering operators use data provided or licensed by sports organizations to determine the outcome of sports wagers through 2024,

¹⁸⁷ *Id.*

¹⁸⁸ David G. Schwartz, NEVADA SPORTS BETTING TOTALS: 1984-2018, at 2 (Las Vegas: Center for Gaming Research, University Libraries, University of Nevada Las Vegas) (2019).

¹⁸⁹ Gouker, *supra* note 186.

¹⁹⁰ *Id.*

¹⁹¹ American Gaming Association, *supra* note 175 (citing AM. GAMING ASS’N, HOW MUCH DO LEAGUES STAND TO GAIN FROM LEGAL SPORTS BETTING? 4 (2018), <https://www.americangaming.org/sites/default/files/Nielsen%20Research%20-%20All%204%20Leagues%20FINAL.pdf>).

¹⁹² David Purdum & Ryan Rodenberg, *What You Need to Know About the New Federal Sports Betting Bill*, ESPN (Dec. 20, 2018), http://www.espn.com/chalk/story/_/id/25581529/what-need-know-sports-wagering-market-integrity-act-swmia-2018.

¹⁹³ *Id.*

¹⁹⁴ S. 3793, 115th Cong. § 103 (2018).

and set requirements for data used thereafter.”¹⁹⁵ The bill would also establish a process to allow the sports leagues to request to restrict certain sports wagers if they believe it would be necessary to protect the integrity of the contest.¹⁹⁶ Furthermore, the bill would “[p]rohibit sports wagering by individuals younger than 21; athletes, coaches, officials, and others associated with sports organizations; and individuals convicted of certain federal crimes related to sports wagering.”¹⁹⁷ Additionally, the bill’s final page included a severability clause, which was a cause for debate in *Murphy*.¹⁹⁸ Under this provision, any invalidity in the bill would not render the entire bill invalid, only that specific portion of the bill.¹⁹⁹ Notably, the bill failed to mention anything of substance regarding integrity fees.²⁰⁰

Despite bipartisan support, the bill did not enjoy significant support from the professional sports leagues and the NCAA, but they were in the minority.²⁰¹ Lawmakers and the gaming industry alike chimed in to express their disapproval.²⁰² Specifically, Sara Slane of the AGA called the bill the “epitome of a solution in search of a problem” and a “non-starter for the gaming industry.”²⁰³

IV. THE SPORTS WAGERING MARKET INTEGRITY ACT OF 2018: FLAWS AND SOLUTIONS

At the very least, Schumer and Hatch’s Sports Wagering Market Integrity Act of 2018 (“SWMIA”) does serve as a starting place for a broader conversation about sports betting.

¹⁹⁵ Adam Candee, *Hatch, Schumer Preparing to Drop Federal Sports Betting Bill in Senate*, LEGAL SPORTS REPORT (Dec. 19, 2018), <https://www.legalsportsreport.com/26901/federal-sports-betting-bill-drop/>.

¹⁹⁶ *See id.*

¹⁹⁷ *Id.*

¹⁹⁸ S. 3793, 115th Cong. § 502 (2018); *See Murphy, supra* note 40, at 1484.

¹⁹⁹ John Holden, *Instant Expert Legal Analysis of the Federal Sports Betting Bill – Part 2*, LEGAL SPORTS REPORT (Dec. 25, 2018), <https://www.legalsportsreport.com/27070/federal-sports-betting-bill-analysis-2/>.

²⁰⁰ Purdum & Rodenburg, *supra* note 192 (stating that the legislation “does not address any such fees paid by sportsbook operators to leagues based on the amount wagered on respective games.”).

²⁰¹ *See Candee, supra* note 195.

²⁰² *See id.*

²⁰³ *Id.*

A. The Flaws

i. Integrity Fees

A major talking point after the *Murphy* decision was the integrity fee conversation. Just about any group you could find that was in favor of federal oversight—most importantly, the professional sports leagues—was also in favor of imposing an integrity fee on state-sponsored sportsbooks.²⁰⁴ It could be inferred from the SWMIA that any talk of integrity fees throughout the year received little Congressional support, resulting in any language on integrity fees being stricken from the SWMIA.²⁰⁵ I surmise that this omission will likely remain unchanged moving forward, given that there has been no state that has included integrity fees in its own sports wagering legislation. Furthermore, evidence strongly suggests that the existence of legalized sports gambling alone would bring plenty of profit to the sports leagues,²⁰⁶ thus, it seems unlikely that any federal legislation would include an integrity fee requirement.

It would seem that the major sports leagues should have plenty of capital to uphold the integrity of their sports without imposing an additional \$2 billion in unwarranted integrity fees. Moreover, the aforementioned figures are not the only bases for opposing integrity fees. For starters, integrity fees would take away from state revenue, likely making it a tough sell to get states to hand over a share of profits to the leagues.²⁰⁷ Even if there were an integrity fee requirement, states would inevitably be left with a choice: lower their tax rates in order to give the leagues more money, or raise their rates to achieve their own initial profit goals.²⁰⁸ Regardless, I expect that the costs associated with an integrity fee would eventually just be passed off to consumers in the form of worse odds and payouts, given that an integrity fee would likely reduce state profits. If the goal is to transition sports betting to regulated markets, states should be interested in keeping costs down. Integrity fees, whether in a state sports betting bill or federal legislation, would not keep costs down.

ii. Data Requirement

The most challenging provision of the SWMIA is likely the requirement that sports wagering operators use data provided or licensed by the sports leagues to determine the outcome of sports wagers through

²⁰⁴ See discussion *supra* Part III, Section a, Subsection iii.

²⁰⁵ See S. 3793, *supra* note 194.

²⁰⁶ See discussion *supra* Part II, Section b.

²⁰⁷ See THE LINES, *supra* note 149.

²⁰⁸ See LEGAL SPORTS REPORT, *supra* note 172.

at least 2024.²⁰⁹ This requirement likely elicits a myriad of concerns, not the least of which are constitutional. That is, a government mandate that state-sponsored private organizations be restricted to certain sources of information could run afoul of the First Amendment. Furthermore, aside from the policy concerns related to hindering the marketplace of ideas among private organizations, intuitive notions of economic competition suggest that the openness of the current market for data providers is an added incentive for sportsbook operators to access the best and fastest information possible.²¹⁰

In an alternative world where the sports leagues hold a monopoly over official data, a two-folded problem is presented. First, a mandate that every sports book contract with only the sports leagues for official data risks granting the sports leagues the authority to set inflated, non-competitive pricing. These inflated prices would not only stuff the pockets of the sports leagues but would do so at the expense of the sportsbooks' net profit. Accordingly, this decrease in profit margin would likely result in sportsbooks passing the burden on to consumers. The eventual result of such a dynamic could have an effect of drawing consumers away from the regulated U.S. market, and toward illegal offshore markets.

Second, the current market for sports data is vast. It is hard to say how many providers already exist. Assuming that sportsbooks operators want to contract with the best service providers, it makes sense that this market is so large. Conversely, a single-provider market is counterintuitive: it likely disincentivizes efficiency of sports book operators and is likely more prone to corruption. After all, it is much tougher to defraud an entire market than a single provider.

iii. Restrictions on Sports Wagers

Another feature of the SWMIA that is likely to be disputed is a proposed provision allowing the sports leagues to restrict state-sponsored sportsbooks from offering certain sports wagers.²¹¹ Of course, the provision that made it into the bill is milder than what was championed earlier in 2018.²¹² Under the proposed legislation, the decision of whether to offer a certain sports wager would ultimately be at the discretion of each state's regulatory entity.²¹³ Proponents of this provision, such as the sports leagues and Senators Hatch and Schumer, justify it by suggesting that such

²⁰⁹ See S. 3793, *supra* note 197, at § 103(b)(5).

²¹⁰ See *Competition Counts: How Consumers Win When Business Compete*, F.T.C., <https://www.ftc.gov/sites/default/files/attachments/competition-counts/zgen01.pdf>.

²¹¹ See *id.* at § 103(b)(3).

²¹² See Spillane, *supra* note 142.

²¹³ See S. 3793, *supra* note 198.

discretion is necessary to ensure that the integrity of the sport is maintained.²¹⁴ In practice, however, I surmise that discretion to police integrity is ambiguous to the extent that it could result in a league-friendly ruling by the state regulatory agencies. For example, if the NFL requests that a state's sportsbooks not offer a prop bet on the length of the national anthem before the Super Bowl, it is likely that the regulatory agency will follow the NFL's recommendation to not upset the NFL, rather than out of caution for integrity.

Perhaps more importantly, the underlying rationale for this particular provision stemmed from the fear that certain types of bets are susceptible to manipulation in the betting market.²¹⁵ Yet, this rationale is likely not enough to uphold the provision for a couple of reasons. First, sports book operators already have a significant economic incentive to avoid exposure to the risk inherent in shady wagers. Second, restricting a certain bet that has an ostensible customer demand would likely not go over too well with those customers. If consumers demand the bet enough, the consumer will simply seek out an illegal sports book operator who does not adhere to these rules, and will accept the bet.²¹⁶ Thus, a provision allowing the sports leagues to restrict certain sports wagers counteracts the goal of federal oversight to eliminate consumers running to the offshore market.²¹⁷

B. The Solutions

The American Sports Betting Coalition believes that in a post-PASPA world, one of the four core principles Congress should adhere to is to "ensure a tax regime [that] does not undermine regulated sports betting operations' ability to compete against illegal and offshore operators."²¹⁸ State legislatures are more than capable of setting appropriate rates according to their needs, as evidenced by the varying rates at which states choose to tax their sportsbooks.²¹⁹

However, state tax rates post-*Murphy* are not guaranteed to remain the same, and a regime that leaves taxation entirely up the states could prove dangerous. Take Pennsylvania for example: it has sustained its early revenue success despite maintaining tax rates on sportsbooks as high as 36%. Is there anything preventing other states from imposing similarly high rates? In fact, West Virginia state legislators are already realizing that

²¹⁴ See discussion *supra* Part II, Section b.

²¹⁵ See Newhan, *supra* note 2.

²¹⁶ See NCAA, *supra* note 23.

²¹⁷ See *id.*

²¹⁸ Am. Sports Betting Coal., About Us, SPORTSBETTINGAMERICA.COM, <http://www.sportsbettinginamerica.com/about-1/> (last visited Sept. 15, 2019).

²¹⁹ See discussion *supra* Part II.

they may be leaving profit on the table by preserving a tax rate of 10%.²²⁰ Therefore, a “race to the top” tax rate may be imminent.

Though great for state revenues, a race to the top tax regime would certainly undermine sports betting operators’ ability to compete against illegal and offshore operators. If other states across the east coast are pressured to ante up their tax rates to keep up with Pennsylvania, I predict that the costs will almost certainly be passed on to the consumers, ultimately resulting in consumers fleeing for unregulated, offshore operations.²²¹ Thus, if the common goal is to eliminate illegal and offshore sports book operators, advocates of PASPA and the SWMIA should support federal oversight of state tax rates on regulated sportsbooks.

In summary, I contend that a revised edition of the Sports Wagering and Market Integrity Act of 2018 should: (1) continue to exclude integrity fees; (2) eliminate any provision granting the sports leagues the right to restrict sportsbooks from offering certain wagers; (3) eliminate any official league data requirement; and (4) include a maximum rate at which states may levy taxes on their sports book operators.

V. CONCLUSION

The Supreme Court’s decision to end the federal ban on sports betting is one that has already opened the door for hundreds of jobs and billions of dollars in state tax revenue. Accordingly, social groups and business organizations continue to advocate the position that sports betting should now be left entirely up to the states post-*Murphy*. On the other hand, a group of federal legislators continue to advocate for federal oversight of state-sponsored sports betting, ultimately culminating in The Sports Wagering and Market Integrity Act of 2018. While the SWMIA’s provisions are mostly counteractive to their sponsors’ goals, a decision to forgo federal oversight is likely not warranted. Instead, Congress should draft legislation that preserves for the states the decision of whether to sanction sports betting, with the caveat that states who do choose to sanction it must adhere to a maximum tax rate on its sportsbooks.

²²⁰ *Sports Betting Tax Too Low?*, THE INTELLIGENCER (Jan. 26, 2019), <http://www.theintelligencer.net/opinion/editorials/2019/01/sports-betting-tax-too-low/>.

²²¹ THE LINES, *supra* note 149 (discussing the effect of a tightened profit margin resulting in consumers “seeking out offshore sports betting websites and local bookmakers [that] legalized sports betting is supposed to eradicate.”).