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## The Danger of Dealer's Choice: Why State-by-State Regulation of Online Sports Betting Is Not Enough

Lily Faulconer

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**THE DANGER OF DEALER’S CHOICE: WHY STATE-BY-STATE  
REGULATION OF ONLINE SPORTS BETTING IS NOT ENOUGH**

*Lily Faulconer\**

*In 2018, the Supreme Court struck down the federal prohibition on states’ legalization of sports gambling, enabling states to legalize and regulate the activity. As a result, numerous states have passed sports gambling legislation, making it now legal in nineteen states and the District of Columbia. However, no state regulation looks alike. Given the criminal associations of past sports gambling and the privacy and security issues imbedded in the use of sports betting technology, there is a need for strong, proactive, and consistent federal sports betting regulation, particularly as it relates to online gambling activities. This paper explores the evolution of online sports gambling policies and the gaps in the current state-by-state regulatory scheme, in addition to discussing the necessary components of a viable national solution.*

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## I. INTRODUCTION

When Kawhi Leonard prepared to shoot a foul shot during the 2019 National Basketball Association (NBA) Finals, he was not the only one on the line.<sup>1</sup> Millions of dollars were waged on the event, with bets ranging from wagers on simple pieces of the game, like whether or not Leonard would make a foul shot, to which team would take the title.<sup>2</sup> Leonard's impressive performance—including his winning shots just before the buzzer in game seven—did far

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<sup>1</sup> Ashish Mathur, *Raptors' Kawhi Leonard Sets Record for Most Free Throws in an NBA Finals Game Without a Miss*, CLUTCHPOINTS (June 3, 2019), <https://clutchpoints.com/raptors-news-kawhi-leonard-sets-record-for-most-free-throws-in-an-nba-finals-game-without-miss/> [https://perma.cc/9H8L-5M7R].

<sup>2</sup> Bryan Mears, *The 2019 NBA Finals Has Been the Ultimate Pros vs. Joes Betting Battle*, ACTION NETWORK (June 4, 2019), <https://www.actionnetwork.com/nba/2019-nba-finals-pros-vs-joes-betting-market-analysis-warriors-raptors> [https://perma.cc/89ZL-EQU8].

more than give the Toronto Raptors their first NBA championship title.<sup>3</sup> It made sports bettors who had placed wagers on Leonard or the Raptors much richer, while those who had placed bets on the Golden State Warriors were left with disappointment and empty pockets.<sup>4</sup>

Sports betting is a type of gambling that allows for the placement of wagers on various components and types of athletic competitions.<sup>5</sup> Today, bettors can place numerous kinds of wagers, including win bets,<sup>6</sup> point spreads,<sup>7</sup> prop bets,<sup>8</sup> totals/over-unders,<sup>9</sup> and futures/outrights.<sup>10</sup> Betting may take place in person or online

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<sup>3</sup> James Herbert, *What the Raptors Winning the 2019 NBA Championship Means to Toronto, Canada and the NBA*, CBSSPORTS (June 14, 2019), <https://www.cbssports.com/nba/news/what-the-raptors-winning-the-2019-nba-championship-means-to-toronto-canada-and-the-nba/> [https://perma.cc/89ZL-EQU8].

<sup>4</sup> Mears, *supra* note 2.

<sup>5</sup> *What is Sports Betting?*, AUSTRALIA SPORTS BETTING, <http://www.aussportsbetting.com/guide/intro/what-is-sports-betting/> [https://perma.cc/Y5LN-QD9E] (last visited Mar. 27, 2020).

<sup>6</sup> Also called “moneyline wagers,” these bets involve a simple selection of which team or individual will win a game or match. *How to Bet on Sports – The Different Types of Wagers*, GAMBLINGSITES.COM, <https://www.gamblingsites.com/sports-betting/introduction/bets-wagers/> [https://perma.cc/VC2D-H5Q5] (last visited Mar. 27, 2020).

<sup>7</sup> Point spreads are bets based on the spread, which is developed by a bookmaker. Opponents are made equal for the purposes of the betting before the favorite is deducted points and the underdog is given points; the size of the spread influences the number of points given or deducted. Betting on a favorite means they must win by a margin greater than the size of the spread, while betting on an underdog means they must lose by a margin less than the spread size. *Id.*

<sup>8</sup> Prop bets, short for proposition bets and also known as specials, are placed on events that may or may not impact the outcome of a match, such as which team will score first, which player will score the greatest number of points, or which time in the game the first time-out or goal will occur. Many games have a large number of prop bets available. *Id.*

<sup>9</sup> Totals/over-unders are bets on lines generated by bookmakers that predict the total number of points, goals, or runs scored during a contest; bets are placed that the total will either be higher (over) or lower (under) than the line. *Id.*

<sup>10</sup> Futures/outrights are bets placed before tournaments or competitions that predict the winner far in advance, such as betting on the winner of the Super Bowl before the start of the National Football League (NFL) season. *Id.*

through internet sites or mobile applications (apps).<sup>11</sup> At times seen as a permissive form of gambling,<sup>12</sup> sports betting has also been plagued with corruption and organized criminal activity.<sup>13</sup> This constantly changing societal status is largely due to the involvement—or lack thereof—of the federal and state governments in regulating sports betting.

Recently, the United States (U.S.) Supreme Court empowered the states to act on sports betting in *Murphy v. National Collegiate Athletic Association*.<sup>14</sup> However, neither *Murphy* nor the state regulatory schemes that were implemented in response comprehensively address the many concerns associated with sports betting. Inconsistencies among state regulations do little to ensure the integrity of competition, protect vulnerable consumers and athletes, or combat privacy and security concerns related to the use of sports betting technologies. The federal government is equipped to address these problems through its commerce clause powers, but without consistent agency action and comprehensive federal legislation, the inconsistencies in regulation turn sports betting into a race to the bottom rather than a viable economic opportunity.

Section II examines the evolution of sports betting regulation before exploring the current regulatory scheme and its shortcomings. Section III highlights the role of existing federal

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<sup>11</sup> See *Legal U.S. Sports Betting – State by State*, US BETTING REPORT, <https://usbettingreport.com/sports-betting/> [<https://perma.cc/RZP7-4GQB>] (last updated Feb. 22, 2020).

<sup>12</sup> See *Murphy v. NCAA*, 138 S. Ct. 1461, 1469 (2018). Betting on horse races was an important revenue generator during the Great Depression and churches were permitted to host bingo events as a way to generate revenue during the 1950s. *Id.*

<sup>13</sup> See Brett Smiley, *A History of Sports Betting in the United States: Gambling Laws and Outlaws*, SPORTS HANDLE (Nov. 13, 2017), <https://sportshandle.com/gambling-laws-legislation-united-states-history/> [<https://perma.cc/L6KK-D4RR>]. For example, in 1919, members of the Chicago White Sox threw baseball's World Series in order to cash in on bets from local mobsters, causing many to worry about the relationship between crime, gambling, and integrity of sporting competition. *Id.*

<sup>14</sup> See *Murphy*, 138 S. Ct. at 1478 (holding that PASPA violated the anti-commandeering doctrine and ending the federal ban on the development of state sports betting operations).

statutes in the development of new online sports gambling legislation. Section IV presents important policy and constitutional considerations for legalizing and regulating online sports gambling at the federal level. Section V details challenges regulators will face when crafting online betting legislation, and Section VI follows with an analysis of potential professional league influence on legislation. Ultimately, this article concludes that comprehensive federal regulation of online sports gambling is necessary to ensure adequate industry growth while enforcing parameters equitably.

## II. EVOLUTION OF SPORTS BETTING REGULATION

Betting has occurred in the United States since colonial times.<sup>15</sup> Though gambling was not formally legalized until 1931, America's first settlers participated in lotteries, and the first horse racing track opened in New York in 1655.<sup>16</sup> In 1949, Nevada became the first state to legalize sports betting, allowing bookmakers to collect bets on all professional sports, including Major League Baseball (MLB), the NBA, the National Football League (NFL), and the National Hockey League (NHL), in addition to horse racing.<sup>17</sup> This period was significant for two reasons: first, it marked the first time that bettors could legally wager on horse races outside of the racing track itself, and second, though not required in the legislation, sportsbooks<sup>18</sup> began as operations entirely independent of Nevada's

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<sup>15</sup> Aaron Gray, *The History of Sports Betting Legislation in the USA (Part I)*, SPORTS BETTING DIME, <https://www.sportsbettingdime.com/guides/legal/sports-betting-history-part-i/> [<https://perma.cc/P9EG-V3GS>] (last updated Feb. 24, 2020).

<sup>16</sup> Katie Berry, *Know When to Fold 'Em: The International Effects of Murphy v. NCAA and Why Antigua Holds the Cards*, 8 ARIZ. ST. SPORTS & ENT. L.J. 93, 95-97 (2019). Gambling was formally legalized in the state of Nevada in 1931 as a way to raise funds to construct the Hoover Dam. Gray, *supra* note 15.

<sup>17</sup> 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/> [<https://perma.cc/K4XY-JC8P>] (last updated Feb. 24, 2020) [hereinafter *The Vegas Era*].

<sup>18</sup> A "sportsbook" is "an establishment that takes bets on sporting events and pays out winnings." LEXICO, <https://www.lexico.com/en/definition/sportsbook> [<https://perma.cc/3UU4-JNEW>] (last visited Mar. 27, 2020).

now-famous casinos.<sup>19</sup> However, the government soon began to heavily tax the activity, levying a 10 percent tax on each sportsbook's handle, or total betting revenue, in 1951.<sup>20</sup> This steep tax prevented legal sports betting operations from remaining competitive with illegal operations, causing them to close or move underground, where they soon became controlled by organized crime bosses.<sup>21</sup> As a result, the next federal attempt at regulating sports gambling involved legislation combatting organized crime in the 1960s by making it illegal to use wire communications to bet on sports or pay winnings related to sports gambling.<sup>22</sup>

By the mid-1970s, the federal government was taking steps to enable the growth of legal sports betting, reducing the 10 percent tax to 2 percent in 1974.<sup>23</sup> Following the tax cut, the first sportsbook opened inside a Vegas casino in 1975.<sup>24</sup> Favorable regulation continued throughout the next decade, as the Interstate Horse Racing Act of 1978 "dramatically expanded the size of the horse racing industry,"<sup>25</sup> and another tax cut from 2 percent to 0.5 percent in 1984 increased the economic viability of sportsbooks.<sup>26</sup>

Despite this progress, the federal government's favorable treatment of sportsbooks ended in 1992 when Congress passed the Professional and Amateur Sports Protection Act (PASPA)<sup>27</sup> as a means of protecting the integrity of sports within the United States. Commonly used in discussions surrounding sports betting, "integrity" refers to the notions of fair play and healthy competition, both of which are integral to the ideals that sports promote within society.<sup>28</sup>

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<sup>19</sup> *The Vegas Era*, *supra* note 17.

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

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

<sup>22</sup> See Berry, *supra* note 16, at 97–98.

<sup>23</sup> *The Vegas Era*, *supra* note 17.

<sup>24</sup> *Id.*

<sup>25</sup> By allowing bettors to wager on races in other states, the legislation spread the horse racing industry across the United States. *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 28 U.S.C. § 3701-04 (2018) (invalidated by *Murphy v. NCAA*, 138 S. Ct. 1461, 1469 (2018)).

<sup>28</sup> See Chris Hume & Christine May, *Integrity in Sport*, CLEARINGHOUSE FOR SPORT, [https://www.clearinghouseforsport.gov.au/knowledge\\_base/](https://www.clearinghouseforsport.gov.au/knowledge_base/)

PASPA did two things: first, it prevented states that did not already have legal sports gambling from authorizing the activity; and second, it prevented individuals in these same states from operating or advertising gambling.<sup>29</sup> However, it did not make sports gambling a federal crime.<sup>30</sup> Instead, it allowed the United States Attorney General, professional sports organizations, and/or amateur (college) sports organizations to bring civil actions to enjoin violations of the law.<sup>31</sup>

Just four years after PASPA was enacted, the first online sports bet was placed.<sup>32</sup> Online sports betting became incredibly popular across the globe, but the United States did not pass a piece of legislation directly addressing online sports betting until 2006.<sup>33</sup> Even then, the 2006 legislation focused mainly on financial transactions, not the act of betting itself.<sup>34</sup> Thus, historically, the challenges to federal regulation of sports gambling in the United States focused solely on PASPA.

The constitutionality of PASPA was challenged twice before being struck down by the United States Supreme Court in 2018.<sup>35</sup> In

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organised\_sport/sport\_integrity/Integrity\_in\_Sport [https://perma.cc/T2LN-5HNF] (last updated Apr. 12, 2019).

<sup>29</sup> 28 U.S.C. § 3702 (2018).

<sup>30</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1461 (2018).

<sup>31</sup> *See* 28 U.S.C. § 3703 (2018). The NCAA, MLB, NBA, NFL, and NHL successfully filed two lawsuits under PASPA before *Murphy*: the first against the Governor of Delaware in 2009 and the second against the Executive Director of the New Jersey Racing Commission, Assistant Attorney General, and Governor of New Jersey in 2012. Darren Heitner, *Constitutionality of Sports Betting at Issue in NCAA and Professional Leagues' Lawsuit Against New Jersey*, SPORTSMONEY (Aug. 7, 2012), <https://www.forbes.com/sites/darrenheitner/2012/08/07/constitutionality-of-sports-betting-prohibition-at-issue-in-ncaa-and-professional-leagues-lawsuit-against-new-jersey/#79d46ff6244a> [https://perma.cc/Q47Y-J3GG].

<sup>32</sup> Aaron Gray, *The Internet Age: Legislation in the Era of Online Sportsbooks (Part III)*, SPORTSBETTINGDIME.COM, <https://www.sportsbettingdime.com/guides/legal/sports-betting-history-part-iii/> [https://perma.cc/R7MJ-ER6W] (last updated Oct. 10, 2019).

<sup>33</sup> *See* 31 U.S.C. § 5361-5366 (2018) (assigning both civil and criminal penalties for those who knowingly accept any financial instrument for unlawful internet gambling).

<sup>34</sup> Gray, *supra* note 32.

<sup>35</sup> *Murphy*, 138 S. Ct. at 1469.

*Murphy v. National Collegiate Athletic Association*,<sup>36</sup> the Supreme Court struck down Section 3701 of PASPA as an unconstitutional attempt by the federal government to regulate state action due to the constitutional prohibition on anticommandeering, which prohibits the federal government from requiring a state (rather than an individual) to comply with federal regulation.<sup>37</sup> The Court then proceeded to strike down the rest of the statute, holding that the provisions could not be severed from Section 3701.<sup>38</sup> As a result, states were free to legalize sports gambling, and a significant number have done so, though few have gone about it in the same way.<sup>39</sup>

### III. CURRENT REGULATORY LANDSCAPE

At the start of the 2019 NFL preseason, ten states offered legal sports wagering and eight others had recently passed legislation legalizing the practice.<sup>40</sup> When the season culminated with the Super Bowl in February 2020, a total of twenty states had legalized some form of legal sports betting.<sup>41</sup> Roughly half of the United States' population will live in a state with some form of legalized sports betting by the end of 2020.<sup>42</sup> Some predictions indicate that more than half of the states will have legalized sports betting by the time the United States hosts the World Cup in 2026.<sup>43</sup> Though many

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

<sup>37</sup> *Id.* at 1477.

<sup>38</sup> *Id.* at 1483.

<sup>39</sup> *Id.* at 1484.

<sup>40</sup> Eben Novy-Williams, *NFL Takes First Major Gambling Step With Sportsradar Data Deal*, BLOOMBERG MARKETS, (Aug. 12, 2019), <https://www.bloomberg.com/news/articles/2019-08-12/nfl-takes-first-major-gambling-step-with-sportradar-data-deal> [<https://perma.cc/F5GF-LJQ5>].

<sup>41</sup> *Legislative Tracker: Sports Betting*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> [<https://perma.cc/66SF-99JV>] (last updated Jan. 11, 2020).

<sup>42</sup> Bob Woods, *Making a Wager? Half of Americans Live in States Soon to Offer Sports Betting*, CNBC (July 10, 2019), <https://www.cnbc.com/2019/07/10/half-of-americans-live-in-states-soon-to-offer-sports-gambling.html> [<https://perma.cc/Q44F-L2DL>].

<sup>43</sup> David Purdum & Ryan Rodenberg, *Cyborgs, Yachts, and VR: How Technology Will Impact Sports Betting*, ESPN (Aug. 14, 2018), [https://www.espn.com/chalk/story/\\_/id/24257306/gambling-why-future-sports-](https://www.espn.com/chalk/story/_/id/24257306/gambling-why-future-sports-)

states are taking action, there are numerous inconsistencies in the various state approaches to sports betting regulation, reducing the effectiveness of regulation as a whole.

#### *A. Responsible Gaming Programming*

The first inconsistency between state regulation, and a major issue for those worried about gambling addiction, is the difference in state-supported responsible gambling programming.<sup>44</sup> Without consistent rules and regulations regarding responsible gambling programming, states may enable mobile app developers to target vulnerable populations and promote the travel or relocation of problem gamblers to states with lenient problem gambling programming and regulation. Problem gambling occurs when individuals begin to suffer adverse consequences as a result of their betting, such as extreme financial losses, deterioration in mental or physical health, or prioritization of gambling over work or other activities.<sup>45</sup> Some states, like New Jersey, rely on experienced regulators and data-driven programming to combat problem gambling.<sup>46</sup> However, others, like Mississippi, spend little to no

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betting-technology-us-involve-sportsbooks-yachts-cyborgs-enba-league  
[<https://perma.cc/RKN4-EXSH>].

<sup>44</sup> Responsible gambling programming includes policies and initiatives protecting vulnerable gamblers, preventing underage gambling and criminal activity, and ensuring payment and information protection. *What is Responsible Gambling and How It Affects Players and Companies*, EVERYMATRIX (Nov. 8, 2016), <https://everymatrix.com/responsible-gambling/> [<https://perma.cc/QQT3-CAKY>].

<sup>45</sup> *What Is Problem Gambling or Gambling Disorder?*, INTERNATIONAL CENTER FOR RESPONSIBLE GAMING, <https://www.icrg.org/press-room/media-kit/faq/what-problem-or-pathological-gambling> [<https://perma.cc/L44E-468R>] (last visited Mar. 27, 2020); *What is Problem Gambling*, CENTRE FOR ADDICTION AND MENTAL HEALTH, <https://www.problemgambling.ca/gambling-help/gambling-information/what-is-problem-gambling.aspx> [<https://perma.cc/NJ5C-WLPS>] (last visited Mar. 27, 2020).

<sup>46</sup> Keith Whyte, the Executive Director of the National Council on Problem Gambling, lauded New Jersey's approach to problem gambling regulation, identifying the state as a leader because of its "data-driven programs and experienced regulators." However, little information is available detailing either. Woods, *supra* note 42.

money addressing the issue.<sup>47</sup> While the gambling industry itself spends \$300 million annually across the country on responsible gambling programming, spending is inconsistent and there are no programs ensuring accountability.<sup>48</sup> Thus, there remains a need for proactive responsible gambling programming to be incorporated in a singular federal regulation enforceable in all states.

### *B. Contests Available for Wager*

The types of sporting contests and bets available for wager are also inconsistent among states. Some states allow betting on both professional and collegiate athletics, while others limit bets to professional leagues only.<sup>49</sup> Further, some states even allow betting on international competitions.<sup>50</sup> For example, one app available in New Jersey allows users to place wagers on European soccer leagues, MLB, Major League Soccer (MLS), NBA, NFL, and National Collegiate Athletic Association (NCAA) football and basketball games.<sup>51</sup> Meanwhile, bettors in Illinois may not wage on any “minor league sports event”<sup>52</sup> or games involving a college team from the state.<sup>53</sup> While bettors in Iowa may wage on collegiate sporting events, certain in-game prop bets are prohibited for these contests.<sup>54</sup> In Indiana, where it is legal to bet on both professional and collegiate sports, leagues and colleges are allowed to request

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<sup>47</sup> Mississippi’s Council on Problem and Compulsive Gambling no longer receives state funding despite previously being allotted state dollars. *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN.COM (Dec. 30, 2019), [https://www.espn.com/chalk/story/\\_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization](https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization) [https://perma.cc/2H98-BMHE] (hereinafter “United States of Sports Betting”).

<sup>50</sup> AJ Dellinger, *TheScore’s Sports Betting App is Live, But Only in New Jersey*, ENGADGET.COM (Sept. 3, 2019), <https://www.engadget.com/2019/09/03/the-us-first-sports-betting-app-is-live-but-only-in-new-jersey> 1zceNYwWBqHz92iHPFfadAlgYhMcVnnQd1ARWTEcvvnaSXFG [https://perma.cc/U484-YMY6].

<sup>51</sup> *Id.*

<sup>52</sup> *United States of Sports Betting*, *supra* note 49.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

use of geofences<sup>55</sup> to prevent wagers from being placed at the location of certain sporting events, such as a university's football stadium.<sup>56</sup> Indiana's regulatory scheme also expressly prohibits betting on e-sports and high school athletic competitions.<sup>57</sup> The inconsistencies regarding which kind of bets are allowed are not only confusing and contradictory, making enforcement difficult, but are also so distinct that they could encourage problem gamblers to relocate or act in a disadvantageous way.<sup>58</sup> A consistent framework for wagering regulation is necessary in the face of inconsistency between states.

### *C. Entering the Marketplace*

The most significant inconsistency in state regulatory schemes is the way by which bettors may enter the marketplace. All states require that bettors be within the geographic boundaries of the state to place wagers, but there are various approaches to how bettors can access the market. There are three main ways to place sports bets: on site, online on site, and online.

#### *1. On Site*

"On Site" gambling occurs at casinos authorized to offer sports wagers. As of March 2020, twelve states and the District of Columbia (D.C.) had legalized on-site sports betting.<sup>59</sup> In states like New Jersey and Nevada, on site gambling includes numerous privately-owned casinos.<sup>60</sup> In other states, on site gambling occurs

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<sup>55</sup> A geofence is a digital parameter based on a physical location. Geofences can be used to allow or disallow activity, but require local permission and a mobile application to do either. Kalle Kaitala, *What is Geofence? A Complete Guide to Geofencing*, PROXIMI.IO (Jan. 31, 2018), <https://proximi.io/geofence-complete-guide-geofencing/> [<https://perma.cc/D9UR-FSQ7>].

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Again, inconsistent regulation encourages problem gamblers to relocate to support bad habits. *See* Woods, *supra* note 42.

<sup>59</sup> *Legal Sports Betting in the United States*, DRAFTKINGS, <https://sportsbook.draftkings.com/help/sports-betting/where-is-sports-betting-legal> [<https://perma.cc/44SW-FJN8>] (last visited Mar. 27, 2020).

<sup>60</sup> *The Vegas Era*, *supra* note 17; *Casinos & Gaming in New Jersey*, VISIT NEW JERSEY, <https://www.visitnj.org/nj/casinos-gaming> [<https://perma.cc/XPP7-RBD6>] (last visited Mar. 27, 2020).

only at casinos operated by Indian tribes.<sup>61</sup> For example, in North Carolina, sports betting will only be allowed in casinos operated by the Eastern Band of the Cherokee tribe.<sup>62</sup> While sports betting opportunities may increase the crowd sizes at casinos,<sup>63</sup> it is unlikely they pose any threat to the existing regulations and tribal compacts governing casino operation.

## 2. *Online on Site*

One way to address the crowds sports betting may bring to a casino is to change the way sports bets are offered by permitting online sports gambling in addition to face-to-face wagering inside of the building. New Jersey, Pennsylvania, Delaware, Mississippi, and Michigan all offer legal online sports betting within the confines of their casinos.<sup>64</sup> In Mississippi, Pearl River Resort, a property with three onsite casinos, recently launched a betting app that will only allow customers to place bets while on the massive property.<sup>65</sup> Some

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<sup>61</sup> Eric Ramsey, *Tar Heel Born: North Carolina Sports Betting Becomes Law*, LEGAL SPORTS REP. (July 26, 2019), <https://www.legalsportsreport.com/34676/nc-sports-betting-law/> [<https://perma.cc/XKQ5-JJYW>].

<sup>62</sup> The only casinos in North Carolina are on Cherokee land. Reservation-based commercial gambling has been popular since the Seminole tribe opened the first gambling entity on its land. The 1988 Indian Gaming Regulatory Act gives tribes the authority to operate these facilities, and many tribes also maintain compacts with their state governments regarding the operation of their casinos. *Id.*; Logan Blackmore, *Internet Gaming On & Off Tribal Lands*, 43 AM. INDIAN L. REV. 389, 392 (2019); *Indian Casinos in North Carolina*, AMERICAN CASINO GUIDE, <https://www.americancasinoguide.com/casinos-by-state/north-carolina-casinos.html> [<https://perma.cc/RP2B-RB54>] (last visited Mar. 27, 2020); Matthew L.M. Fletcher, *The Seminole Tribe and Origins of Indian Gaming*, 9 FIU L. REV. 255, 255 (2014), <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1543&context=facpubs> [<https://perma.cc/2KD2-YH6Y>].

<sup>63</sup> Mississippi regulators believe offering mobile sports betting on site at their casinos will reduce long lines and control large crowds flocking to the state's casinos to bet on sports. *Sports Betting App Goes Live at Pearl River Resort This Weekend*, WTOK (Feb. 1, 2020), <https://www.wtok.com/content/news/Sports-betting-app-goes-live-at-Pearl-River-Resort-this-weekend-505200621.html> [<https://perma.cc/SN49-ZML7>].

<sup>64</sup> *Legal US Online Gambling Guide*, PLAY USA, <https://www.playusa.com/us/> [<https://perma.cc/DMY7-QUSA>] (last visited Mar. 27, 2020).

<sup>65</sup> *Sports Betting App Goes Live at Pearl River Resort This Weekend*, *supra* note 63.

of these bets are likely to be more granular in detail than those offered in the physical sportsbooks.<sup>66</sup>

### 3. *Online*

In the United States, the online gambling market is worth over \$225 million annually.<sup>67</sup> Yet as of March 2020, online gambling is only legal in thirteen states.<sup>68</sup> Of these, ten allow online *sports* gambling.<sup>69</sup>

New Jersey has one of the most robust markets for regulated online sports gambling.<sup>70</sup> Online and mobile gambling access in the state can be based solely on geolocation technology.<sup>71</sup> Unlike other states,<sup>72</sup> New Jersey does not require users to set up accounts in person at a casino before placing bets online.<sup>73</sup> It currently has ten online sites available to users whose location data shows their location as within the state.<sup>74</sup> Online sports betting accounts for 80 percent of the gambling activity in New Jersey, and 20 percent of these bets are placed by New Yorkers traveling in the state.<sup>75</sup>

Online sportsbooks are also legal in Pennsylvania, West Virginia, Rhode Island, Oregon, New Hampshire, and Indiana.<sup>76</sup> Each state has at least one online sportsbook; some have up to three.

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

<sup>67</sup> *Legal US Online Gambling Guide*, *supra* note 64.

<sup>68</sup> *Legal U.S. Sports Betting – State by State*, US BETTING REPORT, <https://usbettingreport.com/sports-betting/> [<https://perma.cc/RZP7-4GQB>] (last updated Mar. 15, 2020).

<sup>69</sup> More states are expected to legalize online sports betting in 2020, which will increase this total. *Id.*

<sup>70</sup> Dustin Gouker, *New Jersey Sports Betting*, LEGAL SPORTS REP. (Mar. 3, 2020), <https://www.legalsportsreport.com/nj> [<https://perma.cc/9L3B-PLJ7>].

<sup>71</sup> Richard Morgan, *New Jersey Poised to Overtake Vegas as Sports Betting Capital of US*, N.Y. POST (Sept. 2, 2019), <https://nypost.com/2019/09/02/new-jersey-poised-to-overtake-vegas-as-sports-betting-capital-of-us/> [<https://perma.cc/59L8-NBW9>].

<sup>72</sup> Nevada requires individuals placing bets online to first create an account in person at a casino. *Legal U.S. Sports Betting – State by State*, *supra* note 68.

<sup>73</sup> *Id.*

<sup>74</sup> Woods, *supra* note 42. Federal regulation may eliminate the need for such barriers on a statewide basis.

<sup>75</sup> Morgan, *supra* note 71.

<sup>76</sup> *Legal U.S. Sports Betting – State by State*, *supra* note 68; *Legal US Online Gambling Guide*, *supra* note 64.

<sup>77</sup> However, there is not one app that is live in all of these states.<sup>78</sup> Continued differences in apps available to users should be expected as more states legalize online sports gambling. While competition among app developers may promote consumer choice, it may also generate a number of issues related to data protection and security. As Section V will further explain, the federal government is best suited to establish a regulatory scheme ensuring consistent data protection.

#### *D. Inconsistent Regulations Spark a Race to the Bottom*

States are continuing to enact laws allowing sports gambling, which may seem like a positive economic decision. However, without consistent regulation across the states, the increase in states allowing this activity may result in a race to the bottom<sup>79</sup> as consumers travel to cash out where they can win the most and as casino operations concentrate in areas that will generate the most profit. For example, while Delaware and Rhode Island tax 50 percent of operators' revenue each month,<sup>80</sup> Mississippi only collects an 8 percent state tax and 4 percent local tax.<sup>81</sup> This discrepancy could shape consumer and casino behavior in a way that has substantial long-term impacts on the state and national economy.

Together, the aforementioned regulatory inconsistencies continue to support the illegal sports betting marketplace that sees \$150 billion in wagers each year.<sup>82</sup> While new federal legislation

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<sup>77</sup> *Legal US Online Gambling Guide*, *supra* note 64.

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

<sup>79</sup> A “race to the bottom” involves competition between groups to make themselves more attractive to business coupled with adverse economic consequences that result in destabilization of industry, sometimes through risky business practices. Hunter M. Haines, *Passing the Ball: The United States Supreme Court Strikes Down PASPA and Throws Sports Gambling Back to State Legislatures*, 78 MD. L. REV. 604, 617 (2018) (citing ROBERTA ROMERO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993)).

<sup>80</sup> The 10 percent tax imposed on sportsbooks in the 1950s drove sportsbooks underground. States levying heavy taxes may see an increase in illegal gambling activity or lack of operator interest from would-be operators. *The Vegas Era*, *supra* note 17.

<sup>81</sup> Woods, *supra* note 42.

<sup>82</sup> *Id.*

regulating online gambling may not address all of these problems, it will enlarge the legal online marketplace, allowing the government to capitalize on the revenue currently underground and provide important protections and clarity for consumers, which is currently lacking on both the state and national level.

#### IV. FEDERAL GAMBLING REGULATIONS AND THEIR SHORTCOMINGS

The *Murphy* majority did not hold that federal regulation of sports gambling was unconstitutional. Rather, the Court expressly stated that “Congress *can* regulate sports gambling directly.”<sup>83</sup> In fact, the federal government has regulated other kinds of gambling activities for many years.<sup>84</sup> There are two significant pieces of federal legislation previously utilized to regulate online sports gambling: the Wire Act of 1961<sup>85</sup> and the Unlawful Internet Gambling Enforcement Act (UIGEA) of 2006.<sup>86</sup> Unfortunately, due to their mixed application and interpretation by varying administrations, these two statutes leave significant regulatory gaps.

##### A. *The Wire Act of 1961*

The Wire Act prohibits the use of wires to communicate information on illegal betting across state lines.<sup>87</sup> Though initially enacted to give police the ability to legally wire-tap phone lines to catch organized crime bosses,<sup>88</sup> the Wire Act can be applied to modern technologies, such as the Internet, used to communicate similar messages.<sup>89</sup> However, the Wire Act is not a viable way to regulate online sports gambling.

The United States Department of Justice (DOJ) has issued two recent memos on the Wire Act: the first in 2011, which expressed

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<sup>83</sup> *Murphy v. NCAA*, 138 S. Ct. 1461, 1484 (2018) (emphasis added).

<sup>84</sup> *Legal Information Institute: Gambling*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/gambling> [<https://perma.cc/NS6D-79V3>] (last visited Mar. 27, 2020).

<sup>85</sup> 18 U.S.C. § 1084 (2018).

<sup>86</sup> 31 U.S.C. §§ 5361–66 (2018).

<sup>87</sup> 18 U.S.C. § 1804 (2018).

<sup>88</sup> Smiley, *supra* note 13.

<sup>89</sup> *Id.*

the position that the Wire Act only applied to wire transmissions related to sports gambling; and the second in 2018, which stated that “the statutory prohibitions are not uniformly limited to gambling on sporting events or contests.”<sup>90</sup> Despite the position taken by the DOJ just one year prior, in 2019 a New Hampshire state judge held that the Wire Act only applied to sports betting.<sup>91</sup> Given the inconsistencies in DOJ policy across administrations and a lack of enforcement related to illegal internet sports gambling, the Wire Act is ineffective at regulating the online sports betting marketplace. Any proposed legislation will need to address the Wire Act and describe its place (or lack thereof) in a modern regulatory regime. Explicitly legalizing online wagering and creating a framework detailing how bettors may use the internet to wage and collect winnings within the United States is essential to filling the gaps the Wire Act leaves in federal regulation.

### *B. The Unlawful Internet Gambling Enforcement Act of 2006*

While the Wire Act prevents the use of wire communication connected to illegal gambling activity, the UIGEA targets financial transactions by preventing gambling businesses from knowingly accepting payments connected to unlawful internet gambling.<sup>92</sup> Furthermore, the UIGEA requires the Treasury and Federal Reserve Board to “promulgate regulations requiring certain participants in payment systems that could be used for unlawful Internet gambling to have policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the processing of restricted transactions.”<sup>93</sup> As a result, the UIGEA has been criticized for

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<sup>90</sup> Steven Engel, *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, DEP’T OF JUSTICE (Nov. 2, 2018), <https://www.justice.gov/olc/file/1121531/download> [<https://perma.cc/F8K8-JSDW>]; John Holden, *Why the New Wire Act Decision Might Not Be A Win For Sports Betting*, LEGAL SPORTS REP. (June 3, 2019), <https://www.legalsportsreport.com/33283/new-wire-act-decision-sports-betting/> [<https://perma.cc/F57R-J3AG>].

<sup>91</sup> N.H. Lottery Comm’n v. Barr, 386 F. Supp. 3d 132, 160 (D.N.H. 2019).

<sup>92</sup> *The Unlawful Internet Gambling Enforcement Act of 2006 Overview*, FEDERAL DEPOSIT INSURANCE CORP. <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf> [<https://perma.cc/T8FE-4YWU>].

<sup>93</sup> *Id.*

placing a greater burden on financial institutions than sports bettors,<sup>94</sup> even though it effectively drove most online wagering overseas or into legal gray areas.<sup>95</sup> That said, the law has become somewhat outdated as sports gambling is largely socially acceptable and mobile technology has changed the way people bank and bet. When crafting new online sports betting legislation, the federal government will need to address the ways by which online bettors may make and receive payments, as well as provide an enforcement arm for instances where money is withheld or mishandled.

Unpacking the meaning of the Wire Act and the UIGEA in an increasingly digitalized society will be important for federal regulation of online sports gambling following *Murphy*. Because federal regulation is unlikely accomplished through consistent interpretation of these existing laws, new legislation that details permissive online gambling behaviors and activities is essential.

## V. A NEW ERA OF FEDERAL REGULATION

The state governments were not alone in their quick investigative<sup>96</sup> and legislative actions following *Murphy*. In September 2018, just four months after the *Murphy* decision, the House Judiciary Committee held a formal hearing on sports betting.<sup>97</sup> In December 2018, a bipartisan piece of legislation, the Sport Wagering Market Integrity Act of 2018, was proposed in the Senate.<sup>98</sup> Though the legislation stalled out in committee, it represented an acknowledgement by some in the federal government that national regulation provides needed clarity, consistency, and

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<sup>94</sup> See Jason A. Miller, *Note and Comment: Don't Bet on This Legislation: The Unlawful Internet Gambling Enforcement Act Places a Bigger Burden on Financial Institutions than Internet Gambling*, 12 N.C. BANKING INST. 185, 219 (2008).

<sup>95</sup> *Id.*; see also Steve Ruddick, *The Difference Between Black and Gray Gambling Markets*, PLAY USA (Apr. 12, 2019), <https://www.playusa.com/illegal-sports-betting-markets/> [<https://perma.cc/E6EC-JK59>].

<sup>96</sup> *United States of Sports Betting*, *supra* note 49.

<sup>97</sup> David Purdum, *Congress Indicates It May Act on Sports Betting*, ESPN (Sept. 27, 2018), [https://www.espn.com/chalk/story/\\_/id/24814518/congress-indicates-act-sports-betting](https://www.espn.com/chalk/story/_/id/24814518/congress-indicates-act-sports-betting) [<https://perma.cc/3ACS-ZE3S>].

<sup>98</sup> S. 3793, 115th Cong. (2018), <https://www.congress.gov/115/bills/s3793/BILLS-115s3793is.pdf> [<https://perma.cc/27AE-68FJ>].

long-term economic viability for all involved in sports gambling. Though a positive indicator of the need for federal regulation, the proposed legislation contained flawed provisions that should be excluded from a future federal regulatory solution, particularly as it relates to online gambling. This section identifies these flaws, provides suggestions for improvement for a law specific to online gambling, and details considerations related to consumer and athlete privacy that will be essential when creating comprehensive online sports betting legislation at the national level.

*A. The Sport Wagering Market Integrity Act of 2018 and Considerations for Future Regulation*

Comprehensive online gambling regulation was not the goal of the proposed Sport Wagering Market Integrity Act of 2018. Rather, this legislation was an attempt to address *all* aspects of *all* types of sports gambling. The proposed Act addressed many of the issues related to sports gambling. It included provisions for oversight, problem gambling programming, and clarification on existing legislation like the Wire Act and its application to sports bets.<sup>99</sup>

However, by allowing the states to create and maintain their own schemes and requiring each be approved by the Attorney General, the proposed Act failed to establish a consistent regulatory framework.<sup>100</sup> Given the aforementioned inconsistencies in interpretation of other regulations related to sports gambling, such as the Wire Act, simply requiring the Attorney General to approve state plans does little to ensure states that their regulatory schemes will be upheld as federal administrations change.

There is a more comprehensive way to approach regulation. The federal government has authority to regulate online sports gambling through its commerce clause powers. Sports contests are considered local activities, which has exempted them from certain federal rules

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<sup>99</sup> The proposed legislation modified the Wire Act to include certain type of sports gambling activities and establish enforcement mechanisms for violations. *Id.*

<sup>100</sup> *Id.*

and regulations.<sup>101</sup> However, purely local economic activity with substantial impact on interstate commerce can be subject to federal regulation.<sup>102</sup> Thus, location becomes an important part of the conversation when developing an online sports betting regulation. Purely local economic activity, if defined as occurring within the confines of a community or state, could certainly subject sports betting to some form of federal regulation under the Commerce Clause.

Presently, numerous questions exist regarding the economic implications of online sports betting activity. For example, what happens when bettors utilize apps in one state while visiting, then go home to another? If a bettor wages in one state, can they still win after leaving the area? Must one travel to collect winnings after leaving the state, or are they automatically deposited in an account, and how does the legality of this transfer relate to the existing federal laws? How are winnings taxed between the states, if at all?<sup>103</sup> A federal regulation with a consistent tax rate for bets placed online would answer these questions, whereas current regulations regarding online gambling provide little clarity or continuity.

While the issues discussed above are relevant, they will all be moot points unless the legislation invites websites to enter the United States marketplace again, which the proposed Act also failed to do. Drawing companies out of the lucrative underground market may be difficult, and regulators should be conscious of past decisions (such as levying high taxes) that reduced the size of the market and promoted illegal operations. Directly addressing the Wire Act and UIGEA is another important part of promoting legal online gambling within the United States.

Deciding who to involve and address in new legislation is critical. The proposed Act was mindful of the many groups with a

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<sup>101</sup> Craig Calcaterra, *Happy Birthday to Baseball's Antitrust Exemption*, NBC SPORTS (May 29, 2019), <https://mlb.nbcsports.com/2019/05/29/happy-birthday-to-baseballs-antitrust-exemption/> [<https://perma.cc/VQ8F-8HFP>].

<sup>102</sup> *Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *Murphy v. NCAA*, 138 S. Ct. 1461, 1489 (2018) (Ginsberg, J., dissenting).

<sup>103</sup> The illegal online sports betting market evades taxes. S. 3793, 115th Cong. (2018), <https://www.congress.gov/115/bills/s3793/BILLS-115s3793is.pdf> [<https://perma.cc/27AE-68FJ>].

stake in sports betting, addressing the role of state actors, professional leagues, college sports teams, and Indian tribes in determining the process for making wagers and on what events wagers may be accepted.<sup>104</sup> New legislation should continue to involve stakeholders such as athletes, teams, leagues, bettors, and state and federal regulators, clearly defining their roles in the market. In addition to clarity on who is participating and how, effective federal regulation for online gambling should include provisions for consumer protection, data safety and security, profit sharing or spending, problem gambling programming, and enforcement mechanisms for engaging with offshore markets.

### *B. Challenges to Broad Sweeping Federal Regulation of Online Sports Gambling*

As comprehensive federal regulation is considered, the federal government will face numerous challenges, such as balancing consumer protection with consumer choice while ensuring consistency, safety, and integrity for teams, leagues, and athletes across the country. Effective regulation will protect consumers and athletes by clearly defining how their data is stored and shared and establishing enforcement mechanisms for data manipulation or misuse.

#### *1. Consumer Protection*

In order to ensure bettors are of the appropriate age and residency to gamble, many apps and betting sites require users to consent to the use of geographic data or submit proof of identification and address.<sup>105</sup> For example, the online site Sportsbook requires users to provide a valid proof of identification such as a driver's license, state or military ID, or passport, as well as a utility bill with proof of address if an address is not shown on the submitted form of identification.<sup>106</sup> Sportsbook account holders must also submit a voided check or bank statement before their

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<sup>104</sup> *Id.*

<sup>105</sup> *Know Your Customer Policy*, SPORTSBOOK, <https://www.sportsbook.ag/info/knowYourCustomer> [<https://perma.cc/RUJ9-4DQ7>] (last visited Mar. 27, 2020).

<sup>106</sup> *Id.*

account can be created.<sup>107</sup> As with any kind of online activity, sharing personal data, such as financial information over the Internet, comes with significant risks.<sup>108</sup> Ensuring sports betting sites are verified is an important step in securing proper payment of wins and guaranteeing a recourse for non-payment.<sup>109</sup> However, even verified online sports betting sites are not exempt from vulnerabilities and may face difficulties safeguarding consumer information. For example, if an online account user is physically present in North Carolina, where online and mobile gaming are illegal, but has a New Jersey address and driver's license, the user may be able to use websites that rely on this type of consumer data to gamble online while in the confines of a state where the activity is not yet legal.

Relying on geolocation technology and user IP addresses could resolve these issues. For example, theScore Bet, a New Jersey sports betting app, will only allow users to place bets if their location software indicates they are within the boundaries of New Jersey.<sup>110</sup> It is unclear whether someone who places a bet through the app while in New Jersey may collect their winnings after leaving the state.<sup>111</sup> However, potential manipulation of location technology or IP addresses could allow users to skirt regulations. Such a risk should be addressed as regulators work to determine the most effective way of ensuring participants in the marketplace are there legally.

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<sup>107</sup> *Id.*

<sup>108</sup> *How to Bet on Sports – The Different Types of Wagers*, *supra* note 6.

<sup>109</sup> *U.S. Sports Betting Sites*, LEGAL SPORTS REP. (Aug. 28, 2019), <https://www.legalsportsreport.com/us-betting-sites/> [<https://perma.cc/B9CR-UW5E>]. Licensing is a potential verification mechanism that can be used to protect consumers. *Legal US Online Casino Sites for 2020*, LEGAL GAMBLING, <https://www.legalgamblingandthelaw.com/us/legal-us-online-casino-sites> [<https://perma.cc/AN42-DE2R>] (last visited Mar. 27, 2020).

<sup>110</sup> Dellinger, *supra* note 50.

<sup>111</sup> *How to Withdraw Funds*, THE SCORE BET, <https://thescorebet.zendesk.com/hc/en-us/articles/360029765411> [<https://perma.cc/L5E5-8CA9>] (last visited Mar. 27, 2020).

## 2. Athlete Protection

Sports betting data extends far beyond records of teams' wins and losses. It encompasses team performance against certain opponents or at particular times in the season such as the playoffs. Individual athletes' health and wellness, history of success during in-game situations such as stealing bases or making free throws, and overall eligibility are also important pieces of sports data.<sup>112</sup> Teams have increasingly relied on data to enhance player performance, determine draft selections, and devise in-game strategies.<sup>113</sup> However, determining who owns this data, and thus who may profit from its sale to sports betting operators, presents professional and collegiate organizations with challenges unique to their level of play and overall governing bodies. This section examines the privacy issues involved in the use of certain technologies and regulations that leagues should consider as they enter the sports betting marketplace.

### *i. Professional Athletes*

Leagues and organizations should be cognizant of athletes' privacy concerns and the possibility of fraud during data recording and transfer.<sup>114</sup> They should also expect future collective bargaining agreements to contain provisions regarding profit sharing related to the use of player data. Player data can be used to supply sports gambling sites with details guiding bets and leagues should be prepared to compensate players for this use of their information.

The "Big Four" professional sports leagues in the United States—the MLB, NBA, NFL, and NHL—each sell data to third-party companies.<sup>115</sup> While the MLB, NBA, and NHL have each established partnerships with multiple data firms for the purpose of

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<sup>112</sup> See Sunil Sharma, *Billy Beane's Revolutionary Use of Statistical Analysis*, MEDIUM (June 24, 2019), <https://medium.com/@SunilSharmaUK/billy-beanes-revolutionary-use-of-statistical-analysis-b24b648e63d9> [<https://perma.cc/KD6B-D4ZW>].

<sup>113</sup> Oakland Athletics manager Billy Beane revolutionized the use of data in professional baseball by using Sabermetrics to construct his 2002 team, which would go on to tie the New York Yankees for best record while spending over \$80 million less. *Id.*

<sup>114</sup> Novy-Williams, *supra* note 40.

<sup>115</sup> *Id.*

selling their data to sports betting operators, the NFL maintains a partnership with a single firm.<sup>116</sup> Sportsradar AG, a Swiss data firm, has the exclusive rights to distribute the NFL's data to sports betting operators in the United States and abroad.<sup>117</sup> Data from the NFL includes information collected through wearable technology in players' uniforms.<sup>118</sup> This technology monitors health data like heartrate and body temperature.<sup>119</sup> There are numerous concerns surrounding privacy related to wearable technology, and some athletes have addressed these through their player's unions and the collective bargaining process.<sup>120</sup>

However, some athlete health information is more publicly available than what is collected through wearable technology. Injury reports are released by all professional leagues, though the frequency and detail may vary. The NFL—which has the most earning potential<sup>121</sup> in a sports betting marketplace—releases injury reports every Wednesday.<sup>122</sup> These reports detail the exact injury and game status of hurt players.<sup>123</sup> Knowing which players will participate in the current week's contest, as well as the likelihood of player return for a season or stretch of games, greatly impacts how bettors make decisions. Limiting the disclosure of information about athlete injuries creates a greater risk for a bettor, who may not know when a key player will return.

In addition to privacy concerns, leagues should be mindful of compensation issues related to data sharing. The Sports

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

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

<sup>119</sup> Joseph J. Lazzarotti, Mary T. Costigan & Ashley Solowan, *As Wearable Technology Booms, Sports and Athletic Organizations at all Levels Face Privacy Concerns*, NAT'L L. REV. (Apr. 5, 2019), <https://www.natlawreview.com/article/wearable-technology-booms-sports-and-athletic-organizations-all-levels-face-privacy> [<https://perma.cc/M5BH-URQM>].

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

<sup>121</sup> Novy-Williams, *supra* note 40.

<sup>122</sup> *2017 Personnel (Injury) Report Process*, NAT'L FOOTBALL LEAGUE, <https://operations.nfl.com/media/2683/2017-nfl-injury-report-policy.pdf> [<https://perma.cc/8U4V-68XP>].

<sup>123</sup> *NFL Injuries Week 3*, NATIONAL FOOTBALL LEAGUE, <http://www.nfl.com/injuries?week=3> [<https://perma.cc/MU45-XLQP>].

Broadcasting Act of 1961 removes the rights of athletes to their name, image, and likeness during a television (TV) broadcast of a game.<sup>124</sup> However, through collective bargaining, players receive a portion of the league revenue from TV deals in their salaries, and in turn are still compensated for appearing on the screen.<sup>125</sup> Leagues should anticipate players seeking compensation in a similar way for the use of their personal performance data.

*ii. College Athletes*

At the collegiate level, two statutes exist that limit the ability of the NCAA to share player data. While college athletes give up many of their rights in order to compete in NCAA contests,<sup>126</sup> they remain protected as students in higher education and as patients in the healthcare system. The Family Educational Rights and Privacy Act (FERPA)<sup>127</sup> and Health Information Privacy Protection Act (HIPAA)<sup>128</sup> restrict what information about player health, wellness, and academic performance may be shared with people other than student athletes, their families, and their doctors.<sup>129</sup> FERPA limits the ability of any school that receives funding from the United States Department of Education to release a student's educational records.<sup>130</sup> Typically, only eligible students and families have access to these records, but schools may release student data to other parties, including accreditation or audit organizations and financial

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<sup>124</sup> Tom Ziller, *3 Consequences of the NBA's Enormous New TV Deal*, SB NATION (Oct. 6, 2014), <https://www.sbnation.com/nba/2014/10/6/6917877/nba-tv-deal-24-billion-player-salaries> [<https://perma.cc/ZK6Q-DJ6J>].

<sup>125</sup> *Id.*

<sup>126</sup> See *Student-Athlete Authorization/Consent for Disclosure of Protected Health Information for NCAA-Related Research Purposes*, [http://fs.ncaa.org/Docs/AMA/compliance\\_forms/DIII/HIPAA%20Buckley.pdf](http://fs.ncaa.org/Docs/AMA/compliance_forms/DIII/HIPAA%20Buckley.pdf) [<https://perma.cc/XM9R-3CN4>].

<sup>127</sup> 20 U.S.C. § 1232g (2011).

<sup>128</sup> 42 U.S.C. § 300gg (2010).

<sup>129</sup> See *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP'T OF EDUC. (Mar. 1, 2018), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> [<https://perma.cc/AZT7-8ZT6>]; see also *Summary of the HIPAA Security Rule*, U.S. DEP'T OF HEALTH & HUM. SERVICES (July 26, 2013), <https://www.hhs.gov/hipaa/for-professionals/security/laws-regulations/index.html> [<https://perma.cc/9HXZ-YM5F>].

<sup>130</sup> 20 U.S.C. § 1232g (2011).

aid providers.<sup>131</sup> HIPPA prevents the NCAA from releasing information about student athlete injuries to the public.<sup>132</sup> However, student athletes may be asked to grant the release of certain health data as aggregate information to the NCAA, who may then release it to researchers and university leadership to inform trends on athlete injuries and “develop education on student-athlete health topics.”<sup>133</sup>

Notably, just because this information is protected under statute does not mean it is completely unavailable to bettors. Close friends and family with knowledge of a student-athlete’s condition are not prevented from disclosing the information to other parties, meaning that information about specific players could potentially influence lines, spreads, or betting decisions even though such information is otherwise protected. Because the statutes only apply to the university’s interaction with eligible students or families, players are left in a vulnerable position of which they may be unaware. Players’ friends and families could expose the players to unwanted attention or profit off their knowledge of the players by sharing information they have on the players’ eligibility, academic record, or injuries simply because the players trusted them. This kind of information sharing, and the potential for manipulation of young athletes it creates, may also result in damage to a student’s or school’s brand or reputation<sup>134</sup> and place additional pressure on these young adults

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<sup>131</sup> *Family Educational Rights and Privacy Act (FERPA)*, *supra* note 129.

<sup>132</sup> HIPPA does not apply to everyone, which is why colleges and universities face restrictions on the release of student-athlete health data that organizations like the NFL do not. See Edward Leeds, *What the Super Bowl Can Teach Us About HIPPA*, BALLARD SPAHR, LLP (Feb. 12, 2018), <https://www.cyberadviserblog.com/2018/02/super-bowl-can-teach-us-hipaa/> [<https://perma.cc/X52V-9SF6>]; see also *Summary of the HIPPA Security Rule*, *supra* note 129.

<sup>133</sup> *Student-Athlete Authorization/Consent for Disclosure of Protected Health Information for NCAA-Related Research Purposes*, *supra* note 126.

<sup>134</sup> Athlete injury can impact an individual’s draft stock as well as the reputation of the university as one that does or does not value athlete autonomy and well-being. For example, many collegiate football players have chosen to skip playing in their schools’ bowl games at the end of the season in order to prepare for the NFL Draft and reduce their risk of injury in the game. One Notre Dame player, an expected first-round selection, was injured in his 2016 bowl game and was not selected until the second day of the draft, costing him an estimated \$20 million. See, e.g., Megan Moriarty, *Why Are So Many College Football Players Sitting*

already burdened with more responsibilities and challenges than most college students.<sup>135</sup>

Additionally, as the NCAA implements new policies allowing college players to profit from the use of their name, image, and likeness,<sup>136</sup> how the NCAA collects and sells player data will likely change significantly. A profit-sharing scheme where student athletes financially benefit from having their names associated with sports bets adds a layer of complexity to this compensation scheme and seriously threatens the integrity of collegiate competition and the notion of fair play. For instance, the ability to profit from prop bets that require selection of a player to score first, or to make/miss a certain number of free throws, could easily deter athletes from performing as part of a team and instead perform (or not perform) for personal financial gain. While it would be difficult for a player to bet on him/herself, agreements with friends—or worse, crime bosses—to perform a certain way in order to make money may be harder to monitor. Though this threat is present in both the professional and collegiate contexts, younger athletes are typically

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*Out Bowls? Just Look at the Numbers*, SB NATION (Dec. 22, 2018), <https://www.sbnation.com/college-football/2018/12/22/18127862/skipping-bowl-games-contracts> [https://perma.cc/376H-JVZJ].

<sup>135</sup> “*Being a student athlete is challenging . . .*” SOUTHEASTERN LOUISIANA UNIVERSITY, [http://www.southeastern.edu/news\\_media/homepage/stories/student\\_athletes.html](http://www.southeastern.edu/news_media/homepage/stories/student_athletes.html) [https://perma.cc/24TV-QYBZ] (last visited Mar. 27, 2020).

<sup>136</sup> In September 2019, the California legislature passed the California Fair Pay to Play Act, which would allow student athletes in the state to be compensated for use of their name, image, and likeness by their universities in marketing materials. This legislation prompted the NCAA to update policies in October; athletes will now be able to receive compensation for their name, image, and likeness. NCAA divisions are expected to implement new rules no later than January 2021. See Jeremy Bauer-Wolf, *One Step Closer to Pay for College Athletes*, INSIDER HIGHER ED. (Sept. 11, 2019), <https://www.insidehighered.com/news/2019/09/11/california-passes-bill-allowing-athletes-be-paid-name-image-and-likeness> [https://perma.cc/Q2ZF-GN98]; see also *Board of Governors Starts Process to Enhance Name, Image, and Likeness Opportunities*, NCAA (Oct. 29, 2019), <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities> [https://perma.cc/Y8RE-94TL].

more vulnerable,<sup>137</sup> and thus colleges will need to be on heightened alert<sup>138</sup> as more of these bets emerge.

The complexities of sports betting highlight the need for focused legislation, particularly for online gambling, which involves many different parties, processes, and technologies. Regulators will need to be mindful of the challenges facing industry professionals when crafting legislation, as sports organizations may influence their ability to pass comprehensive online gambling reform.

## VI. THE BIG FIVE AND THEIR POSITIONS ON SPORTS GAMBLING

In the past, leagues have managed to negotiate some unique federal regulations. For example, the MLB lobby is so strong that the league remains largely exempt from antitrust laws and was not required to introduce free agency until the 1990s, years after other leagues began to do so.<sup>139</sup> In addition to their influence in Washington, sports leagues can also shape their fans' attitudes and behaviors about societal issues and trends<sup>140</sup> such as sports betting.

Concerned about fairness and criminal activity infiltrating the industry, professional sports leagues fought against the legalization of sports betting for many years.<sup>141</sup> Post-*Murphy*, each of the “Big Five” professional sports leagues—MLB, MLS, NBA, NFL,

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<sup>137</sup> See *Reggie Bush to Forfeit Heisman*, ESPN (Sept. 14, 2010), <https://www.espn.com/los-angeles/ncf/news/story?id=5572827> (describing the receipt of what the NCAA calls “improper benefits” by former University of Southern California running back Reggie Bush and his family, who accepted hundreds of thousands of dollars in gifts from agents and marketing executives while Bush was a student-athlete).

<sup>138</sup> Colleges already monitor many aspects of the lives of student-athletes, such as their class attendance. Striking the balance between athlete autonomy and accountability will likely be difficult for administrators as they navigate new NCAA policies regarding compensation, particularly as they strive to protect students from outside influences and preserve the integrity of their games.

<sup>139</sup> Calcaterra, *supra* note 101.

<sup>140</sup> Yuhei Inoue & Aubrey Kent, *Sports Teams as Promoters of Pro-Environmental Behavior: An Empirical Study*, 26 J. SPORT MGMT. 417–32 (2012).

<sup>141</sup> Rey Mashayeki, *Inside the Battle for the Future of Sports Betting*, FORTUNE (Apr. 10, 2019), <https://fortune.com/longform/sports-betting-battle/> [<https://perma.cc/Q4EJ-8QQR>].

NHL—developed its own vision for success in the sports betting marketplace, yet none focused particularly on the online gambling arena. Given the strong league lobbies in Washington, federal legislation that fails to address the varying concerns of league officials and professional athletes is unlikely to be successful. Thus, it is important to understand each league’s approach to sports gambling, especially as it relates to marketing, profit, and data sharing.

### *A. Major League Baseball*

While Major League Baseball has embraced many technologies, including using blockchain technology to sell virtual player bobble heads,<sup>142</sup> it may not be as comfortable with the use or endorsement of sports betting technologies. The MLB has the most notorious connections to sports gambling of all the professional leagues. The Chicago Black Sox scandal of 1919, involving the mob, some desperate Chicago White Sox players, and the emotional 1919 World Series between the White Sox and Cincinnati Reds, is perhaps the most famous gambling story in professional sports.<sup>143</sup> Pete Rose, former professional baseball player and manager of the Cincinnati Reds in the 1980s, remains barred from baseball for betting on his own team.<sup>144</sup> Recent cheating scandals<sup>145</sup> involving the Houston Astros, the 2017 World Series champions, highlight concerns regarding the integrity of the game that are completely unrelated to betting and demonstrate that there are other threats to

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<sup>142</sup> *How the Dodger Crypto Token Eth Card Works – Webview*, [https://content.mlb.com/documents/3/7/2/295517372/DodgerCryptoToken\\_WebInstructions.pdf](https://content.mlb.com/documents/3/7/2/295517372/DodgerCryptoToken_WebInstructions.pdf) [<https://perma.cc/manage/create?folder=57801>] (last visited Mar. 27, 2020).

<sup>143</sup> *See Sports Criminals, The Black Sox Scandal Pt. 1*, PARCAST (Jan. 2, 2020), <https://www.parcas.com/sportscriminals> [<https://perma.cc/3KMG-FEB3>].

<sup>144</sup> *Pete Rose Gets Booted from Baseball*, HISTORY.COM (Nov. 19, 2009), <https://www.history.com/this-day-in-history/pete-rose-gets-booted-from-baseball> [<https://perma.cc/RR84-BG76>].

<sup>145</sup> The Houston Astros stole signs during the 2017 World Series. However, the team is not being required to relinquish its win, causing some to complain about Pete Rose’s lifelong ban. *See* Julia Limitone, *Baseball Legend Pete Rose: Sign-Stealing Tip of the Iceberg*, FOX BUSINESS (Jan. 30, 2020), <https://www.foxbusiness.com/sports/pete-rose-on-mlb-sign-stealing-scandal> [<https://perma.cc/2DNL-LWZU>].

fair play that may deserve more attention from leagues than just sports gambling.

Along with the NBA, the MLB has expressed a desire to receive a portion of an integrity fee.<sup>146</sup> Also known as a royalty, the integrity fee is a portion of the gambling profit regulators give to sports leagues to maintain fairness in competition.<sup>147</sup> Leagues believe integrity fees are justified because ensuring fairness requires “. . . [g]reater and costly integrity monitoring, [and] oversight of wagers to detect any malfeasance or irregularities.”<sup>148</sup> Again, given its storied sports gambling past, it is unsurprising that the league would like funding to ensure fair play, which it is clearly struggling with even outside of the influence of gambling activities. Federal regulators will need to directly address how online bets will be monitored in order to address integrity concerns of the league.

### B. Major League Soccer

MLS entered into an agreement with Metro-Goldwyn-Mayer (MGM) in 2019, labeling MGM the league’s “official gaming partner.”<sup>149</sup> MLS also modified its sponsorship guidelines to allow teams to procure gambling or alcohol sponsors for their jerseys and stadium rights.<sup>150</sup> While the agreement comes with some restrictions—youth jerseys cannot contain logos of gambling or alcohol sponsors (including those worn by players in the clubs’ own

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<sup>146</sup> Associated Press, *How the NBA and MLB are Looking to get a Piece of the Action from Sports Betting*, MARKETWATCH (Feb. 4, 2019), <https://www.marketwatch.com/story/the-nba-and-mlb-think-states-should-regulate-sports-betting-while-the-nfl-wants-federal-regulation-2019-02-04> [https://perma.cc/LA3G-LWTP] [hereinafter “*Action from Sports Betting*”].

<sup>147</sup> *Id.*

<sup>148</sup> Brett Smiley, *Exclusive: Here’s the ‘Model’ Sports Betting Playbook from NBA, MLB*, SPORTS HANDLE (Feb. 20, 2018), <https://sportshandle.com/sports-betting-nba-mlb-model-act-integrity-fee/> [https://perma.cc/CFQ7-GW65] [hereinafter “*Model Playbook*”].

<sup>149</sup> Derek Blake, *MLS Embraces Sports Betting by Legalizing Sponsorship Deals*, WORLD SPORTS NETWORK (July 3, 2019), <https://www.wsn.com/betting/mls-embraces-sports-betting/> [https://perma.cc/UV2N-976S].

<sup>150</sup> Rey Mashayekhi, *Major League Soccer Will Allow Gambling, Liquor Sponsors for Jersey and Stadium Rights*, FORTUNE (June 26, 2019), <https://fortune.com/2019/06/26/major-league-soccer-gambling-liquor-sponsors-jerseys-stadium-rights/> [https://perma.cc/8V3F-2RL7].

academies) and players under 21 cannot appear in advertisements or digital content related to alcohol use— there are also some specifications that will allow sponsors more freedom in states with restrictive gambling laws.<sup>151</sup>

MLS teams will be the first American teams to have liquor or gambling sponsors on their jerseys.<sup>152</sup> The league feels it is “uniquely positioned in the North American sports landscape to benefit from changing attitudes—particularly toward sports gambling, which [has] long been embraced as part of the fabric of the game in other countries.”<sup>153</sup> Not only do soccer bets exist in marketplaces across the globe, but these marketplaces are located where teams have an established presence, unlike bets on football or baseball. Thus, legal betting may impact viewership or fan interaction with the game in the area where they both live and watch sports in ways that the MLS is best prepared to address. The MLS could serve as an example for other leagues, and its progressive mindset<sup>154</sup> likely makes the MLS less of an adversary for regulators.

### C. National Basketball Association

The NBA was probably best positioned for a post-*Murphy* world, as NBA Commissioner Adam Silver has long embraced the

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<sup>151</sup> For example, gambling companies may display advertisements within stadiums regardless of if the state in which the stadium is located has legalized sports gambling. The league appears committed to embracing gambling even if the states in which its teams are located are not. *Id.*

<sup>152</sup> Blake, *supra* note 149.

<sup>153</sup> Mashayekhi, *supra* note 150.

<sup>154</sup> Established in the 1990s, MLS is the youngest of the “Big Five.” In addition to the influence from the global soccer community, the MLS’ modern inception could also be a reason why the league is more willing to embrace topics long considered taboo by other leagues. MLS is not bound by centuries of tradition and is only a recent player in the storied history of the United States sports betting marketplace. See Grant Wahl, Brian Straus & Alexander Abnos, *The Birth of a League*, SPORTS ILLUSTRATED, <https://www.si.com/longform/2015/mls/index.html> [<https://perma.cc/P7F2-Q8X3>] (last visited Apr. 19, 2020); *MLS Founders Reflect on 20 Years of Major League Soccer*, MLS (Dec. 6, 2015), <https://www.mlssoccer.com/post/2015/12/06/mls-founders-reflect-20-years-major-league-soccer> [<https://perma.cc/RYY7-J3KS>].

role that technology has in the future of sports.<sup>155</sup> The NBA was the first professional league to sign a deal with a gambling partner after *Murphy*, entering into an agreement with MGM in July 2018.<sup>156</sup> It has since signed deals with other companies, such as DraftKings and Canada-based The Stars Group, dubbing these companies “Authorized Gaming Operator[s]” and allowing them to access official league data and use team logos and trademarks.<sup>157</sup> The NBA has been vocal about what should be included in regulations, especially pertaining to an integrity fee.<sup>158</sup> The NBA has also suggested it deserves compensation for intellectual property used in the betting process.<sup>159</sup>

Given its strong stance on compensation, it is not surprising that the NBA created model legislation to send to the states.<sup>160</sup> This legislation focuses mainly on compensation for the league, but also includes provisions related to the use and security of league data.<sup>161</sup> As a result of the NBA’s activism, many states included integrity fees in their proposed legislation. Notably, no legislation passed thus far includes compensation for leagues.<sup>162</sup> Moving forward, federal

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<sup>155</sup> Shlomo Sprung, *How the NBA is Using Virtual Reality and Augmented Reality to Get Fans Closer to the Action*, FORBES (Mar. 15, 2019), <https://www.forbes.com/sites/shlomosprung/2019/03/15/behind-the-scenes-how-the-nba-is-using-virtual-reality-to-get-fans-closer-to-the-action/#55409fc93727> [https://perma.cc/5EQN-68FE].

<sup>156</sup> David Purdum, *What You Need to Know About the NBA’s New Gambling Partnership*, ESPN (July 31, 2018), [https://www.espn.com/chalk/story/\\_/id/24248120/gambling-need-know-nba-sports-betting-partnership](https://www.espn.com/chalk/story/_/id/24248120/gambling-need-know-nba-sports-betting-partnership) [https://perma.cc/Y8EA-5RYL].

<sup>157</sup> Darren Rovell, *NBA Signs Deal with Second Sports Betting Partner*, ACTION NETWORK (Dec. 11, 2018), <https://www.actionnetwork.com/nba/nba-sports-betting-partnership-stars-group-december-11-2018> [https://perma.cc/TZ9R-QFZ3]; Jabari Young, *DraftKings partners with NBA as new Authorized Betting Operator for the League*, CNBC (Nov. 4, 2019), <https://www.cnn.com/2019/11/04/draftkings-partners-with-nba-as-authorized-betting-operator-for-the-league.html> [https://perma.cc/F6YX-VBBQ].

<sup>158</sup> *Action from Sports Betting*, *supra* note 146.

<sup>159</sup> Brett Smiley, *Adam Silver Proves That NBA ‘Integrity Fee’ Is A Total Sham*, SPORTS HANDLE (Feb. 18, 2018), <https://sportshandle.com/sports-betting-integrity-fee-adam-silver-nba/> [https://perma.cc/YL2G-SV87].

<sup>160</sup> *Model’ Playbook*, *supra* note 148.

<sup>161</sup> *Id.*

<sup>162</sup> *Action from Sports Betting*, *supra* note 146.

regulators will need to be mindful of the NBA's strong desire to profit from government-supported sports gambling.

#### *D. National Football League*

Among the professional leagues, the NFL was perhaps the most vocal opponent of legalized sports gambling.<sup>163</sup> For decades, the NFL has used its television contracts to prevent broadcasters from discussing sports betting on air, and has continued to discourage reference to gambling in the two seasons following *Murphy*.<sup>164</sup> NFL employees (coaches, athletes, and league officials) are all prohibited from betting on sports, even those who live in states where the activity is legal and even if the sport on which they are wagering is not football.<sup>165</sup> Harsh penalties are imposed on those who do not comply: Arizona Cardinals player Josh Shaw was suspended for an entire season after placing sports bets in a Nevada casino in 2019.<sup>166</sup> As context, Shaw's suspension for a first time gambling offense is much more severe than those typically imposed by the league for first time domestic violence and drug offenses.<sup>167</sup>

Despite its once staunch opposition to sports gambling, in January 2019, the NFL named Caesars Entertainment Corporation the official casino of the NFL.<sup>168</sup> While the "\$30 million-per-year deal does not allow Caesars to use NFL branding on any sports betting products and only permits usage rights in entertainment

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<sup>163</sup> Zack Jones, *NFL Inks First Casino Partnership with Caesar's Hinting Shifting Stance on Sports Betting*, FORBES (Jan. 4, 2019), <https://www.forbes.com/sites/zackjones/2019/01/04/nfl-inks-first-casino-sponsorship-with-caesars-hinting-to-shifting-stance-on-sports-betting/#bf192953918f> [<https://perma.cc/XH65-RJFY>].

<sup>164</sup> Kevin Draper, *Sports Betting Has Arrived to Transform the NFL. Or Not.*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/04/sports/football/sports-betting-nfl.html> [<https://perma.cc/4G7Q-KNHJ>].

<sup>165</sup> Reportedly, Shaw bet against the Cardinals (his own team) in his wager. Even in the largest sports betting scandal, baseball player Pete Rose bet for his own team, not against them. Andrew Brant, *Josh Shaw and the NFL's Complicated Relationship with Sports Gambling*, SPORTS ILLUSTRATED (Dec. 13, 2019), <https://www.si.com/nfl/2019/12/13/josh-shaw-gambling-sports-betting-nfl-business-of-football> [<https://perma.cc/YV3W-LBEX>].

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Jones, *supra* note 163.

locations in casinos that don't include sports wagering[.]" Caesars may use NFL trademarks in both the United States and the United Kingdom.<sup>169</sup>

Though it took the league some time to find its footing in the marketplace, teams quickly took advantage of the legalization of sports betting. The New York Jets, whose games are actually played in New Jersey, formed a partnership with MGM in October 2018.<sup>170</sup> The Oakland Raiders, who have recently relocated to Las Vegas, have a deal with Caesars.<sup>171</sup> Caesars' logos and advertisements will be prominently featured on the Raiders' new stadium.<sup>172</sup> In addition to its NFL and Raiders agreements, Caesars has independent partnerships with seven other NFL teams: the Atlanta Falcons, Baltimore Ravens, Chicago Bears, Indianapolis Colts, New Orleans Saints, and Philadelphia Eagles.<sup>173</sup>

The NFL has indicated it would prefer federal legislation to the "patchwork" of existing and proposed state regulations.<sup>174</sup> Though it has not taken a strong stance on any piece of state legislation, the league did write to Pennsylvania officials in June 2018 expressing concerns related to consumer protection, data, and enforcement of its state sports gambling law.<sup>175</sup> As previously mentioned, federal regulation related to online gambling should include provisions to protect both consumer and athlete data. If Congress clearly establishes a framework for consumer and athlete protection, it seems it can count on support from the NFL.

#### *E. National Hockey League*

The Commissioner of the NHL, Gary Bettman, once advocated against legalizing sports betting because of a fear of how the game

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<sup>169</sup> *Id.*

<sup>170</sup> *Jets, MGM Resorts Announce Gaming Deal Partnership*, AP NEWS (Oct. 31, 2018) <https://apnews.com/44851753610e4a459fd623280b1d7ee2> [<https://perma.cc/7H8P-L66U>].

<sup>171</sup> Jones, *supra* note 163.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Draper, *supra* note 164.

<sup>175</sup> *United States of Sports Betting*, *supra* note 49.

would look to children.<sup>176</sup> Though Bettman remains apprehensive about what sports betting teaches young people consuming sports, the NHL's stance has evolved since the *Murphy* decision.<sup>177</sup> At first cautious with its opinions on the implications of *Murphy*, the NHL now has deals with multiple gambling organizations.<sup>178</sup> It focuses most on its relationships within the industry instead of advocating for government solutions, though it has expressed a desire for regulatory consistency.<sup>179</sup> Commissioner Bettman has “rejected the labeling of the integrity fee”<sup>180</sup> but believes the league deserves compensation for its intellectual property, data, game footage, and other assets that may be used to conduct a sports betting business.<sup>181</sup> Thus, regulators should strive to balance league and sportsbook interests as they craft legislation, as drawing online sportsbooks into the legal market will be challenging if these businesses have to assume high costs<sup>182</sup> for basic functions, such as providing betting information.

The actions (and reactions) of the Big Five regarding current and future legislation will significantly impact the American marketplace. As Congress considers a federal approach specific to online sports gambling, it will need to integrate positions into the legislation explicitly stating how much, if any, money leagues will receive to promote fair play and how league and athlete data will be collected and shared. If Congress does not intend to give leagues a cut of the profits, it can expect significant pushback from officials

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<sup>176</sup> Brett Smiley, *Where Major Sports Leagues Stand on Gambling Legislation in the US*, SPORTS HANDLE (Aug. 19, 2017), <https://sportshandle.com/gambling-legislation-laws-united-states-leagues-commissioners/> [https://perma.cc/6CF3-588M].

<sup>177</sup> *Id.*; Adam Candee, *NHL's Bettman Joins NBA, NFL, In Call for National Sports Betting Rules*, LEGAL SPORTS REP. (May 29, 2018), <https://www.legalsportsreport.com/20787/nhl-joins-nba-nfl-in-national-sports-betting-rules/> [https://perma.cc/E8Z7-VWBY]; *Action from Sports Betting*, *supra* note 146.

<sup>178</sup> *Action from Sports Betting*, *supra* note 146.

<sup>179</sup> Candee, *supra* note 177.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*; *Action from Sports Betting*, *supra* note 146.

<sup>182</sup> SportsHandle Staff, *Impact of a 1% Tax on Sports Betting*, SPORTSHANDLE (Jan. 12, 2018), <https://sportshandle.com/impact-1-tax-sports-betting-i-nelson-rose/> [https://perma.cc/2GUN-Y7Y3].

and perhaps even athletes, as it is likely that the players will eventually want to negotiate a cut of gambling proceeds as part of their collective bargaining agreements.

A consistent national framework will ensure online sports betting is economically viable. Considering the needs of leagues, consumers, athletes, and sportsbook operators is essential for a federal regulatory scheme that enjoys widespread support and success.

## VII. CONCLUSION

*Murphy* empowered the states to act on sports betting, yet both *Murphy* and current state regulatory schemes are a far cry from the consistent foundation needed to ensure the integrity of competition, protect vulnerable consumers and athletes, and combat privacy and security concerns related to the use of sports betting technologies. Federal regulation of online sports gambling is essential to provide consistency and clarity that will protect consumers and allow the government and sports leagues to capitalize on the billions of dollars sports betting generates each year.

However, support for such legislation may not be easily garnered. Not only will the federal government potentially face opposition for a national scheme from the states, but professional sports leagues may also influence the federal government's willingness and ability to pass an online gambling reform. In addition to explicitly addressing existing state and federal gambling laws, new legislation will need to address many issues related to data management and security, education and enforcement programs, and profit sharing. By focusing solely on online regulation, the federal government can draw on its commerce clause powers to regulate a market currently drawing millions of dollars away from the United States economy each year. The stakes are high, and online sports betting cannot continue to remain dealer's choice from state to state.